

Governance and the High Court

Haig Patapan*

The High Court of Australia is taking an increasingly prominent and important role in confronting, mediating and directing international challenges to Australian constitutionalism. It is doing this by augmenting its traditional politics based on parliamentary sovereignty and federal judicial review with a new politics that engages fundamental democratic themes such as rights, freedoms and equality. In this chapter, we examine the court's reasons and justifications for adopting its new jurisprudence and the different forms this engagement has taken by exploring in detail its claim that it 'makes' the law, its jurisprudence of rights and freedoms, and its decisions on Native Title. Though there are significant practical and theoretical limitations to the new politics of the High Court, the chapter suggests that the High Court and other courts of final jurisdiction are responding to, and in turn shaping, global changes, implementing by means of gradual and incremental judicial adjudication an international common law and potentially an international constitutionalism.

The High Court as a political institution

Chapter III of the Australian Constitution, the Judicature section, provides for a federal Supreme Court, to be called the High Court of Australia. It is in this chapter that the judicial power of the Commonwealth is vested in the High Court (section 71); judicial independence secured (sections 72 and 79) and the jurisdiction of the court spelled out (sections 73–78).

There is some ambiguity as to the nature of the court the founders intended to establish and whether they expected the court would exercise judicial review — that is, decide whether legislative enactments by the Commonwealth or the states were unconstitutional. Though the absence of a specific provision to this effect in the Constitution has raised doubts regarding the founders' intentions, it is clear that the majority of delegates at the Constitutional Conventions sought to entrench an American-style judiciary (Thomson 1986, 1988). A number of reasons were given for this. Foremost was the view that, in a federal system, it was essential to have an impartial and disinterested party to negotiate the disputes that would inevitably arise between states and the Commonwealth. As the Constitution was a

legal document, the natural choice for such an interpretive and adjudicative role was the judiciary. In this light, the court was seen as the bulwark of the Constitution.

Now it is clear that, from its inception, the High Court has been a political institution. It is political to the extent that its members are appointed by the federal executive, often controversially. It has also been political in the way it has shaped Australian politics. A cursory survey of the High Court's decisions since its establishment in 1903 clearly reveals the fundamentally political nature of the court's constitutional jurisprudence. Its 1920 decision concerning the validity of a log of claims served on Western Australian government enterprises by the Amalgamated Society of Engineers effectively gave the Commonwealth arbitral control over national wages and foreshadowed a significantly greater scope for all federal legislative powers.¹ By upholding the Commonwealth's wartime income tax legislation in 1942, the court allowed the Commonwealth to implement nationally uniform taxation, ousting the states from the field of income tax. Later decisions on excise completed the fiscal dominance of the Commonwealth.² In a series of decisions between 1945 and 1949, the court undermined Labor's postwar reconstruction program that had envisaged national ownership of airlines and banking and a comprehensive system of social services.³ In 1982, a dispute concerning the validity of a contract entered into by the Aboriginal Development Commission resulted in the validation of the Commonwealth *Racial Discrimination Act* 1975, establishing a new foundation for the recognition of the rights and claims of Indigenous Australians.⁴ The court's rejection the following year of Tasmania's challenge to the Commonwealth's *National Parks and Wildlife Act* 1975 that prohibited the construction of a dam in a World Heritage-listed area expanded the Commonwealth's external affairs power, and in doing so not only reconfigured environmental politics in Australia, but fundamentally altered the legal foundations of Australian federalism, giving greater recognition and impetus to Australian nationhood.⁵

These decisions show a politics of the Court where major political questions are determined in the course of often-obscure argument concerning the validity of specific enactments. They also confirm that the judicial review exercised by the Court was based essentially on the federal division of powers secured by the Constitution. Even a case ostensibly about freedom of speech and association, the *Communist Party* case (1951), was decided on the basis that the Menzies government's *Communist Party Dissolution Act* 1950, which sought to dissolve the Communist Party and declare unlawful affiliated groups and organisations, was beyond the Commonwealth's defence power.⁶

Federal judicial review — reviewing the constitutionality of a provision to determine whether the states or the Commonwealth have exceeded the federal demarcation of powers secured in the Constitution — represented an attempt to accommodate the American innovation of federalism with the English principle

of parliamentary sovereignty. Subject to the federal settlement and the general limits imposed by imperial legislation, the states and the Commonwealth were assumed to have plenary power. The court in this arrangement was, as anticipated by the founders, an arbitrator of federalism and a defender of the Constitution. In this light, provisions limiting parliamentary authority, such as the limited range of rights and freedoms specified in the Constitution, were given a restricted reading by the court because, in appearing to show a distrust or contempt of parliament, they endorsed a view that was inconsistent with English parliamentarianism.

In fact, the primacy of parliament as the locus of political innovation and as the ultimate guardian of ancient freedoms bolstered the court's contention that its role was fundamentally legal. In the now well-known words of Sir Owen Dixon, Chief Justice of the High Court and one of Australia's most eminent jurists, 'strict and complete legalism' was a necessary requirement for the court's independence. The court consistently claimed that its task was fundamentally legal — namely, the interpretation of an imperial legislative enactment, in this case the Constitution. In holding a statutory provision invalid, the court was merely denying a power to one part of the federal union; only in exceptional cases were both Commonwealth and the states deprived of authority by the court's exercise of judicial review. Importantly, the court merely declared or interpreted the law; law-making was a responsibility confined to parliament, the people's representative.

This view of Australian constitutionalism and the court's role within the regime was challenged by fundamental international developments and the evolution of Australia as a nation. Confronted with the increasing difficulty of accommodating or reconciling parliamentarianism with these changes, the court was of the opinion that it was necessary to reconceive and thereby secure a new theoretical and institutional foundation for the court within the regime. Accordingly, it began to undertake fundamental changes in its jurisprudence. Before examining the character of the new politics of the High Court by turning to its major decisions, it is appropriate to consider in greater detail the nature of the changes that warranted such a transformation in its jurisprudence.

Reasons for change

Important changes in Australian constitutionalism that took place in the course of the twentieth century had far-reaching institutional consequences for the court, significantly reformulating its role within the polity. Australia's development into an independent, sovereign state was a gradual, evolutionary process, signposted by major enactments such as the *Colonial Validity Act* 1865 (UK), the *Commonwealth of Australia Constitution Act* 1900 (UK) and the *Statute of Westminster* 1931 (UK). Perhaps the most important enactment, at least in terms of its symbolism, was the passing of the *Australia Act* 1986, which formally terminated the power of the UK parliament

to legislate for Australia. These changes in Australian constitutionalism were mirrored in the increasing authority of the High Court within the Australian legal system (Galligan 1986; Bennett 1980; Sawer 1956, 1963).

One of the most important changes was the gradual transformation of the High Court into the final court of appeal in Australia. Though the majority of founders intended the High Court to be a supreme court of appeal in Australia, appeals to the Privy Council in certain cases were retained in the Constitution as a result of compromises that were implemented at the time the Constitution was formally enacted in Westminster.⁷ As a result, the High Court was not a final court of appeal in Australia and appeals to the Privy Council, though few, were pursued by litigants. This meant that English judicial opinion, especially that of the House of Lords and the Court of Appeal, was considered authoritative in Australia. For example, in *Piro's* case, a decision handed down in 1943, the High Court held that in cases of conflict the decision of the House of Lords would be binding on the High Court, effectively placing the House of Lords at the apex of the Australian legal system.⁸

But 20 years later things had changed. In *Parker*, a case decided in 1963, the High Court announced its judicial independence and held that it was free to consider issues independently of English authority.⁹ By this time, strong nationalist sentiment regarded appeals to the Privy Council as contrary to the status of Australia as an independent nation, and legislation in the form of the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth) was enacted, limiting the right of appeal to the Privy Council. As a result of these decisions, the High Court held in 1978 in *Viro* that it would no longer be bound by the decisions of the Privy Council.¹⁰ The remaining avenue of appeal to the Privy Council was abolished by the *Australia Act* itself. Thus, by 1986, the High Court was effectively the final court of appeal in Australia.¹¹

The independence of the court was accompanied by changes that emphasised its role as a national court. The Federal Court of Appeal was established in 1976 with the specific purpose of freeing the High Court to decide constitutional issues and appeal cases of national importance.¹² A successful referendum made possible the enactment of the *Constitutional Alteration (Retirement of Judges) Act 1977* (Cth), which ended life tenure for judges, imposing a mandatory retiring age of 70 years. By the *High Court of Australia Act 1979* (Cth), the court was given maximum independence to manage its building, staff and finances. The increasing importance of the court had its symbolic confirmation in the construction of a new High Court building in proximity to Parliament House in Canberra. The building, which was opened by the Queen in 1980, was also important for practical reasons: sophisticated court reporting services using audio-visual resources were installed in the building, as was the court's extensive library.¹³ Its procedures also reflected

its growing stature as a court at the apex of the federal legal system as well as a general court of appeal in Australia. The court was now in charge of its own docket: by 1984, most civil appeals as of right were eliminated so that special leave to appeal would be granted by the court only in limited cases, such as those that raised issues of public importance or important questions of law (O'Brien 1996). The court also looked different — as a constitutional court, it decided that it would no longer appear in traditional wigs.

These institutional changes coincided with powerful forces of globalisation. The increasing internationalisation of legal and constitutional norms and the recognition of Indigenous and human rights began to influence significantly domestic legal regimes. At the time of these changes, the court continued to insist that it was no more than an impartial adjudicator of the law, declaring the common law without making it. Desirable changes to the law were to be left to the discretion of parliament.¹⁴ The court's stance was in contrast to developments that were taking place in other courts of final jurisdiction in the common law world. The most important source of change in these other jurisdictions was the entrenchment or adoption of bills of rights, which fundamentally transformed their jurisprudence, altering their methods of interpretation as well as their role within the polity.¹⁵

In contrast, the Australian High Court appeared to stand outside the mainstream of changes to courts of final jurisdiction. Part of the problem was, of course, the fact that Australia did not have a bill of rights — various attempts to entrench a bill of rights had proven to be singularly unsuccessful (Williams 1999a; Charlesworth 1993; Galligan 1990). In spite of the absence of a bill of rights, Australia was nevertheless increasingly committing itself to a number of international human rights covenants and conventions. The gradual opening up of the Australia legal system to the world and the increasing importance of human rights within international law exposed the High Court to international influences. As a court of final jurisdiction, the High Court became the institution that would mediate international changes, compelling it to adopt a more extensive and profound role in the adjudication of constitutionalism in Australia (Bailey 1990; Tenbensele 1996; Charlesworth 1991).

Fundamental changes in society also had an important bearing on the court. A liberal-democratic concern with individual liberty shifted the emphasis from collective to individual interests. A progressive shift to a more highly educated and culturally diverse population and increasing material wealth also contributed to a community that had less confidence in the major institutions of governance. The orthodox theoretical framework of responsible government and parliamentary democracy that protected individual rights and thereby justified a limited role for the judiciary no longer seemed valid. The reality of party government, executive dominance and the administrative state appeared to represent an unchecked and

unaccountable power in Australian politics. Thus the court's abandonment of the declaratory theory and its turn to a jurisprudence of individual rights and freedoms — a jurisprudence that saw the Constitution as a constitutive enactment — was justified as much by an acknowledgment that the political settlement that protected civil liberties and therefore justified judicial deference no longer operated in Australian political life as international developments (Mason 1989; Brennan 1992; Toohey 1993). In adopting this view, the court in turn influenced the evolution of social attitudes that favoured individual rights, and weakened the claims of governments to represent the common good.

These factors would not, by themselves, be sufficient to account for the change in direction in the court's jurisprudence. What made them decisive, however, was a theoretical perspective that was predicated on the need to accommodate change. Here it is necessary to acknowledge the powerful influence of Roscoe Pound, Julius Stone and sociological jurisprudence in the development of the High Court's view of its role within the regime (Stone 1961, 1966; Blackshield 1983: 335–44).

The new politics of the High Court

The prominent features of the court's new politics can be seen in its decisions regarding its own role within the regime as well as the way it has been prepared to interpret and introduce changes into the common law and the Constitution. Though a comprehensive examination of the new politics of the court is beyond the scope of this chapter, a sufficient indication of the court's jurisprudence may be gained if we turn to its major decisions, such as its claim that it 'makes' the law, its jurisprudence of rights and freedoms, and its ground-breaking decisions on Native Title.

Judges as law-makers: repair and upkeep

Perhaps the most striking feature of the High Court's new politics was its rejection of the declaratory theory. The Court had traditionally claimed that it did not make the law: it interpreted and declared the law. This view was abandoned by the High Court. Describing the declaratory theory as a cloak for undisclosed policy considerations and tending towards conservatism, the court advocated a new approach to interpretation, described variously as a 'dynamic' or 'policy' approach (Mason 1996b; Gleeson 1999; Craven 1993; Lindell 1994). This new method of interpretation requires judges to take into account community values, especially in the interpretation of a constitution. Such a method would expose underlying values for debate and enhance the open character of judicial decision-making. Though this would expose the court and its decisions to greater criticism, it would also promote a legal reasoning that was more acceptable to society as a whole.

Dynamic interpretation has changed the formal rules of statutory interpretation: sovereignty of the people replaces parliamentary sovereignty; extrinsic material

will be allowed in interpreting the terms of the Constitution; the Constitution will not be confined to its meaning in 1900, it will be read as an instrument of national government. The High Court is now prepared to take into account decisions in other jurisdictions as well as principles of international law. It sees the Constitution as more than an imperial enactment, and is prepared to articulate the principles that are implicit in its terms or general structure.

The admission that the court in some sense 'makes' the law has raised a number of difficulties. If, indeed, the court makes the law, then its impartiality, neutrality and lack of bias come into question. The difficulty this poses for the legitimacy of the court is exacerbated by the argument that, in a democracy, law-making should only be undertaken by the representatives of the people. In fact, a judiciary that has authority to invalidate parliamentary enactments and appropriates for itself the right to make laws appears to overturn the rule of law and assume supreme authority in the polity. There have been many attempts to formulate theories of interpretation that will justify the court's role as law-maker. The dominant view on the court has been that it has a proper and legitimate role in repairing and keeping up to date the law with changing and fundamental community values (Preston and Sampford 1996; Mason 1995, 1996a; Brennan 1993; Gleeson 1997). The influence of sociological jurisprudence in this formulation is evident. Indeed, the strengths and weaknesses of the court's preferred formulation mirror those of sociological jurisprudence.

The community values argument appears to have a strong case in the interpretation and formulation of the common law. If the common law is viewed not as the declaration of an immemorial law, but as 'judge-made' law, then the role of judges as law-makers appears unavoidable. But if judges are no longer 'living oracles', if they exercise judgment to develop the law, are there any limits or constraints on judicial law-making? The court's response has been to defend judicial law-making as repair and upkeep of the common law: judge-made law — an area of specialised, if not arcane knowledge and expertise — should be altered by judges in order to keep up with the changes in society. Accordingly, common law judicial law-making relies not on the discretion of individual judges, but on community values. If community values shape, guide and constrain the judiciary, then it is possible to justify judicial law-making as a form of representative governance. By construing the community to include practitioners, scholars and the larger deliberative community, it may be possible to have more representative and therefore authoritative decisions by the court. Clear judgments that are a consequence of public debate and discussion are more likely to reach an outcome that is in accord with the principles of the regime. At the very least, they will have more significant support and acceptance in the community. Yet major questions remain. How

appropriate is it to speak of a community? To what extent is the judiciary better placed to discern the changing aspects of community values? In determining community values, will the court not be tempted to lead — that is, shape — community values rather than repair the law, producing controversy rather than consensus? As a consequence of adopting this method of interpretation, the court has been more willing to expose itself to what it considers informed criticism, making its judgments clearer and more accessible to the general public. It has been prepared to relax the rules of standing and broaden the range of interveners and *amicus curiae* or friends of the court, especially in constitutional cases.¹⁶ Judges have also been more willing to undertake extra-curial work, explaining the work of the court by granting interviews, making public speeches and presenting papers at conferences.

Implied bill of rights: 'split personality'

As late as 1986, the High Court had rejected the existence of an implied constitutional guarantee of freedom of communication.¹⁷ But by 1988, the court was hinting at a change in direction.¹⁸ The court's new jurisprudence was inaugurated in two decisions it handed down on the same day: *Nationwide News* and the *Political Advertising* case.¹⁹ In these cases, the court declared that the right of political communication was implicit in the Constitution. Such a constitutional implication imposed limitations on the laws parliament could legislate — for example, there were limits on the laws it could enact on political advertising.²⁰ Subsequently, the court, in *Theophanous*, held that such a constitutional right altered the common law of defamation and therefore could be relied upon as a defence in a civil defamation action.²¹ These cases suggested that the court was developing an implied rights jurisprudence that could, in time, provide an extensive judicially created bill of rights.²² The possibility of such an outcome was checked, at least in the short term, by the court's decision in *McGinty*, where it held that the principle of one vote one value was not an essential aspect of representative government and therefore could not be relied upon as a constitutional principle to overturn electoral laws in Western Australia.²³ *McGinty* was followed by two decisions which reconsidered the *Theophanous* decision. In *Lange*, a case concerning a defamation action by the former prime minister of New Zealand, David Lange, the court in a unanimous judgment confirmed its jurisprudence on implied right of political speech but rejected the view that such constitutional entitlements could be relied upon in defending a civil action.²⁴ *Levy* concerned the attempts of Laurence Levy to protest against recreational duck hunting in Victoria by entering designated areas without the required permits.²⁵ He argued that Victorian legislation limiting access to such areas was unconstitutional because it infringed the principle of free political speech. Though the court held that actions as well as speech were protected by the implied constitutional right of political speech, it

rejected Levy's claim on the grounds that there was no absolute right to free speech and that the relevant provisions were aimed at securing public safety and did so in an appropriate way.

Finally, in *Kruger*, a case dealing with the 'stolen generation' of Aborigines, the court indicated its reluctance to press its implied rights jurisprudence into new areas.²⁶ *Kruger* and others were Aborigines who had been taken from their families when they were young, pursuant to the Northern Territory *Aboriginals Ordinance* which made the Chief Protector of Aboriginals legal guardian, with the power to undertake the care, custody and control of any Aborigine. *Kruger* claimed that the ordinance and the various acts were contrary to the implied constitutional rights and guarantees of legal process, legal equality, freedom of movement and association, and freedom of religion. They also argued that the relevant legislation and the actions of the Territory's Chief Protector were unconstitutional because they amounted to genocide. The majority of the court held that the relevant provisions were not invalid by reason of any rights, guarantees, immunities or freedoms contained in the Constitution. It was also held that such implied rights could not be relied upon to commence civil actions. Thus the *Kruger* decision appeared to mark the limits — at least for the present — of the court's implied rights jurisprudence.

Separation of powers: limits on parliament

In addition to its decisions on freedom of political communication, the court turned to the separation of powers secured in the Constitution as an important source for the protection of liberty (Patapan 1999a; Williams 1999b; Winterton 1994; Zines 1997:Ch. 10; Parker 1994). It has discerned in the nature of judicial power, and the judicial process generally, a constitutional guarantee of a range of individual rights that are not subject to parliamentary discretion.²⁷ For example, the court has held that the legislature may not interfere with the judicial process, particularly with the requirements of natural justice.²⁸ Similarly, in *Dietrich*, the court has formulated a limited notion of right to counsel from the right to fair trial.²⁹ The issue in *Dietrich* was whether an accused person charged with a serious crime punishable by imprisonment, who cannot afford counsel, has a right to be provided counsel at the public expense. The majority, relying on the common law right of fair trial, held that in such cases a judge should adjourn or stay the trial until legal representation is available. Justices Deane and Gaudron went further by claiming that fair trial was entrenched in the Constitution's requirement of the observance of judicial process and fairness, implicit in the separation of judicial power.³⁰

In the *War Crimes* case, the High Court decided that the separation of judicial power recognised in the Australian Constitution prevented the Commonwealth parliament from enacting a Bill of Attainder, an enactment that imposes punishment

on a specified person or members of a specified class.³¹ Such a declaration of guilt and award of punishment by the legislature was an invalid usurpation by parliament of judicial power.³² Although the majority accepted that parliament may make retrospective legislation, Justices Deane and Gaudron, relying on the separation of judicial powers, went further, stating that parliament could not enact retroactive criminal laws as these would usurp judicial power.³³

The wider reach of the implications derived from the separation of powers could be seen in *Leath*.³⁴ In that case, a narrow majority upheld Commonwealth legislation, which provided that the setting of minimum sentences for Commonwealth offenders was to be done according to the law of the state where the trial took place. Justice Gaudron held the provision invalid because it required the exercise of a power that was inconsistent with the judicial process.

All are equal before the law and the concept of equal justice — a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such — is fundamental to the judicial process.³⁵

Because the provision required the exercise of a power that necessarily involved impermissible discrimination, it was not a part of the judicial power of the Commonwealth.³⁶ Justice Gaudron's judgment in *Leath* reveals the extent to which drawing upon constitutional implications — in this case, separation of powers — has the potential to introduce substantive judicial review into Australian constitutionalism.

Interpreting international conventions: the *Teoh* case

The court's implied rights jurisprudence, elaborating a regime of rights and freedoms implicit in the Constitution, was broadly in agreement with the orthodox Australian constitutionalism. It derived rights from representative and democratic institutions rather than 'nature' or 'humanity'. But in a number of its recent decisions it would seem that the court has tended to move beyond these institutional moorings in developing a conception of rights and freedoms. In these cases, the court has been prepared to turn to, and rely upon, international conventions, treaties and evolving common law to shape Australian constitutionalism. In doing so, the court has implicitly — and inevitably — relied on legal concepts and regimes that are founded on traditions of natural and human rights, thereby introducing and gradually incorporating into Australian constitutionalism a human rights jurisprudence (Opeskin and Rothwell 1997).

In Australia, a convention ratified by the executive does not become part of Australian law unless the provisions have been validly incorporated into municipal law by statute. The High Court in *Teoh*, by arguing that mere ratification was an

adequate foundation for a legitimate expectation that administrative decision-makers would act consistently with the convention appeared to be undermine this principle.³⁷ *Teoh's* case concerned a Malaysian citizen, Ah Hin Teoh, who had come to Australia on a temporary entry permit. He married an Australian citizen who had four children from an earlier relationship. There were three children of the marriage. Teoh applied for permanent entry permit, but while the application was pending he was convicted of drug offences and was sentenced to six years' imprisonment. He was subsequently informed that his application for permanent entry permit was refused on the ground that his conviction showed that he was not of good character. An Immigration Review Panel accepted that Teoh's wife and family faced a bleak future if resident status was not granted, but compassionate claims were not compelling enough to waive the character requirement. Accordingly, the minister's delegate made an order to deport Teoh. His application to the Federal Court was dismissed in the first instance, but allowed after an appeal to the Full Court. The minister appealed to the High Court by special leave. The majority of the court held that, provided there were no statutory or executive indications to the contrary, a ratification of a convention — in this case the *United Nations Convention on the Rights of the Child* — gave rise to a legitimate expectation that the minister would act in conformity with it and treat the best interest of the applicant's children as a primary consideration.³⁸ As the minister had not treated the best interests of the children as a primary consideration, and the applicant had been denied a fair opportunity to present a case against a decision that was inconsistent with legitimate expectations, the minister's appeal was dismissed.

The *Teoh* decision was praised for overcoming Australia's 'split personality' regarding human rights, showing an impressive international commitment to human rights issues and a half-hearted and inadequate domestic implementation of multilateral human rights instruments (Charlesworth 1995; Walker 1996). The Keating Labor government saw it in a different light. The Minister for Foreign Affairs stated that *Teoh* was a 'plainly bad decision', creating 'a decision-making environment that is unworkable in practice' upsetting the balance between the executive, legislature and judiciary (Evans 1996; Lavarch 1995). A joint statement was issued by the Minister for Foreign Affairs and attorney-general on 10 May 1995 stating that an unincorporated treaty would not raise legitimate expectations that governmental decision-makers would act in accordance with the treaty, nor would it form the basis for challenging administrative decisions. The government's legislative response to displace the legitimate expectations found by the court in *Teoh* took the form of the Administrative Decision (Effect of International Instruments) Bill 1995, which lapsed when parliament was dissolved for election.

Upon taking office, the Howard Coalition government revised the treaty-making procedures, providing a greater role to parliament, the states, territories and the

community in the treaty-making process, as well as establishing a Joint Parliamentary Committee on Treaties and a Treaty Council. A joint statement by the Minister for Foreign Affairs and the attorney-general and Minister for Justice issued on 25 February 1997 confirmed that unincorporated treaties did not give rise to legitimate expectations in administrative law. The government also adopted the recommendations of the Senate Legal and Constitutional Legislation Committee to implement the Administrative Decision (Effect of International Instruments) Bill 1997, almost identical to the Labor bill. Though the bill had the support of the Labor opposition in the House of Representatives, in September 1997 the shadow attorney-general announced that Labor would oppose it on the grounds that the *Teoh* decision did not cause the problems initially feared.

Leaving aside the merits of the argument regarding the administrative burden imposed by the *Teoh* principle, what is clear is that the decision allows the courts to rely upon ratified conventions and treaties as a foundation and measure for evaluating administrative decisions. As Australia is presently party to over 900 such conventions and treaties, *Teoh* would seem to have subjected the Australian legal regime to the major human rights treaties as well as numerous related international instruments that form the fabric of international human rights laws. True, the executive or parliament could exclude such effect. But to do so would appear inconsistent at best and hypocritical at worst, with significant political costs. Thus *Teoh* is much more far-reaching in its scope than the court's implied rights jurisprudence, and insofar as many of these treaties and conventions had natural rights and human rights as their theoretical foundations, it introduces the potential for a fundamental shift in character of liberal democracy in Australia.

International law and the Bangalore principles

In a similar way, the court's statements that it will rely on international conventions and treaties to shape the common law of Australia highlight the way natural rights and human rights-based constitutionalism is being introduced into Australia. As we have seen, treaties are not part of the domestic law until implemented by legislation. Nevertheless, the court has recently accepted that treaties, and possibly even customary international law, may have a legitimate and important influence on the development of the common law (Shearer 1995). Though an earlier formulation of this principle can be found in the judgments of Justice Murphy, the greatest supporter and advocate of the proposition before it was adopted by the High Court was Justice Kirby. The Bangalore Principles, as Justice Kirby referred to them, stated that international law is a source of law-making only when there is uncertainty, either a lacuna in the common law or obscurity or ambiguity in a statute.

In these instances, the judiciary could incorporate a rule into domestic law (Kirby 1995). The High Court, in *Mabo (No. 2)*, accepted that international law, including international conventions, could be used to influence the development of the common law. Though subsequent decisions have confirmed this principle, the court has advised caution and circumspection where parliament has not enacted the treaty obligations into law. The issue raises major questions regarding the authority of the judiciary in employing such methods of interpretation as a 'backdoor' means of incorporating treaties not enacted into law.³⁹ This difficulty can be seen in the judicial uncertainty on whether an international instrument can justify a change in the common law, as opposed to justifying the resolution of ambiguity, uncertainty or lacunae (Walker 1996).

Native Title

Perhaps the most contentious aspect of the new politics of the High Court has been its decisions on Native Title. Until the High Court's decision in *Mabo*, it was generally accepted that Native Title did not exist in Australia. Though the High Court itself had not decided the question, there was significant English authority supporting this view.⁴⁰ The issue had been addressed directly by the Australian courts only once, in the Supreme Court of the Northern Territory in the *Gove Land Rights* case where Justice Blackburn held that the common law did not recognise communal or group interests in land and, irrespective of the individual or communal nature of the claim, the British assertion of sovereignty over Australia extinguished all such claims.⁴¹

Though the *Gove Land Rights* case was extensively criticised — there were even suggestions by the High Court that the existence of Native Title at common law required reconsideration — the election of the Whitlam Labor government in 1972 shifted the focus for land rights from the judicial to the political forum (McRae *et al.* 1997:207). The legal status of Indigenous land rights in Australia at the time contrasted sharply with increasing international recognition of the rights of Indigenous peoples and more specifically with the jurisprudence in the United States, Canada and New Zealand (Dorsett and Godden 1998:199; Brennan 1995:161–83; Wells and Doyle 1997).

Mabo (No. 2)

It was in the light of these legal, political and jurisprudential advances, and a developing international consensus regarding the rights of Indigenous peoples, that the High Court confronted the question of Native Title in *Mabo*. In 1982, a group of Torres Strait Islanders, including Eddie Mabo, commenced legal action on behalf of the Meriam people against the State of Queensland, asking the courts

to declare that the Meriam people held Native Title to the three islands Mer, Dauar and Waier, constituting the Murray Islands. In 1985, Queensland enacted legislation designed to extinguish any Native Title rights which may otherwise exist. The intention of the *Queensland Coast Islands Declaratory Act 1985 (Qld)* was to declare, retrospectively, that the Queensland legislature's intention in 1879 was not only to acquire sovereignty over the Islands but also to extinguish the land rights of those who, by annexation, became British subjects. The issue before the court in *Mabo (No. 1)* was whether the 1985 Queensland act was inconsistent with the *Racial Discrimination Act 1975*. If it was, the question of whether the law recognised pre-existing Indigenous title could be addressed. In *Mabo (No. 1)* the High Court held that the attempt by Queensland to extinguish traditional land rights by means of its *Queensland Coast Islands Declaratory Act 1985 (Qld)* was inconsistent with the *Racial Discrimination Act 1975 (Cth)* and therefore was invalid. The decision allowed the litigation to proceed, the determination of facts remitted to the Supreme Court of Queensland where it was assigned to Justice Moynihan.

On 16 November 1990, Justice Moynihan delivered the court's determination of the issues of fact raised by the pleadings. Argument was heard by the High Court in May 1991. The court handed down its judgment on 3 June 1992. By a six to one majority, the court upheld the plaintiffs' claim to Native Title. With the exception of Justice Dawson, the sole dissident, all agreed that the common law of Australia recognised a form of Native Title. Regarding the question of extinguishment of Native Title, a differently constituted majority made up of Justice Brennan (with whom Chief Justice Mason and Justice McHugh agreed) and Justice Dawson held that extinguishment by inconsistent grant is not wrongful and does not give rise to compensatory damages.

If *Mabo* was more than a case about property, if it confronted fundamental or constitutive questions concerning Australian constitutionalism, it also disclosed the great limitations of posing such questions as legal problems. Though the case established a vital moral and legal foundation for the claims of Indigenous Australians, it did so in within the legal framework of property and a language that constricted the terms of debate and consequently the reach of any future settlement. Here was a case that could have benefited from public deliberation and compromise rather than legal adjudication.

But perhaps, in handing down its decision, this was what the court sought to initiate, for as Chief Justice Mason observed, Native Title was one of those controversial questions that the political community was happy to defer to the judiciary.⁴² Though the immediate effect of the decision was clear with respect to the litigants, its implications for land use in Australia was far from certain. Indigenous people entitled to Native Title would have to proceed through the courts to justify their claims. The validity of land dealings since 1975 was in question. The states,

mining and pastoral groups argued that the decision created uncertainty. In short, the decision made a judicial solution to the problem impractical and therefore unlikely. Though the court's decision, and even the court itself, was subjected to criticism, it is nevertheless undeniable that the case made possible a political resolution that would not have been possible otherwise (see generally Goot and Rowse 1994; McRae *et al.* 1997:210ff). The political resolution, a result of extensive, complex and unpredictable negotiations and compromise, exacerbated by the problem of representation in Indigenous communities, diversity of interests and federalism, took the form of the Commonwealth *Native Title Act* 1993 (Brennan 1995:Ch 2, 3; Goot and Rowse 1994; Attwood 1996; Stephenson 1995). The *Native Title Act* 1993 was made possible by the courts, implemented by parliament and finally endorsed by the judiciary, the outcome of a complex interplay of the legal and political. It represented a new settlement for Indigenous Australians and a transformation in Australian constitutionalism. But to what extent was it conclusive? Whether the judiciary could consistently take the lead in the formulation of Native Title and rely on parliament to support and take up its initiatives became crucial questions when the court handed down its decision in the *Wik* case.⁴³

Wik

Did pastoral leases necessarily extinguish Native Title? Put in these legal terms, the question obscured the profound practical import of the problem: if pastoral leases did not necessarily extinguish Native Title then 42 per cent of Australia — or more than 3 million square kilometres of Crown leasehold land — could be subject to Native Title claims. In June 1993, prior to the operation of the *Native Title Act*, the Wik peoples commenced proceedings in the Federal Court of Australia against the State of Queensland, the Commonwealth and others, claiming that Native Title and possessory title rights over an area of land and waters in far north Queensland.

The High Court in *Wik* divided on the question. The majority held that the grant of pastoral leases under the 1910 and 1962 Acts did not necessarily extinguish Native Title rights. However, to the extent Native Title was inconsistent with the particular rights and interests asserted with respect to the leasehold interests, leasehold interests would prevail over Native Title.⁴⁴ For the minority, as the lessees of the Michellton and Holroyd River leases had exclusive possession and that right was inconsistent with Native Title, Native Title could not coexist with leasehold estate and was thereby necessarily extinguished.⁴⁵

The majority decision to implement justice proved to have serious political consequences.⁴⁶ Though the court's decision was celebrated by Indigenous Australians, it received a different reception elsewhere. It was attacked by graziers, farmers and miners as leading to uncertainty and to a decline in the value of pastoral properties. Peak pastoral bodies such as the National Farmers Federation regarded

it as undermining Aboriginal reconciliation. The Queensland government refused to issue further leasehold and mining tenements and placed restrictions on further development work on pastoral properties (Hiley 1997; Hunter 1997; Horrigan and Young 1997). The High Court was singled out for an extraordinary and serious political attack. Queensland Premier Rob Borbidge described the court as 'an embarrassment' (*Australian*, 19 February 1997:1). Prime Minister Howard entered the debate, emphatically rejecting a law-making role for the court, while Deputy Prime Minister Tim Fischer criticised the judgment as an example of judicial activism, which should be overcome by appointing a new High Court judge who was 'conservative with a capital C' and would reject 'the doctrine of judicial activism' (*Courier Mail*, 5 March 1997:1).

The Howard government's response to the *Wik* decision, after discussions with premiers and chief ministers, pastoralists, mining and resource groups and the National Indigenous Working Group, was its '10-Point Plan' proposal to amend the *Native Title Act* 1993. The government's bill was opposed by the Labor Party on the grounds that only legislation benefiting Aborigines was valid. The National Indigenous Working Group on Native Title, made up of representatives of ATSIC, Native Title representative bodies and other key Indigenous organisations prepared a position paper, *Coexistence — Negotiation and Certainty*, outlining the reasons it rejected the bill. Though the *Wik* bill passed the House it was opposed in the Senate by Labor, the Democrats, the Greens and the independent Senator from Tasmania, Brian Harradine, where it was rejected with numerous proposed amendments. The Bill was returned to the Senate a second time and a number of amendments were agreed upon, such as a new registration test for Native Title applicants. But on four contentious matters — 'sticking points', as Howard termed them — the Senate refused to give in. The Senate rejection gave Howard a possible trigger for a double dissolution election and made an election based on race a real possibility. Concerned with such a possibility, Senator Harradine 'blinked': holding the balance of power in the Senate, he resolved the impasse by agreeing to negotiate on the four sticking points that were considered unacceptable to the government. Of the requirement that the *Native Title Act* should be subject to the *Racial Discrimination Act*, some aspects of the bill were made subject to the act. Regarding the registration test, where Howard had insisted on the need to prove physical connection to the land, Senator Harradine convinced him to allow those of the 'stolen generation' and others whose parents had connection to the land (the 'locked gates' exception) to appeal to a court and lodge a claim. The contentious sunset clause that would have made the *Native Title Act* provisions cease after six years was scrapped by Howard. Finally, with respect to the Aboriginal right to negotiate about mining leases on pastoral land, an alternative and lesser form of right to negotiate was adopted.

After an historic debate of 109 hours over a twelve-month period, and two rejections in the Senate, the bill finally passed the Senate on 8 July 1998. Howard welcomed the passage of the bill as 'a wonderful outcome for all Australians' (*Australian*, 9 July 1998:6). Kim Beazley declared that Labor would not campaign in the next election on the basis that it would amend the *Wik* amendments to the *Native Title Act*; changes would be made after legal challenges to the act. Senator Harradine justified his decision to compromise with the government as necessary to avoid a race-based election that he believed would have 'torn the fabric of our society and set race relations back 40 or 50 years'. According to him, a double dissolution election, with the possible election of One Nation senators, would have made the Senate anti-Indigenous for at least six years (*Australian*, 9 July 1998:6). Wik elder Gladys Tybingoempa, who had danced with Harradine on the lawns of parliament, and lobbied him in the final minutes before the vote was taken, felt betrayed by him. She and the Wik people who had travelled to Canberra to sit through the Senate debate had walked away from Parliament House declaring that they would turn to the courts to protect them. Judicial politics was now an essential aspect of the wider political struggles of Indigenous Australians.

Yet, as the court's subsequent decisions would show, judicial politics offered no greater certainty. As we have seen, in *Kruger*, the majority of the court held that the relevant provisions of the Northern Territory Aboriginal Ordinance and related legislation were not invalid by reason of any rights, guarantees, immunities or freedoms contained in the Constitution.⁴⁷ Finally, the High Court in *Fejo* was asked to decide that freehold grants did not necessarily extinguish Native Title.⁴⁸ The case presented the court with the opportunity of extending the *Mabo* principle beyond *Wik* and leasehold interests to all land in Australia. In holding that Native Title did not survive freehold grants, the court signalled the outer limits of its Native Title jurisprudence.

Limits to new politics

The general overview of the court's declaration that it 'makes' the law, as well as its decisions on rights and freedoms and Native Title reveals a number of significant features of the new politics of the High Court. Foremost is the fact that in a range of fundamental issues the court has taken an active role, and in some instances the lead, in policy formulation. In pursuing this role, the court has relied on the notion of representative democracy or responsible government secured in the Constitution, the common law and popular sovereignty. In doing so, it has also turned to international developments, especially international law and the jurisprudence of the Canadian, American and English courts to shape and guide its decisions. Importantly, this active policy-making role of the court has affected other institutions

of governance; in particular, it has imposed limits on both Commonwealth and state parliaments.

Theoretical limitations

In pursuing such a new politics, however, the court inevitably confronts theoretical and practical obstacles to its new jurisprudence. In redefining or restructuring aspects of Australian democracy, the court has had to negotiate the ideas and principles that secured its place within the regime and justified its exercise of judicial review. For example, if the common law declaratory theory is rejected as a 'myth', how is the court to reconcile the potentially unlimited law-making ability it thereby acquires with the fundamental, foundational principle of the rule of law? It is not clear that 'community values' as posited by sociological jurisprudence provide the complete and adequate answer. This dilemma is exacerbated by the fact that the court, subject to political demands and exigencies, defines its own place and role in the regime.

Of comparable import is the tension between a law-making judiciary and the concept of separation of powers that secures the impartiality and independence of the judiciary in the regime. If the theoretical basis for separation of powers is the Blackstonian notion of a judiciary that declares the law, will the abandonment of the declaratory theory thereby undermine, if not completely remove, the theoretical defence for having separation of powers? Of course, one possibility — as indicated by some of the court's decisions — is that the liberal-democratic requirement of checking and balancing justifies separation of powers. Though the language of checking and balancing appropriates American constitutional principles, especially those developed in *The Federalist*, such a model does not fit perfectly with a law-making judiciary, an institution that exercises 'Will' instead of 'Judgment' as Hamilton puts it in *The Federalist*. Indeed, a checking and balancing judiciary may come to appear no different from the executive and legislative branches that indirectly limit and curb the encroaching nature of ambition.

These questions that go to the legitimacy of the judiciary are in fact generally articulated in terms of democratic governance: should an unelected minority override the will and judgment of the people's representatives? To what extent is this form of judicial review consistent with parliamentary democracy? The immediate focus of such debates concerns the way judges are selected and appointed. Leaving aside attempts to make the Bench more representative — the need to accommodate federal concerns, minority representation, gender equality — these debates make possible more radical proposals for redefining the nature of the court, including the direct election of members, limited terms and quotas.

Finally, the important overarching question that needs to be posed is whether the court's new understanding and definition of its role within the regime — its implicit reconceptualisation if not restructuring of the institutions of governance

in Australia — is premised upon, or presupposes, a comprehensive view of Australian democracy.²⁸ Though crucial for understanding the nature of the court as an institution, the answer to this question will clearly have fundamental implications for the other institutions of governance in Australia.

Practical limitations

In addition to these theoretical concerns, the court has confronted a number of practical limitations, such as the incremental nature of its jurisprudence, the retrospective nature of its judgments, the changing membership on the Bench and the limits imposed by the specific nature of the dispute in each case. But perhaps the most significant difficulty in the context of the new politics of the High Court may be summarised as the problem of communication. The court has sought to make its decisions more open to deliberative democratic politics by writing clearer and more accessible decisions, by stating its policy presuppositions, and by confirming its law-making role. In doing so, it has encouraged and welcomed what it has termed informed criticism of its decisions. Accordingly, the court has sought to appoint a public relations officer as well as setting up a Website and providing quick access to its decisions (Williams 1999b). But, as we have seen, there are major obstacles in the path of such attempts to justify the court's decisions before the community. The opinion that the court is impartial and independent forms a crucial aspect of its authority. Yet a court that is seen as political, that enters or intrudes into the everyday aspects of the political fray, would appear to place at risk such authority. The sustained and personal attacks on the court, especially after its decision in *Wik*, revealed how vulnerable the judiciary is to such political criticism and how limited its resources are in undertaking politics of this sort.

This problem has been exacerbated by the decision of the Commonwealth attorney-general, Daryl Williams, not to defend the judiciary (see generally Patapan 1999a). Traditionally, British judges refrained from commenting on cases before the courts and were especially careful to abstain from comments on governmental policy; the judgments of the court served as its most authoritative announcements on matters before it (Thomas 1997; Mason 1990). Where its reputation or independence was at issue, it turned to the attorney-general to protect its interests.³⁰ In this context, the decision of the Commonwealth attorney-general, Daryl Williams, not to speak for the courts represented a major break from tradition and appeared to leave the court without a public defender.

According to Williams, it is now time to abandon the notion that the attorney-general should speak for the courts because such a view, based on a British model, is not appropriate for Australia. In Australia, the attorney-general does not necessarily have legal qualifications and is never excluded from the political debate in cabinet. Nor does the attorney-general exercise any independent discretion in supervising

criminal or contempt of court proceedings. Therefore 'the perception that the attorney-general exercises important functions independently of politics and in the public interest is either erroneous or at least eroded' (Williams 1995:183). Consequently, Williams (1995:190-92) argues that there are good practical reasons why neither judges nor the public should look to the attorney-general 'to take up cudgels for judges in media debate'. There is a risk that in making a substantive reply on an issue the interest of the judiciary may conflict with the interest of attorney-general, the government or the party in government. In representing the judiciary, the attorney-general may involve the judiciary in political controversy. Moreover, the demands on a modern attorney-general are so extensive that the response on behalf of the judiciary may not be adequate or timely; such a response may 'lack impact' (Williams 1995:190-92).

If the attorney-general will not 'take up the cudgels' for the judiciary, who is to speak for the courts? According to Williams, judges should seek other means for responding to media criticism and communicating with the public. In particular, he singles out the Judicial Conference of Australia (JCA) as the appropriate body to speak for the courts, with the potential to be a potent political force for the judiciary. The JCA was incorporated in 1993 as an association with membership open to judges and magistrates in Australia, other judicial officers exercising judicial power and former members of superior and intermediate courts. A secretariat with research functions was established with the assistance of the attorney-general (*Judicial Conference News*, May 1997:Vol. 1.1). The goal of the Judicial Conference is to represent the judiciary and promote 'harmonious and constructive relationships with the other arms of government' (*Judicial Conference News*, November 1997:Vols 1.2, 3). Importantly, according to the conference guidelines, it may speak on general matters concerning the judiciary, the administration of justice, and when requested by the chief justice or the judge or judges of a court, though it accepts that it will not speak on specific matters without consulting the relevant chief justice or judge of the court.

Clearly the JCA is a representative body that is intended to replace the attorney-general as the political guardian of the court, to speak for and on behalf of the judiciary, especially in the political forum. The establishment of the JCA and its promotion by the attorney-general is an acknowledgment of the political nature of the judiciary and the potential threat it poses to the government's policy-making ability; it is a concession to the increasing possibility of tension between a law-making judiciary and the executive and parliament. But the establishment of institutions such as the JCA may in fact justify and encourage greater political and partisan attack of the judiciary on the bases that it is no different from any other publicly accountable institution and it now has the political means to protect itself.

Future directions

Notwithstanding these theoretical and practical obstacles, the court has been fully cognisant of the international and domestic influences on Australian constitutionalism and its role within the regime and has attempted to meet these challenges by deliberate and considerate refashioning of its jurisprudence. Therefore the court's new politics reflects, to some extent, the contours and limits of Australian and international politics as well as the inherent limitations of institutional capacity in confronting and mediating such politics.

The court's redefinition of its role within the regime, evident in the jurisprudence of the Mason court (1987–95) was always vulnerable to subsequent reconsideration. In fact, the Brennan court (1995–98) and the present Gleeson court have substantially adopted the jurisprudential principles established by the Mason court, consolidating, clarifying and elaborating the changes theoretical and legal changes developed by the Mason court. This means that the decisions concerning rights, freedoms and Native Title we noted above will continue to inform the court's future decisions.

In saying this, however, we are mindful of the larger aspect of the court's decisions. There is now sufficient evidence to note a trend in democracies around the world — at a time when there is increasing dissatisfaction with the other institutions of governance, the judiciary is exercising greater influence and authority (Holland 1991; Jacob *et al.* 1996; Neal Tate and Torbjorn 1995). The judicialisation of politics and potentially the politicisation of the judiciary that is a consequence of this trend has been much criticised (for scholarship on the American developments, see Tucker 1995; Rosenberg 1991; Horowitz 1977). Significantly, it is difficult to foresee the extent to which such politicisation may result in declining confidence in the judiciary as an institution (for a discussion in terms of 'dignity' of institutions, see Waldron 1999).

Nevertheless, what is important for our purposes is the fact that these courts of final jurisdiction have tended to rely on each other's jurisprudence — there has been, in other words, a continuous conversation as well as appropriation of thoughts, ideas and decisions across a number of jurisdictions. Thus the highest courts are gradually developing an international common law and a constitutionalism that transcends the boundaries of each specific democratic regime (see generally Saunders 1996). It would seem, then, that of the institutions of governance, it is necessary to recognise and acknowledge the silent but powerful role of the judiciary who, in the course of their deliberations and judgments, are influencing the nature and character of international development and thereby meeting and mediating the challenges of global change and innovation.

Notes

- * This chapter draws on a larger research project on the High Court, *Judging Democracy: The New Politics of the Australian High Court* (forthcoming, Cambridge University Press), supported by a Queensland University of Technology Post-doctoral Fellowship.
1. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
 2. *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; *Hay v New South Wales* (1997) 189 CLR 465.
 3. See Galligan 1986:Ch. 4; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *A-G (Victoria) v Commonwealth* (1945) 71 CLR 257; *British Medical Association v Commonwealth* (1949) 79 CLR 201.
 4. *Koussorov v Bjelke-Petersen* (1982) 153 CLR 168.
 5. *Commonwealth v Tasmania* (1983) 158 CLR 1.
 6. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
 7. The appeals to the Privy Council were favoured by the British Colonial Office, a group of colonial chief justices and retired judges, and English investors (La Nauze 1972:173, 220–21, 248–49).
 8. See *Piro v W Foster & Co Ltd* (1943) 68 CLR 313.
 9. *Parker v The Queen* (1963) 111 CLR 610. See also *Shelton v Collin* (1966) 115 CLR 94; Menzies 1968.
 10. *Vinn v The Queen* (1978) 52 ALJR 418.
 11. In theory a right of appeal to the Privy Council remains under s 74 of the Constitution. However, such appeals require a certificate from the High Court and the Court has since 1914 declined all such requests. In *Kirmanli v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, the Court described s 74 appeals as obsolete.
 12. The constitutional role of the court was anticipated by Sir Garfield Barwick as early as 1964: see Barwick 1964; Bennett 1980: 82ff.
 13. A competition to design the building took place in 1972–73 and construction began in 1975. Its first hearing took place in June 1980. The court is now a major tourist attraction. Its Website (<http://www.hcourt.gov.au>) is a popular and sophisticated introduction to the building and the work of the court.
 14. See *Dugan v Mirror Newspapers Ltd* (1979) 142 CLR 583; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617; *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; McHugh 1988:20–24.
 15. The European Court of Justice and the decisions of the European Court of Human Rights had a major influence on the interpretation of law in the United Kingdom, undermining the strength of the declaratory theory to such an extent that by 1972 the judicial members of the House of Lords were willing to admit publicly the reality of judicial creativity. Lord Reid claiming that the declaratory theory was an 'open sesame' form of interpretation, a 'fairytale' no one believed any more (McHugh 1988; Lord Reid 1972; Lester 1993; Sturgess and Chubb 1988:257–93). In Canada, after a false start in 1960 with the Canadian Bill of Rights, the entrenchment of the *Charter of Rights and Freedoms* in 1982 justified the Supreme Court in adopting a new jurisprudence of human rights. In the United States the decisions of the Warren court in the 1960s placed the bill

of rights at the forefront of its jurisprudence. Similar developments could be discerned in India, Ireland and New Zealand.

16. *Batemans Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* [1998] HCA 49 (6 August 1998); *Ley v Victoria* (1997) 189 CLR 579.
17. *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 (Murphy dissenting).
18. *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 8.
19. *Nationwide News Pty Ltd v Willb* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
20. See *Nationwide News Pty Ltd v Willb* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
21. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
22. See for example the articles in the Symposium on Rights in (1994) 16 *Sydney Law Review* 145–305.
23. *McGinty v Western Australia* (1996) 186 CLR 140.
24. *Lange v Australian Broadcasting Tribunal* (1997) 189 CLR 520.
25. *Ley v Victoria* (1997) 189 CLR 579.
26. *Krugger v The Commonwealth* (1997) 190 CLR 1.
27. *Chu Kheng Lim v Minister of Immigration* (1992) 176 CLR 1.
28. *Leath v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ.
29. *Dietrich v The Queen* (1992) 177 CLR 293; per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
30. *ibid.*, Deane J at 326; Gaudron J at 362. See generally Hope 1996.
31. *Polyakovich v Commonwealth* (1991) 172 CLR 501. Historically, a bill of attainder referred to an act that inflicted capital punishment; an act imposing other forms of punishment was called a bill of pains and penalties. The United States Constitution specifically prohibits Congress or the States from enacting a bill of attainder; Art I, ss 9, 10.
32. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.
33. *ibid.*, pp. 606–29 per Deane J; 703–8 per Gaudron J.
34. *Leath v Commonwealth* (1992) 174 CLR 455.
35. *ibid.*, pp. 502.
36. *ibid.*, pp. 502–3. In their minority judgment, Deane and Toohey JJ held that the provision was inconsistent with the doctrine of the underlying equality of the people of the Commonwealth under the law and before the courts (at 486–87).
37. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273. For a discussion of the previous case law, see Walker 1996:209–11.
38. Per Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J dissenting.
39. See *Teoh* (1995) 183 CLR 273 at 288.
40. *Attorney-General (NSW) v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286.
41. *Mildirpan v Nahalo* (1971) 17 FLR 141; per Blackburn J at 244–45. See generally Brennan 1995; McRae et al. 1997:205–7.
42. As Chief Justice Mason notes, though the Commonwealth was originally a defendant in the proceedings, it subsequently ceased to be a defendant and became an intervener and ultimately did not participate in the hearing at all (Virtue 1993).

43. *Wick Peoples v State of Queensland* (1996) ALR 129.
44. Per Toohey, Gaudron, Gummow and Kirby JJ.
45. Per Brennan CJ, McHugh and Dawson JJ.
46. For an earlier discussion of these issues see Patapan 1999b.
47. *Krugov v Commonwealth* (1997) 190 CLR 1.
48. *Fjaj v Northern Territory of Australia* (1998) 195 CLR 96.
49. There is the question I explore in *Judging Democracy* (forthcoming, Cambridge University Press). The institutional limitations on the court — its changing membership, the way cases reach the court, the *ad hoc* nature of adjudication, to name a few — would argue against the possibility of such a comprehensive conception of Australian democracy.
50. There is some ambiguity concerning the status of the attorney-general. For a discussion of the view that the attorney-general should be independent and aloof from politics and the philosophical differences in approach to the office of attorney-general, see Edwards 1984:Ch. 3.