Australasian Study of Parliament Group
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"Parliament and the judiciary: separation does not mean divorce"

First may I congratulate the Queensland chapter for its pursuit of this worthy goal. Our system of parliamentary democracy is not generally well understood, though I do not presume in assuming that it is at least fairly well understood by this audience!

I am pleased to have the opportunity to speak about the relationship between the legislature and the judiciary. I have spoken on a number of occasions about relations between the judiciary and the executive, most recently on 22 March this year at the 11th Conference of Chief Justices of Asia and the Pacific (that paper may be read, should you wish, on the courts' webpage). But I have not in recent times been asked to address the relationship between the judiciary and the legislature.

These two of the three pillars of government throw up some interesting parallels, and some interesting contrasts.

The most obvious parallel concerns core business: both are concerned, although in different ways, with the law. Another similarity, and one which starkly distinguishes those arms of government from the executive, is the openness of their process. Each almost invariably operates in public, under the potential glare of publicity – the process is transparent, and being known, is vulnerable to criticism should things go wrong. Consistently, each of these arms of government is subject to mechanisms which ensure ultimate accountability: in the case of the legislature, the safeguard is the ballot box; in the case of the judiciary, there are various mechanisms: the obligation to publish reasons for judgments; the susceptibility of any judgment to appeal, indeed multiple possible appeals through the court hierarchy; and other mechanisms like the publication of data on caseloads, their extent and timeliness of disposition.

As to contrasts between the legislature and the judiciary, the most obvious concerns tenure: members of the Legislative Assembly are elected for fixed terms, whereas Judges are appointed until the age of 70, removable only on proof of incapacity or misbehaviour.

The missions contrast. The constitutional mission of the parliament is to make laws for the peace, welfare and good government of the State of Queensland. The mission of the courts of law is not to make law, but to deliver justice according to the law primarily at least made by the parliament. Another contrast concerns how the work of the institutions is reviewed. While each of these arms of government is subject to assessment in the public arena, formally the parliament's performance is reviewable only via the ballot box – unless, in extraordinary circumstances, the Governor were to exercise the reserve powers. By contrast, the work of the courts is, as necessary, reviewed in-house, as it were, through the appeal process to which I earlier referred.

There is one feature which supervenes that landscape of similarity and contrast. It is that in a practical sense, both parliament and the court system depend on the confidence of their constituency, the people. Journalistic commentators continually monitor and comment on the level of public support of the parliament, though probably more markedly the performance of executive government. So do letter writers to newspapers, and the on-line bloggers. Most of the commentary on our State courts focuses on the judicial approach to sentencing of criminal offenders, although two comparatively recent appeal decisions have provoked more broadly based analysis. The end position is that the practical legitimacy of these two arms of government rests on public confidence.

The people respect and uphold the laws made by the parliament, because they acknowledge the right of the parliament to ordain the law, and they respect the basic conscientiousness with which parliament discharges that obligation. In similar vein, the peace and welfare of the community are ensured, and anarchy avoided, because the people accept the legitimacy of the judicial process. In rare instances where that does not occur, courts are backed by the coercive powers of the State: those who act in defiance of court orders render their property vulnerable to execution, and possibly their liberty subject to curtailment by police and prison services. Those expedients aside, our court system functions in a streamlined way largely because the people voluntarily acknowledge and respect the rule of law.

In a report published for The Australian Institute of Judicial Administration in 1998 ("Courts and the Public") Professor Stephen Parker of Griffith University relates a story about Sir John Latham and Mussolini. Latham was telling Mussolini about the Australian Constitution and the power of the High Court to declare legislation and executive actions invalid. Mussolini listened, and at the end said: "Yes, Mr Latham, how does the court get its order, with such far reaching effect, obeyed? Does the court have an army or an enforcing agency?" Latham responded: "No, Mr Mussolini, it doesn't work that way. The court simply pronounces its decision and it will be obeyed. That's how the system works." And Mussolini's reply: "Truly, Mr Latham, your answer is remarkable. You have anarchy in your system." Professor Parker observed that "inexplicable though it may be to a dictator, courts primarily work through voluntary acceptance of their authority".

We Judges, like our parliamentarians, are acutely conscious there is inherent fragility about that public confidence. One way of enhancing it, for courts, is to communicate with their public, explaining their processes. How can people be confident about a process of which they are ignorant? Contemporary courts are vibrantly alive to this.

My topic this evening focuses on separation between the legislature and the judiciary. The separation of the three arms of government, each from the others, has long been recognized as one of the major, indeed critical, strengths of our Westminster system. Why? As to judicial power, Montesquieu said that "if it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator".

The assumption, the correct assumption, is that the entity which applies parliament's laws must be in a position fearlessly to do so, even if the course objectively supportable would cause embarrassment or discomfort either to the legislature or the governing party. Bear in mind, also, that "the government" is often a litigant: either in right of the State of Queensland, or through government instrumentalities, like WorkCover.

That laws must be applied by an entity or institution absolutely independent of the legislature, and the executive, is fundamental to maintenance of the rule of law. Judges deliver judgments according to law at no one's behest, completely independently. Of course in a democracy the creating of the law must be subject to the will of the people. But to ensure the impartial application of law, Judges must be completely immune from external pressure, and that includes the political pressure which underlines the operation of the parliament under our system.

What does judicial independence involve? Essentially, impartiality, freedom from any external influence which may corrupt.

It is a critically worthwhile feature of our judiciary that the Judges are not elected, by contrast with the Judges in some American States. We have all heard of those US judges, they tend to impose outlandishly long terms of imprisonment, up to hundreds of years, especially when seeking re-election. In this country, and reflecting the English Act of Settlement of 1701, Judges of most courts are appointed for life, meaning in Queensland until the age of 70, subject to removal for proven incapacity or misbehaviour. Security of tenure means there is no incentive to please the body which would reappoint.

But in practical terms, there is difficulty maintaining a completely independent judiciary. That is because there is necessary material dependence on the other arms of government. The executive provides the necessary resources.

For true judicial independence, Judges should enjoy security in three respects: security of tenure, meaning a guaranteed term of appointment, necessary so that Judges are not concerned about making decisions to please the body responsible for their possible reappointment; financial security, necessary it is said to ensure Judges are not tempted to accept bribes – although there is no need for that justification in contemporary Australia; and institutional security, or control over administration of the court, preventing among

other things the other branches of government from influencing the allocation of Judges to hear particular cases.

The judiciary depends on the other arms of government to respect this independence, and that respect is forthcoming.

The separation of the judiciary and the legislature of course does not exclude interaction. That occurs in a very public way from time to time. For example, the Judges traditionally and ceremonially attend the opening any new parliament, and then present themselves in a highly visible way. They attend to be recognized as an arm of government, but also as a mark of courteous respect for the legislative arm of government. As another example, the Chief Judge of the District Court and I were pleased last year to have the opportunity to address new members, at Parliament House, as part of their induction process. But interaction is not limited to matters of formality, courtesy and ordinary friendliness.

It constitutionally falls to the Parliament, for example, to determine any motion for removal of a Judge from office. In Queensland we follow the practice of Westminster, in relation to criticism of Judges within the House. That is that for Judges of superior courts, debate about a Judge is not permitted except upon a direct and substantive motion, for which, under Standing Rule 63, notice is required. Consequently, criticism of a Judge cannot be raised by way of amendment, or on a motion for adjournment, or in a reply to a question. The process is designed to avoid damage to the court through unwarranted adverse reflections on those comprising it. The safeguard has not necessarily guaranteed an absence of such criticism. In his history of the Supreme Court, Mr Justice McPherson refers to the decline in relations between the judiciary and the parliament in the latter part of the 19th century. As he relates (p 225):

> "In 1880 parliament was being warned by one member that 'no class of men required closer watching than the Supreme Court Judges'; and in 1889 another was heard to complain 'they got their offices by begging, cringing, crawling and skulking', adding that, as soon as a man became a judge, 'he acted as if he did not belong to the ordinary

> run of the human race at all'. In the same year a minister of the Crown thought it 'time the wings of their Honours were clipped; they flew too high', and hinted that perhaps judicial officers should be elected, as in the United States."

Fortunately that is all well in the past.

From the other side, Judges have not infrequently over the years pointed up, in reasons for judgment, legislation which is unclear or ambiguous or otherwise warranting revision. Sometimes this has provoked desirable amendment. Courts are asked sometimes to determine the constitutional validity of legislation. The court's capacity to intervene in the parliamentary process is doubtful, because of the basic principle that the House has exclusive dominion over the control of its own proceedings. The recent Supreme Court proceedings in the Wendy Erglis matter raised some issues in that regard.

Sometimes questions are raised whether the legislature is justified in burdening courts with particular jurisdictions. Courts of law exist primarily to determine cases in the courtroom, in the open and with both parties present. It is important, to maintain public confidence in our process, that that crucial and fundamental position not be distorted or blurred.

A number of cases have emphasized the primacy of that strictly judicial core function, in the context of legislative attempts to embellish it, for example by requiring a Judge to perform an administrative role. The High Court has affirmed that no non-judicial function can be conferred which is incompatible with the performance of the basic judicial function. The High Court has spoken of maintaining the "integrity" and "legitimacy" of the judicial arm. In one case, *Grollo v Palmer* (1995) 184 CLR 348, two of the justices adopted the United States Supreme Court's reference to courts' "reputation for impartiality and non-partisanship", warning that that reputation "may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action".

State legislatures remain alive to the utility of invoking the reputations of their Supreme Courts to lend authority to what could be described broadly as administrative decisions in

controversial areas. In recent decades, as an example, legislation has broadened the jurisdiction of State Judges to authorize covert police operations. Politically, it is obviously attractive to have those potentially controversial decisions made by Supreme Court Judges. But as anti-terrorism legislation, especially, may increase the frequency of such interventions, one may query whether there is risk of eroding the "public confidence" in the judicial process rightly proclaimed as central to the legitimacy of the courts of law. One sees in recent cases reference to the need for the courts to be acting openly, impartially and in accordance with fair and proper procedures (for example, *Wilson* (1996) 1 89 CLR 1, 22). In issuing warrants to authorize covert police activity, Judges invariably must act behind closed doors and ex parte, a process most Judges do not relish.

My point this evening is not to criticize governments for casting those potentially controversial jurisdictions onto courts. Governments have power to do so, and courts have an undoubted reputation for the independent discharge of all their jurisdictions. It is unsurprising governments see courts as attractive decision-makers in those areas. My point is simply to urge the need for circumspection. Governments must be astute to the inherent fragility of public confidence, and also to the pivotal importance to society of a judiciary considered "legitimate". Governments must be careful not to embellish the core judicial function in such a way as to blur it, and thereby erode the confidence on which its authority depends.

Now looking the other way again, from the court to the parliament, there is considerable scope for tension should courts be seen to be trespassing into parliament's sovereign law making territory. While the parliament is the sole source of the statute law, the courts are the custodians of the non-statutory, or common law. The law of negligence is the best example of the common law. Courts have been criticized from time to time for usurping the power of the parliament, where they are perceived to have pushed the boundaries of the common law too far. The High Court in particular has been criticized on that account – fairly or unfairly is a matter for judgment. But courts have, in developing the common law

as necessary to meet contemporary conditions, generally taken a gradual, steady, or, as it is put, incremental approach, careful not to be "legislating".

That process was described in the High Court case *Breen v Williams* (1996) 186 CLR 71, 115 (per Gaudron and McHugh JJ) as follows:

> "Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles. The judges of Australia cannot, so to speak, "make it up" as they go along. It is a serious constitutional mistake to think that the common law courts have authority "to provide a solvent" for every social, political or economic problem. The role of the common law courts is a far more modest one.
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> In a democratic society, changes in the law that cannot logically or analogically be related to existing common rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions."

The recent tort law reform legislation may be seen as an example of legislative intrusion to wind back a judicial approach considered as unduly generous to injured claimants. My own view, which I have expressed publicly, is that time has shown that reform to have been unwarranted, and unreasonably limiting of the rights of those injured through no fault of their own. That aside, as put by Hayne J of the High Court ("Restricting Litigiousness", a paper delivered at the 13th Commonwealth Law Conference):

> "Subject to applicable constitutional restraints, it will be the legislatures of Australia which ultimately determine the course that is to be taken in restricting litigiousness. It will be for the parliaments to say what kinds of litigation are to be restricted and how that restriction is to be effected. That is not to deny the

> importance of the roles of the courts in promoting efficient and predictable disposition of litigation. But if those legislatures choose to modify, or even abolish, legal rights of a kind which those legislatures consider give rise to too much litigation or litigation which is costing too much, that, subject to applicable constitutional restraints, will be a matter for them."

And I add, a matter for which they would ultimately be answerable at the ballot box, were they perceived in their own way to have gone too far.

Those reforms were, ultimately, an example of the operation of the rule of law: the courts acting independently, subject nevertheless to the public safeguard in the end of parliamentary intervention to support any perceived public interest. And it is parliament's perception of that public interest which is the ultimate determinant.

I have endeavoured this evening, while emphasizing the fundamental importance of the separation of the legislative and judicial arms of government, to provide some examples and analysis of the interaction between them, interaction which does not blur that essential separation, and in fact promotes the public interest. Hence the thesis reflected in the title of my presentation to you.