

CONSTITUTIONAL ADJUDICATION AND DEMOCRACY

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The federal Judiciary Bill has not yet been introduced into the Federal Parliament so that I have nothing to report to you about the Federal Bench. There are abundant indications of work for the High Court as soon as the Judges are appointed.

The People of Australia were greatly shocked to hear of the assassination of President McKinley and they hope that the American people will take effective steps to put down the propaganda of anarchism.

Letter from Andrew Inglis Clark to Oliver Wendell Holmes, 26 Oct 1901.

Judicial Power and its Limits

The jurisdiction and role of the final court of appeal in any nation is multifaceted. It reflects the legal values of the nation and is often the venue for great historical moments as decision that shape the direction of law and politics are concluded. The judge is both the adjudicator of legal controversies and a drafter of a historical narrative. When the Australian constitutional framer and High Court aspirant, Andrew Inglis Clark wrote to his mentor Oliver Wendell Holmes in 1901, the High Court was on the eve of its establishment. Inglis Clark was passionate about all things American and drew upon the United States Constitution to inform his drafting on many aspects of the Australian Constitution, and in particular the judicial clauses.¹

Writing to the Australian Prime Minister upon receiving the news that he would not be appointed to the High Court Inglis Clark said:

Whoever is appointed, I hope that the first judges of the Court will do for Australia what Marshall and his colleagues did for the United States, and maintain on all occasions the supremacy of the Constitution and the federal laws under it. Above all things I trust that the first judges will not seek guidance in the decisions of the Privy Council upon the Constitution of Canada, which, broadly speaking, are totally inapplicable to the interpretation of the Constitution of the Commonwealth.²

¹ J Reynolds, 'A.I. Clark's American Sympathies and his Influences on Australian Federation' (1958) 32 *Australian Law Journal* 62.

² Andrew Inglis Clark to Alfred Deakin, 27 August 1903, MS 1540/14/638, Deakin Papers, NLA.

Notwithstanding Inglis Clark's hope for the supremacy of the Constitution and the laws made under it, the role of a final court in a democratic system can be plagued with inexactitudes. The reliance upon (or indeed reference to) the jurisprudence of other nations, will be instructive, but is not without its controversy.³ The crafted endorsement of judicial review by Chief Justice Marshall in *Marbury v Madison*⁴ was taken as 'axiomatic' by the High Court of Australia notwithstanding the debate that the case still engenders.⁵ That the High Court, like the Supreme Court, would take upon itself the role of guardian of the Constitution remains a logical conclusion - but a bold assertion.

What limits or guidance there are to be found upon jurisprudential direction the bench are rarely to be found within the four corners of the document upon which their authority rests. The vesting of judicial power to be exercised, unless the judicial officer is 'incapacitated' or otherwise offending against some vague standard, gives little indication as to the stands of a final court should apply in any particular case.

In functioning democracies it is not the threat of removal that acts as a guide; the ultimate sanction is the loss of public confidence in the institution.⁶ This overarching objective is itself informative of the constitutional jurisprudence. As Owen Dixon, arguably Australia's most prominent jurist, suggested:

Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.⁷

It is thus important to acknowledge that judicial choice is constrained by the legal strictures of precedent and the judicial method. The requirement of determining the law one case at a time provides yet another restraint on judicial creativity.⁸ The fact that the limits on judicial decision makers are vague prompts consideration of who is making the decision.

The Other Judicial Choice

³ See Eric A. Posner and Cass Sunstein, 'The Law of Other States' (2006-7) 59 *Stanford Law Review* 131. In Australia the interchange between Justice McHugh and Kirby is an example of the debate as to the place of international law in establishing constitutional norms. See *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁴ 5 U.S. 137 (1803).

⁵ *Australian Communist Party v Commonwealth* ('Communist Party case') (1951) 83 CLR 1, 262. Fullagar J stated: 'in our system the principle of *Marbury v. Madison* ... is accepted as axiomatic'. See Michael Coper, 'Marbury v Madison' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001), 453-5.

⁶ Sir Ninian Stephen, 'Fragile Bastion - Judicial Independence in the Nineties and Beyond' (1982) 13 (3) *Univ Melbourne Law Review* 334.

⁷ Sir Owen Dixon, *Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952*, in J Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965), p.247.

⁸ See, for example Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (2001).

The realisation the judiciary does exercise significant public power in a democracy obviously raises questions of accountability. The call for greater scrutiny of the judicial process naturally extends to the selection of the judges themselves. This is particularly so when it is perceived that the final court of appeal is a political arena through which social change can be affected.⁹ The pressure to democratise the selection of the judiciary, based on sound public administrative law principles, is found in similar calls to open up to scrutiny the administration of public policy generally. It is here that comparative constitutionalism provides an informative role in testing the various methods available.

In a major study on the appointment of judicial offices Kate Maleson and Peter Russell highlighted the impetuosity for greater concentration on the issue. As Russell states:

The advent of the age of judicial power in common-law countries has aroused concerns about continuing to vest unfettered power of government control over appointment to and advancement within the judiciaries that are supposed to be rendering impartial justice in disputes to which the government itself is very often a party, and which deal with controversial issues of public policy.¹⁰

It is against this backdrop that the examination of the process can be considered. At the centre of any appointment process is the search of the 'merit'. It goes without saying that merit is itself a contested term. As Geoffrey Davies, former Judge of the Queensland Court of Appeal, stated: 'No word is more used or abused in this context [the criteria for judicial appointment] than "merit"'.¹¹ Without a clear articulation of what constitutes merit, 'the concept becomes almost wholly subjective, allowing each decision-maker to construct his or her own features which are significant'.¹² The risk is that invocation of merit will simply collapse into the general tendency 'to see merit in those who exhibit the same qualities as themselves', with the result that those who appoint new judges will select those who share the professional, social and gender characteristics of their predecessors.¹³

One recent articulation of the qualities and skills needed for judicial officers was outlined by the Judicial Appointments Commission in the United Kingdom. In a report on the appointment competition to the High Court in 2005 the Commission indicated that the eight general skills needed for the position:

⁹ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2008).

¹⁰ Peter Russell, 'Conclusion' in Kate Maleson and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power* (2006), 428.

¹¹ Geoffrey Davies, 'Appointment of Judges', (Speech delivered at the QUT Faculty of Law - Free Lecture Series, Banco Court, Brisbane, 31 August 2006) <<http://www.law.qut.edu.au/aboutAppointmentofJudges.pdf>.

¹² Sharyn Roach Anleu & Kath Mack 'Judicial Appointment and the Skills for Judicial Officer' (2005) 15(1) *Journal of Judicial Administration* 37, 38

¹³ Ruth McColl, 'Women in the Law' (Speech delivered at the Anglo-Australian Society of Law, Court of Appeal, Supreme Court of New South Wales, 3 May 2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mccoll030506> (quoting the Chief Justice of Canada, Beverley McLachlin PC).

1. Analysing and Decision Making
2. Legal Knowledge and Expertise
3. Integrity and Independence
4. Authority
5. Leadership & Administrative Duties
6. Managing Workload
7. Communicating
8. Treatment of Others.¹⁴

Others have articulated similar criteria.¹⁵ Notwithstanding the difficulty in fully defining merit, or rather agreeing on what weight is to be given to each element of it, the basic question remain: How it is to be tested or assessed?

Within the comparative constitutional context it is clear that a number of models exists for the appointment of judicial officers to the final court of appeal. Broadly speaking these models can be characterised as: an election, legislative confirmation, the use of an appointments committee, and an executive appointment. Undoubtedly each in their own way achieves the desired end the appointment of a judicial officer. So for instance, the traditional approach in Australia has been that the Governor-General appoints on the advice of the executive. Despite the criticism of some appointments, the overall quality of High Court appointments has been high. The challenge, in an age of judicial power, is to devise models that simultaneously provide rigorous tests for merit while the same time meet the democratic imperative, all this is to be done without compromising the independence of the judiciary. Not an insubstantial challenge.

It is possible to construct an axis that plots the degree of popular participation (either direct or representative) in the appointment of a judicial officer *against* the investigation or interrogation of merit. Under each of the models there is a minimum threshold of merit (often undifferentiated) and democratic accountability. Thus for instance, all models would reject an individual that could not make the minimum standards acceptable for judicial appointment. However, beyond the minimum standards (such as being legally qualified or some 'good character' test) there may be little focused assessment upon other significant merit criteria.

Considering now the operation of democratic and merit axis as they relate to the various models. It is obvious the most democratic of models is the election to office. This has not been the tradition in most common-law countries and has not found favour in Australia. As Chief Justice French recently commented:

¹⁴ Commission for Judicial Appointments, *The Commissioners' Review of the High Court 2005 Competition: Report to the Lord Chancellor 2006* cited in Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295, 313.

¹⁵ For a discussion of 'merit' see Evans and Williams, above, 297-9 and 313-4.

The judicial task remains the same irrespective of the mode of a judge's appointment. But the elected judge's burden of maintaining public confidence and avoiding concerns about impartiality and conflict of interest appears to be more difficult.¹⁶

Notwithstanding its democratic involvement it is open to questions of whether or not the electors are in fact assessing fully merit criteria. This in part is due to the fact that the merit criteria are not overly articulated prior to the selection and in light of partisan politics it actually emerges. That said, it should be acknowledged that there are many models amongst the American States. Some models do have 'merit selection' as part of the process of appointment.¹⁷

If we consider the other extreme, executive appointment, it is clear that there is diffuse democratic accountability and no articulation or public testing of the merits of the candidate. It is this twin ability that has prompted reform in the United Kingdom and calls for similar changes in Australia, New Zealand and Canada.

The appointments commission arguably is less accountable to the public than executive appointment. Though most committees are themselves appointed by the executive, there is usually statutory independence granted to them. That said appointments commissions are predicated upon the articulation of the merit criteria and its methodical assessment. In other words whilst low on the democratic axis they tend to be high on the merit axis.

Finally the 'advice and consent model', such as exists in the United States, is a model of public accountability and involves legislative oversight. The degree to which a legislative committee can assess the suitability of a candidate for judicial office is in theory quite significant. However in recent times the enquiry has taken on a ritual of crafted speeches and bland responses.¹⁸ Politics, not surprisingly, is an overriding consideration.

Conclusion

The challenge of constitution adjudication and democracy manifests itself in many aspects of constitutional law. It is the natural inclination amongst public lawyers to subject power to accountability measures. Such an approach must extend not only to the decision itself, but also the means by which the decision maker is appointed. Comparative constitutional research will no doubt help to frame the debate.

¹⁶ Robert French, 'In Praise of Unelected Judges', The John Curtin Institute of Public Policy Public Policy Forum, Perth, 1 July 2009.

¹⁷ See generally, Thomas R. Phillips, "The Merits of Merit Selection' (2009) 32(1) *Harvard Journal of Law and Public Policy* 67.

¹⁸ Michael C. Tolley, 'Legal controversies over Federal judicial selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments' in Maleson and Russell (eds), above note 10, 80.