The Constitutional Conversation between the Courts and Parliament

The rather unusual title for this address to the 2000 Annual General Meeting of the Queensland Chapter of the Australian Study of Parliament Group derives from an article in the *Public Law Review* of March 1999 by Associate Professor Hiebert from the Department of Political Studies at Queen's University in Canada. Her article is entitled "Why Must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative".[1] Her thesis is that the Canadian Charter of Rights and Freedoms has introduced a new framework for facilitating what she calls 'conversations' between parliaments and courts about the importance that should be attached to citizens' rights and the justification for actions of the state that conflict with protected rights.

In Australia in recent times, particularly after the High Court's decisions in *Mabo v Queensland (No 2)*[2] and *Wik Peoples v Queensland*,[3] the courts and judges have been subject to unprecedented attacks by parliamentarians. The present paper considers how appropriate communication between the two great institutions in our society can be fostered so that such antagonism can be replaced with mutual respect for each other's proper roles within a democracy. In doing so, I will be drawing on the public reactions to Australian, Canadian, British and South African cases to examine the health or otherwise of the relationship between parliaments and the judiciary.

The notion of a civilised constitutional conversation between the great institutions of our democratic society about the rights of citizens seems eminently sensible. In Australia the various organs of government, in particular the legislature and the judiciary, traditionally

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1 (1999) 10 *Public Law Review* 22.
2 (1992) 175 CLR 1.
3 (1996) 187 CLR 1.

show each other wary respect. As in other western democracies, the parliament passes legislation and the courts endeavour to enforce the law by giving effect to the will of parliament expressed through that legislation. At times it is not easy to divine what the legislative intention is and various rules for the interpretation of legislation have developed as a result. Often judges will be required to iron out the incompleteness and ambiguities of laws and even inconsistencies between laws.[4] The courts also apply the common law and from time to time anomalies in the common law give rise to what individual judges perceive to be injustice. In those circumstances, in their judgments judges may call for legislative action to correct a common law rule which apparently gives rise to injustice.[5]

For the most part courts and parliaments are very restrained in their dealings with one another. It is in the public exercise of their respective roles that the separation of powers is most clear in Australia's version of the Westminster system. However, some members of the legislature have occasionally had an explosive, even abusive, reaction to decisions of courts.[6] By their very nature, courts often find themselves unable to respond to criticism of this type. It is essential to their proper constitutional role that the courts remain depoliticised. The Commonwealth Attorney-General, after saying in 1997 that Sir Anthony Mason was ignoring contemporary reality when he asserted that the role of the Attorney-General was to defend the judiciary when it is under attack, has more recently said that while it was appropriate to have public debate on Court decisions, it was wrong to attack

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4 Foster, Sir C., "The Encroachment of the Law on Politics" (2000) *Parliamentary Affairs* 328 at 340.

5 See, for example, *Carlowe v Frigmobile P/L* [1999] QCA 527 at [9]; *Row v Willtrac Pty Ltd* [1999] QSC 359.

6 Mason, Sir A., "No place in a modern democratic society for a supine judiciary" (1997) 35 (11) *Law Society Journal* 51.

judges personally.[7] He conceded that sustained political attacks capable of undermining public confidence in the judiciary, call for defence by the Attorney-General.

> "Personal attacks against individual judges are likely to undermine public confidence in the judiciary and thereby damage the legitimacy necessary to its effective functioning as the third arm of government."[8]

Of course tensions of this nature exist in other countries. In the US there has been considerable constitutional tension between the legislature and the judiciary particularly over the conflict between the United States Supreme Court's interpretation of constitutional principles and legislative priorities. Within the last fortnight on 15 May 2000, for example, the US Supreme Court invalidated a six year old provision of a federal law that permitted victims of rape, domestic violence and other crimes "motivated by gender" to sue their attackers in the Federal Court. The Court, in a five to four decision in *United States v Morrison*,[9] struck down the civil remedy provisions of the *Violence Against Women Act* of 1994. The majority held that the interstate commerce clause of the Constitution was not sufficient to support the statute in question.

While the Court had over many years allowed Congress considerable latitude in regulating conduct and transactions under the commerce clause, in 1995 in *The United States v Lopez*[10] the Court expressed the limits on that power. The Court held that s 922(q) of the *Gun-Free School Zones Act* could not be supported under the interstate commerce clause because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms".

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7 Lagan, B., "A-G will act to curb attacks against judges" *Sydney Morning Herald*, 9 December 1998, p 2.

8 Williams, D., "Judicial Independence and the High Court" (1998) 27 *University of Western Australia Law Review* 140.

9 529 US (2000), 15 May 2000.

10 514 US 549 (1995).

Similarly the Court in *Morrison*[11] held that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."

The minority opinion, written by Justice Souter, paid explicit respect to the findings of Congress. Passage of the *Violence against Women Act* in 1994 had been preceded by four years of hearings which included testimony from medical practitioners and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement agencies and private business. This testimony led to no fewer than eight separate reports by Congress demonstrating the economic effect of this violence. The annual economic detriment of domestic violence and sexual assault was estimated as being $3 billion in 1990 and $5 to $10 billion in 1993. Gender-based violence in the 1990s was shown to operate in a manner similar to racial discrimination in the 1960s in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "gender-based violence bars its most likely targets – women – from full participation in the national economy".[12]

Congress acted after dozens of studies showed that women seeking relief faced considerable obstacles from state judicial systems that regarded sex offences as unworthy of serious attention.[13] Justice Souter predicted that the change in the Court's view of the scope of the interstate commerce power would eventually prove as serious a wrong turn for the Court as the decisions of the 1930s that, in rejecting elements of the New Deal, provoked the crisis of 1937 when President Roosevelt threatened to stack the US Supreme Court.

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11 (supra).

12 at p 9.

The decision to limit the provisions of the *Violence Against Women Act* drew criticism from senators who had sponsored the law about the appropriate division of power between the courts and the legislature. These were not personal attacks but a serious response to the question about the respective roles of the two arms of government. Senator Joseph Biden, the chief Senate sponsor of the *Violence Against Women Act*, said at a news conference on 15 May 2000[14] that "this decision is really all about power: who has the power, the court or Congress?" He said there had been a notable improvement in the response of the states to violence against women since Congress put the issue on its agenda in the early 1990s. He predicted the decision would "have a lot less impact on violence against women than on the future role of the United States Congress. The damage done to the Act is not as bad as the damage done to American jurisprudence". Although Senator Biden's criticism was robust, in my view, the manner in which the debate was carried on is a sign of a healthy and free society.[15]

At the other end of the spectrum is the unacceptable, and more often than not inaccurate, personal criticism of judges. An unpleasant example is found in political attacks on certain American judges over their willingness or otherwise to uphold the death penalty fuelled by the popular election of judges in some states.[16] Supreme Court judges in Tennessee, California and Mississippi have lost office as a result of such attacks which misrepresent the record of the judge or the law. One particularly disgraceful example is that of Justice James Robertson in Mississippi, who lost office after he was attacked for a

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13 Greenhouse, L., "Women Lose Right to Sue Attackers in Federal Court" *New York Times*, 16 May 2000; *US v Morrison* (supra) at 27-28 per Souter J.

14 As reported in the *New York Times*, 16 May 2000.

15 *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887 per Hope JA at 908; *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335 per Lord Atkin; see Chapman, G. "Criticism of Judges, Courts and judicial decisions, especially by politicians" (1995) *New Zealand Law Journal* 267.

16 Bright, S. B., "Political Attacks on the Judiciary" (1997) 80(4) *Judicature* 165.

concurring opinion he had written expressing the view that the Constitution did not permit the death penalty for rape. In doing so, he and his fellow judges were merely upholding their judicial oath. The US Supreme Court had held ten years earlier, in *Coker v Georgia*,[17] that the Eighth Amendment did not permit the death penalty in such cases. This style of political attack on the judiciary has found no place in the Australian political landscape and yet some of the invective against the integrity and intelligence of individual judges and the institution of the High Court of Australia arguably fell into a similar category.

Controversy is not limited to those countries with written constitutions or bills of rights which must be interpreted by the courts. The latest issue of the British *Law Quarterly Review*[18] commences with a discussion on the limits of the judicial function in that country. This discussion was occasioned by the House of Lords' decision in *Fitzpatrick v Sterling Housing Association Ltd*[19] which the authors describe as raising "important questions as to the respective functions of the judiciary and the legislature". The House of Lords held that the deceased man's male partner of 20 years was entitled to succeed to a protected tenancy as a "member of the deceased tenant's family". The authors of the article took the view that this matter, involving as it did questions of changing social attitudes to same-sex relationships, was emphatically not a matter for the courts but for the Parliament. They observed:[20]

> "Few branches of the law more obviously reflect the outcome of conflict between competing economic and political interests than the *Rent Acts*; few areas of the law are more calculated to arouse strongly divergent feelings than those concerned with the consequences of sexual relationships (although the three majority opinions show little doubt about correctly identifying changes in social attitudes to same-sex relationships).

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17 433 US 584 (1977).

18 Cretney, S. and Reynolds, F., "Limits of the Judicial Function" (2000) 116 *Law Quarterly Review* 181.

19 [1999] 3 WLR 1113.

20 (supra) at 184.

> Whether that confidence was securely based or not, there is a powerful reason for regretting the fact that the majority considered the issue of succession rights appropriate for judicial rather than legislative action."

Is there an alternative to this institutional conflict? Not everyone demonstrates the leadership provided by President Nelson Mandela of South Africa. When the Constitutional Court of South Africa struck down a law delegating broad powers to his administration, President Mandela immediately made a public announcement that the Court had spoken and its decision must be implemented.[21]

In the context of the debate in Australia about the need or otherwise for a bill of rights and its possible effects on the balance of power between government and citizen with the judiciary as arbiter, it is interesting to return to some observations of Professor Hiebert in the article I referred to earlier. She suggests that the Canadian experience with its Charter of Rights and Freedoms offers an innovative and useful structure for avoiding political/judicial stalemates.[22] The Charter, she suggests,[23]

> "by political circumstance rather than genius, provides a framework for resolving institutional disagreements about its interpretation. In doing so, [it] offers an alternative way of thinking about how a bill of rights affects governing. Instead of encouraging a contest between political and judicial wills, the Charter envisages an ongoing and multi-layered constitutional conversation about the scope and meaning of fundamental human rights and on the importance and justification of legislative objectives when these conflict with protected rights."

This constitutional conversation is guaranteed by two aspects of the Canadian Charter. The first is the general limitation clause which is in s 1 of the Charter and provides:

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21 Bright (supra) at 173.

22 Other commentators have suggested that there is grave conflict particularly between the Canadian Provincial Court system and the governments which established them: Seniuk, G., "Judicial Independence and the Supreme Court of Canada" (1998) 77 *Canadian Bar Review* 381; *Re Judges' Reference* [1997] 3 SCR 3.

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The second is the legislative override found in s 33 of the Charter which provides:

> "33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 – 15 of this Charter."

These clauses were essential compromises insisted upon by provincial governments in return for their support for the Charter.[24] In Hiebert's opinion the advantage of these clauses is "they allow for constitutional conversations about what priorities should be attached to conflicting objectives and rights, which draw from the comparative strengths of both judicial and representative institutions. Arguably, this mode of resolution, which allows for opportunities for institutional disagreement, offers a more balanced system of checks and balances than what exists in some political systems which have opted for, or have avoided, a bill of rights".[25]

This solution is particularly useful because codified rights do not necessarily provide for obvious or non-contentious resolution to rights conflicts. Furthermore it is legitimate to be concerned about the democratic implications of a small number of non-representative and non-elected judges having the final word on what priorities are to be attached to social values.[26] While the judiciary prides itself on objectiveness and impartiality, there is an equally crucial role for the exercise of political judgment by parliamentarians who are elected for that purpose. The existence and respect for a neutral arbiter of disputes between

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23 Hiebert (supra) at 23.

24 Lougheed, P., "Why a notwithstanding clause?" *Points of View/ Points de vue* no. 6 (1998) 1.

25 Hiebert (supra) at 25.

26 See Griffith, JAG., "The Brave New World of Sir John Laws" (2000) 63(2) *Modern Law Review* 159; Gava, J., "The rise of the hero judge" *The Australian Financial Review*, 14 November 1996, p 21; Enderby, K., "Judges right to go in where politicians fear to tread . . ." *The Australian*, 24 May 1993, p 9.

citizen and citizen, and between citizens and the state, is also essential to the working of a democratic system.[27]

The sophistication of the judicial task and the way in which it must be grounded in an understanding of social and political reality is amply demonstrated in the most recent case on the Charter: *Granovsky v Canada (Minister of Employment and Immigration)*,[28] a decision of the Supreme Court of Canada. The Court was considering the constitutionality of a provision of the Canada Pension Plan for persons with temporary disabilities. In doing so it considered s 15(1) of the Charter which provides that:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The appellant had been denied the disability pension. The Court stated the question before it[29] as being "the pension was properly denied unless the legislation infringes the appellant's equality rights under s 15(1) of the *Charter* and cannot be saved under s 1". It can therefore be seen that an essential part of the task incorporates a consideration of the general limitation clause in s 1 of the Charter. In paragraph 33 the Court said:

> "The *Charter* is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s 15 of the *Charter* can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatise the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognise the added burdens which

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27 Lord Steyn, "The Weakest and Least Dangerous Department of Government – The Role of the Judiciary in a Democracy" [1997] *Public Law* 84.

28 2000 SCC 28.

29 Paragraph 15

> persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied."

The Court referred to many outstanding examples of persons with quite severe disabilities who have made extraordinary contributions to society. As they point out,[30] Beethoven was deaf when he composed some of his most enduring works. Franklin Delano Roosevelt, limited to a wheelchair as a result of polio, was the only president of the United States to be elected four times. Terry Fox, who lost a leg to cancer, inspired Canadians by his effort to complete a coast to coast marathon as he raised millions of dollars for cancer research. And Professor Stephen Hawking, struck by amyotrophic lateral sclerosis and unable to communicate without assistance, has nevertheless worked with well-known brilliance as a theoretical physicist.

In a carefully and closely reasoned decision applying tests developed in previous cases on the Charter,[31] and in the context of social reality, the Court was able to provide a principled solution to the problem in question. In the end it was unnecessary to deal with an argument as to the general limitation clause found in s 1 because the Court held there was no violation of s 15(1) of the Charter. It was, however, integral to the way in which the initial question was posed.

The two limitations introduced into the Bill of Rights in Canada ensure that the democratic ideal prevails. A significant role is preserved for the political judgment of the legislature. No single correct answer necessarily exists for the principled resolution of a rights conflict. A legitimate interpretation of a bill of rights is not necessarily derived

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30 at [28].

31 *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519; *Eaton v Brant County Board of Education* [1997] 1 SCR 241; *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624; *Law v Canada* (*Minister of Employment and Immigration*) [1999] 1 SCR 497.

exclusively from courts. As Hiebert says, "Rather, it accepts the proposition that a range of acceptable and principled answers may exist and views the resolution of rights conflicts as a joint responsibility of courts and Parliament".[32] She concludes:[33]

> "Debates about adopting a judicially reviewable bill of rights inevitably generate polarised positions with respect to the competence and virtue of Parliament, as contrasted with courts, for evaluating State action from a human rights perspective. But reflection on the Canadian experience with the Charter of Rights allows for a different variation on the debate. The Charter establishes the rights and values that are to be the normative standards for evaluating State action. However, in expressing these, it does not presume that judges are the only institutional actors whose voices are authoritative and legitimate when interpreting and resolving conflicts around rights. The Charter seeks to resolve social and rights conflicts by facilitating conversation between Parliament and courts about the legitimacy of State actions, rather than generating a contest of judicial and political wills. In doing so, it recognises the legitimacy of institutional disagreements."

This gives effect to the mutual respect that Sir Gerard Brennan referred to in the speech which he gave on the occasion of his retirement in 1998 as Chief Justice as:[34]

> "the mutual respect which the branches of Government must have and demonstrate for the powers and functions of each. Mutual respect is the necessary acknowledgment of the constitutional distribution of powers and the manifesting of mutual respect accords with the expectation of the Australian people."

As the present Chief Justice of Australia, the Honourable Murray Gleeson AC has similarly observed:[35]

> "The courts and the Parliaments have their own distinctive contributions to make to justice, and there is no reason why each side cannot continue to maintain a decent regard for the role of the other."

So let me conclude by saying that a constitutional conversation may encourage the parliament and the judiciary to work in an independent but complimentary way as the

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32 (supra) at 127.
33 (supra) at 34.
34 (1998) 193 CLR v.

separate arms of government. The advantage of a Charter is that it sets out the common aspirations of citizens articulated through the political process given effect to by the courts. A 'constitutional conversation' between the courts and legislature ensures that it is the citizens who are supreme rather than either institution which serves them.

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[35] Gleeson, A. M., "Legal Oil and Political Vinegar" (1999) 10 *Public Law Review* 108 at 113.