CONSENSUS AND DISSENT AND THE PROPOSAL FOR AN AUSTRALIAN STATUTE OF RIGHTS*

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I R J L HAWKE AND THE SEARCH FOR CONSENSUS

The Hon R J L Hawke was Prime Minister of Australia between 1983 and 1991. A main theme of his public life was the desirability of resolving conflict and reaching consensus in responding to problems and challenges.[1] His name has become associated in Australia with the search for consensus in legal, industrial and political causes. He pursued consensus as a student, union official, advocate, parliamentarian and, ultimately, as Prime Minister.[2] In government, he strove to achieve a consensus in advancing policies suitable to what he saw as a fair and just democracy.

A vivid example of Mr Hawke's approach to consensus was the industrial relations Accord,[3] propounded soon after he became Prime Minister. In the Accord he endeavoured to involve all of the key stakeholders, including the unions and employers, in resolving the main challenges then facing the Australian economy and its

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1 See J Pemberton and G Davis, 'The Rhetoric of Consensus' (Paper presented at the Australasian Political Studies Association Conference, 1985) *APSA Conference Proceedings*, vol 2, 693.

2 See generally B d'Alpuget, *Robert J Hawke: A biography* (1982); M D Kirby, 'The Centenary of Australian Industrial Conciliation and Arbitration' (2004) 78 *Australian Law Journal* 785, 787; P Keller, 'The Cabinet' in C Jennett and G Davis, *Hawke and Australian Public Policy* (1990) 16, 23–5.

3 *Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions regarding Economic Policy* (February 1983). See C Jennett and R Stewart (eds), *Hawke and Australian Public Policy: Consensus and Restructuring* (1990) 2.

industrial relations. In an address to the National Economic Summit, following the 1983 federal election, he explained his approach:

> If a genuine consensus is to emerge it must mean an understanding on the part of all sections of the Australian community of the constraints they will be called upon to accept and the contribution they will be called upon to make to the process of national reconciliation, national recovery and national reconstruction. It will mean a recognition and acceptance of restraint by all sections of the community. It must mean a recognition, a sense of realism, of what can be achieved in the near future. We must all understand that there can be no miracle cures, no overnight solutions. It calls for sustained concerted national effort.[4]

He declared:

> I think it is just stupid economics for a government to approach economic management from a strand of thinking regarding unions as enemies.

In 1979, in highly successful *Boyer Lectures* appropriately titled *The Resolution of Conflict*,[5] Hawke explained the principles that underlay his notion of consensus in Australian society. They were principles that probably encapsulated experiences he had gained from his life to that time – most especially as an industrial advocate for the Australian Council of Trade Unions (ACTU) – working towards the compromises and settlements that would resolve industrial conflict, return workers to work, and keep the wheels of industry turning and profits rolling in.

He spoke of creating a 'greater degree of positive co-operation' to meet the economic, social, constitutional and international challenges facing Australia. He said: '[c]o-operation can only be the product of understanding; confrontation and conflict are the inevitable and disastrous alternatives'.[6] He went on:

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4 Pemberton and Davis, above n 1, 693.

5 See d'Alpuget, above n 2, 390; Pemberton and Davis, above n 1, 690.

6 R J L Hawke, *The Resolution of Conflict* (1979) ('Hawke, *Boyer Lectures*') 43.

> We need much more tolerance of attitudes genuinely held by groups or generations perceived to be out of kilter with our traditional mores.
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> ...
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> [N]o-one should assume he or his group is the sole repository of wisdom and rectitude. In most instances there is some real ground for the adoption by people of positions which to others seem unjustified or preposterous. And in most people there is, I believe, ultimately a desire for harmony rather than conflict – to understand this is to take the first step in the resolution of the conflict which is in fact diminishing our community.[7]

For R J L Hawke, this was not merely rhetoric. His words were written in September 1979, in the midst of important weeks in his own life.[8] The ACTU Congress, over which he had presided, was then engaged in a passionate debate over uranium mining. He had arrived at a personal decision to nominate as a candidate for the seat of Wills for the 1980 federal election. The death of his mother, Edith, who had nourished his talents and instilled in him a belief in his capacity to change Australia for the better, also occurred at this time.[9] The sincerity of his yearning for the resolution of tensions and conflict by rational engagement, debate and consensus cannot be doubted.

In his *Boyer Lectures*, Hawke spelt out his vision of how Australia could best move forward as a free and prosperous nation in a rapidly changing world. It was a kind of public manifesto. He recognised that our central institutions – Parliaments, courts and industrial tribunals – secure a kind of resolution, a type of consensus. However, often they do so by adversarial techniques of confrontation, partisan divisions, conflict and tension. Hawke searched for a different means of promoting genuine agreements. My purpose is to explore whether this was a realistic goal. Was it merely window-dressing? Was it desirable?

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7 Ibid 48–9.

8 d'Alpuget, above n 2, 390.

9 See d'Alpuget, above n 2, 383–92; N Blewett, 'Robert James Lee Hawke' in M Grattan (ed), *Australian Prime Ministers* (2000) 380, 382.

Almost 30 years later, much has changed. Yet much has stayed the same. Contrary to proposals contained in his *Boyer Lectures*, State governments remain in place in Australia and all federal Ministers are still appointed from members of the federal Parliament.[10] None is appointed from outside Parliament, as Bob Hawke proposed. Nevertheless, the core ideas contained in the lectures merit revisiting, especially because it is possible that they will be influential following the return of a federal Labor government in the 2007 election. Reportedly, that government is committing to exploring responses to a national human rights statute to be introduced during its 'first term'.[11]

My object is to explore the idea of community consensus. When is it appropriate to seek agreement or compromise? When is it desirable to robustly disagree? When is dissent a proper response? Some contemporary Australian writers have criticised what they see as a diminution of candid and open public debate about legislation, policy, issues and values in Australia.[12] Other public commentators contest this interpretation.[13] Is consensus, in practice, merely an attempt of those with power to cloak their use of power in the garments of agreement so that those who express opposite points of view are drowned out, shamed or intimidated from voicing criticism or seeking to rock the consensus boat? Is this the kind of consensus R J L Hawke had in mind?

II THE IMPORTANCE OF CONSENSUS

It is natural, within Australia, that we should strive to reach consensus with our neighbours. We might call it different things – compromise, conformity, bipartisanship, even cooperative federalism.[14] But we can recognise that reaching consensus with

10 Cf Hawke, *Boyer Lectures*, above n 6, 11–20, 22–31.

11 See 'State Rights Bill Falls to Federal Bill', *West Australian*, 21 December 2007, 1.

12 See, for example, C Hamilton and S Maddison (eds), *Silence in Dissent* (2007); D Marr, 'His Master's Voice' (2007) 26 *Quarterly Essays* 1; A Loewenstein, *My Israel Question* (2006) 209.

13 J Hartigan, 'Loosen Curbs on Our Liberty', *Weekend Australian*, 8 September 2007, 27.

14 *Re Wakim; ex parte McNally* (1999) 198 CLR 511, 517 [113], 604 [197].

others is, in many cases, a critical tool in building and developing the institutions of society and of the world community.

Consensus does not always mean full agreement. Often, it will mean no more than a majority compromise. Majoritarian consensus is pressed on us all the time, and for good reason. Under the Constitution, at less than three yearly intervals, Australians hold federal Parliaments and governments accountable to the electors. Despite the issues that divide us in such elections there is consensus over many things. Typically, the contenders attempt to narrow the targets and to concentrate on the issues for popular choice on which they hope they will secure the winning edge. The new Parliament, once elected, chooses the new government. It does so by numerical majority, not by consensus.

In courts too, whenever there are important divisions, our institutions act by majority. The important decision in the High Court in 2007, striking down an amending Act of 2006 which had disqualified *all* sentenced prisoners from voting in federal elections was reached by majority, not consensus.[15] Four Justices (Chief Justice Gleeson and Justices Gummow, Crennan and myself) held that disqualifying prisoners serving sentences of imprisonment of less than three years from the franchise was constitutionally invalid. Justices Hayne and Heydon dissented. There was consensus in the orders favoured by the Chief Justice and by Justices Gummow, Crennan and myself. But there the High Court's consensus ran out. The democratic rule of the majority had to be invoked. The majority opinion prevailed. As was their right and duty, the dissenting judges gave reasons explaining why they differed and why they considered that the difference was important.

In recent times, in federal elections, the primary vote for each of the *major* Australian political parties has generally declined. Over the five federal elections before 2007,[16] a greater number of Australians (on average almost one in every five voters) cast their first vote for an independent or a member of one of the *minor* parties.

15 *Roach v Australian Electoral Commissioner* (2007) 81 ALJR 1830, 239 ALR 1.

16 See S Bennett, 'The decline in support for Australian Major Parties and the prospect of Minority Government' (Research Paper No 10, Department of the Parliamentary Library, 1999); Australian Electoral Commission Statistics.

Accordingly, well over 50 per cent (in some cases over 60 per cent)[17] of voters in recent federal elections in Australia have cast their first preference for a party different from the one chosen to form the government.

In 1990 when the Hawke Labor Government was re-elected, candidates of the Australian Labor Party (ALP) received 39.4 per cent of the primary vote. The Coalition Government was re-elected in 1998 after the Coalition Parties received a combined 39.5 per cent of the primary vote. In February 2002, preferences allowed Mr Mike Rann to form a minority government in South Australia after the ALP received 36.3 per cent of the first-preference votes. Similarly, the Western Australia State election only a year earlier delivered a new Gallop Government although the ALP received 37.2 per cent of the primary vote, an increase of only 1.4 per cent on the vote that had resulted in its defeat in the 1996 State election. As pointed out at the time, that vote was, in turn, an increase of only 0.15 per cent on its performance when the Lawrence Government was defeated in 1993. These developments represent a significant change in the degree of consensus about the elected government expressed in the major political parties in Australia from what existed in the mid-20th century.

The distribution of preferences in an election is one way by which a kind of consensus is reached for a particular party or parties to govern. Thus, in the 1998 and 2001 federal elections, no fewer than 185 seats, in aggregate, in the House of Representatives required the distribution of preferences to determine their outcome.[18] Although the final choice in elections may not, therefore, be the first choice of a majority of electors, in Australia, the elected representatives constituting the majority of those returned to the lower house of Parliament, when invited to form a government, necessarily exercise

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17 See B Stone, 'The Western Australian Election of 10 February 2001: More a Case of Protracted Suicide than of Assassination' (2001) *Australian Parliamentary Review* (Autumn) 26–33.

18 See G Newman, 'The Role of Preferences in the 2001 Election' (Research Note No 39, Parliamentary Library of Australia, 2002). In the federal election in 2007, recourse to preferences was required in 75 (of 150) electorates and the ALP (which subsequently formed government) received 43.38 per cent of primary votes: See <http://vtr.aec.gov.au/HouseDownloadsMenu-13745-csv.htm>.

their governmental powers for all electors. All governments say that this is what they do. Often it is what they attempt to do. The necessity to face the electors again at regular (and relatively short) intervals means that parties in government frequently attempt to achieve the objectives important for them and their core supporters. But they also keep in mind the consensus that they need to forge with minor parties and independents if they hope to be returned to government in the next election. This is where political consensus over broad directions, principles (philosophies perhaps) becomes very important. Without such consensus, spoken or unspoken, in today's Australia, neither of the major political groupings can win government, whether in the federal, State or self-governing Territory legislatures.

It follows that Australia's political system forces elected representatives to accept compromises and to endeavour to discover a great deal of middle ground across a range of policy areas. In this sense, political consensus and bipartisanship are natural to a modern parliamentary democracy such as that of Australia.

Consensus will not therefore always deliver what a majority of the electors would consider *perfect* policies. Its object is to produce generally *acceptable* policies, and laws and programmes that are broadly *tolerable*, ie not unduly upsetting to the ever-changing majorities in the community that reflect their views in the ballot box every three or four years as the case may be.

III CONSENSUS AND DISENT IN THE HIGH COURT

The same is not true of Australia's independent courts, particularly the High Court. Under the Constitution, each judge is independent. Each has an equal voice. This is said to be 'all but universally recognised as a necessary feature of the rule of law'.[19] Judges are expected be indifferent to political influence and expediency. Their independence necessarily includes, 'independence of one another'.[20]

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19 See *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett* [2005] 2 AC 356, 368 [12].

20 Chief Justice A M Gleeson, 'The Right to an Independent Judiciary' (Paper presented at the 14th Commonwealth Law Conference, London, September 2005). See also A Lynch, '"The Intelligence of a Future Day": The Vindication of Constitutional

Judicial independence is not provided for the benefit or protection of judges as persons. It is afforded as an institutional protection for the people. It guarantees to every citizen (and also to non-citizens) access to an independent judiciary and legal profession as 'the bulwark of a free and democratic society'.[21]

As the final appellate court in Australia, disagreement in the High Court is as inevitable as it is common.[22] The Australian Constitution is often obscure. Statutory and constitutional language is often unclear. Discovering the applicable common law is far from an exact science. Special leave to appeal is rarely granted unless there is a reasonably arguable point in the case.

This is why it is misleading to look simply at the rates of dissent and agreement amongst the Justices of the High Court in the outcomes of decided cases.[23] The surprising feature of the decisions of the present High Court is not, in my view, that there are differences but that there are not *more* differing voices than mine amongst the other Justices, given the controversial questions and inherent disputability of the issues commonly presented for the Court's resolution.[24]

Judges may agree in the final result in a case but disagree over the method and reasoning by which they arrive there.[25] Or they may disagree as to the final result even though they mainly agree in the

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Dissent in the High Court of Australia – 1981–2003' (2007) 29 *Sydney Law Review* 195, 196.

21 See Justice M D Kirby, 'Independence of the Legal Profession: Global and Regional Challenges' (2005) 26 *Australian Bar Review* 133, 133–7.

22 See Justice M D Kirby, *Judicial Activism*, Hamlyn Lectures (2004) 78–83.

23 See, for example, A Lynch and G Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30 *University of New South Wales Law Journal* 188; Justice M D Kirby, 'Judicial Dissent' (2005) 12 *James Cook University Law Review* 4, 7; P Narayan and R Symth, 'The Consensual Norm on the High Court of Australia: 1904–2001' (2005) 26 *International Political Science Review* 147.

24 A Lynch and G Williams, above n 23, 201: '… 2006 saw the Court produce what we would regard as a solid percentage of unanimous opinions. To the extent that a single dissenting voice as regular as Justice Kirby's further inhibits the opportunities for unanimity, it might not be such a bad thing. Indeed, there are several arguments to suggest it may be strongly desirable. However, some may regret that disagreement with the approach to legal problems of the majority of the Court is found so often in the decisions of the same judge'.

25 See, for example, the Court's recent decision in *Australian Competition and Consumer Commission v Baxter* (2007) 81 ALJR 1622, 1652 [132]; 237 ALR 512, 549–50.

reasons of the other judges. On such matters, statistics (particularly in such relatively small samples) disguise the nuances in the reasons of the judges, which is the way in which the law develops.[26] What is true of the High Court, in this respect, is also true of the other higher courts of Australia.

A dissenting opinion is conventionally described as an appeal to the future.[27] In the United States, it can now be seen that the dissents of Justices Curtis and McLean in *Scott v Samford*[28] (on slavery); of the first Justice Harlan in *Plessy v Ferguson*[29] (on racial segregation); of Justices Roberts, Murphy and Jackson in *Korematsu v United States*[30] (on wartime Japanese internment); and of Justices Black and Douglas in *Dennis v United States*[31] (on anti-communist measures) redeemed the serious errors of constitutional doctrine in the majority opinions in those cases. The dissentients offered a beacon to a later, more enlightened, time when the errors of the majority would be acknowledged and corrected.

There have been many powerful judicial dissents in Australia[32] and in the United Kingdom,[33] that have subsequently been adopted when new court majorities replace old majorities of different persuasions. For example, the dissenting reasons of Justice Gaudron regarding

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26 Judges may also change their minds: see Chief Justice A M Gleeson, 'The Constitutional Decisions of the Founding Fathers' (Inaugural Annual Lecture, University of Notre Dame School of Law, Sydney, 27 March 2007).

27 See Kirby J, 'Judicial Dissent', above n 23, 6.

28 19 How (60 US) 393 (1857).

29 163 US 537, 552 (1896). See W Brennan (1986) 37 *Hastings Law Journal* 427, 431.

30 323 US 214 (1944).

31 341 US 494 (1951).

32 See, for example, *Federated Engine Drivers' and Firemen's Association v Broken Hill Pty Co* (1913) 16 CLR 245, 273–5; *Federated Municipal etc Employees v Melbourne Corporation* (1919) 26 CLR 508, 526 (Isaacs J); *Chester v Waverley Corporation* (1939) 62 CLR 1, 14 (Evatt J). See also K M Hayne, 'Owen Dixon' in T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 218, 220; Lynch, *Future Day*, above n 20, 195.

33 See, for example, the well-known dissent of Lord Atkin in the war-time decision of the House of Lords in *Liversidge v Anderson* [1942] AC 206, 244 (HL). For details of other important dissents in the United Kingdom see J Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221, 231.

the constitutional corporations power in *Re Pacific Coal*[34] emerged as the critical strand of reasoning of the majority of the High Court in the decision in the *Work Choices Case*.[35] That was a case that changed the constitutional basis for industrial relations law that had existed in Australia for more than a century. In my view (and I believe that of the Hon Justice M G Gaudron) her reasons were quoted out of context and for a purpose different to that originally intended. However, this is the way the law sometimes develops and changes.

All the old battles that union advocate Hawke fought in the Conciliation and Arbitration Commission and the courts over the meaning of s 51(xxxv) of the Constitution – battles concerning every word of that paragraph ('conciliation', 'arbitration', 'prevention', 'settlement', 'industrial', 'disputes', 'extending beyond … one State') – all of them now appear like ghostly galleons of a bygone age. The aspiration of resolving such disputes before an independent arbitrator committed to a 'fair go for all', as s 51(xxxv) of the Constitution provided, has now been held unnecessary. A major change in Australia in the legal machinery for achieving resolution of industrial disputes has been upheld. The change was endorsed by a new majority on the High Court, not by a consensus. I dissented as, for different reasons, did Justice Callinan. However, the majority decision was clear. It states the law that presently binds.

Some of my dissents in the High Court on other issues, such as in *Al-Kateb v Godwin*;[36] *Re Aird; Ex parte Alpert*;[37] *Combet v Commonwealth*;[38] and *Thomas v Mowbray*,[39] for example, may one day prevail. Such dissenting opinions reflect significantly different views about the character and purpose of our constitutional

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34 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 [83].

35 See *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices Case*), 144–5 [177]–[178]; cf 206–7 [486]–[489], 366 [877].

36 (2004) 219 CLR 562.

37 (2004) 220 CLR 308.

38 (2004) 224 CLR 494, 614 [289]–[290]; G Lindell, 'The *Combet Case* and the Appropriation of Taxpayers' Funds for Political Advertising – An Error of Fundamental Principles?' (2008) 66 *Australian Journal of Public Administration* 307.

39 (2007) 81 ALJR 1414; 237 ALR 194.

institutions; the meaning of liberty; the maintenance of a limited role for the armed forces in civilian government; the role of international law within our legal system; the use of the judiciary in controlling the executive; and the accountability of the executive to the Parliament.

In the law, as in life, disagreement can only be properly understood by someone when they know the reasons for the dissent. Occasionally, the issues are not easily simplified. Fundamental values and notions about our society may be at stake. Yet in many cases, disagreement is critical to the honesty, transparency and good health of the institution concerned.[40]

Dissent is sometimes addressed to fundamental notions about the role and limits of governmental and economic power. Sometimes it concerns issues that are deeply felt and incontestably important to the long term health of society, such as respect for fundamental human rights. In such cases, at least in the independent courts, there is a clear limit to the extent to which the judges should struggle to achieve consensus and compromise, however unpopular it may be with law students and the practising legal profession. Occasionally progress in the struggle of ideas is only really attained by transparent disclosure of differences; by planting the seeds of new ideas; and by waiting patiently to see if these eventually take root or not.

IV ADAPTABILITY AND CHANGE WITHIN CONSENSUS

This is why reliance upon consensus in Australia, certainly about the law, cannot be pushed too far. There are many things about which there is, and should be, no consensus. For example, Africa, along with many parts of the developed world, is yet to reach a consensus about effective ways of dealing with HIV/AIDS. Decision-makers should not go along with wrong-headed, ignorant policies when millions of people are dying and are neglected as a result.

As another example, 50 years after the Wolfenden report in England[41] (and 30 years after Don Dunstan in South Australia began

40 See C Sunstein, *Why Societies Need Dissent* (2003).

41 England, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, Command paper series 247, HMSO (1957).

the national process to remove the criminal laws against homosexual men)[42] most of the non-settler countries of the Commonwealth of Nations retain the old British laws that target and punish private adult homosexual acts. In this, they enforce an unlovely legal relic of the British Empire. There may indeed be a consensus throughout Africa to retain such laws. Yet such laws are objectively wrong when measured against modern scientific knowledge about human sexuality. They are seriously unjust. Rational people should not go along with them in silence because of a prevailing consensus. Sometimes a consensus needs to change.[43]

Sir Anthony Mason led the High Court of Australia as Chief Justice during a period which largely coincided with the Hawke Government in the 1980s and 1990s. If Australians had not lived for more than a decade under the Mason Court, they might be forgiven for thinking that Australian law was unbending and unchanging, and impervious to modernisation: incapable of responding to new human, social and scientific insights.

Substantially, there was an earlier consensus in the law as expressed in the High Court. It was a consensus about law that I grew up with. In important ways, it was unequal and unjust in the way it dealt with Aboriginal and other indigenous Australians. With women's legal entitlements. With Asian and other 'non-White' immigrants. With homosexuals and other sexual minorities. With prisoners and people accused of crimes. With free speech and criticisms of governmental authority.[44]

Some of the changes to the ways in which law in Australia responded to these issues came about by public consensus: by alteration in political views and by laws enacted by Parliaments, federal and State, or changes of policy adopted by governments. Some were fostered by media discussion. However, other changes

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42 See *Criminal Law (Sexual Offences) Amendment Act 1975* (SA) s 28.

43 Justice M D Kirby, 'Discrimination on the Ground of Sexual Orientation: A New Initiative for the Commonwealth of Nations?' (2007) 16(3) *Commonwealth Lawyer* 36.

44 Justice M D Kirby, 'Swearing in and welcome speech, High Court of Australia' (1996) *Australian Law Journal* 274, 276.

were only achieved when the independent courts broke the spell of an existing consensus and injected a new dynamic.

In the case of women's equality, such a change came about, in part, because of international treaties. However, equal rights for women in Australia was also given a large impetus by the Equal Pay Decisions of Australia's industrial tribunals.[45] The same can also be said of Aboriginal rights. It was a hard-fought case in the Arbitration Commission that secured the first breakthrough in equal pay entitlements for Aboriginal stockmen in Australia.[46] It was not individual bargaining or workplace agreements that achieved such changes. Independent decisions by industrial tribunals in cases brought by unions shattered the old consensus. They stimulated the building of a new consensus – one wiser and more just. Many such decisions were won by the young industrial advocate, R J L Hawke.

I often ask myself whether the *Mabo* decision of 1992,[47] upholding the equal entitlement of indigenous Australians to legal recognition of their interests in land, would be decided by the High Court the same way today? Would the same basic right to legal counsel for unrepresented accused without means, facing a major criminal trial, upheld by the Mason Court in the *Dietrich* case (also in 1992),[48] have happened today? Would it have occurred but for Justice Lionel Murphy's dissent that challenged the earlier legal consensus in his reasons in *McInnis v The Queen*?[49]

Would the High Court's insistence upon properly recorded confessions to police, stated in *McKinney v The Queen*[50] in 1991, have occurred today? Would the perception that our constitutional democracy necessitates limitations on legislative interference in the

45 *Re National Wage Case* (1967) 118 CAR 655, 660; *Equal Pay Case* (1969) 127 CAR 1142; *National Wage Case and Equal Pay Cases* (1972) 147 CAR 172.

46 *Re Cattle Station Industry (Northern Territory) Award* (1966) 113 CAR 651; *Pastoral Industry Award* (1967) 121 CAR 454, 457–8. See also *Work Choices Case* (2006) 229 CLR 1, 218–19 [524].

47 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

48 *Dietrich v The Queen* (1992) 177 CLR 292.

49 (1979) 143 CLR 575, 586–91.

50 (1991) 171 CLR 478.

freedom of the press[51] have come about without the Mason Court? Would we have overcome the past empty rhetoric about the 'sovereignty' of Parliament and recognised the constitutional protection of free speech without Justice Murphy's dissent in *Buck v Bavone*?[52] It was Lionel Murphy who helped unsettle that consensus by suggesting that the terms and very character of the Australian Constitution implied rights to free expression essential to making the democracy, expressly provided for, operate as intended.

These constitutional and other achievements were only secured because a few lawyers and judges – at first in the minority – questioned the legal consensus.[53] Despite occasional decisions like the recent prisoners' voting case, the answer to all of the questions of whether such cases would have been answered the same way today seems to be: probably not. Yet who can doubt that these rulings of the Mason High Court on native title, or basic rights to legal representation, on guarantees of secure confessions to police and on the protection of free speech were correctly decided as contemporary expressions of Australian law? In retrospect, who can doubt that Australia is a juster, more equal, freer place because of such decisions of the Mason High Court?

Those who know of these decisions of the Mason Court therefore know that law does not have to be unjust, out of date and unequal. It does not have to sustain unquestioningly the power arrangements of the past. Law can be modern, human rights-respecting, equal in its treatment of minorities and attentive to the rights to equality of all persons. In these endeavours, courts have a role, even if it is a subordinate role. The Mason Court, with judges appointed both by the Fraser Government and the Hawke Governments, showed that law in Australia can be reconciled with justice. A new legal consensus can be built. Law does not belong to the few but to all the people; not only to the past but also to the present and future.

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51 See, for example, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

52 (1976) 135 CLR 110, 135.

53 See also *Roach v Electoral Commissioner* (2007) 81 ALJR 1830; 239 ALR 1.

V A FRESH CONSENSUS ON FUNDAMENTAL RIGHTS

It follows that the right to disagree or to dissent from the majority view in courts when things seem wrong or unjust is one of the most precious freedoms that exists in a democracy. About fundamental rights, agreement through consensus should not be forced. On such questions, our institutions need strong concurrences. But also sometimes strong dissenting voices. Australian society should cherish its dissenting citizens.

Sitting in the High Court I see disparities and injustices from time to time. They do not become more acceptable because of the passage of years as a judge or even because many, perhaps most, fellow citizens never think about them, are not told about them by our media, are not concerned about them or are indifferent to injustice and basic inequality. I know from my own life that inequality hurts. Treating a person unequally in the law without good cause is hurtful to that person and that person's family and friends.

In the long run in Australia, most wrongs will probably be cured by legislation or a change in governmental policy. Of course, in the long run all of us are dead. Sometimes change requires example and a bit of stimulation. In a society such as ours, that stimulation will generally come, from the three year electoral cycle and from governmental and parliamentary decisions. It may also come from media discussion and civil society agitation. Occasionally, it can also come as a result of court decisions. Courts are sitting all the time. Every day, they are deciding big and small cases according to principles of law and perceptions of justice. Courts cannot cure all wrongs, nor should they try. But the Mason High Court in Australia showed that they can cure some. With new legal implements, they could cure more.

That is why many Australians have concluded that the time has come to strive for a new consensus upon one important national subject. I refer to the rights and freedoms that belong to all persons in Australia. This is a subject worthy of an attempted national consensus – an agreement about fundamentals that we place above divisive politics.

For well over two centuries, the United States of America has had a constitutionally entrenched bill of rights. Other countries have also

moved, many in recent times, to guarantee the protection of human rights by incorporating basic rights in their national constitutions[54] and in local law.[55] Sometimes they have done this by requiring the use of international human rights law when interpreting the provisions of local law.[56] Sometimes they have done it by enacting a statute or charter of rights to forge a new consensus on such questions.

The *Human Rights Act 1998* (UK) of the United Kingdom is a case in point. It has been in operation for seven years. The last decade has seen similar laws enacted in Australia both in Victoria and the Australian Capital Territory. An equivalent law has been under consideration in other jurisdictions. In the light of all these developments,[57] it is surprising that Australians have not yet reached, or even really attempted, a consensus on a national statute of rights. For many, this appears to be a bridge too far. For them, this is a subject for dissent and not consensus.

The resistance to adopting a statute of basic rights is comprehensible. I was raised in a legal culture strongly resistant to such notions. I am not disrespectful towards elected Parliaments.[58] I spend most of my professional life striving to give effect to the purposes of parliamentary legislation. For me, the words of a

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54 As in Austria, Italy, Portugal, South Africa, Namibia, Japan, Germany and Hungary among others: see *Italian Constitution* (1947), Art 10; *Portuguese Constitution*, Art 8(1); *Constitution of South Africa*, ss 39(1), 231–3; *Constitution of Namibia*, Art 144; *Constitution of Japan* (1946), Art 98(2); *The Basic Law of the Federal Republic of Germany*, Art 25; *Constitution of the Republic of Hungary*, Art 7(1).

55 Countries in addition to the United States include Canada, Germany, The Netherlands, Italy, Portugal, South Africa and Japan.

56 See, for example, *R v A* [2001] 2 WLR 1546; *R (on the application of Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929; *Mathew v The State (Trinidad & Tobago)* [2004] 3 WLR 812 [13].

57 One of the first acts of the new Timor-Leste Parliament was to endorse the *Universal Declaration of Human Rights* and to apply to join the United Nations: H Koh, 'International Law as Part of our Law' (2004) 98 *American Journal of International Law* 43, 44, fn 4.

58 See, for example, *Durham Holdings Pty Ltd v New South Wales* (2000) 205 CLR 299, 419 [42]; *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 (*BLF Case*), 387; *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 201–2.

relevant enactment of Parliament are always the starting point for resolving any legal problem.[59]

I respect, and uphold, the powers and privileges of Parliament.[60] I certainly do not advocate a statute of rights in Australia because it would gain Australia credit overseas or secure more attention to our courts' judicial opinions.[61] These are irrelevancies.[62] Nor is the fact that Australia is now the only significant western country without such laws sufficient to suggest that we must adopt them. Australia's national decision, by judicial decision and referendum in 1951, refusing to ban the Australian Communist Party and to take away the civil rights of communists was out of step with decisions taken in other countries at the time.[63] Yet, in retrospect and at the time, it was clearly right.

A constitutional charter of rights for Australia, with an effect that would invalidate inconsistent parliamentary laws, appears unattainable. At least in the first instance, this type of reform is unlikely to be adopted in Australia. In any event, a statute of rights is the way that countries with legal systems closest to our own – New Zealand, Canada and Britain – have recently made their first moves.[64]

The model that appears to have the best prospects in Australia is one based on legislation adopted in New Zealand[65] or in the *Human*

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59 *Central Bayside General Medical Practice v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168, 197–8 [84], fn 64.

60 See, for example, *Sue v Hill* (1999) 199 CLR 462, 568 [279]; *Re Reid; Ex parte Beinstein* (2001) 182 ALR 473, 478–9 [23]–[27]; cf N Bamforth, 'Parliamentary Sovereignty and the *Human Rights Act 1998*' [1998] *Public Law* 572, 579–80.

61 G Robertson, 'A Bill of Rights is the real Guardian' (Unpublished, Sydney, 28 August 2007).

62 Cf A Bolt, 'When Rights are Wrong', *Herald Sun*, 5 September 2007, 18; 'Blair on Saturday (It's Right to Write Wrongs with a Bill of Rights, Right?)', *Daily Telegraph* (Sydney), 1 September 2007, 29.

63 Comparing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 with *Dennis v United States*, 341 US 494 (1951).

64 Sir A Mason, Book Review of Conor Gearty, *Can Human Rights Survive?* (Hamlyn Lectures, 2005) in (2006) 9 *Constitutional Law and Policy Review* 74.

65 New Zealand *Bill of Rights Act 1990* (NZ). See I Richardson, 'Rights Jurisprudence – Justice for All?' in P A Jospeh, *Essays on the Constitution* (1995) 60, 69ff; G Palmer and M Palmer, *Bridled Power: New Zealand Government under MMP* (3rd ed, 1997) 264.

Rights Act 1998 (UK).[66] It would afford no authority to courts to invalidate provisions in Acts of Parliament on the ground that judges find them contrary to the stated rights. Essentially, such a law works on two principles only. By adopting a rule of statutory construction it would encourage courts, wherever possible, to interpret laws made by Parliament so that they do not breach the stated fundamental rights. Where this technique of interpretation did not bring the law into conformity with such basic rights, it would permit courts to identify disparities and to draw such disparities to parliamentary and public attention. This would be done on the assumption that Parliament would then consider the inconsistencies one way or the other.

In effect, this kind of statute of rights would provide a modern stimulus to the democratic process in respect of which many voices suggest the need for institutional refurbishment.[67] It would encourage the community to think in terms respectful of the basic rights of everyone. Arguably, it would promote a culture of mutual respect of basic rights. Yet it would leave the last word to elected Parliaments, whilst rendering them, and their processes, more transparent and promoting vigorous public debate on such matters. Obviously, to the extent that such legislation involved federal courts, it would need to address, in its drafting, the requirement of the Constitution that courts exercising federal jurisdiction be confined to the exercise of the judicial power of the Commonwealth.[68]

R J L Hawke never pressed for consensus as a goal to be achieved at all costs. In industrial relations and in politics, he fought hard for the things that he regarded as essential, many of them contested at the time. He recognised that differences are sometimes inescapable and that, occasionally, the time is not ripe for consensus or the

66 See A Lester and D Pannick, *Human Rights: Law and Practice* (2nd ed, 2004) [2.01]ff.

67 Justice M D Kirby, 'Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman' (2006) 80 *Australian Law Journal* 299, 311–14.

68 S Evans and C Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 7 *Public Law Review* 264, 271; J South, 'The Campaign for a National Bill of Rights: Would "Declarations of Incompatibility" be Compatible with the Constitution?' (2007) 10(1) *Constitutional Law and Policy Review* 2; *Attorney-General (Cth) v Alinta Limited* (2008) 82 ALJR 382, 391 [33]; [2008] HCA 2.

differences are too fundamental. The secret of success was to know the difference between the subjects and occasions suitable for *consensus* and those apt for *dissent*. Success also belongs to recognising the differences in our institutions and the way they severally reach their decisions on such matters.

So far, in Australia, we have for the most part got by without collecting and stating the fundamental rights of the individual that we will respect and uphold through legal process. We have done so largely because, until quite recently, Australia was a relatively homogeneous society facing at most times benign challenges. In the future, Australians will likely become much more diverse and polyglot than they now are. The nation will face greater challenges, including legal challenges. Now would therefore appear to be the right time to attempt to forge a consensus about a national statute of basic rights, and perhaps duties, that we undertake to uphold and that we expect our elected lawmakers to respect.

If Australia achieves a new consensus about a national statute for this purpose, the instruction of R J L Hawke about the centrality of consensus on truly essential things will be vindicated. We will then place truly fundamental rights above partisan squabbles. We will give the courts new powers; but not too many. We will reserve the last word to elected Parliaments. We will enlarge public debates about fundamentals – and the type of society Australia really wants to be. We will distinguish between the proper place of consensus and the proper place of dissent. These are goals worthy of a mature democracy.