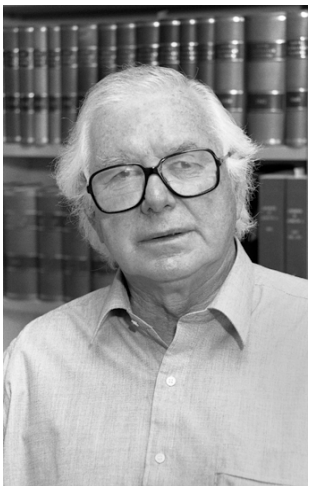
ELLIOTT JOHNSTON, SOCIAL VALUES AND JUSTICE[1]

THE HON MICHAEL KIRBY AC CMG†



I THE FORMATION OF ELLIOTT JOHNSTON

Elliott Johnston was a most unusual Australian lawyer. He was a participant in the establishment of the Law School of Flinders University. Following his death, it is fitting that the University should honour him by the establishment of a memorial lecture. In this way, his life and values can be recounted and remembered. And

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[1] Text on which was based the Elliott Johnston Memorial Lecture, 2012, delivered at the Town Hall, Adelaide, on 28 August 2012 for Flinders University School of Law.

† Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-4). Chairman of the Australian Law Reform Commission (1975-84).

coming generations of lawyers can be encouraged to reflect upon the causes of justice and equality that he so powerfully espoused.

Elliott was born in North Adelaide in 1918, the son of William and Elsie Johnston. His forebears were adherents to the Presbyterian tradition of Christianity. His father was a cashier, who worked for Harris Scarfe and Company, tailors. The family circumstances were modest. But his father remained in employment throughout the Great Depression. Elliott was born blind in the left eye, a disability that only made him more determined to succeed in studies as in sport. Years later, Kevin Borick QC, in his essay in Justice Tom Gray's book, *Essays in Advocacy*,[2] remembered this fact when reflected on the image that justice is sometimes portrayed with a blindfold. When acting as Elliott Johnston's junior, Kevin Borick noticed that a juror in a criminal trial was sleeping throughout the proceedings. He assumed that Elliott must have seen this, for it was obvious. But he had not taken into account his leader's monocular vision. He therefore failed to have the point recorded for appeal purposes. Elliott was only blind in one eye physically. In every other way, he saw all the complexities of legal and other problems in their full detail.

He was educated at the Kingston Public School in Adelaide, for that was the suburb in which he grew up. He later attended Unley High School, where he won an Elder bursary to Prince Alfred College. This was then a responsibility of the Methodist Union. Although Elliott was not religious, he certainly showed a Wesleyan devotion to social justice and working for a better world.

Having completed his schooling in 1935, Elliott won a further bursary to allow him to attend the University of Adelaide. There he made many friends, including Finn Crisp, with whom he was to help establish the National Union of Australian University Students (NUAUS). This body was later to attract many future leaders in

[2] Kevin Borick, 'The Lighter Side' in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2011) 553.

Australian politics and the legal profession, including Sir Gerard Brennan, Peter Durack and Gareth Evans. John Bannon and Chris Sumner were other notable participants at the time (1964-7) that I too took part in NUAUS activities in the 1960s.

Other friends of Elliott Johnston at the University of Adelaide included Max Harris. But he was not well regarded by Sir Douglas Mawson, the great Antarctic explorer. Mawson, the professor of geology, considered Elliott a disrespectful troublemaker. He attempted to frustrate his ambition to become President of the Students' Representative Council.[3] Mawson's attempt was unsuccessful and Elliott won much attention for his skills of leadership and debating. By 1937, he was taking a prominent part in the peace committees which were forming to combat the perceived danger of another great war. He was elected President of the Radical Club of the University and frequently contributed to the student newspaper *On Dit.* It was during this time, that the journal was banned for a month, as a result of articles that attracted official criticism.

Against this background, it is unsurprising that Elliott was not elected Rhodes Scholar for South Australia when the selectors met to consider his application at Government House in 1939. Deprived of the chance to study at Oxford, he, instead, secured employment as a young lawyer with the Adelaide firm of Povey Waterhouse. With admirable tolerance, they allowed him to continue his radical connections. It was in the Radical Club that he met Elizabeth Teesdale-Smith, later to be his wife. She became the secretary of the Radical Club, despite parental wealth and an education then befitting a young lady at Woodlands Church of England School at Glenelg.

When Australia joined Britain in the Second World War, Elliott stepped up his connection with radical politics. In 1941, he joined the Australian Communist Party. He also shared this interest with

[3] Much of the biographical detail is derived from Penelope Debelle, *Red Silk: The Life of Elliott Johnston QC* (Wakefield Press, 2011).

Elizabeth, whom he married on 17 April 1942. Meantime, with war approaching Australia's shores, Elliott Johnston enlisted in the Australian Army. He would see honourable service in New Guinea and the Pacific Islands. Eventually, he was assigned to Army educational services. He used some of this oportunity to raise questions in the minds of his comrades about the future of Australian society, once the war was over.

In 1945, following Victory in the Pacific, Elliott Johnston was demobilised. He was initially recruited as a full time organiser for the Australian Communist Party. It was then that he came to know the leaders of the party, J.B. Miles, Lance Sharkey, Ted Hill and Laurie Aarons. The extent of the party's power over its young members is revealed in Penelope Debelle's biography of Elliott Johnston, *Red Silk*.[4] When an Adelaide married couple, who were members of the party, fell into disagreement, J.B. Miles came personally to Adelaide to sort out the conflict and to order them back into matrimonial bliss. Truly, the party members believed that communism was more than just a political movement. It was a set of ideals that beckoned the members of the working class to a better world, free of want and war. Only later were the crimes of Stalin and Mao to occasion doubts about the party in the minds of its members, including Elliott and Elizabeth Johnston.

Elliott founded the legal firm the still bears his name in Adelaide. It has contributed to supporting this lecture series. In 1949, a son, Stewart was born to the marriage. A shared passion for Australian football helped to forge a life-long bond between father and son.

Elliott's work as a lawyer grew both in quantity and quality. He undertook many contested workers' compensation cases for injured workers. He saw this work as having a social, as well as a compensatory, purpose. It was to keep employers and insurers in

[4] Debelle, above n 3. For details of his early life see also entry (1983) 57 ALJ 542-3 referring to *Law on North Terrace* (1983), in which is a record of the University of Adelaide's Centenary.

check when their capitalist profit motives swamped their obligations to ensure protection of their workers' safety. He was always on the lookout for capitalist oppression. Years later, it was Elliott who conceived the arguments that succeeded against the banks in *Commercial Bank of Australia v Amadio.*[5] That case established a principle, founded in Equity, that, where banks procured parental guarantees for the financial obligations of their children, they owed duties to the parents to make sure that they were fully aware of the risks they were running.

Elliott's work as a lawyer diversified. He undertook many serious criminal trials and appeals, including in one case which he took to the Privy Council in London.[6]

Elliott's membership of the Australian Communist Party led to his offering himself for election to the Australian Parliament on several occasions, never with success. These were difficult times in Australia for communists and their sympathisers. In 1950, Elliott travelled to Warsaw to attend a peace conference. From there, he made a journey to Moscow, capital of the then Soviet Union. This led to the official cancellation of his Australian passport, an event occasioning great difficulty for his travel home. The times were threatening because of the move of the Menzies-Fadden Government to dissolve the Australian Communist Party and to impose civil restrictions on its members. The decision of the High Court of Australia in 1951 to invalidate the *Communist Party Dissolution Act* 1950 (Cth) came as a great surprise to members of the party, including Elliott. It showed that the courts in Australia were capable of adopting a stance independent of government and contrary to hostile public opinion.[7] This event became a kind of legal epiphany for Elliott Johnston. It was also significant for a relative of mine. My grandmother had remarried and her second husband was the national treasurer of the Australian Communist Party, Jack Simpson. I do not

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5 (1983) 151 CLR 447. See also *Garcia v National Australia Bank* (1998) 194 CLR 395, 301 [11], 413 [48], 439 [101].

6 He appeared before the Privy Council in *van Beelen v The Queen.*

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

doubt that Elliott and Jack Simpson knew each other. Each was a confirmed communist. Each had fought gallantly in successive wars. Each was later to become disillusioned with the Communist Party; but never with the ideals of the cause that they had embraced.

In 1954, Elliott was elected to the South Australian state committee of the Australian Communist Party. The following year he made a visit to the Peoples Republic of China. This left him full of hope and enthusiasm which was soon to be dashed after Chairman Mao launched the Cultural Revolution.[8] Meanwhile, Elliott's life as a lawyer continued. At one point, after Elizabeth had herself secured legal qualifications, they became business as well as domestic partners. In his work, Elliott was always a strong promoter of the role of women in the law, an attitude well in advance of his time. Amongst the women who worked with him were Ann McLean, Rosie O'Grady and Robyn Layton. The last was later herself to serve as a Judge of the Supreme Court of South Australia.

Elliott's seniority in the law in Adelaide was well established by the end of the 1960s. It was at this time that events occurred that propelled Elliott into various public offices, which he was to hold with distinction.

II ELLIOTT JOHNSTON AND THE ESTABLISHMENT

In 1969, Chief Justice John Bray included Elliott Johnston's name in the list of candidates whom he proposed for appointment as Queen's Counsel. On a professional level, the nomination was unremarkable, given Elliott's age, years of service at the Bar and manifest professional ability. However, his communist beliefs were thought in some quarters, in government and elsewhere, to disqualify him from

[8] Debelle's *Red Silk* opens with an account of his visit to the Peoples Republic of China. See Debelle, above n 3.

appointment as one of Her Majesty's Counsel learned in the law. How could someone who believed in the revolutionary overthrow of the State and the dictatorship of the proletariat commit themselves to allegiance to the Queen and to our system of government and law?

It was those uncomfortable questions that led the Premier of South Australia, Steele Hall, to decline the Chief Justice's recommendation and to remove Elliott Johnston from the list of barristers to be offered an appointment as silk. When this became known, Chief Justice Bray withdrew his entire list of recommendations. The government nonetheless offered appointment to the remaining candidates. To their credit, none of those named on the list accepted appointment, save on the recommendation of the Chief Justice. A tense standoff ensued between the legal profession and the government.

This difference was resolved in 1970, following a change of government and the election of a Labor Government. The issue of Elliott's appointment as a QC was debated and decided in cabinet, apparently not without dissent. The announcement of his appointment, once made, was generally accepted in the legal profession of South Australia. Elliott's professional work continued to grow in significance and complexity. Naturally, the question of his appointment as a Judge of the Supreme Court was quite often raised in professional conversations. However, according to reports, this was a bridge too far, even for the comparatively progressive Don Dunstan, when he became Premier. For many years, the offer of judicial appointment was not made.

Then, in 1983, by which time John Bannon had become Premier, the Attorney General (the Hon. Chris Sumner) invited Elliott to accept appointment to the Supreme Court of South Australia. By this time, Elliott was 65 years of age. He would serve but 5 years on the bench. The delay meant that he was unable to achieve the mark as a judge that an earlier appointment would probably have allowed. Elliott was conflicted about accepting appointment because he knew

the convention that required judges in Australia to separate themselves from membership of political parties. He had been a member of the Australian Communist Party for more than 40 years. Still, he accepted the post. He resigned from the party and was warmly welcomed to the bench by the Acting Chief Justice, Roma Mitchell. She noted that, whatever controversies had arisen over his earlier appointment as silk, they were no longer relevant. By all accounts, Elliott Johnston served with distinction and impartiality in the judicial seat. Where there were choices, he exercised them judicially in ways protective of the disadvantaged. And whereas he resigned, during his appointment, from the Australian Communist Party, his wife Elizabeth did not. When, in 1988, he eventually retired from his position on the Supreme Court, he rejoined the Communist Party. At his farewell in the Supreme Court in February 1988, Attorney-General Sumner remarked:[9]

> Although you have had to fight for unpopular causes in your professional and political life, you have been secure in your personal value system and have never given way to the attractions of an off-hand detached, uncaring cynicism which seems to afflict many people as they leave the idealism of youth behind. For you, your ideals remain as important now as they have always been.

Following his retirement as a judge, Elliott Johnston was much sought after, including as an example and inspiration for younger members of the legal profession. In 1989, he was appointed one of three royal commissioners of the federal Royal Commission on Aboriginal deaths in custody. He parried with journalists who questioned how he could reconcile his position as a Royal Commissioner, with his convictions as a communist. He declared that there was no difficulty. He recognised the Queen as the lawful head of State of Australia and as a constitutional monarch. Just as he had fought loyally in the Australian Army decades before, he accepted the nation's constitutional arrangements. By this stage in his career, his public statements were full of praise for the independent judiciary in which he had served and whose

[9] The Hon. Chris Sumner, cited in Michael Kirby, *Red Silk* (Book Review) (2011), 35 *Australian Bar Review* 189, 193. For a note on his judicial retirement, see (1988) 62 ALJ 487-8.

independence he had cherished since the decision in the Communist Party case. However, The Royal Commission proved a great challenge for him because of his strong conviction about the need to confront racial prejudice and the widespread disrespect, including in legal circles, for the Aboriginal people of Australia.

In 1991, when Justice James Muirhead retired because of illness, as Chairman of the Royal Commission, Elliott took his place. He led the Commission to a successful conclusion. It presented the Federal Government with 339 recommendations aimed at tackling the serious over-representation of indigenous Australians in prisons and the grave crisis presented by indigenous prison suicides. Many of the recommendations were carried into law.[10]

It was at about this time that Elliott Johnston accepted appointment as an Honorary Professor of Flinders University. He lectured and engaged with the young students of the new Flinders Law School. He described the judicial method and was able to call upon a lifetime of experience at every level of the courts. He also took over as editor of the *South Australian State Reports*. In 1994, his many contributions to public life were recognised with he was appointed an Officer in the Order of Australia.

Elliott Johnston suffered a great blow in 2002 when his wife, Elizabeth, died. She had been his spouse, chief comrade, and intellectual spur. Elliott continued his engagement with causes close to his heart: opposition to the sale of public assets; objection to the demolition of industrial arbitration; criticism of the Northern Territory Intervention and the treatment of refugees. In 2011, he witnessed the publication of his well-received biography, by Penelope Debelle, *Red Silk*. Reportedly, the only requirement he had laid down for cooperation in this work was that the place of Elizabeth in his life should receive full acknowledgement. Some

[10] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report* (1993) AGPS, Canberra.

observers have suggested that Elliott Johnston's tendency to flirtation with women sometimes caused Elizabeth pain. However that may be, no official from the Australian Communist Party was ever obliged to travel to Adelaide to fortify their relationship, which was strong to the end.

Elliott Johnston died in Adelaide on 25 August 2011 aged 93. A memorial occasion took place in the Elder Hall, attended by members of the many organisations with which he had been connected. Reflecting on that event, the then Chief Justice of South Australia, John Doyle, considered Elliott's life, in words adapted from remarks at the 2007 Adelaide Festival of Ideas that had been dedicated to him:[11]

> During his lifetime in the law, as a practitioner, as a judge and as a former judge, Elliott Johnston has striven to realise the aspiration and value that is expressed in the judicial oath to do right to all manner of people according to law, without fear or affection, favour or ill will. He is, and has been recognised as, a leader in this respect. He has led by unassuming but powerful example... People like Elliott are few and far between. They leave their mark on what they do... They leave their mark by the impact that they have on those whom they may encounter along the way. To those at his farewell at Elder Hall I say "Excelsior!"

III THE PUZZLE AND THE PARADOX

Most human beings have elements in their lives which outsiders see as paradoxical.[12] However, they will often themselves perceive no particular paradoxes because they hold all of the contextual considerations in their own minds.

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[11] John Doyle, 'Obituary in South Australia', *Labor History News* (Autumn 2012), 7.

[12] Alexander J. Brown, *Michael Kirby: Paradoxes/Principles* (Federation Press, 2011).

Still, paradox is part of the human condition. Just as genetic variation helped to explain Darwin's theory of evolution,[13] so unexpected, apparently illogical or uncoordinated, events and circumstances can sometimes contribute to allowing a person to escape from wholly logical and predictable behaviour.

How, for example, can one fully reconcile elements of Elliott Johnston's life that appear to sit uncomfortably together:

- His embrace of a revolutionary political philosophy with his pursuit of professional success in the law, in a community that was often specially conservative and resistant to change?"[14]

- His coincident decisions in 1941 to join the Australian Communist Party and to enlist as a member of the Australian Army?

- His lifelong dedication to communism, enduring even after the Australian Communist Party was wound up, and his allegiance to the King and to the Queen in war and in peace, as the symbolic constitutional head of state of Australia;

- His strong commitment to the advancement of women, particularly in the legal profession, and his reportedly 'flirtatious' conduct with particular women; and

- His witness to, and involvement in, cases and other activities demonstrating serious injustices to indigenous Australians, workers, women and prisoners with his continuous involvement over five decades in the work of courts, commissions and law schools, oft proclaiming the justice of their endeavours?

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[13] Charles Darwin, *The Origin of Species,* (Oxford University Press, 1859) republished in *Great Books of the Western World,* Encyclopaedia Britannica, 'Laws of Variation.' Chicago: Chicago University Press. 1952, Vol. 47, 65.

[14] Michael Kirby, 'Black and White lessons in the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195.

These are apparent paradoxes that are presented by a life, such as that of Elliott Johnston.

Yet, if Elliott Johnston were still with us, he would doubtless have explanations for all of these seeming inconsistencies. Essentially, he would provide an explanation similar to that routinely offered by members of other bodies who disappoint their adherents. Such as the churches that disappoint their adherents because of institutional or individual failings. Or football clubs that disappoint supporters because of the conduct of players or the failure of their teams to rise to their expectations. Elliott would, similarly, have rationalised the great wrongs disclosed on the part of the Soviet and Chinese oppressors by reference to analogous explanations. He would have indicated that communism with an Australian face was likely to be more benign and democratic: even though the Australian communist leaders he knew were not always given to operating in tolerable and tolerant ways.

Towards the end of his life, Elliott Johnston would praise the legal and judicial system of Australia in ways that would warm the hearts of contemporaries holding opposite political views. But he remained loyal to the underdog, the disadvantaged and the vulnerable. As many instances indicate, this tends to be a minority attitude within the judiciary and the legal profession of Australia. But it has a steady stream of supporters in the higher reaches of the Australian judiciary and legal profession. For all that, Elliott Johnston was the sole communist to be appointed a Queen's Counsel and Judge in Australia. It seems unlikely that this record will be repeated.

IV COMMITMENT TO SOCIAL VALUES

The more substantive legacy left by Elliott Johnston is his long service in the legal profession. It lay in his contributions, to a liberal-

social democratic conception of the law. Had he delivered the inaugural lecture in his name, as might have happened,[15] he would have celebrated important moments in Australia's recent legal history when the independent courts upheld the claims of vulnerable litigants, addressing their arguments of law from the stand point of their disadvantage and minority positions. I suspect that amongst these cases for celebration would have been those that rejected federal legislation which attempted to ban the Communist Party;[16] that upheld the rights of indigenous people in Australia to enjoy the acquisition of,[17] and legal title over,[18] traditional lands; that protected the rights of homosexuals;[19] that upheld the rights of prisoners to vote in elections;[20] that disallowed the removal of refugee applicants to a country not party to the *Refugees Convention and Protocol;*[21] and that resisted draconian laws impinging in the right to free association,[22] under the principle in *Kable's* case.[23]

It was not in Elliott Johnston's nature to be excessively complimentary to the law or blind in both eyes to its injustices. Were he here, I suspect that he would have had critical words to offer

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15 This was done by Professor Alex Castles in the first Alex Castles Lecture. The second lecture was delivered by the present author. See Michael Kirby, 'Alex Castles, Australian Legal History and the Courts' (2005) 9 *Australian Journal of Legal History* 1.

16 *Australian Communist Party v The Commonwealth* (1951), 83 CLR 1.

17 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

18 *Mabo v Queensland* [No.2] (1992) 175 CLR 1. See also *Wik Peoples v Queensland* (1996) 187 CLR 1.

19 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

20 *Roach v Electoral Commissioner* (2007) 233 CLR 162. But see *Baker v The Queen* (2005) 223 CLR 513; *Fardon v Attorney-General* (Qld) (2008), (2005) 223 CLR 575.

21 *Minister for Immigration and Citizenship v M70/2011* (2011) 244 CLR 144.

22 *South Australia v Totani* (2011) 242 CLR 1; cf. *Gypsy Jokers Motorcycle Club Inc. v Commissioner of Police* (WA) (2008) 234 CLR 532.

23 *Kable v Director of Public Prosecutions* (NSW) (1997) 189 CLR 51. See also *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; Wendy Lacey, 'Kirk v Industrial Court – Breathing life into *Kable*' (2010) 34 MULR 641.

about the detention of child asylum seekers;[24] the ambit of control orders over terrorism suspects;[25] the effective termination of the use of the constitutional power for the settlement of industrial disputes by conciliation and arbitration;[26] and the sanctioning of the so-called Northern Territory Intervention, that happened without proper, or any, consultation with the indigenous people of that Territory.[27] As Attorney-General Sumner said, Elliott was never cynical or complacent about what he perceived as unjust responses from the law. Truly, he had sufficient faith in Australian institutions to believe that they could, and should, deliver just outcomes: outcomes that married law and justice, in ways that he himself had constantly striven to do.

V UNREASONING ABSOLUTE POWER

It seems curious to conclude that Elliott Johnston, the lifelong communist, was committed to the ideal that the deployment of all power in Australian society was subject to the law.[28] And that any unreasoned exercise of power was antithetical to our law. Curious because the huge forces of officialdom, found necessary to administer the state apparatus of control in communist societies, were often the prime exemplars of an unreasoning and unaccountable exercise of power. Like many Australian lawyers, Elliott saw accountability in the exercise of power to independent decision makers in the courts as a precious check on tyranny and as a way of making the supposed accountability of the rulers to the people in elections operate as the Constitution intended.

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[24] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

[25] *Thomas v Mowbray* (2007) 233 CLR 307.

[26] *New South Wales v The Commonwealth* ('Work Choices Case') (2006) 229 CLR 1.

[27] *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

[28] *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 503-4 [70], per Kirby and Callinan JJ. See also Robert French, "Administrative Law in Australia: Themes and Values" in Matthew Groves and Hoong P. Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrine* (Cambridge University Press, 2007) 18.

If Elliott Johnston were still alive, he would take a homely instance of unreasoned power to illustrate the way in which the poor and disadvantaged are still subjected to injustice, despite the occasional endeavours of the law to do otherwise. Such a case, I believe, is *Watson v South Australia.*[29] It is a decision of the Full Court of the Supreme Court of South Australia, the court before which, and within which, Elliott Johnston once served in the law.

The facts of Watson's case are relatively simple. In 1985, a 14 year old schoolgirl was murdered. Mr Watson was arrested in September of that year and charged with the murder. At his trial, he was found guilty and convicted and on 6 May 1986, he was sentenced to life imprisonment. On 28 August 1986, the sentencing judge fixed a non-parole period of 24 years, commencing on the day of his initial arrest. In 1994, under new "truth in sentencing" legislation, the foregoing non-parole period was recalculated so as to permit an application for parole by Mr Watson after he had served 16 years and 5 months imprisonment. At about the same time as this recalculation occurred, he suffered a stroke in prison. Thereafter, he was to experience difficulties in walking. He faced many health and medical problems. He could only get about by using a walking frame.

On 9 October 2001, in accordance with the recalculated sentence, Mr Watson applied to the Parole Board of South Australia for parole. In the event that this request was rejected, the Parole Board was obliged by law to give reasons for its decision.[30] If the Board concluded that parole should be recommended, it had to proffer that recommendation to the Governor of the State, indicating the proposed date of release and the period of parole to be served, which was to be not more than three years nor more than ten years.[31]

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29 (2010) 208 ACrimR 1; [2010] SASCFC 69.
30 *Correctional Services Act* 1982 (SA) s 67(9).
31 Ibid s 67(6).

By the operation of the *Acts Interpretation Act* 1915 (SA),[32] the reference to the Governor in the parole legislation is a reference to the Governor acting with the advice of the Executive Council, i.e. members of the elected Government of the State. There is no express provision in the legislation requiring the Governor to give reasons for a decision if the decision is to refuse release on parole.

Following the first application, the Parole Board of South Australia recommended Mr Watson's release. However the Governor was advised to refuse that relief. This he did in April 2002. Thereafter, on five further occasions, Mr Watson applied to the Parole Board. On each occasion, the Board recommended release to parole. On each occasion, the Governor refused. This was despite the detailed and apparently persuasive recommendation contained in the report of the Parole Board. That report referred to the prisoner's remorse; his insight into his crime; his general good behaviour while in prison; his serious health condition; his immobility which would make any repetition of his offence most unlikely; the strictness of the proposed supervision that was recommended; and the fact that the mother (but not the father) of the victim was reported as agreeing to the release of the prisoner on parole.

The only clue to a reason for the decision, effectively by the Government of South Australia, was a reported statement by the then Premier of the State (the Hon. Mike Rann) saying:[33]

> It is not the role of governments to be the rubber stamp... It is the role of Government to make a decision, and we made a decision. That decision, as far as I am concerned, is final.

Despite requests by Mr Watson, addressed to the Governor, for reasons for the repeated refusals to accept the recommendation of the Parole Board, no such reasons have ever been provided. The

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[32] Section 23.

[33] Mike Rann, quoted in *The Advertiser* 24 April 2002; reproduced (2010) 208 ACrimR, 9.

difficulty in which this placed Mr Watson was well described by Chief Justice Doyle in his reasons in the Supreme Court, when Mr Watson brought an application for judicial review:[34]

> Reasons for the Governor's decision might assist Mr Watson to improve his prospects of release by identifying aspects of his circumstances or behaviour that was seen as an obstacle to release. As things stand, Mr Watson has no idea why the Governor has refused to release him on parole, and he is left contemplating a blank wall. The decision made by the Governor is a decision on his particular case. It has an impact on his hopes of regaining his liberty. So considerations of utility and justice ... support a conclusion that in the particular circumstances of this case, reasons for decision are required.

Despite this conclusion, the Full Court of the Supreme Court of South Australia unanimously refused to provide judicial relief. While upholding the power of the court to examine the exercise of the Governor of his powers, in accordance with law,[35] the judges concluded, on the basis of their understanding of the requirements of Australian law, that there was no duty to provide reasons; that the failure to provide such reasons was a consequence of the governing legislation; and that nothing in what had occurred amounted to a denial of natural justice or of procedural fairness, authorising the intervention of the law.

At about the time Mr Watson had been convicted in 1986, an important decision was delivered by the High Court of Australia in *Public Service Board of New South Wales v Osmond.*[36] That decision, in turn, reversed an earlier one reached by the Court of Appeal of New South Wales.[37] In that case, Justice Priestley and I (with Justice Glass dissenting) held that the common law in Australia had advanced so as to impose upon officials, making administrative decisions seriously affecting the rights of individuals,

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34 Ibid 26-27.

35 Applying *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342; *South Australia v O'Shea* (1987) 163 CLR 378.

36 (1986) 159 CLR 606.

37 *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 477 (CA).

to provide reasons for those decisions as one requirement to be implied into the power of decision-making afforded to officials by a law made by a democratic Australian legislature. The High Court of Australia, led by Chief Justice Gibbs,[38] rejected this conclusion. However, Chief Justice Gibbs, and even more clearly, Justice Deane (in concurring reasons[39]) conceded that, in particular circumstances, specially or exceptionally, an administrative decision maker might be required to give reasons for the decision. No such "special" or "exceptional" circumstances were found to exist in Mr Watson's case.

The theory of the legal control over the power of a government to take from an individual, indefinitely, or "finally", any hope at all of liberty at any time, now or in the future, is that those in the government who make such a decision are rendered answerable to the elected representatives in Parliament. However, those representatives, in turn, are unlikely to raise or pursue such a matter, if they are not made privy to the reasons that have led to such a drastic governmental decision. It might appear the more drastic because it is made in the face of sixfold recommendation by the specialist, multi-member statutory body, ordinarily entrusted by legislation to making recommendations, which will normally be acted upon.

As Chief Justice Doyle recognised in *Watson's* case, the lack of reasons undermines not only the prisoner's likelihood to mend his or her ways, should that be necessary. It also effectively undermines the capacity of rendering the political decision-makers accountable to the people for their decisions. By their silence, they immure themselves from effective political accountability. And in any case, with or without such reasons, it seems unlikely that the fate of a prisoner such as Mr Watson would ever truly enliven the interest of the electorate or a genuine issue of political concern and opposition. Cases such as this tend to show the dead-end that is sometimes reached in pursuit of constitutional accountability, at least where

[38] *Osmond* (1986) 159 CLR 606, 670.
[39] (1986) 159 CLR 606, 675.

unpopular individuals and minorities are concerned. It is precisely for such cases that most countries have now adopted bills or charters of rights, so as to defend minorities against the possibilities of injustice or indifference on the part of the majority and the governments of politicians whom they elect.

A further factor operating in this case is not mentioned in the reasons of the South Australian Court. But it is unlikely to have escaped the notice of the judges. In previous times, the High Court of Australia recognised the entitlement of intermediate courts, such as the Full Court of the Supreme Court of South Australia, to repair defects in the law or to extend principles in the law left open by past reasoning of the High Court.[40] In recent years, however, the High Court Justices have strongly castigated the judges of the intermediate courts where they have sought to elaborate principles in any way arguably contrary to indications from the apex court.[41] Although this approach has been questioned in law journals,[42] it is the possibility of rebuke from the High Court, for failing to conform unquestioningly to the reasoning in *Osmond,* that might restrain intermediate court judges from exploring the potential of the exceptions to the *Osmond* rule, presented by so-called "special" or "exceptional" cases. Yet it is such an expansion of judicial reasoning that has seen progress made in England, so far as the right to reasons for administrative decisions is concerned. In England, such "exceptional" cases, obliging the giving of reasons, have extended to the failure to give reasons "for the length of the penal element period of [a] sentence, such as life imprisonment."[43] In such a case, as Justice Peek noted in the Full Court of the Supreme Court of South Australia, Lord Mustill concluded that it was particularly unfair that

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40 *Nguyen v Nguyen* (1990) 169 CLR 245.

41 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 403 [17]; but see 418 [57]-[59] (per Kirby J.). See also *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 149 [131].

42 Peter Young, 'Authority of the High Court' (2012) 83 *Australian Law Journal* 7.

43 *R. v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531.

a prisoner facing life imprisonment should be left in the dark:[44]

> Contrast this with the position of the prisoner sentenced for murder. He never sees the Home Secretary; he has no dialogue with him; he cannot fathom how his mind is working. There is no true tariff, or at least no tariff exposed to public view which might give the prisoner an idea of what to expect. The announcement of his first review date arrives out of thin air, wholly, without explanation. The distant oracle has spoken, and that is that ... I therefore simply ask, is it fair that the mandatory life prisoner should be wholly deprived of the information which all other prisoners receive as a matter of course. I am clearly of the opinion that it is not.

The *Watson* case is, I am sure, exactly the type of case that Elliott Johnston would have championed. It is the kind of case that tests both the theory and practice of Australian law and constitutionalism. Unaccountable power is fundamentally antithetical to our system of government. Unreasoned decisions feed and sustain the notion of unaccountable power. No lawyer should feel comfortable with such an outcome. Ironically, unaccountable power was a feature of Soviet and Maoist communism. The deployment of governmental power that is truly accountable is usually a feature of the law of democratic Australia. But not in *Watson's* case – at least not effectively beyond the application of legal fictions.

The courts have declared the law. But we can reform and improve the law and its profession. That is the lesson of Elliott Johnston's life. It is a lesson that endures beyond his death. It is one that should be taught in law schools, written in our books, practised in our courts and upheld in our legal decisions. When the law has lost its concern for the unpopular and for minorities, it has lost a central objective that clearly motivated Elliott Johnston in his life. As it motivates me. As it should motivate us all.

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[44] *R. v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531, 565 per Lord Mustill (Lords Keith of Kinkel, Lane, Templeman and Browne-Wilkinson concurring). See also *Watson* (2010) 208 ACrimR, 31 per Peek J.