JUDGES IN ADVANCED CAPITALIST COUNTRIES are men of a conservative disposition, in regard to all the major economic, social and political arrangements of their societies. They have the same outlook as the ruling class which owes its position to the private ownership of property. The law in advanced capitalist societies defends capitalist relations of production and the political and social conditions which are based on them.

In Britain, at the beginning of the twentieth century, the constitutional lawyer A. V. Dicey noted that judges were for the most
part men of a conservative disposition. Several decades later Harold Laski observed that British judges were recruited from the ranks of successful lawyers; and, overwhelmingly, our system makes the successful lawyer a man who has spent the major part of his life serving the interests of property. He comes, therefore, almost unconsciously, to accept the assumptions of the economic system in being, and to adopt, without examination, the legal doctrines evolved for the protection of those assumptions.

The same holds true for Australia. The distinguished biographer of Chifley has written that "the law is a conservative profession, and those who attain in their maturity eminence in its practice overwhelmingly tend to be conservative to a point where they are rarely moved to question (but usually find it second nature to buttress) the existing social and economic order." Barristers who are appointed judges have spent their careers in circumstances of personal affluence and have made their money by attending to the affairs of affluent people. While at the Bar, most of them have established close personal relations with leaders of the business community, and they have often been company directors or retained by companies as advisers. Moreover, not a few have actively participated in anti-Labor politics.

Judges, however, do not simply mirror the interests of the ruling class. It would be "a grievous over-simplification . . . to suggest that the law is a direct, unmitigated expression of capitalist interests". The relation between law and the economic and social conditions which gave rise to it was analysed by Engels in a letter to Conrad Schmidt in 1890:

In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression which does not, owing to inner contradictions, reduce itself to naught. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class — this in itself would offend the 'conception of right'. Even in the Code Napoleon the pure consistent conception of right held by the revolutionary bourgeoisie of 1792-96 is already adulter-

ated in many ways, and in so far as it is embodied there, has daily to undergo all sorts of attenuations owing to the rising power of the proletariat. . . . Thus to a great extent the course of the 'development of right' consists only, first, in the attempt to do away with the contradictions arising from the direct translation of economic relations into legal principles, and to establish a harmonious system of law, and then in the repeated breaches made in this system by the influence and compulsion of further economic development, which involves it in further contradictions. (I am speaking here for the moment only of civil law.) 7

While a marxist analysis of the role of the judiciary in capitalist societies should neither underestimate the strength of the intellectual traditions of the law nor ignore the complexity of the interrelations between political and judicial activity, it is clear that the judiciary has no more been 'above' the conflicts of capitalist society than any other part of the state system. Judges have been deeply involved in these conflicts; and of all classes it is certainly the dominant class which has had least to complain about the nature and directions of that involvement. 8

II

Reformist governments in federal political systems have suffered frequently at the hands of those judicial bodies entrusted with the task of interpreting the constitution. The conservative majority on the United States Supreme Court dealt several devastating blows to Roosevelt's New Deal legislation in the period up to 1937, while the High Court of Australia declared invalid a number of important measures introduced by the Curtin and Chifley governments such as a national health scheme, a government monopoly of internal air services and nationalisation of the private banks. It is a widespread myth that interpretation of a constitution involves nothing more than a mechanical measuring of a statute against the fundamental document. Sir Robert Menzies has noted that there is "no question" that constitutional law is "only half law and half philosophy — political philosophy" 9. Judges involved in constitutional cases are not 'law-vending' machines, and they cannot fail to be influenced by their political philosophy or view of the world. In leading constitutional issues, to quote the distinguished biographer of Chifley, "some advantage, however intangible, is likely to accrue to the side whose case approaches closer to the predominant political philosophy in most minds along the Bench." 10

An examination of appointments to the High Court of Australia over the last few decades illustrates Sawer's point that "parties of the right habitually appoint social conservatives to such positions, but need make no parade of it since most eminent lawyers are social conservatives". Sir John Latham, Chief Justice 1935-52, was a former anti-Labor Deputy Prime Minister. His successor, Sir Owen Dixon, held conservative political assumptions. The present Chief Justice, Sir Garfield Barwick, was previously Minister for External Affairs in the Menzies government. Apart from Barwick, three other members of the present Court were at one time involved in anti-Labor politics. Sir Victor Windeyer was an unsuccessful candidate for Liberal Party pre-selection for the N.S.W. Senate team at the 1949 Federal election. Sir William Owen was an unsuccessful candidate for United Australia Party pre-selection for the seat of Vaucluse at the N.S.W. State election in 1932. Sir Douglas Menzies was once an active member of the Young Nationalists and the Liberal Party in Victoria.

Any Left government seriously intent upon instituting fundamental socio-economic change would be concerned about the composition of the High Court. In the light of the setbacks in constitutional issues experienced by Federal Labor governments, what has been their record regarding appointments during their periods in office? Although constitutionally entitled to increase without upper limit the membership of the High Court, they have never considered following the footsteps of Roosevelt who threatened to enlarge the conservative-dominated U.S. Supreme Court in 1937. They could, of course, choose Labor-inclined lawyers to fill vacancies as they occur, but this type of deliberate choice would produce howls of "packing the Bench", partly because such lawyers are not typical among leaders of the Bar. Consequently, Labor governments have generally leant over backwards for fear of being accused of "packing the Bench". As we have seen, it is a fear from which the anti-Labor parties are free.

Of the twenty-five judges appointed to the High Court since Federation, seven were selected by Labor governments and of

13. Federal and State Labor Governments have been less reluctant to appoint Labor-inclined men to the various arbitration courts. The special role of "Labor judges" in the arbitration system is outside the scope of this article, but see Ralph Gibson, "The Arbitration Machine", *Communist Review*, June 1960; and Playford, "Judges and Politics in Australia".
these one resigned without sitting. In 1913, when the Fisher government had to appoint three judges, W. M. Hughes, the Attorney General,
did not even try to find a Labor man; all he wanted was someone not too hopelessly State-right in outlook. He got a mediocrity (Powers), a State-righter (Gavan Duffy) and his third choice, A. B. Piddington — an able and civilized man who would have made a much better judge than Gavan Duffy — was terrified into immediate resignation by the screams of rage which his appointment elicited from the reactionary Melbourne and Sydney Bars. Hughes then appointed the non-political, and constitutionally colourless, Rich from the N.S.W. Supreme Court.14

Sir Charles Powers had once been a conservative Cabinet Minister in Queensland, while Sir George Rich refrained from retiring from the High Court until his 87th birthday in May 1950, partly because he did not want the Chifley government and in particular its Attorney-General, Dr. Evatt, to be in a position to replace him.15

In 1930 Evatt, a recent N.S.W. State Labor parliamentarian, and Mr. E. (later Sir Edward) McTiernan, a Federal Labor parliamentarian, were appointed to the High Court by the Scullin Labor government which had already had Court setbacks when endeavoring to carry out industrial arbitration policy and which could expect constitutional difficulties with is economic policy. There was an immediate cry of “packing the Bench” from conservative quarters. The Sydney Morning Herald thundered that “these are political appointments, and politics should have nothing to do with judicial office”.16 It should be noted that the two appointments were made by Cabinet during the absence overseas, and against the strong opposition, of Scullin and the Attorney-General, Mr. Frank Brennan. Scullin even sent a message from the ship threatening to resign but his threat did not reach Canberra until after the decision had been taken.17 Both Evatt and McTiernan went on to distinguished judicial careers. However, noted a distinguished constitutional lawyer, the “general social evaluations resulting from their Labor backgrounds were evident in some marginal cases”.18

Only one High Court vacancy came up during the tenure of office of the Curtin and Chifley governments. Sawer later wrote that there were at least two barristers of high standing whose legal and political outlook was a good deal more radical than that of any member of the Bench as it then stood. However the government took the safe, timorous course of appointing Sir William Webb of the Queensland Supreme Court... an able and respected lawyer but neither outstandingly brilliant nor in the least likely to originate new constitutional ideas.19

Elsewhere, Sawer noted that Webb had been accused of pro-Labor sympathies by members of the anti-Labor parties after his appointment as Chairman of a Federal Industrial Relations Council in 1942, but they “never showed in his judgments”.20 One newspaper report stated that Webb had been chosen the fill the High Court vacancy in preference to Mr. J. V. (later Sir John) Barry, KC, a distinguished lawyer who had contested a seat for Labor at the 1943 Federal election and who was favored by the leftwing of the ALP.21 Immediately after his retirement from the High Court in 1958 Webb was appointed chairman of directors of Australian Consolidated Press Ltd., one of the unsuccessful applicant companies for a Brisbane TV licence, and he later became chairman of directors of Electric Power Transmission Pty. Ltd., the largest firm engaged in erecting steel towers for electricity commissions in Australia.22

The record of the postwar Attlee Labor government in Britain (1945-51) was no better. Lord Balogh has noted that not only did Attlee appoint “the most obscurantist Archbishop in modern British history” (Fisher) but also “the most reactionary Lord Chief Justice” (Goddard).23 A prominent Labor barrister wrote of the High Court Bench in Britain:
The post-war Labour Governments leaned over backwards to avoid giving their supporters judicial appointments. As a result, the present-day Bench is, with one possible exception, the exclusive province of gentlemen who are politically well to the right of the Conservative Party.24

22. Playford, “Judges for Hire”.
Lord Attlee himself was typically untroubled about Labor's failure to appoint Labor-inclined lawyers to the judiciary:

I was responsible for a large number of appointments to the judiciary and of promotions. Of these the only ones whose political views I know were Lord Somervell and Lord Reid, Conservatives, and Lord Birkett, a Liberal.25

Two years after British Labor lost executive power, an article in The Solicitors' Journal noted approvingly that "in the matter of its judicial appointments the late Government has a particularly happy record; few of its choices had even so much as a slight Left incline while Lord Reid was selected from the ranks of its opponents". 26 But at least British Labor did not have to contend with a written Constitution.

III

Australian Labor leaders and Fabian constitutional lawyers certainly recognise the limits placed on reforms by the High Court as currently constituted, but they lack the determination to overcome the problem. The late Professor Ross Anderson of the University of Queensland once suggested that in appointing lawyers to the High Court a Federal Labor government would do well to appoint men who are sympathetic to the socialist idea, or at least men who fully understand the nature of the political and social forces at work in the constitutional field. However, he continued:

This is not to advocate 'stacking' the High Court with political supporters of the Government. Any proposal of that kind should be strongly resisted, because all parties can play at that game, and it would be the quickest way to undermine public confidence in the Court, the prestige of which is one of the basic components of our way of life.27

Whitlam also realises that over the last few decades different High Court decisions could have been given by judges of equal competence and integrity, and that the A.L.P. has "to devise policies which will secure not only the approval of electors but also the approval of judges".28 But his solution would appear not to be changing the composition or size of the High Court but rather to emasculate still further the already weak socialist component of the objectives of the Labor Party.