

# ADAPTATION & VARIATION

*in* APPOINTMENTS *to*  
NATIONAL COURTS<sup>1</sup>

VARIATION

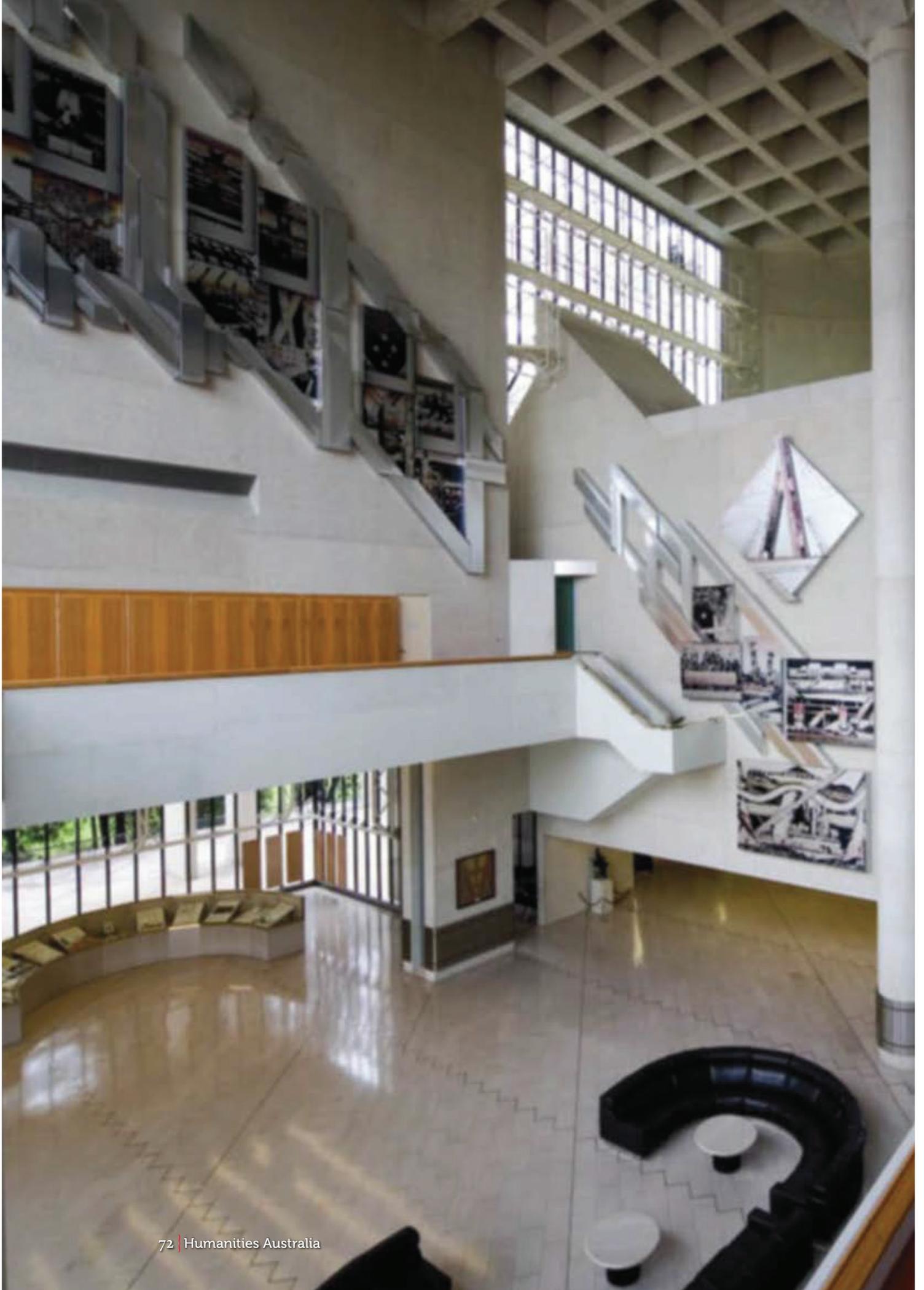
» MICHAEL KIRBY

## THE DARWINIAN LAW OF VARIATION

A final national court plays an 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, and indeed all superior courts, must, like all living physical organisms, adapt to the laws of variation. They must be able to reflect the variety of responses that will permit them to adapt to changing times and needs. Charles Darwin's thesis was that all living organisms need adaptation and variation to survive and adjust to different times and circumstances.<sup>2</sup> Reproduction by identical or near identical cloning will endanger the capacity of an organism to cope with new

challenges, even perhaps to survive. I believe that this conclusion has a message for lawyers, parliaments and 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 Australian Constitution envisaged the High Court of Australia as 'a Federal Supreme Court' and as the principal repository of 'the judicial power of the Commonwealth'.<sup>3</sup> However, detailed provisions for the operation of the court, and for the appointment of the Justices, were not enacted until 1903.<sup>4</sup> Federal legislation<sup>5</sup> subsequently provided that the



court would be a 'superior court of record and consist of the Chief Justice and two (later six) other Justices'.<sup>6</sup> 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 relation to the appointment.<sup>7</sup> This provision was not enacted until 1979. Although it has resulted in the supply of a pool of governmental nominees, and was designed to assuage state criticisms of repeated interpretations of the Constitution inimical to state powers, the process of 'consultation' means just that.

Mason, has argued: 'With the advent of Isaacs and Higgins, Griffith's dominating influence began its steady decline'. The days of friendly concurrences were a thing of the past.<sup>9</sup>

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 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 had a great mastery of the law. And he differed fundamentally in his approach to the construction of the federal Constitution.

THERE IS NO OBLIGATION FOR THE COMMONWEALTH TO LIMIT APPOINTMENTS TO THOSE NOMINATED, MUCH LESS TO ACCEPT ANY OF THE NOMINEES.

The States provide nominees. But there is no obligation for the Commonwealth to limit appointments to those nominated, much less to accept any of the 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 government under this statutory procedure.

#### THE IMPORTANCE OF JUDICIAL VALUES

Because of similarities between provisions in the Australian and United States of America constitutions, the original Justices in the High Court of Australia commonly followed American constitutional doctrines on federal questions, including that of inter-governmental immunities and reserved State powers.<sup>8</sup> In effect, they 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 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. As former Chief Justice

With the support of Higgins, Isaacs began propounding a doctrine that would eventually prevail in 1920 in the *Engineers Case*.<sup>10</sup> 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 the federal law was to be upheld. This rule of literalism continues to prevail.

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 arguable legal approach to the judicial task in hand. Each has had highly intelligent supporters in and outside the Court. Each reflects a different spectrum of values and perceptions about the text and objectives of the Constitution, 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 interest to the governmental appointing authorities and to the people of the nation who will be affected by the decisions made by such judges.



(cover page)  
High Court  
of Australia.

COURTESY OF HIGH COURT  
OF AUSTRALIA.



(left)  
The Public Hall,  
High Court  
of Australia.

COURTESY OF HIGH COURT  
OF AUSTRALIA.

## THE CREATIVITY OF COURTS IN COMMON LAW COUNTRIES

The books on the shelves of judicial chambers demonstrate the fact that centuries of judicial creativity have preceded the appointments of all of the present judicial incumbents in Britain, Australia, and other countries of the common law. 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 is impossible in the face of ever-present reality. Perhaps its very creativity has obliged a kind of fiction or sleight-of-hand to quieten the fears of a democratic people that unelected judges 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. And some of that legislation, 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*, 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,<sup>11</sup> culminating in that of the House of Lords in *McFarlane v Tayside Health Board*.<sup>12</sup> 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



(right)  
Tapestry Banner,  
High Court  
of Australia.

SOURCE: AUSTRALIAN  
ACADEMY OF THE  
HUMANITIES ARCHIVES.

legally liable for a birth, because of negligence, of a healthy but unplanned and unwanted child. But three judges strongly dissented.

Even sharper have been the divisions between judges addressing medical professional liability in the so-called 'wrongful life' cases.<sup>15</sup> 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

TO DENY THE CREATIVE ELEMENT IN THE JUDICIAL FUNCTION IN SUCH A PRAGMATIC AND EFFECTIVE LEGAL SYSTEM IS IMPOSSIBLE IN THE FACE OF EVER-PRESENT REALITY.

rulings in individual cases derived logically and inevitably 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 in commercial or insolvency law was the best preparation for a high judicial decision-maker. In *Cattanach v Melchior*,<sup>13</sup> a majority of the High Court of Australia<sup>14</sup> held that a doctor could be

occasioned by a repeatedly undiagnosed condition of foetal rubella.<sup>16</sup> 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. My own view was, adapting the words of Professor Peter Cane, 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'.<sup>17</sup>

In the United Kingdom, the *Congenital Disabilities (Civil Liability) Act* 1976 (UK) expressly prohibited 'wrongful life' actions.<sup>18</sup>

THE CASES SHOW THAT DIFFERING VIEWS CAN LEGITIMATELY EXIST AND DO EXIST AMONGST HONEST AND HIGHLY EXPERIENCED JUDGES.

That Act had been drafted following recommendations of the Law Commission.<sup>19</sup> The Act also reflected the thinking of the English Court of Appeal in the supervening case of *McKay v Essex Area Health Authority*.<sup>20</sup> In other jurisdictions, the preponderance of decisional law has generally followed roughly the same analysis as that of the majority in the High Court of Australia, although not without occasional contrary views.<sup>21</sup> 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),<sup>22</sup> respectfully I remain unconvinced. But this is beside the present point. The cases show that differing views can legitimately exist and do exist amongst honest and highly experienced judges.

Useful insights can often be found from judicial reasoning in other places. But, in the end, a final national court must reach its own conclusions on subjects involving the content of the 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 exercise, which 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 the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd*.<sup>23</sup> 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 twentieth 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

(below)

Courtroom 1,  
High Court  
of Australia.

COURTESY OF HIGH COURT  
OF AUSTRALIA.



of reading such statutory words so that they would apply in the 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.

If ever there was a clash of legal values and of contestable principles towards the approach

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 other than past cases and a dictionary or two. Individual judicial values affect outcomes. That is why judicial appointments are extremely important, particularly

INDIVIDUAL JUDICIAL VALUES AFFECT OUTCOMES. THAT IS WHY JUDICIAL APPOINTMENTS ARE EXTREMELY IMPORTANT, PARTICULARLY APPOINTMENTS TO FINAL NATIONAL COURTS.

(below)

Sign, High Court of Australia.

SOURCE: AUSTRALIAN ACADEMY OF THE HUMANITIES ARCHIVES.



to generally 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.

appointments to final national courts.

Increasingly, in the coming years (including in the United Kingdom) this truth will come to be realised. It will be realised, for example, by the appointing officers in the executive government who have the all but last (formal) say under our 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.

### TRADITIONAL AND REFORMED PROCEDURES OF JUDICIAL APPOINTMENT

**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, 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 arrangement. The critics fear purely political appointees. On the other hand, there remain strong arguments in support of both the theory and practice that lies behind the appointment of judges, ultimately 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 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

Australia, to ensure a measure of diversity in the values of those appointed to high judicial office. It has attracted public scrutiny of judicial appointments in the media, academic and professional discourse, which is healthy. It has also provided a corrective to an exclusively 'professional' judgment on appointments by involving considerations of the long-term deployment of individual decisional values, not just technical or linguistic skills.

In common law countries, the main 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, which involves a far more active democratic participation in the selection process. 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 modern standards of universal human rights.<sup>25</sup>

The somewhat less radical provisions of the United States federal Constitution also introduced a more openly democratic element

THERE REMAIN STRONG ARGUMENTS IN SUPPORT OF BOTH THE THEORY AND PRACTICE THAT LIES BEHIND THE APPOINTMENT OF JUDGES, ULTIMATELY BY PERSONS ELECTED BY THE PEOPLE.

grounds of proved incapacity or misconduct.<sup>24</sup> 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 between the coming in and going out of the judges of our tradition, 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. And when the significance of judicial values is understood, that political element has, in my view, been justified. It had tended, at least in

in the appointment of federal judges. It did this by the constitutional requirement that federal judges must be nominated by the President but appointed 'with the Advice and Consent of the Senate'.<sup>26</sup> The Senate is advised on such confirmations by the 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.<sup>27</sup>

To Commonwealth eyes, however, this is only one of the defects of the United States 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 subjected them to huge 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.<sup>28</sup>

### THE MODERN AUSTRALIAN APPOINTMENT OF JUDGES

In Australia, the procedures for judicial appointment have not, so far, formally challenged the ultimate repository of the appointments power. It belongs, in the

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 has appointed a non-statutory committee to advise him on appointments. The committee comprises three present or former judges (former Chief Justice F.G. Brennan of the High Court; former 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

IN AUSTRALIA, THE PROCEDURES FOR JUDICIAL APPOINTMENT HAVE NOT, SO FAR, FORMALLY CHALLENGED THE ULTIMATE REPOSITORY OF THE APPOINTMENTS POWER.

(below)

Courtroom 1,  
High Court  
of Australia.

COURTESY OF HIGH COURT  
OF AUSTRALIA.

conventional British way, to the executive government of the Commonwealth or States or Territories concerned. Nevertheless, in a comparatively short time, procedures for advertising judicial vacancies and inviting applications and nominations have spread from

Attorneys-General of the States of Australia. However, appointment is reserved, under the 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 cabinet. It 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. However, if the proposed appointee does not have the support of the Prime Minister and of senior ministers, it is unlikely to proceed to appointment.

### NEW PROCEDURES IN THE UNITED KINGDOM

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. 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 nominees need not be judges or even lawyers.<sup>29</sup> However some 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 recent 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 education and legal practices, of most of the nation’s final court judges. As in Canada, however, the gender imbalance of the final court 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.)

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 may be drawn.

### SOME CONCLUSIONS

**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 emerging 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 function. It is highly desirable that



judges of such courts should be conscious, and transparent, about their own 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 performance of its functions, including the provision of the facility of intervention and advocacy by the parties, addressed not simply to past authority but also to the broader considerations of principle and policy that will be presented by an appeal.<sup>30</sup>

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.

Fifthly, 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 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 for the appointees, reflecting arguably the most precious feature of the national constitution.



(above)

The Public Hall,  
High Court  
of Australia.

COURTESY OF HIGH COURT  
OF AUSTRALIA.

It also tends to secure, over time, a variety of changing values that are also reflected in the changing compositions of parliaments and governments themselves. This is not to politicise the judiciary along purely partisan lines. It is simply to reflect the reality that strongly differing views are often held in

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 background and experience, and an excessively deferential attitude to the established professional

NO ONE SUGGESTS THE ADOPTION IN AUSTRALIA...OR OTHER COMMONWEALTH COUNTRIES, OF ELECTIONS OR POLITICAL CONFIRMATION OF THE AMERICAN VARIETY.

society about the kind of value judgments which such judges must necessarily perform.

No one suggests the adoption in Australia, or the United Kingdom, India or other Commonwealth countries, of elections or political confirmation of the American variety. To our eyes, these 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 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 severs the important link of the judges to democratic authority for their tasks. 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 assessments that are addressed 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 return to the former appointments system whereby persons were exclusively appointed 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

values and culture. That danger is far greater than the supposed danger of political appointments, given the strong democratic inhibitions upon the appointing ministers 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 Darwin wrote so long ago. All living creatures and their institutions thrive best where they exhibit diversity.<sup>31</sup> Inescapably, law and judging are value-laden activities. The appointment process for the judiciary, and particularly in a final court, should reflect this reality. ¶



THE HON MICHAEL KIRBY AC CMG FAHA FASSA served for thirteen years (1996-2009) as one of the seven Justices of Australia's highest constitutional and appellate court, the High Court of Australia. This service made him Australia's longest-serving judicial officer, with other appointments since 1975 including President of the New South Wales Court of Appeal (1984-1996) and Inaugural Chairman of the Australian Law Reform Commission (1975-1984). International posts include President of the International Commission of Jurists (1995-1998), President of the Court of Appeal of Solomon Islands (1995-1996), Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia (1993-1996), as well as numerous positions in the OECD, the Commonwealth of Nations, the ILO, UNDP, UNESCO, UNODC, WHO Global Commission on AIDS and UNAIDS. He was Chancellor of Macquarie University (1984-1993) and holds honorary degrees from seventeen universities. He was elected an Honorary Fellow of the Academy in 2006.

1. This article is an edited extract from a paper delivered in London in November 2009 at a conference organised by the Society of Legal Scholars and the University of Birmingham's Law School. The full version will be published in 2010 in the proceedings of the conference.
2. See C. Darwin, *The Origin of Species* (1859), Great Books Edition, ed. by R.M. Hutchins, (Encyclopaedia Britannica: Chicago, 1952), p. 1.
3. Australian Constitution, s71.
4. *Judiciary Act* 1903 (Cth).
5. *High Court of Australia Act* 1979 (Cth).
6. *Ibid*, s5.
7. *Ibid*, s6.
8. 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.
9. A.F. Mason, 'Griffith Court', in *The Oxford Companion to the High Court of Australia*, T. Blackshield, M. Coper and G. Williams (eds.), (OUP, 2001), 311 AT 314.
10. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (Engineers Case) (1920) 28 CLR 129.
11. *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.
12. [2000] 2 AC 59.
13. (2003) 215 CLR 1.
14. McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon JJ dissenting.
15. *Harriton v Stephens* (2006) 226 CLR 52.
16. Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; Kirby J dissenting.
17. P. Cane, 'Injuries to Unborn Children' (1977) 51 ALJ 704 at 719. See *ibid.*, (2006) 226 CLR 52 at 59 [10].
18. Section 1(2)(b).
19. Law Commission of England and Wales, *Report on Injuries to Unborn Children* (LawCom No.60, 1974), Cmnd 5709, pp. 45-54.
20. [1982] 1 QB 1166.
21. See *Harriton* (2006) 226 CLR 52 at 70 [53]-[73].
22. (2006) 226 CLR 52 at 86 [110] ff.
23. [2001] 1 AC 27 at 34. See A. Lester and Ors. (eds.), *Human Rights Law and Practice*, 3rd edn (London: LexisNexis, 2009), p. 401 [4.8.48].
24. See e.g. Australian Constitution, s72; Indian Constitution, s124 (4).
25. *Universal Declaration of Human Rights*, Arts.10-11, *International Covenant on Civil and Political Rights*, Art.14; *European Convention on Human Rights*, Art.6.1 ('Right to a fair trial'). See Lester and Ors, above n.47, 277 at 324 [4.6.55].
26. United States Constitution, Art.II.
27. *Washington Post*, 16 October 2009, pp. A1, A20.
28. See L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton: Princeton University Press, 2007).
29. *Constitutional Reform Act* 2005 (UK), ss26, 27, 28.
30. *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).
31. See Cass R. Sunstein, *Why Societies Need Dissent* (Cambridge, Mass: Harvard University Press, 2006).