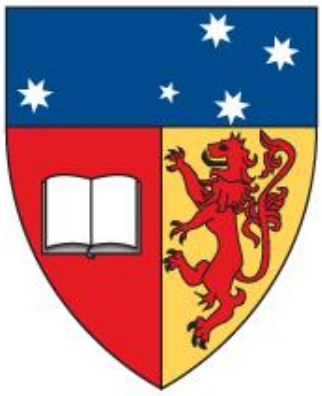

Emmanuel College

Papers

Qualification for judicial office: a democratic imperative

by

The Honourable Justice Hugh Fraser

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Emmanuel College is Australia's ninth, and with St John's College, The University of Queensland's first residential college to gain affiliation. It was founded by the Presbyterian Church of Queensland in 1911 with the first students taking up residence in Wickham Terrace in 1912. As the Presbyterian Church moved towards partnership with other religious denominations during the 1970s, Emmanuel College also came under the auspices of the Uniting Church. Upon its inauguration, Emmanuel College was an all male residence but this changed in 1975 when women were admitted as collegians. Now, the College numbers around 340 students with half our population being female.

Further change was experienced by the College when it moved in 1956 from its original site in Wickham Terrace to its present location on the main university campus in St Lucia.

Since 1911, Emmanuel has stood for excellence in all round education and has had seven Rhodes Scholars during its history. Its graduates have gone on to make a major contribution to Australia in many areas, including as doctors, scientists, teachers, engineers, lawyers and judges, politicians, ambassadors and diplomats, and church leaders.

THE AUTHOR

The Honourable Justice Hugh Fraser

Justice Fraser was educated at the Church of England Grammar School (1967–1974) and The University of Queensland, graduating Bachelor of Laws with honours (1979). He served as associate to Dunn J (1979).

On 18 December 1979, he was admitted as a barrister of the Supreme Court of Queensland. After working as a law clerk at the Brisbane firm of Henderson & Lahey (1980), he commenced practice at the bar in Brisbane (1981), taking silk on 3 December 1992.

He served as a member of the Council (2005–2006), Vice President (2006–2007) and President (2007–2008) of the Bar Association of Queensland, and a director of the Law Council of Australia (2007–2008). He was also Honorary Treasurer and a council member of the Australian Bar Association (2007–2008).

On 25 January 2008, he was appointed a judge of the Supreme Court of Queensland and a judge of appeal. Fraser has served as chairperson of the Queensland Supreme Court library committee since 2009.

This speech was delivered at the Sir Harry Gibbs Law Dinner held at Emmanuel College on 13 August 2015.

Qualification for judicial office: a democratic imperative

The first in this series of papers was given by the late and much missed Honourable Bruce McPherson CBE at the inaugural Sir Harry Gibbs Law Dinner held at this college nine years ago. In his masterful style that eminent judge posed and answered the question, "Why have law at all?"[1]

As McPherson explained, an extensive system of legal rules is practically inevitable in a complex democratic society. Individuals' ideas of what constitutes justice vary widely. Disputes are inevitable. An enquiry into justice which is not limited by rules would allow reference to so many considerations that the time and cost of the enquiry would be prohibitive. Unless there are rules, the application of which may be seen to lead to the result, the losing party might doubt the impartiality of the decision maker – a doubt that would likely harden into a certainty in the mind of a litigant who discovers that a different conclusion was reached in another case. If there were no rules to guide judicial decisions, no decision could assist in the resolution of other disputes, leading to endless litigation: the number of judges would have to be multiplied to such an extent as to lead to a form of judicial tyranny.

As McPherson put it, "Justice apart from law may seem a noble ideal; but it remains at base an unpredictable and therefore potentially dangerous conception that leads to tyranny." For reasons of this kind societies of all descriptions have accepted that it is necessary that there be general rules governing the rights and duties of the members of the society, and the consequences of breaches of such rights and duties, which are capable of objective determination. The Honourable James Spigelman has described this as the "minimum content of the rule of law".[2]

Such a system then requires an answer to a pivotal question: who are to decide disputes about the application of the rules? The answer given to that question in a modern democracy is that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[3]

Fairness and impartiality are self-evident requirements. Competence, meaning professional expertise in the law as it is applied in public dispute resolution, is

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1 Justice Bruce McPherson, 'Why have law at all?' (Speech delivered at the inaugural Sir Harry Gibbs' Law Dinner, Emmanuel College, 25 August 2006).

2 James Spigelman, 'Judicial Appointments and Judicial Independence', (2008) 17 Journal of Judicial Administration 139, 140.

3 *International Covenant on Civil and Political Rights*, art. 14(1); see also *Universal Declaration of Human Rights*, art. 10.

required because of the inevitable complexity in the application of the rules. As McPherson pointed out in his paper, whilst the ideal is that legal rules should be simple and lucid, precise and not vague, and comprehensive and flexible, it is apparent that no single rule could meet all of those requirements. The necessity for the rules to supply answers to innumerable questions in numberless factual situations militates against simplicity and precision and the enactment of general and comprehensive rules militates against flexibility. To that may be added the idea prevailing in some quarters that every wrong can be remedied by legislation. In the result we have a vast array of legislated rules that supplement, modify or replace the common law. That is not to say that the community should accept unnecessary complexity in the law or unnecessary inefficiency in the delivery of justice. Rather, the community is entitled to demand that the law be as comprehensible as is practicable and that justice be made available to all as efficiently as is practicable. But it is inevitable in our complex and highly regulated society, as in all other modern democratic societies, that the extent and complexity of the law inevitably calls forth a group of people expert in the law to interpret and apply it.

By the word "modern" I do not mean to convey that this is a very recent phenomenon. It is reflected, for example, in the thirteenth century in Ch 45 of the Great Charter and later in Lord Coke's judgment in the case of *Prohibitions Del Roy.* In the course of denying that King James I was entitled to act as a judge Lord Coke said that:

> "His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it …."[4]

The independence of our judges from the other branches of government is required by our conception of a democratic society. It is reflected in the provisions in the *Constitution of Queensland* 2001 for the appointment of judges for a fixed term until they reach 70 years of age, the prohibition on any reduction in the remuneration of the judges during their continuance in office, and the prohibition upon removal of a judge from office except by the Governor-in-Council upon an address by the Legislature seeking removal on the ground of proved misbehaviour or proved incapacity. The Queensland provisions are similar to provisions in s 72 of the Commonwealth Constitution and the provisions in Constitutions of other modern western democracies.

[4] (1572-1616) 12 Co. Rep. 63; 77 ER 1342

Such provisions are generally regarded as essential to ensure that judges dispense justice according to law regardless of whether their decisions do or do not suit the policy of the executive government of the day.

In relation to the United States Constitution, Alexander Hamilton, an influential founding father, wrote of the standard of good behaviour for the continuance in office of the judicial magistracy that it was "an excellent barrier to the despotism of the prince", that in a republic it was "a no less excellent barrier to the encroachments and oppressions of the representative body", and that it was "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[5] Occasionally we are starkly reminded of the importance of this and other safeguards of judicial independence when we hear of journalists and others being imprisoned for offending governments in societies less fortunate than ours, where executive governments exert influence over judicial decision-making.

The requirements of expertise, independence, fairness and impartiality are embodied in the judicial oath or affirmation used in Queensland which, as elsewhere around the world, is closely modelled on the oath of judicial office used in England since the 14th century. The form of the oath or affirmation of office for a judge of the Supreme Court or the District Court scheduled to the *Constitution of Queensland* 2001 recites that:

> "As a judge … I will at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of my knowledge and ability without fear favour or affection."

As that text demonstrates, the judicial power is confined to dispensing justice according to law in cases brought before the courts by litigants. Of course there are cases in which there may be more than one decision made within the confines of the law and sometimes, albeit relatively rarely, judicial decisions may alter the law itself. Discretionary sentencing is an obvious example of the first category. But even discretionary powers are not unlimited. Such powers may be exercised only consistently with the terms in which the powers are conferred and only for the purposes for which they are conferred. And a great many cases decided in the courts do not involve any discretion but rather the application of the law to the facts as found.

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5 Alexander Hamilton, 'The Federalist No 78 - The Judiciary Department', *Independent Journal* (Saturday, June 14, 1788).

The limitation upon the power of judges that the justice they dispense must be according to law is necessary to secure the democratic character of our system of government. It does so even in relation to the relatively rare cases in which a judicial decision may alter the law. That is so because the content of the law is ultimately under the control of the community through a representative legislature and, in the case of a law protected by the constitution, by the mechanism for constitutional amendment.

Earlier this year it was reported that some years ago the judges of the Supreme Court commended the adoption of a judicial commission modelled on the New South Wales Judicial Commission, which, amongst other things, considers complaints of judicial misconduct in a way which is designed to preserve the independence of the judiciary from the other branches of government. The New South Wales Judicial Commission has operated for more than 20 years. Perhaps a perception that the Queensland judges have generally fulfilled their obligations to do justice according to law is consistent with the fact that successive Queensland governments have nevertheless not sought to establish such a commission. The only legal remedy in Queensland for judicial misconduct which does not amount to an offence is the constitutional provision for removal of judges for proved misbehaviour or incapacity. That is an extreme remedy which would doubtless not be put into operation except after anxious consideration. It might operate as an effective check only in extreme cases. If the community has nevertheless not had such a level of concern on this topic as to motivate successive governments to adopt the New South Wales model, why is that so?

One factor may be the relative weakness of the power of the judicial branch of government. In the words of Alexander Hamilton:

> "The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has 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 whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." [6]

[6] Alexander Hamilton, 'The Federalist No 78 - The Judiciary Department', *Independent Journal* (Saturday, June 14, 1788).

The framers of the United States Constitution are said to have been of the view that the judges would not have much power both because judicial power as a whole was weak – neither the power of "the sword" nor the power of the "purse"– and because it was expected that the authority of trial judges would be shared with juries, would be bound by precedent, and would be subject to appellate review; it was anticipated that those checks within the judiciary would prevent judges from abusing their power.[7]

The Supreme Court of Queensland does have a mace – a ceremonial mace donated by the Bar Association of Queensland upon the Court reaching its sesquicentenary - but the Court does not have a sword. It certainly does not have a purse. Unlike some other superior courts, the Supreme Court does not have control of its own budget. In an age in which public relations experts are littered in large numbers throughout executive governments, the relative weakness of the judicial arm of government is starkly illustrated by the fact that in Queensland the Supreme and District Courts do not have even one media officer between them to explain the judges' work to the community.

As to the jury system, it enhances the democratic character of our society by ensuring the active participation of members of the community in the delivery of justice according to law and it does share power between the judges and the rest of the community, but in Queensland the jury system is largely confined to serious criminal cases. In Australia there has never been a constitutional requirement or even a consistent tradition that civil cases must or should be tried by jury. Very few civil cases are tried by juries in Queensland.

Even in criminal cases there are limitations upon the effect of the jury system as a check on the judicial power. Most criminal cases concern the less serious offences that are tried by magistrates sitting without juries. For these reasons, whilst the jury system is an important democratic institution which does limit what otherwise would be the ambit of judicial power, it is not a systemic assurance that judges will decide cases only according to law.

The doctrine of precedent is important in so far as it enhances the certainty of the law and limits idiosyncratic justice. Ultimately, however, the efficacy of the doctrine as a check upon any inappropriate expansion of judicial power depends upon the judges themselves generally adhering to it. I imagine that any informed observer would accept that the judiciary generally does adhere to the doctrine of precedent, but it is not an external check upon judicial power.

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[7] Todd Petersen, 'Restoring Structural Checks on Judicial Power in the Era of Managerial Judging', (1995) 29 *University of California Davis Law Review* 41.

The last of the internal checks upon judicial power listed earlier is appellate review. Perhaps it is unsurprising that I consider this to be important, but its efficacy again depends upon judges, appellate judges in this case, themselves acting within the limits of their power in a democracy. It must also be borne in mind that not every error will be discoverable or able to be corrected on appeal. It is often difficult to challenge trial judges' findings of fact, and many would endorse Sir Harry Gibbs' view that "more injustices are created by erroneous findings of fact than by errors of law".[8]

For the necessary external check that judges in fact seek to do justice according to law the judicial system relies in part upon the principle of open justice. With very few exceptions, which must be justified by the necessity to keep proceedings secret to achieve justice in the particular case (for example genuinely confidential aspects of litigation about trade secrets, blackmail, and state security), the common law requires the proceedings of courts be conducted in public. As the Honourable James Spigelman put it:

> "The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure the fairness of a trial, is the way the judiciary is held accountable to the public."[9]

That the decisions of the judges and their reasons for those decisions are exposed to analysis and discussion, including by informed commentators who are independent of the participants in the justice system, supplies a substantial external check that the judges are exercising their power to do justice not only expertly, fairly, impartially, and independently, but also according to law.

In the evocative words of the former President of the Supreme Court of Israel, the Honourable Aharon Barak, it is the principle of open justice which ensures that judges who "sit at trial, stand on trial."[10] In a paper entitled "Why Write Judgments?" Sir Frank Kitto forcefully made the point in the following well known passage:[11]

"The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and

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8 Sir Harry Gibbs, 'Judgment Writing', (1993) 67 *Australian Law Journal* 494, 497.

9 James Spigelman, "Seen to be Done: The Principle of Open Justice – Part II", (2000) 74 *Australian Law Journal* 378, 378.

10 Aharon Barak, 'Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 162.

11 (1992) 66 *Australian Law Journal* 787, 790

practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance. Jeremy Bentham put the matter in a nutshell ... when he wrote … "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial". And of course he is never so much on trial as when is he delivering judgment."

Even so, the principle of open justice is not a comprehensive check upon the exercise of judicial power. There are some exceptions to it, albeit very limited exceptions. The principle may operate to expose shortcomings in the administration of justice by a particular judge only after the appointment of that judge, by which time damage may have been done to individual litigants or even to public confidence in the system. Furthermore, it cannot be assumed that all identified shortcomings in a judge's conduct necessarily would be regarded by those having charge of the process for removal of a judge as justifying the very strong step of commencing that process. Perhaps most importantly, reliance upon the open justice principle as a spur to judicial performance is effective only to the extent that the judge concerned has the qualities necessary to fulfil the judicial function.

It follows that whatever other mechanisms are built into the system, there necessarily must be a heavy reliance upon the personal characters and qualifications of those who are appointed as judges.

As McPherson pointed out in his paper, the judicial oath or affirmation "is the only official formulation that a judge ever receives of his duty". The assumption is that from the moment when that oath is administered the judge has the ability and qualities required to ensure that the judge will "do equal justice …according to law … without fear favour or affection." That function is of such importance in our democracy as to demand that the courts should be constituted by judges of the highest calibre. It follows that it is essential that there be a system which secures and is seen to secure the appointment as judges of those who are best qualified for that office.

That requires attention both to the system of appointment and to the system which produces the pool of candidates from whom the judges are selected.

In Queensland the appointment system is entirely in the hands of the executive government from time to time. In an article published in 2006, Professor

Saunders expressed the view that if an executive government exercises its power of appointment with wisdom it "is capable of producing good results" but if the power were to be "[u]sed as a source of patronage…or, worse, as a means by which the overall predilections of a court might be influenced by the executive branch, it detracts from the quality and independence of the courts".[12] That way of putting it focuses upon the professor's hypothesised misuse of executive power, but since the hypothetical example postulates a judge who might decide cases otherwise than impartially, independently and according to law, such an appointment would also risk an undemocratic overreach by that judge of the judicial power. It would therefore involve multiple breaches of the basic principle, endorsed for example in the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, that the executive and legislative branches of government are obliged to "respect and observe the proper objectives and functions of the judiciary" and "[i]t is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government".[13]

In societies, including Australia, where the idea of turning judges into politicians by requiring them to stand for election has never been popular, it is particularly important that those obligations are not only fulfilled but are seen to be fulfilled.

As to the system which produces the pool of potential candidates for judicial office, it does not seem too much to suggest that those who assume responsibilities for the professional education and culture of potential candidates for judicial office are justified in regarding it as an obligation inherent in our democracy to insist upon the highest practicable standards. The improvements in continuing legal education programs maintained by the professional associations, the strengthening of the regime for the discipline of errant legal practitioners which occurred a decade ago, the earlier introduction of the Bar Practice Course for aspiring barristers, the recent introduction of exacting examinations for entry to that course, and the continuous review of the content of that course, are amongst the substantial steps that have been taken towards the fulfilment of that obligation.

I do not seek to specify all of the matters which might legitimately be taken into account in the appointment of judges. Rather, my intention is to refer to some minimum qualifications required by our democratic society. Justice Keane has made the point that in the long run it is only because of judges'

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12 Cheryl Saunders, 'Separation of Powers and the Judicial Branch', (2006) *Judicial Review* 337, 342.

13 *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (as amended at Manila, 28 August 1997), art 5.

professional competence and because their professional background is apt to inculcate political neutrality that an unelected judiciary is tolerable in a democracy.[14] Political neutrality in decision making may be seen to be inherent in the qualifications for judicial office specified as long ago as the thirteenth century in Ch 45 of the Great Charter. King John promised the Barons that: "We will appoint as justices, constables, sheriffs or other officials, only men that know the law of the realm and are minded to keep it well." In one who knows the law, a settled mindset of keeping the law will go a very long way towards ensuring that the judicial power is exercised, as our democracy demands, by doing equal justice to all persons according to law, without fear, favour or affection.

[14] P A Keane, 'The idea of the professional judge: the challenges of communication' (Speech delivered at the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014).

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within The University of Queensland
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Ph: +61 7 3871 9100
Fax: +61 7 3870 7183
Email: enquiries@emmanuel.uq.edu.au
Sir William MacGregor Drive, St Lucia, Qld 4067
www.emmanuel.uq.edu.au