The Constitutional Centenary and the Counting of Blessings*

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Sir Ninian Stephen and the Constitutional Centenary

Has any Australian lawyer ever had a more glittering public career than Sir Ninian Stephen? There are few offices or honours that have eluded him. Knight of the Garter. Knight of the Order of Australia. Knight Grand Cross of the Order of St Michael and St George. Knight Grand Cross of the Royal Victorian Order. Knight Commander of the Order of the British Empire. One-time Governor-General of Australia. Member of the Privy Council. Justice of the High Court of Australia. Justice of the Supreme Court of Victoria. Australian Ambassador for the Environment. And still at work for his country and the wider world: President of the Constitutional Centenary Foundation at home; Senior Judge of the International Criminal Tribunal for the Former Yugoslavia abroad.

Despite all these honours, Sir Ninian remains a basically modest and exquisitely polite human being: sensitive to his fellows, warm in praise and encouragement, devoid of pomposity, meanness or small mindedness. An exemplar of duty – loved by his family and a wide circle of friends.

Mind you, during his service at Government House, Canberra, his new guests were sometimes astonished to feel a warm, unexpected, moist and muzzling presence under the table - the Stephen family dog who lay

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in wait there for the unsuspecting novice. My slightly adverse greeting to this astonishing presence, when first encountered, was remarked upon when Sir Ninian, as Governor-General, inaugurated me, with many dubious expressions of doubt, into the office of Patron of the RSPCA Australia. I think he saw me as the Scrooge of the animal kingdom instead of its protector. Save for this minor social infraction I can think of not a single criticism of this distinguished fellow citizen after whom this lecture series is named. I am honoured to be invited to deliver the fourth lecture in succession to my friends and colleagues, Justice McHugh, Chief Justice Gleeson and Justice O'Connor. I am specially glad to return to the University of Newcastle on whose Council I served twenty years ago and which has garlanded me with the honorary degree of Doctor of Letters which I am so proud to have. I am also proud to be associated with its Law School, so long in gestation; and with the *Newcastle Law Review* which is carving for itself an enviable reputation.

I have taken as my theme the Blessings of the Australian Constitution. I have done this in tribute to the work that Sir Ninian and his colleagues have performed, and are performing, in the Constitutional Centenary Foundation - striving to lift our national reflection from the simplistic single issues that tend to delight the media and those who quest for simple themes as if in fear that the people of Australia are capable of nothing else.

Every day of my working life - as Sir Ninian Stephen did earlier - I now live with the text and spirit of the Australian Constitution. It is right that, as a free people, we should be considering the Constitution's faults and weaknesses - and the ways in which we can improve it and renew it for the coming century. But it is also proper that we should consider its strengths as one of the six oldest written Constitutions still governing a nation and a people in a world of remarkable changes: so different from the world which saw its birth in 1901. My call is not one to complacency or self-satisfaction – emotions alien to my nature. It is a call to honesty and balance and proportion – three characteristics which Sir Ninian Stephen has deployed throughout his long life of service to the people of Australia. They are characteristics we should all strive to emulate.

The Suggested Constitutional Defects

Let me start first with a few suggested defects – just to position what follows in context and to demonstrate that these are not words of pious self-satisfaction and complacency.

It would be unsurprising if there were not a catalogue of faults in the Australian Constitution. Just compare the different age in which it conceived and the world of today. The year 1901 was one in which the British Empire was reaching its apogee. The penal settlements in Australia had

changed themselves into settler societies. Men of affairs controlled the colonial governments of Australia. For the most part, women's suffrage was still a distant dream. It was a time of White Australia, in which most of the immigrant settlers who came to this land derived from the United Kingdom of Great Britain and Ireland. The Aboriginal and other indigenous peoples of the continent were generally regarded as uncivilised nomads. Their land was taken without compensation. Their culture was ignored or belittled. If they were not killed, they were all too often marginalised or promised complete assimilation. The fear of hordes invading from the north was ever-present in the colonial mind. Imperial preference in peace and the Royal Navy in war were the foundations of Australia's national security.

Yet, in an astonishingly short time these settler societies had won for themselves self-government. They had busy, elected parliaments earnestly debating the statutes and issues of the day. Independent courts had been established and they reflected the legal traditions of "home". They had introduced innovations in industrial relations and in other legal spheres and had developed economic activity which had already gained for the settlers one of the highest standards of living in the world.

Contrast that world with the world we live in, a century later. The composition of Australia's population is radically changed and rapidly changing. "White Australia" has been officially abandoned. An attempt, often faltering, to achieve a new accommodation with the indigenous people of Australia and a correction of past injustices is reflected in the law[1] and in the policies of successive governments. The British Empire has completely faded away. Symbolically, its last substantial vestige, Hong Kong, is to be surrendered in little more than three months time. Imperial preference in trade has been replaced by strong trading links with the countries of the region and a commitment to global liberalisation of trading restrictions. A great network of international and regional institutions has sprung up to respond to the many problems which defy national solution and to the opportunities which demand global cooperation. Nuclear fission and information technology have revolutionised war. Our species has walked on the moon and now explores the outer reaches of space. Computers are linked across the world, integrating millions of minds and defying national borders. Genomic research promises even the possibility of a redefinition of the human species. Cloning of human beings is seriously debated.

We should not, therefore, be surprised that many of our fellow citizens point to defects and call for change in the Constitution. Ten areas, in particular, may be singled out as the subjects of the most persistent and oft-repeated criticisms needing constitutional re-consideration:

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[1] Cf *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1; *Native Title Act* 1993 (Cth).

1. Aboriginals

A number of commentators assert that the Constitution should be amended to reflect the special place in our nation of its indigenous peoples. As originally enacted, the Constitution even omitted people of the Aboriginal race from the powers of the Federal Parliament to make special laws with respect to the people of any race.[2] That exclusion was repealed with the passage of the *Constitution Alteration (Aboriginals) Act* 1967.[3] However there is still no recital about the special position, in Australia, of the Aboriginal and Torres Strait Islander people who are descendants of the people who inhabited this land before the settlers arrived. Some advocates propose the inclusion of recitals which acknowledge the special position of the indigenous peoples. Others call for a constitutional "Treaty of Reconciliation". Still others suggest the need for substantive provisions affording larger rights and constitutional compensation for past wrongs. These are controversial questions. They continue to trouble many Australians. They deserve consideration.

2. The Crown

The suggestion that all references to the Crown should be removed from the Constitution and that Australia should adopt a republican form of government is not entirely new. Indeed, there were advocates (a small minority) who urged that approach upon the Conventions which drafted the Constitution in the 1890s. There have always been a number of Australians who favoured the severance of links with the Crown of the United Kingdom. Only in the past decade or so have they commanded much popular support. Some of the recent advocacy for an Australian republic seems curiously outdated: at least when expressed in the form of appeals to nationalism. It appears more in keeping with the 19th than the 21st century. But other, more rational, voices suggest that a change in this feature of the Constitution is but a natural next step in an historical evolution which has been going on since 1901. For them, the process began with the surrender of all legislative and executive powers belonging to the United Kingdom in respect of Australia, now terminated by the *Australia Acts* of 1986. It progressed through the gradual termination of judicial powers with the end of Privy Council appeals from the High Court

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[2] Australian Constitution, s 51(xxvi) as originally enacted.

[3] At the same time, s 127 of the Constitution was repealed which precluded the counting of "aboriginal natives" in reckoning the numbers of the people of the Commonwealth. See also *Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373. On the topic of Aboriginal reconciliation, see W P Deane, Vincent Lingiari Lecture, "Some Signposts from Daguragu" (1997) 8 *Public Law Review* 15.

and Federal courts[4] and, finally, State courts.[5] Now the only avenue of appeal to the Queen in Council is that vestigial remnant in s 74 of the Constitution which is contingent on a certificate from the High Court, which the Court has said it will never again give.[6] These constitutional developments, allied with the evolution of the Crown's new role in the Commonwealth of Nations and the changing composition and full independence of the Australian nation and people, lead the more thoughtful advocates of a republic to call for the final termination of the last formal link with Australia's colonial past, in the person of the Sovereign as Queen of Australia. Obviously, this is a subject for serious debate. But the apparent appeal of the simple proposition often founders on the disagreements about the alternative arrangements to be put in its place. The present system is so untroublesome. The established reluctance of Australians to alter their Constitution by referendum is ever present as a discouragement.[7] Perhaps we will all be wiser after the Convention which the Federal Government has promised to convene later in 1997.

The Crown is mentioned repeatedly in our Constitution. The form and structure of the document, as well as the history of its operation, are profoundly monarchical. This would not change by the mere erasure of references to "the Queen". It would then simply be a constitution providing for a constitutional monarchy without a monarch. Indeed, there is a tension in the Constitution, for a federation is generally republican in character. Once the Crown is divided in many parts and the people are included with the Crown in Parliament for the referendum procedure under s 128 of the Constitution, the ultimate foundation of the legitimacy of the Australian constitutional settlement may appear to be the people of Australia. It is they who approved the Constitution and whose concurrence is exceptionally required for any formal alteration.[8] Yet so powerful in the mind of the Australian people at the time the Constitution was established was the idea of monarchy, with its centralising forces coming

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4 *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Ex parte Attorney-General for Queensland* (1985) 159 CLR 461.

5 *Australia Act* 1986 (Cth), s 11.

6 *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 at 465. See also *Attorney-General of the Commonwealth v T & G Mutual Life Society Ltd* (1978) 144 CLR 161.

7 Only eight alterations have been effected by the Constitution Alteration Measures on Senate Elections (1906); State Debts (1909); State Debts (1928); Social Services (1946); Aboriginals (1967); Senate Casual Vacancies (1977); Retirement of Judges (1977); and Referendums (1977). On the topic of republicanism see A Abbott, *The Minimal Monarchy and Why it Still Makes Sense for Australia*, Kent Town: Wakefield Press, 1995; A Atkinson, *The Muddle Headed Republic*, Melbourne: Oxford University Press, 1993; M L Brabazon, "Mabo, the Constitution and the Republic" (1994) 11 *Australian Bar Review* 229; Z Cowen, "The Legal Implications of Australia's Becoming a Republic" (1994) 68 *Australian Law Journal* 587; B Galligan, A Federal Republic - Australia's Constitutional System of Government, Melbourne: Cambridge University Press, 1996; Republic Advisory Committee (M Turnbull, Chairman), *An Australian Republic*, Canberra: AGPS, 1993; G Winterton, *Monarchy to Republic: Australian Republican Government*, Melbourne : Oxford University Press, 1994.

8 Cf *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ; *McGinty v Western Australia* (1996) 186 CLR 140 at 230 per McHugh J.

together in a personal Sovereign, that the early federal notions, evinced in the original decisions of the High Court, soon gave way. The tendency to centralisation of power - a general feature of monarchy - continued to gather apace, at the cost of the federal elements. And centralisation of power is still a dominant characteristic of the Australian Constitution. It is thus monarchical and not federal or republican in its essential features. These features could not be changed with a few verbal erasures to the constitutional text.

3. Parliament

There may be less respect today for the institution of Parliament than existed at the time of Federation. In part, this would be because of disillusionment with the public performances of some Parliamentarians. But, in part, it is also a reflection of the loss of power from Parliament to the bureaucracy, to the judiciary and, particularly, to the Executive Government. Whilst the formal system of government in every Australian jurisdiction remains parliamentary, the realities have everywhere enhanced the power of the cabinet, and especially of the head of government. These features of modern realities are every day given emphasis by media coverage of political affairs. There is a widespread feeling that problems are now too complex for a representative Parliament of lay-people who often appear to concentrate their attention upon simple, symbolic issues associated with the race for office rather than the difficult business of government when office is won.

4. No Bill of Rights

Then there is the absence of a general Bill of Rights. True it is there are particular rights guaranteed by the terms of the Australian Constitution. But Justice Dawson was clearly correct when he pointed out that the Founders of the Australian Constitution deliberately rejected the proposal to include a Bill of Rights, believing that the better safeguard for the liberties of Australians would lie in democratic Parliaments.[9] Such guarantees as existed in the Constitution, save for that found in s 92[10] have often attracted a rather narrow construction from a High Court respectful of

[9] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 186. See also 133-134 (per Mason CJ) and *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 193. Note *Cunliffe v Commonwealth* (1994) 182 CLR 272, 361; *McGinty v Western Australia* (1996) 186 CLR 140 at 187-8.

[10] Guaranteeing freedom of trade, commerce and intercourse among the States. See now *Cole v Whitfield* (1988) 165 CLR 360.

parliamentary democracy and, until lately, unaccustomed to the jurisprudence of basic rights.[11] Australia is now one of the few nations of the world without a constitutional charter of rights. Even the United Kingdom has a kind of charter in the *European Convention on Human Rights and Fundamental Freedoms*. Although not incorporated into domestic law, that Convention can afford an avenue of redress by citizens of the United Kingdom through proceedings in the European Court of Human Rights.[12] It can also affect local judicial decisions.[13] In Australia, the High Court has found implied constitutional rights, which are derived from the democratic character of the polity in the provisions and structure of the Constitution.[14] International human rights treaties to which Australia is a party have come "inevitably"[15] to affect the content of Australia's domestic law. In these circumstances, proponents of constitutional change urge that a more modern, democratic and candid way to enshrine basic rights is to adopt a constitutional Bill of Rights which is given legitimacy by the approval of the people. Proponents fear that such a proposal would founder on the rock of the conservatism in formal constitutional change. Opponents fear the politicisation and excessive empowerment of the judiciary at the expense of the other, more accountable, branches of government. But, clearly, this is an important debate which we must have.

5. Federal weaknesses

Within a federation, it is inevitable that there will be controversy about the distribution of powers between the national and the sub-national areas of government. These debates accompany the political life of every country. Critics of the Australian document take to task both the heads of power settled in 1901 and the approach to the constitutional grant of power to the Federal Parliament which was established by the *Engineers' Case* in 1921.[16] As a result of that decision, the federal Parliament's powers were significantly enhanced. No implication, derived from federation itself,

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[11] See eg *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 581-582; *Kingswell v The Queen* (1985) 159 CLR 264. Cf *Cheatle v The Queen* (1993) 177 CLR 541 and P Hanks, "Constitutional Guarantees" in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Sydney: Law Book Co, 1992, 92 at 98-100.

[12] See N Lyall, "Whither Strasbourg - Why Britain Should Think Long and Hard Before Incorporating the European Convention on Human Rights into Domestic Law" (1996) 18 *Liverpool Law Review* 115.

[13] See eg *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.

[14] See eg *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald and Weekly Times Limited & Anor* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211. But see J Miller, "The End of Freedom, Method in *Theophanous*" (1996) 1 *Newcastle Law Review* 41.

[15] *Mabo v Commonwealth [No 2]* (1992) 175 CLR 1 at 42.

[16] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 28 CLR 129 affd (1921) 29 CLR 406 (PC).

could stand against a clear grant of power to the Commonwealth. Advocates of federalism urge a reassignment of powers to enhance those of the outlying governments. They are specially concerned about the diminishing sources of State revenue which have a potential to erode the viability of the surviving functions of State governments. The failure of the Constitution to provide clearly for the democratic character of State governments[17] is also said to be a weakness which requires attention before any redistribution of powers from the centre can be contemplated.

6. Local government

Local government is not mentioned in the Constitution although it long preceded the establishment of the Commonwealth. There are some advocates of change who argue that a proper redeployment of power within Australia would be between the federal Parliament and government and local government, bypassing the States. If this seems too adventurous for a nation which has been described as "constitutionally speaking, a frozen continent",[18] the recognition of local government and the protection of its democratic character could be a reform which would have many supporters.

7. International treaties and external affairs

This is an area of acute concern in several quarters. It has been the source of the effective expansion of the power of the Federal Parliament by the making of laws with respect to external affairs.[19] Fears are often expressed that this head of power, allied with international treaties dealing with topics hitherto the subject of State law in Australia, may be used to undermine the federal compact and to redistribute power to the Commonwealth's advantage without the "irksome" necessity to secure the approval of the people at referendum. Concern about the direction of international treaties, ratified for Australia by the federal executive, came to a head after the decision of the High Court in *Teoh v Minister for Immigration and Ethnic Affairs*.[20] That decision produced State legislation purporting to afford relief from some of its implications.[21] A Bill introduced into the Federal Parliament designed to overcome the effect of the decision lapsed

[17] Cf *McGinty v Western Australia* (1996) 186 CLR 140.
[18] G Sawer, *Australian Federalism in the Courts*, Melbourne: Melbourne University Press, 1967 at 208.
[19] s 51(xxix). See *Victoria & Ors v The Commonwealth*, (1996) 70 ALJR 680 (HC).
[20] (1995) 183 CLR 273.
[21] *Administrative Decisions (Effect of International Instruments) Act* 1995 (SA).

with the prorogation and dissolution for the 1996 general election.[22] The Federal Government has announced proposals which will afford the Federal Parliament a greater role in the scrutiny of international conventions, with their now clearly revealed scope for affecting Australian domestic law.[23] Critics of the Constitution urge the adoption of a clear brake on the power of the Federal Executive to ratify international treaties without the concurrence of the States, or at least of the Senate established to reflect State diversity. Some even argue for the need to secure the approval of the Parliament as a whole. This is one area where the growing influence of globalisation and regionalisation are not really reflected in a constitution drafted for a different age. Yet its adaptation by court decisions has sometimes, in effect, altered the distribution of powers, reducing not merely the powers of the States under the Constitution but also the prerogative of the Australian people to approve or disapprove such changes.

8. The judiciary

The growing appreciation of the importance of the High Court of Australia in deciding the federal balance, and in the general development of the law in Australia, has led to demands, more strident of late, for constitutional controls upon the appointment of Justices of the High Court and of other Australian courts. Whilst the spectacle of congressional hearings, such as accompanied the nomination to the United States Supreme Court of Judges Bork and Thomas seem out of place, and even undesirable, in Australia, some public scrutiny of the opinions and attitudes of judicial appointees may well be appropriate, given the great power which Justices of the High Court, in particular, enjoy, once they are appointed. By their decisions they may sometimes affect the very nature of the society we live in. So long as the rhetoric of the declaratory theory of the judicial function was accepted, such democratic scrutiny was generally considered inappropriate. Alternatively, it was sufficiently satisfied by the appointing function of the Executive, answerable to Parliament. Once it became plain, and generally acknowledged, that judges in deciding cases have inescapable choices to make and are not engaged in a purely mechanical function (least of all in constitutional controversies) appointments to the judiciary – and especially to the High Court – become more arguably matters of legitimate public and political interest. Moreover, the qualities appropriate to appointment become more debatable. The notion that lawyers, skilled in the traditional areas, are necessarily the most suitable to have a seat on the High Court becomes rather more controversial.

[22] *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth).
[23] Australia, Department of Foreign Affairs, *Treaty Making Reforms*, May 1996.

9. Outside power

There is a growing recognition that changes in the realities of the world in which the Constitution operates affect the capacity of the political system it establishes to afford good government to the Australian people. Transnational corporations, the international market in capital and global media operate, to a large extent, beyond the effective power of the governments of any but the most significant nations. What can be done about this increasingly important feature of the world we live in is unclear. Perhaps it merely underlines the diminishing significance of the nation state, and the constitutions by which they live. As governmental and regulatory powers increasingly pass to international agencies, it becomes imperative that a national constitution, such as Australia's, should reflect the realities of the regional and global environment to which Australian institutions must respond and which they must try to influence.

10. Difficulty of change

There is finally the obstacle of the mechanism for change of our Constitution. Very few amendments have secured the majorities required by s 128 for a valid alteration. The number is even smaller when it is remembered that three of the eight proposals only approved by the necessary majorities were adopted on the same occasion in 1977. Critics suggest that the requirements for formal change are too burdensome and that this is part of the reason for the pressure to adopt an expansive interpretation of the Constitution, out of recognition of the fact that formal amendment is almost impossible. A simpler procedure, combined with community education in the desirability of regular constitutional change, are said to be the path proper to a people who take their own responsibility for modernising and reforming their basic law. It is to the people, rather than judges, that we should look in the future as we adjust the centenary Constitution to the rather different nation and circumstances it must serve in the century to come.

I trust that I have done justice to some of the chief demands for constitutional change in Australia. Others exist. They include the position of the States, the system of responsible government envisaged by the Constitution (claimed to be the "big mistake" of the Constitution[24]) and the demand for a more appropriate and realistic reference to the public service than exists in the antique fiction that it is merely part of the Executive

[24] H Evans, "Reflections on the Founders", Australian Parliament, *The House Magazine*, 1 March 1995 4 at 8.

power vested in the Governor-General as the Queen's representative.[25] Some of the language[26] of the Constitution is assailed as outdated, inappropriate and misleading. Some of the bright ideas enshrined in the Constitution are now, effectively a dead letter.[27] Some transitional provisions are clearly spent. They could be tidied up without offence to anyone.[28] But these are trifles. The basic system of government established by the Constitution endures. It is this achievement which deserves recognition. In my view it merits celebration at the very time that, as a free people, Australians contemplate the changes which might be needed to adapt the Constitution to the future.

Institutional Adaptation

Given the great changes which have occurred in Australia and the world since the establishment of the Commonwealth, it has been imperative that the central institutions created by the Constitution should adapt. And adapt they have.

1. The Crown

At the time of federation, it was the decision of the people to whom the Constitution was twice submitted for a vote, to federate "under the Crown of the United Kingdom of Great Britain and Ireland".[29] Recent research has shown that the Founders, who participated in the debates of the Convention, were by no means rabid imperialists. They rather liked old Queen Victoria, who had been on the throne for most of the century. But a notion of imperial association only came later, in the battlefields of the Great War.

Over the century, the Crown in Australia, as in England, has normally performed its duties as Ministers advised. So it was when Governor Strickland, under Royal instruction, extended the duration of the New South Wales Parliament in 1916. He was then relieved by the King for his initial hesitation.[30] So it was when King George V accepted, reluctantly it is true, the insistent advice of Prime Minister Scullin that Sir Isaac Isaacs, an Australian, should be appointed as his representative and Governor-General.[31]

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[25] Australian Constitution, s 61.
[26] See eg *ibid*, ss 58, 59, 60.
[27] See eg s 101 (Inter-State Commission).
[28] See eg ss 69, 70, 95.
[29] Preamble to the covering clauses of the Constitution.
[30] H V Evatt, *The King and His Dominion Governors*, London: Oxford University Press, 1936, at 146-152.
[31] See P Hanks, *Constitutional Law in Australia*, Sydney: Butterworths, 1991 at 140.

King George V gave his assent to the *Statute of Westminster* enacted by the United Kingdom Parliament to confirm the complete legislative independence of the self-governing dominions of the Crown. King George VI assented to the *Statute of Westminster Adoption Act* 1942 (Cth) by which it was enacted that no Act of the Parliament of the United Kingdom, passed after the commencement of the Act, should extend or be deemed to extend to Australia unless expressly declared in that Act that Australia has requested and consented to such enactment.[32]

It is in the reign of the present Queen that the most significant changes affecting the Crown in Australia have occurred. Soon after her accession, she approved her separate designation as Queen of Australia.[33] A separate Australian Crown was thereby established. In 1984, the Queen revoked the Letters Patent issued by Queen Victoria in October 1900 relating to the office of the Governor-General of the Commonwealth of Australia. She issued new Letters Patent, more modern in form and more appropriate in content, doing so on the advice of her Australian ministers.[34] In 1986, in Canberra, the Queen gave the Royal Assent to the *Australia Act* 1986 (Cth). She assented to an Act of the same title enacted in substantially identical terms by the United Kingdom Parliament.[35] Amongst other things, these statutes which finally terminated the remaining appeals to the Privy Council, save for the vestigial residue in s 74 of the Constitution already mentioned.[36] They repeated the termination of the power of the Parliament of the United Kingdom to legislate for Australia. They restated[37] the requirement that the Parliaments of the States must act in the manner and form required by law.[38] They entrenched and clarified the role of State Governors as representatives of the Queen.[39]

Although the Crown's representatives retain the traditional privileges of a constitutional monarchy (to be consulted, to encourage and to warn) the convention has been that they invariably act in accordance with the advice of their Ministers. It is perhaps ironic that the reason often advanced as to why the events of November 1975 damaged the position of the Crown in the Australian Constitution is precisely because what happened contrasted markedly with reticence of Crown representatives and appeared to depart from the traditions of candour and transparency which have otherwise marked the modern relations in Australia between representatives of the Crown and the elected government.

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32 *Statute of Westminster*, 1931 (UK), s 4.

33 *Royal Style and Titles Act* 1953 (Cth). See R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia*, 5th ed, Sydney: Butterworths, at 10-11.

34 Letters Patent relating to the office of Governor-General of the Commonwealth of Australia. 21 August 1984 in Australia, *The Constitution*, Canberra: AGPS 1986, 42-45.

35 1986 c 2. See discussion Lumb and Moens, above n 33 at 13-14.

36 *Australia Act* 1986 (Cth), s 11.

37 *Ibid*, s 1.

38 *Id*, s 6.

39 *Id*, ss 7, 8.

There are rational arguments for the system of government which constitutional monarchy establishes – barring ex-politicians (or for that matter ex-judges) from the position of Head of State. In some ways the very absence of the Head of State from Australia creates a system which appeals to some Australians. At the least the system, as such, has overwhelmingly performed as duty – not personal ambition or self-interest – required. We may change it. But we should make ourselves aware of its paradoxical strengths before we do.

2. Parliament

The Parliaments of Australia have also adapted to changing times. Under the Constitution, the Australian Parliament contained two features which were unique when they were adopted. The first was the provision for direct election of the members of the Senate. This is still not the case in Canada. Only later was it adopted in the United States. The second was the provision for the resolution of conflicts between the Chambers of the Federal Parliament found in the provisions in s 57 of the Constitution.[40]

Attempts have been made to win back popular confidence in the Houses of Parliament, notwithstanding the modern ascendancy of the Executive. House and particularly Senate Committees, by diligent work avoiding the worst excesses of partisan politics, have won, especially for the Senate, a respected and important role in federal government in Australia. The Senate is a brake on majoritarianism which only the naive now believe constitutes the true definition of a modern democracy. Although the Senate has not become, as such, a House of Parliament representing the States, it has ensured that the diversity of viewpoints reflected in all parts of this very large nation, may provide a balance to the force of numbers reflected in the House of Representatives. Moreover, the Senate has become a Chamber in which political viewpoints, which do not always embrace the two major political groupings in the nation, can have their say. This is doubtless viewed by some as an annoying limitation on firm government and democratic mandates. However, because the Senate is itself elected, it is seen by others as the nation's protector of diverse points of view. It has helped to ensure that our national Parliament is so much more effective in preserving and reflecting the diversity of our federation than, say, the Canadian Parliament in Ottawa.

In addition to specialist committees, the parliamentary innovations for the scrutiny of Bills and of subordinate legislation have been pioneered by the Australian Parliament. That Parliament has also established statutory guardians to help it in the performance of its functions. The traditional

[40] See *Cormack v Cope* (1974) 131 CLR 432.

office of Auditor-General, is now supplemented by the Ombudsman, the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and other bodies which support and stimulate the work of the legislators. They, in turn, have promoted administrative reforms for the assurance of lawfulness, fairness and general reasonableness in the activities of the bureaucracy.[41] To observe how far the Federal Parliament, under the same Constitution, has developed in the course of the last century, one need only compare the size, subject matter and variety of the federal legislation in the early years of the Commonwealth with the enormous output of lawmaking which exists today. It is difficult to conceive how an effective response could have been offered to the acute challenges of war and peace that have occurred in this century, without a national Parliament enjoying large powers for the whole of Australia.

3. The Judiciary

In 1902, introducing the Bill which became the *Judiciary Act*, Alfred Deakin declared that:

> "The Constitution is the supreme law. The High Court determines how far and between what boundaries it operates. It is the Court which decides the orbit and boundary of every power".

There is no provision in the Constitution which reserves to the High Court the power to nullify statutes which it has exercised since its establishment. As in *Marbury v Madison*,[42] this has just been a power accepted as inherent in a federal system of government. It is necessary to have an umpire. From the first, the High Court of Australia established its independence and authority as the guardian and expositor of the Constitution. It recognised from its earliest days that constitutional interpretation required techniques which were different from those developed for other judicial tasks of interpretation.[43] Justice Isaacs in *The Commonwealth v Kreglinger*[44] pointed out that the Constitution was "made not for a single occasion but for the continued life and progress of the community". He stated that its meaning was to be derived from the "silent operation of constitutional principles". Similarly, Justice Windeyer in *Victoria v The Commonwealth*[45] explained that because the Constitution was the fundamental law of the

[41] M D Kirby, "The AAT - Twenty Years Forward", unpublished paper, Australian National University, July 1996.

[42] 5 US 137; 1 Cranch 137 (1803). See K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction*, Sydney: Butterworths, 1994, 324-337.

[43] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367-8. See K Booker, A Glass and R Watt, *ibid*, 54.

[44] (1926) 37 CLR 393.

[45] (1970) 122 CLR 353.

land its "interpretation ... may vary and develop in response to changing circumstances".

As the century progressed, and the formal inflexibility of the Constitution became clearer with each defeated referendum proposal, it became obvious to every Australian, including to the Justices of the High Court, that a broad construction of the Constitution was even more necessary if its words were to have any hope of adapting to the complex commercial, economic, social and political changes which were occurring in the nation and the world.[46]

The examples of the adaptation by the Court, for later needs, of the constitutional powers devised in an earlier age are legion. The best known involve the expansion of the power with respect to industrial conciliation and arbitration;[47] external affairs;[48] corporations;[49] and the large expansion of the postal powers to embrace successively broadcasting[50] and television.[51] In times of war, the defence power was given a larger ambit to meet the vital need to ensure the very survival of the nation.[52] As the power and responsibilities of the Federal Parliament and Government expanded, so did the powers of federal taxation.[53]

Yet for all this, it is sometimes more important to study the cases involving the denial of power and the assertion of authority to appreciate the impact of the High Court's decisions on the character of government in Australia.

The decision of the Court in the *Communist Party Case*[54] was certainly one of its most noble moments. By a majority of six Justices to one,[55] the Court struck down as unconstitutional the *Communist Party Dissolution Act* 1951 (Cth). The decision came in the midst of what can now be seen as hysterical public and media concern about communists in Australia. The decision saved Australia from the legal excesses which manifested themselves at the same time in the United States of America, South Africa and other countries.

The Court has also vigilantly defended its authority whenever it was seriously challenged. Anyone in doubt should read the transcript of the exchanges with counsel recorded in *Tait v The Queen*.[56]

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46 *Tasmania v Commonwealth* (1985) 158 CLR 1 at 221 (per Brennan J).

47 See eg *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

48 See eg *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; cf *Victoria v Commonwealth*, High Court, unreported, 4 September 1996.

49 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. Cf *New South Wales v Commonwealth* (1990) 169 CLR 482.

50 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

51 *Jones v Commonwealth* (1965) 112 CLR 206.

52 *Farey v Burvett* (1916) 21 CLR 433. Cf *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43 at 83.

53 See esp *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575. Cf *Commonwealth v Cigamatic Pty Limited* (1962) 108 CLR 372.

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

55 Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ; Latham CJ dissenting.

56 (1962) 108 CLR 620 at 623-627.

Our Constitution therefore creates, or envisages, at the one time, the stable, unelected elements of government (the Crown, the civil service, the military and the judiciary) and the impermanent but elected elements (the two Houses of Parliament; the Ministers of State who are to be Members of the Parliament[57] and, in the exceptional case of a referendum under s 128 of the Constitution, the whole body of the electors, representing the people of Australia). This is a complex mixture of authority and democracy, of permanency and impermanency, of paradoxes, fictions, conventions, practices and law. Yet by the world's standards, it works remarkably well.

Blessings Remembered

So what can we say are the chief blessings of the Constitution as its centenary approaches? Just to survive and endure a hundred years – even so turbulent a century as that past – is not enough. That our country is still governed under a Constitution devised in a different age could theoretically be as much a commentary on lethargy and indifference to the needs for reform as on the value of the system of government which the Constitution puts in place. As to the missing ingredient of excitement, perhaps this is because the imperial power which formally granted the Constitution was, by the time it did so, no tyrant. The evolution of the Constitution owed more to the work of earnest, middle-aged, male settlers and their descendants than to the revolutionary patriots who called forth the Constitution of the United States.[58]

What are the features of the Australian Constitution which we should chiefly celebrate? There are, I suggest, ten at least which deserve our consideration:

1. Securing a nation

By the Constitution, Australians established a nation. They created a federation in a continental country. That federation has survived a century of revolutions, wars, and unstable national borders. If we look around the world today, we see the breakup of nations, particularly of federal states. The Union of Soviet Socialist Republics, Yugoslavia, Czechoslovakia

[57] Australian Constitution, s 64.

[58] G Craven, "The Founding Fathers: Constitutional Kings or Colonial Knaves?" in *Australian Parliament, Parliament and the Constitution - Some Issues of Interest*, Papers on Parliament No 21, December 1993, 119, 121. See also B de Garis, "How Popular Was the Popular Federation Movement?", *loc cit*, 101. As to the Founders, see R R Garran, *Prosper the Commonwealth*, Sydney: Angus & Robertson, 1958 at 112.

and Pakistan have split asunder. Australia has done better than Canada and the United Kingdom because its Constitution recognised from the start the need, in a large and diverse country, to share the central and the outlying power. Our federal arrangements have their distinct weaknesses. But no-one seriously suggests that the solution to them is the dissolution of the nation.

2. Stability and change

We share with other stable democracies, the United Kingdom, the United States, Sweden, Switzerland and Canada, constitutional arrangements within which change, reflecting the popular will, can be readily accommodated. Stability, in itself, may be no boast. The laws of the Medes and Persians were inflexibly resistant to change. The secret of the success of the Australian Constitution has been its adaptability. Other lands, with longer histories, have seen their constitutions changed by violence and revolution. Our stable constitution, and the strong institutions which it established, has provided Australia with the institutional foundations upon which political, business, legal and social affairs can be ordered with the assurance that the fundamental features of society will not be readily changed by political whim or by the unstable exercise of power.

3. Rule of Law

The Constitution also enshrines the rule of law throughout Australia. It is upheld by all the courts. It is supervised by the one national and federal supreme court: the High Court of Australia.[59] The independence of the judiciary, protected in the High Court and in the federal judiciary by constitutional control over removal[60] ensure that judges will act, with neutrality and courage, separately from the political branches of government. Far from the rule of law becoming weakened with the passage of a century of our constitutional government, recent decades have seen an enlargement in the facility of judicial review, both by the common law[61] and by statutes enacted by the Federal and State Parliaments.[62] No-one is above or outside the law in Australia. True it is that in practice it may often be inaccessible to ordinary citizens. When accessed, the law may be in need

[59] Australian Constitution, s 71. Cf N M Stephen, Remarks on receiving an Honorary Degree (1986) 15 *Melbourne University Law Review* 746, at 747.

[60] *Ibid*, s 72. See now as to State Supreme Courts *Kable v Director of Public Prosecutions (NSW)*, (1996) 70 ALJR 814 (HC).

[61] K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction*, above n 42, 324ff. But cf *Craig v South Australia* (1995) 69 ALJR 84.

[62] *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

of reform. But, in the end, high and low are subject to its rule which is enforced by independents courts which are uncorrupted and highly trained. Cases are not decided in Australia by telephone calls to judicial officers by powerful people. Yet, as we know, this is the reality of the exercise of power in most countries of the world.

4. Democracy

The Constitution enshrines the features of our representative democracy. Governments are peacefully changed by the vote of the people in elections which are conducted with integrity. It is a blessing we mostly take for granted to be a citizen of a free country and regularly to live through a peaceful change of government. Overnight the trappings of power change. The conventions are not challenged. Moreover, the fact that leadership of the nation *can* change means that, in our society, ideas constantly compete for the acceptance of the people. In turn, this means that our country is faced at all times with new ideas competing for the people's support. Autocracy tends to be closed to new ideas. Our Constitution provides the governmental, legal and social environment in which such ideas may flourish.

5. Federal government

The elected Senate ensures a break on unbridled majoritarian rule. It does so by ensuring that a different balance may be present in the Parliament. Senators are elected by the people in the scattered communities over the face of the continent. Minority viewpoints can be, and are, represented. The essence of a modern democracy - a reflection of majority will tempered by respect for minority interests - is better achieved in our federal arrangements than in most others.

6. The civil service

The country has been well served by a talented, well trained and uncorrupted civil service. We are still a nation that is shocked by corruption in office when it is revealed. We have not embraced the notion that corruption is a way of life or a mollification of rigidity of laws or administration. The tradition that the civil service faithfully and loyally works within the law to serve whichever government the people elect is deeply embedded in our constitutional traditions, Federal and State.

7. The armed forces

The armed forces of Australia are small in number, non-political in tradition and subordinate to the civil power. The command of them is vested in the Governor-General as the Queen's representative.[63] This fact symbolises their loyalty to the people of the nation, rather than to transient government. True, the Governor-General will act on the advice of Ministers. But the armed forces are not, in their self-concept or in law, the servants of any political power. Australia's strong tradition of a professional defence force which keeps out of politics is enshrined in the Constitution. It is also derived from the English constitutional tradition which preceded it. The notion of our defence forces being involved in a military *coup d'état* is completely unthinkable.

8. Free expression

Without an express constitutional guarantee, free expression has been nurtured and has flourished in Australia for the whole history of federation. Even the old legal inhibitions of sedition[64] and obscenity[65] have declined in the context of new media of communications and modern notions of the right of people to enjoy free expression. The High Court has found implied guarantees of free speech in the democratic and representative nature of the system of government established by the Constitution.[66] We live in a community which enjoys one of the highest levels of communication in the world. This is, in turn, an assurance of the free flow of ideas which is essential to sustain a modern society and a progressive economy. Some jurists contend that the right of free expression is the most important of civil freedoms. Long before the implied constitutional freedom was found by the High Court, Australians enjoyed a high measure of freedom to express their ideas and opinions. They did so not because of Constitutional guarantees as much but because of the political system which the Constitution reflects and protects.

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[63] Australian Constitution, s 68.

[64] *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *Cooper v The Queen* (1961) 105 CLR 177.

[65] *Crowe v Graham* (1968) 121 CLR 375.

[66] *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106. Cf *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997.

9. Adaptation

Our constitutional text has adapted with remarkable success to changing needs and times. This is the more remarkable when it is remembered that the text was actually first conceived by the Founders as long ago as the 1870s. It is a text which has greater popular legitimacy than the constitutions either of the United States or Canada. The draft of our Constitution was twice accepted by the electors, with overwhelming majorities of those voting. There is no right conferred in our Constitution such as the "right to bear arms" which appears in the United States Constitution to embarrass later generations. Its language may not be inspiring to everyone. Many of its central provisions work only by the operation of fictions and conventions. Many relate to financial questions which are important but scarcely the subjects to set the heart beating. But some measure of popular satisfaction with the way the Constitution operates is to be seen in the general disinclination of the Australian population to change its provisions. Such disinclination has occasionally proved to be fully justified.

10. Freedom preserved

When great challenges have come to the tolerant and democratic character of the Australian Constitution, the institutions which it establishes have normally, in the end, provided the right answers. The Constitution has usually proved a protector of tolerance and diversity. A clear illustration of this assertion can be seen in the decision of the High Court of Australia in *Australian Communist Party v Commonwealth.*[67]

A Free, Confident and Just People

Permit me to conclude these reflections with a personal recollection. It concerns my own first consciousness of the Constitution and of the Court on which I now have the honour to serve.

In the late 1940s, my grandmother remarried. Her new husband, Jack Simpson, had been born in New Zealand. He fought at Gallipoli. He was gassed on the Somme. For his military prowess he was honoured with medals. But he was disillusioned with war and with the Depression which followed. He threw away his medals. He became a communist. As a child of nine, I recall accompanying him on his rounds in Tempe, an inner Sydney suburb, as he fixed electoral posters to lamp-posts. They were red of

[67] (1951) 83 CLR 1.

course. "Vote 1, L L Sharkey, Communist". His electoral efforts were completely fruitless. The Menzies Government was returned in the election . It had a clear electoral mandate to ban the Australian Communist Party and to proscribe communists. The newspapers were full of frenzied condemnation of communists. Communists were demonised, as many minorities before and since have been. But for me, the only communist I knew was a kind and idealistic man who was now a member of my family.

I recall that anxious time as the challenge to the *Communist Party Dissolution Act* was before the High Court. Had the Act been upheld, my new "uncle" would surely have been "declared" under its terms.[68] In childhood days I knew little of the law: only that the happiness, and possibly the liberty, of Jack was somehow at stake.

When the news came that a court had removed the danger, I knew nothing at the age of 11 of the doctrine of *ultra vires*. Still less did I appreciate the blessings of the Constitution or the strength of purpose of the Justices of the High Court who had upheld it. I did not know then of the courage of the opponents of the legislation, in all political parties, who objected to a law which would penalise Australians for what they believed or thought, rather than for what they did. All I knew was that a great cloud had lifted.

Only later did this first, personal encounter with the High Court of Australia and the Constitution come to assume its true significance for me. The Court reached its opinion against a great clamour of popular opinion at the time. It was completely impervious to political calumny and media suggestions. It upheld the essential character of the Australian Constitution as one emanating from a free, confident and just people for the good government of all who lived under its protection. In time, I have come to realise how courageous, but foolishly naive, my "uncle's" political views as a communist were. But I have also come to appreciate the courage and wisdom, the foresight and good judgment which the High Court of Australia displayed at that testing moment in its exposition of the requirements of Australian law. The same is now generally said of the Court's decision in *Mabo*. Perhaps, in time, it will be said of *Wik*.[69]

When, therefore, I reflect on the defects of the Australian Constitution, as many there doubtless are, I balance these thoughts with a remembrance of that anxious time in 1951 and of other times since. Of the continuity and change we have seen. Of the rule of law secured by independent judges. Of the peaceful shifts of political power secured by free elections accepted by all combatants. Of the civil service and armed forces who submit dutifully to the civil power. Of the ways in which the Constitution has served us, the people of Australia. Like every product of fallible

[68] *Communist Party Dissolution Act* 1950 (Cth), s 10(1) noted 83 CLR 1 at 6.
[69] *The Wik Peoples v Queensland* (1996) 187 CLR 1.

human beings, it may be improved, as no doubt it will. But amidst all the personal attacks and the legitimate differences of opinion over this and that, let us, a century on, count our blessings.

The coming centenary of the adoption of the Constitution is a time once again to consider our Constitution's oft-catalogued defects. But let us also remember the freedoms which the Constitution has helped to secure to us, the Australian people, who are now the ultimate foundation for its legitimacy, the assurance of its future and the guardians of its justice to all who live under its protection.