

**THE HISTORY TRUST OF SOUTH AUSTRALIA
and
THE STATE ELECTORAL OFFICE**

THE POLITICS OF DEMOCRACY IN SOUTH AUSTRALIA CONFERENCE

**Brookman Hall, University of South Australia
Thursday 8 March 2007**

Public Lecture given by the Honourable Justice John Perry AO¹

**THE TRUE GUARDIANS OF DEMOCRACY – PARLIAMENT
OR THE COURTS?**

I propose to address the framework of our constitutional arrangements, more particularly as between the governments, the executives and the courts.

I will then speak about some tensions arising from their relationship, and how these impact on basic democratic principles.

When the province of South Australia was created in 1834 pursuant to the provisions of an Act of Imperial Parliament,² the unquestioned assumption was that the application of the British common law, together with rule by the Colonial Office through a Governor and nominated council, would ensure that all of the elements of an antipodean democracy were comfortably in place. The Colonial Office acted on the precept that the government of a colony and the administration of the law were best left in the hands of the Crown.³

The reality was that a denial of self-government and the benign but autocratic oversight of the Colonial Office meant that the establishment of a true democracy in the colony got off to a very shaky start indeed.

As we all know, responsible government and an elected parliament came to South Australia by means of the *Constitution Act* of 1855-56. Indeed, much of this conference has been occupied celebrating the sesquicentenary of that event.

At that time, sitting on the bench of the Supreme Court was one Benjamin Boothby; by all accounts an irascible, eccentric and vain man with a unstinting worship of the mother country, coupled with an abiding opposition to the colony's progressive separation from it.

¹ A Justice of the Supreme Court of South Australia. This is a paper from which a much shorter public lecture was delivered on the occasion referred to.

I acknowledge the valuable comments on a draft of the paper made by Dr Melissa Perry QC LLB (Hons) (Adel), LLM PhD (Cantab) and assistance with research by my associate Sarah Attar LLB (Hons).

I take sole responsibility for the text.

² 4 & 5 Will IV, c 95 (UK).

³ Haigh's *History of the Law in South Australia 1837-1867*, Vol 1, page 4.

So great were his feelings in that respect that he proceeded to hold to be unconstitutional a number of major statutes passed by the newly formed local legislature.

So acute was the manifestation of these judicial aberrations that he was eventually removed from the bench in 1868, and the Imperial Parliament passed a number of laws dealing with the validity of laws enacted by the local legislature.⁴ A more regular balance between the courts and the Parliament was then restored.

On 1 January 1901, of course, an extra tier of government was added as a result of Federation.

The immediate effect of federation was to convert the self-governing British colonies into States under the umbrella of the Commonwealth.

Despite the absence of a comprehensive Bill of Rights in the Australian Constitution, this did not pose a threat to the maintenance of democratic values as a central feature of the new constitutional arrangements. Indeed, no comprehensive Bill of Rights was thought necessary at that time as the twin principles of political accountability through the democratic process and ministerial responsibility to the parliament were considered to provide sufficient protection.

The creation of a new Commonwealth Court, the High Court of Australia, has, in time, had a profound influence on our continued recognition of democratic principles, eg in its role as guardian of the Commonwealth Constitution and in upholding the rule of law. The most powerful example of this is to be found in the Communist Party case,⁵ and in the decisions of the High Court in the early 1990s upholding the implied freedom of communication in relation to political affairs.⁶

One of the key indicators of a democracy is, of course, universal franchise. We not only have universal franchise, but there are two quite unusual features of our electoral systems which it is important to note.

The first is compulsory voting, which applies at both Commonwealth and State levels. Very few, if any, other countries in the world oblige, as opposed to permit, eligible voters to attend at a polling booth and have that attendance recorded on the electoral roll.⁷ Whatever criticism this may have attracted over the years, it ensures that the responsibility, which most Australian take seriously, of electing a government is cast broadly across the community. Everyone must have their say. It is a striking feature of our voting franchise which in turn is a key element in identifying our States and the Commonwealth as democracies.

⁴ See the *Colonial Laws Validity Act 1865*, 28 and 29 Vict c 63 and see Selway B, *The Constitution of South Australia* (1997) (Federation Press) 8.

⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶ See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (in relation to federal political affairs) and *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211 (in relation to state political and public affairs).

⁷ I have expressed it in that way, as the obligation falls short of compelling the elector to fill out a ballot paper: *Langer v The Commonwealth* (1995-1996) 186 CLR 302 per Toohey and Gaudron JJ at 327.

The second, applicable to South Australia only, is the “fairness criteria”. This is a unique provision, not to be found in any other Australian State or Territory. It relates to the drawing up of electoral boundaries.

The basic premise is that the boundaries of the 47 electoral districts must be set so that the number of electors in each district does not vary by more than 10% either way from the electoral quota, which is the figure obtained by dividing the total number of electors in the State by the number of districts.

That provision is unexceptional. It is called the system of electoral tolerances. It reflects the philosophy of “one vote, one value”.⁸

However, superimposed upon that is the requirement that any redistribution should, as far as is practicable, ensure that candidates of a particular group which obtains more than 50% of the two-party preferred vote on a State-wide basis will be able to form a government.⁹

However difficult it might be to apply in practice, the provision is a serious attempt at ensuring that a government is voted in by a majority of electors across the board. It is an attempt to avoid a situation where, given the fact that we have single member electorates and two major parties, a party which obtains less than 50 per cent of the two-party preferred vote on a state-wide basis might nonetheless be able to form a government.¹⁰

So that we have in South Australia an electoral system which is a serious attempt to answer to the democratic requirement that the elected government of the day is fairly representative of the electorate it serves.

So far as the other seminal requirement of a democracy is concerned, namely the independence of the judiciary, the first thing to note is that the *Constitution Act* provides that judges of the Supreme Court hold office while of good behaviour, and may only be removed by an address of both Houses of Parliament.¹¹

The independence of the judges is guaranteed by protecting the mode and terms of their appointment and removal. It is regarded as essential to maintaining the confidence of the community in the judges and their decisions. As has long been recognised, “[I]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will”.¹²

I see no grounds for criticism of the method of appointment of judges in Australia. While there is sometimes talk of judicial commissions, more transparency and so on, the fact remains that appointments on the recommendation of Attorneys-General, after consultation with senior judges and legal professional associations, has worked well and continues to do so.

⁸ *Constitution Act 1934*, s 77.

⁹ *Constitution Act 1934* (South Australia), s 83.

¹⁰ This was the result in 1989 when in the election held that year, the Liberal Party attracted 52% of the state-wide popular vote without being able to form a government.

¹¹ *Section 74 and s 75*.

¹² A. Hamilton, *The Federalist*, No 79, 491 (1818) quoted in *United States v Wills* 449 US200 (1980) at 218.

There is criticism of the gender balance, old boys clubs and similar assertions. Insofar as those criticisms are directed to the judges, they are completely off target. The judges don't appoint judges. The government is solely responsible for such appointments. If there are deficiencies, the remedy is entirely within their hands.

The question of gender imbalance is a very complex one. One very significant factor is that few women lawyers practice at the bar, which is the source from which most judicial appointments are quite properly made; and even fewer practice consistently at the bar for long enough to attain an appropriate level of seniority and experience.

On the general issue of the independence of the judges, it is vital that, once appointed, they decide cases according to law, not in response to populist outcries. They must be immune from the influence of pressure groups. Being a judge is not to take part in a popularity contest. We have to have the courage to make what seems to be the right decision according to law, even if it is likely to be unpopular. To do otherwise is to jeopardise the rule of law.

In the long haul, judges will be respected if they exhibit the independence and the courage to follow that path.

As one commentator said recently, "To say a decision is unpopular is not the same as saying it is one in which the public has no confidence".¹³

The independence of the judges is absolutely central to the proper working of a democracy, and I will explain why as we go along.

A word about the functioning of parliament.

A difference to be noted at this stage between the Commonwealth and State parliaments is that the power of the parliament of South Australia under the Constitution of the State is plenary. It can legislate on virtually any topic under the rubric of the words "for the peace, order and good government of the State". On Federation, some exclusive powers were given to the Commonwealth parliament which derogated from the plenary powers of the State parliament, but basically the legislative powers of the State parliament were left unlimited.

Commonwealth parliament, on the other hand, is confined to legislate only within the powers conferred by the Constitution. Unless a specific head of power supporting a particular Act of Commonwealth parliament is found in the Constitution, it has no ability to legislate.

In the result, the courts in South Australia (and the federal courts) have only very limited ability to follow in Boothby's footsteps and declare an Act of the South Australian parliament invalid, albeit that there are certain express and implied limitations on state legislative power arising under the Commonwealth Constitution. Otherwise, generally speaking, courts may do so only on grounds which are

¹³ *The Role of Judges in a Modern Democracy*, Magna Carta Lecture, Sydney, September 2006, delivered by the Rt Hon Lord Falconer of Thornton, Lord Chancellor and Secretary of State for Constitutional Affairs (UK).

sometimes described as “manner and form”, that is, that the statute was not passed in accordance with the formal requirements of the Constitution.

This is in sharp contrast with the Commonwealth parliament. The courts may, and have not infrequently, declared an Act of the Commonwealth parliament to be beyond the power conferred on it by the Constitution.

Identification of a state as a true democracy is not satisfied simply by addressing the question whether or not those who govern it are fairly and properly elected, and the judges are truly independent. There is much more than that to a democracy.

Underscoring the concept of a democracy there is adherence to the principle of equality between citizens, who must be equal before the law. Every citizen has the right to be treated without discrimination.

Furthermore, personal rights and personal freedoms mean nothing unless they are protected by the law. That protection cannot be given unless every citizen has a right of access to the courts, being a right which can be effectively exercised by members of all levels of society.

A thread running through the concepts of which I have spoken so far, is the rule of law. In a democracy, the law applies to everyone equally and is not to be overridden or ignored by anyone, whether they hold high office, whether they command substantial economic resources, or whether they attempt to curry favour with those in power. As Lord Denning, a famous English judge, said many years ago:

“To every subject in this land, no matter how powerful, I would use Thomas Fuller’s words over 300 years ago:

‘Be you never so high the law is above you.’”¹⁴

As a corollary to the rule of law, a characteristic of a Western style democracy such as we have, is the separation of powers.

While there is no strict requirement of a separation of judicial power under the South Australian Constitution (unlike the position vis a vis the Commonwealth), the High Court has held that State courts must comply with certain minimum standards of independence and impartiality implied from the Commonwealth Constitution. This is said to flow from the fact that State courts can exercise jurisdiction vested by the Commonwealth parliament (ie federal judicial power).¹⁵

Pursuant to the doctrine of the separation of powers, the parliament, the executive and the judiciary must fulfil their roles completely independently of each other. The executive cannot, for example, lean on the judiciary, and the judiciary cannot be pressured in any way by the executive.

During the last century, one of the most notable features of modern democracies has been the rise of the executive. While it might be going too far to suggest that governments have, to a large extent, by-passed parliament and conceded much

¹⁴ *Gouriet v Union of Post Office Workers* [1977] 1 All ER 696 at 718.

¹⁵ See, for example, *Kable v DPP (NSW)* (1996) 189 CLR 31; *Northern Aboriginal Legal Aid Service v Bradley* (2004) 206 ALR 315.

decision making to the executive, rather than subjecting it to parliamentary scrutiny, the fact remains that very many of the decisions and actions which affect the lives of ordinary citizens are manifestations of executive power, with little or cursory parliamentary scrutiny.

A corollary of the growth in power of the executive is that, like most repositories of power, intervention by the courts or curtailment of executive action by the courts is often regarded as an impediment which the executive would prefer to do without. In the result, there is a trend in some legislation to limit or exclude the role of the courts, a process which carries with it a serious threat to the maintenance of basic democratic principles.

Against the background of the Australian democratic framework as I have explained it, I will deal in greater detail with matters of concern, which flow from the comments which I have made so far.

They are expressions of tension or potential tension between the executive and the courts.

I will discuss aspects of that tension between the executive and the judiciary in three contexts.

One is in the context of powers granted to the executive under modern terrorism legislation, the second is in the context of limiting access to the courts, and the third revolves around the question of indefinite detention at the will of the executive.

The common theme which links these topics is respect for individual rights and freedoms. Sir Robert Menzies recognised the need to maintain that respect notwithstanding the need to introduce somewhat draconian security legislation shortly after the outbreak of World War II. He said:¹⁶

“Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national efforts – the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.”

Terrorism Legislation

In the wake of September 11, the Commonwealth parliament has passed between 30 and 40 pieces of legislation designed to combat terrorism. There is complementary State legislation in South Australia, such as the *Terrorism (Preventative Detention) Act 2005* and the *Terrorism (Police Powers) Act 2005*.

You will be pleased to know that I do not propose to take you through all of this legislation.

¹⁶ Commonwealth of Australia, Parliamentary Debates, House of Representatives, 7 September 1939, p 164, cited in *Terrorism legislation and the Commonwealth* (supra).

What I will do, however, is discuss some of the key provisions.

Amendments to the Commonwealth *ASIO Act*¹⁷ confer very broad new powers on ASIO.

Police officers have always had the power to question people in the investigation of a crime, but with limited exceptions, the persons interrogated are not obliged to answer questions or incriminate themselves.

Under the new legislation, ASIO may make an application to a Federal magistrate or a judge for the issue of a questioning warrant. Surprisingly, the warrant may be directed to someone who is not under suspicion of the commission of a terrorism offence. Pursuant to such a warrant, a person may be brought before a person appointed by the Attorney-General, known as a prescribed authority, which may include retired judges or serving judges, for questioning about possible terrorism offences. It is an offence, punishable by imprisonment for up to five years, to refuse to answer questions or to give untruthful answers. The questioning takes place in secret session.

It has been pointed out that the power given to ASIO to detain persons for questioning under this legislation is greater than that of similar intelligence agencies in the United States and the United Kingdom, as only ASIO has the power to do so in the case of a person not suspected of a terrorism offence.¹⁸ The legislation abrogates the common law privilege against self-incrimination, although the answers may not be used directly in criminal proceedings against the interviewee. However, the answers may be used to pursue other lines of investigation which may be so used.

Control orders, which may involve a variety of means of restriction of movement or activity or contact or communication by an individual, may be made if a court is satisfied that the making of an order “would substantially assist in preventing a terrorist act”, or that the person who is to be the subject of the order “has provided training to or received training from a listed terrorist organisation”. Control orders can last for up to one year, with the possibility of renewal.

What needs to be noted is that the making of such an order is not dependent upon a person having been convicted of a terrorist or other offence, or even charged with such an offence.

Control orders may be made by Federal Court judges. The jurisdiction conferred on them by the legislation raises a serious question as to the legislation’s constitutional validity. These matters are at the moment under consideration by the High Court in the case of Jack Thomas.

The question is as to whether it is a proper exercise of judicial power to make orders in the nature of control orders in circumstances where the court does not adjudicate upon the question whether or not any criminal offence has been committed.

¹⁷ *Australian Security and Intelligence Organisation Act 1979* (Cth).

¹⁸ *Terrorism Legislation and the Constitution*, the Hon Michael McHugh AC QC, former justice of the High Court of Australia, (2006) 28 *Australian Bar Review* 117.

Under the Constitution, all federal judges must act as judges, and not as an arm of the executive.

Because of certain constitutional principles, a similar limitation derived from the Commonwealth Constitution applies to State judges.¹⁹ Thus State (and Territory) courts must be, and appear to be, independent and impartial, and must be constituted by persons who are, and appear to be, impartial, and a State law which purports to confer a function on a State court which substantially impairs the institutional integrity of a State court vested with Commonwealth judicial power is invalid.²⁰

Preventative detention orders may be made under Commonwealth legislation in circumstances where the issuing authority is not a court, but may, at least for the first 24 hours of detention, be an order of an officer of the Australian Federal Police. Continuing detention may be sanctioned by a judge acting in a personal capacity and not as a judge.

The grounds for issue of a preventative detention order are (putting it shortly) the suspicion on reasonable grounds that the subject will engage in a terrorist act, or posses a thing that is connected with preparation for such an act, or if the making of the order would substantially assist in preventing such an act occurring.

It is important to note that the order may be made if a police officer or the issuing authority entertains such a belief, but not otherwise.

This means that the judge may hold that there are no reasonable grounds for the belief, and refuse to issue the order. This is a very important provision, and is a modern day example of the issue which arose in a famous case which I will come to, *Liversidge v Anderson*.

Even so, there are bound to be constitutional challenges to those provisions, as well as the provisions relating to control orders.

Such challenges may well be labelled as obstructionist in preventing the effective operation of laws against terrorism. (They have been in the UK.)

But as Chief Justice Gleeson has said:

“It is self-evident that the exercise of [judicial review] will from time to time frustrate ambition, curtail power, invalidate legislation and fetter administrative action. As the guardian of the Constitution, the High Court from time to time disappoints the ambitions of legislatures and governments. This is part of our system of checks and balances. People who exercise

¹⁹ See *Kable v DPC for NSW* (1996) 189 CLR 51.

²⁰ *Kable* (supra). See also *Northern Aboriginal Legal Aid Service v Bradley* (2004) 206 ALR 315 at [31] and *Fardon v Attorney-General (Queensland)* (2004) 210 ALR 50.

political power and claim to represent the will of the people do not like being checked or balanced.”²¹

I would have thought that to be very much an understatement.

The fact remains that basic democratic principles are involved in such challenges.

The true characterisation of challenges to legislation such as the terrorism legislation is that they recognise that questioning, arrest and detention are so central to the protection of individual rights and freedoms that they must withstand analysis against the provisions of the Constitution and the common law, otherwise the rule of law is breached. Furthermore, the courts must ensure that judges are confined to performing strictly judicial functions, otherwise the separation of powers is breached.

As has been put Sir Anthony Mason:

“Some limitation or suspension of individual rights is necessary in order to meet the threat of terrorism. But it is of fundamental importance that any intrusion into traditional rights and freedoms is proportionate to the threat which is apprehended, does not involve the grant of powers that may be used for other purposes, and is subject to effective supervision by the courts. In this respect it is important that if persons are to be detained on suspicion that they are a threat to security, the suspicion should be based on reasonable grounds and that the existence of the suspicion and the reasonableness of the grounds on which it is based should be subject to meaningful judicial review. Neither ASIO nor the Attorney-General is a suitable guardian of individual rights.”

Limiting Access to the Courts

This may usefully be discussed in the context of immigration laws.

I can remember when Vietnamese boat people were welcomed onto the shores of Australia. I know a number of these refugees who have built up successful businesses and who have contributed greatly to the development of Australian society.

Before then, of course, there was the great European migration following the Second World War. It was that migration which has been a major factor in the growth of the Australian community and its economy over the last fifty years.

Somehow the warm welcome we gave to these people has, in the case of people seeking asylum other than through regular migration channels, disappeared. It has been replaced by fear, hostility and xenophobia.

²¹ Chief Justice Gleeson, *Legal Oil and Political Vinegar*, (1999) 10 Public Law Review 108 at 111, quoted in a speech given by the Honourable Justice McHugh at the Australian Bar Association Conference in Paris on 10 July 2002.

This is not the time and place for an exhaustive discussion of the operation of our immigration laws. Rather, I will use the example of the immigration laws as illustrative of the tendency to deny access to the courts to challenge migration decisions.

In an endeavour to curb access to the courts in migration matters, the Commonwealth government has adopted the technique of what is known by lawyers as the privative clause. That is a clause which in this context essentially provides that designated administrative decisions are final and not subject to review by the courts.

In the case of the High Court, there are constitutional limitations upon the ability of Commonwealth parliament to circumvent certain constitutional provisions, more particularly the jurisdiction conferred by s 75(5) of the Commonwealth Constitution.

That is a provision which confers on the High Court, as part of its original jurisdiction, the ability to deal with applications for orders requiring officers of the Commonwealth to act within the law. An order made under that provision can restrain an officer of the Commonwealth from acting contrary to a provision of the Constitution or acting pursuant to an Act of Commonwealth parliament which offends the Constitution. It can, and often is, used to justify orders which protect individuals from Commonwealth officers who might act in excess of the limits of the jurisdiction which they may have over individuals.

Despite that provision, successive amendments were made by the Commonwealth government to the *Migration Act 1958* (Cth) in an endeavour to circumscribe access to the courts by asylum seekers disappointed by migration decisions.

The progressive drafting of the relevant clause in the legislation through a series of amendments eventually reached new heights of inventiveness, the clause, being s 474, eventually coming before the courts in a case known as *S157/2002 v The Commonwealth*.²²

Section 474 of the *Migration Act (as amended)* provided that a relevant decision:

- “(a) is final and conclusive;
- (b) must not be challenged, appealed against, reviewed, quashed or called into question in any court;
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.”

We will call this the privative clause.

Separately, the making of a decision the subject of the privative clause which I have just read is defined in very wide terms to include just about any administrative action taken under the *Migration Act*.

²² (2003) 211 CLR 476.

The plaintiff in *S157* was a citizen of Bangladesh who arrived in Australia in 1997. He applied for a protection visa, which was refused by a delegate of the Minister and subsequently by the Refugee Review Tribunal.

The plaintiff then brought his action in the High Court to test whether the privative clause presented any obstacle to his challenging the refusal of the protection visa any further.

In its judgments in the case, the judges of the High Court said that notwithstanding the wide import of the language of the privative clause, it did not extend to block any challenge to a decision of the tribunal which was made outside of its jurisdiction. Furthermore, the tribunal would be making a decision outside of its jurisdiction if it acted unfairly or in breach of the rules of natural justice.

To use the language of the lawyers, s 474 did not prevent judicial review of decisions that involved jurisdictional error. There can be little doubt that this was a decision which the section was framed to avoid.

Section 75 of the Constitution trumps s 474. Plaintiff *S157* could have his case determined, notwithstanding the privative clause, and he would succeed if he could identify jurisdictional error, that is, unfairness or other breach of the rules of natural justice.

That case is important, as it explains how courts must interpret legislation strictly, but take into account constitutional limitations upon the power of parliament to tie the hands of the courts, and may well, in appropriate cases, bring constitutional principles to bear to limit the application of legislation which might appear to run counter to constitutional or other restrictions which might otherwise apply.

The more general constitutional principle for which that case stands, and which is important in identifying the essential characteristics of a democracy, is that for parliament to deny to its citizens access to the courts to test the constitutionality of Acts of Parliament or to test the lawfulness of acts of the executive, is to deny them the protection of one of the pillars upon which a democracy stands.

Sir William Wade, a great constitutional lawyer, said:

“To exempt a public authority from the jurisdiction of the courts of law, is to that extent to grant dictatorial power.”²³

The other important litmus test of the existence of a democracy is the freedom of an individual from arbitrary detention at the behest of the executive.

I come to that now.

This also may be illustrated by reference to migration cases.

²³ Wade, *Constitutional Foundations*, Hamlyn Lectures 1980, 83-84, cited in McHugh (supra).

Indefinite Executive Detention

Under the common law, courts of law have the exclusive power to order detention in custody, and ordinarily the courts may exercise it only as an incidence of its power to punish for criminal guilt. As the High Court observed in the decision of *Lim v Minister for Immigration*:²⁴

... the involuntary detention of a citizen in custody by the state is penal or punitive in character and under our system of government exists only as an incident of the exclusively judicial functioning of adjudging and punishing criminal guilt.

The court went on to explain that the generality of that statement was only qualified by some very specific instances, such as the power of the executive to detain a citizen to enable him or her to be brought before a court to answer to a criminal charge, and in the context of immigration law powers over an alien.

An alien? A strange word to use nowadays. It does not mean a creature from outer space. It means a person described in the vocabulary of immigration law as a non-citizen of Australia.

The power to detain a non-citizen may arise as an incidence of the power recognised by international law as, in turn, an incident of sovereignty over territory to exclude or expel such a person.

It may arise, and frequently does, in a war time context. Let me tell you the story of a famous case which arose in England during World War II.

It was 1941. The outcome of the war in the European theatre was touch and go.

Mr Liversidge was arrested and indefinitely detained under a defence regulation which gave a power of detention to the Secretary of State if he had reasonable cause to believe a person to be of hostile associations.

Mr Liversidge challenged his detention and sought particulars, that is, the detailed reasons, behind the allegedly reasonable beliefs said to justify it.

The case went to the House of Lords. Five Law Lords sat. Four said the particulars need not be given. Lord Atkin, the sole dissenting voice, in a celebrated dissent, said:²⁵

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. ...

²⁴ (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

²⁵ *Liversidge v Anderson* [1942] AC 206 at 244.

I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister.”

An interesting sequel to the judgment is that some 25 years later it was revealed that the reasons for detaining Liversidge in addition to “You are suspected of being in touch with persons who are suspected of being enemy agents”, were the statements “You are suspected of having been engaged in commercial frauds” and “You are the son of a Jewish Rabbi”.²⁶

Not surprisingly, Mr Liversidge was released from custody soon after the House of Lords’ decision.

For a recent Australian example of how far the executive may go in detaining a citizen is illustrated by the recent case of *Al-Kateb v Godwin and Ors.*²⁷

Mr Al-Kateb was a stateless Palestinian born in Kuwait. He arrived in Australia in 2000 without a passport or visa.

He was taken into immigration detention and applied for a protection visa, which was refused. Appeals against the refusal were dismissed. Mr Al-Kateb then asked the Minister to remove him from Australia. He had the right to make that request under the Act.

Efforts were made to remove him, but this was found not to be possible as no other country would take him.

What was to be done? Was he to be held in detention indefinitely?

He asked a judge of the Federal Court for a declaration that he was unlawfully detained and that he should be released. The case was removed into the High Court.

By a narrow majority, four judges to three, the High Court upheld his continued detention, even if it became indefinite.

In doing so, the court considered relevant provisions of the *Migration Act*. It rejected the argument that if compliance with the statutory provision which permitted an applicant to be removed on request from Australia could not be implemented in practice, it ceased to have effect, and the detainee should be released.

The judges of the majority reached that conclusion by a careful analysis of the statutory provisions. I will not go into them now, but you will remember what I said about courts having exclusive power to order the imprisonment of individuals, save for certain limited exceptions. This fell into one of the exceptions, because it was held that the detention was non-punitive if its purpose was to make the non-citizen available for deportation, even though that course was not practicable just at that time.

Being non-punitive, it was not an infringement of the separation of powers between the courts and the executive.²⁸

²⁶ Geoffrey Lewis, *Lord Atkin*, Hart Publishing (1999) page 133, footnote 5.

²⁷ (2004) 219 CLR 562.

The decision seems harsh. It seems inhumane to keep somebody in indefinite detention when they want to go to another country and have not been accepted in our country as a citizen.

Why do I quote it in a speech about democracy?

I quote it because it is an illustration of the rule of law. The courts must construe statutes strictly and apply them according to their terms. That is what the majority did in *Al-Kateb*, even though many would be upset at the result.

For the majority, if there had been any doubt about the construction of the Act, that doubt might have been resolved in favour of the liberty of the subject. But in cases where there is no doubt, the strict letter of the law must be applied, and that is what the High Court did.

So the case illustrates the democratic process at work. If the outcome was thought to be unacceptable, the remedy lay in amendment of the legislation.

Let me give you another example of detention at the behest of the executive. This example is a cause for concern.

Not only in South Australia but in many States and Territories, it has become a practice for the government of the day to say that it will overrule orders made by the courts for the release on parole of prisoners convicted of crime, and to overrule decisions of parole boards consequent upon the parole orders, and declare that notwithstanding the system of parole, the prisoner is to remain in custody indefinitely.

The approach exemplified by the expression “lock him up and throw away the key”, while perhaps answering to populist sentiment in the community, represents a threat to the rule of law and the separation of powers. It is a threat because it tends to undermine the authority of the courts, and it cuts across the long-established principle that it is for the courts to control the imposition of custodial sentences for crime.

Of course, I recognise the difference from the immigration cases, in that in parole cases the prisoner has been convicted of a crime, whereas in the immigration cases that is not so. Nonetheless, the practice needs to be recognised for what it is and serious consideration should be given to the question whether it is consistent with the democratic principles which we have been addressing.

In tracing the relevant statutory provisions operating in South Australia, I notice that it is the Governor who has the power, no doubt acting on the advice of Executive Council, to decline to accede to a recommendation of the parole board that a person serving a sentence of life imprisonment be released on parole.²⁹ I think that it would be more consistent with the separation of powers if that procedure was to be controlled by the courts rather than the executive.

²⁸ See, for example, per McHugh J at 584-585 [45]-[47].²⁹ *Correctional Services Act 1982*, s 67(6).

It is reassuring to see that proposed legislation recently introduced into the House of Assembly³⁰ delegates to the Full Court of the Supreme Court the jurisdiction, exercisable at the behest of the Attorney-General, to declare a prisoner a dangerous offender, the effect of which will be to negate any non-parole period and oblige the prisoner to make a fresh application for a non-parole period no sooner than 12 months later.

That such a matter be dealt with by the courts is as it should be in a democracy.

Conclusion

We have traversed much ground since discussing Justice Boothby and his rantings.

In the course of doing so I hope that I have identified some of the main features of the interface between the parliament and the courts in a democracy.

This country is blessed with parliaments selected by transparent and effective democratic processes. South Australia is no exception.

Equally, we are blessed with courts the integrity and independence of which cannot seriously be impugned.

What tensions there are between the operations of parliaments and the courts have not operated to place the democratic underpinnings of our society under threat.

The growth of the executive and attempts to deny access to the courts are developments which we must keep constantly under review and in check.

A democracy cannot be maintained as such unless every citizen has access to the courts to define and to protect his or her rights.

Although I suppose one could argue with respect to the rhetorical question which is the title to this address, that parliament and the courts have equal parts to play as guardians of democracy, it is the ability of the courts to strike a balance, to maintain the rule of law and to protect the rights of the individual, which perhaps entitles the courts to claim to be the true guardians of democracy.

³⁰ *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Bill 2007* – House of Assembly No 96. Although the power of the Governor to refuse to accede to a recommendation of the parole board that a life prisoner be released on parole remains, see proposed s 33B.