2431

APPOINTMENTS TO FINAL NATIONAL COURTS – LESSONS FROM CHARLES DARWIN

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THE DARWINIAN LAW OF VARIATION

A final national court plays an important role in helping a society to adapt to the ever-changing environment in which law operates in a democracy. My proposition is that, to be successful, such institutions must adapt to the laws of variation. They must be able to reflect a variety of responses that will permit them to adapt to changing times and needs.

A hundred and fifty years ago Charles Darwin explained that all living organisms need adaptation and variation to survive and to adapt to new times and circumstances. Reproduction by identical or near-identical cloning would endanger the capacity of the organism to cope with contemporary challenges, even perhaps to survive. This conclusion has a message for lawyers, legislators and citizens on how they should go about appointing judges to such important national institutions. Variety not sameness, is the message that Darwin's insight teaches. It is also the message that I propound.

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** Justice of the High Court of Australia 1996-2009.

The Australian Constitution of 1901 envisaged the High Court of Australia as "a Federal Supreme Court" of Australia and as the principal repository of "the judicial power of the Commonwealth"[1]. However, detailed provisions for the operation of the court, and for the appointment of the Justices, were not enacted until 1903[2]. Federal legislation[3] later provided that the court would be a "superior court of record and consist of the Chief Justice and two [later six] other Justices"[4].

In the appointment of new Justices, provision is now made for the Federal Attorney-General, before any appointment of a Justice to a vacant office, to consult with the Attorneys-General of the States in Australia in relation to the appointment[5]. This provision was not enacted until 1979. Although it has resulted in the creation of a pool of governmental nominees, and was designed to assuage State criticisms of interpretations of the Constitution by the court inimical to State powers, the process of "consultation" means just that. The States provide nominees. But there is no obligation for the Commonwealth to limit its appointments to those nominated, still less to accept *any* of the particular nominees. My own appointment in 1996 followed my nomination by the Attorney-General for New South Wales. I was then serving as President of the Court of Appeal of that State. But not all Justices in recent years were nominated by a State government under this statutory procedure.

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1 Australian Constitution, s71.
2 *Judiciary Act* 1903 (Cth).
3 *High Court of Australia Act 1979* (Cth).
4 Ibid, s5.
5 Id, s6.

THE IMPORTANCE OF JUDICIAL VALUES

Because of similarities between provisions in the constitutions of Australia and the United States of America, the original Justices of the High Court of Australia commonly followed American constitutional doctrines on federal questions, including doctrines on inter-governmental immunities and so-called reserved State powers[6]. In effect, the Justices concluded, from a reading of the Constitution as a whole, that it was intended to preserve and maintain a kind of federal balance between central and sub-national powers.

The personal harmony of the original Justices of the High Court of Australia over fundamentals is evident from the fact that they lunched together daily and formed a strong social and professional bond with each other. However, in 1906, the appointment of two additional Justices, each a fine lawyer with less conservative legal views, shattered the calm of the new Australian court. As former Chief Justice Mason, explained: "With the advent of Isaacs and Higgins, [Chief Justice] Griffith's dominating influence began its steady decline". The days of friendly concurrences were a thing of the past."[7]

If ever it was necessary to demonstrate to legal readers the importance of judicial appointments for the values of a final national court, that lesson was quickly drawn to notice in Australia when Justice Isaacs and Justice Higgins took their seats. Isaacs, in particular, was no less brilliant than Griffith and even more ambitious. He had a great mastery

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[6] This doctrine was derived from *McCulloch v Maryland* 17 US 316 (1819). See *Deakin v Webb* (1904) 1 CLR 585; *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087.

[7] A.F. Mason, "Griffith Court", in T. Blackshield, M. Coper and G. Williams (Eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001), 311 AT 314.

of the law. And he differed fundamentally in his approach to the construction of the Australian Constitution.

With the support of Higgins, Isaacs began propounding a constitutional doctrine that would eventually prevail in 1920 in the *Engineers Case*[8]. According to this doctrine, if a relevant legislative power was granted by the Constitution to the Federal Parliament, the words of the grant were to be given their natural and full ordinary meaning. The paramountcy of the federal law was to be upheld. This rule of constitutional literalism continues to prevail in Australia. The 'reserve State powers' doctrine was overthrown.

It is vital to appreciate that neither the position of the original Justices of the High Court of Australia nor that of Justices Isaacs and Higgins was unarguable, illicit, improper, wrongly motivated or impermissibly "activist". Each was, and is, a legitimate and fully arguable legal approach to the judicial task in hand. Each has had highly intelligent and honest supporters in and outside the High Court. Each reflects a different spectrum of values and perceptions about the text and objectives of the Constitution. Each was, and is, sincerely held by capable and independent judges.

However, because these values have profound consequences for the outcomes of cases (not to say for the distribution of governmental powers within a federal nation), the appointment of judges having such differing views is of legitimate interest to the governmental appointing authorities and to the people of the nation who will be affected by the decisions made by such judges.

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[8] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (Engineers Case) (1920) 28 CLR 129.

THE CREATIVITY OF COURTS IN COMMON LAW COUNTRIES

The books on the shelves of judicial chambers demonstrate the fact that centuries of judicial creativity had preceded the appointments of all of the present judicial incumbents in Britain, Australia, India and other countries of the common law. Where else did the common law come from, if not from judicial predecessors? To deny the creative element in the judicial function, in such a pragmatic and effective legal system, was impossible in the face of daily and historical reality.

Perhaps this very creativity has obliged a kind of fiction, or sleight-of-hand, to settle the fears of a democratic people that unelected judges might enjoy too much power. Yet creative power they certainly enjoy. Not only in the exposition (or "declaration") of the common law, but also in the elaboration of ambiguities in legislation. Some of that legislation, over the centuries, certainly counts as 'constitutional' in character. It may not, in every country, be in a single comprehensive document. But it exists.

In the exposition of the *common law*, there are many familiar instances of the creative role that now devolves on the new Supreme Court of the United Kingdom. Take as an example the string of decisions in the English courts on the so-called "wrongful birth" cases[9], culminating in that of the House of Lords in *McFarlane v Tayside Health Board*[10]. To a very large extent, the problem presented to the courts was itself an outcome of the application of new medical technology. Lawyers might pretend that rulings in individual cases followed logically and inevitably

[9] *Thake* [1986] QB 644 (CA), leave to appeal to the House of Lords refused. See also *Gold v Harigney Health Authority* [1988] QB 481 at 484; *Allen v Bloomsbury Health Authority* [1993] 1 AllER 651 at 662.

[10] [2000] 2 AC 59.

from earlier decisional authority. However, no one could seriously suggest that the outcomes were exclusively a technical or purely verbal exercise for which a lifetime's experience in commercial or insolvency law was the best preparation for a high judicial decision-maker. In *Cattanach v Melchior*[11], a majority of the High Court of Australia[12] held that a doctor could be legally liable for a birth, because of negligence, of a healthy but unplanned and unwanted child. This is the opposite of decisions reached elsewhere.

Even sharper have been the divisions between judges addressing medical professional liability in the so-called "wrongful life" cases[13]. The majority of the High Court of Australia rejected the existence of a cause of action brought by a child profoundly injured by blindness, deafness and mental retardation, occasioned by a repeatedly undiagnosed condition of foetal rubella[14]. The majority of the Court denied recovery on the doctrinal footing that it was not logically possible for it to be asserted, on behalf of the child, that the child should not have been born at all. Adapting the words of Professor Peter Cane, my own view was that "the plaintiff ... is surely not complaining that he was born, simpliciter, but that because of the circumstances under which he was born his lot in life is a disadvantaged one"[15].

In the United Kingdom, the *Congenital Disabilities (Civil Liability) Act* 1976 (UK) expressly prohibited "wrongful life" actions[16]. That Act had been drafted following recommendations of the English Law

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11 (2003) 215 CLR 1.

12 McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon JJ dissenting.

13 *Harriton v Stephens* (2006) 226 CLR 52.

14 Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; Kirby J dissenting.

15 P. Cane, "Injuries to Unborn Children" (1977) 51 *Australian Law Journal* 704 at 719. See ibid (2006) 226 CLR 52 at 59 [10].

16 Section 1(2)(b).

Commission[17]. The Act also reflected the thinking of the English Court of Appeal in the supervening case of *McKay v Essex Area Health Authority*[18]. In other common law jurisdictions, the preponderance of decisional law has followed roughly the same analysis as that of the majority in the High Court of Australia, although not without occasional contrary views[19]. So far as the basic principles of tort law are concerned (and the evaluation of issues raised by relevant considerations of legal principle and legal policy[20]), respectfully, I remain unconvinced. But this is beside my present point. The cases show that differing views can legitimately exist, and do exist, amongst honest and highly experienced judges. And such differences arise because the judges exhibit different values.

Useful insights can often be derived from judicial reasoning in other countries. However, in the end, a final national court must reach its own conclusions on subjects involving the content of its domestic common law. It must do so by reference not only to legal authority (which will not formally bind the final court to a conclusion); but also by reference to considerations of legal principle and policy. These considerations enliven an evaluative exercise. This is stronger and more convincing if it is transparent in its performance.

JUDICIAL VALUES AND STATUTORY INTERPRETATION

Apart from the common law, judicial values can also influence the outcome in contested cases of *statutory interpretation*. There could be few clearer illustrations of this proposition than in the divided decision of

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17 Law Commission of England and Wales*, Report on Injuries to Unborn Children* (LawCom No.60, 1974), Cmnd 5709, pp.45-54.

18 [1982] 1 QB 1166.

19 See *Harriton* (2006) 226 CLR 52 at 70 [53]-[73].

20 (2006) 226 CLR 52 at 86 [110] ff.

the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd*[21]. There, the majority held that a person was capable of being a member of the "family" of his same-sex partner, for the purposes of the *Rent Act* 1977 (UK). The decision was reached over a strong dissenting decision that laid emphasis upon the history of the *Rent Act* and how it would have been understood at the time of the original enactment of the applicable provisions (and still more the provisions upon which these were based, dating back to the early decades of the 20th century).

A clash was thus presented in *Fitzpatrick* between a value that insisted on a literal interpretation of the words of the legislation, as parliament "intended" those words to apply when they became law. And the value of reading such statutory words so that they would apply in the contemporaneous social circumstances. There, by virtue of other legislation and human rights provisions, discriminatory and unequal interpretations of the law, contrary to the rights and interests of minorities, have generally been discouraged and avoided.

If ever there was a clash of legal values and of contestable principles over the approach to generally beneficial legislation, it can therefore be seen in the majority and dissenting opinions in *Fitzpatrick*. It is not necessary to dig into the psychological well-springs of the respective Law Lords. Nor is it appropriate to evaluate their respective life journeys, religious upbringing or perceptions about human rights. However, enough has been shown to indicate that the task of statutory interpretation, like that of 'declaring' the common law, is not mechanical. It cannot be performed (at least in a final national court) with no aids

[21] [2001] 1 AC 27 at 34. See A. Lester & Ors. (Eds), *Human Rights Law & Practice*, (3rd Ed, 2009), LexisNexis (London) p.401 [4.8.48].

other than past cases and a dictionary or two. Clearly, individual judicial values affect outcomes in such cases. That is why judicial appointments are extremely important. This is particularly so in appointments to final national courts.

Increasingly, in the coming years (including in the United Kingdom, Australia and India) this truth will come to be realised. It will be realised, for example, by the appointing officers in the executive governments who, under our constitutional arrangements, sometimes influence judicial appointments. But it will also affect the process of consultation and selection that is undertaken for the making of such appointments.

OLD AND REFORMED PROCEDURES OF JUDICIAL APPOINTMENT

Under the traditional British model for the appointment of superior court judges, including those of final courts, the last word conventionally belonged to the executive government, elected to reflect the majority of the members in the lower house of Parliament. Some (including in the judiciary and legal profession) have found this a defective, even dangerous, arrangement. The critics fear purely political appointees. On the other hand, there remain strong arguments in support both of the theory and practice that lies behind the appointment of judges by persons elected by the people.

The provision for a democratic component to be included in the appointment of judges, with their law-making role, has a doctrinal and political, as well as an historical, justification. Such appointments provide a constitutional symmetry to the power typically assigned to parliaments operating throughout the Commonwealth of Nations, to remove superior court judges on the grounds of proved incapacity or

misconduct[22]. Both the appointment and removal of judges are obviously constitutionally important steps. They are comparatively rare, and at once personal and public, having significance for the governance of a democratic polity.

Combined with the strong tradition of apoliticism to be observed between the coming in and going out of the judges, the foregoing arrangements must be said to have worked rather well, on the whole, over a very long time. They have recognised constitutional realities. They have assured a democratic and even political role in the appointment of judges. But when the practical significance of judicial values is understood, that political element has, in my view, been justified. At least in Australia, it has tended to ensure a measure of diversity in the values of those appointed over time to high judicial office. It has attracted public scrutiny of judicial appointments in the media, academic and professional discourse. It has also provided a corrective to an exclusively "professional" judgment on appointments by calling attention to considerations of the long-term deployment of individual decisional values, not just technical or forensic or linguistic skills.

In common law countries, the chief radical alternatives to this British model have evolved in the United States of America. In that country, most State judges are either elected to office or are subject to electoral confirmation or recall, which involves a far more active democratic participation in the selection process. Switzerland is the only major country other than the United States that has procedures for judicial election. Few legal observers in Commonwealth countries would favour such a process. It subjects candidates to direct pressures that may be

[22] See e.g. Australian Constitution, s72; Indian Constitution, s124(4).

inconsistent with the independent and impartial performance of their judicial functions. Those features represent the hallmarks of a judiciary conforming to modern standards of universal human rights[23].

The somewhat less radical provisions of the United States federal Constitution introduced an overt democratic element in the appointment of federal judges. They do this by the constitutional requirement that federal judges must be nominated by the President but appointed "with the Advice and Consent of the Senate"[24]. The Senate is itself advised on such confirmations by its powerful Judiciary Committee. At least in recent times, a great logjam has arisen, delaying the appointment of federal judges in a way that was clearly not envisaged by those who drafted the constitutional article[25].

To Commonwealth eyes, this is only one of the defects of the United States' provision. Whilst recognising the high importance of the appointees and of their values for the discharge of their offices, the American confirmation procedure has tended to subject candidates to questions that lie at the heart of their future judicial performance. It has subjected them to political pressure to participate in 'coaching' by representatives of the President, with a resulting potential to diminish the judicial office by needlessly involving its members, or potential members, in controversies defined by political and partisan perspectives[26].

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[23] *Universal Declaration of Human Rights*, Arts.10-11, *International Covenant on Civil & Political Rights*, Art.14; *European Convention on Human Rights*, Art.6.1 ("Right to a fair trial"). See Lester & Ors., above n.22, 277 at 324 [4.6.55].

[24] United States Constitution, Art.II.

[25] *Washington Post,* October 16, 2009, pp.A1, A20.

[26] See L. Eisgruver, *The Next Justice: Repairing the Supreme Court Appointments Process*, (2007) Princeton University Press, Princeton

THE MODERN AUSTRALIAN APPOINTMENT OF JUDGES

In Australia, the procedures for judicial appointment have not, so far, formally challenged the ultimate repository of the appointment power. It belongs, in the conventional British way, to the executive government of the Commonwealth or the States or Territories concerned. Nevertheless, in a comparatively short time, procedures for advertising judicial vacancies and inviting applications and nominations have spread from the lower courts (where they began) to some superior courts, including State Supreme Courts and the Federal Court of Australia. As well, the present Federal Attorney-General in Australia has created a non-statutory committee to advise him on such appointments. The committee comprises three present or former judges (former Chief Justice F.G. Brennan of the High Court; Chief Justice M.E. Black of the Federal Court; Justice Jane Mathews, formerly of the Federal and Supreme Courts) and an official from the federal Attorney-General's Department. The committee's reports, which are confidential, are advisory only.

As stated, in the case of the High Court of Australia, legislation requires a non-binding consultation to take place with the Attorneys-General of the States of Australia. However, the actual appointment is reserved, under the Australian Constitution, to the Federal Executive Council, which advises the Governor-General. That Council comprises, relevantly, politicians who are members of the federal cabinet. In effect, because of the recognised legal, constitutional and political significance of appointees to the operations of the final national court in Australia, the ultimate decision is made by the federal cabinet. That body has before it a recommendation from the Attorney-General. However, according to well substantiated reports in Australia, many a name has gone into

cabinet with the support of the Minister. Yet if the proposed appointee does not have the support of the Prime Minister and that of senior Ministers, the name is unlikely to proceed to appointment.

NEW PROCEDURES IN THE UNITED KINGDOM

In the United Kingdom, a changed selection procedure for the new Supreme Court is established by the *Constitutional Reform Act* 2005 (UK). It involves a panel of five persons, chaired by the President of the Supreme Court. The panel also includes the Deputy President of the Supreme Court and three other members, each nominated by the respective judicial appointments bodies of England and Wales, Scotland and Northern Ireland. These latter nominees need not be judges or even lawyers[27]. However some or all typically are judges. The selection procedure has been described in the media as "convoluted". Clearly, it is dominated, if not formally controlled, by presently serving judges. Contrary to previous practice, the President of the Supreme Court even has a role to play in the selection of his or her successor.

Only one of the initial twelve Supreme Court Justices in the United Kingdom (Baroness Hale of Richmond) is a woman. All but one (Lord Kerr of Tonaghmore) has a background that includes a degree from either Oxford or Cambridge University. From time to time, there have been similar comments in Australia about the comparative lack of diversity in the professional education, background and practice, of most of the nation's final court judges. As in Canada, however, the gender imbalance of the final court in Australia is much less visible. (In Australia 3 of 7 are women, in Canada 4 of 9, including the Chief Justice. In New Zealand, the Chief Justice is a woman: Dame Sian Elias.) Of course,

[27] *Constitutional Reform Act* 2005 (UK), ss26, 27, 28.

most members of the first Bench of the new Supreme Court are chosen from the outgoing members of the House of Lords.

From the foregoing considerations concerning the importance of *values* (involving the ascertainment of relevant legal authority, legal principle and legal policy) in final national courts of appeal, I would suggest that a number of conclusions follow.

NEW DEVELOPMENTS IN INDIA

But what of the position of judicial appointments in India? Under the *Government of India Act* 1919 (UK), the appointments of judges of the High Court were, in accordance with the long-standing British tradition, in the absolute discretion of the Crown. Following the passage of the *Government of India Act* 1935 (UK), the appointment of judges of the Federal Court of India and to the High Courts was also taken to be in the absolute discretion of the Crown[28]. There were no express provisions for "consultations" with the Chief Justice about the appointment process. Doubtless (as a matter of courtesy and convention), the Government of India would, in many or most cases, have consulted, and taken into account, the opinions of the relevant Chief Justices; but not so as to be bound by such opinions. The adoption of the Constitution of India, after independence and with effect from 26 January 1950[29], saw significantly new provisions introduced to add a degree of formality to the judicial appointments process.

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[28] Arvind P. Datar, *Commentary on the Constitution of India* (2nd Ed), (Wadhwa, Nagpur, 2007), Vol.1, 769.

[29] Durga Das Basu, *Introduction to the Constitution of India* (19th Ed), (Wadhwa, Nagpur, 2003, reprint), 19. The Constitution was adopted by the Constitutional Assembly on 14 November 1949 when it was read for the third time and received the signature of the President of the Assembly.

The contemplation of regular turnover in the highest courts was made plain by the provision, in the case of the Supreme Court, of a retirement age of 65 years (s124(2)). The provision for the mode of appointment, provided by the Constitution, was stated in s124(2) as follows:

> Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose. ...
>
> *Provided* that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. ...

Against the background of these words and the long tradition previously observed in the United Kingdom and India, it was commonly believed in India, prior to 1993, that the obligation of "consultation", referred to in the sub-article, connoted discussion and serious consideration but not the necessity of concurrence. This was the view expressed by Justice Pathak for the Supreme Court in the First Judges Case: *S.P. Gupta v Union of India*[30]. Nevertheless, after the 1980s, this interpretation came to be doubted.

The reasons for the doubts were based, partly, on verbal analysis of the constitutional text; but partly on a reflection concerning the perceived intrusions of the Executive with political motives rather than "selection of the best possible candidates". The supersession of judges; their apparent punishment for decisions adverse to the government; and the "weapon to transfer" to "break the back of independent High Court

[30] AIR 1982 SC 149, para.88, 997, 1001, 1013-5, 1026 per Venkataramaiah J.

judges during the Emergency of 1975-1977" led to much closer scrutiny in India of the constitutional appointments process[31].

In 1991, an application was made to the Supreme Court, asking the court to review the correctness of the majority approach, as expressed in *S.P. Gupta*. This application came before a three-judge bench which considered that it should be decided by a court of larger composition[32]. The Second Judge's Case was thus heard by a court of nine judges, assembled to respond to the question, relevantly, whether, in the appointment of judges, the position of the Chief Justice of India was to hold primacy[33].

In the Second Judge's Case, *Supreme Court Advocates-On-Record Association v Union of India*[34], the Supreme Court backed down from the recognition of the primacy or "absolute discretion" of the government that had been upheld in *S.P. Gupta*. It emphasised the historical shift that had occurred by the express introduction in 1950 of a new process of specified "consultation"; the obligatory character of that "consultation", binding on the Executive; the imperative language used in s124(2) ("shall always be consulted"); the absence of similar obligations of consultation for other appointments made by the Executive under the Constitution; and the mandatory provision for the participation of the Chief Justice of India alone. From these provisions, the majority in the Second Judge's Case concluded that the "consultation" referred to was

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31 Durga Bas Basu, above n.29, 764.

32 *Subhash, Sharma v Union of India* AIR 1991 SC 631.

33 S. Vaidyanathan, "Appointment of Judges to the Higher Judiciary" in M.C. Sharma and R. Ramachandran (Eds), *Constitutionalism, Human Rights and the Rule of Law* (Universal, 2005, Delhi) at 192.

34 AIR 1994 SC 268.

intended to be effected in accordance with the conditions that had called for it to happen[35].

Thereafter, it was apparently expected that the Chief Justice of India would speak as the "voice of the institution representing the collective wisdom of the judges in the highest court"[36]. However, this expectation was reportedly breached in 1998. It was at this point that Soli Sorabjee, by then Attorney-General for India, proposed a further Presidential reference to the Supreme Court on the matter, to clear the air. His intervention was described as "statesmanly"[37]. The government was not seeking a reconsideration of the entire decision in the Second Judge's Case. It was made clear that the Union of India would accept, as binding, the decision of the Supreme Court in the Third Judge's Case of 1998[38]. The judicial opinion on this occasion was procured in accordance with a power granted to the President of India to consult the Supreme Court and to obtain an advisory opinion on a matter of public importance (s143).

The Supreme Court laid down a detailed protocol which it felt able to spell out of the comparatively sparse instructions of s124 of the Constitution. The primacy of the Chief Justice of India was reinforced, although it was held that he ought to consult *four* of the most senior puisne judges of the Supreme Court, in place of the *two* next most senior judges as had previously been the relevant *collegium*. A duty to secure the written opinion of the most senior Supreme Court judge from the High Court of the State from which the person recommended comes

35 Citing *Port Louis Corporation v Attorney-General* [1965] AC 1111 (PC) at 1112 per Lord Morris.

36 S. Vaidyanathan, above n.33, 164.

37 Loc cit.

38 *In Re President's Reference* 1998 AIR 1999 SCI 16; (1998) 7 SCC 739.

was also added. Certain exceptions were allowed to the observance of a general rule of seniority amongst High Court judges by reference to special considerations of "outstanding merit" and also geography[39].

Mr Vaidyanathan has remarked that the revised procedure laid down in the Third Judge's Case, involved a "distinct improvement" over the past. However, he suggested that there was room for still further improvement. He foreshadowed the creation of a new national judicial commission for the appointment and transfer of members of the higher judiciary, under an amendment to the Constitution that it was suggested should follow the enquiry in which Senior Advocate Soli Sorabjee took part[40].

An outsider, such as I, has to be hesitant in criticising constitutional developments in another country. However, the foregoing saga has had plenty of critics in India. Their criticisms, which seem persuasive to this writer, draw attention to the great distance that has been travelled from the very modest express requirement of "consultation", for which the Indian Constitution alone expressly provides. Since Dr. Johnson's first *Dictionary of the English Language*, the verb "to consult" in the English language had ordinarily been construed as involving no more than "to deliberate in common"[41]. It involves securing advice and conjoint deliberation. To turn "consultation" into "concurrence" or, even more still, to impose a detailed series of pre-conditions, seems on its face, an alteration of the meaning of the constitutional text unwarranted by its language and purpose.

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[39] S. Vaidyanathan, above n.33, 194-195.

[40] India, National Commission to Review the Working of the Constitution. See also Indian Law Commission, 121st report (1987).

[41] S. Johnson, *A Dictionary of the English Language*, (1755, London) (reprint, Times Books Ltd., London, 1979).

This is say no more than was said by Justice Bhagwati in *S.P. Gupta*[42]*:*

> "... [W]hile giving the fullest meaning and effect to 'consultation', it must be borne in mind that it is only consultation which is provided by way of fetter upon the power of appointment vested in the Central Government and consultation cannot be equated with concurrence ... [T]he Central Government is not bound to act in accordance with [the proffered] opinion."

Clearly, conventions should be developed to ensure that "the finest talent [is] recruited to the Judicial Service". However, as Justice Venkataramiah remarked in *S.P. Gupta*, the provision for the appointment of the judges by the Executive, after consultation, has had the beneficial consequence of according them an appropriate measure of democratic legitimacy. This is indicated by the sanction of the people of India, whom the Council of Ministers represent:

> "In that way only, the Judges may be called People's Judges. If the appointment of judges is to be made on the basis of the recommendation of judges only then they will be Judges' Judges, and such appointments may not fit into the scheme of popular democracy."

Although one commentator has expressed the view that this remark was "so astonishing that no further comment is necessary"[43], it is not remarkable to me to draw inferences from the overall design of a constitution that is both republican and democratic in its basic character. This has been done many times in India itself. Whilst there may have been past occasions of misuse of the political power for the appointment of judges, the great strength of the judiciary of India was first won and

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[42] 1982 SC 149 at 199-200.

[43] Datar, above n.28, at 766.

recognised during a time when the judges were appointed by the power of the Executive alone. That appointing power was itself derived from the people of India and not done by the say-so of fellow judges.

The democratic feature of the Union of India is probably its proudest boast in the world today. Once appointed, the judges of the final and superior courts are completely divorced from party politics. But the moment of appointment involves a properly guarded democratic act. It is one which, in my most respectful view, judges should not erase by self-empowering decisions.

I take this to be the thinking behind the remark of Justice V.R. Krishna Iyer[44], a great judge of the Supreme Court of India, appointed under the old protocol:

> "The [in-house process of appointment] has often been dilatory, arbitrary, and smeared by favourites. ... The Nine Judges Bench, in a mighty seizure of power, wrested authority to appoint ... judges from the top Executive to themselves by a stroke of adjudicatory self-enthronement."[45]

It may be a natural and understandable desire on the part of many judges and lawyers to wish to protect the Bench from unqualified political favourites and incompetents. However, on the whole, judges tend to be older, wealthier and more set in their ways than the members of the elected Executive. The work they do involves giving effect to important values, as the three successive Judges' Cases themselves clearly illustrate. Within the legal profession, judges and lawyers have been

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[44] V.R. Krishna Iyer, "Judiciary: A Reform Agenda" in *Constitutional Miscellany* (2nd Ed, Eastern Books, Lucknow, 2003), 278.

[45] Citing from V. Venkatesan, "Judiciary: A Flawed Mechanism", *Frontline*, Vol.20, Issue 11, 2003.

known occasionally to play favourites. They may not do so for monetary corruption: simply a preference for people who think the way they themselves do and share their values. A great strength of the judiciary of India has been the robust independent-mindedness of the judges appointed under the old system. There are perils in attempting to alter the infusion of an external assessment to palliate the conservatising forces of internal institutional opinion.

SOME CONCLUSIONS

I now state a few conclusions that I derive from the foregoing analysis.

First, judges in final national courts, even more than trial judges and judges in intermediate courts, have very large responsibilities: for the interpretation of constitutional and equivalent provisions; for the construction of important but ambiguous legislation; and for the ascertainment and 'declaration' of the common law.

Secondly, the performance of the foregoing tasks, particularly at the level of a final national court, is rarely a purely technical or mechanical exercise. It is highly desirable that judges of such courts should be conscious, and transparent, about their own values and processes of reasoning.

Thirdly, an appreciation of these features of judicial reasoning, especially in a final national court, will have a number of practical consequences for the organisation of the court and for the performance of its functions, including the provision of the facility of intervention and advocacy by the parties. These will be addressed not simply to past decisional authority

but also to the broader considerations of legal principle and policy that will typically be presented by an appeal[46].

Fourthly, for the tasks that are committed to final national courts, a range of professional and personal skills on the part of the judges appointed to serve is essential. Once the foregoing is acknowledged, there is wisdom in retaining a distinct role for the elected government in the appointment of judges, especially judges of appellate, and particularly judges of a final national court. With popular accountability for such appointments in a representative democracy, it is desirable (if not essential) to have more than a purely nominal or informal or restricted link to the elected government and legislature.

The input of governments that change over time, and which are accountable to legislature, into the appointment of such judges, not only affords democratic legitimacy for the appointees, reflecting arguably the most precious feature of the national constitution. It also tends to secure, over time, reflections of the variety of changing values that are also found in the changing composition of the legislature and governments and in the community itself. This is not to politicise the judiciary along purely partisan lines. It is simply to acknowledge the reality that strongly differing views are often held in society about the kind of value judgments that such judges must necessarily invoke and apply.

No one suggests the adoption in Australia, the United Kingdom, India or other Commonwealth countries, of elections of judges or political

[46] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, applying *Air France v Saks* 470 US 392 (1985) and considering *Sidhu v British Airways PLC* [1997] AC 430 (concerning the meaning of "accident" in Art.17 of the Warsaw Convention on Civil Aviation in its application to deep venous thrombosis).

confirmation processes of the American variety. To our eyes, such procedures have too many faults. By the same token, the effective assignment of (most) judicial appointments to advisory bodies, operating wholly or substantially within an established legal culture, is equally defective. Without disrespect to the very distinguished present and past judges and other officials participating in such procedures, theirs are not the only voices that should be heard in the making of such important public appointments.

To replace judicial appointment by elected politicians effectively by a system of judicial appointments selected by present or past judges severs the important link of the judges to democratic authority for their offices. In the process, it risks the effective imposition of an overly narrow perspective about what really matters in judicial performance. It runs the particular risk of limiting the inputs of information and assessment concerning the very wide range of values and qualities that are essential to the judges of a final national court, immediately upon their appointment.

These conclusions do not require a wholesale return to the former appointments system whereby persons were exclusively appointed in a mysterious and secret process undertaken by politicians advised by their Departments, judges, and other officials. The introduction of opportunities for nomination of, and application by, candidates for high judicial office is desirable. So may be a facility for some kind of appropriate and proper official interview process. Nevertheless, the danger of a purely judicial dominance of the appointments of future judges is obvious. The risk in such a procedure is that there may be insufficient questioning of the values of the judicial candidates, their

backgrounds and experience, and an excessively deferential attitude to the established professional values and culture. That danger is far greater, in my view, than the supposed danger of political appointments, given the strong democratic inhibitions upon the appointing authorities to avoid criticism on that ground.

The wisdom of the politicians may be that politicians (more than many judges) will be more aware of the need for observance of the laws of variation of which Charles Darwin wrote so long ago. All living creatures and their institutions thrive best where they exhibit diversity[47]. Inescapably, law and judging are value-laden activities. The appointment process for the judiciary, and particularly in a final court, should properly reflect this reality.

The preferable appointment process, and the one that Darwin would have favoured, would involve the judges and other legal groups being seriously consulted and their views considered. But the last word would belong to elected ministers, answerable to the electors. And this, I suggest, is what the Constitution of India actually provides. Just as the decision of the Supreme Court in *S.P. Gupta* originally declared.

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[47] See Cass Sunstein, *Why Societies Need Dissent*, Harvard (2006).