## Judicial Appointment\*

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I write from the perspective of one who frequently appears on behalf of litigants in courts and who is, therefore, frequently an agent of those who are the consumers of judicial services. That perspective causes me to break the topic into two questions. First, what are the attributes of a good judge? Second, how does one best go about ensuring that persons appointed to judicial office have those attributes?

It was said some time ago in England that the function of a trial judge was to be quick, courteous and wrong. It was immediately added, that did not mean that the function of the Court of Appeal was to be slow, rude and right. The Court of Appeal would then be usurping the function of the House of Lords. <sup>1</sup>

We have in Australia now long abandoned the notion that there is a uniquely 'right' answer to any legal contest that matters. But there are many 'wrong' answers. Much of the time of intermediate courts of appeal in this country is spent correcting what can only properly be described as 'error'. Judges who simply get it 'wrong' do so at a significant cost. They do so at the expense of the parties, and at the expense of making unnecessary work for other ranks of the judicial system whose job it is to correct them.

That brings me to the first and essential attribute of a judge. Any judge appointed to any level of the judicial hierarchy must have a level of technical competence and practical judgment commensurate with the jurisdiction he or she will be called upon to exercise. By 'technical competence' I mean a mastery of legal technique, not necessarily a knowledge of any particular legal subject. By 'practical judgment' I mean just that. The noun is also a verb. The job of a judge is to judge. Generally, judgment comes with experience, and generally experience comes with age.

Other attributes are secondary but two other attributes are, in my opinion, essential: courtesy and industry. I take fairness and integrity for granted. A consequence of the independence quite properly bestowed upon the judiciary under our constitutional system is that judges have a monopoly in the provision of judicial services. That monopoly gives them monopoly power. They should not abuse it. There is no excuse for a discourteous or lazy judge, just as there is no excuse for discourtesy or laziness in any other walk of life. Those who litigate should not have to put up with temper tantrums or with bullying or rudeness of any sort. They should be able to expect that their genuine disputes will be resolved

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<sup>1</sup> See Asquith LJ, 'Some Aspects of the Work of the Court of Appeal' (1950) 1 Journal of the Society of Public Teachers of Law 350 at 350.

expeditiously. Those litigants who lose should be told fully and frankly in reasons for judgment why they have lost, and they should have the satisfaction of knowing that their evidence and arguments have been properly considered.

The essential attributes of a judge are, then, in my opinion:

- technical competence;
- · practical judgment;
- · courtesy; and
- industry.

At a minimum, those are the attributes we should be able to expect in any judge in any court.

But once those essential attributes are identified, it is important to recognise that at any time they can be shared by a fairly wide pool of potential judicial candidates. My perception is that at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice. My perception is that the pool gets proportionately wider the further down the judicial hierarchy you go.

How, then, do you choose amongst the potential candidates?

The notion that appointment can only validly be based on 'merit' is naïve. It is the product of the same school of thought that gave us uniquely 'right' legal answers. There are no uniquely 'right' legal answers, and there is no unique measure of judicial 'merit'. There are some people who will display more strongly than others the essential attributes I have described, and that should be given a very great deal of weight.

But at this point wider considerations can, and ought legitimately to be, brought to bear. Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance. Judges are not representatives of sectional interests within the community, but sectional interests within the community need to feel that the law administered by judges applies equally to them all. Representation within the judiciary avoids alienation.

Considerations of judicial style and legal policy are perhaps more controversial. My own view is that those considerations ought not to be ignored. Particularly as one ascends the judicial hierarchy, the style and policy of individual judges matters hugely to the practice and development of the law, and consequently to the practice and development of those areas of civil society that are governed by the law. Save for the private nature of the communication involved, I see nothing wrong with the infamous inquiry of W M Hughes to A B Piddington, nor with Piddington's reply that he was 'in sympathy with supremacy of Commonwealth powers'. That was Piddington's sympathy whether or not he was asked about it. It mattered hugely to the performance of the functions of the judicial office to which he was being considered for appointment. Nor do I think that the United States federal judiciary is any worse off for having to run the gauntlet of Senate scrutiny before appointment.

As to methods of appointment, doubtless there are many different models that can, and have at different times and in different countries, achieved a broadly workable result. Although I am no particular critic, I certainly am no apologist for the traditional and current Australian system of purely executive preferment. At its best it lacks transparency when it comes to the choice between suitably qualified candidates. At its worst, it can result in the appointments of some who are not up to the task of performing the functions of the judicial office to which are appointed. I also sense danger to the fundamental value of judicial independence in continuing the tradition of purely executive preferment in the face of the relatively recent phenomena of judges being elevated through the ranks of the judiciary and of judges retiring to do other things.

On the other hand, I would not be comfortable with moving to a system of judicial preferment where judges are allowed to act like a College of Cardinals. Like begets like. Judges would tend to create their successors in their own images. The tendency would be for the pool of potential judicial candidates to be unduly narrowed.

If I had to choose an ideal method of judicial appointment, it would probably be something of a hybrid. It would have two stages. I would have one method for identifying the pool of potential judicial candidates and another for choosing amongst them. Both stages would be transparent. The first stage would be solely concerned with identifying persons having what I have described as the essential judicial attributes. At the second stage, I would be happy to see the broader considerations to which I have referred openly brought to the fore and debated.