

Features

When it comes to picking High Court justices, give the little guys a go

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WHEN I arrived in Australia in January of 2005, five of the seven High Court justices came from the Sydney Bar. Today that dominance by NSW lawyers has been reduced by 14 per cent, meaning that there are presently four of the seven judges on the High Court who come from working in Sydney. Put differently, a ``mere'' 57 per cent of our top judges are New South Welshmen. (The two women, as it happens, are from Victoria and Queensland.)

There is simply nothing like that sort of regional dominance on the top courts of Canada and the US. In fact, and I say this as a native-born Canadian, there would probably be an insurrection in Canada if anyone were to suggest that Toronto's lawyers should get more than their present maximum of one-third of the spots on the top court. And Toronto is every bit as economically and legally and population-wise the centre of Canada's universe as Sydney is, or thinks it is, in Australia.

The same goes for the US, though there one could, I suppose, make the point that a few Ivy League law schools dominate in terms of who gets on to their Supreme Court. But at least it's not a regional thing, with New York or California hoarding the top spots. (In fact, they don't even get the share their relative populations would warrant.)

Does this massive Sydney-side extra weighting matter? Well, I think it might. First off, it might have affected our federalist arrangements. It is the judges of the High Court who ultimately interpret which level of government -- state or commonwealth -- gets to enact which sorts of laws based on those judges' readings of the Constitution. Over the past 80-odd years here in Australia, our top judges have sided with the commonwealth far more than with the states. More revealingly, perhaps, they have favoured the centre more than Canada's judges have, and even more than the US Supreme Court has.

Of course, there are all sorts of possible explanations for that. But having lots of Sydneysiders on the court may be one of them. Whether that is the case or not, it is undeniable that Australia's Constitution has been interpreted by our top judges over the years to leave the states here in a far more enervated, emasculated position vis-a-vis the commonwealth than has Canada's or the US's.

And how many readers realise that of our six states, two of them have never had a home-grown judge on the top court? In the 100-plus years since federation, neither South Australia nor Tasmania has ever produced anyone that the commonwealth government judged as worthy of appointment to our top court.

Maybe you think that, when it comes to appointing top judges, what is needed is raw legal intelligence and that you're more likely to find that in the biggest urban smoke, namely Sydney.

For the sake of argument, let's just assume that's true. Sydney, because of its size and wealth or what have you, is the home of our biggest legal brains. Does it follow that you want to appoint your top judges from this group of big swinging legal non-hicks?

The answer largely depends on what you want from your judges and how you see them best doing their job. For me, the answer is a resounding ``no''. I think a powerful case can be made for

appointing solid, grey, smart but by no means brilliant people as judges. I think it's a big mistake to appoint people who, deep down, think they're smarter, more sophisticated and possess greater moral perspicacity than the democratically elected politicians who make the enacted laws and the voters who elect them.

Those sort of appointees are much more likely to indulge in judicial activism. And by that I mean they are more likely to give statutes a meaning they, the point-of-application interpreters of those laws, happen to think is fairer, more just, more efficient, what have you, than are your solid judicial plodders.

In terms of democratic outcomes, if you want to limit the extent to which your top judges end up as a sort of aristocratic ersatz upper house, then you want generally to avoid appointing legal whiz kids.

Of course, it's different if you're one of those people who really doesn't trust elected legislators (and believe me such people can be found throughout the law schools and the ranks of lawyers).

If you think a few years of law school and a couple of decades of extremely lucrative work as a top lawyer is likely to produce someone whose views on immigration and criminal procedure and just about everything else are more in keeping with your own views, then it's going to be mighty tempting to want such lawyers to be making as many social policy line-drawing calls as possible.

Or rather, it's going to be tempting if you think these appointees will be smart enough to get you those answers in a way that's seen to be more or less legitimate. (Think of the implied rights cases for example.)

The irony is that once you go down the road of that sort of thinking then those who oppose that sort of judicial activism will probably also need to look for the smartest appointees, people who can make the best arguments against this judicial activist trend.

All of the above is a roundabout way of saying that if Kevin Rudd is sincere in his calls for a renewed federalism then a good first step would be to appoint someone from a small state, preferably South Australia or Tasmania.

And that appointee absolutely must be someone who has never once called for a bill of rights. Doing that should, in my view, make anyone immediately unappointable for the simple reason that all bills of rights (even statutory ones) end up substantially increasing the power of the unelected judges. So calling for one as a potential judge is, quite simply, self-serving. It makes such a person too risky a choice in terms of his or her likely interpretive approaches.

So, come August, what are the chances that our next High Court judge will be a solid, plodding, safe pair of hands from South Australia or Tasmania? That's who I'd like, but don't bet on it.

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