

# **The John Curtin Institute of Public Policy**

## **Public Policy Forum**

### **Perth**

#### **IN PRAISE OF UNELECTED JUDGES**

**Chief Justice RS French**

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1           It has been heartening to see the vigour in which the proponents and opponents of our important national debate about a statutory Human Rights Charter have joined issue. The question whether we should, or should not, have such a Charter is not one on which I wish to express an opinion. It is a matter of national policy to be decided by the Parliament and there are reasonable arguments for and against.

2           There is, however, one term which has been deployed in the debate which provides an opportunity for reflecting upon the role of the nation's judiciary. That is, the term "unelected judges". It has been used to make two different but related points:

1.       That the enactment of a Human Rights Charter would confer power on "unelected judges" to make decisions which should be reserved to elected officials. These include decisions striking a balance between the human rights or freedoms of individuals and the claims of society to limit or qualify those rights or freedoms. In a statutory charter such decisions might affect the way in which Acts of Parliament are interpreted and applied and official powers exercised.
2.       The judiciary could be exposed to political controversy because such decisions are political in character.

The force of these arguments will be a matter for the politicians to decide.

3           There is, however, a subtext that can be associated with the repeated invocation of the

term "unelected judges". It is what might be called in contemporary political discourse a kind of dog-whistle signal suggesting a lack of democratic legitimacy in what judges do. And it conveys the not too subtle suggestion that judges see themselves as philosopher kings whose mission in life is to sculpt the nation's laws according to their own values.

4           In this talk I would like to reflect on two questions raised by the use of the term "unelected judges". They are:

1.       Why are our judges appointed, rather than elected?
2.       If our judges were popularly elected, would they have a mandate to do more than they are presently appointed to do?

There is an important issue which lies at the threshold of these questions. That is the nature of the judicial function. It is that issue I would like to address first.

### **The judicial day job**

5           There is a deep interest in democratic societies of the common law world in the nature of the judicial function. It begins with the question – what is different about this class of decision-maker? Are judges just a species of administrator who have given themselves lordly airs? Or is there something about the way in which they have to make their decisions which differs from the approaches taken by legislators and executive officials?

6           That question can be answered immediately. Judges are concerned with individual cases. Each case has to be considered on its merits and on the law applied to it regardless of:

- (i)     the influence, wealth, prestige or popularity of any party;
- (ii)    the unpopularity of any party;
- (iii)   government policy of the day.

Each case must be considered and decided, in the terms of the judicial oath, without fear, affection, favour or ill-will. That means independently of official or public pressure to decide

in a particular way. It is this characteristic of judicial independence and associated notions of impartiality to which we attach a high social value. It is reflected from time to time in calls for "judicial" inquiries into public controversies which cannot be resolved across a partisan divide. Against that background, it is helpful to review briefly the central attributes of judicial decision making.

7           The core function of judges in court is to decide disputes or controversies by finding out the facts of the case and applying the law to those facts. A simple logical model for this kind of decision-making has the following elements:

1.       The judge identifies the applicable rules of law.
2.       The judge, after hearing evidence, decides the facts of the case.
3.       The judge then applies the relevant rule of law to the facts of the case to reach a conclusion about the rights and liabilities of the parties to the dispute or controversy.

8           The rules of law may be found in the Constitution, or in Acts of Parliament made under the Constitution, or in the judge-made rules of the common law, such as rules relating to contract or tort or property or the rules of equity.

9           The process of identifying the rule of law which applies to a particular case may involve choices between competing views about the content of the rule. The law which offers the greatest potential for debate about interpretation is the Commonwealth Constitution. Because it is concerned with the distribution of powers between Federal and State Parliaments and between the legislative, executive and judicial branches of the national government, it is expressed in broad terms. Broad terms leave room for choices about their meaning and their application in particular cases.

10          There are debates in Australia and other countries which have written Constitutions about the proper approaches to constitutional interpretation. There are labels for the different approaches that various schools of thought propound. It is doubtful that we will ever see a universally agreed theory of interpretation which will infallibly guide judges to choices everybody agrees with, when it comes to interpreting the Constitution. The point to be made

is that constitutional interpretation inescapably involves choices about meaning and application. While that task falls finally and definitively to the High Court, constitutional issues can arise in any court in the country. And although the judges who interpret and apply the Constitution will apply, if they are doing their job properly, well-recognised legal techniques to that task, the decisions they make may have political consequences. This is particularly so of decisions involving the extent and limits of the power of the Parliament and the Executive but we do not expect that their political significance or political consequences will influence their outcome.

11           The interpretation of Acts of Parliament made under the Constitution can also give rise to the need to make choices about meaning and application. There are, of course, many statutory provisions whose meaning is well-settled and which judges use routinely as stating the rules of law which are applicable to their decisions. However, parliaments, both Federal and State, are continually enacting new legislation and amending or repealing the old, and enacting and amending thousands of regulations and statutory instruments. As a result, the courts are frequently faced with new issues concerning the meaning and application of the laws that they are called on to apply.

12           There are well-recognised rules for interpreting statutes. Usually the judge begins with the ordinary meaning of the words of the Act. However, anyone who has read a dictionary knows that most words have more than one definition. Sometimes the applicable definition is obvious. On other occasions, it is not so obvious. The correct meaning of statutory words must be identified by reference to their context and legislative purpose. Increasingly Acts of Parliament specify what their objectives are. However, these statements are at such a level of generality as to be of limited assistance in solving particular problems of interpretation. Sometimes the court will have regard to other material such as the Minister's Second Reading Speech, the Explanatory Memorandum which was tabled in Parliament and, perhaps, Law Reform Commission Reports or other Reports which have been the moving force behind the enactment of the law.

13           The problem is not readily solved simply by saying that judges have to construe Acts in accordance with the intention of the Parliament. That concept is of limited use. Individual Members of Parliament may have different views of the meaning and purpose of the Bill on which they are voting. Sometimes, although not often, the Minister's Second Reading Speech

cannot be reconciled with the words of the Act which he or she is explaining. In that case it is the words of the Act which will prevail over the Minister's intention.

14           When a court declares that it has construed an Act in accordance with the legislative intention, it can be taken to mean that the Court has used rules for interpretation which are generally accepted and known to those who draft the laws which are presented to the Parliament. On this basis the rules can properly be regarded as understood by the Parliament.

15           Beyond the interpretation of statutes, the words used may require judges to make choices about the outcomes of particular cases according to legal standards rather than precise legal rules. There are many judge-made common law rules which use language such as "reasonable" or "unconscionable" or "foreseeable" or "remote" or "good faith". The use of these words is not a new phenomenon. But they involve value judgments in their application to particular facts or circumstances.

16           Similarly, some statutes lay down legal standards expressed in broad terms rather than legal rules. These involve the use of evaluative expressions such as "good faith" which appears in over 160 Commonwealth Acts, "reasonable" which appears in over 140, the "interests of justice" which appears in at least 50 Acts and "unconscionable" which appears in at least 12. There are also terms like "just cause" and "just excuse". In taxing statutes, terms such as "in relation to" and "in connection with" require judges to consider their general range and make evaluative judgments about their application in particular cases. Interpretation and application of these standards case by case involves not only the development of a principled approach based on logic, but one necessarily informed by value judgments. Even in these cases the judge does not have free reign to indulge prejudices or predispositions or idiosyncratic values. The proper application of such standards will generally be limited to what is necessary to dispose of the case before the judge. It will also be constrained by binding decisions of higher courts on the same point. The decisions of the judge will also be subject to appellate review.

17           The entrusting by the legislature to judges of responsibility for developing the law within broadly stated guidelines is commonplace and has become more so over recent decades. It reflects the complexity of our society and the individual variety of particular circumstances.

18           Against this background it is necessary to turn to the principal issues I wish to address, namely why our judges are appointed rather than elected, and whether it would make a difference to what they do, if they were elected.

### **The appointment of Australia's judges**

19           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. 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.

20           The laws of the various States make similar provisions for the appointment of State judges, although they may vary in detail. State Constitutions are more readily changed than the Commonwealth Constitution and to the extent that terms and conditions of judicial appointment in the States depend upon particular statutes, they can be changed by amendment of those statutes. Having said all that, there is a powerfully entrenched tradition of an appointed, rather than an elected judiciary in Australia. It is closely related to what I venture to say is 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 not to say that there is not room for improvement in the processes of judicial appointment in terms of consultation and transparency. There has been considerable discussion of this in recent years and steps have been taken in relation to the appointment of judges to strengthen the application of the merit principle and to widen the range of persons who may be considered for appointment by calling for expressions of interest or nominations.

21           The idea that judges should be elected has generally not been popular in this country. Although proposals for elections have been raised from time to time, they have never been seriously considered. An obvious reason for their rejection is because judicial elections are thought to interfere with judicial independence. Sir Anthony Mason, a former Chief Justice

of the High Court, wrote in 1997<sup>1</sup>:

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 Other commentators, based upon observation of practice in the United States, have noted that judicial elections can become not only blatantly political contests between partisan judges, but also financial contests<sup>2</sup>.

### **Election of judges in the United States**

23 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.

24 In the United States, all States originally selected judges by executive or legislative appointment. However, during the mid 19th century there was a marked shift towards popular elections in a significant number of States. The reasons for this change have been said to include the rise of Jacksonian 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. 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"<sup>3</sup>.

25 There is a significant body of literature which questions the merits of popular judicial elections in the United States. Former Justice Sandra Day O'Connor of the Supreme Court has written about the problems of a pure election system of judicial selection. In February 2009, the current Chief Justice of the Texas Supreme Court lamented the influence of money

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<sup>1</sup> Sir Anthony Mason, "The Appointment and Removal of Judges" in Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 1 at 13.

<sup>2</sup> Davis and Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia", (2003) 27 *Melbourne University Law Review* 819 at 848. See also Christopher N Kendall, "Appointing Judges: Australian Judicial Reform Proposals in Light of Recent North American Experience" (1997) 9(2) *Bond Law Review* 175 at 180.

<sup>3</sup> Phillips, "The Merits of Merit Selection", (2009) 32(1) *Harvard Journal of Law and Public Policy* 67 at 68.

in partisan judicial elections and the reduction of merit as a criterion for the selection and retention of judges.

26           A great deal of discussion has focussed on the issues of campaign speech and its effects upon impartiality. This issue was considered in the 2002 decision of the Supreme Court in *Republican Party of Minnesota v White*<sup>4</sup>. The case concerned the constitutional validity of restrictions on campaign speech by candidates for judicial office. Discussion has also focussed on the issues of impartiality raised by campaign financing. Justice Kennedy of the United States Supreme Court, wrote in a 2008 case<sup>5</sup>:

When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.

The Supreme Court's most recent decision concerning the implications of campaign financing for judicial impartiality was *Caperton v AT Massey Coal Co Inc* (No 08-22), which was delivered on 8 June 2009. The two decisions of *White* and *Caperton* both provide interesting case studies of the issues thrown up by popular elections for judicial office.

### **Campaign speech by elected judges**

27           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, as I have noted, in *Republican Party of Minnesota v White*<sup>6</sup>.

28           A lawyer who ran for judicial office in the Supreme Court 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 candidate on the basis of a breach of the

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<sup>4</sup> 122 S Ct 2528 (2002); 536 US 763 (2002).

<sup>5</sup> *New York State Board of Elections v Lopez Torres* 128 S Ct 791 at 803 (2008).

<sup>6</sup> 122 S Ct 2528 (2002); (2002) 536 US 763.

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.

29           The matter went to the Supreme Court, which held by majority that the law violated the First Amendment. The judgments throw into sharp relief some of the issues which arise in relation to campaign speech in judicial elections. The candidate alleged that he was forced to refrain from announcing his views on disputed issues during his campaign to the point where he would not respond to questions put to him by the press and public because he was worried about falling foul of the announce clause. Other plaintiffs who joined him, including the Minnesota Republican Party, claimed that, because the clause kept him from announcing his views, they had been unable to learn what those views were and whether they should support or oppose his candidacy.

30           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. 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.

31           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<sup>7</sup>:

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

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<sup>7</sup> 122 S Ct 2528 (2002) at 2536.

have preconceptions about the law.

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<sup>8</sup>:

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.

32 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<sup>9</sup>:

This 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. (emphasis in original)

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.

33 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<sup>10</sup>:

Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.

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. She also commented on the effects of the elected judge system on public confidence in the judiciary<sup>11</sup>:

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<sup>8</sup> 122 S Ct 2528 (2002) at 2536.

<sup>9</sup> 122 S Ct 2528 (2002) at 2536.

<sup>10</sup> 122 S Ct 2528 (2002) at 2542.

<sup>11</sup> 122 S Ct 2528 (2002) at 2542.

Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

34 In a dissenting judgment, Justice Stevens focussed upon the nature of the judicial task<sup>12</sup>:

Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.

He pointed out the difference between the work of the judge and the work of other public officials and said<sup>13</sup>:

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 judges to be indifferent to unpopularity.

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.
12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

An important point to be taken from these comments is that the nature of the judicial task to be carried out by the elected judge in the United States is not seen as being different in kind from that of the unelected judge in Australia.

35 Justice Ginsburg, who wrote the principal dissenting judgment, also drew the distinction between judges and their counterparts in the political branches, saying<sup>14</sup>:

... 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'

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<sup>12</sup> 122 S Ct 2528 (2002) at 2546-2547.

<sup>13</sup> 122 S Ct 2528 (2002) at 2547.

<sup>14</sup> Citing Scalia, *the Rule of Law as a Law of Rules*, 56 *University of Chicago Law Review* 1175 at 1180 (1989).

on individual records ... neutrally applying legal principles, and when necessary 'standing up to what is generally supreme in a democracy: the popular will'.

Although Minnesota had decided, in common with most other States, to allow its citizens to choose judges directly in periodic elections, it had not thereby opted to install a corps of political actors on the bench. It had endeavoured to preserve the integrity of its judges by other means. The announce clause was designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges".

36           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**

37           The issue of campaign financing for judicial elections came before the Supreme Court in March of this year, in a case that was decided on 8 June 2009. The well-known writer, John Grisham, recently published a novel called "The Appeal" apparently inspired, at least in part, by the facts of this case.

38           In August 2002, a West Virginia jury found a coal company, AT Massey Coal Company 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, Mr 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 Justice McGraw, one of the incumbents who was seeking re-election.

39           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.

40 Before the coal company filed its appeal, Caperton moved to disqualify the newly elected Justice 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. Justice 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.

41 The Supreme Court held by majority that in all the circumstances of the case, due process required that Justice 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.

42 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 own constitutional precedents. Those issues were instead addressed by legislation or court rules.

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.

43 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 finance reports, and many more in contesting nonrecusal decisions through every available means.

### **Conclusion**

44 The two United State's cases of *White* and *Caperton* demonstrate powerfully why we should not have elected judges. The judicial task remains the same irrespective of the mode of a judge's appointment. But the elected judge's burden of maintaining public confidence and avoiding concerns about impartiality and conflict of interest appears to be more difficult. That is not to say the appointment process for unelected judges is perfect. It has been a matter of public discussion and some degree of change in recent times. Consideration of that process will no doubt continue. In any event, for the foreseeable future, unelected judges will be appointed by elected officials. What those unelected judges decide may or may not have political significance. It may or may not be popular. It may or may not attract the approval of the government or the media of the day. What we expect of our unelected judges is that because they are unelected and because they are not beholden and do not appear to be beholden to campaign commitments or campaign financiers, they will be able to discharge the official oath or affirmation requiring that they decide the cases that come before them without fear or favour, affection or ill will.