

Chapter 21

Individualised Justice – The Holy Grail*

In an address delivered at Oxford University in 1978, Professor PS Atiyah developed the thesis that modern law has moved away from the application of general principles and towards what he described as a search for individualised justice. This, he argued, has transformed its character.¹ His contention was that, in former times, courts, in resolving conflicts, aspired to adhere strictly to principle. They were less concerned with an attempt to achieve justice perfectly attuned to the facts and circumstances of each individual case than with the formulation and application of general rules which would enable people to know, with relative certainty, their rights and obligations. Even if those rules operated harshly in some cases, that was accepted as inevitable and as a price worth paying. In modern times, he argued, legislatures and courts have become highly pragmatic, and aim to find solutions, especially discretionary solutions, tailored to the circumstances of the individual dispute. Professor Atiyah's address explored the consequences of this in terms of the function of the judicial process and the law.

Other commentators have observed a major change in what is expected of the law, and the legal system, in a society that is "rights-conscious and individualistic"² Professor Friedman, with particular reference to the United States at the end of the 20th century, has examined the burgeoning expectations of law, legislation and litigation, in an age when every dispute seems justiciable, all manner of expectations are claimed to be legitimate in the most formal sense, and most kinds of disappointment or injury are seen as potential occasions for legal redress.

People outside the legal system, and many within it, are perplexed as to why modern justice appears to be so cumbersome, dilatory, expensive and complex. In large measure, however, these features of the system are the consequence of what society has come to demand of it. The community has, consciously or unconsciously, assigned to the law, and to the courts, a function that makes huge demands upon resources of time and money. The individualisation of justice is proceeding with gathering pace. Many examples can be given, both in the field of legislation and of judge-made law. For the purposes of this article, some particular instances will be examined, with a view to considering the impact of this trend on the nature of the legal process, and on the administration of justice.

* An edited version of the Martin Kriewaldt Memorial Lecture, Darwin, 28 July 1994.

1 Atiyah, PS, *From Principles to Pragmatism: Inaugural lecture delivered before the University of Oxford, on 17 February 1978*, (Oxford: Clarendon Press, 1978).

2 For example, Friedman, Lawrence M, *The Republic of Choice*, (Cambridge: Harvard University Press, 1990) p 5.

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