MLL 110 – Law Society and Civil Rights

Semester One 2007-05-03

Compulsory Essay

Topic One

Introduction

The Australian system of appointing judges has served our democracy well. While there is no move in Australia to replicate the systems of judicial election found in many American states, growing debate about the law making role of Australian judges does at times see our judicial appointment system called into question.

Public commentary on High Court decisions such as *Mabo v Queensland (No 2)*[1], *Cattanach v Melchior*[2] and Justice Heydon's claims that the Mason High Court had in essence undermined the Rule of Law[3] show that concern about the law making role of the Australian judiciary is alive and well.

This paper examines the increasing debate and commentary on the law making role of Australian judges and argues that while there may be room for some improvement in our judicial appointment system we should strenuously defend that system against any moves towards Jacksonian Democracy[4].

The paper begins with a brief discussion of judicial independence and judicial selection.

The paper then moves on to discuss the rise in the law making role of judges in Australia and contrasts this role with that of legislators.

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[1] (1992) 175 CLR 1.
[2] (2003) 199 ALR 131.
[3] Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2002) 23 *Australian Bar Review* 131.
[4] Larry Berkson, *Judicial Selection in the United States: A Special Report* (2005) American Judicial Society <http://www.ajs.org/js/berkson_2005.pdf> at 1 May 2007.

The paper then argues against the proposition that in light of their increasing law making role, Australian judges should be democratically elected in the same way as legislators. In particular this section explores the difficulties posed by the American system of judicial selection in state courts.

Judicial Independence and Judicial Selection

At the heart of the western democratic tradition is the doctrine of the separation of powers. Underpinning the separation of powers is the notion of an independent and impartial judiciary free from political influence.[5]

That's the theory anyway. The judicial selection process can have significant impact, on the perception at least, that judges are independent and free from political influence.

In Australia the system for appointing judges has remained unchanged since Federation. Appointment of judges in Australia is in essence made by the government of the day via the Governor (General). Given this, it is difficult to argue that there is no politics involved. As the then Shadow Attorney General Sen. Gareth Evans remarked:

> [T]here is no point at all in the government of the day being coy or hypocritical about the appointment of judges. It should not relinquish the power of appointment to anyone else, and should use such opportunities to appoint to the Bench men – and women – who are known to be in general sympathy with its own aims and perspectives. This will happen anyway, just as appointments have always been made on this basis in the past. The notion that is possible for the benches of the courts of the land, and especially the High Court, to be composed of wholly disinterested, wholly dispassionate, ideological eunuchs is another one of those fairly stories which we should have all outgrown.[6]

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[5] See Justice at Stake Campaign, *Why Judicial Independence Matters* (2002) <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=2> at 1 May 2007.
[6] G Evans as cited in M Spry 'Executive and High Court Appointments' (2000) Research Paper No.7 2000 – 01 *Department of the Parliamentary Library* 23.

In American federal courts, judges face nomination by the President and then a confirmation process by the Senate. The confirmation process places a spotlight on where nominees stand on issues, particularly controversial issues such as abortion and euthanasia. Although this process is not without controversy[7] there is even greater pressure placed on judicial independence when we examine the systems of judicial selection used in state courts[8].

The merits or otherwise of judicial election are discussed later in this paper. Suffice for now to say that whether it is by appointment or some form of judicial election it is difficult to argue that judicial selection in either Australia or the United States is entirely free from political influence.

Perhaps the issue of judicial selection as it relates to judicial independence would attract less controversy if it were not for the growing awareness that the judicial arm does not just interpret law but actually has always made law.

Rather than being the 'weakest arm' as envisioned by Alexander Hamilton[9] the judiciary significantly influences society and our democracy through its law making role.

Judges v Legislators

To deny that judges make law is to ignore the practical reality of what happens in our courts and the nature of the disputes they are required to preside over. In my view the very system of common law we live under has

[7] Justice Michael Kirby, 'Models of Appointment and Training Judges – A Common Law Perspective' (2000) 26 No 1 *Commonwealth Law Bulletin* 540. Kirby highlights the confirmation processes of Judge Bork and Justice Thomas as depressing examples of the lack of independence of the United States federal court selection system.

[8] See Berkson, above n 4. for a description of the different systems of judicial election to American state courts, including partisan, non partisan and merit elections.

[9] Justice Mc Hugh, 'The Strengths of the Weakest Arm' (2004) 25 *Australian Bar Review* 181. disagrees with Alexander Hamiliton's notion that the judiciary would be the 'weakest arm' with 'no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatsoever.'

evolved because of 'judicial activism' and it is a fundamental part of our pluralist democracy.

That is not to say that judges everyday and on every case are boldly going about changing the law. Far from it but the strict adherence to pre existing legal doctrine is not always possible. As Justice Finkelstein states:

> Because statutory and common law principles are developed by human beings, because they are necessarily reduced to words, and because they are the products of the cultural and social circumstances in which they were created, they can be afflicted by ambiguity, find themselves unsuited for application to new circumstances, or simply in need if development and renewal to keep pace with society's expectations of justice.'[10]

The law making role of the judicial arm in Australia has been the subject of much debate and controversy[11]

Opponents argue that the role of the judicial arm is purely to apply the rule of law to the facts of a particular case or, in the case of Constitutional issues apply the Constitution as the Framers considered it over 100 years ago. Proponents of this view argue that the judicial function is one of strict and complete legalism[12]. They argue in various degrees of intensity that 'judicial activism' threatens the separation of powers, makes a mockery of the independence of the judiciary and undermines the legislature's role. As Justice Heydon argues:

> The more the courts freely change the law, the more the public will come to view their function as political; the more they would be rightly open to vigorous and direct public attack on political grounds; and the greater will be the demand for public hearings into the politics of judicial candidates before

[10] Justice Raymond Finkelstein, 'The Role of the Judge: Judicial Activism and the Rule of Law' (2006) 9 *Flinders Journal of Law Reform* 25.
[11] PP McGuinness and Janet Albrechtson have been particularly scathing about judges who make their own law. See J Albrechtson 'Tradition Says Judges Should Butt Out of Politics' *The Australian* (Sydney) 27 March 2002. P McGuinness, 'Courts may be High but that Does Not Make Them Mighty' *The Sydney Morning Herald.* (Sydney) 18 September 2001.
[12] Sir Owen Dixon sworn in as Chief Justice in 1952 was a strong proponent of this view.

> appointment and greater control over judicial behaviour after appointment. So far as these demands were met, judicial independence would decline, and such attraction as judicial office presently has would be diminished. None of these outcomes would be desirable. All would multiply the threats to the rule of law which judicial activism has created.[13]

This is perhaps overstating the case somewhat but even those who support courts being more open about their law making role are concerned that without public understanding of the legal system and the way in which courts operate judges will come under increasingly critical scrutiny[14] particularly if they are seen to be usurping the role of elected legislators.

Justice Mc Hugh highlights the many instances where the High Court not only changes law but shapes our democratic institutions[15]. In *Mabo V Queensland (No2)*[16], Justice McHugh argues this is where the strengths of the court are most apparent:

> In politically unprofitable areas – most characteristically involving groups which, or individuals who, lack political or economic strength- ultimate appellate courts cannot avoid their responsibility to decide cases that result in political and economic change.'[17]

Some of the High Courts decisions have caused headaches for legislators, the *Mabo*[18] decision for example saw Parliament have to legislate in an area of great controversy that it had been unwilling or perhaps felt unable to do so before.

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[13] Justice J D Heydon, 'Judicial Activism and the Death o f the Rule of Law' (2003) 23 *Australian Bar Review* 133.
[14] Justice John Doyle, 'Implications of Judicial Law Making', 84.
[15] Justice Mc Hugh, above n 9, 181. Looks at the cases of *South Australia v Commonwealth* (1942) 65 CLR 575 and *Victoria v Commonwealth* (1926) 38 CLR 399 and argues that the decisions of the court made it certain that 'the States would become tied to the chariot wheels of the Commonwealth' In *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 he argues shaped the Australian economy. In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.he argues the very notion of political freedom in Australia would be different if the court had not taken an activist role.
[16] (1992) 175 CLR 1.
[17] Justice McHugh, above n 9, 188.
[18] *Mabo v* Queensland (1992) 175 CLR 1.

The notion that judges are acting as legislators sees calls in Australia, not so much for judges to be democratically elected, but certainly calls that because they are not democratically elected they should curtail their law making tendency's and leave that to the legislators.

The argument goes:

> Parliaments make mistakes, but at least their members are directly elected representatives who, if the will of the majority of the electorate desires it, can be thrown out of office at the next election and have their entire legislative program repealed. High Court Judges on the other hand, are an elected oligarchy, unaccountable to the Australian public for their decisions. There is no court of appeal for their judgments.[19]

I take a different view. The law making capacity of legislators and the judiciary are different. Legislators have almost unlimited law making capacity. Legislators can amend legislation at any time, they can compromise and at times take the politically expedient route in legislation rather than that which the facts may purely dictate should be followed. Legislators have endless capacity to make inquiries, to consult experts, hold focus groups and conduct surveys. Legislators can legislate over any matter regardless of whether it is before the public or not. Legislators are elected to represent their various constituencies (and political parties).

The judicial law making function is much more constrained. Judges must still work within the context of existing law and precedent. Judges can only respond when a case comes before them and then only respond to the facts of that case, although they may make comment outside of it. Judges are not appointed to represent anyone nor should they be swayed by individuals, communities, interest groups or political parties when making decisions.

[19] Peter Phelps, 'Of Bridges and Blue-Eyed Babies' (1999) December *Quadrant* 57.

It is the combination of the law making roles of both the legislature and the courts that together provides for a vibrant democratic tradition of evolving law that reflects changing social and cultural values.

Regardless of which side of the argument you fall on there are few judges, politicians or commentators in Australia who think that judges should be elected in a manner similar to that conducted in many states in America.

Why not elect judges

The election of judges in many states in America has been no panacea for the criticism that judges, if they are to undertake a law making role, should be responsible to the people.

In fact the judicial election processes in America seems to undermine the democratic tradition of an independent judiciary more than support it.

In those states with judicial elections for all or some of their courts, judges must campaign for election or re-election, raise funds for their campaign and it would appear since *Republican Party of Minnesota v White*[20] can make significant statements about their political and policy positions on areas of legal dispute.

Examples are given of judicial candidates standing on platforms of tough on crime which would be a little disconcerting if you were charged with a crime and appearing before that judge a week prior to his or her re-election.

While the original intention of judicial elections may have been to introduce democracy into courts that were largely dominated by property owners controlling the judiciary[21] the process has now become so distorted it is difficult to argue that it protects judicial independence at all.

[20] 536 U.S 765 (2002).
[21] Berkson, above n 4, 1.

In the 2004 judicial elections $24.4 million[22] was spent on television advertising with donations coming from law firms, business interests, political parties and individuals. Special interests groups also reportedly spent millions supporting their preferred candidates.

While there are rules of judicial conduct for elections it is difficult to see how potential judges are not politicised through the election process. Indeed the decision by the Supreme Court in Republican *Party of Minnesota v White* that the part of the Minnesota Code of Judicial Conduct that prohibited a judicial candidate from announcing 'his or her views on disputed political of legal issues' was inconsistent with the First Amendment – Freedom of Speech, has led commentators to argue that the way is now paved for even more openly political judicial elections than has been seen in the past.

> Increasingly, politicians and voters nominate or elect judges based on their ideologies, providing seats with the purpose of filling a political agenda…The American judiciary has become increasingly politicized in recent decades, and unless government takes measures to slow this trend, America runs the risk of completely deviating from the initial purpose of the judicial branch[23].

A 1997 American Bar Association Report into the independence of the judiciary[24] found that there was much disquiet amongst judges about the role elections played in politicising decisions of the court:

> As one witness explained: "the system of electing judges poses other threats to judicial independence as judges are voted out of office for controversial rulings. A key issue is whether judges can be independent if their rulings can be the basis of a negative vote at the polls."[25]

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[22] B J Tenn 'Electing Judges and the Impact of Judicial Independence' (2006) June *Tennessee Bar Journal* 42.
[23] Brendan Chandonnet, 'The Increasing Politicization of the American Judiciary: *Republican Party of Minnesota v White* and its Effects on Future Judicial Selection in State Courts (2004) 12 *The William and Mary Bill of Rights Journal* 577.
[24] American Bar Association, *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence*. <http://www.abanet.org/govaffairs/judiciary/ropem.html.
[25] Ibid.

The case is starkly illustrated by John Fabian who argues that increases in the confirmation of death penalty cases reflects the electoral victory over time of judges who have campaigned on a pro death penalty platform.

> Elected judges who wish to remain in office face strong pressure to base their decisions on political realities rather than on the demands of the law. The natural outcome of such a situation is that as political pressure builds over time and judges who rely on the law are replaced by judges whose decisions conform with the will of partisan voting majorities, cases will be determined solely by political will….death sentences in California, Texas, Florida, Pennsylvania, Ohio and Virginia from 1985 to 1995 found that, although these states affirmed only 63% of death sentences in 1985, they affirmed 90% of death sentences in 1995. In California, where three justices had been ousted in 1986 for their dissents in death penalty cases, the affirmation rate went from zero in 1985 to 94% in 1995[26].

Far from enshrining judicial independence in the American state courts judicial election now appears to be undermining it[27]. It is not a system we should follow in Australia.

Justice Doyle has been a strong advocate against judicial election stating:

> Subjecting a judge to re-election strikes at judicial independence in the same way as does enabling the Government to dismiss a judge for anything other than serious misconduct or demonstrable incompetence. The judge facing re-election would be subject to considerable pressure to decide cases in a fashion that was likely to please the electorate[28].

Judicial appointment systems, such as that used in Australia, appear to be accorded a greater deal of respect when it comes to judicial independence

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[26] John Fabian, 'Parodox of Elected Judges: Tensions in the American Judicial System' (2000) Fall *The Georgetown Journal of Legal Ethics.*

[27] In the 2000 Presidential election George Bush defeated Al Gore in Florida by 537 votes. The role of the Florida Circuit Court and the Supreme Court decision in *Bush v Gore* 531. U.S 98 (2000) continues for some commentators to be a controversial example of the role of judicial selection and political interference.

[28] Justice John Doyle, 'The Eighth Robert Harris Oration: The Judiciary and the Community' (1999)18 *Australian Bar Review* 98.

than judicial elections in American state courts. '[A]ppointed judges are less likely than elected judges to be influenced by partisan interests, public clamour or fear of criticism; appointed judges are less likely than elected judges to make statements or promises committing themselves on issues'[29]

Conclusion.

They system of judicial appointment we have in Australia whilst by no means perfect has served us well. Whilst there is possibly some reforms that could be made to the appointments process such as consultation with some form of Judicial Appointments Commission[30]it would be foolish to go down the path of American style state court election.

Our terms of parliament and appointment system mean that it is possible to have a bench appointed by different political parties and the fact that judges do not face sacking[31] or re-election makes them less likely to come under the sort of political pressure that exists in the American state court election system That is not to say that they are entirely removed from politics but with the notion of judicial independence underpinning the separation of powers they should be protected from its worst excesses.

While controversy will continue over 'judicial activism' the business of courts goes on regardless – and as Justice Kirby contends:

> Somewhere in between the spectre of a lawless judge, pursuing political ideas of his or her own from the judicial seat, irrespective of the law, and the idealised mechanic of the daydreams of the strict formalists, lies a place in which real judges perform their duties: neither wholly mechanical nor excessively creative[32].

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[29] Fabian, above n 32, 15.
[30] Spry, above n 7, 16.
[31] *Australian Constitution* s 72 does contain provisions to be dismissed by the Governor General on support form both Houses of Parliament for proven misbehaviour or incapacity.
[32] Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (2004) 63.