Chapter Two

Reforming the High Court

Greg Craven

Introduction

Discussions about reforming the High Court usually revolve around suggestions for improving the appointment process for High Court Justices, and questions as to whether that would make any difference. Accordingly, those are the matters which I propose to address in this paper.

Lawyers are always fascinated with the processes for the appointment of judges. This fascination is born of much the same sort of obsession with the remotely dirty and sordid that underlies the entire pornography industry, and numerous popular women's magazines. To lawyers, nothing could be more grubbily fascinating than the mechanics by which various of their colleagues are elevated to improbable heights of professional respectability.

It cannot be denied that this general issue of the appointment of judges raises numerous important questions. Thus, both the media and academic journals have been filled in recent years with discussions of such matters as the pool from which judicial candidates should be drawn; the openness or otherwise of the mechanisms by which judges presently are chosen; and the identification of those individuals and groups, if any, who should be consulted by the executive government before a judicial appointment is made. Similarly, various more or less concrete suggestions as to how the process of curial appointment might be improved have been floated from time to time before an indifferent public, and a rapt audience of lawyers and judges. Such suggestions have included proposals for the creation of an independent judicial commission to oversee the appointment of judges;[1] the imposition of constitutional or statutory requirements of consultation before judicial appointments are made;[2] and the ratification of such appointments by some component of the relevant legislature.[3]

However, these are not the primary issues upon which we should concentrate in discussing the appointment of High Court Justices: because of the special constitutional position of the Court, the appointment of its Justices raises far more fundamental matters. In fact, no useful consideration may be given to the issue of the appointment of High Court Justices without a close concentration upon three truly basic questions concerning that Court, only one of which relates directly to issues of appointment.

These questions are as follows. First, what is the basic role of the High Court? Second, what are the most significant deficiencies in the Court's current discharge of that role? Finally, how could changes to the appointment processes for High Court Justices assist in resolving those deficiencies? Naturally, it is this third question that is vital in the present context.

The approach of this paper will be to address in turn these three basic questions. Thus, it will first examine the role - or more correctly roles - of the High Court, and then go on to identify the deficiencies of the Court in its discharge of these roles. Having done so, it will consider the extent to which particular proposals for change in the process for appointments to the Court might alleviate these failings.

It may be noted at this stage that one consequence of the adoption of this approach is that there necessarily will be a considerable focus on the problems of the High Court, rather to the detriment of the positing of solutions to those problems. For this I make no apology. One of the great failures of Australian constitutional discussion is that the vast majority of commentators have yet to recognise that the High Court is part of the problem, rather than part of the solution, and any modest contribution to producing such a recognition is greatly to be welcomed.

The Role of the High Court

Clearly, an understanding of the intended role of the High Court is required before any attempt may be made to identify transgressions in the discharge of that role, and certainly before one can begin to formulate proposals for the remedying of those transgressions. Moreover, it is particularly vital that Australians collectively come to a clear understanding of the role of the Court now, at a time when it is consciously asserting a new constitutional mandate which is entirely different from any articulation of the function of the Court that has come before.

Essentially, the Founding Fathers envisaged the High Court as fulfilling two more or less distinct roles.[4] The first was as a final court of appeal for the whole of Australia. As such, the High Court was to be the final arbiter on matters of both common law and statutory interpretation throughout the nation. The second, and ultimately more important role, was as Australia's constitutional court. In the discharge of this brief as constitutional adjudicator of last resort, the Court was in particular to exercise the critical function of umpire over the federal division of power. Of course, it was also to have more general responsibility for interpretation of the Constitution. This paper will examine briefly both of the Court's intended roles, although it obviously will focus more upon the second, constitutional aspect of the Court's task.

In considering the role of the High Court as Australia's final court of appeal, it is absolutely clear that the Founders intended the Court to exercise judicial control over the whole of the Australian legal system, subject to the limited part to be played by the Privy Council, which need not concern us here.[5] This conception of the Court's role necessarily envisaged it as master of an increasingly local Australian common law. Consequently, the Founders would have readily accepted that the Court would be routinely involved in the identification and interpretation of common law, its occasional refinement, and even - exceptionally - its adaptation in light of changed and compelling circumstances.

To make a similar point in the context of statutory interpretation, the Founders would have recognised that this is a field in which opinions may legitimately differ, and that the construction of many statutes will never be clear. Thus, they would have been monumentally relaxed with the proposition that the High Court would need to pro-actively interpret and elucidate statutes, rather than to apply them mechanically and automatically to fact situations. The Founders, after all, were experienced in the ways of the judiciary, and none of this would have come as any surprise to eminent lawyers of the late nineteenth Century.

However, there is nothing to suggest that the Founders intended that the High Court should operate outside the construct of the traditional mode of proceeding by a British court. Thus, in interpreting statutes, it would be the fundamental role of the Court to discover the intention of Parliament, not to depart from that intention because the Court considered it inappropriate in all circumstances. In respect of both the elucidation of the common law and the interpretation of statutes, the Founders would have expected the High Court to display the great respect for precedent that was the hall-mark of the British judiciary.[6]

As regards the body of the common law itself, the Founders would have been astounded by the proposition that this should be regarded merely as a corpus of legal policy, to be changed by the

Court at will, whenever social circumstance demanded. As the Founders understood it, were a court to take the grave decision consciously to develop the common law, it would do so slowly, incrementally and with the greatest deference for what had gone before. This is not to resurrect the old furphy that judges never make law, a furphy which it should be noted only ever existed as a musty legal man of straw to be deployed by proponents of judicial activism. Rather, the question for us, as it was for the Founding Fathers, is not whether judges make law, but how they make law, and to what extent. To this question, and specifically as it applied to the High Court, the Founders unhesitatingly would have replied: cautiously; slowly; incrementally; and in obedience to the will of Parliament.[7]

Turning to the constitutional role of the High Court, it already has been noted that this has two aspects. The Court's first and primary role as a constitutional judiciary was to maintain the federal balance. The fundamental intention of the Founding Fathers was that the Court would protect the States against possible encroachment upon their powers by the Commonwealth, and it was for this reason that they repeatedly referred to the High Court as the key-stone of the federal arch.[8]

In fact, the Founding Fathers probably did not foresee the precise manner in which the Court would be required to protect the States. As the Founders tended to conceive of the Commonwealth merely as an amalgam of the two largest states (Victoria and New South Wales), they generally understood constitutional protection of the States as involving the High Court in safeguarding the smaller States from the ravages of their two larger brethren, who would be operating through the convenient *persona* of the Commonwealth. To this extent, they did not foresee what came to be the real danger for the States, namely, the ravages of a centralising Commonwealth, directed against all States equally.[9] Nevertheless, it is clear beyond all doubt that the Founding Fathers saw the central role of the High Court as being to protect the States against the Commonwealth, regardless of the precise form that any such danger might take.

As regards the Court's intended role in constitutional interpretation beyond issues of federalism, it would be a fair generalisation that the Founding Fathers showed less interest here than they did in connection with the federal division of power. While they fully accepted that the Court should have complete responsibility for the interpretation of the Constitution, and considered all parts of that Constitution to be important, they undoubtedly regarded its federal provisions as lying at the very heart of the Court's future role.

What must be understood in this context is that, just as the Founders made certain assumptions about the general role of the Court in the more mundane settings of the common law and statutory interpretation, so they made fundamental - and similar - assumptions as to the manner in which it would discharge its role as a constitutional court. Firstly, the Founding Fathers envisaged that the High Court would indeed `interpret' the Constitution: that is, in the manner of a British court seeking to discern the intention of Parliament behind an Act, the High Court would search for the intention of the Great Conventions behind a provision of the Constitution.

Secondly, the Founders believed that in this search for the relevant constitutional intent, the words over which they had laboured so long would be absolutely vital. This accorded with the practice of the English and Australian courts at the time, where British and Colonial statutes were interpreted with a heavy reliance upon the text.[10] Thirdly, the Founding Fathers would have accepted without qualm the proposition that implications have a role to play in constitutional interpretation.[11] Indeed, resort to implications was familiar to all lawyers engaged in the interpretation of British statutes, and their use was seen simply as one aspect of the interpretation of the statutory words in question. However, in conformity with the character of statutory (and

constitutional) interpretation as an exercise based upon notions of intent, such implications would themselves have to be similarly founded.[12]

The combined effect of these three assumptions on the part of the Founders was to accord to the High Court only a very limited degree of constitutional creativity. Of course, in a given case the views of different judges might legitimately vary as to the scope or meaning of a particular constitutional term, and to this extent, a significant element of judicial choice unavoidably would be present. However, that choice was itself always constrained by those fundamental precepts outlined above concerning the primacy of the search for intention and the meaning of the text.

Moreover, any element of constitutional creativity on the part of the High Court was strictly limited by a further, critical assumption on the part of the Founders. The Founding Fathers did not see it as any part of the Court's role consciously to modify the Constitution in line with changing social conditions. Such a judicially activist role, particularly in a constitutional context, was absolutely inconsistent with every notion of how a British court at the turn of the century should operate. It is quite clear from the pages of the Convention Debates, as well as from contemporary literature, that the Founders believed that the means by which the Constitution would be up-dated was through the use of the democratic amending procedure contained in section 128.[13]

Recently, however, there have been some attempts to claim that the architects of the Australian Constitution did indeed intend that the High Court should operate as an instrument by which that Constitution could be updated in line with the expectations of succeeding generations. This view, which I shall refer to throughout this paper as `progressivism', was espoused in particular by Sir William Deane during his period as a High Court Justice.[14]

It would be harsh to say that this view amounts to an egregious historical nonsense: but not too harsh. The specific evidence presented by Sir William Deane and others in support of such an interpretative hypothesis is pitifully thin, flying as it does in the face of everything we know about the general assumptions and intentions of the Founders.

That evidence tends to fall into two categories: namely, general statements made by the Founders concerning the need to maintain the Constitution's currency in line with contemporary developments - which are in reality far more likely to be statements directed towards the use of the section 128 referendum process; and isolated comments concerning the future role of the High Court by individual Convention delegates - most notably Andrew Inglis Clark - which are in no way representative of the main stream of thought within the Conventions.[15] In any event, there can be little doubt that even constitutionally `radical' delegates such as Clark would have been horrified by the use to which his comments are now being put, and the entire weight of the historic evidence is fundamentally against the admissibility of the High Court discharging any progressive role in relation to the Constitution.

The High Court's Discharge of its Role

It is at this point that it becomes appropriate to identify the principal failings of the High Court in the discharge of its roles as a final court of appeal, and as a constitutional court. Only having done this is it possible to consider whether these deficiencies might be remedied or alleviated by any alteration in the appointment process.

The role of the High Court as a final court of appeal within Australia generally has been uncontentious for most of its history. For many years, and especially under the dominance of Sir Owen Dixon, the High Court was one of the pre-eminent common law courts in the world. As such, it developed the common law of Australia in the manner outlined in the first section of this paper, that is to say, cautiously and with great regard for precedent.

In recent years, however, there has been a marked departure from this pattern. The Court has increasingly eschewed traditional common law techniques in favour of those which produce relatively rapid changes in the law which are neither incremental, nor obviously consistent with precedent, and which are often justified (at least in part) by reference to the need for this or that social change. Probably the best example of this phenomenon has been the High Court's dramatic decision regarding native title in the *Mabo*[16] case, but it also can be discerned in the growing influence of such concepts as `internationalisation' in decisions like *Teoh*,[17] where the Court held that administrators, in executing statutes, must have regard to Australia's treaty obligations, even if those obligations have not been the subject of domestic enactment.

In a paper which ultimately is about the High Court's constitutional role, rather than its role as a general court of appeal, I do not intend to pursue this matter further. However, it may be noted for present purposes that this basic change in common law method is consistent with the Court's direction in constitutional interpretation, which I will outline now.

In terms of the High Court's role in maintaining the federal balance, the dismal fate of the best intentions of the Founding Fathers is too well known to bear much repeating here. Since 1920, the High Court has embarked upon a steady centralisation of power in favour of the Commonwealth. This process has been subject to fits and starts depending upon a variety of circumstances, but the general direction has been consistently in favour of the expansion of Commonwealth power. Indeed, that leading Australian constitutional lawyer and convinced centralist, Professor Sawer, once remarked that the High Court's enthusiasm for the concentration of power in the hands of the federal government often exceeded that of Canberra itself.[18]

From the early 1980s, `mega-powers' like the corporations power[19] and the external affairs power[20] have provided a means by which the Court can expand central competence at an exponential rate. While the Court recently has had other constitutional fish to fry, there is no real sign of a slackening in its enthusiasm for the cause of centralism. The conclusion must be, therefore, that one fundamental deficiency of the High Court has been its basic failure as a protector of Australian federalism. While many would applaud the centralising course of the Court's decisions, few would quibble with this historical assessment. The question in the present context must therefore be whether there are any refinements to the process by which Justices are appointed that might work to alleviate this failure of the Court to fulfil its most fundamental constitutional role.

As regards the Court's more general role of constitutional interpretation, one may begin by remarking that, notwithstanding certain flurries concerning section 92 and the separation of judicial power, the performance of the Court has until recently been relatively uncontroversial. However, since the early 1990s, we have seen the Court embark upon an entirely new direction in terms of constitutional theory. In cases like *Nationwide* [21] and *Theophanous*,[22] the High Court has purported to discover in the Constitution an implied right of freedom of political speech, which is said to be based upon the Constitution's supposed enshrinement of `representative democracy'. This discovery by the High Court has plunged it into almost unprecedented controversy.

It must be understood that although this right invariably is referred to as an `implied' right, it in fact has nothing to do with any process of implication. Crudely speaking, an implication is a presumption, on the part of the hearer or reader of language, based upon the supposed intention of the person from whom that language - oral, written, statutory or constitutional - proceeded.[23] Thus, for example, if John Brumby says "Jeff Kennett reminds me of Attila the Hun", the

implication is, at the very least, that Jeff Kennett has a robust style as Premier, and this is precisely the meaning which Mr Brumby *intends* to convey.

In this sense, the implied rights propounded by the High Court are quite outside the realm of constitutional implication, because they are not based upon any intention of the relevant constitutional authors, namely, the Founding Fathers. In fact, we know beyond all question that the Founders never intended that the rights of the Australian people should be safe-guarded by constitutionally entrenched judicial review in the manner of the United States. On the contrary, they intended that such rights should be protected by the operations of democratically elected Parliaments. It was to these legislative institutions that the complex task of adjusting competing rights was confided.[24]

So, if not implication, what is this new process of constitutional interpretation? The simple answer is that it is progressivism in its purest form. The reality is that the High Court has decided that a modern Constitution should include guarantees of human rights, and it has therefore created them. The obfuscatory language of implication has been adopted by the Court essentially on the grounds of judicial respectability. This is perhaps clearest in the judgments of Sir William Deane, where he misleadingly and simplistically characterises the Constitution as `a living tree', the direction of whose growth is to be discerned by the High Court in accordance with the demands of modern society.[25]

This judicial espousal of progressivism, then, is the second fundamental problem of the High Court today. That it is indeed a problem cannot seriously be doubted, notwithstanding the adulatory clamour of the Court's usual socio-legal fan club. Progressivism is a problem, first, because it is intrinsically undemocratic. Quite simply, its application by the High Court in a constitutional context involves the amendment of the Constitution otherwise than under the section 128 referendum process, as Justice McHugh trenchantly observed in *McGinty*.[26]

Secondly, the new constitutional course of the High Court is basically unprincipled. This is true, not only in the sense that progressivism's proponents frequently seek to ground it on the utterly false premise that it was countenanced by the Founding Fathers, a tendency which already has been noticed, but also because the common encapsulation of progressivism in the language of implication is nothing less than a disingenuous attempt to disguise its true, extraconstitutional nature.[27]

Thirdly, and most disturbing of all, progressivism is fundamentally at odds with that part of Australian constitutional theory usually referred to compendiously as `the rule of law'. It is entirely inconsistent with any real adherence to the rule of law if judges accord Australia's fundamental legal norm - the Constitution - no more meaning than that which they are prepared to acknowledge as consistent with their own views as to the directions in which society should develop. Similar comments might be made concerning the relationship between progressivism and the doctrine of the separation of powers: that doctrine can mean nothing if the highest judicial body in the land conceives of itself as a supreme constitutional legislator.

It is true that the High Court recently has shown some slackening of enthusiasm for implied rights theory - and the progressivism which it embodies - most notably in the *McGinty* case. However, it would be unwise to view this as the beginning of a permanent retreat. In the first place, at the time of *McGinty*, Mr Justice Kirby had not yet taken his place on the bench, and he may confidently be expected to be an enthusiast for the progressivist cause. Moreover, Mr Justice Gummow, who preceded him onto the Court, showed himself in *McGinty* to be extremely muddled in his conception of the basic interpretative role of the Court.[28] It may be that, like Sir

William Deane, he will in time mutate from a conservative black-letter lawyer to a rainbow-hued judicial innovator.

Secondly, it must be remembered that the characteristic constitutional technique of the High Court is to take a series of forward steps, and then to rest a while gathering its strength for further judicial excursions. Certainly, this has been the method employed by the Court in relation to the expansion of central power, and there is no reason to suppose that a similar course will not be followed in the present context. On this basis, we are probably enjoying no more than a pause in hostilities between the forces of progressivism and its foes.

Thus, one of the major deficiencies of the High Court - if not the major deficiency - is its continuing flirtation with progressive constitutional theory. The question which thus arises is whether this deficiency could be minimised by any alteration in the method by which High Court Justices are appointed.

General Criticism of Judicial Appointments

Before considering changes to the appointment procedures in relation to the High Court which might alleviate the two fundamental problems identified above, it is appropriate to discuss briefly the general problems perceived as attending the judicial appointment process in Australia, together with the range of suggested solutions to these problems which have been proffered from time to time.[29]

Essentially, there are a number of perceived difficulties in Australia's system of judicial appointment, most of which apply as much to the High Court as to inferior courts. One is that judicial appointments are, by definition, government controlled, thereby raising the possibility of political appointments and patronage. Another is that the appointment process, carried on as it is deep within the secret labyrinths of the executive government, is opaque, it being impossible to determine the process by which a choice is made, or the reasons therefor. The result is that there exists no real accountability in respect of the making of judicial appointments.

A further concern relates to a perceived lack of consultation by governments in connection with judicial appointments. There is no statutory requirement for any person or institution to be consulted over the appointment of a judge, other than that comprised in section 6 of the *High Court of Australia Act*, which imposes the barest stipulation of consultation in relation to the appointment of High Court Justices upon the Commonwealth Attorney-General, in favour of his or her State counterparts. A final and very prevalent concern is as to the depth of the pool from which judicial talent is drawn. Many commentators, particularly from the Left, have argued that the various State bars are an impossibly restricted field from which to draw judicial candidates, and favour the expansion of the search to take in university law schools and solicitors.

All of these concerns have some degree of validity, but in the context of appointments to the High Court ultimately are peripheral. As has been emphasised throughout this paper, the real question in relation to the appointment of High Court Justices must be whether there are mechanisms which might resolve the basic deficiencies of the Court in relation to its profoundly anti-federal stance, and its recently embarked upon course of progressive interpretation.

Nevertheless, it is worth noting here some of the solutions most commonly proffered in relation to the perceived difficulties of the judicial appointment process generally. The first, and generally the least favoured, is legislative ratification. This would involve judicial appointments being ratified either by Parliament, one House of Parliament, or a representative parliamentary committee. The perceived benefits of such a procedure are that it would prevent cronyism and political appointments. The best known example of legislative ratification is the ratification of

the appointment of Justices to the United States Supreme Court by the United States Senate, after examination by a Senate Committee.[30]

Another proposal is for the imposition of statutory or constitutional requirements of more or less full consultation.[31] Thus, it has been suggested that governments should be required in appointing judges to consult everything from state governments, bar associations and law societies to academics and other judges.[32] It also has been suggested that the requirement of consultation could be an onerous one, potentially including a right in some consultees to veto the proposed appointment.

Finally, there has been significant support for the concept of a Judicial Appointments Commission. This would be an independent body, which either would recommend a list of judicial candidates to government, from among whom a choice could be made, or which might even be accorded the right to choose the appointee itself.[33] It is usually envisaged that such a body would be composed of judges, lawyers, academics and lay persons.

For present purposes, it should be noted that there obviously is at least some possibility of one or more of these solutions being adopted to address the fundamental problems previously identified in the specific context of the High Court.

Judicial Appointments and the High Court's Antipathy to Federalism

The first task in this context is to attempt to understand the reasons underlying the Court's long-standing hostility to federalism, before proffering any suggestions as to how an altered appointments procedure might improve the situation. This is a highly complicated question, and necessarily will be treated only superficially here.[34]

A wide variety of considerations underlie the historically centralist bent of the High Court. Traditionally, the Commonwealth has always benefited as the natural magnet of nationalistic feeling in Australia, in judges as much as in school children. Nor should it be forgotten that the High Court is, after all, a central institution, a fact emphasised by its relatively recent location in the central capital. In a sense, therefore, centralism is in its blood.

Such inherent tendencies were reinforced strongly by the early history of the Commonwealth. Nationally traumatic events such as the First and Second World Wars, as well as the Depression, tended to convince many Australian thinkers - lawyers among them - that strong central authority was simply part of the equation for survival. Such views found support in the strongly anti-federal British constitutional tradition, founded as it was upon the deeply perceived virtues of strong unitary government, and the historic necessity of controlling such peripheral dissident elements as the Irish, the Welsh and the Scots. These wider constitutional tendencies in turn fed into a profoundly literalist tradition among British and British-Australian lawyers, who early seized upon literalistic trends in British theories of statutory interpretation to deny the drawing of implications from federalism.

Throughout this process, centralist judges were applauded by like-minded academics, who made up (and continue to comprise) the great bulk of Australia's university constitutionalists.

The result has been that while it cannot be denied that the stance of the High Court has been profoundly anti-federal, nor that it has adopted this stance in despite of the best intentions of the authors of the Australian Constitution, the Court's performance has nevertheless received highly favourable reviews from the critics.

Moreover, there is no reason to suppose that the High Court's antipathy to federalism is in any sense lessening. In fact, one logically would expect it to grow more intense. The constitutional law now taught in Australian law schools generally regards the States as an irrelevance, and the argument for enhanced central power as being almost too obvious to require articulation. As the

Court's novel implied rights theories arouse more and more excitement among academics and students alike, the bizarre likelihood exists of a new generation of lawyers who are not merely opposed to federalism, but who scarcely have even heard of it. From among these students will come the High Court judges of 30 years time. It is against this depressing background that one must set any proposal to mitigate the anti-federal bias of the High Court through a reform of the appointment process.

The present practice concerning the appointment of High Court Justices, as it relates to the role of the component integers of the Australian federation, revolves around section 6 of the *High Court of Australia Act*. This provision requires that the Commonwealth Attorney-General consult the State Attorneys before recommending the appointment of a High Court Justice to the Governor-General. While this is encouraging, so far as it goes, it must be recognized that section 6 comprises only the leanest requirement of consultation. Thus, section 6 can be complied with through the Commonwealth Attorney-General merely seeking names of possible appointees from the States at the outset of the process, and then following his or her own inclinations, without the slightest exchange of ideas or information.

Indeed, until last year, this appears to have been the practice that was followed. The Commonwealth Attorney would solicit names from the States, and then - after a long silence - loftily advise his fellow Attorneys of the Federal Government's decision. Last year, however, saw a marked (though possibly ephemeral) change in procedure. One State Attorney-General, irked by the ritualistic nature of the consultative process, responded to the standard invitation of Commonwealth Attorney-General Michael Lavarch by proposing that the Commonwealth indicate the names of the possible appointees it had in mind, in order that the States might respond to more or less concrete proposals.

Mr Lavarch acceded to this request, with the result that instead of the States merely proposing names and in the fullness of time being advised of the eventual appointment, they instead commented upon possible appointees identified by the Commonwealth. One of those possibilities - Mr Justice Kirby - was in due course appointed. Of course, it remains difficult to assess whether a meaningful process of consultation did in fact occur in this case, and it is highly doubtful whether the comments of most of the States concerning Mr Justice Kirby were favourable to his appointment. Nevertheless, the procedure followed in 1995 clearly represents an improvement upon that which preceded it.

Over the years, there have been a range of suggestions as to how a more federal element might be injected into the process for the appointment of High Court Justices, with the ultimate aim of producing a Court more supportive of the decentralizing character of the Australian Constitution.

In 1973, the Victorian Government proposed that the Commonwealth should appoint only every second High Court Justice, with each individual State acting alternately to choose a Justice on other occasions.[35] The effect of this would have been that a particular State would have filled every twelfth High Court vacancy. In 1975, New South Wales proposed to the Australian Constitutional Convention that appointments to the High Court should be recommended to the Governor General by a `judicial council', to be composed of Commonwealth and State Attorneys-General, with the Commonwealth enjoying two votes.[36] A similar recommendation was endorsed by a Committee of the New South Wales Parliament in the same year.

In 1978, Victoria proposed to the Australian Constitutional Convention that the Constitution be formally amended so that no appointment could be made to the Court without consultation of the States by the Commonwealth.[37] Five years later, Queensland argued in favour of a proposal that High Court Justices be appointed by the Governor-General on the recommendation of the

Commonwealth Attorney-General, but only once the agreement of a majority of the States, or at least of three of them, had been obtained.[38]

In 1988, the Constitutional Commission appointed by Prime Minister Bob Hawke rejected any proposal for a constitutional requirement that the States be involved in the appointment of High Court Justices. In particular, the Commission disdained the suggestion that the agreement of three States be required before such an appointment could be made, on the grounds that this would produce `compromise candidates', and would give `undue prominence to regional considerations'.[39]

In fact, the issue of State involvement in the High Court appointment process has been a very sensitive one for antifederalists. They have hotly opposed any suggestion of a consultative process that goes beyond mere tokenism, for the precise reason that it might indeed result in a Court less sympathetic to the ambitions of central power. This tendency is, perhaps, well-illustrated by the haughtiness of the rejection by the Constitutional Commission of Queensland's not unreasonable proposal that the consent of three States be required for a High Court appointment.

It should be noted in this context that some degree of regional involvement in the appointment of judges to the constitutional court of a federation is not unknown under other federal and quasi-federal Constitutions. In the United States, for example, Article II Section 2 of the Constitution requires the appointment of Supreme Court Justices to be approved by the Senate. As the Senate is composed of an equal number of representatives from each State, and as it operates rather more effectively as a States' House than our own Senate, at least a limited element of federal involvement may be discerned in this arrangement.

The position in Germany is rather more favourable to the involvement of sub-national governments in central court appointments. There, the Federal Constitutional Court is chosen with the involvement of the Bundesrat, the Federal Upper House.[40] As the Bundesrat is composed of representatives directly appointed by the Governments of the Lander (i.e. the States), and as the Lander can direct their representatives as to how they vote, the Lander necessarily have a significant collective influence over appointments to the Court.

Perhaps ironically, even the draft Constitution of the Russian Federation is more sympathetic to the claims of regional governments in the present context than our own constituent document. Article 28 requires judges of the Constitutional Court to be appointed on the suggestion of the President of the Federation, but the actual appointment can be made only by the Council of the Federation, which is composed of two representatives of each unit of the Federation. Less prescriptive, but still tending in a similar direction, is section 122B of the Malaysian Constitution, which requires the Prime Minister to consult the Conference of Rulers - that is, the rulers of the component States of Malaysia - before recommending the appointment of a Supreme Court Judge to the King.

Finally, perhaps the most striking recognition of the interest of sub-national governments in the appointment of judges to the constitutional court of a federation is comprised in section 6 of the Canadian *Supreme Court Act*, which specifically requires that three out of nine Supreme Court Judges must be drawn from the Province of Quebec.[41] The failed Charlottetown Accord would have gone further, with Quebec's constitutionally guaranteed representation being maintained, but with the federal Government being required to name future judges from lists submitted by all the Provinces.[42]

The general conclusion, after a brief examination of other federal and quasi-federal Constitutions, must therefore be that a degree of sensitivity to federal considerations in the

appointment of judges to central constitutional courts is far from atypical or outlandish. Consequently, it is not possible to justify the present unbridled discretion reposed in the central government in this country as merely representing the invariable norm in comparable Constitutions, and a consideration of potential improvements to the Australian system is thus highly relevant.

However, in undertaking such a consideration, it has to be accepted at the outset that most of the suggestions commonly put forward for the improvement of judicial appointments in general, and noted previously in this paper, would do nothing to alleviate the particular difficulty presented by the anti-federal bias of the High Court.

To begin with the most obvious possibility, the approval of High Court nominations by a Senate Committee, or for that matter by the Senate itself, would be unlikely to have any significant effect on the composition of the Court from a federal aspect. The Senate has not operated as a States' House in living memory, and it would be as unlikely to protect the States' interest in the context of High Court appointments as in any other. Rather, a requirement of Senate approval would simply create the opportunity for the political examination along party lines of any unfortunate candidate for judicial office. Indeed, given the likely political composition of the Senate into the foreseeable future, and the attitudes to federalism of parties like the Australian Labor Party and the Australian Democrats, legislative ratification of this sort would be more likely to operate against the production of a federalist High Court than in favour of such an outcome.

Much the same may be said of proposals for the establishment of a judicial appointments commission, or some similar body. Such Commissions exist in most of the American States, and have been proposed at various times in Canada, the United Kingdom and New Zealand.[43] In Australia, they have been favoured by commentators as far apart in constitutional outlook as Sir Garfield Barwick[44] and Professor George Winterton.[45] Taking Winterton's proposal as a typical example, the Commission would be appointed by the Commonwealth Government, and would be required to prepare a list of names for presentation to the Commonwealth AttorneyGeneral. The Attorney-General, who could demand further names from the Commission, would then consult with relevant parties. These would include judges, practicing lawyers, academics and - along with all the rest - the States.

The general point which must be made concerning judicial commissions in the present context is that they would be highly unlikely to operate so as to moderate the centralist bias of the High Court. If one considers the Winterton proposal even briefly, one quickly comes to suspect that any commission would follow an appointments agenda as little sympathetic to federal considerations as have been the agendas of successive Commonwealth Governments. Critically, as an appointed creature of the central Government, a judicial appointments commission confidently could be expected to reflect at one remove precisely the same centralising views which presently dominate the appointment of High Court Justices. To adapt the old cry of "Who guards the guardians?", "Who appoints the appointers?" Indeed, the creation of a seemingly independent Commission by the Commonwealth might well operate to objectify and legitimise in the eyes of the public precisely those basic deficiencies of method and approach which presently plague the Court.

The result therefore must be that the only immediately obvious means of addressing the anti-federal character of the High Court via the appointment process is to involve the States directly in that process. It is clear, of course, that because the High Court is ultimately an organ of the Federation as a whole, appointments should continue to be made formally by the Governor-

General. It would not be constitutionally appropriate that any other method of appointment be adopted.

The best proposal seems to be that of Queensland to the Australian Constitutional Convention in 1983, or some variant thereof. It will be recalled that this proposal was for the Commonwealth Attorney-General to propose a name to the collective State Attorneys-General, and for the agreement of at least three of the States to be required before that name could proceed to the Governor-General. This requirement for the consent of half of the States inevitably would impose a real and onerous obligation of discussion and consultation upon the Commonwealth, without presenting the significantly more difficult hurdle involved in the gaining of a majority. Notwithstanding the historic spinelessness of the Australian States on almost every conceivable constitutional issue, a requirement that three of their number consent to any High Court appointment would at the very least cause the Commonwealth to ponder long and hard before making an obviously unacceptable nomination.

Of course, criticisms could be levelled against such a proposal. The first would be that it would lead to an orgy of political horse-trading behind closed doors. This may well be at least partially true, but surely no more true than is presently the case within the Cabinet room (and possibly the party room) whenever the Commonwealth Government appoints a High Court Justice. To take just one recent example, rumours were rife at the time of the appointment of Mr Justice Kirby, that Cabinet was significantly split between his nomination and that of Chief Justice Doyle of South Australia. In any event, the requirement that four Governments effectively agree before a nomination can go forward would undeniably involve a greater degree of accountability and interchange of views than the present unilateral process.

A second objection is that raised by the Constitutional Commission in 1988, that such a process would produce compromise candidates.[46] This may be true, but it is not clear why it is undesirable. It may well be that the best candidates in practice are those who enjoy a significant degree of confidence among a wide range of Governments and their Attorneys, rather than those who arouse the unbridled passion of the Commonwealth Government alone. Indeed, the general point must be that it is far from clear why we should be so eager to rely upon the judgment of a single government in choosing a High Court Justice as the best guarantee of quality, rather than the collective wisdom of a number of governments.

A further objection of the Constitutional Commission to the Queensland proposal was that it would give undue prominence to regional considerations.[47] The broad answer to this point is that it all depends upon what prominence one believes should be given to regional considerations. The assumption made in this paper is that the High Court is not only the supreme judicial authority within the Commonwealth legal hierarchy, but that it occupies a similar position in respect of the law of each of the States. To this extent, the High Court is as much a court of the States as it is a court of the Commonwealth. This is without even considering the role of the Court as final constitutional arbiter in disputes between the States and the Commonwealth. On this basis, one could be forgiven for believing that `regional considerations' should be given a very great prominence in the appointment of High Court Justices, on the grounds that the States and the Commonwealth in reality have a roughly equal interest in the operation of the Court.

It is intriguing to speculate as to the effect that the adoption of such a proposal might have had upon the appointment of Justices to the High Court in the recent past. In the case of Mr Justice Gummow, it is difficult to hazard any informed guess. Certainly, his name was not prominently raised prior to his appointment, and thus it may be that a body of the States would have insisted upon the nomination of another, more obvious candidate. On the other hand, they might have

been persuaded. In the case of the appointment of Mr Justice Kirby, it is probable that a very different result would have prevailed. It is hard to imagine a majority of States (four of which possessed conservative governments) agreeing to the appointment of Mr Justice Kirby over what is believed to have been their preferred candidate, Chief Justice Doyle of South Australia.

In summary, then, my proposal would be as follows. The Commonwealth Attorney-General would ask the State AttorneysGeneral for nominations of persons suitable for appointment to the High Court. At the same time, he or she would also indicate to the States the name or names of the persons already under consideration by the Commonwealth. The States would consider the matter, and then furnish to the Commonwealth Attorney-General the names of their own candidates, together with comments upon the candidates already put forward by the Commonwealth. After deliberating upon this material, the Commonwealth would propose a name to the States. In the event that three States agreed, this nomination would be passed by the Commonwealth Attorney-General to the Governor-General. If less than three States could be persuaded to agree, then the Commonwealth Government would be required to provide another nomination, and the process would continue until at least three States could be persuaded to agree to the appointment of a person so nominated.

Progressive Interpretation of the Constitution and High Court Appointments

The first question which must be addressed here, albeit briefly, is why the High Court has moved in the space of ten years from a more or less literal interpretation of the Constitution, to the position where a number of its Justices sturdily advance the position that it is the role of the Court to interpret that Constitution so as to adapt it to the demands of modern society. All that will be attempted here is the most basic of outlines.

It cannot be denied that one force behind such a progressive view of the Court's constitutional role is the undeniable intellectual bankruptcy of the old strict literalism. Literalism is neither an intellectually sustaining constitutional theory, nor can it be applied plausibly in any number of important contexts, most obviously whenever the constitutional text is seriously ambiguous.[48] A further difficulty lies in the fact that the appeal of literalism to judicial objectivity is essentially superficial, in the sense that constitutional literalism in Australia has always masked the hidden political agenda of centralism, and to this extent many High Court Justices have long been involved in the making of covert policy choices in a constitutional context.[49]

Nor can one ignore the enormous influence that has been exerted in recent years by theories of legal realism upon the minds of Australian lawyers. The now prevalent assumption that judges routinely make law has seriously undermined the concept of judicial restraint in constitutional law, as in virtually all other areas of jurisprudence. Coupled with this has been the profound impact of specifically constitutional ideas derived from the United States. Two entire generations of Australian constitutional lawyers have now looked largely to America, and not to the United Kingdom, for intellectual inspiration. There they immediately have been impressed by the glowing example of the Bill of Rights, with all its attendant judicial activism.

This American constitutional influence has dovetailed with the perplexing phenomenon of a prevalent and growing contempt on the part of Australian lawyers for government. This contempt appears to derive not only from legitimate concerns over the excesses of executive government during an era of declining parliamentary authority, but also from a wider belief that governments in general (though elected) are themselves inherently untrustworthy, and that they should be controlled in the wider interests of humanity by clever, civilised lawyers.

Nor should one ignore a more thoroughly cynical analysis, which suggests that a large part of the High Court's new judicial imperialism is about nothing more complicated than the acquisition of

power. We often forget that Courts are composed, generally speaking, of middle aged men who have risen to the top of their highly competitive profession, acquiring an exceptionally high opinion of themselves along the way, and who are as prone to the seductions of power and influence as any one else. Once such persons are freed from the traditional inhibitions imposed by judicial office, there is no obvious restraint upon the natural human tendency to seek to recast society in one's own image.

Perhaps the most important point to derive from all this is an understanding that progressivism is not a tendency which has arisen peculiarly upon the bench of the High Court. In reality, constitutional progressivism is one aspect of a basic change in attitude on the part of many of Australia's most influential lawyers. This change can be discerned in the obsession of such lawyers with Bills of Rights; their disdain for Parliament as an instrument of liberty; their mania for `human rights' generally; and their unreasoning support for every imaginable international covenant, regardless of content. In short, everything that will allow the constitutional legal elite to determine the basic structures and values of society, and sideline more populous institutions such as governments and Parliaments, is hailed as indispensable to a new, principled and shining social order.

It may be noted that some constitutional commentators breathed a sigh of relief after the decision of the Court in *McGinty*, and regarded that case as evidence that the Court's flirtation with implied rights and progressivism was over. In my view, this is a forlorn hope. In the first place, the implied freedom of political speech continues to exist, and merely awaits the ear of a more sympathetic future Court for its elaboration and extension. Secondly, the general concept that the Constitution is to be modified by the High Court in light of changing circumstances is to some extent embedded in most of the judgments in *McGinty*, even those of so-called conservative judges such as Justices McHugh and Gummow.[50]

Finally, as has been argued elsewhere in this paper, the High Court rarely abandons a novel line of constitutional reasoning. Rather, the Court may lie low for a period, but the relevant direction is always liable to be resumed upon the arrival of a more propitious moment.

Obviously, progressivism as described in this paper is to a very large extent the product of past appointments to the Court. However, no academic or political consideration has hitherto been given as to how this phenomenon might be dealt with through the appointments process, largely because progressivism is not yet acknowledged to be a problem. On the contrary, the vast majority of constitutional commentators, and particularly academics, are of the view that the philosophy of progressivism and its associated implied rights theory are the most favourable developments in Australian constitutional law since Sir Isaac Isaacs put down the States in the *Engineers Case*. With this view, a great many judges and practising lawyers cordially agree.

The question in the present context, therefore, is whether any change might be made to the appointment process which would reverse or at least confine the spread of progressivism on the Court. In this connection, this paper makes the unashamed assumption that progressivism is indeed something to be halted, if necessary, by constitutional amendment. This is because, in the words of Mr Justice McHugh, its application involves nothing more noble than the unauthorised amendment of the Australian Constitution.[51] In short, it comprises not constitutional law, but unconstitutional law. It thus behoves any government genuinely committed to constitutionalism to do all in its power to prevent the appointment of High Court Justices who would foster this illegitimate method of constitutional interpretation. A number of possibilities exist.

On an informal basis, governments can try not to appoint persons they believe would adopt a progressivist view of the Constitution once seated on the Court. This is an important issue,

especially for a conservative or a liberal government which takes seriously a commitment to the constitutional rule of law. In practical terms, it means that a government such as the present Coalition administration should be extremely cautious in its High Court appointments, and should ensure that any available writings produced by possible appointees on the subjects of constitutional law and interpretation are closely analysed.

However, there are obvious problems in relying upon the constitutional rectitude of Commonwealth governments as a cure for progressivism on the High Court. In the first place, a Labor government with an extensive agenda of constitutional change might well be highly attracted to the appointment of like-minded progressivist Justices, on the basis that they would be able to achieve far more by way of covert change to the Constitution through the application of illegitimate interpretative techniques than would ever be possible by legitimate resort to the referendum process under section 128.

Another difficulty is presented by the prevalence of progressivism among Australian lawyers. To a very real extent, it would be difficult for any Commonwealth government to identify a sufficient range of candidates suitable for appointment to the High Court who were not to some extent infected with this fashionable constitutional heresy. This problem is exacerbated by the fact that it may well be far from easy to diagnose progressivism in a barrister prior to that barrister's appointment to the Court. As Sir William Deane could testify, even reputed legal conservatives, once appointed to the bench, may well rather enjoy the idea of becoming constitutional philosopher kings. Of course, the fundamental difficulty here - which underlies much of the attractiveness of progressivism to Australian lawyers - is the lack of any obvious alternative in the form of a comprehensive and plausible conservative theory of constitutional interpretation upon which constitutional traditionalists might take a stand.

Were one disinclined to trust to the good sense of successive Commonwealth governments in this regard, it might be thought that some form of legislative ratification - already examined in the context of the Court's anti-federal bias - might offer some potential to restrain the appointment of progressivist judges. In fact, such a mechanism would be useless or worse. Any examination of potential candidates before a Senate committee or similar body inevitably would produce a highly public controversy between progressivists and traditionalists, with the likely result being the type of disaster represented by the failed Bork nomination in the United States.[52] Moreover, the likely composition of the Senate into the foreseeable future would positively favour the appointment of progressivist, rather than traditionalist judges. Finally, were the Senate or a Committee thereof actually to ratify the appointment of progressivist judges, it might be argued that such ratification operated to legitimize their subsequent lawmaking activity.

No further hope is offered by the creation of a judicial appointments commission. Given the prevalence of progressivism in what passes for Australian legal intellectual circles, there is every reason to suppose that the persons likely to be nominated to such a commission - academics, representatives of legal professional organisations and judges - would themselves be infected with progressivism to precisely the same degree as are the existing Justices of the Court. Thus, such a Commission could be expected to promote the appointment of progressivist judges, while giving to the whole process a spurious imprimatur of objectivity. This would presumably be the case unless a Commonwealth government were to appoint to the judicial appointments commission only the most constitutionally conservative judges, lawyers and academics, a course which would be politically extremely difficult.

Ultimately, it would appear that the mechanisms of State consultation outlined earlier in this paper might constitute the best, if sadly deficient protection against the appointment of

progressivist judges. This is because such mechanisms would promote scrutiny by six State governments and require agreement by three of those governments, a process which would be as likely as any other to involve the detection of any strongly held progressivist view. As the States have more to fear from progressivism than any other Australian constitutional entity,[53] their reaction to such a constitutional philosophy logically would be one of considerable hostility. For this reason, one would be inclined to think that the proposal previously outlined in relation to State concurrence in High Court appointments offers the best chance of combating progressivism through the appointment process. Against this, however, it must be noted that the operation of such a measure in relation to progressivism admittedly would be indirect; would rely upon the constitutional sophistication of State Attorneys-General; and would not resolve the difficulty posed by the prevalence of progressivist thinking among the pool of available candidates, nor the problem of detecting a progressivist bent prior to appointment.

Of course, there would in theory be more direct ways of coping with progressivism than through a modification of the appointment process. Ideally, it would be possible to amend the Constitution so as to define the duty of the High Court in the interpretation of the Constitution in such a way as to absolutely preclude judicial amendment. However, even assuming that one could effectively draft so problematic a provision, difficulties remain. In the first place, it is doubtful whether such a section would be approved at referendum, and its effect would certainly be difficult to explain to the electorate. Secondly, there could never be any guarantee that the Justices of the Court would themselves obey such an interpretative provision, given that it would itself be subject to interpretation by them.

The conclusion concerning progressivism must therefore be that it cannot really be dealt with effectively through the appointment process. As progressivism represents a sea-change in the constitutional attitude of Australian lawyers, it has to be dealt with as such. The only means by which progressivism ultimately may be defeated is through the development of an alternative constitutional theory which is sufficiently principled and logical to attract the allegiance of a majority of Australian constitutional lawyers. This, of course, is easy to say. The real problem is that our legal culture has, like a bad football team, gone soft: lawyers find the mushy social theory of progressivism with its appeals to higher notions of justice irresistibly attractive. It flatters lawyers to imagine themselves as the final arbiters of social priorities, and as philosopher kings dedicated to the protection of human rights. This is the view of constitutional law that is being taught to future lawyers and judges, and it is a view which is taught without concession to any alternative position. The real question is whether there will be any lawyers in Australia who are not progressivists in thirty years time.

General Problems in Judicial Appointments

The issues dealt with here do not relate specifically to the problems of the High Court, but rather to questions concerning the process of judicial appointment generally. Nevertheless, it is appropriate in a paper of this kind to express some tentative personal views upon this wider subject.

I would be opposed on pragmatic grounds to any proposal for legislative approval of judicial appointments as practised in the United States and Switzerland. It is not that the High Court does not richly deserve exposure to the rigours of ordeal by politician. On the contrary, its flirtation with progressivism clearly demonstrates that the Court merits being set adrift on the political seas which it has been so eager to chart. However, consistently with what has been said before in this paper, the probable result of legislative ratification would be the even greater politicisation of the Court, via all the usual horrors of media-directed judicial assassination.

Similarly, I would oppose the creation of judicial appointments commissions. I detect in such proposals that same strand of legal empire-building that underlies much of progressivist theory. Thus, nothing would suit progressivist lawyers better than to wrest from the executive government the task of constructing the nation's courts. Once this principle was firmly established, it would be possible to fully implement a judicial structure which reflected the role of lawyers as a directive liberal aristocracy. Naturally, this structure would be both profoundly anti-federal and anticonstitutionalist.

On the general issue of consultation, I am broadly supportive of any measure requiring governments to consult widely over judicial appointments. However, in the specific case of the High Court, it is vitally necessary that the States have an entrenched and pre-emptive right to such consultation. Unless this were the case, any requirement of wider community consultation almost certainly would be utilised for the purpose of swamping their views. It would be all too easy for a Commonwealth Government to engineer a consultative process that was designed to reflect precisely the anti-federal and progressivist views that it might wish to hear.

As regards the question of the pool from which judicial appointments should be drawn, I am inclined to think that it should be broader than is presently the case. This view is based upon a variety of considerations, which are too far removed from the subject of this paper to warrant consideration here. However, I would make the point that barristers often are fond of identifying themselves as the dispassionate guardians of legal and constitutional rectitude, and thus as the natural appointees to the courts, and to the High Court in particular. Yet it should be remembered in relation to that Court that it is populated exclusively by barristers, and that barristers as a corporate entity must consequently be prepared to accept some responsibility for its present constitutional course. After all, Sir Anthony Mason, Sir William Deane and Justice Gaudron were all barristers.

Moreover, were one being absolutely honest, a government in search of constitutionally conservative intellectual muscle for the High Court would be hard put to find it in the Bar. It has to be accepted that, in these days of constitutional confusion, it is not enough to recite - as many barristers are prone to do - the old legal certainties. What is imperative is the synthesis of a principled conservative constitutional theory, which will build upon but not slavishly adhere to the old formulations. Virtually no one has even attempted to generate such a theory since Sir Owen Dixon, and however much its passing may be mourned, the days of Dixonian theory are past.

Conclusion

I am forced to accept that this has been a depressing paper, in which discussion of problems far outweighs identification of solutions. However, I adhere to the view that in considering the question of High Court appointments, we must concentrate on the real issues concerning that Court: anti-federalism and progressivism. In the case of anti-federalism, an at least partial solution is readily to hand in the form of a requirement that three States agree before a High Court appointment may be made. Whether such a proposal is politically or constitutionally practicable, of course, is another question. The issue of progressivism is a much harder one, and one which in all probability requires more sophisticated solutions than mere constitutional amendment.

Endnotes :

1. See e.g. Winterton, G., *The Appointment of Federal Judges in Australia* (1986), 16 University of Melbourne Law Review 185, pp.209-10.

2. Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts,* Appendix C.

3. See Winterton, *op.cit*., pp.196-8.

4. See Craven, G., *The States* in G. Craven (ed.), *Australian Federation: Towards the Second Century* (1992), pp.62-5.

5. Section 74 of the Constitution permitted appeals to the Privy Council in certain circumstances. These were finally terminated by the *Australia Acts* in 1986.

6. See generally, Quick, J. and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), pp.797-804.

7. See Dicey, A.V., *The Law of the Constitution* (8th ed., 1915), p.38.

8. See e.g the comments of Trenwith at the Adelaide session of the Convention: *Convention Debates,* Adelaide, 1897, p.940.

9. See Craven, *op.cit*., p.61.

10. As was ringingly asserted in the joint judgment in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

11. As illustrated by the approach of the first High Court in cases like *Huddart, Parker and Co. Pty. Ltd. v. Moorehead* (1909) 8 CLR 330.

12. See e.g. *Attorney-General (Queensland) v. Attorney-General (Commonwealth)* (1915) 20 CLR 148, per Griffith CJ at 163.

13. See generally, Craven, G., *Original Intent and the Australian Constitution Coming Soon to a Court Near You* (1990), 1 Public Law Review 166; see also Quick and Garran, *op.cit*., pp.985-95.

14. See e.g. *Theophanous v. Herald and Weekly Times Limited* (1994) 182 CLR 104 at 168-74.

15. *Ibid*., and see especially the comments concerning Andrew Inglis Clark at 171-3.

16. *Mabo v. Queensland* (1992) 175 CLR 1.

17. (1995) 183 CLR 273.

18. Sawer, G., *Australian Federalism in the Courts* (1967), p.201.

19. Section 51 (xx).

20. Section 51 (xxix).

21. *Nationwide News Pty. Limited v. Wills* (1992) 177 CLR 1.

22. (1994) 182 CLR 104.

23. See Goldsworthy, J., *Implications in Language, Law and the Constitution* in G. Lindell (ed.), *Future Directions in Australian Constitutional Law* (1994), p.l50.

24. See the judgment of Dawson J in *Theophanous* at 193.

25. See especially his judgment in *Theophanous* at 171-2.

26. *McGinty v. Western Australia* (1996), Unreported, 87.

27. See the comments of McHugh J in *Theophanous* at 197-198; and of Dawson J at 193-4.

28. *Op.cit*. See e.g. at 147 the comments of Gummow J as to the `evolving' nature of representative democracy under the Australian Constitution.

29. These general problems are discussed comprehensively in Winterton, *op.cit.*

30. See Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts* (1984), Appendix D, `Appointment of Judges in Other Federations', pp.40-42.

31. The various proposals are fully set out in Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts* (1984), Appendix B, `Commonwealth Government Paper - Appointment of High Court Judges.'

32. Winterton, *op.cit.*, p.204.

33. *Ibid.*, pp.209-10; see also Barwick, G., *The State of the Australian Judicature* (1977) 15 Australian Law Journal, pp.480, 494.

34. For a more detailed discussion see Craven, G., *The States*, *op.cit*., pp.62-7.

35. Australian Constitutional Convention, *Commonwealth Government Paper - Appointment of High Court Judges*, *op.cit*., p.29.

36. *Ibid.*, p.30.

37. *Ibid.*

38. Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts,* Appendix C.

39. Australian Constitutional Commission, *Report* (1988), p.401; see also Australian Constitutional Commission, *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (1987), p.74.

40. Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts,* Appendix D, `Appointment of Judges in Other Federations', pp.42-3.

41. See Hogg, P., *Constitutional Law of Canada*, pp.168-186.

42. *Charlottetown Accord*, paras. 17-19.

43. See Winterton, *op.cit*., pp.188, 202.

44. *Op.cit*.

45. *Op.cit*., pp.209-10.

46. Australian Constitutional Commission, *Report* (1988), p.401.

47. *Ibid.*

48. See generally, Craven, G., *The Crisis of Constitutional Literalism in Australia* in Lee, H.P. and G. Winterton, *Australian Constitutional Perspectives* (1992), p.1.

49. *Ibid*., pp.8-10.

50. See e.g. the judgment of McHugh J at 96-7; of Gummow J at 147.

51. *McGinty v. Western Australia* (1996), Unreported, 87.

52. See generally, Bork, R., *The Political Seduction of the Law: The Tempting of America* (1990).

53. For the simple reason that a progressivist judge invariably equates centralism with progress: see e.g. Mason, A., *The Role of a Constitutional Court in a Federation* (1986), 16 Federal Law Review 1.