UNELECTED JUDGES IN A REPRESENTATIVE DEMOCRACY

St Thomas More Society Sydney

Chief Justice R S French AC
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Introduction

It is a pleasure to join the St Thomas More Society at this annual dinner to mark the Feast Day of the Saint. Although the etymology of the term 'feast' is tied up with the notion of a festival its usage as 'a sumptuous meal or entertainment' is on display this evening - at least as to the first limb of that definition. That usage was my understanding of the word as a young Catholic school student and it seemed to me a regrettable oversight on the part of the Catholic education system that the feast days of the Saints at Catholic schools were not marked by very many feasts. One exception was St Patrick's Day at the primary school known as St Teresa's which I attended in Nedlands and which was run by the Loreto nuns. The local Parish Priest, a larger than life Irishman Monsignor Ted Moss of florid complexion, a shock of white hair and a scent of eau d'cologne, would provide free ice-cream for the entire school. That is perhaps why I remember St Patrick more fondly than many others of the saintly host.

Thomas More was a figure little spoken of at the St Teresa's primary school. His feast day was not noticed. It certainly did not merit free ice-cream. Nevertheless as many of us at this gathering have discovered, perhaps later in life, his character, his intellect and his personality fascinate and also enliven a degree of controversy even at the remove of nearly 500 years since he was executed after a trial conducted under the shadow of regal power and the King's claim to supremacy over the Church in England.

More was convicted of treason under the Statute of Treasons, one of three statutes enacted in 1534. The first was directed against More personally. It was in effect a Bill of attainder under which he was convicted of misprision of treason for

refusing to take the oath required of subjects under the Act of Succession. The oath required affirmation of the right of the children of Henry VIII and Anne Boleyn to succeed to the throne. The second statute recognised King Henry as supreme head of the Church in England. The third statute made it treason to oppose any royal title by act or deed. The third Act commenced its operation on 1 February 1535. Within the next six months nine persons including Thomas More and Bishop Fisher were convicted and executed for the offence. More was convicted on 1 July and executed on 6 July.

Thomas More's trial was not what would be regarded as a fair trial by contemporary standards. It pre-dated the emergence of the concepts of separation of powers and conflict of interest principles.[1] There are a number of accounts of the trial. One by Thomas More's son-in-law William Roper was written about twenty years after the event. Another was written by an eyewitness originally in Latin and is referred to as the Guild Hall Report. Another was written by Reginald Pole whose brother Henry Lord Montague was on the Commission that tried More although he did not appear on the day of the trial. Pole was appalled by the trial and described it in his report as having been presided over by Satan. There has been some interesting academic debate about what precisely transpired at the trial and in particular whether More succeeded in having two counts of the indictment struck out before the trial proceeded.[2] It is not necessary to visit that debate here.

According to Pole's account after the indictment was read More replied that the law he was supposed to have broken was passed after he had been committed to prison for misprision under the first of the statutes of 1534. Being attainted for misprision he was legally dead and the law did not apply to him. Moreover, he said, that he had never said anything by deed or spoken word to indicate that he disapproved of the law. The Judges then asked the King's Advocate, Sir Christopher Hales, for his reply. The Advocate said, according to Pole, 'Well then if we have neither word nor deed that we can charge you with we assuredly do have your

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1 Louis Karlin and David Oakley, 'A Guide to Thomas More's Trial for Modern Lawyers' in Henry Kelly, Louis Karlin and Gerard Wegemer (eds), *Thomas More's Trial by Jury* (Boydell Press, 2011) 71, 84.

2 See generally, Henry Kelly, Louis Karlin and Gerard Wegemer (eds), *Thomas More's Trial by Jury* (Boydell Press, 2011).

silence.' More suggested that silence was evidence of nothing but consent but nobody took any notice.

The trial was heard by a commission of twelve councillors and seven justices and a petty jury of twelve lay people. The justices were senior members of the English judiciary, the Chief Justice of the King's Bench, the Chief Justice of Common Pleas, the Baron of the Exchequer, three Justices of the King's Bench and the Justice of Common Pleas. The councillors included Anne Boleyn's father, her brother and her uncle, who was the Duke of Norfolk, and the Duke of Suffolk who was married to Henry VIII's sister.

The trial of Thomas More occurred in a constitutional and legal universe which was quite different from that which we inhabit today. There is little point in trying to judge it by today's standards.

Nevertheless his trial reminds us of the importance today of the essential characteristics of the judicial function including independence, impartiality and a commitment to the rule of law. Those characteristics are reflected in the meaning which we give to the judicial oath of office whose origins go back to the statute of Edward III, predating the trial of Thomas More by some two centuries. By the oath or equivalent affirmation a judge swears, or solemnly and sincerely promises and declares, that he or she will well and truly serve in the office of judge and will do right to all manner of people according to law without fear or favour, affection or ill will. Those key words 'according to law without fear or favour, affection or ill will' lie at the heart of the judicial function.

In his swearing in speech as Chief Justice of the High Court in April 1995 Sir Gerard Brennan explained the significance of the judicial oath or affirmation. He said:

> It is rich in meaning. It precludes partisanship for a cause, however worthy to the eyes of a protagonist that cause may be. It forbids any judge to regard himself or herself as a representative of a section of society. It forbids

> partiality and, most importantly, it commands independence from any influence that might improperly tilt the scales of justice.[3]

In noting that the oath requires justice to be done according to law, Sir Gerard said:

> the jurisdiction of the Court is fixed by law and judgment must be rendered in accordance with the judicial method. The security which each of us has is the law. Sir Thomas More of the 'Man for All Seasons' is surely right to put to Roper -
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> > "This country's planted thick with laws from coast to coast … and if you cut them down … d'you really think you could stand upright in the winds that would blow then?"[4]

Thomas More himself had been a judge. He occupied the highest judicial office in England that of Lord Chancellor although for less than three years. Today he might be called a judicial activist. He reformed Chancery practice. He developed the principle that equity could relieve against forfeitures a principle which laid the foundation for the mortgagor's equity of redemption. He proposed the bringing together of law and equity foreshadowing the Judicature Acts of 1873 by more than three centuries.[5]

Professor Garrard Glenn in an erudite and elegant address to the Thomas More Society of America in May 1940 called More the good companion of Mansfield, Blackstone and Campbell and said of him:

> we of the Bar, practitioners and teachers, need him because he showed us how it is possible for a man to lead a busy life, to find time for his family, to leave behind him the idea of reforms which the centuries were to develop; and, better still, also to leave the memory of a vibrant personality.[6]

It is against the background of More's life, his independence and integrity and the legal process which took that life, a process barely recognisable as judicial, that I turn to the role of the judge today in our representative democracy.

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3 The Hon Sir Gerard Brennan, Speech on Swearing in as Chief Justice of the High Court of Australia, Canberra, 21 April 1995.

4 Ibid.

5 See generally, Professor Garrard Glenn's address to the Thomas More Society in 1940, as revised for publication, from which the observations about More as a judge and lawyer in this presentation are taken: Garrard Glenn, 'St Thomas More as Judge and Lawyer' (1941) 10 *Fordham Law Review* 187.

6 Ibid 195.

Democracy, representative democracy and separation of powers

The representative democracy and responsible government for which our Constitutions, Commonwealth and State, provide involve elected officials making and, at least indirectly, administering the laws. They are the legislature and the executive, the first and second branches of government. The courts and judges make up the third branch of government. They decide the cases that come before them and in so doing are required to interpret and apply the law. In Australia where our written Constitution places limits on the law-making power of Commonwealth and State Parliaments, judges may have to decide whether a law made by elected representatives in Parliament is valid. In so doing, they may have to interpret the law under challenge and the provision of the Constitution which is said to authorise or justify or in some cases to prohibit such a law. The judges may also have to decide, as the High Court did on Wednesday[7], whether executive action undertaken by Ministers of the Crown or their officers is authorised by law or by the Constitution.

There is a considerable history behind the idea of courts as a third distinct branch of government. A lot of its development has to do with the idea of separation of legislative, executive and judicial powers and associated with that the independence of the judiciary from the legislature and executive.

In the Commonwealth Constitution there is a sharp separation of judicial from legislative and executive powers. That separation is not apparent to the same degree in State Constitutions although there are conventions which underpin political respect for the principle and for the independence of the judiciary. As a former Chief Justice of South Australia, Chief Justice Len King, said in a paper on separation of powers given in 1994:

> The constitutional arrangements which existed in England in the 18th century, being the separation of powers resulting from the post-1688 Settlement upon which responsible government was engrafted, flowed into the constitutions of

[7] *Williams v Commonwealth of Australia* (2012) 86 ALJR 713.

> the Australian colonies and, hence, into the constitutions of the present Australian states.[8]

The separation of judicial power of the Commonwealth from its legislative and executive powers is apparent from the text of the Constitution. Three key provisions define the constitutional positions of the three branches of government. The first is s 1 which vests 'the legislative power of the Commonwealth' in 'a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives'. The second is s 61, which vests the executive power of the Commonwealth in the Queen and states that it is exercisable by the Governor-General as her representative. The third is s 71, which vests the judicial power of the Commonwealth 'in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.'

The separation of the judicial from the legislative and executive branches is more pronounced than the separation between the legislative and executive branches. The executive has significant legislative functions conferred upon it by the Parliament in relation to the making of regulations and many other kinds of legislative instrument. Under the system of responsible government for which the Constitution provides, Ministers of the government must be members of the Parliament.

The separation of the judicial from the legislative and executive power means that federal courts and judges cannot validly undertake in their capacity as judges executive functions not incidental to their judicial functions, although they may undertake a non-judicial function as persona designata provided it is compatible with their judicial functions. It must of course be acknowledged that judges, particularly at the appellate level, have an interstitial or incremental law making function. That arises in the development of the common law case by case. It also arises in the process of the interpretation of statutes where choices have to be made between

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[8] Len King, 'The Separation of Powers' in Australian Institute of Judicial Administration, *Courts in a Representative Democracy: A Collection of the Papers from a National Conference, Courts in a Representative Democracy, Presented by the Australian Institute of Judicial Administration, the Law Council of Australia and the Constitutional Centenary Foundation in Canberra on 11-13 November 1994* (Australian Institute of Judicial Administration, 1995) 1, 5

competing constructions. Sometimes statutes contain broadly expressed legal norms or standards, leaving it to the judiciary to develop principles for the application of those norms or standards case-by-case in a way that is analogous to the development of the common law.

The separation of powers and judicial independence are two principles that go hand in hand. Section 72 of the Constitution, which protects the tenure and remuneration of federal judges, protects them from subjugation to the executive in the discharge of their judicial responsibilities, and thus supports their independence and impartiality. The two principles make the High Court and federal courts a distinct branch of government and one of the three pillars upon which our Commonwealth polity rests.

The courts of the States derive their existence from the State Constitutions or from laws made under those Constitutions. The absence of explicit separation in their powers of the judicial power of the States from their legislative and executive powers is not the end of the debate about that topic. As Professor Gerard Carney, now the Dean of Law at the University of Queensland, has observed:

> Despite the absence of a binding doctrine of separation of powers at the State level, that doctrine is nonetheless recognised as a powerful *political* doctrine of good government.[9]

Importantly, because ss 71 and 77 of the Commonwealth Constitution contemplate the use of the State courts as repositories of federal jurisdiction, the High Court has developed a doctrine that their institutional integrity must be protected from laws that would compromise the constitutional scheme. The High Court has described the State courts as 'part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power.'[10] It is not open therefore to a State Parliament to confer powers or functions on State courts which are 'repugnant to or incompatible with their exercise of the judicial

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9 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 349 (emphasis in original).

10 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114-115 (McHugh J).

power of the Commonwealth.'[11] Nor is it open to the State legislatures to abolish the State Supreme Courts or to prevent them from exercising the powers they had at federation to judicially review by the prerogative writs the decisions of other judicial and executive authorities within the States.

Whether by constitutional rule, implication or convention, federal and State courts are an essential, distinct and distinctive part of the infrastructure of our representative democracy. Let me now say a little about what they do.

The functions of the courts

The core function of all courts is to hear and decide cases which come before them. When the issues for determination in a case have been defined, the judicial decision making process involves the following basic steps:

1. The judge determines the legal rules or standards applicable.

2. The judge (or a jury directed by the judge) considers the evidence and determines what the facts are.

3. The judge applies the relevant legal rules or standards to the facts as found to determine the rights and liabilities of the parties and to award legal remedies or not as the case may be.

This simple model represents the core of the judicial function undertaken by most judges on a day-to-day basis. It is a useful working guide to the judicial process in the great bulk of cases.[12]

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[11] Ibid 103 (Gaudron J). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 [101] (Gummow J), 648 [198] (Hayne J agreeing).

[12] Other non-judicial functions may be conferred as an incident of judicial power – *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278. See also *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 (Deane J). And some functions which do not fall within a neat dispute resolution model are treated as judicial because they have historically been functions exercised by courts: *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490, 500-502 [21]-[25] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). Still further functions may be seen as judicial or non-judicial by virtue of the body exercising the function: *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 566 [230] (Kirby J).

Some cases may raise legal issues of general public importance. But even in the most routine of cases, the court always discharges a significant public function. For not only is it required to decide the dispute before it, but it is required to decide it in a principled manner. Compliance with that requirement carries with it an affirmation of the rule of law generally and of the particular legal rules and standards which govern the relationship between the parties and all parties in like situations. That affirmation and its repetition over the multitude of cases that come before all levels of the judicial system is an important feature of our democracy at work. It is a reminder to all that when the courts interpret and apply the laws made by the Parliament they are carrying out a democratic function. The importance of this public declarative function was emphasised in a well-known article by Professor Owen Fiss in the *Yale Law Journal* entitled 'Against Settlement':

> Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.[13]

There is, of course, today a strong emphasis on encouraging negotiated or mediated dispute resolution to avoid resort to the courts. Professor Fiss' comments, which reflected a principled scepticism about alternative dispute resolution, may be at odds with the prevailing conventional wisdom. But the point he made about the essential character of the judicial function remains valid. It is rooted in our history and tradition and is supportive of our liberties. It is important not to allow the distinctiveness of the judicial function to be blurred by simply treating it as one item in a menu of dispute resolution mechanisms.

Statutory interpretation

The first step in the simple model of the judicial process is determination of the applicable legal rules or standards in light of the issues for decision by the Court. The relevant legal rule or standard may be found in the common law, in statutes

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[13] Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1085.

enacted by the Parliament or regulations made under statute and even in the Constitution itself.

Today we live in an age dominated by statutes of increasing volume and complexity. Executive governments, the initiators of legislation in the parliaments, sometimes aspire to unachievable precision in statutory language. Nested definitions coupled with arrays of sections, subsections, paragraphs, schedules, items, sub-items and clauses do not yield unambiguous meaning. There are few words in our language with only one meaning. There are few meanings which do not change their shades or nuances according to context. When words are combined, meanings and shades of meaning may interact in unexpected ways. Language is plastic. In any serious dispute about meaning courts are confronted with choices. It is not always possible to say that one choice is plainly right and another choice plainly wrong. In making choices the courts engage in a form of law making according to common law and statutory principles of interpretation. Those principles help to define the boundaries between the judicial and the legislative function. The task of interpretation is sometimes characterised as discerning the 'intention' of the legislature.

It is here that the democratic legitimacy of the judicial function of statutory interpretation comes into focus.

A frequently quoted judgment of the High Court in this context is *Project Blue Sky Inc v Australian Broadcasting Authority*.[14] The case involved the interpretation of the words 'the Australian content of programs' in a section of the *Broadcasting Services Act 1992* (Cth). Under that section, the Australian Broadcasting Authority was required to determine standards to be observed by commercial television broadcasting licensees. The term itself was not defined. The Court held it to be a flexible expression, including matter reflecting Australian identity, character and culture. In their joint judgment, McHugh, Gummow, Kirby and Hayne JJ said, inter alia, 'the duty of a court is to give the words of a statutory

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[14] (1998) 194 CLR 355.

provision the meaning that the legislature is taken to have intended them to have.'[15] It is useful to reflect upon what is meant by the concept of legislative intention.

The concept is elusive. The search for authorial intention, whether by the collective makers of a legal text or a single author, can involve the pursuit of a mirage. *Byrnes v Kendle*,[16] a decision of the High Court delivered in August 2011, raised the question whether a person who signed an acknowledgment of trust had actually intended to create a trust. The Court held that the person's intention was to be found from the words of his written acknowledgment, not from any mental reservations which he might have held. Heydon and Crennan JJ quoted a paper by Charles Fried, published in the *Harvard Law Review* in 1987 in which the author said:

> The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and text are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors or of the framers.[17]

In their joint judgment, their Honours related this passage, which concerned constitutional construction, to statutory construction and to the construction of contracts. What then is the purpose of referring to legislative intention at all?

The significance of the idea of 'legislative intention' was considered by the High Court in *Lacey v Attorney-General (Qld)*,[18] which was delivered on 7 April 2011. The case involved a provision of the *Criminal Code Act 1899* (Qld) permitting appeals by the Attorney-General against sentences imposed on convicted persons. The contested question of interpretation was whether or not it was necessary for the Court of Appeal to identify some error on the part of the primary judge before it could intervene in such an appeal. The joint judgment of six members of the Court accepted the objective of giving to the words of a statutory provision the meaning

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15 Ibid 384 [78] (footnote omitted).

16 (2011) 243 CLR 253.

17 Ibid 282-283 [95] quoting Charles Fried, 'Sonnet LXV and the "Black Ink" of the Framers' Intention' (1987) 100 *Harvard Law Review* 751, 758-759 (emphasis in original, footnotes omitted).

18 (2011) 242 CLR 573.

which the legislature is taken to have intended them to have. The joint judgment then said of legislative intention:

> The legislative intention … is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[19]

Although, on this approach, the intention of the legislature is not presented as having an independent existence, the process of interpretation does involve the identification of a statutory purpose. Such purposes may be set out in the Act itself or may be inferred from its terms. It may be found by appropriate reference to extrinsic materials, such as a Second Reading Speech or an Explanatory Memorandum, or the report of a Law Reform Commission whose recommendations have led to the enactment of the statute. In the end, however, it is the words of the statute which govern. Even if there was a ministerial statement about the purpose of a statute, if it cannot be reconciled with the language of the statute itself then the language will govern.

Interpretation versus rewriting the limits of the judicial function

Neither common law principles of interpretation nor interpretation Acts authorise the courts to change the meaning of a statute or to distort it. One of the questions which was raised in the recent case of *Momcilovic v The Queen*,[20] concerning the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), was whether the Charter requires the Victorian Courts to undertake a rewriting exercise in interpreting statutes in accordance with human rights declared in the Charter. Section 32(1) of the Charter provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

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19 Ibid 592 [43] (footnotes omitted).

20 (2011) 85 ALJR 957.

Although there was a variety of views in the High Court about a number of issues raised in the case, the general proposition emerged that s 32(1) cannot be used to do anything other than interpret a statute compatibly with human rights declared in the Charter, to the extent that such an interpretation is open on the language of the statute. In this respect the position under the Charter is to be distinguished from the position under the *Human Rights Act 1998* (UK).[21] The Charter provision resembles the common law principle of legality which is an important rule for the interpretation of statutes. That rule takes the form of a strong presumption that if on one interpretation a statute would infringe common law rights and freedoms and on another interpretation it would not the latter interpretation is to be preferred. It is important to observe that the interpretation which is chosen under this rule must be one that is open on the language of the statute and not the result of simply rewriting it. In that constraint the rule preserves the proper constitutional relationship between the courts and the Parliaments.

The judicial function can impinge upon the operation and validity of laws made by elected representatives of the people. Why not then elect the judges?

The appointment of Australia's judges

Australian judges are not, and never have been, popularly elected. The Commonwealth Constitution provides for the appointment of High Court and other federal judges by the Governor-General in Council, that is to say, by the Governor-General acting upon the advice of the government of the day. Federal judges, once appointed, cannot be removed except by the Governor-General in Council following an address from both Houses of Parliament in the same session seeking removal on the ground of proved misbehaviour or incapacity. Moreover, their remuneration cannot be diminished during their continuance in office. The appointment of federal judges is for a term expiring when they attain the age of 70 years. All of these provisions are to be found in s 72 of the Constitution. The laws of the various States make similar provisions for the appointment of State judges, although they may vary in detail.

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[21] See, eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

This tradition of an appointed rather than an elected judiciary is powerfully entrenched in Australia. It is closely related to wide acceptance of the proposition that judges should be independent of influences from governments and political parties and the ebb and flow of public opinion, in deciding cases before them. This is entirely consistent with changes in recent years to the processes of governments inviting expressions of interest and undertaking consultation processes in connection with judicial appointments. Steps have been taken to widen the range of persons who may be considered for appointment and, in the case of federal courts other than the High Court, obtaining advice about candidates suitable for appointment from an independent panel.

An obvious reason for the rejection in Australia of the idea of electing judges is that the judicial election process is thought to interfere with judicial independence and impartiality. Sir Anthony Mason, a former Chief Justice of the High Court, wrote in 1997:

> The election of judges is bound to compromise their independence because it entails their campaigning for office and because it exposes the judges to the pressures of possible removal in consequence of popular disapproval of their judicial decisions.[22]

Some of the problems associated with the process of electing judges are illustrated by difficulties that have arisen in the United States in relation to campaign speech by candidates for judicial office and financing of their campaigns.

Election of judges in the United States

Apart from a few cantons in Switzerland and the use of retention elections for Japan's High Court judges, the USA is the only other country which selects judges by popular election.

In the United States, all States originally selected judges by executive or legislative appointment. However, during the mid 19th century there was a marked

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[22] Sir Anthony Mason, 'The Appointment and Removal of Judges' in Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 1, 13.

shift towards popular elections in a significant number of States. The reasons for this change have been said to include the rise of Jeffersonian democracy, popular outrage at judicial decisions favouring landlords and creditors and political patronage in appointments made by Governors and legislatures. There are now some 39 States which use popular elections to elect and/or retain judges in at least some courts. Approximately 87% of State judges stand for popular election at least once in their career.[23] However, there is no uniformity in the election methods employed. A former Chief Justice of the Supreme Court of Texas once said: 'America has almost as many different ways of selecting state judges as it has states'.[24]

There is a significant body of literature which questions the merits of popular judicial elections in the United States. There has been in particular a great deal of discussion on the issues of campaign speech and campaign financing in judicial elections and their effects upon judicial impartiality. There are two related decisions of the Supreme Court of the United States which bear particularly upon those issues.

Campaign speech by elected judges

An important issue surrounding the popular election of judges concerns the extent to which candidates for judicial office can promise to adopt particular policy positions in relation to classes of case as part of an election campaign. The related question of how far campaign speech can be restricted by professional conduct rules without infringing upon freedom of speech arose in *Republican Party of Minnesota v White*[25] decided in the Supreme Court of the United States in 2002.

A lawyer who ran for judicial office in the Supreme Court of Minnesota in 1996 distributed literature criticising some of the Court's decisions on issues relating to crime, welfare and abortion. There was a law in place in Minnesota stating that a candidate for judicial office could not 'announce his or her views on disputed legal or political issues'. It was known as the 'announce clause'. A complaint against the

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23 In a recent scholarly exposition on the history of judicial elections in the United States of America, Jed Shugerman has noted that '[a]lmost 90 percent of state judges face some kind of popular election': Jed Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Harvard University Press, 2012) 3.

24 Thomas Phillips, 'The Merits of Merit Selection' (2009) 32 *Harvard Journal of Law and Public Policy* 67, 68.

25 536 US 765 (2002).

candidate on the basis of a breach of the announce clause was filed with the Local Lawyers Disciplinary Board which dismissed the complaint. Nevertheless, concerned about these ethical complaints, the candidate withdrew from the election. In 1998 he ran again and sought an advisory opinion from the Lawyers Board on whether it would enforce the 'announce clause'. Receiving an equivocal answer, he filed a law suit in the Federal District Court seeking a declaration that the announce clause violated the First Amendment guarantee of freedom of speech.

The matter went to the Supreme Court, which held by majority that the law violated the First Amendment. Justice Scalia who wrote the majority judgment striking down the law, discussed the implications of judicial campaigning for judicial impartiality. He said that the root meaning of impartiality in the judicial context is lack of bias for or against either party to the proceeding.[26] Impartiality in that sense would assure equal application of the law. The announce clause was not limited to preservation of that kind of impartiality. It extended further than a restriction of speech in favour of or against particular parties, to speech for or against particular issues.

Another meaning of impartiality considered by Justice Scalia was lack of preconception in favour of, or against, a particular legal view. With that sort of impartiality, litigants would be guaranteed an equal chance to persuade the court on the legal points in their case. But that kind of impartiality was not a 'compelling State interest' which would justify the interference with freedom of speech effected by the announce clause. He said:

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.[27]

He added that even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. Quoting former Chief Justice Rehnquist, he said:

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[26] Ibid 775.
[27] Ibid 777.

> Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.[28]

A third meaning of impartiality which Justice Scalia addressed was open mindedness. This quality would not require that a judge have no preconceptions on legal issues, but that he or she be willing to consider views opposed to those preconceptions and remain open to persuasion. He said: '[t]his sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the points in the case, but at least *some* chance of doing so.[29] He accepted that impartiality in that sense and the appearance of that kind of impartiality might be desirable in the judiciary, but that was not what the announce clause was concerned with.

Justice Sandra Day O'Connor concurred with Justice Scalia and the majority, but raised fundamental concerns about the whole practice of electing judges. She said: 'Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their re-election prospects.'[30] She quoted a former California Supreme Court Justice, Otto Kaus, who had said that ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub'. She referred to a study conducted in 1995 citing statistics establishing that judges who faced elections were far more likely to override jury sentences of life without parole and impose the death penalty than were judges who did not run for election.

In a dissenting judgment, Justice Stevens focussed upon the nature of the judicial task.[31] He pointed out the difference between the work of the judge and the work of other public officials and said:

> In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of

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28 Ibid 778.
29 Ibid 778 (emphasis in original).
30 Ibid 789.
31 Ibid 797-798.

> judges to be indifferent to unpopularity.[32]

He quoted from Sir Matthew Hale's 'Rules for His Judicial Guidance':

> 11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.
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> 12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

In this context it is useful to recall what William Roper said of Thomas More's respect for the rule of law: 'my father stood on one side and the Devil on the other, his cause being good, the Devil should have right.'

Justice Ruth Bader Ginsburg, who wrote the principal dissenting judgment in the *White* case, also drew the distinction between judges and their counterparts in the political branches, saying:

> judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records, … neutrally applying legal principles, and, when necessary, 'stand[ing] up to what is generally supreme in a democracy: the popular will.[33]

The judgments in the *White* case raise issues about impartiality in relation to elected judges which are also relevant in considering the proper limits on appointed judges speaking publicly about issues of legal or political controversy. Whether a judge is appointed or elected, the need for impartiality and the appearance of impartiality remain.

Campaign finances and elected judges

The issue of campaign financing for judicial elections came before the Supreme Court in a case that was decided on 8 June 2009.[34] The well-known writer, John Grisham, published a novel called *'The Appeal*' apparently inspired, at least in

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32 Ibid 798.

33 Ibid 803-904 citing Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175, 1180.

34 *Caperton v A T Massey Coal Co* 556 US 868 (2009).

part, by the facts of this case.

In August 2002, a West Virginia jury found a coal company, AT Massey Coal Co Inc and its affiliates, liable for fraudulent misrepresentation, concealment and tortious interference with contractual relations. It awarded the plaintiffs the sum of $50 million in compensatory and punitive damages. In June 2004 the State Trial Court denied the coal company's post-trial motion challenging the verdict and the damages award. It found that the coal company had intentionally acted in utter disregard of the plaintiffs' rights and ultimately destroyed its businesses because it concluded that it was in its financial interests to do so. Following the verdict, but before the appeal, West Virginia held its 2004 judicial elections. Knowing that the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Don Blankenship, the coal company's chairman, chief executive officer and president, decided to support an attorney, Brent Benjamin, who was campaigning for election against Judge McGraw, one of the incumbents who was seeking re-election.

Mr Blankenship contributed $3 million to Mr Benjamin's campaign. His contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won the election by fewer than 50,000 votes.

Before the coal company filed its appeal, Caperton moved to disqualify the newly elected Judge Benjamin under the due process clause and the State's Code of Judicial Conduct based on the conflict caused by Mr Blankenship's campaign involvement. Judge Benjamin denied the motion for his recusal indicating that he found nothing showing bias for or against any litigant. The Appeal Court on which he sat reversed the $50 million verdict. During the rehearing process, he refused twice more to disqualify himself and the Court again reversed the jury verdict.

The Supreme Court held by majority that in all the circumstances of the case, due process required that Judge Benjamin should have disqualified himself. The majority based its opinion, however, on the rather exceptional circumstances of the case before it, which it described as 'extreme'. Justice Kennedy, who delivered the opinion of the majority, said:

> Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. … We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[35]

Chief Justice Roberts, writing for the minority, pointed out that there were established rules for disqualification on the basis of a financial interest in the outcome of the case and circumstances in which the judge tried a defendant for certain criminal contempts before the judge. He said:

> Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.[36]

In the opinion of the Chief Justice the new approach of the majority provided no guidance to judges and litigants about when disqualification would be constitutionally required. This would inevitably lead to an increase in allegations that judges were biased however groundless those charges might be. He dismissed the majority's contention that the case before the court was 'an extreme one' which would not necessarily have ramifications for the ordinary run of campaign financing arrangements. This he described as 'just so much whistling past the graveyard.' This was a circumstance in which a hard case made bad law.

Justice Scalia dissented in his typically colourful prose, asserting that the majority's opinion would reinforce the perception that litigation was just a game to be won by the party with the most resourceful lawyer but incapable of delivering real world justice. Describing what might be seen as a silver lining for the legal profession, he said:

> Many billable hours will be spent in poring through volumes of campaign

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35 Ibid 884.

36 Ibid 890.

> finance reports, and many more in contesting nonrecusal decisions through every available means.[37]

Conclusion

Representative democracy and responsible government operate within the framework of the rule of law. That is to say that nobody is above the law. And in a constitutional democracy with limited legislative powers divided between Commonwealth and States there is no parliament which has unlimited power. It is a corollary of that limitation that no public official can be given unlimited powers. No power exercised by any Minister, authority or public officer, is valid unless authorised by the Constitution of the Commonwealth or of a State or by a law which is in turn authorised or permitted by the Constitution of the Commonwealth or a State. The courts which, in the context of particular disputes, are asked to interpret and apply our laws, and sometimes to determine their validity and the limits of official powers which those laws create, are essential to the rule of law.

Although the judges who make up Australia's courts are not elected, it is an important feature of the courts that their proceedings are conducted in public, that their decisions are made in public and that they give public reasons for their decisions. It is also an important feature of the operation of the courts that there are appeal provisions which allow their decisions to be reviewed for error. If the courts make decisions about the common law or the statute law which result in consequences that the Parliament thinks are undesirable then, subject to the Constitution, Parliament can change the law. And the Constitution itself can be altered by a referendum of a majority of people, in a majority of States. Courts are an essential part of the infrastructure of our representative democracy. Ultimately, however, the content of our laws, subject to the Constitution, is a matter for our Parliaments and the content of our Constitution is a matter for the people.

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[37] Ibid 903.