

## Introduction

# A Place for Values in Legal Reasoning

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For practising Australian lawyers, values are somewhat like emotions: it's not that we deny their existence; it's just that we don't like to talk about them much. We generally do not feel comfortable when we recognise them in ourselves and we generally feel even less comfortable when we recognise them in others. We try for the most part to suppress them. The whole idea of the practice of the law as a discipline is to keep values, like emotions, in check: constrained as much as possible within the confines of intellectual structures. We seek as professionals to resolve the factious disputes of others through the application of soothing neutral principles.

Of course, we know that the principles can never be entirely neutral. We recognise that they are founded on values. But we strive to locate those values so far as we can within the legal system itself and we like to see the legal system as largely self-sustaining. The very processes of the law we like to think of as the embodiment of systemic values are of a pretty fundamental kind:

- formal equality of parties, encompassing a respect for the dignity and autonomy of the individual;
- fairness of procedures, encompassing what we have traditionally labelled "natural justice"; and
- consistency and coherence of decision-making, encompassing our common law doctrine of precedent.

These are all fundamental. Although their application can be problematic at the margins, they are also relatively uncontroversial and comfortable.

Where controversy and discomfort begin to set in is when we move from the general to the particular: from the values that underlie the legal system as a whole to the values that underlie the continuing existence or application of some particular legal principle within that system. It is there at the micro level that, if we probe too deeply, we can be prone to experience a crisis of legitimacy.

Our preference is always to portray the legal principles that currently exist as anchored in ancient traditions. Yet the truth is that few current legal

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