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MODES OF APPOINTMENT AND TRAINING OF JUDGES -

A COMMON LAW PERSPECTIVE

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OLD WAYS

Northern Ireland, like Australia and most other jurisdictions of the common law inherited from England the old ways of going about judicial appointment and the training of judges.

Unlike the countries of the civil law tradition, it rejected a career judiciary with training and promotion inside the ranks. Instead, judges, whether of superior or inferior courts, were chosen (almost without exception) from members of the practising legal profession. Indeed, they were usually chosen from an even smaller group, being barristers whose full time work was normally in advocacy before courts. For the superior courts, appointment typically from the senior members of the Inner Bar whose professional skills

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and learning had earlier been recognised by their appointment as Queen's Counsel.

Under the old ways the judge, upon appointment, was given no formal training to ease the path from the life of an advocate to a life on the bench. Usually, after a formal welcoming ceremony, at which extravagant praise was voiced about the judge's merits, he or she (usually he) was scarcely over the pleasure of the event when the rude necessity to sit in court descended. For most, the transition from the well of the court to a seat on the bench appeared to go smoothly enough. Occasionally, the novice would be seen to leap to the feet or to cry "I object" when a question was asked or answer given that seemed objectionable. But the kind of person who was appointed to judicial office had normally had such a long experience as an advocate in the courtroom that the transmogrification was relatively painless. In most cases it turned out to be astonishingly successful. I say astonishingly because the qualities inherently required of an advocate are substantially different from those required for a judge. Truly, in mid-life and mid-career the appointee has the challenge of a virtually unaided translation to large public responsibilities for which the only real preparation was the observation, over many years, of other judges at work.

The training of judges, in a formal school or college, as a prerequisite to the commencement of judicial service, or as an accompaniment to years of service, was, in the old days, out of the question. In part, the resistance flowed from the fact that this had never been the way it had been done in England which, in the judiciary (as in so many other things) adored the gifted amateur. In part, doubtless, it was because the English way of doing things was cheap to the public purse and relatively efficient. The private sector, of the advocate's practice, was thought to give the judge the necessary

preparation at no cost to the state.

Setting up schools and colleges for judicial education is an expensive business. It involves the provision not only of the infrastructure and the personnel but also diverting the judicial novice from the performance of judicial duties. As these are at a premium in every common law jurisdiction, and because judge power is scarce as the case lists expand, the notion of "lost time" in judicial training was uncongenial to the Executive. But there were also theoretical objections. In England, Lord Devlin, a great judge, was most critical of the Bridge Report which had suggested that English judges should undergo specialised training¹:

"I ... regard with a degree of indifference verging on contempt the criticism of judges that demands for them a type of training which render them more like assessors or expert witnesses than judges of fact and law ... The judge's function is to listen intelligently and patiently to evidence and argument ... to evaluate the reliability and relevance of oral testimony ... and finally to reach a conclusion based on an accurate knowledge of law and practice ... The capacity of being a judge is acquired in the course of practising the law".

Lord Devlin's view was supported by Lord Hailsham². The explicit fear expressed by Devlin was that judicial training would become an illicit means of inculcating in the judicial branch the values and opinions of the Executive Government. In the United States, with a different organisation of the legal profession (and without the specialised *cadre* of advocates known as barristers) the necessity to provide schools and colleges, training and instruction was clear in some cases. But this was not thought to be the case in

¹ P Devlin, *The Judge*, OUP, 1979, 36-47.

² Lord Hailsham, *Hamlyn Revisited: The British Legal System Today*, London, Stevens, 1983, 50-51.

countries which followed the English model. A fine Australian judge, Gordon Samuels, remarked in 1980³:

"The best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their task with tolerable efficiency. If it is recognised that a large proportion of new appointees cannot perform competently without prior instruction, then the system of selection has failed, and basic training is little more than a means of propping it up".

There were similarly settled ways for the selection of the judiciary. Whereas in civil law countries, those who would advance through the ranks were persons who entered college after university and spent a lifetime as a member of the judicial branch and whereas in the United States formalised procedures of selection, confirmation and even election were the norm, things were different in most of the jurisdictions of the common law. It was true that independence constitutions commonly introduced new systems of appointment in many new Commonwealth countries. These usually involved a Judicial Services Commission comprising representatives of the legal profession and of the judiciary to temper the judicial appointments of the politicians. There was no suggestion of election: an American extension of democracy thought in most parts of the world quite unsuitable to the choice of judges and to the need to secure and maintain in office independent and courageous persons who (if required) would actually stand *against* the tide of popular opinion. Even formal confirmation hearings were regarded as an anathema. The instances in the United States involving Judge Bork and Justice Thomas are frequently mentioned - but there are other equally depressing stories about the

³ G J Samuels, "Judicial Competency: How Can it be Maintained" (1980) 54 *Australian Law Journal* 581 at 585.

⁴ J A Maltese, *The Selling of Supreme Court Nominees*, Johns Hopkins, Baltimore, 1995. See esp the defeat of the nomination of John J Parker,

confirmation process⁴.

Instead of these systems of choice or recommendation by a Commission, the old ways involved a remarkably simple procedure. Appointment to the Bench was in the gift of the elected Executive Government of the day. A principal political officer would make the eventual proposal (in England the Lord Chancellor; in Australia usually the Attorney-General). The decision to appoint or not, or to select amongst candidates, would be made by the Cabinet of politicians, usually in the midst of other pressing political business. Once the new appointee was chosen, his or her name would go forward to the Queen, the President or a Vice-Regal representative for formal confirmation. That was it.

ADVANTAGES OF THE OLD WAYS

There are many defects in the foregoing description of the old ways of appointment and training of judges in the courts of the common law. Some of the defects explain the invention of new systems for appointment and training now followed in many countries of the new Commonwealth and the established systems of election, appointment, confirmation and formal training which are a feature of the judiciary of the United States. I will turn to these innovations. But first, I want to note a number of important values which the old ways preserved in jurisdictions, such as Northern Ireland and Australia.

As in most things in life, the old ways were not wholly bad. As in many things long settled, they had reasons behind them which explained their

endurance. In considering changes to the settled practice hitherto followed in the matter of appointments and training of judges, it is as well to start with a recapitulation of the advantages of the systems that have been followed to date:

- ❖ So far as appointment is concerned, there can be no doubt that there are important strengths of the common law system over that followed in civil law countries. A person appointed to the judiciary in middle years, after having established a significant legal career in the private sector, is likely to have a different attitude to the office of a judge than a person who has never done anything else, has always worked in the public sector and who has been dependant on superiors, bureaucrats or politicians for advancement to higher judicial office. It has always seemed to me to be an explanation of the strongly independent cast of mind of the judge of the common law tradition is that he or she will ordinarily not consider the judicial office to involve service to the government. On the contrary, those who have spent the better part of their lives in the successful pursuit of functions as an advocate (or more recently as a senior solicitor, government lawyer or academic) will tend to have a different point of view to the person whose life has been spent in various positions of government service. This attitude of mind is extremely important to the way in which judges of the common law go about their work and to the power which they exercise on behalf of the people whom they serve. It explains, for example, why the reasons of judges of common law courts are more discursive, longer and less obviously syllogistic than those of judges of the civil law tradition. There is a greater candour. There is greater willingness to explore the major and minor premises which explain the decision in hand. Nowadays, there is less self-deception that the words of constitutions or statutes are

unambiguous, that past precedents of the common law fill all the gaps needed to meet new circumstances or that policy and legal principle have nothing to do with the decision in a particular case.

- ❖ People nurtured in the private sector are, it seems to me, more likely to be questioning and candid about such matters. They are likely to be more insistent upon the right to dissent (not often a feature of the jurisdiction in civil law countries). They are prone to demand the opportunity to explain honestly and in detail the reasons for their opinions. They do not pretend that the law is always clear and unambiguous lest ambiguity or dissent might unsettle obedience to government and respect for the law⁵.
- ❖ There is another strength in the flexibility which the politicians of the day had in choosing the judges. In the right hands, it meant that appointees could reflect, over time, and in a very general way, the differing philosophies of successive governments. There was never a precise correlation in this. Where governments rarely changed, correctives often emerged as (I would suggest) the appointments of high quality to the House of Lords in the last years of the previous Conservative Government. Governments could sometimes be greatly disappointed by the decisions of their appointees once safely in office. But the old ways did allow light and shade. There is a risk in judicial commissions and legislative confirmation proceedings that the appointment process will opt for the "safe" or "unknown" candidate rather than the intellectually

⁵ L Mailhot and J D Carnwath, *Decisions, Decisions*, a handbook for judicial writing, Y Blais, Quebec, 1998 (reviewed (1999) 73 *Australian LJ* 290 at 291-2.

vibrant, energetic or bold appointee. Judge Bork was brought down largely by his mass of academic writing revealing his opinions on a great range of topics. Studies of the United States scene have demonstrated a significant fall-off in the academic writings of judges of the United States Courts of Appeals who may be aspirants for appointment to the Supreme Court⁶. The old ways could sometimes result in the appointment of controversial candidates who would never make it through a club-like astrosphere of a judicial commission or the political circus of a legislative confirmation.

- ❖ There is another feature of the old system of appointment which is connected with this. Many defenders of the old method of appointment argue that it ensured that the politics of candidates was treated as irrelevant. If by politics it is meant that politicians would ignore the projected philosophical stance of a candidate, it is probably true that this mattered less in a jurisdiction such as the United Kingdom, where there is no comprehensive written Constitution and where, until recently, there was no formal bill of rights. In a country such as Australia, where the federal Constitution is extremely important to the division of powers in the nation between the Commonwealth and the States, the perceived social values of the judges are inescapably significant to the governments appointing them. The present Chief Justice of Australia earlier introduced an element of *Realpolitik* into this debate⁷:

⁶ J Gaille, "Publishing by US Court of Appeals Judges Before and After the Bork Hearings" (1997) 26 *Journal Legal Studies* at 371. cf M D Kirby, "Attacks on Judges - A Universal Phenomenon" (1998) 72 *Australian Law Journal* 599 at 606.

⁷ R T Thomson, *The Judges*, Sydney, Allen and Unwin, 1987 quoting Gleeson CJ at 72.

"There is nothing that makes one person appear more enlightened to another person than that the former agrees with the latter's views. It is only human nature that politicians, like everybody else, tend readily to accept the notion that a particular person is wise and enlightened when they know that that person shares their opinion on matters affecting law and society ... That is just human nature".

I venture to suggest that this has always been the case wherever politicians have been involved in the appointment of judges. It is not necessarily a bad thing, unless the convention of seeking high quality candidates is ignored or unless a long-term government of one political persuasion seeks to stamp on the judiciary partisan appointees unquestioningly loyal to its values. If these abuses are avoided by the observance of conventions, the right of the elected representatives of the people to appoint the judges from those senior, qualified lawyers whose general values they hope will be in tune with their own is a means, which defends the judicial institution from uniform or monochrome social values. Under the system copied from England, it is legislators who have the final say in removing judges from office for proved incapacity or misconduct. It is therefore not entirely inappropriate that, in parliamentary democracies, representatives of the legislators in government should have the final say in the matter of appointment. This gives an element of democratic legitimacy to the judiciary. Of course, once appointed, the judge must be independent of party politics and must avoid all appearance of partisan allegiance.

- ❖ The lack of formalised judicial education had the advantage that most governments would hesitate before appointing a person to judicial office who did not have easy acquaintance with the running of a court and the business of law as the courts practise it. In this sense, the lack of formal

training tended to reinforce the mode of appointment from the select band of experienced senior advocates. They could be trusted, once appointed, to perform their duties easily, with skill and without embarrassment to the government which put them there. The lack of institutional courses reinforced the high individualism of the Bench. This, in turn, was a defence against orthodoxy and the waves of received wisdom and popular passion against which the judiciary is sometimes essential to defend the individual.

It is rare today to see the traditional common law method of appointment defended and the previous lack of formal judicial training explained. But it is important, in addressing the options for reform, to realise that the old ways did not develop and persist wholly by accident. They had merits. They had rational supporters. In devising any new procedures that will be put in their place, it is essential to keep the values defended by the old ways in mind.

NEW WAYS - SELECTION

A number of features of the outcome of the established procedure for judicial selection have lately cast doubt on whether it is still appropriate for the judicial institution in common law countries as the judiciary readies itself for service in the 21st century.

Despite the opportunity for varied appointments, from different backgrounds, the reality is that in most common law jurisdictions the judiciary is fairly uniform, usually being a reflection of the composition of the senior Bar. The kinds of people who make it to the ranks of Queen's Counsel (or Senior Counsel as they are now known in a number of jurisdictions, including of Australia) are often those with substantial commercial or other practices. They

may not reflect an entire cross-section of talent of the Bar, still less of the legal profession as a whole. Furthermore, there remains a serious under-representation of women, of ethnic or other minorities and sometimes a disinclination to look to other, equally independent minded lawyers, who have served in senior positions in universities, in large law firms or even perhaps in government departments. In the past two decades, an increasing number of appointees to the judiciary in Australia - especially the federal judiciary - have come from the new ranks. This has occurred because of a personal commitment of individual Attorneys-General to appoint judges from outside the lists of the senior silks, whilst insisting on professional skill.

Accepting that it is unlikely that any common law jurisdiction would throw over its procedures of appointment for those followed in civil law countries, and accepting further that it is unlikely that we would now follow the Jacksonian model and move to the election of judges (as occurs in 33 States of the United States) the options for reform in the procedures for appointment are principally as follows:

1. To introduce a procedure whereby the legislature elects judges, at least of the highest courts;
2. To adopt the procedure of advice and consent, with formal confirmation hearings, as followed in the United States for the appointment of federal judges;
3. To establish, by judicial decision⁸ the special prerogative of the judges

⁸ cf *Supreme Court Advocates Association v Union of India* [1994] AIRSC 268; [1993] Supp 2 SCR 659.

to be involved in the business of appointment of the judiciary so as to maintain the quality of appointments and to ensure the true independence of the judiciary from the other branches of government;

4. To establish some form of judicial appointments body in which the voice of sittings judges will be heard but at a table at which the Executive Government and perhaps community groups, reflecting democratic will, has a say or the predominant say, in the final appointments; and
5. To introduce a procedure of formal consultation before appointment but continuing to reserve to the Executive Government the final say.

The involvement of the legislature occurs in Germany where judges are appointed under a system of election by the legislature⁹. In Israel, almost a country of the common law, judges are selected by a committee comprising representatives of the legislature, the Executive, the judiciary and the Bar. An analogous system appears now to operate in South Africa. Candidates are interviewed and voted upon.

Because of notable, and highly publicised examples, most lawyers are familiar with the procedures followed in the case of appointments of federal judges in the United States, whether as Justices of the Supreme Court or as judges of the other federal courts. The President's nominees are investigated by the Department of Justice, the Federal Bureau of Investigation, the White House, the American Bar Association and the various lobby groups in the community prior to consideration by the Senator's Judiciary Committee, in

⁹ L Armytage, *Educating Judges - Towards a New Model of Continuing Judicial Learning*, Kluwer, the Hague, 1996, 59.

advance of their hoped for confirmation. In some States of the United States, the Missouri Plan involves the Governor of the State appointing a judge from a list of qualified candidates screened by a nominating committee. Within a year after appointment, however, the judge must stand for election where he or she can be confirmed or recalled. To most of us, the involvement of the electorate is wrong in principle. Moreover, it is likely to be a formula for judicial caution where sometimes boldness and courage are absolutely necessary.

In India, in a controversial decision of the Supreme Court, a majority held that the constitutional requirement that in the case of a judge other than the Chief Justice, the Chief Justice of India shall always be "consulted" by the President¹⁰, "consultation" meant concurrence. Thus, without the agreement of the Chief Justice of India, no judge could be appointed to the Supreme Court. Whilst there may be special conditions in India which gave rise to this decision, whether as a matter of interpretation of the language of the Constitution or as a matter of policy, few countries of the common law are likely to go down the same path. A judiciary, and particularly a judiciary of an ultimate constitutional court, whose members are effectively controlled solely by the judges themselves might tend to adopt a rather uniform outlook. It would lack entirely the democratic legitimacy which the involvement in the process of persons elected directly by the people, gives to the current system.

The establishment in new Commonwealth countries, often under constitutional provisions, of Judicial Services Commissions was designed to formalise the protection of the judiciary against excessive politicisation, incompetence, corruption and other such vices. It would be necessary to be

¹⁰ Indian Constitution, s 124(2).

on guard that such a commission did not become a further vehicle for judicial orthodoxy: each generation replicating itself in mirror image of its own esteemed qualities.

The International Bar Association's *Code of Minimum Standards of Judicial Independence* provides¹¹:

"Participation in judicial appointments and promotions by the Executive and legislature are not inconsistent with judicial independence provided that the appointments and promotions of judges are vested in a judicial body in which members of the judiciary and the legal profession form a majority".

This would no doubt be acceptable to most members of the legal profession. But many politicians, and not a few citizens, would question the necessity and wisdom of removing political choice. Perhaps it depends on the society concerned. In those in which conventions rule which ensure the appointment of adequate women and members of ethnic, religious and other minorities, the need for such a commission may be doubtful. In societies which are divided along such lines, the establishment of institutional arrangements may be necessary.

At the very least, a more open procedure of consultation and appointment seems to be required. In Australia, legislative provisions require consultation by the federal Attorney-General with his State counterparts before appointing the Justices of the High Court¹². The procedure of consultation is now quite formalised. The federal Attorney-General also takes considerable

11 New Delhi, 1982, par 3a.

12 *High Court of Australia Act 1979 (Aust)*, s 6.

time in consulting judges, legal professional groups, political parties and others. But there is no assurance that the consultative process will deliver a consensus candidate. In a recent appointment to the Court, it was widely rumoured that the Attorney-General took one name to Cabinet but another person was appointed. In some States of Australia, for appointments to the magistracy at least, advertisements are now lodged and specialist selection committees interview candidates before appointment. Whilst the final say remains that of the politicians, the anterior procedure is more open. There is some evidence that it has resulted in appointees of greater diversity and with no suggested fall-off in professional skill and appropriate temperament¹³.

NEW WAYS - JUDICIAL EDUCATION

Within Australia, a series of radio lectures given by me 15 years ago on the judges¹⁴ included the first proposal, at a national level, that judicial training should be institutionalised. It led to a vigorous public debate in which my proposal was often roundly condemned. Most judges of the time (1983) thought my ideas to be unnecessary and even dangerous.

However, in the ensuing years, the establishment of the Judicial Studies Board in Britain (1988), the introduction of special courses for new appointees in New Zealand¹⁵ and ultimately the joint activities of the Australian Institute of Judicial Administration (AIJA) and the Judicial Commission of new South

¹³ Armytage, above n 9, 62.

¹⁴ M D Kirby, *The Judges*, Boyer Lectures 1983, 25-26.

¹⁵ I Richardson, "Changing Needs for Judicial Decision-Making" (1991) 1 (Aust) *Journal of Judicial Administration* 61.

Wales, have seen the opposition to training crumble. A past Chief Justice of Australia, Sir Anthony Mason, observed in 1994¹⁶:

"There has been some apprehension that educational programmes [could compromise] judicial independence. So long as these programmes are left in the hands of the AIJA, the Judicial Commission and the courts, I do not think these apprehensions will be realised ... The need to maintain judicial independence is no argument against the desirability of judges becoming better informed".

One factor in the appreciation of the need for the provision of introductory courses for judges is the growing realisation of the inadequacies of the declaratory theory of the judicial function and of the choices which judges (especially of the higher courts) have to exercise every day. Informing those choices with policy oriented courses as well as courses in judicial technique, can only be to the advantage of the appointee. Mixing with other new appointees - and especially those from different jurisdictions of Australia and from other common law jurisdictions of the region - is also of great benefit. Lecturers are chosen to reflect a happy mixture of experienced judges and lawyers and challenging academics from Australia and overseas. Most of the new appointees find the courses extremely helpful. No one now, in Australia, suggests that they should be disbanded.

On the contrary, in April 1999 the Judicial Conference of Australia announced a plan to establish a National College to educate the judiciary, including in such matters as gender issues, cross-cultural awareness and new technologies. The proposed college would also have a role in continuing professional education. The Director of the Judicial Conference, Professor

¹⁶ A F Mason, "The State of the Judicature" (1994) 20 *Monash Uni Law Review* 1; A F Mason, "The Role of the Courts at the Turn of the Century" (1993) (Aust) *Journal of Judicial Administration* 156 at 166.

Stephen Parker indicated: 'Judges are so busy it is unrealistic for them to seek out their own professional development ... Judges have an increasingly important role in society. More things are subject to law now than in the past. These are such important appointments in public life that the time has come for them to be more open'¹⁷. National arrangements for the training of the judiciary in Canada have been long established. For the last decade, Australia has got by with improvisations. It is now on the brink of considering a more substantial and clearly national institution, possibly in conjunction with a university¹⁸.

The heretical idea has thus become orthodoxy. The dire predictions of disastrous consequences have not been borne out. It is a sign of the open-mindedness of the judiciary and its willingness to change, that most judges in Australia today acknowledge the value of formal orientation procedures.

When I was President of the New South Wales Court of Appeal, I invited new Judges of Appeal to sit with me to observe the very busy motions list before they tackled the list on their own. It was a tribute to their integrity and curiosity that even judges who had served for many years in trial courts gladly embraced the opportunity. Once judicial apprenticeship would have been regarded as an admission of self-doubt or incapacity. Now, judicial education and on the job experience are regarded, in most courts, as the norm. The capacity of virtually all recently appointed judges to access the Internet and to tap into websites specifically designed for new judges means that the formal

¹⁷ S Parker, "Back to School for Judges Under National Reforms" in *The Age*, (Melb) 14 April 1999 A3.

¹⁸ *Ibid.*

processes of education are supplemented by those offered in the new technology.

CONCLUSIONS

Thirty years ago the subjects of this paper were hardly discussed in most jurisdictions of the common law. When mentioned, change would generally be denounced as unnecessary and mischievous. But now changes in judicial education are clearly established. Changes in the appointment process have occurred in some places and are likely to be adopted in most others.

The old ways had strengths. They could not have persisted for so long in common law jurisdictions if that had not been so. But these are rapidly changing times for the law, for society, for technology and for community values. The old ways are now questioned. The genius of the common law has always been that of preserving the good of the past whilst discarding the outdated, the irrelevant and the erroneous. I have no doubt that this is the way in which Northern Ireland, Australia and other jurisdictions of the common law will approach the important and sensitive topics of this paper.