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**A DARWINIAN REFLECTION ON
VALUES AND APPOINTMENTS IN
FINAL NATIONAL COURTS**

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A DARWINIAN REFLECTION ON VALUES AND APPOINTMENTS IN FINAL NATIONAL COURTS

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DARWINIAN ADAPTATION AND VARIATION

The year 2009 was notable in the United Kingdom for at least two events. For lawyers, it saw the commencement of a new national Supreme Court. For the wider world, it afforded an occasion to remember the bicentenary of the birth of the great scientist Charles Darwin, and the sesqui-centenary of the publication in 1859 of his work *The Origin of Species*¹.

Chapter 4 of *Origin*² concerns 'Laws of Variation'. Darwin's proposition in that chapter was that living organisms survived and adapted to their environment by processes of variation by which they were modified, thus contributing to the "innumerable complex co-adaptations of structure which we see throughout nature between various organic beings". These laws of variation were essential to the survival of organisms and to their gradual evolution to fit them for the world in which they lived. This was a central pillar of Darwin's grand theory of evolution. That theory has proved important as an explanation of the natural world and all living things within it.

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¹ C. Darwin, *The Origin of Species* (1859) Great Books Edition (R.M. Hutchins, Ed. In Chief), Vol 49, 1952, Encyclopaedia Britannica, Chicago, 1.

² *Ibid.* 65. Thus, Darwin presented the question whether thicker and better fur in north dwelling animals [in the Northern Hemisphere] was a consequence of a process of selection over generations or was influenced by the severe climate itself. An interaction of biological and environmental forces was postulated.

It was Darwin's thesis that helped challenge the simplistic notion of divine creation, based on untestable beliefs. He did so by a postulate premised on a rational understanding of the world and grounded in the scientific method. The theory has, in turn, resulted in a staggering collection of advances in knowledge. It had a profound impact on organised society. That impact continues to the present time.

My thesis is that Darwin's theory of variation has relevance, by analogy, to the living organism of the law. Specifically, it has relevance to the institutions of the law, by which binding rules are made for. In all systems of law derived from the British Isles, the decisions of a final national court play a crucial part in defining the legal values of the nation and expressing the rules by which its people live together and co-exist with foreign nations and organisations.

A final national court plays a specially important role in helping its society to adapt to the ever-changing environment in which law operates. My proposition is that, to be successful, such an institution must, like all living physical organisms, adapt to the laws of variation. It must be able to reflect the variety of values that will permit it to adjust to changing times and needs. If this is correct, Darwin's thesis will have implications for the appointments of judges to courts, including to a final national court. Variety is essential to flourishing adaptation. Reproduction by identical or near identical cloning will endanger the capacity of the institution to cope with contemporary challenges, even perhaps to survive.

These conclusions have a Darwinian message to lawyers, to parliaments and to citizens about how they should go about appointing

the judges to such important national institutions. Variety not sameness is the message that Darwin teaches. It is also the message that I propound.

THE JUDICIAL SETTING

The creation of the Supreme Court of the United Kingdom³ is, by any account, a most significant constitutional development. I can think of no other modern parliamentary democracy that would have effected such a significant change to one of its principal constitutional organs with such comparative speed and with relatively little public and professional debate⁴.

The change, symbolised by ceremonial events in which the Queen participated in October 2009, attracted some media attention. However, much of it was of the superficial infotainment variety⁵. Several legal commentators predicted that the new court would exhibit a greater transparency than the Appellate Committee of the House of Lords that it replaced⁶. Others opined that the change was cosmetic and not an “epoch-making event”. Still others expressed concern that the change might result in a drift away from quality in commercial judgments. However, they consoled themselves with the thought that such cases were now often resolved in the City by arbitration rather than litigation⁷.

³ By the *Constitutional Reform Act 2005* (UK)

⁴ A. Le Sueur, “From Appellate Committee to Supreme Court: A Narrative”, in L. Blom-Cooper, B. Dickson and G. Drewry (Eds), *The Judicial House of Lords 1987-2009* (2009), OUP, Oxford, 64, (hereafter Blom-Cooper *et al*).

⁵ See e.g. the coverage of the brooch and hat worn by Baroness Hale of Lincoln at the opening of the new Supreme Court: *The Times*, October 2, 2009, 1.

⁶ E. Fennell, “More independence? Their Lordships have never hesitated to make their views clear in the past”, *The Times*, October 1, 2009, 1.

⁷ *Ibid.*

Desperate journalists, noticing the presence at the opening ceremonies of visitors from Commonwealth countries, the United States and Europe, sought to draw lessons from the record of Supreme Courts created in the other English-speaking countries, progenies of the British judiciary beyond the seas⁸. Justice Albie Sachs, then recently retired from the Constitutional Court of South Africa, suspected that the physical move of the Court's premises and the change of name would "have little more than symbolic importance"⁹. However, he recognised that symbols matter. And that it would "only be to the good if the concept of the independence of the judiciary is reinforced".

Amidst the froth and bubble, there was remarkably little public reflection on the comparatively modest process of consultation with the people of the United Kingdom that took place in the re-design, re-creation and re-establishment of their nation's apex court. In the United States of America, Australia, and most similar nations, any such change would have required huge public debate. In Australia, at least, it would have necessitated a constitutional referendum, few of which, in the history of the nation, have secured the double majority mandated by the Constitution¹⁰.

The High Court of Australia bears its title quite possibly to reflect the relationship which the court was originally intended to enjoy (if that be the word) with their Lordships as members of the Judicial Committee of the Privy Council and despite the earlier decision to call the highest court

⁸ D. Pannick, "The Supreme Court may have had a shambolic start but it's getting better all the time", *The Times*, October 1, 2009, 1.

⁹ Albie Sachs, "Nelson Mandela and Mahatma Gandhi were locked up in our court", *The Times*, October 1, 2009, 1.

¹⁰ Australian Constitution, s128 (a majority of the total electors voting and the majority of the electors in a majority of the States).

in Canada, “the Supreme Court of Canada”, after the model of the Supreme Court of the United States¹¹. However, even an attempt, at this stage, to “re-badge” the High Court of Australia would require a constitutional amendment. Its passage would be no sure thing, given the history of the court under its current name and the natural inclination of Australians to conservatism before altering constitutional things so long settled. I mention these differences not out of criticism of what has occurred in the United Kingdom, but in order to contrast the comparative ease of securing constitutional alterations, large and small, in Britain, when compared with most other countries.

Amidst all the insignificant and desultory commentary on the new court, my eyes fell upon one statement that seemed to express an accurate prediction. It was attributed to the new President of the Supreme Court, Lord Phillips of Worth Matravers. He is recorded as saying that it is “inevitable that there will be more interest in who is appointed to the Supreme Court – and I am bound to say that is a perfectly legitimate state of affairs”¹². He contrasted the attention to the selection procedure for the most recent appointee confirmed to the Supreme Court of the United States, Justice Sonia Sotomayor. By comparison, he pointed out, three appointments in recent months of judges who would become members of the new Supreme Court of the United Kingdom had “received no publicity whatsoever”¹³.

¹¹ *British North America Act 1867* (UK). See K. Keith, “The Interplay with the Judicial Committee of the Privy Council” in Blom-Cooper *et al*, above n.2, 315 at 328ff and “Canada” by Robert J. Sharpe, *ibid*, 350.

¹² F. Gibb, “Supreme Court opens as fears raised of US-style selection of judges”, *The Times*, October 1, 2009.

¹³ *Ibid*. The appointment to the Supreme Court of the United Kingdom in March 2010 of Lord Justice Dyson conformed to the previous tradition. It was announced by the Prime Minister in a press release of a few lines. The statement by the Supreme Court itself was likewise extremely short with 4 lines describing solely the new appointee’s previous judicial service. There was little public discussion. A consideration of the new Justice’s remarks in a dissenting opinion in the Court of Appeal and in his article ‘Some Thoughts on Judicial Deference’[2006] JR 103 might have been fruitful for an engaged media and society.

My purpose is not, of course, to urge that the United Kingdom, any more than Australia, Canada or other countries, should go down the track of the confirmation that process for federal judges in the United States. I will suggest that their process is deeply flawed. The flaws affect not only the filling of positions and the gross delays that attend their consideration, but also the consequent caution imposed on the President by the process, in the hope of avoiding a filibuster in the United States Senate¹⁴.

My thesis is that appointees to a final national court necessarily bring with them values that influence their judicial decisions. That judging in such a court is not, and should not be, a purely mechanical or technical task. That appointing authorities have a legitimate interest in the values that a newly appointed judge will bring to such a court in his or her performance. That a range of backgrounds, interests and skills is important in the case of such appointees, more so even than in the appointment of judges to intermediate and trial courts. That the community that will be affected, indeed governed, by expressions of the law made by such judges therefore has a legitimate interest in knowing more about the values of potential appointees. And that the fiction that such judging is value-free, or value-neutral, is wearing thin and unlikely to last much longer. So that demands will increase for an appropriate democratic involvement in the appointment of such judges at the critical moment of their confirmation in office.

¹⁴ M.A. Fletcher, "Obama criticised as too cautious, slow on judicial posts", *Washington Post*, October 16, 2009, pp.A1, A20.

But what should that democratic component be? And how can it be introduced without importing overt and partisan politicisation into judicial institutions?

CREATION OF THE NEW SUPREME COURT

The opening of the new Supreme Court of the United Kingdom, in its redesigned building across Parliament Square, revived Australian memories of the action of the great, great grandmother of the present Queen, Queen Victoria, in signifying her royal assent to the legislation that earlier gave birth to the Supreme Court of Canada (in 1867) and the High Court of Australia (in 1901). Continuity, not revolution, is the modern hallmark of British constitutional history¹⁵.

The termination of the arrangements by which the highest court of the United Kingdom comprised a committee of the House of Lords and was housed in a corridor of the upper house of the United Kingdom Parliament, came about, apparently, with some gentle persuasion, reinforced by notions of judicial independence contained in the *European Convention on Human Rights*¹⁶. According to such notions, it was considered anachronistic and anomalous, in the twenty-first century, that a nation's highest court should be so closely, even physically, associated with the parliamentary chambers of the principal law-maker of the United Kingdom. The fact that no-one alleged that the Law Lords were actually influenced by the legislative (or executive) law-makers working in the parliamentary buildings was beside the point. In the matter of judicial conduct, English law had long insisted that not only

¹⁵ Cf. S. Pincus, 1688, *The First Modern Revolution*, Yale, New Haven, 2009.

¹⁶ *European Convention on Human Rights*, Article 6.

must the rules of integrity be observed. They must manifestly appear to be observed¹⁷.

Fifty years before the principle of the separation of the judicature was belatedly insisted upon in the United Kingdom, the High Court of Australia imposed a similar rule in the case of 'court' of the Australian judicature. An early innovation of the Commonwealth of Australia was the adoption, in the Australian Constitution, of a provision envisaging laws for the conciliation and arbitration of interstate industrial disputes. This provision¹⁸, in turn, gave rise in 1904 to the creation of a new federal 'court' to perform the constitutional tasks: the Commonwealth Court of Conciliation and Arbitration. Successively, Justices of the High Court of Australia, and later other federal judges, served as presidential members of this important and distinctive national 'court'.

In 1956, however, in a dramatic decision, the High Court of Australia invalidated the federal legislation creating this 'court'¹⁹. It held that the language and structure of the Australian Constitution, providing for an independent judicature, as set out in a separate chapter (Chapter III), forbade the attempt of the Australian Parliament to confer on a court-like body not only powers to decide contested matters requiring the application of the law to facts as found, but also legislative-like powers to create entirely new legal norms in the form of awards for the settlement of industrial disputes.

¹⁷ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 where Lord Hewart CJ famously observed that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". See *Johnson v Johnson* (2000) 201 CLR 488 at 502 [42].

¹⁸ *Australian Constitution*, s51(xxxv). See now the decision of the High Court of Australia in *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

¹⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

In this way, the special Australian 'court' was declared constitutionally invalid. The result was a huge dislocation and much inconvenience. The immediate outcome was the enactment of new laws that created two bodies – a federal court to perform the court-like functions, and a federal tribunal (the Commonwealth Conciliation and Arbitration Commission) to perform non-court functions²⁰.

The essential principle that was involved in the foregoing decision, and the steps that followed it, was that the judicial power must be conserved to judges serving in courts, properly so called, and properly so functioning. Upon the basis of that principle, there would be little doubt that an attempt today to place a federal court in Australia within a federal or State parliament or allowing federal judges to be members of such a parliament and to participate there (however rarely) in the legislative process, would be struck down as incompatible with the Australian Constitution. It would be seen as inconsistent with the need to preserve the manifest independence and separation of the judiciary from the other branches of government.

Accordingly, to the extent that it was known in Australia, the move of the new Supreme Court of the United Kingdom to refurbished and separate premises outside the Palace of Westminster would have caused no special surprise. If there were any surprise, it would only have been that, for historical reasons, the move was so long in coming. In such matters, symbols count, although I concede that Australian symbols have, over time, sometimes themselves been confusing.

²⁰ *Conciliation & Arbitration Act 1904 (Cth)*, s6. The provision was inserted by amending Act No.44 of 1956 which followed the decision of the Privy Council affirming that of the High Court of Australia: *R v Kirby* (1957) 95 CLR 529.

Until comparatively recently, the High Court of Australia regularly utilised State court buildings for its hearings. This was so both on circuits to outlying State capitals, and even in Sydney and Melbourne where, successively until 1980, the seat of the High Court was first based. In 1980, in Canberra, Queen Elizabeth II opened the new building erected to house the High Court of Australia in its permanent home. Suitably enough, the opening ceremony was performed on the anniversary of the birth of Queen Victoria, 24 May 1980. That was a day that, in my youth, was celebrated throughout Australia, and elsewhere in the British Empire, as Empire Day. Those celebrations had continued long after the passing of the late Queen Empress.

Quaint historical anachronisms and temporary accommodations are therefore understandable to Australians, especially lawyers²¹. But viewed with modern eyes, the notion of the highest judges of the United Kingdom daily rubbing shoulders with members of parliament and of the executive government looked increasingly alien to the essential principles that the British rulers themselves had transplanted throughout their Empire. Central to their transplant was a judiciary at once professional, impartial and manifestly independent. In nearly 35 years as a judge in Australia, I was never subject to improper pressure or attempted corruption. That fact represents an Australian achievement. But the judicial model that it carries forward was the one inherited from the United Kingdom.

²¹ These were also addressed in the United States. Until October 1935, when the Supreme Court moved into its own building in Washington DC, it shared space with other governmental institutions. In the 1790s, it occupied the Lower House of the State legislature in New York. Thereafter it shifted to Philadelphia and in 1819 moved to Washington where, for forty years, it was housed in a chamber of the unrestored Capitol building. In the late 1850s, the Court moved upstairs to the old Senate Chamber. It was for critical lack of space rather than separation of powers reasons that Chief Justice Taft in 1925 began lobbying for a separate building for the court, under its exclusive control. See M. Bloomfield, "Buildings, Supreme Court", in K.L. Hall (Ed), *The Oxford Companion for the Supreme Court of the United States*, (OUP), 1992, 99.

To mark the notable occasion of the creation and inauguration of a new national Supreme Court in one of the oldest polities on earth, to whose courts the High Court of Australia and the people of Australia owe a huge intellectual debt, I offer the present reflections. I accept that it may seem inappropriate for someone who was, until recently, a judge in the Australian legal system, to intrude ideas for the consideration of a largely United Kingdom audience. No-one is in doubt that the new Supreme Court is, in a real sense, a continuation of the Appellate Committee of the House of Lords, indeed an evolution from it. In constituting the new court, great pains have been taken to maintain all of the already serving and available members of the House of Lords. Observing this rule was extremely wise if Australian experience in the creation of new superior courts from old courts constitutes any guide²².

The hard-earned reputation for judicial excellence of the Appellate Committee of the House of Lords (and of its *alter ego*, the Judicial Committee of the Privy Council) has assured the new Supreme Court of the United Kingdom a beginning unequalled by any other recently established final national court of which I am aware. The only final court bearing an imperfect comparison was the Federal Court of India of 1935 which was replaced by the Supreme Court of India in 1950. The three other early Supreme Courts of the English-speaking common law tradition – the Supreme Court of the United States, the Supreme Court of Canada and the High Court of Australia – were created completely afresh. There was no equivalent lineage in their judicial membership to

²² M.D. Kirby, “Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal”, (2008) 30 *Sydney Law Review* 177. On the creation of the NSW Court of Appeal, the order of seniority of judges of the State Supreme Court was altered by the elevation of some of them to the new appellate court so that they enjoyed a higher status and precedence than those formerly senior to them. The disruption that this caused lasted decades.

assure to the fledgling institutions a similar certainty of success. Just the same, any creation of a new final national court, with a distinct charter, new premises and some fresh personnel, inevitably raises hopes that, to some extent, a new start will be made and some new ideas adopted. New aspirations, appropriate to the occasion, will normally attend the creation of the new court.

The present is a time of remarkable social, economic and technological challenges for the law. The Imperial era in which the House of Lords and its judges predominated in the exposition and application of the law for a quarter of humanity is now well and truly over. The potential for the new Supreme Court of the United Kingdom to exert influence over other courts, in the many countries where the common law continues to flourish, will depend not on Imperial coercion but on the intellectual cogency of the new court's reasoning and the relevance of its opinions to the solution of like problems in other jurisdictions²³. Still, there is a great potential for utility to others, in part because of the traditions of the past and in part because of the continued use of the English language and many features of English legal traditions throughout the world. These considerations are now reinforced by new links (such as the internet) that did not exist in the days of Empire.

At the centre of these reflections is the troublesome question concerning the appointment of judges to a final national court. So long as, in the United Kingdom, those judges were substantially hidden away in the Law Lords' corridor of the Palace of Westminster, they would be

²³ Cf. M.D. Kirby, "Australia and New Zealand" in Blom-Cooper *et al*, above n.4, 339 at 350; Robert J. Sharpe, "Canada", *ibid*, 350 at 359; A. Chaskalson, "South Africa", *ibid*, 360 at 366.

guaranteed a very high measure of anonymity from all but the *cognoscenti* in Britain and abroad. Now this has changed.

The Law Lords were not, of course, unknown to the judges and many lawyers in Australia, the Commonwealth and other English-speaking countries. Doubtless, in recent years, many of them will also have become known to Europe by reason of their engagement with continental lawyers, 30 years after Lord Denning described the “incoming tide” on European influences on the law of the United Kingdom²⁴. However, save for an occasional foray into the public consciousness of Britain – as when the *Spycatcher* judges were displayed upside down in a London tabloid – most of the final court judges, until now, lived their lives without the public scrutiny ordinarily addressed in other lands to leaders of the legislative, executive and judicial branches of government. Their values and occasional idiosyncrasies, their particular modes of analysis and writing, and their special interests were often known to us who read their judicial opinions (until recently, still called their “speeches”). However, for the general public and even for most persons serving in the other branches of the government of the United Kingdom, such elements of their personality, and anything more, would generally have constituted unexplored territory.

All of this may gradually change now that the Supreme Court of the United Kingdom has a distinctive face and home. Slowly but surely, the individuals who make up the leadership of the third branch of government of the United Kingdom will probably become known to the people they serve. Their decisional values are therefore likely to be

²⁴ *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418.

much more openly displayed, analysed, evaluated and criticised. Endeavours in Britain to go on suggesting that final court judging is value-free are not likely to survive long as a greater realism invades the attention to the new court²⁵. It is my thesis, like Lord Phillips, that these changes are inevitable. Being grounded in an appreciation of reality, the changes will generally be healthy. And they are likely to require the judges themselves to be more conscious of the values they bring to bear in their judicial decision-making. It is also likely that increased public scrutiny will make the judges more aware of the values underpinning the opinions of their colleagues and of the court as an institution, including on the occasions when the judges disagree, either as to the disposition of an appeal or in their reasoning towards a common disposition.

Once it is appreciated that final courts, in particular, are obliged, by the nature of their functions, to analyse evidence and legal questions, and to solve disputes, in part by reference to considerations of legal principle and legal policy²⁶, the notion that the judges are operating on a kind of automatic pilot of purely “technical” law will almost certainly become untenable. The fiction that judging in a final court is value-free will then be exploded. The assumption that it does not matter greatly who is appointed to a judicial seat in a final court, so long as he or she has the “merit” of high professional experience, is then dissolved. Suddenly it becomes clear that the appointments made to the final court are very important indeed for the shape of the nation’s law. They are important because the values of the judges necessarily affect (and in some cases decide) judicial outcomes.

²⁵ See on this T. Etherton, “Liberty, the Archetype and Diversity: A Philosophy of Judging”. Lecture to the Institute of Advanced Legal Studies, 9 July 2009, unpublished, ms pp.29-30.

²⁶ *Oceanic Sun Line Special Shipping Co. Inc v Fay* (1988) 165 CLR 197, at 252 per Deane J; cf. *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

Select a judge with a general disposition to “creative” approaches to the law, with an appreciation that mechanically applying old precedents may today produce unjust and awkward outcomes, and you will probably secure dispositions very different from those that tend to be favoured by a judge who is not inclined to legal creativity but is disposed simply to apply old precedents without too much worry about their unsuitability or inappropriateness. Appoint a legal ‘liberal’ and the outcomes, in terms of judicial dispositions, will tend to be different over time from those crafted by a legal ‘conservative’. Install a person who has an interest in, and knowledge about, international human rights law and that judge’s decisions are likely to be significantly different, over the long haul, from those of a lawyer who is generally sceptical about such ‘new-fangled’ (even ‘European’) notions, and possibly even a little hostile towards them. Elevate a judge whose background was originally in the Family Law Division (such as Lord Scarman) and it may be more likely that his or her values will be marginally different from those of a judge whose background was in large commercial or insolvency disputes (such as Lord Diplock). Appoint a judge who is a devoted adherent to church or other religious beliefs and it is likely that his or her decisions on bio-ethical questions, may be different from those of a non-believer or humanist.

None of the foregoing is inevitable, still less irreversible. People, even judges, change their positions over the course of their service which, in the case of final court judges, tends to have been comparatively long. Chief Justice Mason in Australia is a judge whose judicial values appeared to change mid-career, when he was elevated to be Chief Justice of the High Court of Australia. Of course, differences in judicial

values do not necessary follow the lines of modern political parties (which, in recent times, tend anyway to be noted for their close similarities rather than differences over a wide range of subjects). The complete divorce of the judiciary from party politics is one of the great legacies of the British judiciary to the world. No-one is suggesting that this legacy is about to change or that it should do so . Nor am I suggesting for a moment that any of the foregoing judicial ‘inclinations’ are necessarily improper. Or that a good judge will not strive to be conscious of personal inclinations and to make appropriate adjustments of the mind in reaching judicial orders impartially and independently.

The fact remains, however, that there are deep-lying values that emerge in the performance by judges of their professional functions. They affect the way the judges see problems and whether they see a problem at all. Inclinations are important to assessments. So are intuitions that play an inescapable part in any form of decision-making, including that by judges. If judges say that they have no sin of personal inclinations, born of their life’s experience, they deceive themselves and the truth is not in them. Analysis of the decision-making of final courts by reference to mathematical scalograms that track decisional patterns over the years of judicial service, tend to confirm the impressionistic assessment of the *cognoscenti*. Few leading judges of our tradition can be classified by reference to the categories of party politics. But most can be catalogued by reference to other considerations such as background, inclinations, tendencies and professional and other experience²⁷. To deny these truths is to fly in the face of informed professional assessment; as well

²⁷ A. R. Blackshield, “Quantitative Analysis: The High Court of Australia 1964-1969”, (1972) 3 *Lawasia* 1; cf. F. Kort, “Predicting Supreme Court Decisions Mathematically” 51 *American Political Science Review* 1 (1957); G. Schubert, “Judicial Attitudes and Policy-making in the Dixon Court”, (1969) 7 *Osgoode Hall LJ* 1; A. Tyree, “The Geometry of Case Law”, (1977) 4 *Victoria University of Wellington LRev* 403.

as the more precise statistical analysis. It also contradicts, in my own case, a lifetime's experience spent observing, and participating in, the governmental function of appellate judging.

It is ironic that it is the step of the final court of the United Kingdom, in moving across Parliament Square to its new home, that will probably remove the court from the protective anonymity of the parliamentary corridor in which it hitherto operated. The irony derives from the fact that that corridor was in the very building where the examination of the values of everyone else was a daily obsession, not only of the occupants of the building themselves, but of the news media and many of the general public.

The important question thus posed is how far the shift will not only remove the cloak of anonymity, but expose the new court, in the United Kingdom, to the analysis of the values of its highest judges in a way that has not hitherto generally occurred in Britain, certainly at a popular or public level. Until now, such analysis was generally discouraged not only by situational considerations but also by doctrinal beliefs rooted in the traditional 'declaratory' function of the judiciary and the positivist, objective and linguistic analysis of the judiciary's performance. In the United Kingdom, these long-held verities are about to be exposed (as in other common law final courts) to the light of greater public attention and enhanced legal realism. As Lord Phillips has remarked, these developments are likely to be healthy ones. But they have also great significance to the choice of persons to serve on the final court and thus the process by which that choice is made and given effect.

ESTABLISHMENT OF THE HIGH COURT OF AUSTRALIA

Some of the foregoing themes about values in the law (and the special importance of judicial appointments in a final court) can be illustrated by turning back to the establishment of the High Court of Australia in 1903.

Although the Australian Constitution of 1901 envisaged the court as “a Federal Supreme Court” and as the primary repository of “the judicial power of the Commonwealth”²⁸, detailed provision for the operation of the court and for the appointment of the Justices was not enacted until 1903²⁹. Federal legislation³⁰ subsequently provided that the court would be described as a “superior court of record and consists of the Chief Justice and two [later six] other Justices ...”³¹.

In the appointment of new Justices, provision is also 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 relation to the appointment³². That provision was not enacted until 1979. Although it has resulted in a pool of inter-governmental nominees and was designed to assuage State criticisms of repeated interpretations of the Constitution by the High Court inimical to State powers, the process of “consultation” in Australia (unlike India³³) means just that. The States provide nominees. There is no obligation for the Commonwealth to limit appointments to those nominated, much less to accept any of the

²⁸ *Australian Constitution*, s71.

²⁹ *Judiciary Act 1903* (Cth).

³⁰ *High Court of Australia Act 1979* (Cth).

³¹ *Ibid*, s5.

³² *Ibid*, s6.

³³ The Supreme Court of India is established by the *Constitution of India*, Art.124. Judges of the Supreme Court are to be appointed by the President ... “after consultation with such of the judges of the Supreme Court and of the High Courts of the States as the President may deem necessary”. The word “consultation” has been given a meaning obliging it to be effective and implying an exchange of views after examining the merits of appointments. It does not necessarily connote concurrence but it comes very close. See *S.P. Gupta v Union of India* AIR 1982 SC 149; *Union of India v Sankalchand Seth* AIR 1977 SC 2328.

nominees. My own appointment to the High Court of Australia 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.

State perceptions of the inclination of the High Court judges to interpret the Constitution in a way most favourable to the expansion of federal legislative powers go back to the early days. Yet at the very beginning, the original appointees to the High Court of Australia did not take an unnuanced view of that matter. The three original Justices were the Chief Justice, Sir Samuel Griffith (then Chief Justice of Queensland), Mr Justice Edmund Barton (first Prime Minister of Australia) and Mr Justice Richard O'Connor. Each had played a part in the constitutional conventions in the 1890s that led to the adoption of the Australian Constitution. Each was a fine and ambitious lawyer. Each had seen himself as a potential Chief Justice. Yet, once the new national court was created, they all worked closely together. They appeared conscious of the historical function that they were performing as the initial expositors of the law in Australia, especially the written constitutional law.

Because of similarities between provisions in the Australian and United States constitutions, the original Justices in the High Court initially followed American constitutional doctrines on federal questions, including those of inter-governmental immunities and reserved State powers³⁴. In effect, from a reading of the Constitution as a whole, they concluded that it was intended to preserve and maintain a kind of

³⁴ These doctrines were 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.

balance between federal and sub-national powers. Such a view would perhaps now be explained in terms of two interpretive principles that have come to the fore in recent decades in the construction of legislation more generally: a *purposive* construction, aimed at upholding the overall objective of the law and a *contextual* construction, aimed at subjecting particular provisions to the overall structure and object of the document.

The harmony of the original Justices of the High Court of Australia is evident from the fact that they lunched together daily and formed a strong social and professional bond. However, in 1906, the appointment of two additional Justices, each a fine lawyer with less conservative legal views, shattered the calm of the new court. If ever it was necessary to demonstrate the importance of appointments to the values of a final national court, that lesson was quickly drawn to notice in Australia when Justice Isaac Isaacs and Justice Henry B. Higgins took their seats. Isaacs, in particular, was no less brilliant than Griffith and even more ambitious. He was destined to become Chief Justice and the first Australian-born Governor-General. He had a great mastery of the law. And he differed fundamentally in his approach to the construction of the federal Constitution.

With the support of Higgins, Isaacs immediately began propounding a doctrine that would eventually prevail in 1920 in the *Engineers Case*³⁵. 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 ordinary meaning and the paramountcy of federal law was to be upheld. There was to be no implied limitation upon such a meaning by reason of the federal character of the

³⁵ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129.

constitutional document in which the grant of power appeared. This was a rule of literalism which was much favoured by common law courts in statutory construction generally for most of the 20th century. In constitutional adjudication in Australia (but not more generally), it continues to prevail.

In practical terms, this approach has meant the continuous expansion of the powers of the federal government and parliament. At the end of my service on the High Court, when a radical outcome of this approach effectively expunged a century of painstaking judicial elaboration of the federal industrial relations power³⁶, I drew attention to the dichotomy that had evolved between the *contextual* interpretation of most legislation and the *literalist* interpretation of the Australian Constitution³⁷. The shockwaves of the nationalistic and non-federal approaches of Isaacs and Higgins are felt in Australia to this day.

It is vital to appreciate that neither the position of the original Justices of the High Court of Australia nor that of Isaacs and Higgins was unarguable, illicit, improper, wrongly motivated or so-called “activist”. Each is a legitimate and fully argued approach to the judicial task in hand. Each has had highly intelligent supporters in and outside the High Court. Each reflects a different spectrum of values and perceptions about the text and objectives of the Australian Constitution. Each is sincerely held by capable and independent judges. However, because these values have profound consequences for the outcome of cases (not to say for the distribution of governmental powers within the nation), the appointment of judges having such differing views is of legitimate

³⁶ *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

³⁷ *Ibid* at 229 [557], per Kirby J.

interest to the governmental appointing authorities and to the people of the nation who will be affected by the decisions made by such judges.

According to Chief Justice Mason, writing on the Griffith Court that ushered in the earliest operations of the High Court of Australia³⁸:

“With the advent of Isaacs and Higgins, Griffith’s dominating influence began its steady decline. The decline gathered pace with the death of O’Connor in 1912, his replacement by Gavan Duffy and the appointment of Powers and Rich as additional Justices in 1913. ... Isaacs’ knowledge of the law was just as comprehensive as Griffith’s. Isaacs was an outstanding constitutional and equity lawyer whose influence has continued to the present day. He was just as determined and as energetic as Griffith had been. He was a prolific judgment writer; his judgments were encyclopaedic but prolix. The days of friendly concurrences were a thing of the past.”

Lest it be thought that the United Kingdom, with its different constitutional arrangements, is free from the potential for such a clash of values, it is necessary to reflect upon both the similarities and differences between the situation in Britain today and that of Australia after 1903.

The tradition of Austinian positivism has always been stronger in the judicial tradition of Britain. The absence of a single national written constitution with judicial powers of legislative disallowance has fostered an approach to judging that is generally more modest in its conception and technical or verbal in its exposition. Perhaps the very presence of the highest court within the parliamentary building enhanced a felt need on the part of the judges to limit the assertions of judicial power and to

³⁸ 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.

carve out a governmental role that was distinctively different and non-legislative.

However, the books on the shelves of judicial chambers daily demonstrated the fact that centuries of judicial creativity had preceded the appointments of all of the present judicial incumbents. Where else did the common law of England, 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 ever-present reality. Perhaps its very creativity obliged a kind of fiction or sleight-of-hand to quieten the fears of a democratic people that unelected judges enjoyed too much power. Yet creative power they certainly enjoyed. Not only in the exposition (or “declaration”) of the common law, but also in the elaboration of ambiguities in legislation. And, over the centuries, certainly counts as ‘constitutional’ in character. It may not be in a single comprehensive document. But it exists.

In the exposition of the *common law*, some of that legislation there are many familiar instances of the creative role that now devolves on the Supreme Court of the United Kingdom. Take as an example the string of decisions in the English courts on the so-called “wrongful birth” cases³⁹, culminating in that of the House of Lords in *McFarlane v Tayside Health Board*⁴⁰. 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 the rulings in the individual cases followed logically and inevitably from earlier decisional authority. However, no-one could seriously suggest that the outcomes were

³⁹ *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.

⁴⁰ [2000] 2 AC 59.

exclusively a technical or purely verbal exercise for which a lifetime in commercial or insolvency law was the best preparation for a high judicial decision-maker.

Such a background might certainly be proof of intelligence, professional application, ability to perform legal analysis and a capacity for hard work. But these are not the only values that are called upon in litigation of such a kind; nor are they confined to commercial litigators. We discovered this in Australia when substantially the same problems came before the High Court of Australia in *Cattanach v Melchior*⁴¹. In that case, the High Court was divided four Justices to three⁴². The Australian decision is somewhat more forthcoming than the English one, I suggest, about the underlying policy choices faced by the law and the moral dilemmas presented by a decision in such a case, although some such discussions are present in the English decisions and in those of Canada, New Zealand, South Africa and continental Europe, to which reference was made in *Cattanach*⁴³.

Even sharper have been the divisions between the judges addressing medical professional liability in the so-called “wrongful life” cases⁴⁴. The majority of the High Court of Australia on this occasion, rejected the existence of a cause of action asserted by a child profoundly injured by blindness, deafness and mental retardation occasioned by a repeatedly undiagnosed condition of foetal rubella⁴⁵. The majority of the Court denied recovery on the basis that it was not logically possible for it to be asserted, on behalf of the child, that he should not have been born at all.

⁴¹ (2003) 215 CLR 1.

⁴² McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon JJ dissenting.

⁴³ (2003) 215 CLR 1 at 50-51.

⁴⁴ *Harriton v Stephens* (2006) 226 CLR 52.

⁴⁵ Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; Kirby J dissenting.

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”⁴⁶.

In the United Kingdom, the *Congenital Disabilities (Civil Liability) Act* 1976 (UK) expressly prohibited “wrongful life” actions⁴⁷. That Act had been drafted following recommendations of the Law Commission⁴⁸. The values expressed in the Act reflected the same thinking as the English Court of Appeal expressed in the supervening case of *McKay v Essex Area Health Authority*⁴⁹. In other jurisdictions, the preponderance of decisional law has followed roughly the same analysis, although not without occasional contrary views⁵⁰. 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 policy⁵¹), respectfully I remain unconvinced. But this is beside the present point. The cases show that differing views can legitimately exist, and do exist, amongst the judges faced with such problems.

Useful insights can often be found from the study of judicial reasoning in other places. However, in the end, a final national court must reach its own conclusions on subjects involving the content of domestic common law. They 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 legal principle and policy. These considerations enliven an evaluative

⁴⁶ P. Cane, “Injuries to Unborn Children” (1977) 51 ALJ 704 at 719. See *ibid* (2006) 226 CLR 52 at 59 [10].

⁴⁷ Section 1(2)(b).

⁴⁸ Law Commission of England and Wales, *Report on Injuries to Unborn Children* (LawCom No.60, 1974), Cmnd 5709, pp.45-54.

⁴⁹ [1982] 1 QB 1166.

⁵⁰ See *Harriton* (2006) 226 CLR 52 at 70 [53]-[73].

⁵¹ (2006) 226 CLR 52 at 86 [110] ff.

exercise which is stronger and more convincing if it is transparent in its performance. In *Harriton*, I put it this way⁵²:

“[J]ust as parliaments have their functions in our governance and law-making, so have the courts. The courts develop the common law in a principled way. They give reasons for what they do. They constantly strive for the attainment of consistency with established legal principles as well as justice in the individual case. ... The appellant’s life exists. It will continue to exist. No-one suggests otherwise. The question is who should pay for the suffering, loss and damage that flow from the respondent’s carelessness. That is why the proper label for the appellant’s action, if one is needed, is “wrongful suffering”. The ordinary principles of negligence law sustain a decision in the appellant’s favour. None of the propounded reasons of legal principle or legal policy suggest a different outcome.”

Once again, at least at the level of a final court and in the absence of legislation, it is unconvincing to present such an issue as resolved by past judicial reasoning. Because of the procedures of leave or special leave, cases will rarely reach a final national court if there is a long and clear line of decisional authority standing in the way. The very nature of the Court’s jurisdiction is such that it must normally evaluate more than earlier judicial utterances. Once it starts to do this, it enters into the contestable territory of legal principle and policy. In the resolution of such questions, the values of the final national judges are incontestably influential. Sometimes they are controlling. And that it is why those who appoint the judges and those whom the judges serve, have a legitimate interest in the values that may affect their judicial reasoning.

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

⁵² (2006) 226 CLR 52 at 110 [154].

the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd*⁵³. 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 opinion that laid emphasis upon the history of the *Rent Act* and how it would have been understood at the time of the enactment of the applicable provisions (and still more the provisions upon which they were earlier based, dating back to the early decades of the 20th century).

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

The extent to which this clash of values has continued in the United Kingdom can be seen in *Mendoza v Ghaidan*⁵⁴. In that case, the English Court of Appeal held that the survivor of a same-sex couple, who could succeed to a statutory tenancy, could be “spouse” under the *Rent Act*. In each of these cases, the United Kingdom courts declined to follow the earlier decision of the European Commission of Human Rights in the case of *S v United Kingdom*⁵⁵. That decision had refused to extend the

⁵³ [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].

⁵⁴ [2003] Ch 380.

⁵⁵ (1986) 47 DR 274.

concept of “family life” to include a same-sex relationship. Lord Slynn of Hadley, on this point, said specifically⁵⁶:

“Leaving aside the fact these [Strasbourg] cases are still at an early stage of development of the law and that attitudes may change as to what is acceptable throughout Europe, I do not consider that these decisions impinge upon the decision which your Lordships have to take.”

If ever there was a clash of legal values and of genuinely contestable principles towards the proper approach to the meaning of beneficial legislation, it can be seen in the majority and dissenting opinions in the House of Lords 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 inclinations or perceptions about human rights. 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 other than past cases and a dictionary or two. Individual judicial values affect outcomes. That is why values are significant for judicial appointments.

Increasingly, in the coming years (including in the United Kingdom) this truth will be realised. It will be realised by the appointing officers in the executive government who have the all but last (formal) say under most constitutional arrangements about judicial appointments. But it will also influence the process of consultation and selection that is put in place for the making of such appointments.

⁵⁶ [2001] 1 AC 27 at 39-40.

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

The provision for a democratic element 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 an appointment provides 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 misconduct⁵⁷. Both the appointment and removal of such judges are constitutionally important steps, comparatively rare, at once personal and public and having significance for the governance of a democratic polity.

Combined with the strong tradition of apoliticism (in Australia, including absence of contact with politicians and also with unelected officials) between the coming in and going out of the judges, the foregoing arrangements must be said to have worked well, on the whole, over a very long time. They recognise constitutional realities. They assure a democratic and even political role in the appointment of judges. And when the significance of judicial values is understood, that political element has, in my view, been justified. Over time, it has tended, at

⁵⁷ See e.g. *Australian Constitution*, s72; *Indian Constitution*, s124(4).

least in Australia, to ensure a measure of diversity in the values of those appointed to high judicial office. It has attracted 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 involving consideration of the long-term deployment of individual decisional values, not just technical or linguistic skills.

In common law countries, the most radical alternative to this British model has evolved in the United States of America. In that country, under differing procedures, 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, appointment and retention processes. Switzerland is the only other country 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 inconsistent with the independent and impartial performance of their judicial functions. Those features represent the hallmark of a judiciary conforming to universal standards of human rights⁵⁸.

The somewhat less radical provisions of the United States federal Constitution also introduced a democratic element in the appointment of federal judges. It does this by the constitutional requirement that federal judges must be nominated by the President but appointed “with the Advice and Consent of the Senate”⁵⁹. Historically, about 20 percent of candidates nominated by the President to the Supreme Court of the

⁵⁸ *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.53, 277 at 324 [4.6.55].

⁵⁹ *United States Constitution*, Art.II.

United States have not been confirmed. The Senate is advised on such confirmations by the powerful Judiciary Committee. In recent times, a serious logjam has arisen, delaying the appointment of federal judges in a way that was clearly not envisaged by those who drafted the constitutional article⁶⁰.

To Commonwealth eyes, however, this is only one of the defects of the United States federal provision. Whilst recognising the high importance of appointees and of their values for the discharge of their office, the confirmation procedure has tended to subject candidates to questions that lie at the heart of their future judicial performance. It has exposed them to substantial 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 perspectives⁶¹.

A measure of what can happen in this respect may be seen in the process involving Justice Sonia Sotomayor on her appointment to the Supreme Court of the United States in 2009. Prior to her appointment, in part as a result of talks or papers she had delivered, three points of view were attributed to her from which she felt obliged to retreat during questioning in the confirmation hearings: (1) that her judicial decisions might sometimes be affected by her life’s experience as a *Latina*, who grew up in disadvantaged circumstances; (2) that it would be sensible for the Supreme Court sometimes to inform itself on decisions of other national courts considering common issues of comparative or international law; and (3) that, in construing the Constitution of the

⁶⁰ *Washington Post*, October 16, 2009, pp.A1, A20.

⁶¹ See L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process*, (2007) Princeton University Press, Princeton

United States of America, the Supreme Court has functions that include re-considering past authority and developing old precedents⁶². The disclaimer or severe qualification of these three very sensible views, which would largely be uncontroversial (or at least fully debatable) in Commonwealth countries accustomed to greater realism and comparativism, evidences the danger of subjecting judicial candidates to such intense political pressures, in the appointment process. It illustrates the corrupting tendency of political partisanship to reduce the judicial candidate to the standards of the infotainment world of modern media and politics.

The previous Canadian government indicated that future candidates for appointment to the Supreme Court of Canada would be introduced to a committee of the Canadian Parliament and subjected to some form of questioning. However, no constitutional requirement obliging “advice and consent” has been introduced into the Canadian Constitution. So far, despite the value-laden provisions of the *Canadian Charter of Rights and Freedoms*, the appointments procedure has been much more restrained. Its future development remains uncertain.

In South Africa, a procedure for appointment to the higher courts has involved facilities for application and nomination, town hall meetings with opportunities for public questioning of candidates; and the submission by an appointments authority of names of appointable candidates from whom the President must select the judge to be appointed. These procedures were considered necessary to alter the composition of the

⁶² J. De Mint, “Two Views of the Constitution and Supreme Court Nominations”, *Washington Examiner*, May 21, 2009, 26. See also, “A Steady Rise, Punctuated by Doubts”, *Washington Post*, July 12, 2009, A1; D.S. Broder, “Battle Lines – For Another Day”, *Washington Post*, July 16, 2009, A23; N.A. Lewis, “Old Confirmation Wars Fuelling Some Critics Now”, *New York Times*, June 26, 2009, A11; D.M. Herszenhorn, “Court Nominee Criticized for Relying on Foreign Law”, *New York times*, June 26, 2009, A11.

judiciary in South Africa, inherited from the previous apartheid years in that country. The achievements of the Constitutional Court of South Africa, in establishing its reputation and credentials in such a relatively short period, appears to vindicate the success of this model, as it operates in that country.

In India, under British rule, the judges of the higher courts were all appointed at the discretion of the Crown⁶³. Under the *Government of India Act 1935* (UK), there were no express provisions for “consultations” on appointments to the Federal Court of India, although, as a matter of courtesy and convention, these were often doubtless made. With effect from January 1950, the *Constitution of India* created a Supreme Court, whose judges were to 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 Court in the states as the President may deem necessary for the purpose”. There was a proviso to this article that, “in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted”⁶⁴.

In a series of decisions of the Supreme Court, this requirement of “consultation” has been elaborated. In *S.P. Gupta v Union of India*⁶⁵, it was concluded that “consultation” connoted discussion and serious consideration; but without the necessity of concurrence. In part, because of the supersession of judges during the Emergency of 1975-1977, a stricter view of the obligation was taken in *Supreme Court Advocates-On-Record Association v Union of India*⁶⁶. There, a majority

⁶³ Arvind P. Datar, *Commentary on the Constitution of India* (2nd Ed), (Nagpur, 2007), Vol.1, 769.

⁶⁴ Indian Constitution, Art.124(2).

⁶⁵ AIR 1982 SC 149, paras.88, 997, 1101, 1013-5, 1026 per Venkataramaiah J.

⁶⁶ AIR 1994 SC 268.

of the Court concluded that the “consultation” was binding on the Executive so that, effectively, the judges had the last say on any proposed appointment. Reliance was placed on the imperative language of the duty to secure the opinion of the Chief Justice. This provision was contrasted with others in the Constitution providing for “consultation”.

This decision has proved controversial and has led to revised procedures following a still further decision of the Supreme Court⁶⁷. Suggestions have been made for an express amendment to the Indian Constitution to ensure that “the finest talent [is] recruited to the judicial service”⁶⁸. However, the expansive interpretation of the requirement of “consultation” remains controversial. It has been strongly criticised by a distinguished retired judge of the Supreme Court as amounting to “a mighty seizure of power” by which the judges have “wrested authority ... from the top Executive to themselves, by a stroke of adjudicatory self-enthronement”⁶⁹. Those who defend the more recent rulings of the Supreme Court of India on this issue generally do so by reference to the peculiar needs of the Indian judiciary to be protected from the perceived defects of the political process.

In Australia, the procedures for judicial appointment have, so far, not formally challenged the ultimate repository of the appointments power. It belongs, in the traditional British way, to the executive government of the Commonwealth or the States or Territories concerned. Nevertheless, within the past decade, procedures for advertising judicial vacancies and

⁶⁷ *In Re President's Reference* AIR 1998 SC 16; (1998) 7 SCC 739.

⁶⁸ See e.g. India, National Commission to Review the Working of the Constitution; see also India, Law Commission, 121st report (1987).

⁶⁹ V. R. Krishna Iyer, “Judiciary: A Reform Agenda” in *Constitutional Miscellany* (2nd Ed), Eastern Books, Lucknow, 2003) 27.

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. The present Federal Attorney-General (Mr. Robert McClelland) has appointed a non-statutory committee to advise him on appointments. The committee presently comprises three judges or former judges (Chief Justice F.G. Brennan of the High Court; the Chief Justice of the relevant 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.

In a recent series of appointments to the Federal Court of Australia, it has been suggested that the government ultimately decided to step outside the recommended nominees to ensure that the consideration of gender was given a higher weight than, seemingly, the committee had done. Under the foregoing procedure, there is no infusion of viewpoints or opinions about short-listed nominees from the general population or from civic, professional or other groups⁷⁰.

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, appointment is reserved, under the Constitution, to the Federal Executive Council which advises the Governor-General as the representative of the Queen. That Council comprises, relevantly, politicians who are also members of the federal cabinet. In effect, because of the recognised legal, constitutional and political significance of appointees to the final national court in Australia,

⁷⁰ Announcement, Attorney-General Robert McClelland, "Federal Court Appointments", Media Release, 23 October 2009.

the ultimate decision is made by the Federal cabinet. It has before it recommendations 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, but, if the proposed appointee does not have the support of the Prime Minister and of senior Ministers, it is unlikely to get up⁷¹.

In this respect, Australian appointments to the final national court continue to observe the realism of past British constitutional practice. The politicians get but one chance to influence the values of the Court and this at the moment of appointment (or at the almost never used moment of removal). They recognise that the selection is extremely significant both for constitutional and other decision-making. They know that big 'mistakes' have been made in the past in the assessment of the values of appointees. They also know that, once appointed, the time for any direct political influence on the judge has passed.

In the United Kingdom, the 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, presently Lord Phillips. The panel includes the Deputy President of the Supreme Court (presently Lord Hope of Craighead) and three other members, each nominated by the respective judicial appointments bodies of England and Wales, Scotland and Northern Ireland. These nominees need not be judges or lawyers⁷². However, at the time of writing, one other nominee (for Scotland) is a judge. Thus, a majority of the five, comprises serving judges. The selection procedure

⁷¹ See "Appointments that might have been ..." in T. Blackshield, M. Coper and G. Williams, *The Oxford Companion of the High Court of Australia*, OUP, 2001, 23-27.

⁷² *Constitutional Reform Act 2005* (UK), ss26, 27, 28.

has been described in the media as “convoluted”. It does not finally involve any direct political or parliamentary participation like that in the United States. Nor is there any direct involvement of citizens or civil society organisations. It is still a largely secret process which does not enjoy the muted political legitimacy that was provided by the former long-standing and traditional role of the Lord Chancellor in *selecting* judges of the higher courts, with the advice of his officials and consultations (but not direct decisional involvement) with the senior judiciary.

Commenting on the process adopted in the United Kingdom, Lord Pannick QC, agreed that “people would start to take more interest in who the judges were and how they were appointed because of the new visibility of” the Supreme Court. To like effect, Professor Kate Maleson of the University of London (Queen Mary College) reportedly said that “the trend generally towards openness and public knowledge” would ensure that the new Supreme Court could not function with anonymity. As its cases attract more attention, so would the composition of the court and so, it was suggested, would its “lack of diversity”⁷³.

From the context, it seems unlikely that Professor Maleson was referring solely to the fact that only one of the twelve Supreme Court Justices (Baroness Hale of Richmond) is a woman and 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 practice, of most of the nation’s final court judges. As in Canada, however, the gender imbalance of the final court in Australia is

⁷³ F. Gibb, *The Times*, October 1, 2009.

much less visible. (In Australia 3 of 7, in Canada 4 of 9, including the Chief Justice. In New Zealand, the Chief Justice is a woman: Dame Sian Elias).

Two insightful comments on the new arrangements in the United Kingdom should be included. They are made by senior office holders in remarks offered on my original paper. I will not attribute them. From other communications, I believe that they are not isolated opinions. They reflect my own views⁷⁴. The first wrote:

“I am like you ... concerned about the extent to which the present system of appellate appointments has come under judicial control, without (at present) any reviewing process, with very real risks of unconscious cloning and with the Lord Chancellor retaining (in reality, despite the CR Act’s elaborate provisions) no residual possibility of intervening. Another feature that you may not have noted is that retiring presidents/deputy presidents get to sit on the appointments commissions which appoint those who are going to succeed them and to fill the extra place needed on the Court. That seems quite wrong. Before the CR Act, the understanding was that retiring judges were not even consulted!”

The other wrote:

“[T]he presence of the UK’s two most senior judges on the panel will inevitably have a crucial effect on the decision making. It seems inconceivable that any lay member will be able to challenge successfully the views expressed by those judges as to any deficiency in legal expertise in a particular area in the Supreme Court required to be filled, and the views expressed by those judges as to the judicial and legal expertise of the applicants and the standing in which those applicants are held by their judicial colleagues. Moreover, there are inevitably personal associations between those judges and judicial applicants which members of the public and their elected representatives might consider undermine the integrity of the process, such as membership of the same Inn, or of the same club, or the formation of a close professional, and, possibly as a result, personal association over

⁷⁴ Letters on file with the author, dated respectively 16 November 2009 and 11 January 2010.

the years. Moreover, the President and Deputy President will inevitably feel an obligation to the other members of the Supreme Court, each one of whom is a statutory consultee. That itself raises questions about the professional and personal associations, such as I have described, between each of those persons and applicants. In those circumstances, the appointment panel looks, to my mind, badly balanced. I very much doubt whether it is capable of delivering the necessary diversity to which you refer ...”

Professional and media speculation about greater public attention in the United Kingdom to judicial appointments to the new Supreme Court and to its decisions and values appear to be useful thinking rather than an institutionally guaranteed likelihood.

CONCLUSIONS

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, the following conclusions may be drawn:

1. Judges in final national courts, even more than trial judges and judges in intermediate appellate courts, have very large responsibilities for the interpretation of constitutional and equivalent provisions (in the United Kingdom, the *Human Rights Act* 1998 (UK) for example); for the construction of important but ambiguous legislation; and for the ascertainment and ‘declaration’ of the evolving common law;
2. The performance of the foregoing tasks, particularly at the level of a final national court, is rarely a purely technical or mechanical function, devoid of value judgments on the part of the decision-makers. In awareness about, and identification and resolution of, such issues, it is highly desirable that the judges of such courts

should be conscious, and transparent, about their own processes of reasoning. They should identify and elaborate any general consideration of legal principle and policy to which they have regard. They should not ignore, or disguise, such considerations by pretending that complex and novel legal questions can all be resolved by reference solely to considerations of legislative texts and past legal authority;

3. 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. Such consequences may include: (a) provisions for the facility of intervention and the presentation of submissions by *amici curiae* in appropriate cases⁷⁵; (b) facilitation of advocacy by the parties addressed not simply to past decisional authority but also to the broader considerations of principle and policy presented by an appeal; and (c) facilitation of the provision of judicial decisions of other final and appellate or equivalent courts and tribunals which may have addressed like questions, and in doing so, may have provided useful materials for reasoning by analogy and (where appropriate) for pursuing a course of consistency in the elaboration of international law⁷⁶.
4. 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. As the business of such courts increasingly extends far beyond the resolution of commercial litigation, skills in, and awareness of, other disciplines beyond contract, maritime,

⁷⁵ Cf. *Levy v Victoria* (1997) 189 CLR 579 at 600-604 per Brennan CJ; 650-652 per Kirby J.

⁷⁶ *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).

taxation, equity and insolvency law is critical. Moreover, the appointment of judges of different sex, background, life experiences and professional engagement becomes imperative. The notion that a narrow range of educational, professional and intellectual attributes is sufficient for the discharge of the “technical functions” of the court, should be firmly rejected by the government, parliament and by the courts and legal profession themselves. As the mechanical (or declaratory) conception of the judicial function gives way to greater realism about that function, the result is obviously a need to address more closely the criteria and procedures of judicial appointment;

5. Once the foregoing is acknowledged, it demonstrates the wisdom of 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. One can safely delegate to unelected officials the selection of other officials whose functions are wholly, or mainly, technical. However, that is not the character of the functions performed today by a judge of a final national court. Inescapably, such a judge must resolve substantial “leeways for choice”⁷⁷. In the theory of popular accountability for such appointments in a representative democracy, it is highly desirable (if not essential) to have more than a purely nominal or informal or restricted link to the elected government and parliament. The input of governments that change over time, and which are accountable to parliament, into the appointment of such judges, not only affords democratic legitimacy to the appointees. It also tends to secure, over time, the variety of changing values that

⁷⁷ J. Stone, *Social Dimensions of Law and Justice*, (Maitland), 1977, Sydney, 649 applying K. Llewellyn “Law Jobs”, 1376-1370.

are also reflected in the changing compositions of parliaments and governments. This is not to politicise the judiciary along purely partisan lines. It is simply to recognise the reality that strongly differing views are often held in society about the kinds of value judgments which such judges are called upon to perform;

6. The type of politicisation of judicial appointments now seen both in federal and State courts in the United States of America seems unsuitable to the judicial tradition of Britain, which is itself reflected and observed in most Commonwealth countries and certainly in Australia. No-one suggests the adoption of elections or political confirmation of the American variety. To our eyes, these procedures go too far and have too many faults. By the same token, the effective assignment of (most) judicial appointments to bodies operating wholly or substantially within an established legal culture is equally defective. Without disrespect to the very distinguished judges and other officials presently participating in such procedures, theirs is not the only (or even the main) voice that should be heard. To replace judicial appointment by elected politicians effectively by a system of judicial appointments selected by present or past judges is not only to sever the important link of democratic legitimacy for our judiciary. 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 input of information and assessments concerning the very wide range of values and qualities that are essential to the judges of a final national court, once appointed; and
7. The foregoing conclusions do not require a total return to the former appointments system whereby persons were exclusively 'given the nod' in a mysterious and secret process undertaken by

politicians advised by Departments, judges, and other officials. The introduction of opportunities for nomination of, and application by, candidates is desirable. So may be a facility for some kind of appropriate interview process. Nevertheless, the danger of a judicial dominance of the appointments of future judges is obvious. The risk in such procedure is that there may be insufficient questioning of present values and an excessively deferential attitude to the established professional values and culture. That danger is far greater than the supposed danger of purely political appointments, given the strong democratic inhibitions upon the appointing ministers to avoid public criticism on that ground. Those who wish to build an effective final national court will infuse its personnel with elements of variety and a questioning inclination. All living creatures and their institutions thrive best where they exhibit diversity⁷⁸.

The foregoing analysis suggests that the appointments procedures in the United Kingdom, Canada and Australia represent a work-in-progress so far as the final national courts are concerned. We need to avoid the Scylla of partisan American politics whilst navigating around the Charybdis of new systems that effectively, if not formally, amount to judges appointing judges.

The guiding principle for the future should be the retention of a healthy democratic element, at the moment of every judicial appointment; but with inbuilt procedures and diverse voices to assure against the selection of unappointable or purely political and unqualified candidates.

⁷⁸ Cf. C.R. Sunstein, *Why Societies Need Dissent*, Harvard (2006), 166.

If we have not yet arrived at a universally acceptable model for the selection of such important and long-serving public office holders, we have at least the begun the journey to a more transparent system. One important key to a successful system must lie in a recognition of the values that judges apply in their decisions and the high desirability, in elected democracies, that those who make value judgments should secure real, and not just nominal, authority from the ultimate source of power in every nation: The people.

The wisdom of the politicians may be that they will be more aware of the need for observance of the laws of variation of which Darwin wrote so long ago. In his bicentenary year, we should not forget the lessons of that great British scientist for the precious institutions of the law and the need for those institutions to resist turning judicial appointments over, effectively, to a perpetual professional elite.
