AUCTIONEERS, FENCE-VIEWERS, POPES — AND JUDGES

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INTRODUCTION: *PLUS ÇA CHANGE*

It is a measure of the character of late 20th century Canadian society that the judicial function — the appointment, remuneration, governance and discipline of judges — has become a "hot-button" issue around which politicians can marshall electoral argument, lobbies can muster public support, and university research centres can sponsor conferences. The intensity of interest and comment appears to be a relatively novel phenomenon for jurists in common law provinces. Not so, however, for those of us from Quebec. The great disputes of the first forty years of this century about the insensitivity of the higher courts (and of the Supreme Court of Canada in particular) to the civil law tradition are of exactly the same order as those now being raised in Alberta and elsewhere.

Thoughtful common lawyers will, of course, already have some perception of how civil lawyers see judicature issues when they reflect on their own constitutional folklore that the Privy Council destroyed the balance of legislative powers elaborated in the 1867 Confederation compromise. Not surprisingly, the very decisions that provoked Frank Scott, Bora Laskin and others to rail against the Judicial Committee were seen entirely differently by francophone jurists in Quebec.[1] What is more, these Quebec jurists came to laud the J.C.P.C. for re-establishing the integrity of the civil law against inappropriate invasions of common law ideas promoted by the Supreme Court under the guise of "uniformity of law." Still later, the establishment of the Provincial Court of Quebec as a court of civil jurisdiction to compete with the Superior Court and to be staffed by provincially-appointed judges was seen in part as a means to reassert some local control over the day-to-day administration and interpretation of Quebec private law. And, finally, the charge that the Supreme Court is biased against Quebec in its more recent division of powers decisions is another reflection of broader concerns that may loosely be grouped under the rubric "politicization of the courts."[2]

When compared with the longstanding, legitimate grievances emanating from Quebec, the contemporary anti-court passion arising in certain western provinces seems forced. Just because the Supreme Court has rendered judgements under the *Charter of Rights and Freedoms* that limit provincial legislative autonomy in the name of civil liberties and equality is no reason for politicians, lobbies and law teachers to feign outrage against courts and to seek to revise the judicature provisions of the *Constitution Act, 1867*. One might well ask whether the cause for outrage is qualitatively different than that animating Aberhart, who saw his press and banking legislation struck down in the 1930s, or Duplessis, who saw the *Padlock Act* struck down in the 1950s, or the several provincial governments that saw their landlord and tenant, labour relations and transport regulation tribunals struck down in the 1970s?[3] Indeed, the proliferation of *Charter of Rights and Freedoms* claims at the expense of division of powers litigation in the Supreme Court over the past 15 years can be taken as confirming the suspicion that many of that Court's pre-1982 decisions striking down provincial statutes found their ultimate ground in "implied Bill of Rights" reasoning nicely dressed up in the language of a section 91-92 dispute.

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[1] Compare L.-P. Pigeon, "The Meaning of Provincial Autonomy" (1951) 29 Canadian Bar Review 1126 with F.R. Scott, "The Consequences of the Privy Council's Decisions" (1937) 15 Canadian Bar Review 485. See, generally, A. Cairns, "The Judicial Committee and its Critics" (1971) 4 Canadian Journal of Political Science 301.

[2] For discussion, see G. L'Ecuyer, *La Cour suprême du Canada et le partage des compétences 1949-1978* (Quebec: Gouvernement du Québec, 1978); P.W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?" (1979) 57 Canadian Bar Review 721.

[3] For example, *Saumer* v. *City of Quebec*, [1953] 2 S.C.R. 299; *Reference Re Alberta Statutes, A.G. Quebec* v. *Farrah* [1978] 2 S.C.R. 638; *Re Residential Tenancies Act* [1981] 1 S.C.R. 714; *MacMillan Bloedel* v. *Simpson* [1995] 4 S.C.R. 725.

Today's critical rhetoric differs in that it is not just the institution of the judiciary, but individual judges that are its targets. Here we do not mean criticism of the sort directed against judges who are alcoholics, tax evaders, and common criminals, or who make outrageous and stereotypical comments from the bench. This type of individualized condemnation has long been present in Canada, and rightly so. What we mean is criticism grounded in the idea that judges are covert political agents and that they are advancing their own private opinions through their ostensibly impartial decisions. Such criticism came fully to the surface in the years following enactment of the *Charter of Rights and Freedoms*.[4] An early reflection was the quip that the sole effect of the *Charter* was to transfer political power from elected liberals in Parliament to defeated liberals on the bench. Since then, the critique has become more refined. Individual judges are being pilloried not simply for being Liberals, Conservatives, Reformers, *Péquistes*, Socreds or New Democrats. In a manner reminiscent of classical arguments about judicial review of administrative agencies and privative clauses, judges now are also being challenged for their "attitudes" about the judicial function: are they sufficiently deferential to Parliament; are they social activists?

It is difficult not to be jaded by the recent rush of enthusiasm for examining the judicial function. After all, processes of judicial appointment have been a public issue for a decade now. Who should have the ultimate control over court administration is a question that has smouldered among judges for two decades. Diverse models of judicial decision making have intrigued legal theorists and political scientists for three decades. The meaning of section 96 as a bulwark of judicial independence has appeared in lawyers' after-dinner speeches for at least four decades. And the proper role of the Supreme Court of Canada as a final court of appeal for Canada has kept law teachers busy for five decades.

Frankly, there is little new in the two current darlings of the media and politicians: (1) the relationship between the processes of fixing judicial remuneration and the independence of the judiciary; and (2) the method of judicial selection. More to the point, with the noteworthy exception of the judgement of LeDain J. in *Valente,*[5] much recent writing on matters of judicature (whether by courts or commentators) has been simply gratuitous affirmation with neither credible empirical evidence nor well worked out political theory in support. While this essay probably is in the same *genre*, we shall at least try to say something new, or at least helpful, about our assigned topic — methods of judicial selection.

THE STUART CONTROVERSY AND ITS LESSONS

Concern about the role and duties of the senior judiciary in the common law tradition is not new. In the 17th century, the Stuart Monarchs of England believed that the King was the physical embodiment of the divine, and that the Royal person was the sole authorized dispenser of God's justice on earth. King's Bench and Chancery judges were, in this conception, mere instruments of the sovereign's will. Hardly surprising, therefore, that they were expected to do the King's bidding as God's agent, and were subject to immediate removal if they did not.

The Stuart controversy brought to the fore a number of deep issues about who embodied justice (were Royal judges mere extensions of the king, dispensing his version of divine justice or were they true nonpartisan and detached agents of secular justice?) and who owned the common law (did responsibility for its administration and improvement belong to the King or to Parliament?). The conflict was, at bottom, about the separation of the judiciary from the executive, not the independence of the judiciary from Parliament. The thought that judges might claim for themselves a status and legitimacy grounded otherwise than in the will of Parliament was, at that time, unthinkable. The judiciary were simply bit players in a conflict between King and Parliament about the ultimate source of constitutional legitimacy, and about which political institution was the true delegate of that ultimate authority.

While the Monarchy lost the dispute in England, it is not a controversy that has been banished from the face of the earth. It is, for example, being replayed today in every theocratic State. For theocracies the question is how, if at all, ought the institutions of government to mediate between the divine (in the

[4] Representative of the two main tendencies in the literature are F.L. Morton, "The Charter Revolution and the Court Party" (1992) 30 Osgoode Hall Law Journal 627; M. Mandel, *The Charter of Rights and the Legalization of Politics*, rev. ed. (Toronto: Thompson Educational Publishing, 1994). For an overall assessment of the structure of these critiques see R. Sigurdson, "Left and Right-wing Charterphobia in Canada: A Critique of the Critics" (1993) 7-8 Canadian Journal of International Studies 95.

[5] *R.* v. *Valente*, [1985] 2 S.C.R. 673.

persona of God or his (*sic*) earthly representatives) and the merely human. Before one can even contemplate the dissociation of judiciary and government, one has to accept the possibility that God's law and human law have competing legitimacies and may, therefore, come into conflict. This possibility theocratic States deny.

The controversy is resurgent even in avowedly secular States. Not only are some countries still caught in the throes of secular religion parading as "revolutionary legality," other well-established liberal democracies are increasingly being challenged by religious fundamentalism. In North America, politicians cynically genuflect towards some notion of pure or direct demagogic democracy in which a majority (in the mask of a corrupted version of Rousseau's "general Will") must be right simply because it is a majority.

The reason why the 17th century Stuart controversy is relevant to the judicial appointments process, and to matters of judicature more generally, flows from the reasons for decision issued by the Supreme Court of Canada in the *PEI Provincial Court Judges References*.[6] In these cases, the showdown between King and Parliament that resulted in the English *Act of Settlement of 1701* was reimagined as a straightforward conflict about the independence of the judiciary as this concept is now understood. It was, however, much more than this. The 1701 Act must be read alongside other milestones such as the *Case of Proclamations* in 1615 and the *Bill of Rights of 1688*. Seen in this larger context, the conflict was a reflection of tensions accompanying the gradual progression in English constitutional theory and practice from a conception of political authority in which "law was derived from the State," to a notion of governance in which "the State was derived from law."

Post-enlightenment constitutions, whatever their form — liberal or communitarian, democratic or oligarchic, unitary or federal, monarchical or republican — result from the realization that complex, dispersed societies are fundamentally different from the neighbourhood, the community, the tribe or even feudal orders. Normative frameworks necessarily must transcend the personal authority of local, face-to-face, intersubjective negotiation. Broad, democratic enfranchisement, coupled with diversity in the geography, gender, class, religion and ethnicity of citizens constitute inescapable impediments to the exercise of either direct or delegated personal authority in the modern State.

Just as the emergence of industrial capitalism demanded and responded to a division of productive labour, the emergence of constitutional democracies demanded and responded to a division of constitutional labour. For the past three centuries the challenge of governance has been to deduce the essential co-ordinating tasks of human society, to determine when it is profitable to distinguish them, and to think through how it is possible to regroup them meaningfully in coherent and recognizable institutions. Locke, Montesquieu and Madison each saw institutional dispersal as an antidote to the possible abuses of unified political power; yet this was the very kind of centralized power deemed necessary by Hobbes and desirable by Rousseau.

INSTITUTIONAL DESIGN

Given the contemporary diversity of human political achievements, there can be no transcendant formula for managing the exercise of distinguishing and regrouping governance tasks. Different societies imagine their possibilities differently, and hence draw their institutional boundaries differently. But the very idea of distinguishing and regrouping tasks inescapably raises two pragmatic issues of institutional design to which modern constitutions typically attempt to respond.

First, to what degree does effective performance of these differentiated and regrouped tasks require that they be given a more or less stable institutional location? In relation to judging, the question is whether the judiciary as an institution must be afforded an impregnable status and an inviolate jurisdiction (and, if yes, to what extent and in what connection). These, of course, are the structural questions that lie at the heart of most litigation under section 96 of the *Constitution Act, 1867*. Second, once any such institutional location has been imagined and elaborated, how can the people who are called upon to fill the designated institutional role be protected from the temptations of office? In relation to judging, the question is how to ensure that those holding office both respect the limits of their institutional role and exercise that role free from inappropriate external influence. These are the questions to which those who examine judicial appointments, judicial education and judicial discipline direct their attention. In considering these two issues of institutional design, it is useful to begin by reflecting on how our processes of selection attempt to match the kind of person who is chosen with the expectations we

[6] *Reference re: Public Sector Pay Reduction Act (PEI), s.10; Reference re: Provincial Court Act (PEI); R.* v. *Campbell*; *R.* v. *Ekmecic*; *R.* v. *Wickman*; *Manitoba Provincial Judges Assn.* v. *Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3.

have about the role to be performed in each of the two offices of judge and legislator.

Those who are called upon to serve as legislators are chosen, in a liberal democracy such as Canada, for their own special virtues. We do a disservice to our legislators to attack them on the basis of criteria appropriate to the selection of candidates for medical school or of members of the Olympic hockey team. There is an identifiable role morality to being a legislator. We hope that our processes of selection — election by the voting public — work to produce people possessed of the required virtues and committed to that role morality.

This idea of special virtue is equally true for those called upon to serve as judges. We do a disservice to our courts and judges if we disregard or denigrate traditional judicial virtues, or if we attempt to substitute alternative virtues not necessarily coherent with the demands of the office. We hope that our processes of selection — executive nomination — and the design of our system of judicature will work to match people having these virtues with the tasks to be performed.

These points merit further elaboration. Legislation and adjudication are, in theory, distinctive processes of social ordering that are responsive to identifiable and particular sets of institutional norms. This is not to say that there will never be occasions when both legislatures and courts step beyond the frontiers of their traditional roles. But when the public senses an inappropriate conflation of the legislative and judicial functions, it feels disempowered — unable to evaluate outcomes and to attribute accountability. For many, apprehension that such a conflation is becoming too frequent lies behind a their loss of confidence in the law and legal institutions.

In principle, we do not want our judges to be establishing public education budgets or deciding how many times per hour the police should patrol a given neighbourhood. And yet we know that there are times when the courts must themselves set the limits of governmental and Parliamentary discretion: during the 20th century there are no shortage of examples where Parliament and provincial legislatures have shown little regard for civil liberties.

Similarly, we generally do not want politicians whose public career depends on their satisfying the popular will to be deciding contracts disputes, criminal trials and cases involving child custody upon divorce. And yet we know that there are times when the courts are incapable of policing themselves and their handiwork: Parliament having to intervene by statute to correct judicial development or non-development of the common law is the standard instance.

Present public concern about the slippage between law and politics — that is, about what appears to be the reemergence in modern garb of the undifferentiated political authority asserted by the Stuarts — can be traced to a number of fundamental shifts in the rationality of adjudication and in our theory of legislation. Unfortunately, our constitutional theorists have devoted inadequate attention to exploring them. Because scholars can be so neatly divided into *Charter* patriots and *Charter* sceptics, the key governance question — are the institutions and processes by which our constitutional division of labour is assured sufficient to prevent an inappropriate constitutionalization of politics and an inappropriate politicization of the courts? — is being addressed almost exclusively through polemics about *Charter* interpretation.[7]

How tragic. The *Charter* here is epiphenomenal. Until we understand the changed character of the judicial and Parliamentary roles in contemporary society, we shall not be in a good position to determine if our inherited processes of judicial nomination continue to achieve an optimal match of personal virtue and governance task.

CONTEMPORARY ADJUDICATION

The classic statement of what distinguishes common law adjudication from the legislative enterprise is that given by Lon Fuller in his essays "The Forms and Limits of Adjudication" and "The Implicit Laws of Lawmaking."[8] Fuller held that the characteristic feature of adjudication as a process of social ordering was the mode of participation in decision making afforded to the affected parties. For him, adjudication involved the presentation of context-constrained proofs about cold facts, and the advancing of reasoned arguments about pre-existing norms setting out duties and entitlements. In its pristine form, adjudicative reasoning is bounded, rule-based, and non-consequentialist.

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[7] See the thoughtful discussion of this issue in J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1996).

[8] L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353 and Fuller, "The Implicit Laws of Lawmaking" in K.I. Winston, ed., *The Principles of Social Order [:] Selected Essays of Lon L. Fuller* (Durham: Duke University Press, 1983) at 158.

Today, Fuller's stylized model of the judicial process seems strangely anachronistic. There are several reasons for this. To begin, the private law increasingly is moving away from the Aristotelian logic of corrective justice. As Ernie Weinrib has argued forcefully, this long-dominant image — that judges apply pre-existing norms to pre-existing facts in order to redress identifiable wrongs only to the measure of the harm caused — grounds the law of contracts, of torts and even of crimes.[9] But judges are now being explicitly asked by Parliament, even in private law matters, to make quasi-legislative allocative decisions of enormous consequence: for example, they must decide family property entitlements and dependant's relief claims by reference to *ex post* standards, and mass tort compensation by reference to principles of market share liability. In addition, judicially-invented equitable doctrines such as abuse of rights, unjust enrichment, the constructive trust and unconscion-ability are moving everyday adjudication into the realm of distributive justice. By definition, these allocative and redistributive decisions require courts to make "small-p" political decisions that previously fell within the purview of Parliamentary discretion.

To its great discredit, Parliament increasingly is succumbing to the temptation to duck responsibility for deciding difficult issues of policy. In consequence, judges increasingly are being asked by litigants to solve complex social problems by judicial fiat and, to their discredit, they are succumbing to the temptation to do so. The invention of novel entitlements and new injunctive remedies that require the ongoing supervision of courts, and the transformation of adjudication into some form of Solomonic or Kadi justice, unbounded in its inquiry and untrammelled in its decisional outcomes, has reframed the judicial role. Of course, judges need not have accepted, nor need they continue to accept, this abdicatory remit by Parliament. Rather than attempt to solve the unsolvable through adjudication, they could return serve to Parliament. In this light, Supreme Court decisions such as those involving Canada's abortion legislation are to be preferred as a judicial response to Parliamentary pusillanimity.

A better understanding of what it is that judges actually do, and of the interrelationship of formal adjudication and other social-ordering and dispute-resolution processes, compels the conclusion that the skills required of judges are rapidly changing. A large part of the judicial function today is to manage or to supervise other decision-makers — administrative, political, legislative, or private. The trends to alternative dispute resolution, consensual arbitration, mediation, settlement conferences, and judicial med-arb have accelerated to the point that the predominant characterization of federal judges in the United States is that, in civil cases, they are "managerial judges."[10]

There is another feature of late 20th century public life that bears on the judicial role. The inevitable conflicts between the constitutional values of a liberal democracy and the will of those who want the state to promote a rather deeper social homogeneity, have thrust judges into the public domain where they are increasingly being perceived as political figures. By explicitly casting the judiciary as the censor of Parliament, the *Charter of Rights and Freedoms* exacerbates the suspicion of those who have internalized only imperfectly the legal requirements of a liberal democracy. And because judges themselves are still learning how to exercise their powers to leave pieces of legislation on the cutting room floor and how to resist the reviewer's temptation to write the book that Parliament did not, sceptics can relatively easily find examples of judicial overreaching.

It is not just their changed constitutional role that makes courts an object of public scrutiny. As judges come to accept more and more invitations from the media and the legal academy to hold forth on pressing issues of public policy, they subtly change their own perception of their role morality, as well as the perception of citizens. Judgments no longer are left to speak for themselves; for a few judges they have become simply the institutional deposit that authorizes more elaborate efflorescence. Yet the Faustian bargain with the public can never be won. When judges seek to be heroic, they expose themselves to heightened critical scrutiny over issues tangential to their primary role. Because they have neither the resources nor the rhetorical liberty of Parliamentarians, they should practice the virtue of modesty, both in *curial* and in *extra-curial* settings.

To summarize, distinguishing and regrouping the tasks of governance first requires that we decide what it is that we want judges to do. And deciding this question requires asking whether we want all judges to do all things. We know that, today, at least some judges routinely: (1) decide disputes; (2) develop the law; (3)

[9] E. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

[10] See J. Resnick, "Managerial Judges" (1982) 96 Harvard Law Review 374; M. Galanter and M. Cahill, "Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 Stanford Law Review 1339.

allocate benefits and burdens; (4) control government; (5) mediate between the volition of legislatures and constitutional norms; (6) manage other disputing processes and supervise private decision-makers; and (7) get Parliament off the hook for its policy inertia. Obviously, before the design of a judicial appointments process can even be imagined, it is necessary to think about the scope, forms and limits of contemporary adjudication that we are prepared to accept or adopt.

THE SELECTION OF PARLIAMENTARIANS AND JUDGES

Having argued that there are distinctive role moralities that attach to the offices of legislator and judge and that the rationality of adjudication is evolving, we should like to go further and argue that these role moralities themselves are inescapably plural. There is no single role morality that attaches to the office of legislator in a liberal democracy; nor is there a single role morality that attaches to the office of judge. The morality of office will be a complex amalgam of several factors: political culture; institutional arrangements; economic context; socio-demographic environment. For this reason, it is impossible to say, as an *a priori* matter, that any given system for choosing legislators and judges is preferable to any other. Selection processes cannot be divorced from all the other features of a given institutional environment.

Some examples drawn from legislative and judicial realms may be offered to illustrate the point. Take first some central aspects of the legislative office.

The Constitutional System: The expectations voters have of legislators vary depending on whether a Parliamentary system or a congressional system is in place. After all, when one can dissociate the election of individual legislators from the election of the executive, a different constellation of choices confronts voters and the abilities and qualities one seeks in a legislator are different. How much can we attribute the fact that capital punishment does not exist in Canada, despite popular clamour for it, to the Parliamentary system and its attendant party discipline?

Definition of Constituencies: The definition of electoral constituencies matters to our expectations of legislators. When, as in 17th and 18th century England, all voters and all MPs were white landowners, a purely territorial definition of electoral constituencies posed no particular problem of representation. As an electorate becomes more diverse, however, the use of geography as the sole criterion for allocating political representation also becomes suspect. The deficiencies of defining constituencies geographically are even more apparent as the services provided by governments transcend the local: highways, schools, sidewalks, and sewers remain mostly local. But employment insurance, defence, welfare, labour standards, product labelling, and so on usually are not. Ought representatives at every level of government be elected according to constituencies determined by the same criteria, or should Parliamentary ridings be specified by some other means — gender, age, religion, language, occupation? Many of these other criteria are just as "objective" as geography. Were they to be adopted, there is no question that both the electoral process and the qualities expected of persons selected as MPs would be different from those we now privilege.

The Voting System: A third design issue that bears on the character of the persons we select as Parliamentarians touches the system of voting itself. Why do we think that a first-past-the-post system is still valid? If the argument is that this tends to produce stable majority governments, would not the best result be to separate representation from the executive? Going further in this direction, why do we think that direct election is always a good idea? The United States lives with an electoral college for its presidential voting. This achieves something like the indirect voting for Prime Minister that a Parliamentary system replicates: Parliament as ongoing electoral college. Once more, rules about how we vote and who we can vote for are directly tributary to previously-taken structural decisions about the electoral system.

Models of Representation: Finally, there is the question about what we expect our legislators to do. If they merely are to act as ciphers in representing us, one set of criteria for their election trumps all others: legislators must not think for themselves but must be good at reading public opinion in their constituencies. If, by contrast, they are to exercise their own best judgement, it follows that other talents are needed — a point Edmund Burke saw two

centuries ago. There is another complicating factor. It may be that, today, the two most important traditional roles of the parliamentarian — to participate in selecting and sustaining a government, and to represent the voice of constituents at the time new legislation is being considered — no longer are primary. Indeed, it might be that parliamentarians now must, above all, legitimate the state to their electors and advocate on their behalf before the agencies of government: this is the role of the legislator as ombudsman. The relative weight assigned to these diverse duties will directly bear on the type of person we should be selecting as a legislator.

The gravamen of the above discussion is, obviously, that parliamentarians can play several roles and perform several functions. Simply deciding that they should be elected says little about our expectations of them. Depending on how legislative institutions are structured, constituencies are defined, voting rules are established, and depending on which model of representation is desired, quite different electoral outcomes may result. "We want democratic elections" is, in this light, a grossly inadequate response to the question "how ought we to choose our parliamentarians?"

Consider now the office of judge. The idea here is to ask whether the expectations we have of judges shape our understanding of how they should be selected, and whether our processes of selection will have an impact on the kinds of tasks that can reasonably by assigned to judges. In general outline, our claim is that the appointments process, even viewed as a matter of internal organization, is part of a larger scheme of judicature. This system includes at least the following elements: (1) length and conditions of tenure of office; (2) pre-appointment training and ongoing education; (3) material and intellectual support services; (4) remuneration; (5) discipline and removal; (6) jurisdiction and procedure; and (7) court management. Some of these are briefly explored in the following paragraphs.

Models of Adjudication: Among the first questions to be addressed in the design of a system of adjudication is that which centres on the role of the judge. Conventionally, a distinction is drawn between systems that essentially are adversarial (where carriage of the dispute is in the hands of the parties and the judicial office is simply to decide the dispute that is submitted for decision) and systems that essentially are inquisitorial (where judges are active in leading evidence, questioning witnesses, and raising issues of law).

In the former, of which we think the common law system is an example, judging is a public function provided to assist private parties (except where the state is a party). Solving the problem presented by litigants is, in theory, a higher value than normative coherence. But even in adversarial systems, some argue against settlements and A.D.R. on the basis that judicial decision making ought to be a public debate about law and normativity. Owen Fiss is the most notable proponent of

this perspective.[11] Notice that it changes what we think of the management of the process if we want judges *not* to facilitate private settlements. And the more we move to an inquisitorial system, the greater the claim for judges who do not necessarily respond to the needs of the parties, but who are conceived as governance delegates of the state.

The Rationality of Adjudication: This consideration leads to a second question, more directly related to our expectations of what judicial decisions should do. Take the limiting cases. Currently, in the common law system of England, the theory (admittedly not always applied in practice) is that judgements simply reflect the discovery of an already existing law and therefore have an incidental *ex post facto* effect. In European civil law systems, by contrast, the formal absence of a system of precedent means that, once again in theory, all judgements are prospective only. How one understands the appropriate balance between the *res judicata* and *stare decisis* functions of adjudication will bear on the kinds of persons one seeks to name as judges.

Ideology of Judging: Some systems, such as those in European civil law countries, explicitly are designed to efface the personal role of the judge in decision making. A number of institutional features contribute to this effacement: judges, even at first instance, always sit in panels of three or more; judgements are never signed but are given by the court; there is never a dissent; the style of judgment is not fact-based and it is written syllogistically; upon appeal, the appellate court never substitutes its judgement for the trial court, but merely, as in the case of a judicial review application, quashes (the technical term is *casser*) the decision and remits the matter back to the trial court for re-hearing. In the common law, a different ideology predominates — an ideology that one commentator has characterized as "the judge as rock-star." There are no equivalents to Oliver Wendell Holmes Jr., Lord Denning and Bora Laskin in civil law systems. Because personality and style are factors in common law judgement-writing, the public tends to associate the outcome of a case with the judge who decides. What is more, personalized judgements conduce to rhetorical flourishes that rarely appear in the dry syllogism in the civilian "*arrêt*."

The Judicial Career: Since the *persona* of the judge is more central in the common law system, there is a sense that being named a judge is the culmination of a legal career. Not so in the civil law. At the point of graduation from law school, students are confronted with career-determinative choices: to become a lawyer; to become a notary; to become a *fonctionnaire*; or to become a judge. Each legal career is, in principle, decided at this point. The professional training courses are run by the bar, the board of notaries, the *administration publique* and the *Conseil de la magistrature*. One embarks on a career as a judge just as one would embark on a career as a lawyer, except that instead of being on a tread-mill within a firm, one is on a tread-mill as a public servant. The different roles performed by courts, lawyers and the academy are clearly drawn and transfers between them are extremely rare.

Meritocracy and the Appointments Process: One first enters the judicial system in a civil law jurisdiction by writing an entrance exam upon graduation from law school. This resembles the kind of recruitment process for Canadian foreign service officers. Once accepted into the system, one goes to judges school, and one is graded on one's performance. Initial assignments are based on the results of these examinations. Throughout one's career, one is evaluated and promoted within the judicial system according to much the same system as applies to any organization: annual performance reviews and merit assessments. The entire recruitment and nomination process is insulated from political interference through the *Conseil de la magistrature*, which functions somewhat like a Civil Service Commission. Of course, this does not mean that all aspects of the judicial function are so insulated. It only means that politics plays its role elsewhere in the judicature system.

It is not difficult to discern the upshot of the above discussion. Judges do more than simply decide individual cases. The processes by which they perform

[11] See, notably, O. Fiss, "Against Settlement" (1984) 83 Yale Law Journal 1073.

their roles vary enormously from legal tradition to legal tradition, from jurisdiction to jurisdiction, and even from court to court within a jurisdiction. Deciding that judges should be recruited like public servants or nominated by the government (with or without a parliamentary advise and consent process) or elected says little about our expectations of them. It also says almost nothing about the personal qualities — integrity, honesty, wisdom, sensitivity, compassion, judgement, literacy, perhaps even some knowledge of legal rules and procedures — that we deem appropriate in persons appointed to judicial office.

Yet the reason why processes of judicial nomination are actually being discussed is because many people have very settled ideas about what kinds of persons should be selected as judges and what their role as judge ought to be. Putting these public expectations clearly on the table is a first step in subjecting ideology to the discipline of analysis. It enables us to distinguish, and then to get a better sense of potential answers to, two related questions: (i) are these public expectations about the judicial function reasonably attainable in a liberal democracy; and (ii) does election or any other process of selection, including the current process, achieve a maximum of coherence between the tasks we want performed by courts and the virtues possessed by the persons actually chosen as judges.

CONCLUSION: AUCTIONEERS, FENCE-VIEWERS AND POPES

And so to conclude. At this juncture, you may be wondering what is the relevance of the reference to auctioneers, fence-viewers and popes in the title of this essay. In fact, we have implicitly been discussing them all along. Auctioneers, fence-viewers and popes are all third-party decision makers who perform a role that has strong affinities with that of judges. But there also are substantial differences in these roles. Noticing these differences can help us reflect upon how we should approach the question of judicial selection.[12]

One might start by identifying the nature and source of the authority claimed by each of these decision-makers. The normal expertise of auctioneers is in generating an enthusiasm for and confidence in the bidding process — the decision rules are all fixed in advance and invariably operate to determine the outcome without contestation. Of course, where a Dutch auction is being run, the auctioneer's expertise lies in generating an anticipation of a bid, not in encouraging interactive competition. The normal expertise of fence-viewers is not a knowledge of the formal rules of land law, but an intimate familiarity with practices and customs of the locality and the expectations of the parties — the decision rules are essentially discretionary and the expertise is in listening to the unmediated stories of the parties who share the boundary. For popes, the source of authority transcends this world, and is given through prayer by the grace of God. The decision rules produce outcomes that are neither automatic nor discretionary. Because outcomes are revealed rather than discovered, a pope's expertise lies in his capacity to know God's will on earth.

What, then, of the process by which these decision makers are selected? Auctioneers are process managers normally selected by one of the parties in question: the seller. Fence-viewers are arbitrators often selected by lot from a list of accredited nominees agreed upon by the two parties to a dispute. Popes are elected by a specialized and self-legitimating electoral college known as the college of cardinals. In evoking the appointments process applicable to these other adjudicators the point is not to carry a brief for any particular judicial selection alternative. It is, rather, the contrary — to raise questions about judicial selection by imagining counter strategies for choosing fence-viewers, auctioneers and popes. Would, for example, an electoral college of potential fence-viewers constitute an efficient deployment of resources and render the process less responsive to local need? Again, would changing the appointments process for auctioneers to an election among bidders change the rationality of auctions and the expertise required of auctioneers? Similarly, what would the impact of selecting Popes by lot be on their role and their required expertise?

You can probably deduce our sceptical reaction to many proposals for reforming the process of judicial selection. Indeed, it is far from clear that the current appointments process is as bad as it is made out to be in various political and academic circles. Apart from adjusting the scope of political consultations so as to balance the influence of those with formal legal training (whose concerns typically will focus on credibility within the profession) with input from a broader range

[12] When this paper was presented, Carl Baar helpfully pointed out that the tryptic "auctioneers, fence-viewers and popes" largely captured the distinctions he had previously drawn between "decisional adjudication, diagnostic adjudication and procedural adjudication." See notably, C.M. Kerwin, T.A. Henderson and C. Baar, "Adjudicatory Processes and the Organization of Trial Courts" (1986) 70 Judicature 99 and C. Baar, "Judicial Independence and Judicial Administration: The Case of Provincial Court Judges" (1998) 9 Constitutional Forum 114.

of Canadians (whose concerns typically will focus on issues of character), one would be hard pressed to imagine a better system, in a parliamentary democracy, for reconciling the competing requirements of political accountability and moral rectitude.

A couple of things are, in any event, certain. First, it is relatively easy to offer a radical critique of current systems because one is simply comparing a messy, compromised, imperfect empirical state of affairs (in which individual human failings can always be cited as evidence of systemic defects) with an idealized, untried, theoretically pure, hypothetical situation (in which the best possible outcomes are always advanced as the necessary product of the proposed system). Law reformers all too frequently forget that the social, economic, political and cultural factors that have come to play a role in current systems will not go away simply because the system is changed to palliate their direct influence. They will simply move to the most appropriate locale in the newly designed system. As Madison and Hamilton clearly saw, politics cannot be depoliticized. Any system of judicial selection will be politicized; the only question is "where?"

Second, a system of judicature is an integrated whole. Once you begin to tinker with the appointments process you must ultimately contemplate tinkering with everything: recruitment, length of and conditions of tenure, pre-appointment and continuing education, promotions, the role of chief judges in court administration, and merit increments and decrements. One might ask whether the appointments process is even the issue upon which attention should be focused. It is, of course, intuitively the most obvious place to begin to think about who we should be appointing as judges; but could one not also think that questions of remuneration and tenure would bear on the catchment of potential candidates? The ambition is to generate the best appointments. Modifying the appointments process may not be the most appropriate place to invest energy if the idea is to effect a change in the character and competencies of the persons appointed as judges.

Finally, reconsidering the appointments process puts squarely on the table a central paradox of adjudication in democratic states that both defenders of Stuart justice consistently raised and proselytizers for the *Act of Settlement of 1701* consistently sought to hide. As ideals, judicial independence and public accountability frequently pull in opposite directions: at one and the same time, the public wants a judiciary that is impartial and independent of government, and a judiciary that is directly responsive to its own, often very partial, concerns. Only the naive or the mischievous think that any system of direct judicial elections can contribute to reconciling these opposing desires.❑

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An earlier version of this Essay served as a background document for a presentation by one of us to the symposium on "Independence and Impartiality: The Case of Provincial Court Judges" sponsored by the Centre for Constitutional Studies at the University of Alberta, 21 April 1998. There is an enormous literature on the themes we address here. Nonetheless, in the interests of readability we have only lightly footnoted this text. It goes without saying that the views expressed are those of the authors writing as professors of law and should not be taken to reflect the position of the Law Commission of Canada.