DEMOCRACY, JUDICIAL INDEPENDENCE, AND JUDICIAL SELECTION FOR FEDERALLY APPOINTED JUDGES

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This paper pursues a theme developed by Professor Lorne Sossin in an address delivered for U.N.B.'s Ivan Rand Memorial Lecture Series "Judicial Appointment, Democratic Aspirations and the Culture of Accountability".[1] Sossin argues that a fair and transparent appointment process for federally-appointed judges, insulated from political manipulation, should be thought of as one of several essential conditions to promote judicial independence and impartiality. The purpose of this paper is to look more closely into what the mechanics of such a process might be like. A judicial selection process in a democratic state needs to correspond to and promote democracy, and so I will begin by clarifying what I mean by democracy. Next, I will argue that in most respects, the Judicial Appointments Advisory Committee in Ontario, which has been in operation for two decades, serves as a model for the improvement of the judicial selection process for federally-appointed judges. Finally, I will argue that the selection process should be ideologically-neutral so that a "left-" or "right-wing" preference is treated more like an irrelevant personal characteristic than a determining factor in appointment.

DEMOCRACY

I have argued elsewhere that democracy is founded on the principle of mutual respect.[2] Five sub-principles of democracy are derived from mutual respect: social equality, deference to the majority where consensus cannot be reached, protection for minority rights, respect for individual freedom, and integrity. These principles, in turn, create two basic duties for public-sector officials including judges: impartiality, and a duty to act in the public interest.

Mutual respect means that we owe the same consideration to others, while making decisions that have an impact on them, as we feel that we are owed when they make decisions that affect us.[3] Ronald Dworkin put it this way: "...individuals have a right to equal concern and respect in the design and administration of the

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[1] Lorne Sossin, "Judicial Appointment, Democratic Aspirations and the Culture of Accountability." (Ivan Rand Memorial Lecture delivered at the Faculty of Law, University of New Brunswick, 14 February 2008), 58 U.N.B.L.J. 11.

[2] Ian Greene & David Shugarman, *Honest Politics* (Toronto: Lorimer, 1997). See also Ian Greene *et al. Final Appeal* (Toronto: Lorimer, 1998) [Greene *et al.*].

[3] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

political institutions that govern them. . . . [T]hey possess [this right] not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice."[4]

The first sub-principle of democracy derived from mutual respect is social equality. Reasonable people can and will disagree about the breadth of social equality in a democratic context, and the best ways of implementing the principle, but no one would disagree that social equality is an important democratic ideal. The Supreme Court can be thought of as a battleground where proponents of liberal and conservative versions of social equality fight for ascendancy with regard to particular issues such as how best to respect the equality of gays and lesbians, or how best to recognize the equality of children with autism in providing appropriate treatment.

Second, mutual respect suggests that everyone in a particular community should have an equal opportunity to participate in community decision-making. As much as possible, political decisions should be made by consensus. Where consensus is not possible, the majority rules out of practical necessity, but with respect for the situation of minorities. That leads to the third sub-principle, protection for minority rights. Even when minorities are on the losing side of an issue, they still have the right to be treated with equal concern and respect. Human rights legislation is not a catalogue of special entitlements, but rather an attempt to list the most important ways in which all members of society, and in particular minorities and the less advantaged, deserve to be treated with equal concern and respect.

Respect for individual freedom is the fourth sub-principle: mutual respect implies that individuals in society should have the right to make their own decisions about how to conduct their lives, compatible with an equal freedom for others. Integrity, the fifth sub-principle, is honesty combined with concern and respect for our fellow human beings. "One cannot have integrity without being honest ... but one can certainly be honest and yet have little integrity."[5] Finally, mutual respect implies that public officials have a general duty to treat all citizens fairly and impartially, and they are obligated to try to act in the general public interest and to resist attempts by some to exercise undue influence over the public policy or administrative process.[6]

The practice of democracy is constantly changing. Representative democracy with a universal franchise is a relatively recent invention in human history that developed alongside the increasing recognition of the importance of mutual respect as a basic principle of liberal political ideology. Throughout history, there has always been a lag between ideals and practice, and this delay helps to explain, for example, why the current system for appointment of s. 96 and s. 101 judges does not meet current democratic expectations.

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[4] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 180-82.

[5] Stephen L. Carter, "The Insufficiency of Honesty" *Atlantic Monthly* 277:2 (February 1996) 74.

[6] Ian Greene, "Allegations of Undue Influence in Canadian Politics" in Janet Hiebert, ed., *Political Ethics: A Canadian Perspective* (Toronto: Dundurn Press, 1991) at 101.

JUDICIAL SELECTION

Professor Sossin noted in his Rand Lecture that the system developed in Ontario to select provincially-appointed judges, in no small measure thanks to the efforts of our respected colleague Peter Russell, is reputed to be one of the best in the country.[7] I agree. This system has been in effect, with several modifications, since the late 1980s. It is worth examining this process in more detail.

There are currently thirteen members of the Ontario Judicial Appointments Advisory Committee (JAAC). Lay members (persons without a law degree) comprise more than half: seven of the thirteen members. Ontario is the only jurisdiction in Canada where lay members constitute the majority on a judicial selection advisory committee. This provision has worked well; the lay members have brought an invaluable perspective to the deliberations of the Committee, and the presence of a majority of lay members underlines the fact that the courts are a public service, and not a private club where members of the legal profession practice their craft. The Ontario committee also includes three judges appointed by the Chief Justice, and three lawyers appointed by lawyers' professional associations (the Ontario Branch of the Canadian Bar Association, the Law Society, and the County and District Law Presidents' Association, respectively). Committee members are appointed for terms of one to three years, and their names and biographies are made public.

When there are judicial vacancies, the Committee advertises for qualified lawyers with at least ten years of experience to apply. The advertisements specify that "applicants must have a sound knowledge of the law, an understanding of the social issues of the day and an appreciation for the cultural diversity of Ontario. ... Applications are encouraged from women, aboriginal peoples, francophones, persons with disabilities, and visible and ethnocultural minorities." The committee's mandate requires it to recommend judicial appointments that "reflect the diversity of Ontario's population, including gender, geography, racial and cultural minorities."[8] After interviewing the leading applicants, the committee provides at least two names to the Attorney General. The Attorney General makes the final selection, although additional names may be requested if the Attorney General does not like any of the names submitted.

The committee's web site mentions the following qualities that it looks for in applicants: professional excellence, experience in professional activities related both to important legal issues and the administration of justice, good writing skills, commitment to public service, awareness of social problems and values that are relevant to litigation, good listening skills, respect for human dignity, politeness,

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[7] Lorne Sossin, *supra* note 1; most of the provincial processes for judicial selection are more fair and impartial than the current federal process. See Ian Greene, *The Courts* (Vancouver: University of British Columbia Press, 2006), c. 2.

[8] Judicial Appointments Advisory Committee, online: Guide to Ontario Courts <http://www.ontario courts.on.ca/jaac/en/>.

high ethical standards, patience, fairness, punctuality, good work habits, compassion, and humility.

The committee seeks to recommend applicants whom they believe can resist "judgitis" (allowing the esteem of the judicial office produce a swelled ego), and who can act impartially.[9] My understanding is that the liberal or conservative disposition of the applicants is not an issue unless the committee considers that this disposition may well lead to judicial decision-making that is not up to the standards of impartiality expected of judges.[10]

The result of this process is that the Ontario provincial judiciary is now amongst the most diverse in the country in terms of gender and minority group inclusion.[11] For example, at the end of 2004, when 75 per cent (224) of Ontario's 272 judges had been appointed through the Advisory Committee process, 34 per cent of the 224 appointments were women, seven per cent were francophone, two per cent had a First Nations background, and seven per cent were visible minorities.[12] Interviews that I have conducted since the early 1990s with trial lawyers and superior court judges in Ontario indicate that there is a general consensus amongst these groups that the Ontario appointments system has led to higher quality appointments than before.

The appointments of the lay members of the Committee, who come from each of the seven judicial districts of the province, are approved by all the party leaders in the legislature, and this process encourages the selection of lay committee members who are competent, have integrity, and who will act in a non-partisan fashion.

The first Ontario Judicial Appointments Advisory Committee was established as a pilot project by Liberal Attorney General Ian Scott in late 1988, and the first appointments pursuant to the new system were made in 1989. After several years of operation, the Committee wrote a report evaluating its experience and recommending that legislation be enacted to give the Committee permanence.[13] The Report contained a recommendation that the lay members of the committee be selected through a process that involved consultation with the leaders of each of the parties in the legislature in order to make the lay member selection process multi-partisan.

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[9] One of the qualities that the committee looks for in applicants is "an absence of pomposity and authoritarian tendencies": "Ontario Judicial Appointments Advisory Committee Annual Report 2004", online: Guide to Ontario Courts <http://www.ontariocourts.on.ca/jaac/en/annualreport/2004.pdf> at 10.

[10] This understanding flows from my personal experience of having given references for several applicants for judgeships, and being interviewed by members of the Committee further to my references.

[11] Jean-Pierre Goudreau, *A Statistical Profile of Persons Working in Justice-Related Professions in Canada, 1996* (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 2002); Katie Snowball, *Courts Resources, Expenditures and Personnel, 2000/01* (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 2002).

[12] *Supra* note 9.

[13] Judicial Appointments Advisory Committee, *Final Report and Recommendations*, (Toronto: The Committee, 1992).

None of the parties were enthusiastic about this very sensible recommendation, and so the legislation that led to the permanent Committee gave the Attorney General the responsibility to appoint the lay members without consulting the party leaders.[14] The failure of the government to adopt a non-partisan or multi-partisan system for appointing lay members of the Committee is, from my perspective, the one serious flaw in the system.

During the early mandate of the Harris government, the Attorney General was distrustful of the JAAC system that had been set up initially by a Liberal government, and which by 1995 had lay members who had been appointed by an NDP government. For several years, the Attorney General regularly requested additional names from the committee until the name of someone he thought had more "trial experience", such as a prosecutor, appeared. From my perspective, this period represented an abuse of process that demeaned democratic values.[15] This abuse of process could have been avoided had the parties agreed to a multi-partisan or non-partisan approach to appointing the lay members of the JAAC.

Does the JAAC model comply with the democratic principles outlined above? I believe that in most respects it does. First, both social equality and minority rights are advanced because the committee makes every effort to recommend the best possible applicants for appointment, and encourages members of minority groups and women to apply. Second, the committee works hard to make decisions through consensus, if possible. Third, the committee does its best to make recommendations in an impartial fashion, and its procedures are designed to prevent undue influence from any groups or individuals. However, although political ideology is generally not a factor that is considered by the committee in its deliberations, the potential for political manipulation of the committee through the Attorney General's power to appoint lay members without consultation with other party leaders could mean that political ideology might become a central factor in the judicial selection process, as it did during the early years of the Harris government and as it often does in some jurisdictions in the United States.

THE IDEOLOGICAL AND PHILOSOPHICAL FACTORS

In the United States, the ideology of candidates for judicial appointment is often a factor in the appointments process, especially with regard to appointments to the U.S. Supreme Court. Given the approach to democracy outlined in this paper, I argue

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[14] The legislation now stipulates that the Attorney General shall recognize "...the importance of reflecting, in the composition of the Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance..." in making the appointments. *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 33(3), as am. by R.S.O.1994, c. 12, s. 13.

[15] "Ontario Judicial Appointments Advisory Committee Annual Report 2000", online: Guide to Ontario Courts <http://www.ontariocourts.on.ca/jaac/en/annualreport/2000.pdf> at 19; It is hardly surprising that the provincially appointed judge who refused to hear a case unless an HIV-positive witness wore a mask was appointed during this period. See Tracey Tyler, "Witness with HIV made to wear mask in court" *The Toronto Star* (30 January 2008) A1.

that ideology should not be a factor in judicial appointments in an advanced democracy.

The majority of Canadian judges, at least at the appellate court level, agree that most judges tend to have a somewhat conservative or somewhat liberal disposition in relation to specific kinds of issues such as criminal justice, human rights, or economic issues.[16] I suggest that the philosophical bents that all of us have are partly innate—qualities that we are born with—and partly a result of our life experience and socialization. It would be hard to find any individual that we could not describe as having a liberal or conservative approach to at least some social issues. I also suggest that these philosophical bents are distributed more or less randomly throughout the population of lawyers who apply for judgeships. Both the liberal and conservative dispositions are valuable in reasoning through difficult issues in the judicial decision-making process—in considering all sides of complex issues. It would be counterproductive to establish a judicial appointments process that attempts to screen out candidates with either a liberal or a conservative disposition. What is more important is to try to screen out candidates whose disposition is so strong that they could abandon the attempt to be as impartial as possible. When disposition hardens into an agenda, there is the danger that impartiality might be compromised. That is why judicial appointments processes in advanced democracies should be as non-partisan as possible, and open to good candidates with both liberal and conservative dispositions.

THE FEDERAL JUDICIAL APPOINTMENTS PROCESS

The Ontario JAAC system—with the addition of a multi-partisan or non-partisan system for appointing lay members, should be seen as a model for the reform of the process for appointment of s. 96 judges as well as s. 101 judges, and the JAAC model should also apply to elevations of judges to appellate courts.

With regard to appointments to the Supreme Court of Canada, an *ad hoc* committee along the lines of the Ontario JAAC should be established whenever there is a vacancy on the Supreme Court. The composition of the Supreme Court *ad hoc* JAAC would take into account the region of the country from which the appointment is to be made. After advertising for candidates to apply for the position, considering references, and interviewing the top candidates, the JAAC would submit two or three names in confidence to the Minister of Justice and Prime Minister. The Prime Minister could ask for additional names from the *ad hoc* JAAC, but if so would be required to explain publicly the reasons for this request, while respecting the privacy of the applicants and the confidentiality of the process.

The candidate selected by the Prime Minister would be introduced to an *ad hoc* Committee of the House of Commons, following the example of the interview of Justice Rothstein, Prime Minister Harper's nominee to the Supreme Court. Justice Rothstein's experience of this process, as described in a recent address to U.N.B.'s

[16] Greene *et al.*, *supra* note 2.

Faculty of Law, indicates that due to serendipitous circumstances, the procedure was fair and could serve two useful purposes.[17] First, this process could prevent Prime Ministers from abusing their power to make partisan appointments. And second, this process can help to de-mystify the courts and to introduce Canada's top judges to Canadians.

Will we ever get to this stage? It depends on the quality of our political leadership in Ottawa. If Ontario implemented a largely satisfactory system two decades ago, surely such a reform can take place at the national level. My study of ethical politics in Canada has taught me that ethics reforms at the national level usually lag behind reforms at the provincial level by one to two decades.[18] It seems to me that the national ship of state is larger and more cumbersome than its provincial counterparts, and it takes simply longer for it to change direction.

[17] Justice Rothstein, "Judicial Selection and the Supreme Court of Canada" (Ivan C. Rand Memorial Lecture Series delivered at the Faculty of Law, U.N.B., 15 February 2008).

[18] Ian Greene, "The Harper Impact on the Federal Ethics Regime" (paper presented to the Canadian Political Science Association Annual Meeting, Saskatoon, 1 June 2007) [unpublished].