THE PROBLEM WITH A BILL OF RIGHTS

'When I use a word,' said Humpty Dumpty, 'it means just what I choose it to mean—neither more nor less.'
'The question is,' said Alice, 'whether you can make words mean so many different things.'
'The question is, which is to be master—that's all.'

Lewis Carroll, *Through The Looking Glass*

There is much agitation among certain lawyers, especially academics and certain retired High Court judges, for the establishment of a bill of rights in Australia. The agitation has been going on for more than 30 years now, but in recent time has become increasingly frenetic. According to these advocates, a bill of rights is essential to protect the individual citizen from the increasing incursions on human liberty found in legislation and regulation. It is concerning, they say, that we have not followed the lead of other Common Law countries, Canada, New Zealand, South Africa and the United Kingdom.

The objections to a bill of rights are fundamental: 1) it lends great uncertainty to the law; and, 2) it provides scope for evil to flourish. The end, the securing of human liberty against oppression, is noble; the means suggested, apparently so attractive, are clumsy and incompetent to achieve that end.

* *

Human Rights Rooted In The Natural Law
A law is *an ordinance of reason unto the common good promulgated by him who has the care of the community*.[1] Laws are generally expressed not in the form of permissions, but of prohibitions. Of the Ten Commandments, for example, eight are expressed as prohibitions, and the other two (the Third and Fourth) are expressed as commands of conduct not to be omitted, and so, are also essentially prohibitions.

In a country that operates under the rule of law[2], that is, under a system of laws which forbids certain conduct, but is otherwise silent about rights and duties, there is a presumption, derived from the natural law, *that everything is permitted except that which is forbidden*. In such a system, a good law is characterised by rigour, its terms precisely defined. Congruently, the judges in a legal system under the rule of law, if they are true to their oaths of office, will interpret its laws rigorously—*contra proferentum*—precisely because the demands of human liberty are sacrosanct. Australia's greatest judge, Sir Owen Dixon, in a paper he gave at Yale University, in September 1955, speaking of the way in which the rule of law was applied in Australia, summarized this well for our less fortunate cousins in the United States—

[1] St Thomas Aquinas, *Summa Theologiae*, I-II, q. 90, articles 1, 2.
[2] In his *An Introduction to the Study of the Law of the Constitution* (1885), A V Dicey (1835-1922) elaborated the theory of parliamentary democracy under the British constitution. The twin pillars of the constitution were the sovereignty of parliament and the rule of law.

> *Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority...*[3]

He went on to detail one of the essential tools serving to guarantee those freedoms—

> *It is taken for granted that the decision of the court will be 'correct' or 'incorrect', 'right' or 'wrong' as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves… The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness*.[4]

A legal system operating within the rule of law, such as the Australian system of parliamentary democracy inherited from England, relies tacitly upon the natural law from which all the rights of man derive[5]. In this it exercises—though at a distance quite remote—a heritage derived ultimately from the Catholic Church which asserted (and will assert till the end of time) that all human law is founded on the natural law which, in turn, has its source in the eternal law established by the author of nature, Almighty God.[6] *There is no authority*, as St Paul says, *except from God.*[7] Before the Protestant Revolt turned the hearts of the people away from their heritage, the teaching and practice of the Catholic Church had ruled in England, Scotland, Wales and Ireland for upward of a thousand years. Despite the Protestant institutions which replaced the Church, the Catholic 'capital' has remained. That 'capital', greatly diminished, continues to exert an influence on the Common Law of England and Australia even into the 21st Century.

Almighty God who gives us both essence and existence (*what* we are; and *that* we are) did not hand Moses a bill of rights on Mt Sinai. He handed him a list of prohibitions.[8] Here is the Divine acknowledgement that man is free from all restraint save that imposed by the natural moral law.

Subjectivism And The Law

The curse of the modern age, an inevitable consequence of a train of thought begun with Descartes, is subjectivism, the attitude of mind that holds that what matters is *not reality, but what I think about reality*. The ultimate source of this evil was not, however, Descartes but Martin Luther. His insistence that man should no longer be

---

[3] Sir Owen Dixon, *Concerning Judicial Method*, 29 ALJ 468 at 469.
[4] Ibid at p. 470.
[5] The Ten Commandments are only a statement in summary form of the edicts of the natural law.
[6] *Summa Theologiae*, I-II, q. 91, articles 2 and 3. *God directs out every action toward the common good of the universe according to that ideal conception of order existing in His mind from all eternity. This plan of order looked upon with reference to things to be governed is called the Eternal Law.* (*St Thomas on Law*, Patrick M. J. Clancy, O.P., in *First Complete American Edition of the Summa Theologiae*, Benziger Bros., New York, 1948, Vol. 3, p. 3271, at 3273.)
[7] *Romans* 13: 1
[8] He did the same thing in the Garden of Eden.

beholden to God as to what he believed but should determine that for himself, effected in the theological order what Descartes came to effect in the philosophical order. Just as there was no longer an objective standard for belief; neither was there any longer to be an objective standard for reasoning.

Sir Owen Dixon refers to this modern evil obliquely—

> *[This] is not an age in which men would respond to a system of fixed concepts logical categories and prescribed principles of reasoning… Philosophy appears to have foregone the search for reality and seldom speaks of the absolute…*[9]

For the judge who gives way to this vice, the subjectivist position becomes *not what the law is, but what I think the law should be.* The modern description of such a judge, a not entirely happy one, is *judicial activist*.

Legal Subjectivism & Australia's High Court

In 1973, the Shadow Attorney General, Senator Lionel Murphy, introduced into the Commonwealth Senate a Human Rights Bill in which he sought to implement the International *Covenant on Civil and Political Rights*. He argued—

> *[A]lthough we believe these rights to be basic to our democratic society, they now receive remarkably little protection in Australia… What protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights… [T]he enactment of this legislation will be a significant milestone in the political maturity of Australia. It will help to make Australian society more free and more just*.

There is not room to deal here with the errors in these assertions. Suffice it to say that there was strong opposition to the bill and it lapsed early in 1974.

On 10th February, 1975, by an act of political expediency and in breach of an undertaking previously given by him to the Chief Justice, Sir Garfield Barwick, Prime Minister Gough Whitlam appointed Senator Murphy to the High Court where he set about promoting his ideas. Dyson Heydon has assessed his conduct—

> *He treated judicial work as an act of uncontrolled personal will, and sneered at the doctrine of precedent as one 'eminently suitable for a nation overwhelmingly populated by sheep'. He said: 'As judges make the law… they are entitled to bring it up to date… [Judges] should not change it by stealth, they should change it openly and not by small degrees. They should change it as much as they think necessary.'*[10]

---

[9] Owen Dixon, op. cit., p. 469.

[10] Dyson Heydon, *Judicial Activism And The Death Of The Rule Of Law*, Quadrant, January-February 2003, 9 at.16, quoting from Murphy's paper *The Responsibility of Judges*, in Gareth Evans (ed.) *Law, Politics and the Labor Movement*, pp. 5-6

Mr Justice Murphy enjoyed only limited success while he lived. But *exempla trahunt,* and his ideology came to exert on the High Court after his death an influence hardly foreseen.

> *For some reason he came to fascinate and influence several of the other judges, very different in approach and experience though they were from him. This influence became most clearly apparent not while he served, but after his premature death in office on October 21, 1986, following an unhappy period of personal controversy and painfully debilitating illness. Soon after Mason J succeeded Sir Harry Gibbs as Chief Justice in 1987, the majority approach radically changed.*[11]

In the period between 1987 and 1998 the attitude of the majority of the members of the High Court shifted from the traditional view that a judge exists to interpret and apply the law, to the view that the judge should wrest the law to his own authority. The disregard of the judges for the law of the country reached its high water mark in *Mabo v Queensland No.2*[12], where six of the seven judges disregarded 200 years of settled law to recognise the existence of a native title to land on grounds established not on logic or adherence to precedent but—no matter how they tried to disguise it—on sentiment. In vain, did the lone dissenting Judge, Sir Daryl Dawson, insist—

> *[If] traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.*[13]

Later a majority of these judges sought to 'discover' in the Commonwealth Constitution a series of implied civil rights, including a right of political discussion which could not be curtailed by Parliament[14], and a right of freedom of communication, ie, a right to be free from the rules of defamation in respect of discussion of government and political matters[15].

This disregard for the doctrine of precedent and these 'discoveries' effectively made the judges legislators, rather than interpreters of the laws, of their country and involved them in a breach of the formal separation of legislative and judicial powers contained in the Commonwealth Constitution[16]. It involved them, moreover, in an objective breach of the oaths of office each had taken—'to do right to all manner of people *according to law...*' For their actions, as judicial 'legislators', they were responsible to no electorate and could not be called to account.

Sir Garfield Barwick put it well, in 1995—

---

[11] Heydon, ibid.
[12] (1992) 175 CLR 1: 66 ALJR 408
[13] Ibid, at p. 481
[14] *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992-3) 177 CLR 106; 108 ALR 577.
[15] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; 124 ALR 1.
[16] The powers of each are set forth in Chapters I and III respectively, of that document.

It would be quite fair to say that [the] liberties… freedom of speech, of association, of movement, etcetera—are far more secure under a Westminster system of parliamentary democracy than they are in the United States of America where they are in the hands of and subject to the vagaries of the judiciary.

This until recently could also have been said of the position of those liberties in Australia. Our liberties could be protected by ourselves. But recent decisions of the High Court… have reduced the sovereignty of the Parliament, withdrawn from the community its heretofore democratic control of its liberties and vested it in an unelected and unrepresentative judiciary. The Parliament cannot overturn such decisions even though in truth they may be unwarranted in law. It is exclusively a judicial function to construe the words of the Constitution. Like the entrenchment of the American Bill of Rights, this is an undemocratic step.[17]

These essays in judicial subjectivism would have scandalized eminent past judges of the High Court, Sir Samuel Griffiths, Sir Isaac Isaacs, Sir Edmond Barton, Sir John Latham, Sir Hayden Starke, Sir Owen Dixon, Sir Frank Kitto, Sir Wilfred Fullagar, even Labor Party appointee, Herbert Vere Evatt. The Fathers of Federation would have condemned them. Yet the fact that their conduct was, in a jurisdiction governed by the rule of law, outrageous gave proponents Sir Anthony Mason, Sir William Deane, Sir Gerard Brennan and their ilk no pause. In proposing an interpretation of the Federal Constitution so far removed from the rule of law, these judges manifested their commitment to the subjectivist ideology.

Sir Owen Dixon's comment on the subjectivist judge is to the point—

The objection is that in truth the judge wrests the law to his authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong. Indeed there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish a better rule or doctrine. For this the court looks to the binding effect of its decisions as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at nought every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday.[18]

Happily, with the accession to the bench of the High Court of William Gummow in April 1995, and the replacement of Sir Gerard Brennan as Chief Justice with Murray Gleeson (from the Supreme Court of New South Wales) in May 1998, the tide of judicial subjectivism began to ease and, in due course, to turn. A majority of the High Court bench now adheres more strictly to the doctrine of legal precedent. But much of the harm done remains in place for the doctrine of precedent compels the present judges of the Court to acknowledge past decisions, even ones they may

---

[17] Sir Garfield Barwick, *Parliamentary Democracy in Australia*, in *UTAC*, Vol. 5 (1995), 205 at 216.
[18] Dixon, op. cit., at p.472

regard as erroneous, and to give effect to them unless they can find sound reasons in principle for overturning them.

Moreover, certain tensions between the judges remain. These are well illustrated by an interchange between Justices McHugh and Kirby in the case of *Al Kateb v Godwin*[19] in which the High Court decided by a majority of four to three that failed asylum seekers with no other country to accept them could be kept in detention indefinitely. Kirby J, part of the minority, said that the High Court had to interpret the *Constitution* in the light of international law on human rights. McHugh J condemned this view as 'heretical', saying it was tantamount to amending the *Constitution* without reference to the Australian people.

Law Under A Bill Of Rights Contrasted With Law Under The Rule Of Law

There is a presumption in a country that operates under the rule of law that everything is permitted except that which is forbidden. In a country which operates under a bill of rights the opposite presumption is inferred—*everything is forbidden except that which is permitted.*

> *In the strict sense, a bill of rights is a constitutional provision which protects individual rights from infringement by the legislature or the executive. It prevails over, and cannot be amended by, ordinary legislation. In that way, it detracts from the sovereignty of the Parliament. Since a bill of rights is enforceable by the courts, it becomes the province of the courts, and not of the Parliament, to determine the nature and extent of the protected rights.*[20]

In so far as a bill of rights sets out to list human rights comprehensively, it always fails for it is impossible to categorise comprehensively all the rights that attach to man. The reason is that man is not something material (and limited) but something immaterial and objectively infinite. His essential constitutive is not his material body, which will die, but his immaterial soul, which will not. We know instinctively that the Marxist doctrine that man exists for the state is wrong. Few, however, are able to explain why. Even fewer understand that the truth is the very contrary of the Marxist proposition: not only does man not exist for the state: *the state exists for the sake of man*. The state will cease to exist, but man, possessed as he is of a soul which is immaterial, will live forever.

It follows inevitably that any attempt to categorise human rights serves not to enlarge but rather *to restrict human freedom*. The paradox of a bill of rights is that it defeats its own ends. The United States *Constitution* with its ongoing amendments provides an illustration. To the original 10 clauses in the US *Bill of Rights* (the first ten *Amendments* to the US *Constitution*), a further seventeen have been added. Moreover, one of these, Amendment XXI, contradicts an earlier amendment, number

---

[19] http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.html [2004] HCA 37; 6th August 2004.

[20] Sir Harry Gibbs, *Does Australia need a Bill of Rights?* In *Upholding the Australian Constitution*, *Proceedings of the Samuel Griffith Society* (hereafter, *UTAC*), Volume 6 (1996), 141 at 142.

XVIII. And there is no reason why the addition of amendments, or their amendment according to the whim of the age, should not go on *ad infinitum*.

A legal system founded on a bill of rights relies not on the natural, but on posited, law. Such a legal system involves, at least implicitly, a contention that man can do a better job than his Creator in delineating human rights. It is no surprise, then, to find in many such legal systems no mention of the authority of Almighty God but instead, an appeal to human authority[21]. This appeal is implicit in the English *Bill of Rights* of 13th February 1688, a declaration by *the Lords Spirituall and Temporall and Commons* of certain rights and liberties as *true auntient and indubitable Rights and Liberties of the People of this Kingdome* made in the act of deposing their lawful and anointed King, James II, and replacing him with the Prince of Orange.

In the Virginia *Bill of Rights* of June 12th, 1776 the appeal to human authority was explicit. Clause 2 of that document states: *All power is vested in, and consequently derived from, the people… The Declaration of the Rights of Man* of the French National Assembly, the forerunner of the French revolutionary government, issued in August 1789, owes its provenance to the thought of Rousseau, who placed authority in the popular will, and the influence of the English and the Virginia *Bills of Rights*.

The preamble of the United States *Constitution* was also explicit—

> ***We the People*** *of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity,* ***do ordain and establish*** *this Constitution for the United States of America.*[22]

Characteristic Uncertainty Of A Bill Of Rights

Since its proponents must ensure that that the rights so asserted have as broad a range as possible, imprecision is an essential characteristic of a bill of rights. It follows that it is enormously difficult to determine just what each right means.

The Fathers of the Second Vatican Council asserted the existence of a human right in n.2 of their Declaration on Religious Freedom, *Dignitatis Humanae—[T]he human person has a right to religious freedom*. What is meant here by the word 'religious'? Does it mean:

---

[21] Note: it is not to be implied from this that those who live under a legal system based on the rule of law are any the less atheistic or agnostic in their inclinations than those under a bill of rights. The distinction lies in the *system of law*.

[22] Emphasis added. In contrast, the preamble in the Commonwealth of Australia Constitution Act reads—*Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth…*

- belief in some thing, or in some being beyond the range of human experience—(which would embrace belief in the occult, Rosicrucianism, and certain of the sects associated with Freemasonry)?
- belief in a god, or in gods—(which would embrace the beliefs of the ancient Romans, Hinduism, some of the branches of Freemasonry and Mormonism)?
- belief simply in a supreme being—(which would include Judaism, Christianity and Mohammedanism)?
- belief of any of the sects which call themselves Christian, but which deny the divinity of Christ as the Son of God—(such as the Jehovah's Witnesses and Iglesia ni Cristo)?
- belief of any of the Protestant sects (which admit that Christ was God but decline to follow many of his teachings)?
- or, as some few assert, only belief in the one true religion revealed by Almighty God, the Catholic faith?

Having exhausted these possibilities, one may then ask what is meant in the same statement by the word 'freedom'? Does it mean:

- freedom to practise this faith privately?
- freedom to practise his faith publicly?
- freedom from coercion in the practice of his faith?
- freedom to proclaim his faith to others?
- freedom to defend his faith?
- freedom to criticize those who oppose his faith?

The Vatican Council Fathers were sensitive to the problems posed by such a Declaration and made efforts elsewhere in the document to refine the scope of what they were asserting, but their efforts were hardly comprehensive and, forty years on, the debate within the Catholic Church as to the meaning and effect of the Declaration continues unabated.

In 1996, Mr Justice Roderick Meagher of the New South Wales Court of Appeal, in an extra judicial address he gave in Darwin, put the dilemma well in respect of assertions of civil rights.

> *They are not immediately recognizable as having defined features. In this, they do not resemble ordinary proprietary rights, like rights to possess, to enjoy the benefit of an easement over another's property, a right of support. They seem to be of a different quality to, say, a parent's right to inflict condign punishment on his or her own child. They seem to be unlinked to obligations or responsibilities. They mean whatever each proponent wants them to mean.*[23]

Every citizen in a country with a bill of rights necessarily applies his own interpretation to each of its clauses, anticipating that his interpretation is the correct one. It is inevitable that he will be disappointed.

---

[23] The Hon. R.P. Meagher, *Civil Rights: Some Reflections*, (1998) 72 ALJ 47

We have in Australia at least one entrenched civil right in section 92 of the Federal Constitution. It reads—

> *[T]rade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

An Australian author has written—

> *The essential words of that section have about them a deceptive air of simplicity… But that formula has been the cause of more trouble, contention and expense than any other section of the Australian Constitution…*[24]

Indeed, the history of the section provides a microcosm of the problems of uncertainty attaching to any bill of rights. By way of illustration here is the comment of the members of the Judicial Committee of the Privy Council in 1936 on the word 'free' where it appears in the section—

> *[T]he use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realize that the mere generality of the word must compel limitation in its interpretation. 'Free' in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws of defamation, blasphemy, sedition and so forth… Free love, on the contrary, means licence or libertinage… Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable. Free trade means in ordinary parlance freedom from tariffs.*[25]

There have been some 140 decisions on the section yet its words have given rise to persistent disagreement which, as former Chief Justice Sir Harry Gibbs remarked in 1995, *eventually led the High Court to give them a meaning… arrived at only by disregarding a multitude of previous decisions.*[26] Mr Justice Meagher's verdict on the section the following year was more pungent—

> *After nearly 100 years of federalism, nobody yet knows what this means. This is not because opportunities have not existed for the High Court to tell us. Nor is it because they have not tried to.*[27]

There can never be a fixed standard according to which the meaning of any asserted civil right is to be determined. The meaning will always turn on the subjective views of the interpreter—

---

[24] *Barwick*, David Marr, Sydney, 1980, p. 45.
[25] *James v The Commonwealth* (1936) 55 CLR 1 at 55-6
[26] Sir Harry Gibbs, op. cit. at p. 149.
[27] R.P. Meagher, op. cit., p.50

> *The existence of a bill of rights requires the judges to decide questions of policy which in a democracy should be decided by the Parliament. The judges may persuade themselves that in deciding questions of that kind they are giving effect to the will of the majority of the people, or that they are acting in accordance with current social values. However, they have no reliable means of determining what is the will of the people, and the values to which they give effect must necessarily be their own.*[28]

Anyone who doubts this assertion of the uncertainty characteristic of a legal regime under the burden of a bill of rights should read Sir Harry Gibbs' short study of the contradictory determinations handed down by the United States Supreme Court on various of the provisions of the United States *Bill of Rights* in his paper *Does Australia need a Bill of Rights*? The URL is footnoted below[29].

Who Is To Be The Interpreter?

A legal system based on a bill of rights is undesirable even when the judges are men of integrity. When the judges lack that virtue, however, the scope for the damage they may do under colour of giving force to such rights in the society in which they operate is enormous.

As a sop to criticism of the Soviet regime, Josef Stalin included in his 1936 *Constitution of the USSR* a declaration of certain rights including freedom of religious worship (Article 124), freedom of speech and freedom of the press (Article 125).

No one would assert that these guarantees of 'freedom' to the Russian people ever had any objective meaning. The interpreter, the functionaries of the Soviet system, deprived them of it because their idea of freedom was stunted by Marxist ideology.

Section 1 of the XIVth Amendment of the United States *Constitution*, reads as follows—

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In the case of *Roe v Wade* decided in 1973, a panel of US Supreme Court judges under Masonic influence and with the assistance of a renegade Catholic named Brennan, ruled by majority, that State criminal abortion laws such as those of the Texas legislature which only except from criminality a procedure intended to save the life of the mother, and which ignored the stage of her pregnancy and other interests involved, violated this clause. According to these judges, such laws offended a

---

[28] Sir Harry Gibbs, op. cit., at p. 145.

[29] http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm

woman's right to privacy which included her qualified right to terminate her pregnancy[30]. The harm that has resulted from that evil decision in the thirty years that have followed to the citizens of the United States parallels the harm done in their countries by Adolf Hitler and Josef Stalin. Upwards of thirty million unborn American children have been killed in consequence.

The Cure For Abuses Of Human Rights

If some laws should prove draconian, the solution is not to pass bills of rights. The solution is to remove the draconian laws! And if the government of the day, whether State or Federal, will not do this, the solution is to replace it with one which will. Therein lies the freedom given us by parliamentary democracy.

This is, of course, easier said than done. A major problem in any modern parliamentary democracy is the fact that the parliament has been captured by the party system. It is the party system which has put Australia's Commonwealth Parliament under the control of the Executive which, as former Chief Justice, Sir Anthony Mason, has observed is *the very converse of the historical conception that Parliament's role is to act as a watchdog over the Executive government.*[31]

There is no such thing as a perfect system of laws. Nor is there a perfect system of their application. Abuses of the rights of individuals, as individuals, and abuses of their rights as citizens, occur daily in any country. In particular, the passing of laws driven by ideologies such as secular humanism or feminism, laws that proscribe behaviour not itself evil, are destructive of human freedom. Anti-discrimination laws, for example, interfere unnecessarily with human freedom. So do laws which insist on protecting the privacy of the individual at society's expense, such as those prohibiting access to public records and those prohibiting the recording of conversations. Here is Sir Harry Gibbs again, speaking of Australia's reputation as a free and tolerant country—

> *Already legislation is passed which appears to limit unnecessarily the freedom of the individual, and already citizens incur public obloquy if not punishment, for speaking truths which offend against political and social orthodoxy.*[32]

The desire for perfection may move us to make the legal and political system, and its implementation, perfect, or as perfect as can be in our own country. But there is only so much that can be done at the level of law and justice. One can agree with Sir Anthony Mason's assertion that *[a] fair and equitable justice system goes hand in hand with a system of government which responds to the needs of the people and reflects the qualities of integrity, humanity and respect for human dignity…* and, that *[n]ot even its most fervent admirer could faithfully claim that the Australian political system exhibits all*

---

[30] 410 *U.S.* 113. The Court went on to categorise the way States' laws should treat of abortion in each of the three trimesters of pregnancy in a way which hardly affected their substantive ruling.

[31] Sir Anthony Mason, *Democracy and the Law*, *Law Society Journal* (of New South Wales), November 2005 (Vol 43, n. 10), p.68.

[32] *The Threat to Federalism*, UTAC, Volume 2, (1993), p. 183 at 191

these qualities[33]. But the solution to the problem is not as he contends, a bill of rights. Indeed, the solution lies outside the legal and political system *because at base the issue is not a legal, but a moral, one*.

The solution lies in turning the hearts of individual citizens back to adherence to moral principle; in urging and adjuring each individual citizen to live his life in conformity with the dignity that befits his human nature. In a decent society, one in which the citizens are conscious of natural moral duty prohibitions can be limited to the bare minimum. In such a society, unnecessary prohibitions will be understood to be unnecessary; there will be pressure for their removal, and they will be removed.

The ones charged with that duty are, primarily, the bishops, priests and laity of the Catholic Church, since that institution is the one which Almighty God has set up for the perfection and the salvation of men. The duty falls secondarily on all other men of good will, that they live their lives in conformity with moral principle and urge others to do the same; that they seek to put, or preserve, in place moral principle at all levels of public office and in the passing, and enforcing, of laws.

Some Conclusions

Why is it that one never hears public calls for a *bill of duties*. Duties attach to man as extensively as do rights. Respect duty, and rights will be preserved. Such a bill would achieve the same end as its much vaunted opposite, but more safely. Why are we so keen on rights, and so reluctant to embrace duties? The truth is that any legal system which operates under the rule of law is, in effect, a bill of duties. It says to each citizen of the country: *You are at liberty to enjoy all the freedoms given you by Almighty God in this country, but you have the following duties which you must observe at the peril of the law's sanction.*[34]

The proliferation of laws in Australia since the mid 1970s—exponentially since the early 1980s—is not a sign of social or moral progress, but of its opposite. It is no accident that there has occurred in the same period a general loss of belief in God, the source of all human rights and all authority, and with that, a parallel loss of respect for the life and rights of other human beings manifest in the fact that the citizens of this country allow the slaughter each year of in excess of 100,000 of its unborn children.

Nor is it an accident that the only Australian legislature which, so far, has passed a bill of rights, the Australian Capital Territory, has also removed every prohibition against abortion. Like Humpty Dumpty, the legislators of the ACT could recite in unison—*When I use a word it means just what I choose it to mean—neither more nor less!*

* *

[33] Ibid.

[34] Whether the laws of the country are all in conformity with the natural law, and therefore, truly laws; or whether they infringe that law, and therefore operate, as St Thomas says, as a species of violence, and can, or must, be disobeyed, is not canvassed here.

A bill of rights is not only unnecessary for Australia it is perilous. At best (to descend to the colloquial) it would amount to a statement of the bleeding obvious, at worst a palliative, a substitute for the concerted action necessary to protect the rights of the people. At best it would be a source of uncertainty and disruptive of the peace of society, at worst a vehicle for tyranny.

A final contribution from Sir Harry Gibbs—

> *The [US] Bill of Rights did not seem to inhibit the activities of Huey Long, who ruled Louisiana in a way that put the worst of some of our former State Premiers in the shade, or Senator McCarthy, who destroyed the careers of many writers and actors by his inquisition into their opinions. Constitutional guarantees may provide some protection to human liberties, but* ***in the end freedom depends on the willingness of a community to defend it***.[35]

The price of liberty is eternal vigilance. Implicit in that need for vigilance is the imperative that the country's citizens live a life of virtue. Liberty is not to be purchased—to be preserved—by easy solutions, nostrums contrived by judges, ex-judges, or academics bereft of a grasp of fundamental principle or sound philosophy. Whenever easy solutions to society's problems are mooted, Milton's words should ring in our ears—

> *But what more oft in nations grown corrupt*
> *And by their vices brought to servitude,*
> *Than to love bondage more than liberty,*
> *Bondage with ease, than strenuous liberty*.[36]

Michael Baker
20th November 2005—*Solemnity of Christ the King*

[35] Sir Harry Gibbs, op. cit., p. 145. Emphasis added.
[36] John Milton, *Samson Agonistes* (1671), lines 268 to 271