THE DEMOCRATIC DILEMMA Verrelli, Editor

Queen's School of Policy Studies
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Reforming Canada's Supreme Court

Edited by Nadia Verrelli

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PREFACE

In 2009, the Institute of Intergovernmental Relations launched a working paper series on the process of appointing justices to the Supreme Court. In light of the continuing interest in this topic and in order to facilitate access to these papers, the Institute decided in 2011 to pull them together in book format. *The Democratic Dilemma: Reforming Canada's Supreme Court* is the second in our Democratic Dilemma series, the first one being our book on Reforming the Canadian Senate, edited by Jennifer Smith.

The financial support we received from the Secrétariat aux affaires intergouvernementales canadiennes of the Government of Quebec was critical in making this project possible.

I would also like to acknowledge the contribution made by Jennifer Smith, professor emeritus of political science at Dalhousie University, in helping with the start of the project and helping to review all chapters, and for her continuous feedback. Also, I would like to thank John Allan, Tom Courchene, both senior fellows of the Institute, and John Whyte, Senior Policy Fellow, Saskatchewan Institute of Public Policy, for their initial and continued feedback. The support of Peter Leslie, now deceased, has not been forgotten. I am also grateful to Jonathan Aiello and Mary Kennedy, in coordinating and assisting with the preproduction preparations of the volume. Mark Howes and Valerie Jarus of the School of Policy Studies Publications Unit, Carla Douglas, the copy editor, and translator Michel Beauchamp of Scribe Réduction-Traduction worked to complete the volume.

I also wish to thank the authors for their contribution and their attention to the book version of their papers. Once again, the passing of Tom Kent, one of the authors, must be noted.

The Institute of Intergovernmental Relations is very pleased to publish this second volume of the *Democratic Dilemma*. I believe very strongly that the institutions of Canadian federalism need to be better understood and strengthened. This book is another Institute contribution to that goal. For that I thank the editor of the book, Nadia Verrelli, now an assistant professor in the Department of Law and Politics, Algoma University, and a research associate at the Institute of Intergovernmental Relations.

André Juneau
Director
Institute of Intergovernmental Relations

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constitutionnel et administratif -appliqués à des champs variés traversant le domaine urbain, et celui de la santé et de l'enseignement supérieur- ses travaux ont porté plus tard sur la théorie du droit (pluralisme, herméneutique), induite notamment à partir de corpus de droit constitutionnel reliés au rôle du pouvoir judiciaire et plus spécifiquement de la Cour suprême du Canada dans la production du droit et aux droits des minorités. Ses travaux récents et actuels portent en particulier sur le droits ancestraux des Autochtones au Canada.

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INTRODUCTION

Nadia Verrelli

The appointment of Mr. Justice Marshall Rothstein to the Supreme Court of Canada in March 2006 made Canadian history. Justice Rothstein was the first nominee required to face questions in a public hearing from a committee of the House of Commons established for the purpose. Prime Minister Stephen Harper emphasized the importance of the innovation: "The way in which Justice Rothstein was appointed marks an historic change in how we appoint judges in this country. It brought unprecedented openness and accountability to the process. The hearings allowed Canadians to get to know Justice Rothstein through their members of Parliament in a way that was not previously possible" (Prime Minister 2006). It was certainly a change. When Madam Justice Rosalie Abella and Madam Justice Louise Charron were appointed to the nine-member Court in 2004, the committee had to make do with questioning then-Justice Minister Irwin Cotler rather than the nominees. Before that date, the government simply made an appointment directly, without evident consultation.

Following on the Rothstein innovation, in May 2008 Justice Minister Rob Nicholson announced the process to be used to replace outgoing Supreme Court Mr. Justice Michel Bastarache. This time a committee of the House of Commons would review prospective candidates for the job and hand the government a short list of three, unranked, from which presumably the government would make its choice. Then the nominee would face questions from an ad hoc Commons committee in a public hearing. In the end, the scheme fell apart, and in September the Prime Minister announced the nomination of Nova Scotia judge Mr. Justice Thomas Cromwell for the position. He said that Cromwell would still face questions from a Commons committee à la Rothstein. Even that collapsed. In December the Prime Minister simply appointed him to the Court.

On 19 October 2011, Prime Minister Harper returned to the process used for the appointment of Justice Rothstein. On this date, Mr. Justice Michael Moldavor and Madam Justice Andromache Karakatsanis faced a public ad hoc committee at which they answered questions from members of Parliament. Prime Minister Harper continued with this process when, on 5 October 2012, he announced the most recent appointment to the Supreme Court bench. Prior to the official appointment,

Mr. Justice Richard Wagner appeared in front of an ad hoc committee meeting to answer questions from the members of Parliament. Newspaper journalists and court watchers labelled the committee meetings as a "meet and greet" – a simple get-to-know the nominees as opposed to a real opportunity to scrutinize the candidates, their values, past decisions or to assess whether they are a "fit" for the court. Still, these hearings, along with those that took place prior to the formal appointment of Justice Rothstein, are a departure from past practices of appointing justices to the Supreme Court.

Of course, this was not the first time Canadian governments attempted to reform the process used to select or appoint judges to the Supreme Court of Canada. In 1950, the Tremblay Commission in its report recommended a greater provincial influence over the appointment process and/or the creation of a separate tribunal that would deal with constitutional issues exclusively. (Currently, the Supreme Court is the highest court of appeal in all legal matters and all constitutional matters). Neither of these two recommendations was adopted. The issue of an increased role for the provincial governments in the appointment process was raised again during the constitutional negotiations between the federal and provincial governments that led to the Victoria Charter, 1970. In this proposed document, the federal government, led by Pierre Trudeau, agreed to make appointments to the Supreme Court subject to provincial scrutiny. This proposal died when the government of Quebec, then under Robert Bourassa, refused to ratify the Victoria Charter. In the 1987 Meech Lake Accord, proposals were put forth to constitutionalize provincial consultations in the Supreme Court selection and appointment process. This was raised again during the constitutional negotiations that led to the Charlottetown Accord and both were included in the final document. However, neither the Meech Lake Accord nor the Charlottetown Accord was ratified by Canadian governments and so the proposal to ensure a role for the provincial governments in the appointment process was not adopted.

In 2004, reform of the appointment process was raised once again under the Liberal government of Paul Martin. An ad hoc parliamentary committee was established, the purpose of which was to review the nominations to the bench. It was intended, through this ad hoc committee, to ensure that the appointment process was more transparent and accountable, and to promote greater parliamentary consultation. A more formal ad hoc committee would then be established when a position on the court becomes available. The proposed reformed process would unfold as follows: the minister of justice would provide the committee with a list of seven candidates; the names of three would be chosen and presented to the prime minister for a final decision; once a decision was made, a parliamentary selection panel would question the appointee prior to the formal appointment to the bench. As indicated, to date, only three judges have been appointed after facing questions by a parliamentary selection committee. It should be noted that this revised appointment process is not mandatory. In fact, as already mentioned, Justice Cromwell was formally appointed to the Supreme Court without having to face questions from members of a parliamentary selection committee.

If nothing else, these events demonstrate an unsettled attitude towards the process used to select and appoint judges to the Supreme Court. On the one hand, some observers – although by no means all – evidently regard the traditional process under the constitution of straightforward prime ministerial nomination, in itself a guarantee of appointment, to be lacking in transparency. On the other, there is debate about what should be done instead. Since the Supreme Court is the final arbiter of the Constitution, and therefore of Canadian federalism, the matter is relevant to students of federalism as well as of the judiciary. Indeed, the court's credentials as the arbiter of federalism provoked criticism of the appointment process from the start.

The criticism was straightforward. How could the court, it was argued, be regarded as an independent and objective arbiter of conflicts between the federal government and the provinces over their respective roles under the constitution when the members of the court were appointed by one side? Suspicion was rife in some quarters that the very purpose of the court was to ensure that the provinces remained subordinate to the federal government within the federation. The Quebec government was particularly sensitive about the point, and over the years made a number of recommendations to involve the provinces in the selection process, to no avail. When Parliament abolished appeals from Canadian courts to the Judicial Committee of the Privy Council in 1949, thereby establishing the Supreme Court as the country's final appellate court, the event sparked a fresh round of consternation on the part of some of the provinces that the court would necessarily take an overly centralized view of federal matters.

Today, critics of the Court continue to suggest that the appointment process raises doubts about the legitimacy of the institution as the arbiter of federal disputes. They have also developed a criticism of the process that is focused on the office of the prime minister, the idea being that it gives the office a monopoly over judicial appointments that is out of keeping with democracy in the 21st century. In addition, critics now raise other issues in connection with the Court, such as the term of appointments. Under the constitution the term is appointment until age 75, and the suggestion has been made that this is too long.

Given the ongoing criticisms of institutional features of the Supreme Court, the inability or unwillingness of the federal government to decide how to reform the existing process used to select its members, and the lack of consensus generally on the matter, the Institute of Intergovernmental Relations (IIGR), Queen's University sponsored a series of papers on these and related issues in an effort to advance the debate.

THE DEMOCRATIC DILEMMA: REFORMING CANADA'S SUPREME COURT

This book is the second in the IIGR's *Democratic Dilemma* series. The first, *The Democratic Dilemma: Reforming the Canadian Senate*, edited by Jennifer Smith (2009), explores the proposals of Stephen Harper's Conservative government to

reform the Canadian Senate. Continuing with the theme of institutional design and democratic dilemma, this book explores the institutional features of the Supreme Court of Canada as they relate to Canadian federalism and the relationship between the court and other institutions of government. Specifically, it focuses on the current makeup and role of the court, first established in 1875 by *The Supreme Court Act, 1875*, and its suitability in the 21st century. Should the process used to select and appoint Supreme Court justices and the structure of the court reflect the evolving federal and democratic nature of Canada and Canada's multicultural and bilingual character? Does the current design and structure of the court compromise the legitimacy and role of the Supreme Court in the eyes of the Canadian public? Should Canada's highest court of appeal continue to exist both as the final court of appeal on all legal issues and as a constitutional court having final say on all constitutional matters? Or should two courts be established: one dealing with legal matters and one dealing with constitutional matters? And finally, do comparator courts in other liberal democracies offer any lessons?

I: THE MAKEUP OF THE SUPREME COURT OF CANADA

The book is organized in four sections. In the first, the authors explore the current makeup and structure of the Court. In the first chapter, Peter Hogg describes the recent history of appointments, paying particular attention to the process that was followed for the appointment of Cromwell J. and the public hearing before a parliamentary committee that was part of the process for the appointment of Rothstein J. He goes on to describe and comment on the criticisms made of the Rothstein hearing, noting the risks and benefits and concluding that there are benefits to holding public hearings prior to the official appointment of a nominee to the Supreme Court. He acknowledges that the public hearing that was part of the process in Rothstein J.'s appointment was not part of Cromwell's appointment. Despite this, he argues, it is the policy of the present government – and probably of future governments. This in fact is evident in the appointment processes that were followed for the appointments of Justice Michael Moldavor and Justice Andromache Karakatsanis in 2011 and Justice Richard Wagner in 2012.

Considering the current makeup of the Supreme Court, Lorne Sossin, Sébastien Grammond and Mark Power, and the Indigenous Bar Association explore whether Canada should have a representative supreme court to better reflect its multicultural society, its official bilingualism and the indigenous peoples of Canada. Lorne Sossin, in his paper, advocates a representative supreme court as an inherent mandate of liberal democracy. Exploring this issue, he argues that Canada's highest court of appeal ought to be composed of people with a mix of identity and experience, reflecting Canadian society; this will contribute to both democratic legitimacy and quality adjudication. Sossin begins his paper by exploring Canada's multicultural makeup, the reasons the Supreme Court should reflect this diversity, and the current approach to representation on the bench. He then describes the relationship between a representative court and judicial impartiality. Upon exploration of the rationales fuelling the allure of a representative supreme court, namely fairness of adjudica-

tion, reasonableness in decision-making, democratic equality, and the protection of minority rights, Sossin examines the relationship between representation and judicial appointments. This culminates in a call for greater clarity of appointment criteria, transparency in the process, and public engagement.

Sébastien Grammond and Mark Power, approaching the issue of a representative supreme court from a different angle, focus on bilingualism on the bench. Specifically, they ask whether a policy requiring Supreme Court justices to be capable of hearing and understanding cases in Canada's both official languages should be adopted. The authors argue for such a policy. It would guarantee that oral arguments in both French and English would be understood by all justices; it would put both francophone and anglophone litigants on an equal playing field as it would enable both to present their arguments in their native tongue; it would help judges to interpret bilingual legislation and ensure the equality of statutes in both languages; and it would not marginalize francophone case law and doctrine. The authors dispute the common argument that requiring Supreme Court justices to be bilingual will narrow the pool of candidates by demonstrating that there is a sizeable number of bilingual judges outside of Quebec. The ability to understand both languages should be considered a required skill, among other skills, when vetting potential candidates for the Supreme Court of Canada.

The section ends with two press releases issued by the Indigenous Bar Association (IBA). In the first, released 19 July 2011, prior to the appointments of Justice Michael Moldaver and Justice Andromache Karakatsanis, the IBA urges Prime Minister Harper to appoint an aboriginal justice to the Supreme Court. The IBA is not alone in this call. It is supported by the Canadian Bar Association, the Canadian Association of Law Teachers and the Law Commission of Canada. It was a recommendation put forth by the Royal Commission on Aboriginal Peoples. The press release goes on to highlight several qualified candidates from the indigenous law community.

In the second release, issued 7 May 2012, the IBA calls for the removal of barriers to the appointment process to ensure indigenous legal traditions are reflected in the process to appoint federal judges. It points out that in the last 100 appointments made by Prime Minister Harper, 98 were white. Criticizing the Harper government's narrow understanding of merit, the IBA stresses the importance of the principle of merit, understood as "outstanding contributions to law over the career of a lawyer or legal scholar." According to the IBA, systemic changes to the appointment process must be made. Only then can diversity of judicial appointments be realized.

II: THE SUPREME COURT OF CANADA: THE SELECTION PROCESS

The second section of the book is focused on reforming the current process used to select Supreme Court Justices. The authors reflect on the structure of the court in relation to contemporary democratic considerations and the requirements of Canadian federalism. The section begins with a paper by Erin Crandall, who examines past attempts to reform the judicial selection process from 1949–2008.

Paying particular attention to the evolving role of the provinces in a reformed system, Crandall notes that, since the failure of the Charlottetown Accord, the focus of reform has shifted from the role the provinces ought to play in selecting judges to transparency and accountability of the process. In asking where the provinces have gone in this later period, the author highlights the importance that historical context, the *Charter of Rights and Freedoms* and the prime minister have played in both the formal and informal efforts to reform the judicial selection process of the Supreme Court of Canada. This paper sets the scene for the following papers in the section, authored by F.C. DeCoste, Tom Kent and Allan Hutchinson, where each looks at the necessity of reforming the current process of selecting and appointing justices to the Supreme Court in order to secure transparency and accountability and a provincial role.

Focusing on the important role of the Supreme Court in Canadian politics, F.C. DeCoste argues for an appointment process that is divided confederally. According to DeCoste, the current process for selecting and appointing judges, whereby the prime minister has unfettered discretion, is a constitutional embarrassment. Considering both the role of the Supreme Court and the prime minister's power, the authority to appoint justices should be divided between the two orders of government, the provinces and the federal government. Only then, DeCoste argues, can Canada recuperate from two constitutional diseases which he identifies as the Court's understanding of the constitution as a violation of the norms of liberal constitutionalism, and of the central constitutional norm of Canadian federalism.

Echoing similar sentiments, the late Tom Kent emphasizes the importance of transparency, provincial clout and public trust in the appointment process to rebuke the current method of selection by the prime minister. He advocates a reformed appointment process fully conducted by a special committee authorized solely by the House of Commons and accessible to the public. He also recommends a shorter term of service and earlier mandatory age of retirement. According to Kent, reform will only be significant and substantive if the government is removed from the appointment process. The task of appointing justices belongs with the House of Commons. And for an appointment process to be meaningful and true to Canadian democracy and federal principles, it must be free from partisanship.

Allan Hutchinson, in exploring potential ways of reforming the appointment process, focuses on the "merit-ideology debate," arguing that the two must be discussed when considering the appointment of a judge to the Supreme Court. While he agrees that the current appointment system needs to be reformed, he argues that we cannot ignore that adjudication deals with values and ideas. Therefore, it is not enough to ensure diversity on the bench or a provincial role in the appointment process, both valuable ends. It is also important to inquire into the values and ideas held by potential Supreme Court Justices, given the increasingly important role the Supreme Court plays in Canadian politics. He goes on to propose an appointment process whereby a committee is established and charged with the responsibility of vetting potential candidates and making binding recommendations. He admits that his proposed system does not guarantee democratic accountability and the institu-

tional independence of the judiciary, but it does deal with the realities of judicial authority and power and can lead to an improved democratic polity.

III. ISSUES AFFECTING THE LEGITIMACY OF THE SUPREME COURT OF CANADA

The third section of the book slightly shifts focus to explore the legitimacy and the role of the Supreme Court in relation to the selection process, where all four papers suggest that perhaps reforming the appointment process alone is not the solution. The section begins with a paper by Nadia Verrelli, in which she reviews criticisms frequently made of the Court, focusing on the democratic and federalism deficits of the institution. Common to these criticisms, fuelling calls for a reformed appointment process, is the charge that the court has the ability and tendency, through judicial review, to overturn the decisions of a democratically elected government and to alter and shape the substance and understanding of the Canadian Constitution. Borrowing from Irwin Cotler, she identifies this as the anti-majoritarian paradox. This is exacerbated by the current appointment system. Verrelli argues that reforming the appointment process to ensure transparency, accountability and a provincial role may address the democratic and federalism deficits, but it does not address the anti-majoritarian paradox that potentially affects the legitimacy of the Court and its decisions. Instead, a better understanding of the mechanisms in place that provide a check on the Supreme Court in performing its adjudicative function and using these mechanisms to ensure that the Supreme Court properly and faithfully fulfills its role, will better secure the legitimacy of the Court and its decisions.

Focusing on the federal dimension of legitimacy, Eugénie Brouillet and Yves Tanguay also argue that purely institutional reform of the Supreme Court, specifically how judges are appointed, does not address the deficit of federative legitimacy facing the Court, at least in Quebec. Brouillet and Tanguay begin by drafting an analytical framework illustrating the federative dimension of legitimacy as it gravitates around three axes: institutional legitimacy, functional legitimacy and social legitimacy. Using this framework, the authors highlight certain problems pertaining to the legitimacy of the Supreme Court acting in its capacity as the final arbiter of federative disagreements. While the authors agree that institutional reform of the court can secure institutional legitimacy, it does not address functional and social legitimacy. In order to fully address legitimacy, an institutional reform of the Supreme Court must be accompanied by the Court adopting an enhanced theorization of the federative principle whereby equilibrium of power between the two orders of government is respected.

Andrée Lajoie, as did Verrelli, Brouillet and Tanguay, argues that the way in which Supreme Court justices are appointed is not necessarily the most pressing issue when considering the legitimacy of the Court. In fact, focusing on reforming the appointment process avoids the real problem with the Court, which she identifies as its penchant to adopt and base its rulings on dominant values. According to Lajoie, judges, once appointed, are bound by neither the values of those who

appointed them, nor by the values they adhered to in the past. Rather, anxious to establish their credibility, judges are bound by the dominant values of society. Therefore, those concerned with addressing the "ills" of the appointment process should direct their efforts to defending their values in a way to render them dominant and/or establish a country that relates to and respects different values.

The section ends with a paper by Peter Oliver in which he suggests that rather than focusing on reforming how justices are appointed, reform should come from "within" to ensure the legitimacy of the Court. Adding another dimension to the debate concerning institutional reform and legitimacy of the Court, Oliver centres his analysis on how the Court defines its role, particularly in regard to the recognition and enforcement of constitutional conventions. In order to secure its legitimacy, Oliver argues that in references, the Court should only articulate those conventions that are clearly established and not participate in the creation of new ones. In cases dealing with regular constitutional litigation, the Court should refer, only occasionally, to well established conventions and refuse to make a declaration regarding constitutional conventions. Reforming the Court from "within" – that is, Supreme Court justices understanding its proper role vis-à-vis the use of constitutional conventions, and not from "without," by the prime minister, cabinet, Parliament, or the provinces – will ensure the legitimacy of the Court.

IV: SUPREME COURT APPOINTMENTS BEYOND CANADA

The papers in the fourth section look at the appointment and selection process of final courts of appeal outside Canada. The purpose for including this section was to see whether comparator courts in other liberal democracies offer any lessons for Canada. In that spirit, the section begins with a comparative paper by Peter McCormick. In it he looks at the role of the Supreme Court as both a general court of appeal dealing with all legal issues and a constitutional court with final authority over the meaning and application of the Constitution. Though this fusion of functions is typical in countries Canada is normally compared to, it is not the standard in other countries, namely those in continental Europe and post-apartheid South Africa. Drawing on the example of other countries, McCormick proposes replacing the Supreme Court of Canada with two separate and distinct institutions, one dealing with legal matters, and one dealing with constitutional matters. Considering the expanded role the Supreme Court of Canada plays in Canadian politics, especially since the entrenchment on the Charter in 1982, it may serve Canadians well to consider following the example of other liberal democracies and establish two high courts.

Peter McCormick's paper lays the foundation for the following papers that describe the appointment process, functions and roles of the United Kingdom Supreme Court, the United States Supreme Court, the constitutional court of Germany, the constitutional court of post-apartheid South Africa, the European Union Court of Justice, and the Argentinean Supreme Court.

Alan Trench discusses the new United Kingdom Supreme Court established in 2009. This new court, which took over the functions of the House of Lords and the Judicial Committee of the Privy Council, was created unilaterally by the UK government. He looks at how the UK government set up the court and addressed the practical challenges, including the process to select and appoint judges, and establishing (or not) a territorial balance on the bench. And finally, Trench discusses the new role for this court which may involve British justices taking on a more active role in public affairs.

Aman McLeod explains the process for selecting and confirming the justices of the United States Supreme Court. He details the rules that govern this process, how the president selects nominees and what qualities the president looks for in potential Supreme Court justices. He then demonstrates how political considerations suffuse the nomination and confirmation process at every stage.

Arthur Benz and Eike-Christian Hornig discuss the Federal Constitutional Court in Germany. Beginning with the new role of the court entrenched in the Basic Law in 1949, the authors look at how the court has become a central player in Germany's federal system. They then discuss the functions and competences of the court, along with its organization, the election of judges, and the internal logic of its operations.

Yonatan Fessha in his paper provides a brief overview of the appointment process of justices to the constitutional court in post-apartheid South Africa. He focuses on the representation and transparency of the judiciary as an integral part of the constitutional democratic project that characterizes post-apartheid South Africa. He notes that although the current process is transparent compared to process during the apartheid regime, concerns about the politicization of the selection commission are slowly emerging.

Achim Hurrelmann and Martin Manolov discuss the Court of Justice of the European Union and its role in Europe's multilevel system. Though the European Union is not a full-style federation, the role of the Court of Justice resembles the functions of a federal arbiter common in other federations. They go on to discuss the composition and competences of the Court as well as the federalizing impact recent court decisions have had in Europe.

Neil Cruickshank offers an overview and critical appraisal of the process used to appoint justices to the European Court of Human Rights (ECtHR), a process that carries with it intergovernmental and democratic legitimacy. Considering this and considering how the ECtHR successfully balances the sovereignty of its state members with the universalism of a "European" convention, Cruickshank offers three reasons why Canadian parliamentarians ought to look at the Strasbourg model when discussing potential reforms to the process used to select and appoint justices to the Supreme Court of Canada.

The section ends with a paper by Jorge Bercholc discussing the Argentinean Supreme Court. In it, he examines the inconsistencies in the judges appointment process. Using empirical evidence, Bercholc demonstrates the opportunism of the strategic decisions adopted in designing the institution. He then goes on to discuss what is required to establish an effective tribunal.

The book closes with an appendix prepared by Jonathan Aiello. It lists reforms and attempted reforms to the Supreme Court of Canada from 1869, when a formal proposal to establish a final court of appeal in Canada was introduced in the House of Commons, to 2011. We trust that this appendix will be useful to students and scholars studying institutional reform and evolution of the Supreme Court of Canada.

CONCLUSION

Each of the authors in this volume explores a different aspect of the debate over the constitution of high courts, thereby offering insights and arguments on how, why, and whether current institutional issues need to be revisited. In Canada, this debate will likely persist. In the next two years, the Canadian prime minister will appoint two new judges to the Supreme Court: one to replace Mr. Justice Morris Fish, retiring in 2013, and one to replace Mr. Justice Louis LeBel, retiring in 2014. What process will he follow? As Peter Hogg indicates, it would be safe to speculate that the processes followed in the last three appointments will be adopted to fill the vacancies. However, the process remains in dispute mainly because it exhibits the prime minister's unfettered authority, and it does not take into account the wishes of the provincial governments to gain a formal role in the appointment process. Finally, the process does not guarantee the judges are bilingual. Some concerns were raised on this front when it became known that Mr. Justice Moldaver was not truly bilingual. Since the two pending appointments noted above are from Quebec, the issue of bilingualism is likely to be moot. However, it is also the case that the existing process does not guarantee diversity on the bench – to date Canadian prime ministers have yet to appoint a non-white, non-Judaeo-Christian to the bench. If anything, this demonstrates the need to revisit the appointment process and put into effect a formal selection and appointment process that is democratic, transparent, and accountable.

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I

THE MAKEUP OF THE SUPREME COURT OF CANADA

1

APPOINTMENT OF THOMAS A. CROMWELL TO THE SUPREME COURT OF CANADA*

Peter W. Hogg

L'auteur décrit le processus de nomination du juge Cromwell à la Cour suprême du Canada. Il retrace aussi l'histoire récente des nominations, et tout particulièrement l'audience publique devant un comité parlementaire ayant précédé la nomination du juge Rothstein. Même si aucune audience publique n'avait précédé la désignation du juge Cromwell, le gouvernement actuel exige désormais qu'on en tienne avant chaque nomination, suivant une politique qui sera sans doute reconduite par les prochains gouvernements. L'auteur décrit donc cette audience du juge Rothstein avant de rendre compte des critiques et commentaires qu'elle a suscités, d'analyser les risques et les avantages de cette pratique et de conclure qu'elle va dans le sens de l'intérêt public.

INTRODUCTION

When I was asked to prepare a paper on the process for the appointment to the Supreme Court of Canada of Mr. Justice Thomas Cromwell, it was assumed that the process would include a public hearing by a parliamentary committee in which the nominee would appear publicly before the committee, would make a statement to the committee and would respond to questions by members of the committee. This was the big innovation in the process of appointing Mr. Justice Marshall Rothstein to the Court in 2006.[1] What happened, however, was that the projected parliamentary hearing for the Cromwell appointment was delayed by the dissolution of Parliament, an election and a prorogation of Parliament; and eventually the government

* This paper was presented at the 2008 Constitutional Cases conference, Osgoode Hall Law School, York University, 17 April 2009. It was originally published in the *Supreme Court Law Review*, Second Series Number 47.

[1] See P.W. Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44 Osgoode Hall L.J. 527. Some of the points made in that article are repeated in this one.

decided to appoint Justice Cromwell without holding the parliamentary hearing. However, it is still the policy of the Conservative government of Prime Minister Harper – and it is a policy that is likely to be followed by successor governments – to hold a parliamentary hearing on future nominations to the Court. Therefore, it still seems worthwhile to reflect on the process of appointment, including the usefulness of the parliamentary hearing, as well as describing the process that was actually followed for the Cromwell appointment. That is what this paper attempts to do.

The Power of Appointment

The appointment of judges to the Supreme Court of Canada is provided for in the *Supreme Court Act*.[2] It is not provided for in the *Constitution Act, 1867*, s. 96 of which provides only for the federal appointment of judges to the provincial superior, district and county courts. That is because no Supreme Court was established in 1867. The framers were content for the Privy Council to continue to serve as the final court of appeal for Canada. However, by s. 101 of the *Constitution Act, 1867*, they did provide a power for the Parliament of Canada to establish a "general court of appeal for Canada." That was done in 1875, when the original *Supreme Court Act* was enacted, establishing the Supreme Court of Canada.[3] The Court originally had only six judges; a seventh was added in 1927; and two more were added in 1949 to bring the Court up to the current complement of nine.[4]

All that the *Supreme Court Act* says about the appointment of judges is that the appointments are to be made by "the Governor in Council" (s. 4). That term normally means the cabinet. In the case of judges of the superior courts of the provinces, s. 96 gives the appointing power to "the Governor General"; and the convention that has developed is that chief justice appointments are made on the recommendation of the prime minister and puisne judge appointments are made on the recommendation of the minister of justice. In the case of the Supreme Court of Canada, however, it seems likely that the prime minister is normally involved in the appointments of the puisne judges as well as the chief justice. In the case of the appointment of Mr. Justice Rothstein, Prime Minister Harper made clear that the final decision was going to be made by him, and (after the public hearing), it was made by him. In the case of the appointment of Mr. Justice Cromwell, the announcement of his nomination was made in a joint statement by Prime Minister Harper and Justice Minister Rob Nicholson (Prime Minister, 5 September 2008) and the announcement of his appointment (including the reason for not holding a public hearing) was made by Prime Minister Harper alone (Makin 2008).

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[2] R.S.C. 1985, c. S-26, s. 4.

[3] *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

[4] The history is related in P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997, annually supplemented), ch. 8.

The Process of Appointment before 2004

The *Supreme Court Act* makes no provision for ratification of appointments by the Senate or House of Commons or by a legislative committee. And, until 2004, no aspect of the appointment process was public. It was understood that the minister of justice would consult with the chief justice of Canada and with the attorneys general and chief justices of the provinces from which the appointment was to be made,[5] and with leading members of the legal profession, but this was all informal and confidential.

This informal process seems to have been very effective in winnowing out unsuitable appointees, and successive Canadian governments, regardless of party, have consistently made appointments to the Court of people who were regarded by the legal profession as fully worthy of the appointment. In particular, successive governments have not seen appointments to the Court as an opportunity to reward faithful supporters of the party in power or as an opportunity to pack the Court with judges who will render decisions pleasing to the party in power. Obviously, governments have welcomed the praise that their Supreme Court appointments have attracted. It has been good politics to make good appointments.

The Appointment of Charron and Abella JJ. in 2004

In 2004, Irwin Cotler, who was the minister of justice in the Liberal government of Paul Martin, introduced a more transparent process to find the replacements for Justices Louise Arbour and Frank Iacobucci (both from Ontario), who retired in that year. He appeared before the Standing Committee on Justice of the House of Commons and presented the names of his nominees for the replacements, who were Justices Louise Charron and Rosalie Abella of the Court of Appeal of Ontario, and he answered questions posed to him by the committee about the search process that had been gone through and about the qualifications of the nominees. The nominees themselves did not appear before the committee. After the minister's appearance, the two nominees were appointed.

The Appointment of Rothstein J. in 2006

Justice John Major (from Alberta) retired from the Supreme Court in 2005, and the minister of justice (still Mr. Cotler) announced a new and more elaborate process that would be used to fill the vacancy. The new process would start with the minister's normal informal consultations with the attorneys general, chief justices and leading members of the legal profession. The minister would then submit a short

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[5] The practice is for three judges to be appointed from Quebec (a requirement of the *Supreme Court Act*), three from Ontario, two from the western provinces and one from the Atlantic provinces. When a judge retires or dies, a replacement is found from the same region as the former judge came from.

list of five to eight candidates to an advisory committee composed of a member of Parliament (or senator) from each recognized party in the House of Commons, a nominee of the provincial attorneys general, a nominee of the provincial law societies and two prominent Canadians who were neither lawyers nor judges. They would review the files of the candidates, and provide the minister with a short list of three names from which the appointment would be made. All of this would take place on a confidential basis. However, the final step would be public. That would be the appearance by the minister of justice (but not the appointee) before the Standing Committee on Justice to explain the selection process and the qualifications of the person selected.

This process was duly commenced to fill the Major vacancy. The minister appointed an advisory committee and submitted six names to the committee. The committee reviewed the names and came back with a short list of three names. But, on 29 November 2005, before it had made its final selection, the government was defeated in the House of Commons and Parliament was dissolved for the election that took place on 23 January 2006. In that election, the Liberal government of Paul Martin was defeated, and the Conservative government of Stephen Harper was installed. One of the policies of the new government was a public, parliamentary interview process to review nominations to the Supreme Court of Canada.

The new Conservative minister of justice, Vic Toews, was left with the unfinished business of finding a successor to Justice Major. Instead of starting the entire process anew, the minister decided to work from the short list provided by the advisory committee appointed by the previous government. The prime minister, no doubt in consultation with the minister of justice, chose one candidate from that list. That candidate then had to submit to the new public interview process. The government, with the agreement of all the party leaders, established an "ad hoc committee to review a Nominee for the Supreme Court of Canada." The committee consisted of 12 MPs drawn from each party in proportion to their standings in the House of Commons (five Conservative, four Liberal, two Bloc Québécois, one NDP). The minister of justice, who was one of the Conservative members, was the chair of the committee. His predecessor, Mr. Cotler, was one of the Liberal members.

The committee held a three-hour televised hearing in the Reading Room, Centre Block, Parliament Buildings, on Monday 27 February 2006. The name of the nominee, Justice Marshall Rothstein of the Federal Court of Appeal, had been made public the previous Wednesday, and members of the committee had been supplied with a dossier which included his curriculum vitae, a list of all of his decisions, four sample opinions in full, a list of his publications and four sample publications in full. The hearing took from 1:00 pm to 4:30 pm. It opened with a short introduction of the nominee and the process by the chair (the minister), then with opening remarks by me (legal counsel to the committee), then with opening remarks by Justice Rothstein, then with questions from the members of the committee, then with a closing statement by me and a closing statement by the chair. During the question period, Justice Rothstein was asked approximately 60 questions in two rounds of questioning (3 per member on the first round, 2 per member on the second round; and the committee elected not to continue for a third round).

The committee did not prepare a written report. The proceedings were watched on television by the Prime Minister, and no doubt the Minister of Justice reported to him. As well, at the conclusion of the hearing, the Minister invited the members of the committee to communicate their views directly to the Prime Minister. The result was a foregone conclusion in that the nominee's credentials, his statement to the committee and his answers to questions left no doubt as to his suitability for appointment, and the reaction of the committee members left no doubt that they would advise the Prime Minister to proceed with the appointment.

The Prime Minister had announced that he would make his decision the following Wednesday 1 March – two days after the hearing. And on that day he announced in a written statement that he had selected the nominee and would recommend him for appointment by the Governor in Council. Justice Rothstein was duly appointed, and was sworn in as a justice of the Supreme Court of Canada on 6 March 2006.

The Appointment of Cromwell J. in 2009

Justice Michel Bastarache (from New Brunswick) retired from the Supreme Court in 2008, and, after the announcement of the retirement, in May of 2008 Justice Minister Rob Nicholson announced that he would carry out the normal consultations in the Atlantic provinces, that he would compile a list of names and submit it to a selection panel comprised of five members of Parliament – two from the government caucus and one from each of the three opposition parties. The panel would provide a confidential list of three names to the prime minister. The person chosen by the prime minister would then appear before a parliamentary committee for questioning by members of Parliament.[6] However, on 5 September 2008, Prime Minister Harper and Justice Minister Nicholson jointly announced that the work of the selection panel was "suspended" (terminated would have been more accurate) "because of Opposition objection to the panel's composition," and they announced that Justice Thomas A. Cromwell, a judge of the Court of Appeal of Nova Scotia, would be the government's nominee for the appointment.[7] However, the Prime Minister said that "an appointment will not be made until Mr. Justice Cromwell has an opportunity to answer questions from an ad hoc all-party committee of the House of Commons" (ibid.).

Two days later, Prime Minister Harper called an election and Parliament was dissolved. The election was held on 14 October 2008, and Prime Minister Harper was re-elected, although still with a minority government. On 18 November, Parliament opened, but, on 4 December, Parliament was prorogued until 26 January

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[6] The process leading to the appointment of Cromwell J. is described in P. Slayton, "Ottawa's Best-kept Secret?" *Maclean's*, 20 January 2009, p. 20.

[7] Press Release, PMO, 5 September 2008. According to Slayton, previous note, the opposition members of the panel objected to the fact that the government members of the panel were cabinet ministers who, it was claimed, would not approach their task with the independence of regular members of parliament.

2009. During the period of prorogation (on 21 December 2008), the Prime Minister announced that Mr. Justice Cromwell would be appointed immediately without the scrutiny of a parliamentary committee. By this time, the Supreme Court had been without its full complement for six months, which is a problem for a nine-judge court that usually sits as a full panel of nine. The Prime Minister explained the immediate appointment by saying that "the Court must have its full complement of nine judges in order to execute its vital constitutional mandate effectively." He also explained that this appointment was an exception, and that future Supreme Court nominees would undergo parliamentary scrutiny (Makin 2008). Mr. Justice Cromwell was duly appointed and was sworn in as a justice of the Supreme Court on 5 January 2009.

The Parliamentary Hearing

(a) Should it continue?

Although no parliamentary hearing was held on the Cromwell nomination, that omission was caused by the special difficulties of the minority Parliament in 2008, and, as I have related, the Prime Minister said that future Supreme Court nominees would undergo parliamentary scrutiny. So it is clear that, for the Conservative government, parliamentary hearings will continue to be part of the Supreme Court appointment process. If the government were to change before the next Supreme Court vacancy, it is likely that a Liberal government would also hold hearings. As explained, the Liberal government had moved a long distance in that direction before they lost office, and the Liberal opposition had participated fully and constructively in the Rothstein hearing. It would be politically difficult for a federal government to revert to a wholly confidential process, and I think it would be a mistake to do so.

I will discuss the Rothstein hearing in more detail later in this paper, but it certainly established that Canadian parliamentarians can conduct a civil hearing that poses no danger of politicizing the judiciary or of embarrassing the nominee. It is true that in 2006 the stars were particularly well aligned for a peaceful hearing since the nominee had been drawn by a Conservative government from a short list prepared by a committee set up by a Liberal government and on which all parties were represented. But the political parties in Canada, unlike the Republican and Democratic parties in the United States, have not defined themselves primarily by reference to issues that have been decided by their courts, such as abortion, same-sex marriage, religion in schools and due process protections for persons charged with crime. Nor have Canadian prime ministers, unlike the American presidents (who at least on the Republican side, are perfectly open about their intentions),[8]

[8] The original court-packing plan was devised by a Democrat, President Franklin D. Roosevelt, to overcome the destruction of his New Deal at the hands of an ultra-conservative Supreme Court, which believed that measures such as minimum wages or limitations on hours of work, let alone the New Deal programs to combat the Depression of the 1930s, were contrary to the Bill of Rights. After the swing judge on the nine-man Court changed his

ever made any effort to pack the highest court with their supporters. Senate confirmation hearings in the United States are focused on issues like abortion, and take on a partisan and rancorous atmosphere. (Even so, one observes that strongly qualified nominees are prepared to come forward, and they handle the difficult proceedings with aplomb.) Canadian hearings are never likely to become like the American confirmation hearings.

Canadian hearings are advisory only, because neither the *Supreme Court Act* nor the Constitution provides any formal role for Parliament. This lowers the temperature in Canada, because in the end the government has the power to insist on the appointment of its nominee. In the United States, by contrast, the Constitution requires the appointment of a Supreme Court justice to be made by the president only with the advice and consent of the Senate.[9] The Senate can block the appointment, and, for the reasons already given, the senators who do not belong to the president's party often perceive that they have a political incentive to strive mightily to do so. Moreover, in the United States, unlike Canada, there does not seem to be an institutionalized process of consultation administered within the federal government to ensure that nominations are always of high quality, so that in some cases there is legitimate concern about the quality of a presidential nominee. When this occurs, senatorial opposition becomes more bipartisan, and this can lead to the defeat or (more usually) the withdrawal of the nomination.

The prospect of a public hearing operates as a deterrent to a government that is considering making a partisan appointment of a poorly qualified person. This has not been necessary in Canada in the recent past, where the diligence of the government of Canada's routine informal process of consultation has yielded consistently strong appointments. It is to be hoped that Canadian governments will continue to believe that it is good politics to make good appointments. Presumably, as well, governments will not care so intensely about the decisions of the Court that they will want to influence future decisions through the appointment process.[10] I have already made the point that the "wedge issues" in Canadian political debate tend not to be decisions of the Supreme Court of Canada. As well, we have a weaker form of judicial review in Canada under the Charter of Rights than the strong form of judicial review in the United States. Judicial decisions striking down laws

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mind in 1937, the so-called Lochner era ended without the implementation of the expansion of the Court that had been proposed by the president. A period of judicial restraint ensued, but decisions in the 1960s and 1970s on issues such as abortion, contraception, pornography, desecration of the flag, and rights of criminal defendants raised the ire of conservatives, introducing a new round of hostility to the Court and open demands for the appointment of more conservative judges.

[9] US Const. art. II, s. 2(2).

[10] So far as I am aware there was no public comment on the fact the Justice Cromwell, the nominee of the federal Conservative government, had been appointed to the Court of Appeal of Nova Scotia by the federal Liberal government. This kind of bipartisan appointment is normal for the Supreme Court of Canada.

on Charter grounds usually leave room for a legislative response and usually get a legislative response that accomplishes the objective of the law that was struck down.[11] Court packing and court bashing are not as necessary in Canada as they are perceived to be by American politicians.

If the impulse to hold public hearings to interview Supreme Court nominees does not stem from any concerns about the quality of the people nominated or the suspicion of court-packing motives on the part of government, what is the basis for it? I think it is really the democratic notion that important decisions should be transparent. Decisions that are taken in secret, based on confidential consultations, will inevitably be less acceptable than those that are more open. Based on comments in the press and many comments made to me personally after the hearing for Justice Rothstein, lay people as well as lawyers were interested to receive some real information about the work that Supreme Court judges do, including the way in which cases come to the Court, the materials that have to be studied for each case, the hearing at which all parties' arguments are heard and tested, and the way in which judges try to reach decisions that are faithful to the law and the facts. It was also interesting to see a judge answer questions about his career and his work, which sent a reassuring message about the industry, ability and integrity of the person who was about to join the Court.[12]

People are interested in appointments to the Court. This is demonstrated by the experience of the existing judges, each of whom on appointment was bombarded with questions and requests for interviews by the media. There is much to be said for getting this over in the form of a structured public hearing before appointment. The hearing, which is broadcast on television and reported on by the print media, is inevitably more thorough and informative than the story that any one journalist can realistically expect to obtain on his or her own.

In summary, I think that future public hearings will undoubtedly carry significant benefits in helping Canadians to understand the appointment process and the judicial function and to learn about the qualifications of the person nominated for appoint-

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[11] The Canadian Charter of Rights explicitly permits legislatures to enact limits on Charter rights (s. 1) and even to use a notwithstanding clause to override Charter rights (s. 33). The common phenomenon of Charter decisions being followed by legislative sequels is the subject of a considerable literature focusing on the idea of "dialogue" between courts and legislatures. For a recent contribution, see P.W. Hogg, A.A. Bushell Thornton and W.K. Wright, "Charter Dialogue Revisited—Or Much Ado About Metaphors" (2007) 45 Osgoode Hall L.J. 1.

[12] It is possible to exaggerate the transparency of a process that culminates in a public hearing. The candidate does not know, and the hearing will not disclose, what considerations moved the government to choose the candidate over other well qualified persons. However, each appointment will have unique elements, and considerations of practicality and confidentiality probably make it unrealistic for public information to go beyond information about the role of judges on the Court, the search process and the qualifications of the particular candidate. And these, I suggest, are the truly important matters.

ment. And, although nominations to the Canadian Court have in the past been of well qualified people, I do not dismiss the value of the hearing as a deterrent to the nomination of someone who is not well qualified. The retention of counsel for the committee, the development of informal guidelines as to what can and cannot be answered by the nominee, and the willingness of committee members to respect the guidelines, as well as the dignity and privacy of the nominee, are features of the 2006 process that should be able to be repeated in future. With these understandings in place, judicial independence is not threatened by public hearings.

(b) What form should the hearing take?

I have already briefly described the form that the Rothstein hearing took. It was by no means all questions and answers, since the chair (the Minister of Justice) made brief opening and closing statements, I made an opening statement and a short closing statement and Mr. Justice Rothstein made an opening statement. However, the bulk of the time was occupied by questions from the committee members and answers by Justice Rothstein.

I was retained by the commissioner for federal judicial affairs, whose office administers the processes of federal judicial appointments, to provide advice to the ad hoc committee as to its procedures. My initial thought was that I would prepare a protocol that would limit the kinds of questions that committee members could ask the nominee, and the protocol would be enforced by the committee chair. However, what emerged from deliberations within the government was the view that a binding protocol was not the way to go. The members of Parliament on the committee should be free to *ask* any questions they want. This view was adopted by the committee, which decided that the chair would not attempt to impose limits on the questions that could be asked. My role became one of giving guidance to the committee as to the kinds of questions that could or could not be *answered* by the nominee. At the hearing, I made an opening statement to the committee explaining what their role was and what were the appropriate limits of judicial speech. I then remained with the nominee at the hearing in case any questions arose that I could help with. (In fact, I was asked two questions by members of the committee, one on practices in other Commonwealth countries, the other on the wisdom of a special constitutional court.)

In retrospect, it was the right decision not to impose any limit on questioning by members of the committee. A protocol enforced by the chair would have led to a tightly controlled hearing; this would have annoyed the MPs, to say nothing of the audience; and I think the committee would not have obtained as full a picture of the nominee. As it was, the questions at the hearing ranged far and wide, but were always civil and respectful, and Justice Rothstein's courtesy and good humour kept it all very pleasant. He was adept at handling the questions. He was asked what he thought about expanding the Supreme Court to 11 members to allow more representation from the West. He replied that he would be in favour of it if he didn't make it this time! Although the committee members understood the limits of judicial speech, they could not resist asking some questions on top-of-mind

policy issues, like crime in the cities, gun control and the elimination of poverty. And each time, Justice Rothstein said something about the validity of the concern and concluded by saying something like "that's your issue, not mine." I observed that, without exception, the questioner seemed perfectly happy with this response.

Guidelines for Questions and Answers

In my opening statement to the Rothstein parliamentary committee,[13] I attempted to describe the work that the Supreme Court does and the role of judges on the Court. Among other things, I pointed out that "[i]n the appeals that reach the Supreme Court of Canada, there is the further complication that the law itself is usually unclear." In that case, "the judges have to decide what the law is, as well as how it applies to the facts of the case." I suggested some guidelines about questions that the nominee could or could not answer.

One category of questions that I said the nominee could not be expected to answer were these:

> He cannot express views on cases or issues that could come before the Court. He cannot tell you how he would decide a hypothetical case. He might eventually be faced with that case. For the same reason, he cannot tell you what his views are on controversial issues, such as abortion, same-sex marriage or secession. Those issues could come to the Court for decision in some factual context or other. Any public statements about the issues might give the false impression that he had a settled view on how to decide those cases – without knowing what the facts were, without reviewing all the legal materials, and without listening to and weighing the arguments on both sides.

Phillip Slayton, who described me as "lecturing the committee about what it should and should not do," criticized this particular restriction on the basis that "[t]hese questions [about cases or issues that could come before the Court] were, of course, the very ones that most people wanted answered" (Slayton 2009, 21). I doubt that "most people" wanted answers to questions that might ultimately come before the Court, since it is rather obvious that a judge must not give the impression of having predetermined the answer to questions that might come to him later for decision. As John Whyte commented, the answer to such questions "might lead to the inference that the nominee was making decision commitments in exchange for approval, which would be a stark abridgement of the rule of law" (Whyte 2006, 14). It would also be an abridgment of judicial independence if a judge was not free to approach every case coming before him with an open mind and listen attentively to the arguments on both sides of the case. It may be that Mr. Slayton did not intend his criticism to be taken seriously; in any event, it should not be taken seriously.

No one on the committee asked Justice Rothstein a question about a hypothetical case or issue that might come before him on the Court.

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[13] The full text is to be found as an appendix to Hogg, note 1, above.

The only other category of question that I said could not be answered is the question of why he had, in his previous life as a judge, decided a particular case in a particular way. I explained that a judge is limited to his written reasons for judgment in explaining a decision that he has reached; he cannot supplement the written record with oral explanations. No one on the committee asked this category of question either.

On the positive side, I suggested that the committee "might want to explore" the nominee's personal qualities of wisdom, fairness, compassion, diligence, open-mindedness and courtesy. Professor Whyte interpreted my remarks as excluding the exploration of other issues than these personal qualities (ibid.). But in fact there were no restrictions of any kind on *questioning*, and, in the realm of *answering*, I had no intention of excluding other matters, and no one on the committee interpreted my remarks in that fashion. Virtually none of the 60 questions directly addressed any of the personal qualities that I had listed, although no doubt committee members drew some conclusions about those personal qualities from the way in which he answered questions on other topics. As explained earlier, the questions ranged over a broad range of topics. These included a number of questions about his judicial philosophy and his ideas of legitimate legal reasoning, for example, his attitude to criticism of the activism of the current Supreme Court. And all of these questions were courteously and carefully answered by the nominee. The only questions he did not answer – and he did this very graciously and to the evident satisfaction of each questioner – were questions about appropriate public policies on crime, gun control and poverty, which were clearly matters for the legislature, not for judges.

Michael Plaxton (2007) made a similar criticism to Professor Whyte. He also interpreted my remarks as intending to limit the questioning to the list of personal qualities that I claimed a judge should possess, which he described as "a politically and morally thin conception of the sort of person the committee should seek out" (ibid., 96). However, Professor Plaxton implicitly acknowledged that no one on the committee had recognized any limitation on the questioning, because he went on to quote from the questions posed by the committee that he thought were intended to draw out the "political and moral values" that Justice Rothstein would bring to his decision-making on the Supreme Court. He then moved on to criticize the answers offered by Justice Rothstein, who implicitly denied that his personal philosophy would influence his decision-making and expressly denied "that judges should be advancing the law with a social agenda in mind" (ibid., 101). According to Professor Plaxton, the members of the Committee were also at fault in that "they simply chose not to require anything more than superficial answers" to their questions about judicial method (ibid., 103). By taking this approach, "the committee quietly endorsed the neutrality thesis, acting as though the judge's political stances self-evidently have no bearing on adjudication, even in constitutional cases"; the result was a "flawed process" that "positively misled Canadians about the nature of the judicial function" (ibid.).

In a somewhat similar vein, Professor Whyte was disappointed that there was no discussion at the Rothstein hearing of "the constitutional philosophy or the moral authority that will lie behind his judicial development of constitutional

meaning," "questioning that might have illuminated constitutional philosophy," "what values Justice Rothstein saw the constitution bringing to Canadian political society," "explorations of judicial philosophy and constitutional values" and "theories of interpretation with respect to a national constitution."[14] I have already made the point that there was nothing in the proceedings to restrict such questions, and in fact a number of questions dealt with his approach to deciding cases. In thinking about why these kinds of questions were not properly explored, we have to remember that a parliamentary committee is composed of people of various backgrounds and interests, many of them without a sophisticated understanding of constitutional law, and it would not necessarily occur to them that these questions were a valuable way of assessing credentials for a Supreme Court appointment.[15] As well, it is worth remembering that the majority of the Court's caseload is non-constitutional law: criminal law, administrative law, civil procedure, remedies, contract, tort, property, tax, and so on. These cases may not be as important to the public policy of the country as constitutional cases, but the parliamentary committee is aware that the judges have to decide the non-constitutional cases wisely too. That is why, when you come right down to it, it is the personal qualities of wisdom, fairness, compassion, diligence, open-mindedness and courtesy that are the most important things which, on top of a distinguished legal career, qualify a person for the Supreme Court of Canada.

The criticisms of the hearing process by Professors Whyte and Plaxton, although strongly worded, were not, I am sure, intended to drive the country away from holding public hearings. They just wished that the questions and answers had been more penetrating and frank in acknowledging that judges make new law when they interpret an instrument as open-ended as a charter of rights, and that in hard cases a judge's moral and political views are bound to have an influence on his decision-making. These points, however commonplace they have become to lawyers (and especially to academic lawyers), are subtle ones that are not easy to bring out in a public, parliamentary hearing without giving the false impression that the Court is just another branch of government where policy is the driving influence. Justice Rothstein's insistence that he, like his fellow judges, felt constrained by legal texts, precedents and the established principles of the legal system was also articulating an important point about the judicial function. Judges are not supposed to decide cases according to their own personal predilections, and they should make an effort to keep an open mind on the cases that come before them. That understanding may be unsophisticated, even "superficial," but it is surely a useful part of a public assessment of the qualities that should be possessed by a judge of the Supreme Court.

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[14] See Whyte (2006), saying that "Professor Hogg set tight restrictions on any questions that might have illuminated constitutional philosophy," rendering the hearing an "empty process."

[15] Irwin Cotler, MP was on the committee and he is a former professor of constitutional law at Osgoode Hall Law School and McGill University (as well as a former minister of justice). But he was only entitled to one-twelfth of the questions, and he did not ask any of the questions Professor Whyte was looking for.

CONCLUSION

The insertion of open parliamentary scrutiny at the end of what is a careful, but confidential, process of finding people to serve as judges of the Supreme Court of Canada is likely to continue for future appointments, despite its suspension for the appointment of Justice Cromwell. The process gives the public some insight into the work of the Court and the role of the judges, and introduces the nominee to the public. It is a safeguard against the appointment of a poorly qualified nominee, although past experience suggests that this is less likely to occur here than it is in the United States. Nor is the partisan rancour that now characterizes nomination hearings in the United States likely to disfigure Canadian hearings, because the issues that divide Canada's political parties do not include the decisions of the Supreme Court, and partisan squabbles can safely be set aside for nomination hearings in Canada. I believe that the civility and courtesy that marked the hearing for the nomination of Justice Rothstein would also have characterized a hearing for Justice Cromwell had one been held.

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SHOULD CANADA HAVE A REPRESENTATIVE SUPREME COURT?

Lorne Sossin

Cette étude traite du lien entre la représentativité de la Cour suprême du Canada, la nomination des juges et l'influence des partis pris. Au double motif de la légitimité démocratique et de la qualité des nominations, y soutient l'auteur, la Cour devrait regrouper des juges dont les identités et expériences variées témoignent de la réalité canadienne. Le premier des trois volets de son analyse examine le caractère de plus en plus multiculturel du pays, les arguments en faveur d'une Cour qui traduise la diversité canadienne et l'approche actuelle de représentativité des juges. À cet égard, et malgré l'amélioration de la diversité judiciaire observée depuis une trentaine d'années, on n'a toujours nommé aucun juge issu d'une minorité ethnique ou visible, d'une confession autre que judéo-chrétienne ou de la communauté LGBT. Le deuxième volet, qui traite du rapport entre représentativité et impartialité à la lumière de la décision rendue en 1997 par la Cour suprême dans l'affaire R. c. R.D.S.*, examine le dilemme à résoudre entre une cour diversifiée et l'interdiction pour chaque juge de fonder ses décisions sur son identité ou son appartenance communautaire. À propos du lien entre représentation et nominations, l'auteur soutient enfin que la transparence est la clé d'une diversité améliorée et d'une sélection de qualité. En conclusion, il plaide pour une Cour suprême représentative qui favoriserait la compréhension du public et renforcerait sa participation au système judiciaire.*

INTRODUCTION

Should Canada have a representative Supreme Court? While the idea has an undeniable appeal, and is received wisdom in a variety of institutional settings in the public sphere (the federal public service, for example, is committed to becoming a representative institution), it sparks some questions. What groups or values should judges represent and how should they represent them? By what criteria should representation be assessed and in whose eyes? Finally, what does representation mean to and for the Supreme Court, and those affected by its decisions?

This set of interlocking questions must be asked against the backdrop of two broader debates in Canada – one surrounding judicial appointments and the other involving the evolving law of bias in judicial decision-making. In other words, the value we assign identity and experience of Supreme Court justices cannot be disentangled from how we appoint Supreme Court judges, or from how we understand judicial impartiality more broadly.

In this paper, I elaborate on the questions set out above and focus on the relationship between a representative court, judicial appointments and bias. My analysis is divided into three parts. In the first part, I explore Canada's increasingly multicultural makeup, the rationales for a court that reflects the diversity of Canadian society, and the current approach to representation on the Supreme Court of Canada. In the second part, I consider the relationship between a representative court and judicial impartiality, with particular focus on the Supreme Court of Canada's decision in *R. v. R.D.S.* in 1997. Finally, in the third part, I examine the relationship between representation and judicial appointments.

I conclude that the Supreme Court, for reasons tied both to democratic legitimacy and the quality of adjudication, ought to be composed of people with a mix of identities and experiences that broadly reflect the Canadian experience. This shift to value identity and experience more transparently may mean that, in years to come, the Court will and should "look" different than it now does, but in order to achieve a genuinely reflective Court, we will need both a broader and a deeper conception of diversity. Further, as part of this conceptual shift, we will need to develop along the way a broader and deeper understanding of judicial impartiality and the judicial appointment process.

I: TOWARD A REPRESENTATIVE SUPREME COURT?

Canada has been transformed from a society with predominantly European roots into one that embraces many cultures and traditions. One Canadian in nine is a member of a visible minority and more than half of the residents of Canada's largest city, Toronto, were born outside Canada or are from a visible minority community. There are more than ninety different ethnic groups in the Toronto Census Metropolitan Area and over one million people who speak neither English nor French. The top six ethnic groups in Toronto include European (997,180), East and Southeast Asian (488,350), British (457,990), Canadian (311,965), South Asian (291,520) and Caribbean (167,295).

In the 1996 census, visible minorities in Canada numbered more than three million. Two million came as immigrants; one million are Canadian by birth. As a result of Canada's changing society, a variety of private and public institutions has had to grapple with the question of whether particular communities are over- or under-represented in their workforces. A federal government report emphasized that the federal public service is supposed to serve all Canadians, yet its workforce does not reflect the diversity of the Canadian population. The report pointed out that visible minorities are under-represented and that, in 1999, only 1 in 17 employees in the federal public service was a member of a visible minority group and that

visible minorities are almost invisible in the management and executive categories (1 in 33) (ibid., 20).

Visible minorities, of course, represent only one of many communities of identity that one might wish to see reflected on the Supreme Court (a court which, to date, has not had an appointment from a visible minority community). I believe it is important at the outset to address what we might mean by diversity when it comes to the composition of the Supreme Court.

As discussed below, the overarching priority for the government in Supreme Court appointments is regional diversity, driven in part by the statutory requirement to appoint at least three judges from Quebec. Regional diversity also is a proxy for linguistic diversity (at least between anglophones and francophones).

Canada is renowned for its cultural diversity, yet the highest court adjudicating Canadians' issues does not reflect the makeup of the population. While regionally diverse, the bench is overall homogeneous. According to Peter McCormick (2005), "for most of the Court's history, the basic characteristics of its justices were easily described: They were middle-aged (or older) white professional males of British or French ethnicity."

Since the enactment of the Charter, and the appointment of Bertha Wilson as the first woman on the Supreme Court in 1982, gender representation has become a consistent factor in discussions of a representative Court. The focus on gender was no doubt intensified by the engagement of the Court with a series of high profile Charter and human rights cases involving equality rights relating to gender. While focusing on barriers of gender in society, it was natural for the court to pay more attention to barriers in the legal profession and the under-representation of women on the bench generally and on the Supreme Court in particular. By 2004, four out the nine justices were women and Beverley McLachlin had been appointed Chief Justice of the Court. The logic between the subject matter of the Court's decision-making and a focus on its composition is not always straightforward. While the Court has championed gay and lesbian rights under the Charter, for example, no similar scrutiny has been brought to bear on the sexual orientation of Supreme Court justices.

Religion remains a controversial community of identity for a host of reasons. As a secular institution of government, there is no obvious reason why the religious affiliation or beliefs (which may not be the same!) of Supreme Court justices should be relevant. That said, because religious approaches to morality and justice parallel aspects of the legal system so closely, it would be disingenuous to suggest religion has nothing to do with judging. Further, religious communities often overlap and interact with communities of ethnicity. In an aboriginal context, for example, spiritual beliefs cannot easily be disentangled from community identity.

Other kinds of identity change over time. For example, by definition, every Supreme Court justice was once young but no longer is at the time of her or his appointment. Does the experience of youth mean justices tend to have the ability to identify with the problems of youth, or does the distance from this experience mean justices lack this ability? The same might be said of a judge's socio-economic status. While some may have grown up or lived part of their life in poverty, this

is by definition not the case once an individual is appointed to the Supreme Court and is thereby the recipient of an annual salary in the range of $300,000.

Importantly, there are also communities of identity that remain largely hidden, but which may reflect important experiences for a representative Supreme Court to draw upon. For example, having had exposure to a mental illness such as depression or schizophrenia or to people suffering from trauma-related disorders could well provide rich insight for a judge, but many may choose not to disclose this experience. Growing up in poverty or emotional deprivation similarly shape identity but in ways that are difficult to measure. People also may choose not to identify with a community of identity. Someone born into a religious community may decide to have no connection to that community later in life. Someone with a physical disability may choose not to view themselves as disabled or identify in any way with others who share a similar condition.

Any concept of a representative or reflective Supreme Court will have to confront the almost infinite complexities of pluralism both within and between communities of identity. This complexity includes both intersectionality (some people might be members of both a visible minority and a religious majority, or be at once transgendered and disabled), and individuality (no category or categories of identity can capture all of the unique experiences and perspectives that make every person an individual). For both groups, identity may be a dynamic rather than a static phenomenon, and the very act of attempting to "categorize" a person may be perceived as illogical and even offensive.

Finally, it is important to clarify that not all communities of identity need be treated or valued in the same way. Membership in majority communities may be less important for the Court to "reflect" than minority or marginalized communities. While there undoubtedly will be intense scrutiny of the experience of the first South Asian or African-Canadian Supreme Court justice, few would suggest that a "white" perspective is important to the Court.

The purpose of the above discussion is not to settle on a definitive meaning of diversity or the categories which will or should "count" for purposes of achieving a representative Supreme Court. Rather, my comments are intended to hint at why a broader and deeper approach to diversity is needed, one that accommodates both the aspects of people that we can see and those we cannot. Like Canadian society, the Supreme Court ought to be seen as a complicated, evolving and heterogeneous community. To the extent the Court has failed to keep pace with the changes in Canadian society, in my view, we should view this as a deficiency to be remedied.

Beyond calls for a representative court in the interests of "democracy," and attempting to broaden and deepen what we take diversity to mean, I believe it is also important to understand why a court should reflect the diversity of society. What does it mean to claim that a more representative Supreme Court is more democratic? Do we, and should we, expect the decisions reached by a representative judiciary to differ from the decisions reached by an unrepresentative judiciary (or a judiciary selected without representation in mind)? Would a representative court be any less valuable if it turned out not to lead to any measurable difference in outcomes than

a homogenous court? Is the ideal of a representative Court symbolic, substantive or a little of each?

It is to the rationales for a representative Supreme Court in a multicultural society that I now turn.

The Rationales for a Representative Court

Liberal democracy is built on the claim that public institutions should be inclusive,[1] and is tied directly to the aspiration of "government by the people."[2] This interest in a barrier-free route of entry into the judiciary is of particular concern in Canada, as for many decades the Canadian judiciary was a vehicle for social exclusion.[3]

The removal of barriers, however, is not the same as the proactive commitment to a representative judiciary. An actively representative court implies that judges will actively "represent" the interests, values or representativeness of their community. A passively representative court suggests that judges would not seek to represent their communities but that demographic proportionality is a good in and of itself.[4] Many proponents of passive representation, however, assume that active representation is a likely consequence of such changes to the makeup of the judiciary. Whatever the relationship between the two, the tension between passive and active representation in the judiciary raise important issues as to the rationale of a representative court.

1. Fairness: The exercise of adjudication should reflect values of the community.

A compelling rationale for a judiciary that reflects society is that fair adjudication requires it. A wide variety of judicial decision-making calls on judges to determine who is credible, what would shock the conscience of Canadians, what would bring the administration of justice into disrepute, what limitations on rights are justified in a free and democratic society, just to name a few. These sorts of subjective determinations ought to reflect the community's mix of identities and experiences. Fairness in a pluralist society, in other words, requires pluralist decision-making.

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[1] For a review of this trend, see Vidu Sonhi, "A 21st century Reception for Diversity in the Public Sector: A Case Study" (2000) 60 Public Administration Review 395.

[2] See for a classic statement of this argument, Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (Oxford: Oxford University Press, 1968).

[3] See James Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985); and Paul C. Weiler, *In the Law Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974).

[4] For one of the first studies to focus on this distinction, see David Rosenblook and Jeanette Featherstonhaugh, "Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites" (1977) Social Science Quarterly 873.

2. Reasonableness: The more perspectives and backgrounds included in public decision-making, the more reasonable those decisions will be.

On this rationale, related to the fairness of decision-making, different voices and perspectives will help refine and improve the quality of judicial decision-making.

This rationale reflects the claim that a representative judiciary will adjudicate in a more compassionate, empathetic and effective manner than a judiciary that is not representative. This claim is particularly apposite in the context of appellate adjudication which makes decisions as panels, where judges must deliberate and craft decisions collaboratively (Lawrence 2010; Edwards 2003; Kornhauser and Sager 1993). Thus, one can see the fact that the Supreme Court sits as a bench of five, seven or nine as an indication that pluralist perspectives are valued. A homogenous bench reflecting the same identities and experiences would defeat the purpose of this appellate structure.

3. Equality: In a society devoted to the constitutional value of equality, courts should be responsive to the ethnic, cultural and gender composition of the population they serve.

Whether or not a difference in the court's makeup leads to any apparent difference in its decision-making, a representative Court still may be justified on grounds of democratic legitimacy and equity (Malleson 2003, 1). In a democratic society with an aversion to discrimination, we should expect the Court to reflect society. Therefore, where there is no substantive difference in suitability for the judicial role, as in the case of gender, under-representation is presumptively a concern. When the *Globe and Mail* reported in 2012 that 98 of the previous 100 federally appointed judges had been white, it created a significant degree of hand-wringing in the legal community (Makin 2012). This is especially relevant in light of the modest gains with respect to diversifying the legal community reported earlier in the year (DiverseCity 2011). A former BC Provincial Court judge, B. William Sandhu, spoke out against the record of appointments. He said: "[it] ought to raise serious concerns about equality, legitimacy, representation in the justice system and courts of the country" (Makin 2012). This factor is amplified by the fact of political accountability of the government for its judicial appointments. Since governments are accountable for their appointments to the Supreme Court, if that Court fails to resonate with the public, it is the government that pays a political price.

While political accountability may suggest an inclination to reflect majority will, as with the development of the constitutional ideal of equality under section 15 of the Charter, we should also be more concerned with representation of disadvantaged and disenfranchised minorities. In other words, the under-representation of otherwise disadvantaged or marginalized groups will merit remedial measures more than the under-representation of otherwise privileged groups. Whether or not members of under-represented groups bring fresh and different perspectives to these kinds of decision-making settings, if groups are under-represented in the judiciary, this may undermine public confidence in these critically important judgments. Under-representation may be particularly damaging in minority communities which are otherwise discriminated against, vulnerable or marginalized.

4. Minority Rights: The Court's commitment to the protection of minority rights and reconciliation between communities through constitutional interpretation is enhanced by a Court with first-hand experience with the minority/outsider experience.

Entry of its members into the judiciary is a tangible sign of enfranchisement for minority groups, especially new immigrant communities. Beyond its symbolic significance, it is also a tangible conduit of social mobility for many groups who confront discrimination, exclusionary requirements or other barriers in society. As Sonia Lawrence (2010) has observed, "we cannot ignore the connection between the judiciary and the other hierarchies which mark our society without allowing the judiciary to be a(nother) symbol of hierarchy through difference, another marker of where power resides in terms of colour, ethnicity and gender."

For Lawrence, the bench is another example of persistent exclusion, and as such it may fail to attract the confidence of the public, particularly those sections of the public that are unrepresented (Ifill 1997). In other words, if the consequences of a homogenous bench could include a loss of faith in the ability of the courts to deliver fair and impartial justice, this creates a clear and important role for diversity on the bench in establishing and maintaining judicial independence.

Conclusion

As I have attempted to show, these rationales raise significant questions and concerns which are rarely the subject of serious debate. In Canada, at least, the aspiration for a representative judiciary has become an article of faith tied to support for multiculturalism. To agree with the aspiration, however, is not necessarily to subscribe to any or all of these rationales. Yet the rationales, it seems to me, are as important as the aspirations (and in some cases may be more so). Depending on which of these rationales predominates, one may develop more passive or more active expectations of how representation will influence discretionary decision-making.

In the analysis below, I intend to explore this apparent dichotomy and suggest problems in viewing representativeness only through passive or active lenses. In areas where discretion turns on value structures, administrative culture and empathy, this bright line becomes decidedly blurred. Here, the question is not *whether* decision-makers represent particular viewpoints, perspectives and preferences but simply *which* viewpoint, perspective and preference is given priority and *why*, and how a justice system committed to transparency ought to address the ways in which the humanity of decision-makers informs their judgments.

Representation and the Supreme Court of Canada

The Supreme Court is distinct among Canadian courts in that appointments to the Court already are based on representative principles, at least in limited ways. The point of departure for representation on the Supreme Court is regionalism. By virtue of s. 6 of the *Supreme Court Act*, at least three judges must be appointed from

Quebec. While the principle underlying this provision appears to be to ensure a sufficient number of judges are proficient in the Civil Law of Quebec, there may be other goals which this requirement serves – for example, to ensure at least a component of the Court has been exposed to issues of minority rights protection inherent in the Quebec experience. Because three of the nine judges on the Court will come from Quebec, the government has recognized the principle of regional representation more broadly, roughly in correlation to population. As a result, in addition to the three judges from Quebec, the Court will also have three judges from Ontario, one judge from the Atlantic provinces (with a loose understanding that the appointment should rotate between provinces, so that with the retirement of Justice Michel Bastarache from New Brunswick in 2008, the government appointed Justice Tom Cromwell from Nova Scotia), one judge from British Columbia, one judge from the other Western provinces (Alberta, Saskatchewan and Manitoba).

While regionally diverse,[5] the Court historically was criticized as overwhelmingly homogenous. As Peter McCormick (2005) observed, "[f]or most of the Court's history, the basic characteristics of its justices were easily described: They were middle-aged (or older) white professional males of British or French ethnicity. Writing in the 1970s, Paul Weiler (1974) stated bluntly that "[t]he most obvious limitation in the membership of the Supreme Court is that it is an all-male society."

Because regional representation has been valued so highly, other forms of representation may have received too little attention. The exception to this rule has been those identity characteristics closely tied to regional representation (i.e., linguistic community and religion). For example, at least one of the non-Quebec judges historically has been francophone (examples would include LeDain, La Forest, Arbour, Bastarache, and most recently Charron).[6] A similar proxy-regional concern was the mix of Catholic and Protestant Supreme Court justices. It was therefore noteworthy when the first Jewish judge (Bora Laskin) was appointed in 1970. Justice Fish became the second Jewish member of the Supreme Court in 2004, joined by Abella later the same year, and subsequently by Marshall Rothstein in 2008. The first woman, Bertha Wilson, was appointed as discussed above in 1982, and has been followed by L'Heureux-Dubé in 1987, McLachlin in 1989, Arbour in 1999, Deschamps in 2003, Abella in 2004, and Charron in 2004. John Sopinka, a Ukrainian-Canadian, was (apart from Laskin) the first person appointed who was not clearly of British or French descent, and Frank Iacobucci, an Italian-Canadian, was the second.

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[5] It is necessary to qualify the degree to which even regional diversity has been achieved. Important constituencies within the federation remain unrepresented, notably Canada's three territories (Yukon, Northwest Territories and Nunavut). Additionally, the province of Newfoundland, which entered Canada sixty years ago, still has not had a Supreme Court judge.

[6] The reverse convention – that one of the Quebec judges would be an anglophone – seemed to have gone into suspension after the 1954 appointment of Abbott, but may have been revived by the 2004 appointment of Fish.

While the diversity of the Court has clearly been enhanced over the past three decades, particularly with respect to the categories indicated above, the Court remains distinctively and remarkably homogenous. The Court has yet to have a justice who is from the aboriginal community, is not born into a Judeo-Christian religious culture, is from a racialized or visible minority community or is openly homosexual. In this sense, at first glance, the Supreme Court appears markedly out of step with the rapidly evolving heterogeneity of Canadian society.

As discussed above, assessing the representative nature of the current Supreme Court is not as simple as a roll count of ethnicity, gender, religion or linguistic identity. Chief Justice McLachlin was born into a small-town community in Alberta, while Justice Abella was born into a displaced persons camp in Germany. Are these experiences not as formative as the various identity communities into which those judges might claim membership?

The discussion above on the rationales of a representative court becomes important in this context. If our concern is a diverse range of perspectives on the substantive issues which face the Court, we might privilege judges with diverse experience even if they are members of majority communities. If the more compelling rationale for a representative court is visual – that society see a Supreme Court that "looks like them" – then identity communities might take precedence even if this results in homogeneity of experience (e.g., judges from diverse ethnic communities who went to the same schools, practiced in the same firms, lived in the same neighbourhoods and enjoyed the same privileges). Clearly, experience may count as much as identity when it comes to the factors that shape a representative court.

The question underlying the distinction between identity and experience may be, which has a significant role in shaping judicial decision-making? The answer is certainly "both."[7] The relationship between identity and decision-making, however, is neither linear nor one-dimensional. Some have argued (myself included) that members of the Supreme Court have viewed the development of constitutional rights through the prism of their own life experiences.[8] Yet, at the same time, it would be difficult to sustain the argument that the judges have been unable to reach beyond their own experiences in the application of Canadian law, and in particular

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[7] The first significant attempt to address this question from the standpoint of a Supreme Court judge was Bertha Wilson, "Will Women Judges Make a Difference ?" (1990) 28 Osgoode Hall Law Journal 507. See also Regina Graycar, "The Gender of Judgments: An Introduction" in Margaret Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 262; Brenda Hale, "Equality and the Judiciary: Why Should We Want More Women Judges" (2001) P.L. 489; and Judith Resnick, "On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges" (1987–1988) 61 S. Cal. L. Rev. 1877.

[8] See L. Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights," in *Access to Care, Access to Justice: The Legal Debate on Private Health Insurance in Canada,* Colleen Flood, Kent Roach & Lorne Sossin, eds. (Toronto: University of Toronto Press, 2005).

the Charter of Rights and Freedoms. A Court had no member with aboriginal roots and yet was able to recognize aboriginal rights and value the aboriginal perspective in cases such as *Calder* and *Sparrow*.

While the identity of a judge does not dictate how that judge will decide any particular case, or even a class of cases, it arguably does affect the ideal of impartiality to which all judges aspire. It is to that question that I now turn.

II: REPRESENTATION AND JUDICIAL IMPARTIALITY

The puzzle of a representative judiciary is that we want a diverse bench because their more varied experience will enhance judicial decision-making, and yet we worry about a representative judiciary precisely because it may mean judges will decide based on their identity or community affiliation rather than based on the facts and law before them.

The absence of bias is sometimes referred to as an independent procedural entitlement, but in Canada, the Supreme Court has made clear that it should be understood as a further aspect of the duty of fairness.[9] It is not necessary to establish actual bias in order to invalidate a judicial decision. Rather, the requirement is to demonstrate a mere reasonable apprehension of bias. The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[10]

The standard for reasonable apprehension of bias, as with the other aspects of procedural fairness, will vary according to the context and the administrative decision-maker involved, so that it differs, for example, for a judge in a court and a judge appointed as a commissioner of a public inquiry.[11]

The originating principle of bias is that a decision-maker should not decide her or his own case. A reasonable apprehension of bias may arise when a party or witness is related to the judge. Relationships may be of a personal, professional or business nature. The issue is whether the relationship is such that a reasonable

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[9] See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 849.

[10] [1978] 1 S.C.R. 369 at 394; this test was adopted in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, infra, discussed at 496 per Major J., 502 per L'Heureux-Dubé and McLachlin JJ. and 530-531 per Cory J.

[11] See *Chrétien v. Canada*, 2008 FC 802. See also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

person might fear the decision-maker would not approach the matter with an open mind. As a result, not every relationship will result in a reasonable apprehension of bias. In the case of a purely professional association, for example, the associated tribunal might not rise to this standard if tribunal members are normally drawn from among the ranks of the profession in question. Judges may hear cases, for example, argued by lawyers who were once their partners. The courts have confronted only incidentally the question of whether membership in a particular cultural, racial, ethnic or linguistic group could give rise to a reasonable apprehension of bias. Judges address this issue individually when deciding if they need to recuse themselves from a particular matter. The failure to recuse in circumstances where the impartiality of the judge, and therefore the fairness of the hearing is in doubt, can lead both to grounds for reversing the decision on grounds of bias and potentially to a disciplinary proceeding against the judge for unethical conduct.[12]

The Supreme Court considered these issues most squarely in the context of *R.D.S. v. The Queen*.[13] In that case, the trial judge (who was African-Canadian), was hearing a case involving an African-Canadian youth who was charged with assaulting a police officer. The only two witnesses at trial were the accused himself and the police officer. The police alleged that the youth had resisted arrest and become violent with him. The youth alleged that he had been the subject of threats of violence at the hands of the police officer. Their accounts of the relevant events differed widely and the case turned on credibility. The trial judge indicated that she had a reasonable doubt about the accused's guilt even without accepting the evidence of the accused with respect to the conduct of the police officer. She concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt. The trial judge elaborated on her findings with the following comments:

> The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the

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[12] A decision which gave rise both to a reversal and a disciplinary proceeding involved Justice Matlow. He participated in a decision quashing a City of Toronto construction project. Based on a conflict of interest arising from Justice Matlow's opposition to a construction project in his neighbourhood, the decision in which Justice Matlow participated was reversed, and an inquiry into his ethical conduct was undertaken by the Canadian Judicial Council. See *Report of the Canadian Judicial Council to the Minister of Justice*, 3 December 2008, accessed at http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf.

[13] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 ("*R.D.S.*").

> evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

The case reached the Supreme Court on the question of whether these comments gave rise to a reasonable apprehension of bias – a divided Court issued four separate sets of reasons. Writing for the majority judgment on this issue, Cory J. observed:

> The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. … True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. [Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p. 12.] It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. *The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging* (emphasis added). See for example the discussion by The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), C.J.W.L. 1. See also Devlin, *supra*, at pp. 408-409. (Ibid., para. 119-20)

In the context of this case, Cory J. held that the comments by the trial judge were "unfortunate," "worrisome" and "come very close to the line" but when considered in light of the submissions and evidence in the case, did not in his view give rise to a reasonable apprehension of bias (ibid., para. 152).

Three judges of the Court dissented and found the comments did create a reasonable apprehension of bias, as it suggested factors not in evidence influenced the trial judge's determination of credibility.

> The two female judges of the nine-member court, Justice McLachlin (as she then was) and Justice L'Heureux-Dubé, concurred with Cory J. in the result, but would have gone even further in condoning the comments of the trial judge, asserting, "[a]n understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context … : A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality. (Ibid., para. 44-45)

Thus, when one takes stock of the various concurring and dissenting judgments in the case, the majority of the Court found that the comments did not constitute a reasonable apprehension of bias, but that majority split on the question of whether it was desirable and appropriate that the trial judge refer to her own "personal understanding and experience of the society" in which she lived and worked. When combined with the dissenting judges who concluded the comments were both inappropriate and reflected bias, this led to the majority view in the case being, first that the comments did not render the decision legally invalid, but second, that it would have been preferable had the trial judge not addressed the social context surrounding that assessment in her reasons.

If judges follow the direction provided by a majority of the judges in *R.D.S.*, we arguably would be left with a situation where judges were encouraged to draw on identity and experience in their decision-making but who would similarly be encouraged to explain those decisions on other grounds. We would, in other words, learn little about the influence of identity and experience on the content of judging.

The *R.D.S.* approach would impair the development of a judicial and public dialogue about the kinds of identity and experience related factors which ought to shape judgments, and those which ought not to do so. If judges rely on these factors to shape their decisions, but make no mention of them in their reasons, it may be difficult if not impossible to refine which kinds of experiences are appropriate to use and which might create a reasonable apprehension of bias. For example, if a judge has a child with special needs, should that judge sit on a case dealing with a constitutional challenge to underfunded programs for children with special needs? On the one hand, that judge will have special insight into the facts and issues raised in the case, and her judgment may be enriched by such insight. On the other hand, because the judge may be personally affected by the decision, would a reasonable person likely conclude that the judge could not be unbiased? If a parent of a child with special needs should not sit on a case involving funding for children with special needs, should only childless judges sit on cases dealing with public schools? At some point along the spectrum of judicial impartiality, we reach a point where identity and experience cannot be said to create bias, but without transparency in judicial decision-making, this spectrum will remain opaque.

Clearly, identity and experience have always influenced judging (even if this mostly has meant that the identity of being a member of the dominant community and the experience of privilege has shaped the judicial mindset), especially in contexts of credibility assessments. Yet, judges have rarely acknowledged the ways in which such cultural factors affect their decision-making – so, the prevailing view in *R.D.S.* simply restates and affirms the status quo.

Perhaps ironically, the decision that reflected the resilience of the status quo also set in motion significant change. One aspect of that change was a program initiated by the National Judicial Institute to educate the Canadian judiciary on "social context." While controversial at the start, social context programs have become a well accepted part of judicial education, which enable judges to reach beyond their own experience.[14]

While there is arguably significant support for the move to a representative judiciary, and a judiciary with an understanding of social context beyond their own experience, there is real ambivalence surrounding what difference such a shift would generate. What *R.D.S.* and its debate about the nature of bias disclose is the difficult balance required in decision-making settings between identity and merit.

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[14] See Rosemary Cairns Way, "Contradictory or Complementary? Reconciling Judicial Independence with Judicial Social Context Education" (2008) (on file with the author).

Traditionally, these concepts are seen in tension with one another. To the extent we privilege identity and seek a Supreme Court that is representative, merit matters less; and, to the extent merit is the sole driver of appointments, identity recedes as a priority. But need these concepts be oppositional? Should a candidate's familiarity with another perspective or set of life experiences itself be an element of merit? As Lizzie Barnes observes:

> There is no doubt that reconfiguring our understandings of merit is as difficult as that of complicating notions of identity. But without a shift in this regard, the transformative capacity of any step will be limited. If we do not believe the diverse ways of living produce diverse skills and abilities, we are never going to entrust important decision-making power to groups composed of people from a diversity of backgrounds.[15]

It is against this backdrop of the tension between objective merit and subjective identity that the selection process for Supreme Court justices emerges as a critical issue in reconciling the various aspirations we have for the Supreme Court. We need the Court to serve as an expression of democratic will and as an expression of counter-majoritarian protection for minority rights. Walking this particular tightrope is a quintessentially Canadian enterprise.

III: REPRESENTATION AND JUDICIAL APPOINTMENTS

Should identity be a factor considered in merit-based judicial appointments, or as a justifiable exception to, or additional factor beyond merit? While the debate regarding merit is an interesting and important one, what is important to keep in mind in this discussion is the virtually unfettered nature of judicial appointments in Canada. Merit, in other words, is whatever the government decides it is.

There is no obvious connection between whether an appointment system is merit based or not and its reflection of society's diversity.[16] Some might argue that a more truly merit based system would remove the many barriers which marginalized, under-represented communities now experience. Others might argue that a political commitment to diversity in appointments is more important than an allegedly objective set of merit criteria which simply would perpetuate existing barriers. Either way, I would suggest the key both to enhancing diversity and to enhancing the quality of appointments more broadly is transparency.

Transparency is critical as the appointment power afforded to the federal government is so expansive and is not subject, as a practical matter, to review or

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[15] L. Barnes, "Public Appointments and Representativeness" [2002] Public Law at 606 at 613.

[16] For a study attempting to find connections between methods of appointment and diversity, see Mark Hurwitz & Drew Noble Lanier, "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts" (2003) 3 State Politics & Policy Quarterly 329. The study failed to identify a correlation between a particular appointment model and diversity.

oversight. Under the *Constitution Act, 1867*, judges of s. 96 and s. 101 courts are appointed by the Governor General in Council (i.e., the federal cabinet), on the recommendation of the minister of justice (save for appointments to the Supreme Court of Canada and of chief justices, which are made on the recommendation of the prime minister). The *Constitution Act, 1867* does not speak to the content of the judicial appointments process or to the criteria for judicial selection. The Charter *of Rights and Freedoms* is also silent on the appointments process, although s. 11 of the Charter states that "any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*" (emphasis added). While independence and impartiality are guaranteed by constitutional and legal requirements, there is no legal answer to the question of the qualifications necessary for judicial office.

The legislative framework for Supreme Court appointments, as set out in the *Supreme Court Act*,[17] is straightforward. Section 5 indicates that "[a]ny person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province." The most remarkable and distinctive feature of the appointment criteria is the provision in the Act requiring "at least" three judges of the Supreme Court be from Quebec.

Some have raised the question about what other forms of representation ought to be similarly entrenched. A recent panel report on Supreme Court appointments, commissioned by the Canadian Association of Law Teachers (CALT), recommended that the proportion of women on the Supreme Court not be permitted to drop below the current level of four, and further recommended a requirement that at least one member of the Supreme Court be of aboriginal heritage (either as a constitutional or statutory amendment).[18]

While the future of judicial appointments has engaged a growing community of academics and activists, we still know very little about the present. A rare window into the appointment process at the Supreme Court was offered by Minister of Justice Irwin Cotler in 2004, when he appeared before a standing Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to explain the government's existing approach to Supreme Court appointments. He described the appointment process as it existed then as "not so much secretive as unknown" (Standing Committee 2004). He noted that no government had appeared before a parliamentary body to explain the process, and proceeded to do so, highlighting that the selection of a Supreme Court justice is the product of extensive consultations in the province or region where a vacancy has emerged (including discussions with the Chief Justice of Canada, the chief justices of the courts of the relevant region, the attorneys general of the relevant region, at least one senior member of the Canadian Bar Association, and at least one senior member of the law society of the relevant region). He indicated that the assessment of potential nominees

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[17] R.S.C. 1985, c. S-26.

[18] See "Canadian Association of Law Teachers Panel on Supreme Court Appointments," accessed online at <http://www.acpd-calt.org/english/docs/SupremeCourt_panel.pdf>.

involved three categories of merit: professional capacity, personal characteristics and diversity. He described professional capacity in the following terms:

> Highest level of proficiency in the law, superior intellectual ability and analytical and written skills, proven ability to listen and to maintain an open mind while hearing all sides of the argument, decisiveness and soundness of judgment, capacity to manage and share consistently heavy workload in a collaborative context, capacity to manage stress and the pressures of the isolation of the judicial role, strong cooperative interpersonal skills, awareness of social context, bilingual capacity and specific expertise required for the Supreme Court.

With respect to diversity, he stated simply, "Ce titre porte sur la mesure dans laquelle la composition de la cour reflète convenablement la diversité de la société canadienne" (ibid.).

The lack of specificity with respect to diversity is as revealing as its inclusion as a selection criterion. Whereas professional capacity may be assessed by a range of objective factors, diversity is in the eye of the beholder.

The evolution of Supreme Court appointments in Canada has culminated in a process with both an advisory committee for vetting names prior to the government's decision and a hearing process before a parliamentary committee after the selection of a candidate for appointment.[19] Importantly, however, the government is not bound by the outcome of either process, and in the case of Thomas Cromwell's appointment in December of 2008, this process was not followed, and the appointment was simply announced by the federal government in the midst of its constitutional crisis after the Governor General prorogued Parliament.

Justices Louise Charron and Ian Binnie announced their retirement in May 2011. With a call from many in the legal community, including Rod Snow, president of the Canadian Bar Association, for a "transparent process to fill the vacancies," (CBC News 13 May 2011) Prime Minister Harper returned to the process used in 2006 for the appointment of Justice Rothstein (and skipped in 2008 with the appointment of Justice Cromwell).

To select a pool of twelve candidates, the Minister of Justice and Attorney General consulted with the Attorney General of Ontario, senior members of the Canadian judiciary and prominent legal organizations. Members of the public were also invited to submit their input (Makin 2011). A selection panel with five members of Parliament – three from the majority caucus, one member from the Liberal Party, and one member from the NDP – reviewed the list and consulted a

[19] Justice Rothstein was appointed following an aborted advisory committee vetting process (cut short by the Liberal's election loss in 2006) and after a brief hearing before an ad hoc committee of MPs (which had concluded before its allotted time had expired, as the members of the Committee agreed they had heard enough to reach a conclusion). The conclusion was an enthusiastic endorsement of Justice Rothstein, and he was sworn in as a justice of the Supreme Court of Canada on 6 March 2006. See Peter Hogg "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44 Osgoode Hall L.J. 527-38.

range of experts across the country. This selection panel assessed the candidates and gave a short list of six approved candidates to Prime Minster Harper and Minister of Justice Rob Nicholson.

On 17 October 2011, Prime Minister Harper announced Justice Andromache Karakatsanis and Justice Michael J. Moldaver as the Government's nominees for the Supreme Court of Canada (Prime Minister 2011a). Two days later, the nominees appeared in front of a public ad hoc committee to answer questions from members of Parliament. This dialogue was open to the public, and the transcript was later published online. Much like the Rothstein hearing, Peter Hogg appeared in a dual role as a consultant and counsel and opened with a statement about the constitutional framework and Canadian traditions that ought to guide the deliberations. The nominees then gave opening remarks. Following this, there were rounds of questions by the committee members (Canada 2011b). The Prime Minister announced that the two nominees were to be appointed to the SCC four days later (Prime Minister 2011b).

It is uncertain whether the process used in appointing Moldaver J. and Karakatsanis J. is that of a new process or simply a refinement of the process adopted in the appointment of Rothstein J. In keeping with Canada's system of executive discretion over Supreme Court appointments, the government has neither changed any rules nor implemented any policies to set clear guidelines in determining a process.

While the issue of diversity receives only passing attention (Justice Karakatsanis's Greek heritage was highlighted as yet another ethnic barrier broken), in recent years there has been a great deal of controversy regarding French speaking abilities of judges appointed to serve on the SCC. Since May 2008 alone, there have been five private member's bills that have been tabled in the House of Commons.[20] These bills tried to make bilingualism a requirement for appointments to the Supreme Court. All five bills died on the order paper (Canada 2011a).

Section 16 of the *Official Languages Act* requires that every federal court, excluding the SCC, be able to carry out the proceedings in either French or English, as chosen by the parties, without the assistance of an interpreter (RSC 1985, c C-41 (4th Supp), s. 16). The *Supreme Court Act* does not make French fluency a prerequisite to being appointed to the bench (RSC 1985, c S-26). Certain tools such as simultaneous translation are used in the SCC to adhere to the constitutional right to access the courts in either official language.[21] While being bilingual is not

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[20] In May 2008, Bill C-548 was proposed to amend s. 16 of the *Official Languages Act* to require that judges in the Supreme Court, like other federal courts, would be capable of hearing cases in either language without the assistance of an interpreter. In June 2008, Bill C-559 was proposed with a similar goal, while amending s. 5 of the *Supreme Court* instead. Since 2008, Bill C-232, a similar bill, has been introduced three times and been dissolved. See Parliament of Canada, Bilingualism of Supreme Court Judges, by Marie-Ève Hudon & Lucie Lecomte (Ottawa: Library of Parliament, 2011).

[21] *Canadian* Charter *of Rights and Freedoms,* s. 19, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act* (UK), 1982, c 11.

a requirement for being appointed to the SCC, it is certainly a factor that goes into assessing the strength of a candidate. It is unclear how much weight is given to that factor.

Most recently, Karakatsanis J. with English, French, and Greek fluency, is trilingual. Moldaver J., on the other hand, does not have the requisite French fluency to be able to follow the proceedings without the assistance of simultaneous translation. Moldaver J.'s monolingualism became a focus of the ad hoc committee meeting in October 2011. Many of the committee members asked Moldaver J. about his inability to speak French (Canada 2011b). Regardless of this issue, he was still approved and appointed to the bench.

Moldaver J.'s appointment rekindled the debate inherent in the amending bills (see para. 7) to include French as a requirement for SCC judicial appointments. Proponents for the amendments explain that simultaneous translation is not perfect in relaying the subtleties of certain arguments. Additionally, since both the French and English federal documents are equally binding, it is critical that judges be able to analyze documents in both official languages with the same level of understanding.

There are concerns that such a requirement would shrink the pool of competent candidates. Such a concern is pertinent given the convention of regional diversity on the bench. Former justice of the Supreme Court, Justice Major, appointed from Alberta, was not bilingual and noted the regional implications of such a requirement: "If they make [bilingualism] a requirement, I don't know where you're going to find both competency and fluency in places like Vancouver and Calgary and Edmonton" (Ibbitson 2010).

In my view, the desire for a judiciary generally, and a Supreme Court in particular, which reflects Canadian society, can only be satisfied by greater transparency by government in articulating the reasons for its appointments. If diversity is as significant an aspect of Supreme Court appointments as professional capacity and personal characteristics, then it is reasonable to expect government to account for the way or ways in which a candidate resonates with the diversity of Canadians just as government ought to be able to account for why the professional capacity and personal characteristics of a candidate led to the candidate's selection. Linguistic proficiency is no different than other qualifications a judge must demonstrate to be considered for a seat on the Court.

In May of 2009, President Obama announced the nomination of Judge Sonia Sotomayor. In his remarks, he referred to Judge Sotomayor's professional capacity (for example, her experience as a prosecutor, corporate litigator and trial judge) and her personal characteristics (being principled, practical, etc.), but also spoke of her "inspiring example," and her "extraordinary journey," from a childhood spent in a housing project in the Bronx to scholarships at Princeton and Yale. President Obama focused on the importance of her experience as a member of a disadvantaged minority community and her perseverance in surmounting barriers – this led, in his view, to her understanding of how "ordinary people live" (*Huffington Post* 2009).

While every Supreme Court justice's path is unique, understanding what in that judge's path is of value to the government is a necessary point of departure. Though necessary, justification and transparency alone will not be sufficient. The goal of

a representative Supreme Court is not only an aspiration which the government needs to advance, but which also needs to be the subject of public engagement, legal discourse and political accountability.

CONCLUSIONS

Whatever the merits of a representative Supreme Court, it is clear that the composition of the Court reflects the commitments and challenges of a range of institutions beyond the Supreme Court, from universities and law schools, to law firms and organizations, to public servants, ministers and parliamentarians. The pool of possible Supreme Court appointments, in other words, already reflects a filtering which leads to the structural under-representation of a host of communities for a host of reasons. By the same token, as those organizations make diversity an aspiration, there will be a "trickle-up" impact on Supreme Court appointments.

In addition, Supreme Court appointments have the power to create change throughout the legal community and beyond. For example, the appointment of Bertha Wilson as the first woman to the Supreme Court did not, overnight, remove gender barriers in the legal community, but her presence on the Court nonetheless had a transformative impact which made the appointment of other talented women both more likely, and indeed, expected.

Similarly, our understanding of judicial impartiality needs to be enhanced by the rationales for a representative Court. The most compelling rationales, in my view, focus on the fact that a progressive and multicultural society, committed to surmounting the barriers that marginalize the less powerful, should look to public institutions to be a reflection of society. This reflective aspiration includes more than the categories of identity that can easily be "counted." Impartiality signifies an open mind, not a blank slate. One of the least helpful metaphors in the administration of justice is the notion that justice wears a blindfold. This image is meant to convey that the poor and the rich, the powerful and the powerless, all find equal justice in our courts and equal benefit of the law, and most of all in our Supreme Court. Justice, however, is not blind. It is informed by the humanity of the judges who stand at the fulcrum of the justice system. That humanity, of course, does not arise in a vacuum.

Ultimately, the argument for a representative Court, in my view, is an argument to ensure we do not lose sight of that humanity. It need not and should not lead to one-dimensional assumptions about how white males or women of colour see the world. It should, rather, lead to enhanced public understanding and public engagement with the justice system. This public discussion needs to be informed by clear and transparent accounts of how a Supreme Court justice's identity, life experiences and perspectives are valued. This clarity and transparency begins with the government's selection process. When it comes to Supreme Court appointments, the criteria should be clear, the process should be transparent and the outcome be explained by the government in as authentic terms as possible. That same commitment to transparency ought to continue through to the judicial decision-making process. Whether explaining determinations of credibility, or elaborating on con-

cepts such as "reasonableness" and "fairness," all judges and most of all Supreme Court justices ought to explore the extent to which their decisions are shaped by culture, ethnicity, religion, race, gender and life experiences. In this sense, *R.D.S.* represents an important early chapter in an unfinished manuscript.

The goal of this process is not to cast doubt on the legitimacy of the judicial process, but rather to situate that process within the project of Canadian society. The Canadian project has its roots in accommodation, tolerance, mutual recognition, protection for minority rights, and democratic accountability. Given the centrality of the Supreme Court in articulating and advancing this project, it is worth understanding the Court as one of its primary works in progress.

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3

SHOULD SUPREME COURT JUDGES BE REQUIRED TO BE BILINGUAL?

Sébastien Grammond and Mark Power

Ce chapitre présente une analyse des arguments en vertu desquels les juges de la Cour suprême devraient être en mesure d'entendre des affaires en français et en anglais. D'un point de vue pratique, le bilinguisme est nécessaire pour donner aux juges un accès sans intermédiaire aux documents de chaque affaire et pour leur permettre de comprendre les plaidoiries orales dans la langue originale. L'incapacité de certains juges à comprendre le français désavantage les parties et les avocats francophones. De plus, les juges doivent pouvoir comprendre les deux langues afin d'interpréter les lois bilingues, comme la Charte*, les lois fédérales ou celles de plusieurs provinces. La présence de juges unilingues anglophones mine également l'égalité de statut des deux langues officielles et marginalise la jurisprudence et la doctrine francophone.*

On dit souvent qu'une exigence de bilinguisme « sacrifierait la compétence » en réduisant le bassin des candidats potentiels. Cependant, une étude des compétences linguistiques des juges des cours d'appel à travers le Canada démontre qu'il y a un bon nombre de juges bilingues à l'extérieur du Québec. De plus, la capacité de comprendre les deux langues officielles devrait être considérée comme nécessaire pour un juge de la Cour suprême, et constitue donc un aspect de la compétence.

INTRODUCTION

The Supreme Court of Canada hears and decides cases in both of Canada's official languages, English and French. Its francophone judges have always spoken English. But as Peter Russell, who studied bilingualism at the Supreme Court more than 40 years ago, observed: "[W]hile fluency in English appears to have been a necessary qualification for membership on the Court's bench, fluency in French has not" (Russell 1969). Even though the situation has improved since the time of Russell's writing, there are still some Supreme Court judges who cannot understand written or oral submissions in French without the assistance of an interpreter or translator, and there is no guarantee that the situation will not persist. Francophone litigants

before the Supreme Court face a challenge that is not shared by their anglophone counterparts: to attempt to persuade judges who do not understand the language in which arguments are presented.

Several attempts have been made to correct this disequilibrium. Some judges have suggested that a party's constitutional right to use English or French before the federal courts and the courts of certain provinces entails the right to be understood by the judge in that language without interpretation,[1] but this remains a minority view. When a new *Official Languages Act* was introduced in the House of Commons in 1988 by the Conservative government of the day, it contained a provision explicitly recognizing such a right in the federal courts. However, in the course of the debates, an exception was made for the Supreme Court.[2] More recently, at least two private member's bills requiring future appointees to the Supreme Court to possess some proficiency in both official languages have sparked a countrywide debate.[3] One such bill was passed in the House of Commons but died on the order paper in the Senate at the end of the 40th Parliament. At present, the prospects of such a principle becoming law in the near future appear bleak.

This paper surveys the arguments in favour of and against a statutory requirement to the effect that Supreme Court judges be bilingual. We adopt a public policy perspective rather than a purely legal one. We do not analyze arguments aimed at showing that such a requirement is mandated by existing constitutional provisions (for example, as a consequence of one's right to speak the language of one's choice before the courts) or prohibited by such provisions (for example, if it somehow led to the impairment of a judge's right to speak in the language of choice). Rather, we explore whether, given Canada's political and demographic conditions, there are any substantive reasons for requiring Supreme Court judges to be bilingual. We disclose at the outset our sympathy for a requirement of bilingualism.

We begin by showing that the ability to understand French has increasingly become critical to the performance of the tasks assigned to Supreme Court judges, especially to hear oral argument in French, to read written submissions in French and to interpret bilingual statutes and sections of the Constitution. We then underline how bilingual judges would improve the Court's status and fulfillment of its role as a national institution and ensure the equal status and use of Canada's two official languages. We consider the objection to the effect that a requirement of bilingualism would unduly narrow the pool of candidates from which judges are selected. We present empirical data in order to measure the extent to which this

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[1] *Société des Acadiens du Nouveau-Brunswick inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549 at 638-647 (Wilson J. dissenting).

[2] This exception is found in the *Official Languages Act*, R.S.C. 1985, c. 31 (4th supp.), s. 16.

[3] Being C-232, *An Act to amend the Supreme Court Act (understanding the official languages), 40th Parliament*, 3rd Session (Y. Godin); and C-548, *An Act to amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada)*, 39th Parliament, 2nd Session (D. Coderre).

argument is valid. Finally, we assess other proposals that would aim at achieving the same goals.

We decided to write this paper in English because the points we make are usually considered to be obvious by a francophone audience. We thus speak to those who need to be convinced of our point of view.

HEARING AND DECIDING CASES IN BOTH LANGUAGES

When an employer lays down minimal requirements for a job, it should normally do so after considering the tasks that an employee must perform and identifying the skills necessary for the fulfillment of those tasks. Thus, the most convincing arguments for a requirement of bilingualism are based on a consideration of the process by which the Supreme Court actually decides cases.

The Supreme Court hears cases in English and French, as it is the constitutional[4] and statutory[5] right of the parties before it to speak the official language of their choice. For example, of the 62 cases in which it rendered judgment in 2009, 22 were entirely or partly in French, including many cases originating from outside Quebec. Moreover, many of the cases heard by the Court involve the interpretation of bilingual legislation, including the *Canadian Charter of Rights and Freedoms*.

A case before the Supreme Court comprises many types of documents: the record, which contains the judgments of the courts below, the exhibits and the transcripts of the evidence at first instance or before an administrative tribunal, the factums, which are detailed analysis of the legal arguments put forward by each party and are up to 40 pages long; and the authorities, which are the statutes, cases, law journal articles and textbooks cited by the parties. None of that is translated.[6] Hence, a unilingual anglophone judge does not have direct access to a case presented in French by a francophone litigant. That judge will have to rely on the "bench memo" written by a clerk. A bench memo is a report by a law clerk that summarizes the facts of the case, the judgments below and the results of the law clerk's analysis and research on the legal questions at issue.[7] The bench memo is not communicated

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[4] *Constitution Act, 1867*, s. 133; *Canadian* Charter *of Rights and Freedoms*, s. 19(1).

[5] *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), Part III.

[6] Some courts or administrative tribunals will issue their reasons in both official languages. This is a rare occurrence. When reasons are prepared in both languages, it is not uncommon for the translation not to be simultaneously released with the original version. See generally *Official Languages Act*, R.S.C.1985, c. 31 (4th Supp.), s. 20. Some parties go so far as to file with the Supreme Court, at great personal cost, unofficial English translations of decisions of Quebec courts or tribunals issued in French only. This was the case, for instance, in *Enerchem Transport Inc. v. Gravino*, [2008] S.C.C.R. No. 479. Regarding the language of factums, to the best of our knowledge only the Commissioner of Official Languages regularly serves and files French and English versions of his written submissions.

[7] For a description of the work of the law clerks, see M. McInnes, J. Bolton and N. Derzko, "Clerking at the Supreme Court of Canada" (1994) 33 Alta. L. Rev. 58.

to the parties. Thus, the unilingual judge will have access to the arguments of the parties through the eyes of an inexperienced recent law school graduate, rather than directly. While we do not want to trivialize the law clerks' abilities (we were both law clerks at the beginning of our careers), we think that law clerks are likely to focus more on particular categories of argument (e.g., discussions of precedents or academic literature) that their studies have trained them to recognize, while giving less weight to arguments based on a lawyer's practical experience. Even though the phenomenon is difficult to measure, it may be that law clerks act as a sort of filter when they summarize the arguments made by the parties.

The situation at the hearing is somewhat different. When the case is entirely or partly in French, the court provides simultaneous interpretation during the course of the hearing, which normally last no more than two hours. Unilingual anglophone participants in the hearing, be they judges, lawyers, parties or members of the public, may thus have access to a means of understanding what is said in French. Serious doubts have recently been expressed, however, about the accuracy of the translation. Lawyer Michel Doucet, QC, publicly expressed his grave concerns when, by chance, he listened to the English version of his oral argument in *Charlebois v. St John (City)*, a case his client lost by a margin of 5 to 4, broadcast on the Cable Public Affairs Channel. His reaction was as follows:

> I listened to the English interpretation of my argument, and I understood none of it. I have a lot of respect for the interpreters and the work they have to do. It must be quite complicated to do it in a political context; I can imagine what it must be in a judicial context, where every word counts, where the interaction between bench and counsel plays a very important role, and where the questions put to counsel and the answers given can have an influence. In those circumstances, if I had to plead another case before a bench on which three judges did not directly understand the language in which I wanted to plead, I might suggest to my client that we proceed in the other language to ensure the nine judges were able to understand the argument. (Canada 2008)

In fact, the ambivalence of French-speaking lawyers such as Doucet regarding the language they should use before the Supreme Court is reminiscent of the practice of many Quebec lawyers, documented by Peter Russell in the late 1960s, to argue in English to ensure that they would be understood (Russell 1969).

More recently, one of us argued a case before the Supreme Court.[8] The overall quality of the simultaneous interpretation was very good. Yet, by comparing the webcasts of the original French argument and its English translation, both available on the Supreme Court's website (Supreme Court 2010), the following discrepancies may be noted. The French sentence, "The *Gosset* case affirmed the principle of full compensation of the injury," was translated as "*Gosset* says that there has to be comprehensive damage." In addition to the cumbersome style of the translation, the

[8] *de Montigny v. Brossard (Succession)*, [2010] 3 S.C.R. 64. Luckily, the case was argued before a panel of seven judges who all listened to the argument without the assistance of an interpreter. The discrepancies noted here did not result in any injustice to the parties.

words "comprehensive damage" are imprecise and do not convey clearly the idea of full compensation of the injury. But there is more. In order to contrast the civil law and the common law, which adopt different positions on the compensation of grief, it was said, in French, that "at common law grief is not compensable." The interpreter omitted to translate "at common law," making it sound as if the statement related to the civil law, thus inserting a contradiction in the English version of the argument. Other examples of errors are the translation of "*droit commun*" (which means general law) by "common law" (a totally different concept); saying that one's rights were not breached without specifying that the argument was related to "Charter rights" only, which makes the argument incomprehensible; or saying that the second paragraph of article 1610 of the Civil Code of Quebec was not applicable when the original French argument made exactly the opposite point, that the article was indeed applicable.

An interesting comparison may be drawn with the practice of international arbitration, where language issues are pervasive. In his book-length study of the question, law professor and arbitrator Tibor Várady (2006, 49-50) asserts that most authors on the subject agree that "arbitrators must have an adequate command of the language chosen as the language of arbitration." In this regard, the International Bar Association has adopted a code of ethics for international arbitrators that states that a "prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of arbitration" (International Bar Association 2011, art. 2.3). As to the possibility of simultaneous interpretation as a second-best solution, Várady notes that "experience has shown that interpretation is usually the less effective choice. Translation simply cannot fully mirror both the arguments and the art of advocacy. It cannot reflect every emphasis, gambit of persuasion, or undertone. Often, the arguments are not reflected clearly either" (Várady 2006, 53).

It has sometimes been suggested that the Supreme Court of Canada's internal decision-making process would somehow "self-correct" any translation errors that occur during oral argument. For example, a unilingual judge could ask clarification from his or her fellow judges or from law clerks. By its own nature, the accuracy of such a claim is difficult to verify. Moreover, it would require in the first place an awareness of the shortcomings of translation and a willingness to actively seek clarification. A unilingual judge may not feel at ease to seek clarification from law clerks, and may even assume that translation errors will be caught by bilingual colleagues.[9] In any event, a unilingual judge may simply not appreciate the gap between the original arguments presented in French and their translation. Retired Justice John Major, for one, stated: "I was unilingual for all intents and purposes, and I was on the court for 14 years and made use of the translation, which I found

[9] During a speech at the University of Ottawa's Faculty of Law on 4 February 2010, the Honourable Louis LeBel, a judge of the Supreme Court of Canada, recounted the many hours he devotes in order to ensure that the French and English language versions of the Court's reasons convey the same meaning.

to be very good. There was no case from Quebec or elsewhere argued in French in which I did not feel I had a complete grasp of the facts and the positions of the parties" (Canada 2009). This position is hard to reconcile with the evidence of discrepancies outlined above and does not bode well for the self-correction theory.

More importantly, however, this claim is reducible to the idea that English-speaking lawyers have a right to an oral hearing without their arguments being filtered by translators, while French-speaking lawyers do not. Yet, despite the fact that applications for leave to appeal have been dealt with in writing for over 30 years, there is very little support for the abolition of oral argument at the appeal stage. The possibility to speak directly to the decision-makers and to attempt to influence them has been a vital part of the Anglo-American judicial tradition. Lawyers will sometimes make concessions or reframe their arguments when they feel that the position articulated in their written factums does not find favour with the court. In our experience, lawyers always refine their arguments between the moment they file their factums and the oral hearing. At the hearing, judges ask questions about points that may not have been addressed in the factums. Oral argument can be the turning point of a case.

This is also what distinguishes oral argument before a court and making a speech before Parliament, for instance. Legislative processes are largely institutionalized and involve a large number of actors. Effective advocacy does not require personal access to each person involved in the process. The process is highly public and ideas may be pursued at various stages and with a variety of individuals, such as civil servants, members of Parliament, ministers' staff, as well as through the media. This is in contrast with the judicial process. A court's decision-making process is secret. The oral hearing is the only occasion when litigants may engage in direct, real time communication with the decision-makers. It would be highly improper for a litigant to attempt to speak to a judge (or the court's personnel) in private. This sets oral hearings apart from other political forums where persons do not have a right to be heard in their own language.

Another important aspect of a Supreme Court judge's duties is to interpret bilingual legislation. Federal legislation, as well as the legislation of Quebec, New Brunswick, Manitoba, Nunavut, the Northwest Territories and the Yukon is bilingual, and both versions have equal status and authority.[10] The situation is the same for all public general statutes of Ontario since 1992, as well as many other

[10] See the *Canadian* Charter *of Rights and Freedoms*, R.S.C. 1985, app. II, no. 44, s. 18 (federal and New Brunswick legislation); the Charter *of the French language*, R.S.Q., c. C-11, s. 7(3) (Quebec legislation); the *Interpretation Act*, C.C.S.M., c. I80, s. 7 (Manitoba legislation); *Languages Act*, R.S.Y. 2002, c. 133, s. 4 (Yukon Legislation); *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, s. 7 (Northwest Territories and Nunavut legislation). For the historical development of the rule, see M. Bastarache, N. Metallic, R. Morris, C. Essert, *The Law of Bilingual Interpretation* (Toronto: LexisNexis, 2008) at 16-32; see also *R. v. DuBois*, [1935] S.C.R. 378; *A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.

statutes and many regulations in that province.[11] Some legislation in other provinces is bilingual.[12] The same is also true of the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms*. It should be noted that the French version of federal legislation is not a mere translation of the English. Rather, the federal drafting process involves the concurrent drafting of the two versions by two teams of drafters who strive to produce English and French versions that respect each language's drafting tradition. As a result, the French version is often more concise and more precise than the English version.

Giving equal status to both versions surely means that the ultimate interpreter of legislation must be able to understand them both.[13] In truth, a bilingual judge will be in a position to benefit from the additional information contained in the French version. In some cases, even a quick look at the French version might very well resolve an ambiguity that arises from the English version.[14] Moreover, the well established rule of interpretation that requires judges to give bilingual provisions their shared meaning, that is, a meaning that can be supported by both versions, obviously requires the judge to be able to understand both. This rule may in fact lead the court to prefer the French version over the English one.[15] To implement these principles, the court mandates a process the first step of which is the comparison between the English and French versions of the legislation. The Supreme Court even requires litigants to reprint in their factums both versions of the bilingual statutory provisions that are relevant to the cases to facilitate its interpretation of those provisions.[16] It should be obvious that a unilingual judge is not well equipped to perform that task.

A TRULY NATIONAL INSTITUTION

Standing at the apex of Canada's judicial system, the Supreme Court should reflect the country's fundamental values and principles, in particular with respect to language. In this connection, subsection 16(1) of the *Canadian Charter of Rights and Freedoms* states that "English and French are the official languages of Canada

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[11] *French Language Services Act*, R.S.O. 1990, c. F-32, s. 4; *Legislation Act, 2006*, S.O. 2006, c. 21, s. 65.

[12] See for instance: *Language Act*, S.S. 1988-89, c. L-6.1, s. 4 (Saskatchewan legislation).

[13] The role of *ultimate* interpreter distinguishes the Supreme Court from other courts: while it might be desirable that judges of the Alberta Court of Appeal, for example, understand French, their failure to take into account the French version of a federal statute could be corrected by the Supreme Court.

[14] See, e.g., *R. v. Mac*, [2002] 1 S.C.R. 856.

[15] *Schreiber v. Canada (A.G.)*, [2002] 3 S.C.R. 269; *R. v. Daoust*, [2004] 1 S.C.R. 217; numerous other Supreme Court judgments that interpreted federal legislation by comparing the two versions are cited in the latter case; *R. v. S.A.C.*, [2008] 2 S.C.R. 675.

[16] *Rules of the Supreme Court of Canada*, s. 41(2)(*g*). This rule was made in order to avoid, going forward, what occurred in *R. v. Mac*, [2002] 1 S.C.R. 856.

and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." Subsection 16(3) of the same instrument encourages Parliament "to advance the equality of status or use of English and French." In doing so, our constitution clearly excludes regimes, which have been adopted in other countries, where one language has more privileges than the other, where a non-dominant language is official only in certain parts of the country or for regional governments only, or where speakers of a non-dominant language simply have rights of accommodation rather than equality of status and use. Yet, the presence of unilingual anglophone judges at the Supreme Court has the effect of marginalizing French in a number of ways that are incompatible with the principle of equality of status and use.

One obvious limitation of unilingual judges is that they are unable to draw upon the rich body of Canadian legal literature written in French. There have been a few quantitative studies of academic citations by the Supreme Court over the recent decades.[17] The general picture that emerges from those studies is one where English-language books and articles overwhelmingly dominate, and French-language texts are mostly cited in judgments dealing with civil law or other issues peculiar to Quebec. Thus, the information compiled by McCormick suggests that the Supreme Court cites English and French law journal articles in a ratio of about 7:1.[18] The only francophone author to appear on the list of the most often-cited authors is Albert Mayrand, who ranks 13th. The only French-language article that was cited four times or more was written by Louis Perret and was cited four times, whereas there are more than ten English-language articles in that category. The only book originally written in French that ranks among the ten most often cited works is Pierre-André Côté's treatise on statutory interpretation, most certainly owing to the fact that it was translated into English. Apart from Côté, the most often-cited French-language textbook author is Jean-Louis Baudouin, ranking 13th. Black and Richter's study of citations in the period 1985–90 shows that books written in French about fields of the law that are uniform throughout Canada, such as criminal law and evidence, constitutional law and statutory interpretation, are sometimes cited by francophone judges but almost never by anglophone ones. They concluded: "Our study provides support for the claim that while Québécois judges are quite

[17] P. McCormick, "The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985-2004" (2004) 83 Can. Bar Rev. 633; P. McCormick, "Do Judges Read Books, Too? Academic Citations by the Lamer Court, 1991-96" (1998) 9 Sup. Ct. L. Rev. 463; V. Black and N. Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) 16 Dal. L.J. 377.

[18] Surprisingly, McCormick did not publish statistics concerning the language of the articles cited. However, he provides detailed information about the number of times every major law journal was cited. Assuming that all the articles cited were in each journal's main language of publication, and making adjustment for the number of French and English articles cited from the *Canadian Bar Review*, which he provides, we can infer that the Supreme Court, over the 1985-2004 period, cited English-language articles 1380 times and French-language ones 203 times, a ratio of approximately 7:1.

prepared to utilize scholarship available only in English, non-Quebec judges, as a group, are slow to make use of works available only in French."[19]

The unilingualism of some judges also severely limits their ability to understand the civil law. Although there are notable exceptions, most civil law literature is written in French. While it is certainly possible to acquire a general idea of the system from materials written in English, the literature that supports specialized arguments of the kind that is likely to reach the Supreme Court are overwhelmingly written in French.

Most importantly, unilingual anglophone judges can only have an indirect access to francophone and, in particular, Quebec society. It is often said that the Supreme Court should render decisions that are adapted to contemporary society. That can only take place if judges keep themselves abreast of social and political developments, through the media or other means. Yet, one gets only a partial and largely inaccurate perspective if one learns about Quebec by reading the *Globe and Mail*, or if one learns about the francophone community in Ontario by reading the *Ottawa Citizen* or the Acadian community in New Brunswick by reading the Moncton *Times & Transcript*. And, of course, there is the reality and the perception. For many Quebeckers, the Supreme Court's legitimacy to decide questions about Quebec has always been suspicious.[20] Unilingual anglophone judges certainly reinforce that perception, and make the counter-argument that English and French "have equality of status and equal rights and privileges" sound hollow.

"NARROWING THE POOL"?

We thus have strong reasons, related to the nature of the work performed by Supreme Court judges and to the status of the Court as a national institution, to require its judges to be bilingual. We now assess whether the implementation of such a requirement would have severe drawbacks that would counterbalance its advantages. In this connection, opponents of mandatory bilingualism often argue that this would sacrifice "competence" in the name of bilingualism.[21] Presumably, this is not meant to say that francophones or bilingual anglophones are per se less competent, nor that learning French diverts a person from the acquisition of more directly relevant skills. Rather, we understand the argument to mean that a requirement of bilingualism would drastically reduce the pool of candidates from which Supreme Court judges are selected, presumably leading to the appointment of less competent judges, or preventing the appointment of "deserving" unilingual jurists.

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[19] Black and Richter, *loc. cit.*, at 394. See also J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (Montreal: Thémis, 2007).

[20] See, e.g., Eugénie Brouillet's paper in this volume.

[21] This is in substance the argument made by retired Justice John Major in his testimony before the Justice Committee of the House of Commons, 17 June 2009, accessed 16 June 2011 at http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004136&Language=E&Mode=1&Parl=40&Ses=2.

To assess this argument, we must highlight the fact that when an employer draws the list of requirements for a job, essential requirements – which cannot be dispensed with because their absence compromises a candidate's ability to do the job – are usually distinguished from desirable qualities – which are not essential, but would facilitate performance of the job's tasks. We would argue that bilingualism falls into the first category, notably for the reasons outlined above. It is an essential requirement for the job. Hence, requiring bilingualism does not compromise "competence." Competence, in fact, includes bilingualism.[22] One would not seriously argue that we should appoint a non-lawyer to the Supreme Court on the basis that that person is extremely wise; one would never say competence or wisdom is sacrificed in selecting judges among those who obtained a law degree.

The competence argument may also be assessed from an empirical standpoint. The question then becomes whether there is a sufficient number of available competent bilingual candidates. Supreme Court judges are usually chosen from among the judges of the courts of appeal. Thus, we conducted a survey of appellate judges (outside Quebec) to measure their rate of bilingualism. We sought information from the court registries concerning the number of judges who could hear a case in French without the help of an interpreter (the criterion employed by Bill C-232) and the number of judges who had some proficiency in French without being able to hear a case in that language. We did not independently verify the information provided. While we suspect some cases of over-reporting or under-reporting, we make the assumption that those would cancel each other out. The results are as follows:

Province	Number of judges	Judges who can hear an appeal in French without translation		Judges with some knowledge of French	
British Columbia	24	3	13%	4	17%
Alberta	17	5	29%	5	29%
Saskatchewan	11	4	36%	6	55%
Manitoba	8	2	25%	4	50%
Ontario	22	4	18%	4	18%
New Brunswick	9	5	56%	8	89%
Nova Scotia	8	0	0%	4	50%
Prince Edward Island	3	0	0%	0	0%
Newfoundland and Labrador	9	0	0%	0	0%
Federal Court of Appeal	13	7	54%	7	54%
Total	124	30	**24%**	42	**34%**

[22] The fact that bilingualism is an aspect of competence was recognized by the Canadian Bar Association's resolution concerning Bill C-232: *Resolution 10-03-A, Institutional Bilingualism at the Supreme Court of Canada*, adopted at the CBA's annual meeting in Niagara, Ontario, 14-15 August 2010, accessed 16 June 2011 http://www.cba.org/CBA/resolutions/pdf/10-03-A.pdf.

These figures show that there is a sizeable pool of bilingual appellate judges from which Supreme Court judges can be appointed.[23] They also show that these bilingual judges are not concentrated in Central Canada (i.e., Ontario and New Brunswick), but that bilingual judges are present in provinces that are often thought to be almost exclusively English-speaking, such as Alberta and Nova Scotia.

On the other hand, one could argue that a rate of bilingualism of about twenty-five percent excludes three-quarters of the appeal court judges from consideration. At first sight, this might be cause for concern, but a more in-depth analysis alleviates the fears. Over the last two decades, there has been only one of the nine members of the Supreme Court who was unilingual. Thus, it has been possible to find a good number of bilingual judges. Moreover, several of the persons who were rumoured to be on the "short list" for the recent appointments were bilingual. Even with respect to a more distant past, Russell noted that anglophone judges such as Justices Strong, Anglin, Abbott, Judson, Cartwright, Kerwin and Kellock understood French,[24] and the same was true of Chief Justice Duff (Williams 1984, 69-70). This suggests, first, that bilingualism is not a major impediment to finding competent candidates and, second, that there is a correlation between the ability to understand French and other qualities that are deemed essential for a Supreme Court judge. Although there are debates regarding who should be appointed, one rarely hears that someone was appointed because he or she spoke French, or that someone was not appointed for the opposite reason, nor arguments that the past appointments have sacrificed competence for bilingualism. Thus, recent history shows that there is a correlation between knowledge of French and being regarded as fit for an appointment to the Supreme Court.

It might be risky to infer causality, but three explanations may be attempted. First, it may be that the prime minister is already considering bilingualism as a very important asset, if not a prerequisite for appointment. If that is true, the pool of candidates would already have been "narrowed" and the adoption of a statutory requirement would simply officialize long-standing practice and prevent future exceptions. Second, knowledge of a second language may be a sign of an openness of mind or intellectual curiosity that would be correlated with the qualities expected of a Supreme Court judge. Third, the incentives in Canada's judicial system are such that judges who consider themselves as potential candidates for the top court make an effort to learn French, as it has been known for at least 30 years that speaking French is an asset, if not an informal requirement for a Supreme Court appointment. Indeed, superior and appeal court judges in Canada have the opportunity of taking free French lessons, and close to 200 judges take advantage

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[23] It may be that this is partly attributable to the status of French in criminal proceedings throughout Canada; *Criminal Code*, R.S.C. 1985, c. C-46, Part XVII; see generally *R. v. Beaulac*, [1999] 1 S.C.R. 768.

[24] P.H. Russell, *op. cit.*, at 62. In a 1952 speech, Justice Cartwright asserted that all Supreme Court Justices could at least read French and were generally able to understand oral argument in French: Remarks to the 45th Annual Banquet of the American Association of Law Libraries, (1952) 45 *Law Library Journal* 437 at 446-7.

of that opportunity every year (Commissioner for Federal Judicial Affairs, pers. comm. 20 May 2010). (This large number suggests that judges do so not only by hope of promotion, but simply because they regard knowledge of French as a useful asset for the discharge of their duties.) Some judges have also used their study leave to spend a few months in a Quebec university, thus improving their knowledge of the civil law, as well as their French. Moreover, there is every reason to believe that the rate of bilingualism among appellate judges will continue to increase, as a result of the availability of very popular French immersion programs, of the greater emphasis on bilingualism and bijuralism in certain law schools (e.g., McGill and Ottawa) and of the increased popularity of exchange programs.

A variant of the "narrowing the pool" objection is that it might hamper the appointment of judges from more diverse backgrounds, in particular, an aboriginal Supreme Court judge. We do not take issue with the idea that the Court should be as representative as possible of Canadian society, and we hope that an aboriginal person will one day be appointed to the Court. However, the pursuit of diversity is not a reason to ignore an essential requirement for the job. A non-lawyer could never be appointed to achieve representation of ethnic minorities; neither should a person who does not speak French be appointed. Moreover, the objection is based on the premise that most aboriginals or members of ethnic minorities do not understand French. This is an unverified assumption. According to media reports, one of the persons currently considered for filling a vacancy at the Court comes from a minority ethnic group and speaks French. We have not conducted a survey of Canada's leading aboriginal judges, but we know anecdotally that at least one of them has a fair level of understanding of French. There are a number of young aboriginal lawyers who speak English and French and who, one day, could serve on the Court.

SECOND-BEST SOLUTIONS?

Are there any other ways of achieving the goals identified above without requiring each judge of the Supreme Court to be bilingual? At its 2010 summer annual general meeting, the Canadian Bar Association adopted a resolution calling on the Court to become "institutionally bilingual" but explicitly rejecting a requirement of bilingualism for individual judges. According to the resolution, subsection 16(1) of the *Official Languages Act* should be amended to provide the right of members of the public to be heard by the Supreme Court without the help of an interpreter. While the details are not spelled out in the resolution, this apparently means that the Supreme Court would hear cases involving a French-speaking litigant in a panel of five or seven judges, all of whom would be bilingual. Thus, in making appointments, the prime minister should ensure that there are no more than two unilingual judges on the Court at any given time. This raises obvious practical problems. A party, even an intervener, could decide to use French in order to disqualify a unilingual judge for reasons entirely unrelated to language. Most constitutional cases, in which the Attorney General of Quebec routinely intervenes, would be decided by a panel of seven judges in which the western provinces would be under-represented (if the pattern of the last 20 years continues). Aside from its impact on the development

of the law (in division of powers jurisprudence, for example), such a measure would not address the other problems caused by unilingual judges. Even in cases involving English-speaking litigants only, the Supreme Court is often called upon to interpret bilingual legislation, and the problem of unilingual judges not being able to understand the French version of the statute would remain. Neither would such a proposal remedy the under-representation of French-language literature in the authorities referred to by the Court.

It has also be suggested that the coming into force of a measure like Bill C-232 should be delayed by a number of years that would allow candidates to learn French or upgrade their knowledge of that language.[25] The objective would be one of fairness towards persons who did not have sufficient notice of this new requirement for the job they relish. This suggestion is problematic in two ways. First, it sees an appointment to the Supreme Court as a sort of entitlement of the individual. We think this is misguided: those appointments are made in the interests of the country and its judicial system, not in the interest of the individuals who are appointed. Requiring bilingualism is in no way unfair to unilinguals. Second, we would argue that there has already been sufficient lead time for the enactment of a requirement of bilingualism. An exception for unilingual judges to be appointed to the Supreme Court was carved out nearly 25 years ago, in subsection 16(1) of the *Official Languages Act*. It has been known for decades that knowledge of French is at least a highly valued skill. Any jurist embarking on a long-term plan to position him- or herself as a candidate for the Court would already have taken measures to learn French. How many more years could reasonably be required? Another alternative would be to give new appointees with a partial understanding of French a "period of grace" within which they would be required to improve their French abilities to the level required for them to hear a case without the aid of translation services. The data shown in the table above suggests that this would enlarge somewhat the pool of eligible candidates. Indeed, it is often pointed out that some current members of the Supreme Court did not, on their appointment, possess the requisite level of French, but that they acquired it later and are now able to hear cases in French. However, it should be noted that such a policy has produced uneven results in the higher echelons of the federal public service. It would also be difficult to enforce such a rule: would we require a judge who has not achieved the requisite fluency within the prescribed delay to step down? It may be that in practical terms, a "period of grace" rule would not be very different from what was proposed in Bill C-232. It did not mandate any form of testing, so that whether a judge meets the required standard would have fallen upon the judge's individual conscience.[26] Thus, a judge who reads and understands French but who has some doubts as to his or

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[25] It should be noted that the requirements of subsection 16(1) of the *Official Languages Act*, RSC 1985, c 31 (4th Suppl.) only entered into force five years after their enactment.

[26] As suggested by Justice Wilson in *Société des Acadiens du Nouveau-Brunswick inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549 at 638-647. See also, in the context of international arbitration, T. Várady, *op. cit.*, pp. 51, 60.

her capacity to hear a case in French could accept an appointment, take measures to upgrade his or her level of French within a couple of years and take measures in the interim to ensure the proper understanding of oral argument.

The polarization of the debate concerning the status and use of French in the Supreme Court of Canada and the fierce opposition of many to the very idea of a formal requirement of bilingualism has made it very difficult to seriously discuss how such a measure could be implemented. While we firmly believe that the time has come to require Supreme Court judges to be bilingual, we acknowledge that a serious discussion about the modalities of application could make the principle more acceptable. For example, political expediency may call for a two-year "period of grace" applicable to persons appointed in the next ten years who have partial knowledge of French but not to the level required to hear a case. That could alleviate fears about narrowing the pool, especially with respect to aboriginal judges. It could also be made clear that there would be no testing regime, especially not at the public interview that the current government has indicated it would hold with nominees. Such a regime might deter potential candidates who understand French but whose speech does not match the understanding.

CONCLUSION

The Constitution requires the Supreme Court of Canada to be a bilingual institution fully able to hear cases in French. Simultaneous translation at the hearing is not an adequate substitute to judges being able to listen to argument in French. It undermines the equality of status and use of French and English. As the ultimate interpreters of bilingual legislation, Supreme Court judges have a mandate that goes beyond that of trial and appellate judges in certain parts of the country. To discharge these duties, the Court needs a full complement of judges who understand Canada's official languages. The experience of the past decades and the results of our survey show that there is a good number of bilingual jurists who have all the qualities to be appointed to the Supreme Court. Requiring bilingualism does not compromise competence. Rather, it should at last be recognized that understanding English and French is a required skill for being appointed to the Court.

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4

RESPECTING LEGAL PLURALISM IN CANADA: INDIGENOUS BAR ASSOCIATION APPEALS TO HARPER GOVERNMENT TO APPOINT AN ABORIGINAL JUSTICE TO THE SUPREME COURT OF CANADA

Indigenous Bar Association

OTTAWA, 19 July 2011 — The Indigenous Bar Association (IBA), the national association of First Nation, Inuit and Métis lawyers, is urging the Conservative government to appoint an aboriginal justice to the Supreme Court of Canada.

The Supreme Court of Canada has nine judges, three of whom must be from Quebec. There is also a convention of ensuring regional balance. But there has never been an aboriginal person on the Supreme Court of Canada – despite the fact much of its work deals with indigenous law and legal traditions.

IBA President Margaret Froh believes there are several qualified candidates from the aboriginal legal community, emphasizing that the merit principle must be the first priority in any candidate selection.

"Canada's legal system is based on legal pluralism recognizing English common law, French civil law, and indigenous law. The Supreme Court of Canada needs to be representative to include indigenous legal traditions. How fortunate Canada is that we have a choice of highly qualified candidates for appointment to the Supreme Court of Canada who simultaneously represent the very best of the principles of merit and are also aboriginal persons," says Froh.

The IBA is not alone in its call for aboriginal representation on the Supreme Court. The Royal Commission on Aboriginal Peoples stated in its 1996 final report that the SCC should include at least one aboriginal member. The Canadian Bar Association and the Canadian Association of Law Teachers (CALT) have also recommended the appointment of aboriginal justices to the SCC.

In 2005 the Canadian Bar Association passed a resolution to reaffirm the merit principle in judicial appointments and to urge the federal government to reflect better the recognition of indigenous legal traditions in making judicial appointments, and to give particular focus to the appointment of aboriginal judges to the Supreme Court of Canada and other appellate courts.

The Canadian Association of Law Teachers, the association representing law professors from across Canada, issued its Report on SCC Appointments in 2005 which noted that "aboriginal representation not only augments the legitimacy of judicial appointments; it contributes to enhanced competence of the courts generally and the SCC in particular as a decision-making body which must understand and apply distinct legal traditions." International law expert, Professor Paul Chartrand, a member of the IBA, chaired the CALT committee that issued the report and noted, "The question of judicial competence does not conflict with the case for merit in making judicial appointments."

In 2006, the Law Commission of Canada discussion paper "Justice Within: Indigenous Legal Traditions" called for greater recognition of indigenous legal traditions within the Canadian legal system and echoed the CBA's resolution calling for more judicial appointments of people conversant in indigenous law at all levels of the judicial system.

"On the issue of aboriginal appointments to the Supreme Court, we are well past the days when critics could argue lack of experience or merit," says Jeffery Hewitt, former President of the IBA. Thanks to things such as the federal government Indian residential schools policy and the *Indian Act*, First Nations people were effectively barred from obtaining a legal education until the 1950s. "Today, we have over one thousand aboriginal people that have gone through law school. Aboriginal lawyers and judges today have the same legal training, experience and credentials as their non-aboriginal counterparts; however, aboriginal candidates will bring to the court an added ability to engage with indigenous legal traditions which is currently lacking on the bench," says Hewitt.

Justice Harry LaForme currently sits on the Ontario Court of Appeal. He is the first and only aboriginal judge to be appointed at an appellate level court in Canada and, at the time of his appointment in 2004, Justice LaForme was the highest ranking aboriginal judge in all of the British Commonwealth.

"There are several excellent candidates for appointment to the Supreme Court from the indigenous legal community, all of whom represent the highest of standards of the legal profession and demonstrate outstanding merit," says Hewitt. This includes Justice LaForme (Ontario Court of Appeal), Justice Todd Ducharme (Ontario Superior Court of Justice), former Justice Rose Boyko (former Judge of the United Nations Appeal Tribunal and former Judge of the Ontario Superior Court of Justice), Justice Leonard (Tony) Mandamin (Federal Court of Canada), Justice Murray Sinclair (Manitoba Court of Queen's bench and current Chair of the Truth and Reconciliation Commission of Canada), and Justice Mary Ellen Turpel-Lafond (Saskatchewan Provincial Court and current BC Representative for Children and Youth). Several legal scholars and practitioners also stand out, including Professor John Borrows, a member of the Chippewas of the Nawash First Nation in Ontario and an academic who has written leading texts on indigenous law and aboriginal and treaty rights; and David C. Nahwegahbow, a highly respected legal practitioner in Ontario and recent recipient of the Law Society Medal from the Law Society of Upper Canada.

5

INDIGENOUS BAR ASSOCIATION URGES PRIME MINISTER HARPER TO REMOVE BARRIERS TO JUDICIAL APPOINTMENTS FOR INDIGENOUS JUDGES

Indigenous Bar Association

OTTAWA, 7 May 2012 /CNW/ – The Indigenous Bar Association (IBA) today called upon the Prime Minister to make systemic changes in the federal judicial appointment process and ensure indigenous legal traditions are properly reflected in the appointment of federal judges. The IBA and the Canadian Bar Association (CBA) have for many years urged governments to ensure that indigenous peoples are properly represented in judicial appointments, both federal and provincial. In April 2004, the IBA released a paper, calling for the appointment of an indigenous judge to the Supreme Court of Canada. This position was also adopted by the CBA in a resolution in August 2005. The CALT adopted a similar position in their report dated June 2005, which also called for the depoliticization of the judicial appointment process.

Recent reports indicate a lack of diversity in judicial appointments – of the last 100 appointments made by Prime Minister Harper, 98 were white, according to the *Globe and Mail*. Reports continue to express concern over political affiliation being a determining factor in the appointment process. The Harper Conservatives were highly critical of the Liberals and spent years preaching the value of merit as the cornerstone of the judicial appointments process in Canada. Koren Lightning-Earle, president of the IBA, said: "The Conservatives seem to equate merit to colour and political ideology. It means that in spite of a majority of graduates to the Bar across Canada being women, there's no 'merit' in their contribution because they had the audacity to be born female. It means that the Conservatives see no 'merit' in the contributions that aboriginal lawyers and lawyers from racial minority communities make to the Canadian justice system."

The IBA has long been on record supporting the fundamental value of merit in the judicial appointments process, but has insisted that merit reflect indigenous legal traditions, just as Quebec Civil law is reflected in Supreme Court appointments. The IBA believes merit is about the rule of law and its application to Canadian society. The IBA believes merit is about outstanding contributions to law over

the career of a lawyer or legal scholar. The IBA believes merit is about being the best among us as Canadians, lawyers and legal scholars – not whether we fit into a narrow Conservative mould under the guise of "merit" which has been used to keep all but white males off of the bench.

Frankly, the IBA has always supported the principle of merit as key to judicial appointments because so many aboriginal lawyers and academics have qualified themselves for appointments by getting the same law degree from the same law schools as those currently being appointed under the Conservatives' rule. Aboriginal lawyers and academics have made important contributions to Canada's jurisprudence and have earned all of the cornerstone qualities to be considered for meritorious appointments to the bench. The only thing we cannot change is who we are, which under the Conservative government's appointment's record, seems to disqualify us. It's time to change the Conservatives' meaning of "merit."

II

THE SUPREME COURT OF CANADA: THE SELECTION PROCESS

6

INTERGOVERNMENTAL RELATIONS AND THE SUPREME COURT OF CANADA: THE CHANGING PLACE OF THE PROVINCES IN JUDICIAL SELECTION REFORM

Erin Crandall

Ce n'est pas d'aujourd'hui qu'on parle de modifier le processus de sélection des juges de la Cour suprême du Canada. À preuve, ce chapitre retrace de 1949 à 2008 les tentatives visant à le réformer, s'intéressant en particulier à l'évolution du rôle des provinces. C'est ainsi qu'avant 1992, les propositions de réforme visaient surtout à élargir ce rôle alors que depuis l'échec de l'Accord de Charlottetown, on s'intéresse surtout aux questions de transparence et de responsabilité. En s'interrogeant sur cette mise à l'écart des provinces, on met en relief l'importance du contexte historique, de la Charte canadienne des droits et libertés *et du premier ministre quant aux efforts officiels et informels visant réformer le processus de nomination des juges de la Cour suprême.*

INTRODUCTION

"Canada is the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court and interpret its binding constitution (Russell 2004, 1)." Spoken by Peter Russell – one of Canada's preeminent constitutional scholars – this provocative statement helped set the tone for the study of the judicial appointment process of the Supreme Court of Canada [SCC] undertaken by the Committee on Justice, Human Rights, Public Safety and Emergency Preparedness [JUST] in 2004. Indeed, by the time the JUST Committee began its study of judicial nominations, the federal government, opposition parties, provinces, legal community, and academics alike were overwhelmingly in agreement that reforms to the SCC appointment process were needed. And, in fact, Canada is hardly alone on this score. The growing importance of judicial selection and its relation to increasing judicial power have become recurrent topics in comparative judicial studies (Malleson and Russell 2006). However, what is arguably most notable in the case of Canada is the changing role of the provinces.

Common law countries, Canada included, have historically been less open to acknowledging the inherently political nature of their courts.[1] Consequently, liberal democracies with a common law system have traditionally designed judicial selection systems with processes outside the public eye. In Canada, other than a few formal guidelines set out in the *Supreme Court Act*,[2] the discretion of the prime minister in selecting a judge for the SCC is practically unlimited and the selection process itself remained publicly undisclosed until 2004.[3]

Perhaps unsurprisingly then, proposals for the reform of the SCC have been part of virtually every contemporary effort at constitutional renewal, beginning with the Victoria Charter in 1971.[4] However, while there has been a long-standing view that the process by which justices of the SCC are selected is inadequate, this position underwent a notable shift following the defeat of the Charlottetown Accord in 1992. In less than two decades, the lens through which political actors approached reform of the SCC appeared to shift from federalism to the principles of accountability and transparency. This relative lull concerning provincial participation in appointments to the SCC is especially notable given that the provinces – in the form of the Council of the Federation – desired an appointments system designed

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[1] The obvious exception being the United States.

[2] According to the *Supreme Court Act*, the person appointed must have been a judge of a superior court, or a lawyer of at least ten years' standing in the bar of a province. Additionally, three of the judges must be from the bar of the province of Quebec. Although only Quebec's seats are formally guaranteed by the *Act*, by convention each region of the country is allocated a certain number of seats: three judges from Ontario, one from one of the four Atlantic provinces, and two from the four Western provinces.

[3] According to the minister of justice at the time, Irwin Cotler, the process involved informal consultations by the minister of justice with the chief justice of Canada, the chief justice(s) of the region in which there was a vacancy, the relevant provincial attorneys-general, and senior members of the legal profession. See Irwin Cotler, "The Supreme Court Appointment Process: Chronology, Context and Reform.(Canada)," *University of New Brunswick Law Journal* 58 (2008). While these consultations were understood as standard operating procedure, there was and continues to be no formal obligation for the prime minister to consult with any of these parties, or a duty to disclose to the public if and what consultations take place.

[4] Proposals for constitutional reform of the SCC during this time include the Ontario Government's Advisory Committee on Confederation (1967); the 1978 Trudeau Government's Constitutional Amendment Bill, Bill C-60; *Towards a New Canada*, the 1978 report of the Canadian Bar Association; the 1979 report of the Task Force on Canadian Unity (Pepin-Robarts Commission), *A Future Together;* and the 1985 Macdonald Royal Commission on the Economic Union and Development Prospects for Canada. Reforms to the Supreme Court were also considered in the 1956 Tremblay Report in Quebec. For a review of these proposals see, Peter H. Russell, "Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Considerations," *Canadian Journal of Political Science/Revue canadienne de science politique* 17, No. 02 (1984).

to "ensure that provincial and territorial interests are adequately reflected and accommodated" as recently as 2004 (Council 2004). Given that SCC justices are, in part, selected based on region, and that the court still decides several division-of-power cases each year, an important puzzle for understanding reforms to the SCC selection system is why the provinces have been relegated, apparently with only minor protest, to second-tier status in the selection of SCC justices. What can help explain this shift from the province-focused reforms of the Victoria Charter, Meech Lake and Charlottetown Accords to those pursued under the governments of Paul Martin (2003–06) and Stephen Harper (2006–)?

A move away from executive federalism and to the public review of judicial nominees (at least in the 2006 selection of Justice Marshall Rothstein) seems to indicate that a significant shift in the perceived roles of Parliament and the Supreme Court has occurred. By tracing Canada's reform efforts from 1949 to 2008, this paper will analyze this apparent change. Two time periods will be considered – 1949–92 and 1993–2008. From this within-case analysis, I suggest that the shift from the province-focused proposals of the first time period to those implemented beginning in 2004 can be explained in large part by three developments: 1) the mega-constitutional politics of the 1970s to the early 1990s allowed the provinces to secure judicial selection reform on the political agenda, an advantage that has not occurred since; 2) the introduction of the Charter, and consequent growth in judicial power, created additional factors that made judicial selection reform desirable for political actors; and 3) many of the reform proposals defended by this second wave complemented Liberal Prime Minister Paul Martin's "democratic deficit" agenda; by contrast, increased provincial participation premised on the principle of executive federalism did not.

JUDICIAL SELECTION AND THE SUPREME COURT OF CANADA

Period 1: 1949–92

The SCC was not always the country's final court of appeal – until 1949 this position was held by the Judicial Committee of the Privy Council [JCPC] in the United Kingdom. Consequently, the question of who was appointed to the SCC was less important given the opportunity to appeal the court's decisions. Moreover, even after appeals to the JCPC were discontinued, the SCC was not immediately viewed as a particularly critical institution of Canadian society (Snell and Vaughan 1985). By the time the SCC became Canada's final court of appeal, the federal and provincial governments were engaged in the rapid expansion of social programs and consequently relied heavily on intergovernmental negotiations to circumvent the complications of jurisdictional encroachment – making division of power cases less consequential.[5]

[5] During this time period a succession of Canadian academics noted the declining significance of judicial intervention. See for example, J.A. Corry, "Constitutional Trends and

However, as political conflict between the provinces and the federal government became an increasingly familiar feature of intergovernmental relations, particularly in the 1970s and 1980s, breakdown of the informal processes of federal-provincial diplomacy ensued. Beginning in the late 1960s, the SCC accentuated this breakdown in a series of controversial cases that enhanced federal powers.[6] At this moment of federal-provincial impasse, the role of the Court, by D.V. Smiley's account, "…came to play a more crucial and contentious role in the Canadian political system than at any other previous time" (Smiley 1980, 40).

While a clear sense of provincial frustration toward the SCC (and indeed the federal government) was present at this time,[7] Quebec's dissatisfaction during this

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Federalism," in *Evolving Canadian Federalism*, ed. Arthur Reginald Marsden Lower and F.R. Scott (Durham: Duke University Press, 1958); F.R. Scott, "Our Changing Constitution," in *The Courts and the Canadian Constitution : A Selection of Essays*, ed. William R. Lederman (Toronto: McClelland and Stewart, 1964); D. V. Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism," *The Canadian Journal of Economics and Political Science / Revue canadienne d'Economique et de Science politique* 28, no. 1 (1962); Richard Simeon, *Federal-Provincial Diplomacy; the Making of Recent Policy in Canada*, Studies in the Structure of Power: Decision-Making in Canada, 5 (Toronto; Buffalo, NY: University of Toronto Press, 1972). Russell also notes that centralism was at its strongest point in Canada between 1930 and 1950. See Peter H. Russell, *Constitutional Odyssey : Can Canadians Become a Sovereign People?* 3rd ed. (Toronto: University of Toronto Press, 2004), 62.

[6] According to Russell, from 1950 to 1972, no federal law was judged invalid while twenty provincial laws were struck down. See Peter H. Russell, "The Supreme Court since 1960," in *Politics Canada*, ed. Paul W. Fox (Toronto; New York: McGraw-Hill Ryerson, 1977). Russell concludes, however, that the Supreme Court's overall record shows an "uncanny balance" in considering division of powers cases. See P.H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources," *Canadian Public Policy / Analyse de Politiques* 11, no. 2 (1985). For comprehensive analysis of the SCC's federalism jurisprudence see Baier, *Courts and Federalism : Judicial Doctrine in the United States, Australia, and Canada*; John T. Saywell, *The Lawmakers : Judicial Power and the Shaping of Canadian Federalism*, Osgoode Society for Canadian Legal History Series (Toronto, Ont.; Buffalo: Published for The Osgoode Society for Canadian Legal History by University of Toronto Press, 2002).

[7] For example, Saskatchewan Premier Allan Blakeney presented a brief to the First Ministers' Conference of October 30 November 1, 1978, reviewing the Court's constitutional decisions over the previous five years. The report concluded that "[r]ecent decisions of the Supreme Court of Canada reveal two striking features (i) absence of effective limits on federal powers, [and] (ii) serious erosion of provincial powers. They go a long way towards undermining the concept of a balanced federalism developed by the Privy Council." Premier Blakeney's criticism of the SCC during the Saskatchewan provincial election in October 1978 was so great, in fact, it was rumoured that the Court considered citing the premier with contempt. See, Roy J. Romanow, Howard A. Leeson, and John D. Whyte,

period is particularly notable. After efforts by the Liberal government of Prime Minister Lester Pearson to patriate a constitutional amending formula were scuttled by Quebec in 1965, it became clear, as noted by Russell, that "Quebec's price for supporting patriation would be nothing less than a restructuring of the Canadian federation to give sufficient scope for Quebec nationalism"(Russell 2004b, 74). The importance of renewing the constitution was made all the more imperative when Quebec elected its first sovereignist government in 1976.

Beginning in the late 1960s and lasting until the Charlottetown Accord's defeat in 1992, Canada was immersed in an intensive series of constitutional negotiations, a process that Russell has termed "mega-constitutional politics" (ibid., 75). The impact of mega-constitutional politics on reforms to the judicial selection system of the SCC was significant. Despite strong provincial desires to formalize their participation in the selection process of SCC justices, and moreover agreement to this by the federal government during every round of constitutional negotiations of this time period, reforms to the SCC were never the crux of these negotiations. As such, proposals that would have increased provincial participation in the judicial selection process, such as the Victoria Charter (1971), the Meech Lake Accord (1987–90), and the Charlottetown Accord (1992), failed for reasons other than SCC reform; or in the case of the negotiations leading to the *Constitution Act, 1982*, judicial selection reforms were set aside, along with a number of items, so that a final deal could be brokered.

The Meech Lake Accord illustrates the complexities of implementing judicial selection reform within the context of mega-constitutional politics. When the Liberal Party of Quebec adopted *Mastering Our Future*, a document articulating its constitutional positions in March 1985, one of its key demands was a provincial role in appointments to the SCC. When the party came into power soon after in December 1985, the conditions set out in this document became the basis for reopening constitutional negotiations with the federal government. The five conditions set out by Quebec were (1) a full Quebec veto for constitutional changes, (2) the recognition of Quebec as a "distinct society," (3) a provincial role in making appointments to the SCC, (4) a shift to the provinces in power over immigration, and (5) limits on the federal spending power. Though change in the selection process to the SCC was not the most important of Quebec's demands, it was part of a core, non-negotiable list and so a necessary element of what was to become known as the Meech Lake Accord.[8]

Canada–Notwithstanding: The Making of the Constitution 1976–1982, 25th anniversary ed. (Toronto: Thomson Carswell, 2007).

[8] Under the Meech Lake Accord, while the power of appointment was to remain with the Governor General in Council (in practice the prime minister), it would be greatly constrained by the requirement that justices be appointed from names submitted by the government of a province. Thus, when a justice from Quebec resigned, the vacancy would have to be filled by a person acceptable to both the Government of Quebec and Government of Canada. In addition to giving the provinces a role in the selection of SCC justices, Meech Lake proposed

The reasons for the Meech Lake Accord's failure are numerous and debated. Nonetheless, it seems clear that a provincial role in nominations of SCC justices was one of the least controversial and most widely accepted of Quebec's five constitutional demands. Given the SCC's traditional role as umpire of division of power disputes, the participation of only one level of government appeared out of step with the principles of federalism and greater participation by the provinces had long been proposed as the appropriate remedy. For those who objected, concerns were not focused on the illegitimacy of enhanced provincial participation but on the idea that such participation did not include other interested members of the legal community, such as the Canadian Judicial Council and representatives of the various bar associations. While the Canadian Association of Law Teachers' submission to the special parliamentary committee on Meech Lake did note the new and more predominant role of the SCC since the enactment of the Charter (CALT 1989), for the vast majority of key political actors, the SCC was still seen firstly as the overseer of the division of powers. If the elite-driven process that led to the creation of the Meech Lake Accord was in large part what led to its ultimate demise, this same principle residing at the heart of the proposed changes to the SCC selection process was seen as legitimate and for the most part sufficient. As will be seen in the next section, however, since the failure of the Charlottetown Accord, focus has moved away from provincial participation and towards concerns of accountability and transparency.

Period Two: 1993–2008

Following the failures of the Meech Lake and Charlottetown Accords, politicians and citizens alike experienced what might be aptly termed constitutional fatigue. In step with this mood, federal Liberal Party leader Jean Chrétien entered the 1993 election promising to set constitutional reform aside, and during his ten years as prime minister, he did just that.[9] However, while reforms to the SCC selection system were off the table, they were by no means out of mind: the media,[10] politicians,

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to constitutionally entrench the Supreme Court, including the guarantee that at least three of the nine judges be appointed from the bench or bar of Quebec.

[9] One exception, however, is arguably Chrétien's decision to refer questions to the SCC regarding Quebec's constitutional right to secession (*Reference re: Secession of Quebec* [1998]) and the resulting *Clarity Act* [2000].

[10] For editorial accounts see, for example, Malcolm Bernard, "Selection of top-court judges should be more open: experts," *The Gazette*, 2 September 1997; Paul Schratz, "Public should have a say in judge selection: The bunch we've got now is a swell lot and well intentioned. Trouble is…they seem to think it's their job to right all of Canada's wrongs," *Calgary Herald*, 4 September 1997; Jeffrey Simpson, "Needed: A better way to make Supreme Court appointments," *Globe and Mail*, 29 August 1997; Rosemary Speirs, "Filling Supreme Court vacancy fraught with peril" *The Toronto Star*, 11 September 1997; Editorial, "Nice judge. Too bad how he got there," *Globe and Mail*, 3 October 1997; —, "A Supreme Court for a new

and even SCC justices[11] during this time began calling for greater transparency in the judicial selection process. The desirability of reforms was also expressed by an increasing number of academics – most often framing their recommendations in post-Charter terms.[12]

It was the Reform Party (1989–2000), however, that was especially vocal on the issue of judicial selection reform. In contrast to the proponents of the Meech Lake and Charlottetown Accords, Reform Party Leader Preston Manning did not frame his reform interests in terms of the SCC's role in division of power cases, but rather argued that the policy-making role played by the SCC since the enactment of the Charter ran contrary to democracy, where "policy must be made by persons who are elected by and accountable to the people."[13] This view was carried through

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age" *Globe and Mail*, 28 August 1997; —, *Globe and Mail*, 5 March 1999; — , "Supreme chance for Ottawa," *The Gazette*, 31 August 1997.

[11] After announcing his retirement from the SCC in 1997 Justice La Forest stated his preference for SCC nominees to be publicly vetted before appointment. See, Canadian Press, "La Forest favours US-style public review for Supreme Court judges," *Globe and Mail*, 3 September 1997.

[12] Peter Russell, "A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada," (Ottawa: Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 2004); Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada," *The Journal of Appellate Practice and Process* 7, no. 1 (2005); Daniel Nadler, "An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter," *Constitutional Forum* 15(2006); Emmet Macfarlane, "Reforming the Supreme Court of Canada Appointments Process: Politics, Transparency, and Judicial Independence" (Queen's University, 2005); Jacob S. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada," in *Judicial Power and Canadian Democracy* ed. Paul Howe and Peter H. Russell (Montreal: McGill-Queen's University Press, 2001); F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Kate Malleson and Peter H. Russell (Toronto: University of Toronto Press, 2006); Rainer Knopff, "The Politics of Reforming Judicial Appointments. (Canada)," *University of New Brunswick Law Journal* 58(2008); Christopher P. Manfredi, "The Case for Vetting the Supremes," *National Post*, 3 July 2003; Martin L. Friedland, *A Place Apart : Judicial Independence and Accountability in Canada*, ed. Canadian Judicial Council (Ottawa: Canada Communication Group-Pub., 1995); Patrick J. Monahan and Peter W. Hogg, "We need an open parliamentary review of court appointments," *National Post*, 24 April 2004.

[13] E. Preston Manning, "A 'B' For Prof. Russell," *Policy Options*, April 1999, 16. The Reform Party included reform of the judicial selection process for the SCC as part of its New Canada Act (1998). Speaking in the House of Commons in June 1998, Reform Party MP Paul Forseth set out the party's preferences as (a) supporting "more stringent and more public ratification procedures for Supreme Court justices in light of the powers our legislators are handing the courts. We believe that an elected Senate should ratify all appointments to

the Reform Party's transformation into the Canadian Alliance Party and finally its merger with the Progressive Conservative Party in 2003. Speaking in 2004, Conservative Party justice critic Vic Toews demonstrated this consistent stance: "this Liberal government has allowed judges to become the most powerful force in setting social policy in Canada. Whether it is by allowing convicted [murderers] to vote or by changing fundamental institutions like marriage, this government has substituted the supremacy of an elected Parliament with unelected judges" (Toews 2004). Speaking in 2007, Toews noted that the introduction of the Charter was the "primary if not the only reason" why changes to the judicial selection process were necessary. "Judges," he explained, "are more and more involved in policy decisions as opposed to straight legal decisions and therefore this process [judicial selection reform] was a natural outcome of this expanded role of the judiciary in policy or political matters" (Toews 2007).

The other federal opposition parties during this period also supported changes to the system of federal judicial appointment. For example, in 2003, Bloc Québécois justice critic Richard Marceau presented a motion to the House of Commons calling for the justice committee to study the process by which judges are appointed to Courts of Appeal and the SCC. Explaining why a study of judicial selection was warranted, Marceau stated:

> As the honourable members know, there is an old principle in English law, in the common law, that justice must not only be done, it must be seen to be done. The purpose of this principle, the very foundation of our justice system, is to maintain the highest possible level of public confidence in the judiciary. The current process of appointing judges, however, is in direct conflict with this principle, and clouds the image of justice. [Translated] (Marceau 2003, 5899)

Parliamentary Secretary to the Minister of Justice, Paul Harold Macklin (2003), responded to Marceau's call by declaring such a venture unnecessary, noting that "[t]he appointments process has been highly successful in producing judges of the greatest quality and distinction. Indeed, Canadians are envied around the world for the quality, commitment and independence of their judiciary."

The final push leading to reform eventually came with a change in Liberal leadership, seven months after this statement by Macklin, in the short-lived tenure of Prime Minister Paul Martin and his efforts to fix the "democratic deficit."[14] Upon

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the Supreme Court of Canada and all Courts where the judges are appointed by the federal government; (b) supporting efforts to "secure adequate regional representation on the Supreme Court, and that nominations should be made by provincial legislatures, not provincial governments; and (c) supporting "the appointment of judges at the Supreme Court of Canada level for fixed, non-renewable terms of ten years." See Paul Forseth, House of Commons, *Debates (Hansard)* (8 February 1998, 36th Parliament, 1st Session): 7681-82.

[14] The basis of Paul Martin's democratic deficit plan was originally presented in a 2002 speech at Osgoode Hall before he was Liberal Party Leader. See Paul Martin, ""The Democratic Deficit." Speech Given at Osgoode Hall, York University, Toronto, October 21,

being sworn into office in December 2003, Martin announced his government would respond to the call of opposition parties and consult the JUST Committee on how best to implement prior review of appointments of SCC justices.[15] Minister of Justice Irwin Cotler, who oversaw changes in the judicial selection process under the Martin government, has noted the importance that both the Charter and Martin himself played in creating the conditions for reform. His reflections are worth quoting at length:

> The Charter increased the visibility and importance of the role of the courts, and rightly so in the sense that we moved from being a parliamentary democracy to a constitutional democracy. We moved from the sovereignty of Parliament to the sovereignty of the Constitution. We moved from judges being the arbiters of legal federalism, which they still are, to judges being the guarantors of our rights under the Charter – because we, Parliament, gave that authority to judges not because they usurped it. And individuals and groups are no longer passive bystanders to a constitutional process; they are now rights holders and rights claimants. So clearly, the change in the constitutional framework and the advent of the Charter made the role of judges more public, more significant and therefore increased interest in the appointments process because of the increased impact of the judiciary in a post-Charter universe. Having said that, the actual impetus for the reform was actually the former Prime Minister Paul Martin because he was the one who said he wanted to correct the democratic deficit and he gave as an example of the democratic deficit the absence of parliamentary and provincial participation in Supreme Court appointments process. (Cotler 2007)

In April 2005, the Liberal government announced the details of its reformed selection process, which most notably included a committee mandated to review potential SCC nominees.[16] Before a replacement for the retiring Justice John Major

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2002," *Policy Options* (December 2002–January 2003); Canada, "Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform," ed. Privy Council Office (Ottawa: Queen's Printer, 2004).

[15] Prime Minister, "Prime Minister Martin Announces New Government Will Be Guided by a New Approach," Office of the Prime Minister (Ottawa 12 December 2003). Within a few months of the committee's new mandate, Justices Louise Arbour and Frank Iacobucci announced their resignations from the Court leaving insufficient time to draft and implement a new long-term process. Instead, then Minister of Justice Irwin Cotler followed an interim procedure in which he appeared before an ad hoc committee to describe the process used to select incoming Justices Rosalie Silberman Abella and Louise Charron, including the consultations undertaken and the information reviewed.

[16] The process, as proposed by the Liberal government, was as follows: the minister of justice would put forward a short list of five to eight candidates to an advisory committee composed of a Member of Parliament from each of the elected political parties, a nominee of the relevant provincial attorneys general, a nominee of the relevant provincial law societies, and two lay members chosen by the minister of justice. The committee would provide the minister with a shortlist of three to five names from which the final nominee would be

could be made under this new system, however, the Liberals were defeated by the Conservative Party in the election of 23 February 2006. The new Conservative government, led by Prime Minister Stephen Harper, chose to adopt the work already completed by the Liberals, but made one further addition to the process – a public hearing of the recommended SCC nominee before a parliamentary committee – for which the party had advocated while in opposition.

Although changes were undertaken in 2006, no legislation reforming the appointment system has actually been put forward and the powers of the prime minister remain formally unaltered. It remains to be seen, then, whether this process will become the accepted mode of judicial selection;[17] a question made all the more pertinent since the 22 December 2008 appointment of Justice Thomas Cromwell, who was selected using a modified advisory committee composed only of MPs and without public review by a parliamentary committee. While Prime Minister Harper cited the unusual situation of a recent federal election and the unforeseen proroguing of Parliament in November 2008 as the reasons for needing to fill the vacancy without public review (Canada 2008), the event certainly indicates that the final shape of the SCC's selection system remains in flux.

Where Did the Provinces Go?

During the review of Supreme Court appointments by the JUST committee and the consequent changes undertaken, there was notably little provincial participation. This limited role is particularly surprising given a number of provincial efforts demonstrating support of increased participation during this period.

In 1999, for example, the Ontario government of Mike Harris called for a provincial say in the appointment of Supreme Court justices.[18] In a letter to federal Justice Minister Anne McLellan, Ontario Intergovernmental Affairs Minister Norm Sterling wrote that recent "decisions of the Supreme Court of Canada have increasingly shifted toward determining social and economic policy…[d]ecisions that have such effects are not in accordance with the public's understanding of the respective roles of the legislators and the judiciary in our parliamentary and legal systems" (Ibbitson and Chase 1999). This letter followed two particularly

chosen. Following the final selection, the minister of justice was to appear publicly before the House of Commons Justice Committee to explain the selection process and qualifications of the selected appointee.

[17] Though Peter Hogg has noted his belief that parliamentary review of judicial nominees is likely to continue in the future. See, Peter W. Hogg, "Appointment of Thomas A. Cromwell to the Supreme Court of Canada," Chapter 1 in this volume.

[18] Alberta, British Columbia, and Manitoba publicly noted their support of the letter sent by Minister Sterling.

controversial decisions by the Court made that year: *M v. H*,[19] which ruled that family law must include same-sex couples; and *R. v. Marshall*,[20] which recognized certain fishing rights of aboriginal peoples in Canada. The response by McLellan was simply to note that the provinces are already consulted during the selection process (Laghi and Lunman 1999).

Additionally, the Quebec Liberal Party's 2001 position paper, *A Project for Quebec –Affirmation, Autonomy and Leadership*, endorses the reforms essentially set out in the Meech Lake Accord. In fact, the principle of provincial participation was endorsed by all provinces in 2004 in the form of a commitment by the COF to form a committee of ministers to "develop new models for selecting individuals to serve in key national institutions such as the Senate of Canada and Supreme Court of Canada, to ensure that provincial and territorial interests are adequately reflected and accommodated" (COF 2004). To date, however, the COF has not put forward a new model and issued no formal response to recent changes to Supreme Court appointments. How, then, can we account for this relatively truncated role for the provinces compared to the proposed constitutional reforms of the first time period presented here?

ANALYSIS

It is apparent that the context within which reforms were considered mattered a great deal in both periods. A series of controversial division of power decisions by the SCC beginning in the late 1960s, in combination with disintegrating federal-provincial relations, contributed significantly to provincial interest in SCC reforms during this first time period. The rise of Quebec nationalism in the 1960s further solidified the importance of judicial selection reform. The entry into constitutional negotiations by the federal government and provinces initiated this series of reform attempts. By Quebec making reform of the SCC a non-negotiable demand of constitutional negotiation, the federal government had little choice but to concede a degree of its control over judicial selection in pursuit of the more important and pressing objective of a final constitutional package. The provinces' influence in setting the constitutional agenda can also explain, at least in part, why the role of the Charter in judicial decision-making did not seriously enter into constitutional negotiations even ten years after its entrenchment.

Following the failure of the Charlottetown Accord in 1992 is the second time period of interest. Under the leadership of Jean Chrétien, the Liberal Party dismissed all calls for judicial selection reform of the SCC. Considering the political conditions faced by Chrétien, in which his powers can be understood as reasonably secure, there was virtually no political incentive to concede authority over the selection process and moreover few political costs for declining to take action. This is in striking contrast to the political pressures faced by the federal government dur-

[19] M. v. H., [1999] 2 S.C.R. 3.

[20] R. v. Marshall, [1999] 3 S.C.R. 456; R. v. Marshall, [1999] 3 S.C.R. 533.

ing the first time period. Despite the impasse imposed by the governing Liberals, interest in reform continued and was particularly taken up by federal opposition parties. However, unlike the first period, interest focused largely on the SCC's role in a post-Charter universe, rather than on federalism.

Sujit Choudry (2005) has framed the recent push for reforms in the SCC selection process within the larger scope of two competing institutional reform agendas – democratic renewal and intergovernmental relations. With the intergovernmental relations agenda seeking to "perfect executive federalism" and that of democratic renewal attempting to "diminish executive power," the two, he argues, are in deep tension with one another (ibid., 3). In the case of SCC appointments, he notes, elite provincial participation has been largely discarded over the last few decades in favour of democratic renewal. Choudry points to two reasons for the shift: first, the inefficiency of joint decision-making by the COF as the primary institution for intergovernmental relations, and second, the SCC's expanded constitutional authority post-Charter.

Looking to Choudry's first point, certainly the COF's rule of decision-making by consensus does limit its effectiveness as an organization. As Nicole Bolleyer (2006) explains, by each government insisting on a veto to maintain its autonomy, conflicting issues do not get placed on the common agenda . However, it is also worthwhile to note that in the case of SCC judicial selection reform there does appear to be consensus regarding the principle of provincial participation. How, then, can we best understand the provinces' failure to mobilize effectively?

Comparing the two time periods, political actors mobilized in both cases, at least in part, in reaction to a series of controversial SCC decisions. While the types of cases changed between these two periods, this should not have necessarily resulted in less interest concerning SCC appointments by the provinces. After all, when the Charter was enacted, many critics, including the provinces, anticipated that it would prove to be a nationalizing instrument – homogenizing public policy and limiting federal diversity.[21] The Charter, in short, was seen as a threat to provincial particularism and Canadian federalism.

Pushing against this centralization thesis, however, James Kelly (2001) has argued that this view has been overstated and that the court has instead been sensitive to federalism in its Charter decisions – allowing space for policy variation. Thus,

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[21] See for example, Alan Cairns, Charter *Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal; Buffalo: McGill-Queen's University Press, 1992); Peter W. Hogg, "Federalism Fights the Charter," in *Federalism and Political Community : Essays in Honour of Donald Smiley*, ed. David P. Shugarman, Reginald Whitaker, and Donald V. Smiley (Peterborough, Ont.: Broadview Press, 1989); Rainer Knopff and F. L. Morton, *The* Charter *Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000); Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal; Buffalo: McGill-Queen's University Press, 1995); Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism : Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal; Buffalo: McGill-Queen's University Press, 1996).

one possible explanation for the provinces' failure to successfully mobilize may be the SCC's own jurisprudence. That is, the court is not considered to be a major threat to the political and policy autonomy of the provinces. However, despite an overall trend toward provincial sensitivity, this point can only be carried so far, as demonstrated by the reaction of some provinces in 1999 to a number of particularly controversial decisions issued by the Court.

With the provinces reacting to controversial decisions by the SCC in both time periods, the key difference, then, would appear to be that in this second time period these provincial calls for reform were marginalized. We return, then, to the importance of the constitutional negotiations that defined the first time period of this study. This series of constitutional attempts allowed the provinces to play a major role in agenda-setting in a manner that has not been possible since. No longer capable of placing judicial selection reform on the political agenda, the provinces' preferences instead became part of the larger background noise, along with other interested actors including the media, academics, legal interest groups, and federal opposition parties. Importantly, the focus of these other actors largely centred on the Court's role in a post-Charter universe and the value of transparency and accountability in the selection process. With his interest in developing policy to fix the "democratic deficit," it was this later focus on judicial reform that was picked up by Martin and further followed on by Harper. While Choudry is undoubtedly correct in highlighting the competing roles of the democratic renewal and intergovernmental relations agendas, it is also important to note that under the conditions faced in this second time period the likelihood of the provinces – even with strong coordination – gaining powers comparable to those proposed in the Meech Lake Accord appears weak.

The shift from the province-focused proposals of the first time period to those implemented in 2005–06 can be explained, then, in large part by three developments: 1) the mega-constitutional politics of the 1970s to the early 1990s allowed the provinces to secure a place for judicial selection reform on the political agenda, an advantage they no longer hold; 2) the introduction of the Charter created additional factors, mainly increased judicial power, that made judicial selection reform politically desirable for additional actors; and 3) many of the reform proposals defended by this second wave complemented Liberal leader Paul Martin's "democratic deficit" agenda, while increased provincial participation premised on the principle of executive federalism did not.

CONCLUSION

This paper began by asking why the provinces' recent role in reforms to the Supreme Court's selection process was diminished compared to efforts in the 1970s through to the early 1990s. By employing a processing tracing approach, two time periods were set out and compared – 1949–92 and 1993–2008. It was found that in both time periods political actors' interests in reform stemmed, at least in part, from a set of SCC decisions – in the first period, decisions impacting the division of powers, and in the second, those related primarily to the Charter. One possible

explanation for the comparative weakness of the provinces in this second time period has been put forward by Choudry, who highlights the ineffectiveness of the COF as an intergovernmental decision-making body. This paper offers a qualification to Choudry's point by emphasizing the importance of constitutional negotiations in the first time period of the study. Moreover, it was only with a change in Liberal Party leadership that an opening for reform was created in the second time period, and only then within the specific framework of Martin's democratic deficit agenda. On this point, the introduction of the Charter facilitated the framing of judicial selection reform within the democratic renewal agenda: with the Supreme Court making important decisions affecting public policy, the question of who appoints its members gained particular attention.

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THE JURISPRUDENCE OF "CANADA'S FUNDAMENTAL VALUES" AND APPOINTMENT TO THE SUPREME COURT OF CANADA

F.C. DeCoste

La Cour suprême du Canada a fait de la Charte canadienne des droits et libertés *l'incarnation et le dépositaire de ce qu'elle appelle inlassablement les « valeurs fondamentales » du pays, elle s'est posée en oracle et en gardienne de ces valeurs, puis elle a appliqué ce singulier mandat en décrétant que toutes nos lois doivent être assujetties et subordonnées aux dites valeurs qu'elle conçoit et inscrit dans la jurisprudence. Ayant établi ces prémisses, l'auteur estime que la Cour suprême verse ainsi dans une interprétation constitutionnelle absolument contraire aux normes du constitutionnalisme libéral, et plus particulièrement à la norme centrale du fédéralisme canadien. Pour guérir de cette double maladie, il juge indispensable que les pouvoirs de nomination soient à tout le moins répartis de façon confédérale, c'est-à-dire entre les gouvernements fédéral et provinciaux.*

Judged by the norms of liberal democratic governance, our system of appointing judges to the Supreme Court of Canada is a constitutional embarrassment. This much must, by now, be beyond dispute. Since the Court's founding in 1875, s. 101 of the *Constitution Act, 1867* has been taken by successive federal executives to be a grant of unfettered – which is to say, ruleless[1] and therefore largely lawless – prime ministerial discretion. In consequence, both the process and the substance of appointment offend in disgracefully equal measure the principles of transparent and accountable government. That this sorry state of constitutional affairs has not in

[1] The sole rules being ss. 5 and 6 of the *Supreme Court Act* [R.S.C. 1985, c. S-26], the first prescribing minimal qualifications and the second that at least three of the Court's nine justices must be appointed from Quebec. The convention with respect to the provincial place of origin of the remaining six justices constrains executive discretion in the same fashion as holes do cheese.

fact fatally compromised the legitimacy of the Court can only, I think, be attributed to the complicity of those who know or ought to know better – the legal, academic, and press communities especially included – in the maintenance of civic ignorance among Canadians. But further criticism in these regards is not my remit in this too brief working paper.[2] Instead I shall argue that the Court's post-Charter devotion to what it terms "Canada's fundamental values" violates a core constitutional principle of federalism. I shall then argue that this violation not only supports but demands remediation by way of a role for the provinces in the appointment process.

Since the inception of the *Canadian Charter of Rights and Freedoms* in 1982, ink has bled profusely and continuously about the tectonic jurisprudential and political shifts it has wrought. Early along at least, these concerns seemed themselves overwrought. The Charter after all was but a local iteration of a standard institutional feature of the limited and accountable government promised by liberal political philosophy and practice. As events would have it, however, the (many) celebrants of Charter change and the (far fewer) Charter naysayers were alike proven correct in their prognostications of seismic upheaval. What none of them could have foreseen was the curious judicial methodology by which an otherwise prosaic strategy of limited government was turned into an instrument of an ever-expanding federal state.

The method is simply stated: with the Charter as its point of hermeneutic departure, the Supreme Court has over time come to view constitutionalism – the constitution itself and the law as a whole – as an expression and repository of what it never tires of styling as "Canada's fundamental values."[3] Though this is not the place to provide a full decisional archaeology of this notion, some excavation of its logic and breadth is necessary to disclose its suppositions and consequences, both of which matter much to my argument concerning the process of appointment to the Court.

The logic begins with the Court's view of the historical and legal significance of the adoption of the Charter. It is the Court's view that, considered historically, the Charter signalled a "new social contract" in which "our constitutional design was refashioned" as "part of a redefinition of our democracy."[4] With this constitutional revolution came a jurisprudential one: henceforth, the judicial branch was to serve as "interpreter," "arbiter" and "trustee" of the rights and freedoms enumerated in the Charter (ibid., paras. 132 and 135). This understanding of history compels a hermeneutical turn: if the judicial branch is the interpretive trustee and arbiter of the Charter, it falls to the courts and to the Supreme Court especially to articulate what Ronald Dworkin would describe as a pre-interpretive understanding of the

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[2] For my take on the embarrassment and the complicity, see respectively, "Political Corruption, Judicial Selection and the Rule of Law" (2000) 38 Alberta L. Rev. 654 and "Howling at Harper" (2008) 58 U.N.B. Law J. 121.

[3] For a recent and rather dramatic proclamation, see *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 at para. 2.

[4] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 134-135.

Charter and of its place in our constitutional structure and affairs more generally.[5] And it is here that the Court's tale of fundamental Canadian values really begins. For the Court's pre-interpretive position is that the Charter is itself an expression of values that somehow or another lay unwritten beneath it. It has put the matter variously and repetitively. There are "democratic values and principles under the Charter"[6]; "the values underlying the rights and freedoms guaranteed by the Canadian Charter form part – and sometimes even an integral part – of the laws to which we are subject"[7]; "fundamental values [are] reflected in the Charter"[8]; "fundamental principles emanat[e] from the Charter[9]; and so on and so on.

This understanding raises two questions, the answers to which complete the Court's pre-interpretive staging of its narrative of fundamental values. If the Charter is indeed an expression of the values that lay beneath it then, one is led to ask, whence those values and whose values are they? So far as their origin is concerned, the Court has taken the view that Charter values are "an expression of our traditions, of our debt to them as well as of the evolving values of our society"[10] (or alternatively put, "a restatement of the fundamental values which guide and shape our democratic society").[11] Thus rendered, the values that underlay the Charter become social values, the people's values, *real* values. And so in the Court's view, they indeed are. Those values buried beneath the Charter are "the fundamental values and aspirations of Canadian society,"[12] "the most fundamental values of our society,"[13] "the values of contemporary Canadian society,"[14] "the values of modern Canadian society"[15]: they are, that is, "fundamental Canadian values," our "basic values."[16]

It is on this transmutation of judicial values into social values that the post-Charter Court grounds its constitutional permit to discover and to defend the values of Canada and Canadians. The Court has proven itself ready and eager to the task. Indeed, the breadth of values discovered and defended is breath-taking both in number and in reach. As regards the latter, the Court has declared the common

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[5] Ronald Dworkin, *Law's Empire* (Harvard U.P., 1986) at 65-66.

[6] *Vriend* supra note 4 at para. 142.

[7] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 6 at para. 16.

[8] *R.W.D.S.U., Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 at para. 65.

[9] *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 174.

[10] *R. v. Advance Cutting and Coring Ltd.*, [2001) 3 S.C.R. 209 at para. 259.

[11] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 92.

[12] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 735-736.

[13] *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 624 at para. 28.

[14] *R.W.D.S.U.* supra note 9 at para. 69.

[15] *WIC Radio v. Simpson*, [2008] 2 S.C.R. 420 at paras. 79-80.

[16] *R. v. Hape* supra note 10 at paras. 163 & 178.

law,[17] governmental policy,[18] the division of powers,[19] and indeed the law in its entirety,[20] as each and all subordinate to Canada's fundamental values.

The list of values is no less ambitious. "[M]ulticulturalism [and] diversity" (ibid., para. 79), "inclusiveness, equality, and citizen participation,"[21] "self-fulfillment, participation in social and political decision-making, and the communal exchange of ideas,"[22] and "environmental protection,"[23] are just some of the values that the Court has declared as fundamentally Canadian. But the high-water mark, at least so far, has surely been reached in the Court's decision in *Bruker*,[24] a non-Charter divorce case,[25] in which the Court announced a veritable cascade of fundamental values. Besides multiculturalism, there we find the Court declaring and defending the following as Canadian values: "to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion";[26] our "evolutionary tolerance for diversity and pluralism" (ibid., para. 1); "our approach to marriage and divorce and our commitment to eradicating gender discrimination" (ibid., para. 16); "Canada's approach to religious freedom, to equality rights, to divorce and marriage generally" (ibid., para. 63); "our commitments to equality, religious freedom and autonomous choice in marriage and divorce" (ibid., para. 80); "the right of Canadians to decide for themselves whether their marriage has irretrievably broken down" and our "attempt to facilitate, rather than impede, their ability to continue their lives, including with new families" (ibid., para. 82); our view that "marriage and divorce are available equally to men and women" (ibid.); and "protecting equality rights [and] the dignity of Jewish women in their independent ability to divorce and remarry" (ibid., para. 92). As elsewhere, here too the Court may be fairly said to have simply discovered these values since, with one unhappy exception, it credentializes none of them.[27]

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[17] See e.g., *WIC Radio* supra note 16 and *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835.

[18] *Health Services & Support-Facilities Subsection Bargaining Assn. v. B.C.*, [2007] 2 S.C.R. 391 at para. 26.

[19] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 23; *R. v. Advance Cutting* supra note 11 at para. 277. And this understanding, it is worth noting, arose despite the spirit of the non-extension of powers provision found in s. 31 of the Charter.

[20] *Multani* supra note 8 at para. 16.

[21] *Sauve v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 41.

[22] *R.W.D.S.U.* supra note 9 at para. 32.

[23] *114957 Can. Ltee. v. Hudson (Town)*, [2001] 2 S.C.R 241 at para. 1

[24] Supra note 3.

[25] *Bruker* concerned the enforceability at law of a religious undertaking by a divorced Jewish man to grant his former wife a *Get*, a religious divorce under Judaic law. For commentary see my "Caesar's Faith: Limited Government and Freedom of Religion in *Bruker v. Marcovitz*" (2009), 32(1) Dalhousie Law Journal 153-76.

[26] Supra note 3 at para. 19.

[27] The exception is "the dignity of Jewish women in their independent ability to divorce and remarry," which it founds on s. 21.1 of the *Divorce Act* and on the parliamentary ad-

The whole of this – the pre-interpretative sensibility and its continuing execution in the discovery and defence of fundamental values through the case law – has sedimented into the ruling orthodoxy of the Court. So much indeed is this the case that the Court's mark is in equal measure ideological uniformity and blindness (and this quite independently from whether the appointing executive is Liberal or Conservative). The blindness reveals itself most tellingly in the Court's failure to come to terms with the supposition on which its entire fundamental values enterprise is based. The supposition is that the state is properly seized of a *weltanschaunng* – the state's "fundamental values" – to which the conduct and projects of its subjects are properly held to judicial account. Now, whilst this may be, and of course has been, true of certain kinds of states, it has never been true, nor can it ever be, of liberal states. This is so because, unlike a *Kulturstaat*, the liberal state is, by definition and aspiration both, a *limited* state. And states of that kind and character are not in the business of articulating and consolidating nationalist values independently from the security and liberty interests of their subjects or of forcefully declaring those values as the core morality of the communities they serve or of degrading citizenship into clientelism. Just the contrary: in liberal states, the law's purchase is the liberty of the law's subjects to choose their own values and morality, and with that, their own lives, beyond the touch and taint of law and politics. Which is merely again to say, liberal constitutionalism is about personal and social autonomy and never about state-sponsored authenticity.

But not only does the jurisprudence of fundamental values in this fashion constitute a deformation of liberal constitutionalism, in our constitutional context, the neo-constitutionalism of which it is comprised is as well a violation of a founding norm of federalism. Federalism, ours included, is about split sovereignty in service to limited and liberty-serving government. The protection of the individual from abusive state power is the *raison d'être* of divided sovereignty; and federal regimes are everywhere proposed and structured so as to make the individual safe from overreaching, liberty-constraining government, from the central authority in particular.

Now, it is always the case that federalism has built into it a centralizing impulse, especially so in the authority of federal courts to interpret constitutional provisions and their own authority. However, I want to suggest that the Supreme Court's jurisprudence of fundamental values far exceeds such normal frailties of federalism. In the final analysis, that jurisprudence consists of a judicially conjured and constitutionally enforced pan-Canadianism that so violates the practice of divided, limited and agonal authority, that it constitutes its subversion by judicial means. For judicially manufactured Canadian values make jest of the norm of provincial protection of the individual from the claims of the central government by redefining the individual root and limb as an expression of federally sanctioned values.

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dresses of two, now long departed Ministers of Justice, Doug Lewis and Kim Campbell: ibid. at paras. 7, 8. 81. But s. 21.1 has on its own terms nothing whatsoever to do with the matter before the Court in *Bruker*.

The jurisprudence of fundamental values is then diseased in two respects: it violates the norms and institutional patterns and limitations of liberal constitutionalism, and it compromises a central constitutional norm of Canadian federalism. So established however is this jurisprudence, there exists in my view no reasonable expectation that the Supreme Court will on its own accord recover from its totalizing and centralizing mission. Remedy, if a remedy there is, can only begin with an understanding of the relationship between the maladies. Though the second anti-confederational disease is a consequence and symptom of the neo-constitutional disease – which is to say, without the former there would be no constitutional opportunity for the latter to infect – treatment must begin with the symptom. The rationale is simple enough: though we may dissent from the Court's illiberal constitutional conception of fundamental values, the anti-federalism result alone gives constitutional room and reason to manage constitutional recuperation. The reason is the defence of a core norm of Canadian federalism, and the room is the appointment of justices with suitable "constitutional convictions" (Dworkin 1996, 263) to the Court.

Now, if we wish to test the "jurisprudential integrity and commitment" (ibid., 331) of proposed appointees along confederational lines, then it is both proper and necessary for the provinces to have a place of prominence in the appointment process. The reason here too is so simple: not only have both the federal executive and the Supreme Court, when left to their own devices, proven themselves unfaithful custodians of divided, liberty-serving federalism, even were that otherwise, the structure and norms of Confederation alone would command divided appointment authority.

Nor, considered in the abstract, need this recuperative mission be complicated. Setting in place provincial authority, along the lines of either Meech or Charlottetown, would require nothing more substantial than parliamentary amendment of the *Supreme Court Act*. When, however, the rubber of abstraction meets the coarse and degraded surface of the present circumstances of our Confederation, the matter becomes so much more murky. Indeed, since 1982, so drastically have we turned from the founding impulse of our Constitution, setting matters aright seems to me every bit a fool's errand.

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8

SUPREME COURT APPOINTMENTS: BY PARLIAMENT, NOT PM, AND SHORTER

Tom Kent

La forme et la durée du processus de nomination des juges de la Cour suprême du Canada doivent tous deux être réformées, fait valoir l'auteur, qui récuse l'actuel mode de sélection par le premier ministre en invoquant l'impératif de transparence, de participation des provinces et de confiance de la population. Il révèle aussi les failles de certaines solutions de rechange comme la présélection provinciale proposée par l'Accord du lac Meech, la présélection parlementaire ou l'examen des candidats devant un comité parlementaire. Pour définir et appliquer les conditions de l'efficacité et du caractère démocratique du processus de nomination, celui-ci devrait être entièrement mené par un comité spécial qui relève exclusivement de la Chambre des communes et qui soit accessible à la population, tout en s'accompagnant d'une réduction de la durée des mandats et d'un abaissement de l'âge de retraite obligatoire.

The role of a Supreme Court for Canada has been played, in varying measure at varying times, by three distinct institutions. In this as in some other respects, for Canada as for many countries, the reality of the public business differs from the words of the Constitution.

Canada was created in 1867 "with a Constitution similar in principle to that of the United Kingdom." That statement of the BNA Act was, on the surface, nonsense. The UK was at the time a strictly unitary state; its Parliament was in all matters supreme. Canada, however, was to be a federation, its Parliament limited by the "exclusive powers" conferred on provincial legislatures.

Except … the founding genius of the new nation had no intention that its government should be hampered by lesser legislatures. Their powers might be listed as extensive and exclusive, but Sir John A. Macdonald had his version of a "notwithstanding" clause to ensure that provincial politicians never had the final say on anything that the national authority considered important. Every provincial statute had to be sent to Ottawa, where the cabinet had a year within which to decide whether to let it be or make it null by order in council.

Thus, from the provinces' viewpoint, the federal government was like a Supreme Court sitting over their legislation, though a court bound not by judicial interpretation of the law but by political judgment of the national interest.

Except, again … even Macdonald could not out-manoeuvre all the lawyers. The BNA Act was a UK statute, subject to judicial interpretation at Westminster. In the British style of parliamentary supremacy, that meant by the law lords of the upper chamber, comprising the oddly named Judicial Committee of the Privy Council. They were men in the small government mode of Britain at the time, not in tune with an activist government creating railways, erecting tariffs, subsidizing immigrants, for the development of a new Dominion from sea to sea.

The British Lords might have responded differently if it had been Quebec that led the charge against federal suzerainty, but for most Quebeckers Ottawa, where they had votes, was more palatable than Westminster. The champion of provincial rights was the English ex-colony of Ontario, whose politicians found in the law lords the most willing of allies. The provinces were soon given all the jurisdiction that dedicated judicial interpretation could squeeze from the language of the BNA Act. The intent of its founding fathers was perverted.

The Lords were ingenious. One of their ways of inflating provincial powers was to interpret away the distinction between direct and indirect taxation. Nevertheless, they could not throw out the federal power to disallow provincial legislation. It was too plainly worded for even the most far-fetched interpretation to get round it. But our federalism had been made so decentralized, provincial authority so enlarged, that exercise of the power became increasingly impracticable politics. Disallowance withered to complete dormancy sixty years ago.

By then the Lords had done their work on the BNA Act and could be retired from Canada. Our own Supreme Court replaced them as the ultimate arbiter. For three decades, however, the change had little political significance. Decentralization had gone as far as was constitutionally possible. The political mood was for a shift the other way, to a more active national government, but there was little wish to go to Westminster for constitutional amendments. The wartime precedent of unemployment insurance was followed only for old age security in 1951. Otherwise nationwide measures were established by federal subsidization of provincial programs. Some provincial governments grumbled that their priorities were thereby distorted, but that did not prevent them from using money for which they did not have to impose the taxes. Neither then nor since have provinces (other than, at times, Quebec) tried to challenge the federal spending power.

In this situation the Supreme Court was a quiet place, its composition of little political interest, until in 1982 the *Charter of Rights and Freedoms* destroyed for Canada the supremacy of Parliament. The basic constitutional principle that John Hampden and many others had fought and died to establish in Britain disappeared on this side of the Atlantic. Parliament and provincial legislatures became subject to the Court, in the sense that their laws must conform to the Charter as the justices interpret it.

Again, except … the "notwithstanding" provision makes it possible for Parliament and legislatures to sustain what they have enacted despite the Supreme Court's disapproval.

Except, yet again … this provision is, outside Quebec, of virtually no account. In 27 years the federal government has never used it. Even the most notoriously irresponsible of the Court's opinions has gone for years uncorrected. In consequence, any person from anywhere has only to set foot in Canada and ask for residence in order to become entitled in advance to the legal rights of a resident when asserting a claim to be in danger of mistreatment or deprivation elsewhere.

The result is not only to distort the rational immigration policy so important to Canada. It is also a gross, uncaring injustice to the most deprived victims of violence and oppression who have no way to set foot here. Yet no government has had the courage to use, no opposition to urge, Parliament's power to correct the folly of the Court. The reason is all too plain. The mistakes of politicians are frequent and often exaggerated by the media. Those of justices are somewhat fewer and much less apparent. The Court therefore stands considerably the higher in public esteem. Confrontation with it is unlikely to be politically rewarding. And this is reinforced by the contorted form of the notwithstanding clause that was wrung from a reluctant Trudeau. In effect, Parliament (or a legislature) must "expressly" recognize that the Court is correct in ruling that an item of existing legislation does not conform with the Charter. It can then pass new legislation to keep the previous law operative. But this special measure is inferior to normal legislation. It is not permanent law, effective indefinitely unless Parliament takes some new initiative. It is good for only five years, then dies unless it is enacted again.

This contorted formulation was clearly designed to discourage use of the notwithstanding provision, and it has succeeded. It does not effectively preserve the supremacy of Parliament, of elected democracy. To do so, two amendments are required. First, it should be clear that no judicial finding automatically invalidates an existing legal provision or practice. Rather, it should be notice from the Supreme Court to Parliament (or the relevant legislature) that a legal change should be made within some defined period, normally no more than a year. Second, if elected politicians choose instead to use the notwithstanding provision, that law should be as good as any other; that is, it should have no time limit but stand until repealed or amended.

Those may be dismissed as formalistic changes. They certainly would not produce a mass of "notwithstanding" legislation. They would undo a subterfuge. The 1982 Constitution was supposed to be a commendable Canadian compromise, safeguarding the rights and freedoms of Canadian citizens without destroying their ultimate authority to assert, through their elected representatives, the collective interest of people in society.

That compromise in principle was the wisdom of the politicians of the time, but it seems that the lawyers who contrived the detail were determined to minimize the concession of judicial prerogative. They certainly succeeded in wrapping the notwithstanding provision in the shrouds of shame-faced burial for an unwanted progeny. Another generation of politicians should at last bring it into the open and free it for effective use when the public interest requires assertion over the occasional folly of justices.

Yet that is the lesser item of the business that the 1982 constitution-makers left unfinished. The major item is how the justices of the Supreme Court are appointed. They are unique among public officials of such great authority. Others of comparable importance are in some way accountable, either to electorates directly or indirectly through those who are. A member of the Supreme Court, once appointed, is independent of everyone, of everything except his or her personal understanding of Canadian law. So it should be. The independence is crucial to a free society. Equally crucial, therefore, is how this unique independence is bestowed. How does a democracy select the few people best fitted for such responsibility? In nothing is it more important not only that justice be done but that it be seen to be done in a manner that merits public trust.

As yet there has been no such visibility. The appointment of a Supreme Court justice remains the prerogative of the prime minister of the day. How wide are the consultations that precede the decision, what considerations are weighed, what alternatives considered: all this is obscure. No doubt prime ministers always consider carefully, but they decide by their own lights, in their own styles.

This is, of course, a hangover from the days when the Court's proceedings were of little general import and only some major scandal or demonstration of massive incompetence would have roused wide interest in the subterranean way justices come to be. But the continuation of that way became an undemocratic enormity when the Court was elevated to a major role in our public business.

Initially, the fault could be attributed to an accident of personality, to the dominance of a remarkable politician. Trudeau's determined dedication to the Charter was joined with scant regard for most of politics and its practitioners. Willing as he was to upset many applecarts, the existing concentration of authority in the prime minister was to him the natural order of things. Amid the constitution-making turmoil of 1981 there were no voices strong enough to say him nay.

That does not explain, however, the inertia that has now sustained the prime ministerial prerogative for 27 years of Supreme Court activism. As in many other areas of public policy, reform loses the name of action in the quagmire of federal-provincial confusion. The prominent objection to the present appointment process comes from provincial governments. Since the Supreme Court rules on their legislation as well as Ottawa's, they can reasonably claim that the premier of the province from which a justice is to come should share in the making of the appointment. The Mulroney government, desperate to change "Trudeau's constitution," was willing to concede more than a share. If the Meech Lake "Accord" had held, the provinces would have gained primacy. The relevant province would have listed a few lawyers it considered acceptable to fill a vacancy; the prime minister's prerogative would have been reduced to picking one of them.

Few compromises have been more plainly flawed. There was no mechanism to resolve the deadlock if, for example, a PQ government nominated only declared separatists for a Quebec justice on the Court. Short of that extreme, disagreements between federal and provincial governments of different stripes could well introduce partisanship inappropriate to judicial appointments. The underlying issue is broader. Even if partisanship were always shunned, shared responsibility would

do nothing for democratic accountability. On the contrary, it would be yet another addition to the confusion of federal and provincial responsibilities that so often militates against decisive public policy. The Supreme Court is a federal institution. To convert it to another neither-one-thing-nor-the-other is not the way to ensure responsible quality in its functioning.

Nevertheless, it remains true that provincial governments have an entirely valid objection to appointments solely by the leader of whatever federal party is the government of the day. The cure is not, however, to muddy the water with the leaders of provincial parties. The cure is to take appointment to the Supreme Court out of the hands of all governments, federal and provincial. It should be where democracy places national sovereignty. That is in Parliament as a whole, not one side of it. Judicial review now somewhat qualifies, but in no way destroys, the basic role of Parliament. It remains the authority higher than the Supreme Court. It is therefore the one body that can appropriately take responsibility for appointments to the Court.

That is recognized, after a fashion, in the kind of reform most often discussed, that the prime minister's appointee be submitted to questioning by a parliamentary committee. The suggested procedure is shaped, however, by desire to avoid the intensely partisan grilling that comes with the power of the US Senate to confirm or reject presidential nominees. The alternative presumes that Canadian MPs will be polite provided they are powerless. That is, the justice chosen by the prime minister would be open to questioning but not to rejection. The hearing would matter only in the unlikely event that it led the prime minister, in his wisdom, to change his mind and cancel the appointment. The clumsy process would risk overt partisan debate while keeping the monopoly of power intact.

The change with which the Harper government toyed in 2008 would have been a shift of initiative. The review of candidates would have started with a parliamentary committee charged to produce a short list of three. The prime minister would presumably have then limited his choice to which of the three he liked best. This procedure would almost certainly have been divisive without achieving any reform of principle. The prime minister's prerogative would have been restricted but not removed. It is not surprising that there was hardly a squeak of protest when the proposal was dropped and the latest justice appointed like his predecessors.

Reform will be substantive only if it entirely removes government from the appointment process. The problem is to transfer the authority to the House of Commons, where it properly belongs, in a way that rules out partisanship. Suppose, for example, that when a vacancy is pending, the Commons should by motion authorize a special committee to which it delegates the appointment. Each recognized parliamentary party would be authorized to appoint one of its members to the committee. They (at present the four) would ask the Canadian Bar Association to nominate a chairperson acceptable to them all. The normal selection process, privately reviewing candidates, would proceed until there was an agreed short list. Three might be the normal number, but it could be more or less. Each would then be interviewed by the committee in public. Its final choice would always be unanimous, in the sense that the members and chair would be bound by the Commons, in the terms of their appointment, not to say otherwise. While the choice would be, formally, a

recommendation, it would be as binding on the governor in council as the prime minister's appointments have hitherto been.

This suggestion may be improved upon, but it establishes the crucial point. Supreme Court justices can be appointed by MPs collectively, with democratic authority, through a procedure as free from partisanship as is ever possible. It would show that MPs can be more than automatic cheer-leaders or yapping critics of government, that they can work together not only in vague, do-good rhetoric but in a specific item of major national business.

Such a change in the way appointments are made could well be combined with a simpler reform to strengthen the Court. Retirement at age 75 now ensures that it is well endowed with the wisdom of experience. There is equal need for lively minds in tune with the changing norms of our society. The two requirements are at present hard to balance. Unless appointees to age 75 are people already well into their sixties, the turnover of membership is slow; the refreshment of change comes rarely to the Supreme Court. A more consistent combination of talents would be achievable if appointment was for a term of, say, 15 years, or to retirement at age 70 if that came earlier.

A somewhat younger and more flexible Court, looking more in tune with current attitudes, would enhance the public respect that the Court generally merits but which grows harder to maintain in an increasingly questioning society. It would complement a parliamentary procedure for appointments that could do much to restore the respect for politicians which has been of late so greatly impaired. And at the same time the muddle in the relationship between Parliament and Court could be removed by clarifying the notwithstanding power.

That package of three related reforms would be solid progress towards a Canadian federalism more able to cope with the contemporary demands on public policy.

9

LOOKING FOR THE GOOD JUDGE: MERIT AND IDEOLOGY

Allan C. Hutchinson

Bien qu'on ne puisse amalgamer les questions de mérite et d'idéologie, il est impossible de les aborder séparément dans le débat sur les nominations judiciaires, démontre ici l'auteur. Les « bons juges » reconnaissent d'ailleurs que le recours aux valeurs (même contestées) est une partie intégrante et inévitable de leurs tâches judiciaires. L'auteur commence donc par examiner ce qui caractérise ces juges, avant de décrire comment les juristes canadiens ont expliqué le recours aux valeurs dans le processus juridictionnel. Puis il réagit à l'idée selon laquelle les juges peuvent et doivent éviter toute forme d'« activisme ». Enfin, il recense les répercussions institutionnelles d'un processus de sélection qui ferait de la fonction judiciaire une combinaison de mérite et d'idéologie. Car pour appréhender sensément cette fonction, il faut accepter que le vrai problème ne réside pas dans la dimension idéologique des décisions mais dans les tentatives de camoufler cette dimension.

INTRODUCTION

Whenever we move into one of the regular seasons of "judicial appointments" to the Supreme Court of Canada, there is the usual chorus of complaint among the general hubbub. As speculation mounts as to who is to be the next appointee, a predictable appeal goes out from many in the legal community, both academic and practising, that considerations of "merit" should be uppermost in the prime minister's mind. In particular, there is an urgent, almost desperate plea to ensure that issues of "ideology" are treated as having no legitimate place in the selection of Supreme Court judges. For many, therefore, merit and ideology are antithetical notions which must be kept separate and apart if the legitimacy of the new judge and the Supreme Court generally is to be protected and maintained. As Peter Russell put it, the prime consideration is to "prevent ideology from trumping merit in the appointment of judges to our highest court" (*Globe and Mail* 2011, letter to ed. 16 May).

The ambition to appoint judges who are truly meritorious is unquestionable. Nobody would want to have judges on such an important tribunal who did not possess all the technical and professional attributes of a truly competent judge. This much is undeniable. The problems arise when people assume that this can be achieved with indifference to the ideological leanings of any particular candidate. It would be folly to select out-and-out ideologues, especially if they otherwise lacked (or even had) all the qualities of meritorious judges. Karl Marx and Friedrich Hayek would make for less than ideal judges. However, the assumption that merit and ideology are unrelated notions and that it is possible to attend to matters of merit without taking into account ideology is mistaken. No matter how much people may wish that it were so, it simply is not. Merit and ideology walk down much the same street. Any denial to the contrary flaunts both history and analysis. Moreover, how the relation between merit and ideology is understood has profound implications for the whole process of not only appointing judges, but also evaluating their judicial performance.

In this short paper, I will demonstrate that, while merit and ideology do not collapse into each other, it is simply not possible to talk of one without the other. Good judges recognize that the resort to values (and contested ones at that) is an integral and inevitable part of the judicial task. In the first part, I explore what might be involved in being a "good judge." I then proceed to examine how Canadian jurists have sought to explain the resort to values in the adjudicative process. In the third part, I respond to the claim that "activism" is something that judges can and should avoid. Finally, I look at the institutional implication for the judicial selection process of understanding the judicial function as a mix of merit and ideology. Throughout the paper, I will insist that any reasonable appreciation of the judicial function must accept that the sin is not accepting the ideological dimension of adjudication, but trying to hide it.

WHAT DO GOOD JUDGES DO?

When the present American Chief Justice John Roberts was appearing before the Senate's Judicial Committee during his confirmation hearing, he confided that he did not have an "all-encompassing approach" to his judicial role or to constitutional interpretation particularly. He went on to say that "judges are like [baseball] umpires. Umpires don't make the rules; they apply them." He sealed this modest portrayal of judicial virtue by insisting that "judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath" (*USA Today* 12 September 2005). The not-so-implicit message of Roberts's credo was that being a good judge required restraint and forbearance; judges, even and perhaps especially Supreme Court ones, were not in the justice or politics game in any expansive or direct way.

While this humble depiction of judicial responsibility – "it's my job to call balls and strikes and not to pitch or bat" – will strike a reassuring chord with some, it fails to reflect the history and nature of the judicial role in common law countries generally and Canada in particular. Judges are much more than umpires. Indeed,

the whole analogy between judging and umpiring is misleading and inaccurate. As far as their common law duties go in both constitutional and non-constitutional matters, history demonstrates that judges are very much part of the action. It is less about *whether* they change the rules than about *how* they do so. In its last few hundred years' lifespan, the law has changed and judges have been some of the main architects and artisans of that change. Staying with the baseball analogy, while some umpires claim to call balls and strikes "as they see 'em," others assert that "they ain't nothin' 'til I call 'em." People might be fated to play a baseball of the judges' choosing, but the judges are also very much part of the game; they play by as well as change the rules as they go along. In legal terms, what counts as not only "balls" and "strikes," but also what counts as "baseball," changes over time. And it is the judges, for better and worse, who are the purveyors and guardians of these changes.

That being said, if judges are not umpires, neither are they godly figures. They have no especial, let alone sacred, insight into the meaning of legal texts or the nature of social justice. Judgeliness is not next to godliness. In the same way that there is no way to simply read off the meaning of laws, especially constitutions, in an impersonal exercise of professional technique without resort to larger and contested issues of social and political values, there is also no way for judges to negotiate that fraught terrain with a quasi-divine certainty or supernatural wisdom. As Francis Bacon observed, neither heavenly saints nor sporting officials, who are they? What is involved in judging?

For me, the common law is a dynamic and engaged activity in which how judges deal with rules is considered as vital as the resulting content of the rules and actual decisions made; judges are social artisans of the first order whose impact, although often more subtle and understated than their political counterparts, is undeniable. The common law is better understood less as a fixed body of rules and regulations than as a living judicial tradition of dispute resolution. Because law is a social practice and society is in a constant state of agitated movement, law is always an organic and hands-on practice that is never the complete or finished article; it is always situated inside and within, not outside and beyond, the society in which arises. In short, the common law is a *work in progress* – evanescent, dynamic, productive, tantalizing, untidy and bottom-up: it is more tentative than teleological, more inventive than orchestrated, more fabricated than formulaic, and more pragmatic than perfected.

Having this experimental, catch-as-catch-can, and anything-might-go sense about it, the common law recommends that its judicial personnel must also adopt some of those qualities. While it is clearly a great help to possess an excellent set of technical skills, these will not be enough in and of themselves; they are a necessary, but not sufficient condition of good judging. The battery of adjudicative techniques for rule application does not amount to a self-contained or self-operating technology: they only make sense as part of a larger understanding of law as a rhetorical and dynamic enterprise. Being a practical activity, adjudication does not consist of a series of formulaic applications in an abstract space. Instead, it is more profitably understood as an organic and judgment-based engagement in real time

and in real places; it is less an occasion for logical operations than an exercise in operational logic.

Nonetheless, while the learned knack of using legal materials with adroitness and dexterity is not to be underrated, the effect of such a limited depiction of lawyers' special and distinctive expertise is misleading. It can too easily be used to avoid the democratic responsibility of justifying their power and authority by reference to the real world pressure of getting the job done. The depiction of the judicial craft as an inward and insular undertaking serves to cut off law and adjudication from the sustaining socio-political context and rich historical resources from which they gain their vigor. Legal artistry demands more than technical proficiency. Especially at the level of a nation's supreme judicial tribunal, judges do not simply reproduce mechanically and mindlessly old arguments and trite analogies; they are those who can rework legal materials in an imaginative and stylish way. A bare legal craft can too easily acquire the elite habits of a Masonic order and fail to meet or sabotage its civic obligations: a job well done is not always its own reward. To be worthy of the highest professional prestige, lawyers and judges must nurture a sense of social justice and a feel for political vision. Without these qualities, they will more likely become only hired hands for vested interests. As one commentator succinctly put it, "technique without ideals is a menace; ideals without technique are a mess."[1]

Adjudication is not carpentry, let alone umpiring. While judges would do well to inculcate the equivalent judicial pride in their work, they also must be designers and innovators who place their professional craft in the service of political values and social ideals. It is true that legal tables will wobble and precedential doors will jam without crafted care and professional attention, but there is a significant difference between the doors and tables of a torture chamber and those of a hospital ward; a hospital bed is not a torture rack, although it can become one. Values and commitments can be hidden, but they cannot be done away with altogether. Judges and jurists cannot so easily evade taking responsibility for the artifacts and outcomes of their crafted performances by taking refuge in matters of technical consistency and internal coherence. In the same way that a block of wood only has whatever shape and symmetry that it happened to pick up at the last turn of the carpenter's lathe, the law possesses only whatever shape and symmetry that it happened to acquire during the last occasion for legal crafting. So while the good judge should have technical skills in abundance (i.e., merit), he or she also needs to possess a socio-political vision within which and on behalf of which they can deploy those technical skills (i.e., ideology).[2]

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[1] Karl Llewellyn, *The Adventures of Rollo*, 2 U. of Chi. L. Sch. Rec. 3 (1952).

[2] Although *all* judges should combine merit and ideology, the great judges are those that rework conventional standards of what it is to judge well. See Allan Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (2011).

DEALING WITH VALUES

Few judges and even fewer jurists subscribe to Justice Roberts's umpiring analogy. In the 21st century, this seems an almost farcically simplistic account of the judicial role. Although the advocates of such a modest characterization of adjudication are vocal about the failings of a more so-called activist rendition, they are extremely quiet on how such a mode of judging can be operationalized. What is involved in simply applying established legal norms to new fact situations?

At a very general level, three initial observations come to mind in considering this. First, the ascertainment of legal norms is itself fraught with political contamination and content. "Established" is simply a way of saying that certain controversial moral or political commitments are now accepted by the legal community as settled; this is less an endorsement of the principles' apolitical nature and more an acknowledgement that general acceptance is a form of political validation. Second, the range of established norms is extremely broad and often encompasses competing maxims; there is no neutral or non-political way to select between contradictory norms. Third, even if it is possible to isolate a relevant and exclusive legal norm, it is far from obvious how that general principle can be applied to particular facts in an entirely objective or impartial manner.[3] In short, despite the critic's yearning for a simpler and more professional age, there is no purely technical and non-political way to engage in a principled mode of adjudication. This is especially true of the Charter. Not only is what amounts to "freedom" or "equality" the stuff of fierce ideological debate (and how one relates to the other), but how such values are to be enforced within s. 1's "such reasonable limits as can be demonstrably justified in a free and democratic society" merely invites judges to wade even deeper into the political waters. Adjudication necessarily involves political choice.

These challenges have become particularly acute as judges and jurists strive to identify a legitimate mode of judicial decision-making in the Charter age. Of course, the democratic status of judges has always been suspect. The fragility of their legitimacy arises not so much from their exercise of power, but more from the nagging doubts about the warrant under which they wield such authority. Lawyers must claim to speak and act in a voice other than their own; they must justify themselves by reference to an authority beyond themselves – law. However, as it is no longer possible to simply "follow the rules" (because the questions of which rule, what it means, and what following it entails remain irresolvably contestable), it is now generally conceded that law is as much a constructive activity as a given thing and that adjudication involves an inescapable dimension of political choice; legal interpretation is not a pseudo-scientific or umpiring practice, but an engaged exercise in value-choices. The mainstream jurist must demonstrate that, even if legal doctrine does not compel definite results, it places sufficient constraints on judges to save them (and the citizens they are supposed to serve) from themselves

[3] See A. Hutchinson, *Evolution and the Common Law* (2005).

or, at least, to justify the civic trust placed in them. The democratic challenge is to hit upon a way to act decisively as well as legitimately.

In the last few decades, with the advent of the *Charter of Rights and Freedoms*, judges and jurists began to question the continuing reliance upon the old stand-by of "liberal legalism" – sharp public/private distinction, neutral interpretation, and objective balancing – as a method for legitimizing their decisions and reconciling the courts' role with democracy. This approach was failing to placate either liberal or more radical critics who complained that judicial review was not fulfilling its functions as effectively or as democratically as it might. Not only were the courts' efforts at preserving a sharp distinction between legal analysis and political judgment becoming more transparent and unconvincing, but the substantive political values which animated their decisions were being revealed as increasingly out-dated and unresponsive to contemporary sensibilities. Indeed, "liberal legalism" was unable to command a sustained consensus even among the judges.[4] As part of their role as judicial helpmates, jurists have offered a number of proposals to move forward on the constitutional front. There are two main trends that have been explored in Canada and elsewhere – "pragmatic reasoning" and "democratic dialogue." Ironically, these very efforts to bolster democratic legitimacy have managed to reveal even more starkly how thoroughly undemocratic is the judges' involvement in constitutional review. Most significantly, these interventions fail to take seriously that it is the "who" of adjudication as much as the "what" of adjudicative activity that matters most in a society that seeks to be strongly democratic.

The first response has involved a much greater candour and willingness to treat legal reasoning as being a substantially pragmatic enterprise. By this, it is meant that judges ought to worry less about abstract legitimacy and more about practical usefulness. In doing this, they do not abandon the idea of legal reasoning having some distinctive character and they do not treat it as being entirely unprincipled: they view it as being a more modest engagement which is about social consequences, not conceptual properties. Because there is no single algorithm for decision-making, there are only a potpourri of tried-and-tested techniques that are more akin to riding a bike than solving a mathematical equation. While this pragmatic approach undoubtedly improves upon more traditional understandings of legal reasoning, it still presents it as a lot less contingent and a little more final than other normative vocabularies. Rather than accept law as one more way of coping, legal pragmatists cannot resist the temptation to press practical reasoning into service in the analytical workhouse and to make it into more of a method than the experiential make-do that it is. Although championed as a practical and socially situated endeavour, judicial performance remains centred on textual, doctrinal, and argumentational matters: there is little attention to the actual social context in which disputes arise or to the political consequences of judicial decisions.

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[4] For a full and unimpeachable account of these developments, see Andrew Petter, *Twenty Years of Charter Justification: From Liberal Legalism to Dubious Dialogue* (2009).

The second trend has been a turn to "dialogue theory" as an alternative justification for judicial review. Accepting that some reliance upon contested political commitments is not only inevitable, the primary concern has been less with politicization itself and more with "the degree to which judges are free to read their own preferences into law."[5] Cautioning that judges are not free to go wherever their personal political preferences direct them, the dialogic approach still claims to insist upon the existence of a workable distinction between legitimate legal analysis and illegitimate political decision-making. It is argued that this crucial differentiation is much fuzzier, that the domain of law is much more expansive, and that the boundary between law and politics is much less breached than traditionalists maintained. However, these dialogists do concede that there is a point at which the judges can be said to be no longer doing law; they will have wandered off into other parts of the constitutional and political domain. In some important sense, law is to exist separately from its judicial spokesperson such that law places some non-trivial constraints on what judges can do and say. While legal principles are more open and sensitive to political context, law is not only reduced to the contingent political preferences of the judiciary.

The general thrust of the dialogue theory is that courts and legislatures will engage in an institutional conversation about the Charter and its requirements on particular and pressing issues of the day: the courts and the legislators have complementary roles that enable legislation to be carefully tailored to meet the government's political agenda and to respect Charter values as well. Judicial advocates of a dialogic approach insist that "judicial review on Charter grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches." Of course, in establishing a "dialogic balance" and "retaining a forum for dialogue" between the different branches of government, the courts are urged to tread a thin but vital line between deferential subservience and robust activism.[6] Nevertheless, done with institutional sensitivity and pragmatic responsibility, the courts and legislatures can be dialogic partners in an institutional conversation to advance shared democratic goals. The problem is, of course, that, under the cover of dialogue and accommodation, the judges might be simply indulging in an overtly political performance; it might be that they have simply given up the ghost rather than exorcised the wraith of judicial activism.

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[5] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, 106 (2001). See also Peter Hogg, Allison Bushnell Thornton, and Wade Wright, *Charter Dialogue Revisited – Or "Much Ado About Metaphors*," 45 Osgoode Hall L.J. 1 (2007).

[6] *Bell Express Vu Limited Partnership v. R.*, [2002] 2 SCR 559 at 65-66 per Iacobucci J. See also *Vriend v. Alberta*, [1998] 1 SCR 493 and *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203. This effort to ground "democratic dialogue" is facilitated by the fact that legislatures possess the final word on Charter matters by virtue of their (almost never used) s. 33 override power and that courts can engage in a more overt balancing of political values under the s.1 "reasonable limits" provision.

Accordingly, with its apparent rejection of judicial objectivity, lack of normative content and vague invocations of democracy, these most recent rationalizations actually serve to undermine further the project of justifying constitutional adjudication's democratic legitimacy. Although both dialogic theory and pragmatic reasoning (often combined and mutually reinforcing) are intended to calm fears that the courts are undisciplined and unlimited in their powers, it manages to reinforce the perception that courts are not only at the centre of the crucial process through which political discourse and values are shaped and sustained, but also that courts get to determine the role and contribution of the other branches of government. The "degree to which judges are free to read their own preferences into law" seems to be reducible to the rather oxymoronic conclusion that they will be as "free to read their own preferences into the law" as "their own preferences" allow. There is a huge gap between the rhetoric of democratic dialogue and the reality of judicial performance. Presenting judicial review as part and parcel of a democratic dialogue merely underlines the extent to which democracy has become a pathetic caricature of itself. An elite and stilted conversation between the judicial and legislative or executive branches of government is an entirely impoverished performance of democracy; it is an empty echo of what should be a more resounding hubbub.

"Activism." It sounds as if it is something positive – healthy, vital and purposeful. But, when it is used in connection with courts, many hear it only as having disturbing negative resonances – uppity, illegitimate and uncontrolled. For them, courts that do the least are courts that do the best. Of course, the concern that courts are interfering too much in the political process is a valid one. In a democracy, the role of the judges is said to be a modest one of applying the laws which duly elected politicians enact. It is most definitely not part of the judicial responsibility to impose their own values and ideas on the country in the name of judicial review. Moreover, because courts can now more easily strike down government action, the need for judicial restraint is thought to be even more fundamental. Judges are expected to tread a sharp line between appropriate legal interpretation and inappropriate political intervention, between countermanding legislation in the name of constitutional values and trespassing onto illegitimate ideological terrain.

While these exhortations to "stick to the law" are seductive, they offer little suggestion of how such a seemingly prosaic practice can be achieved. The fact is that, whether we like it or not, judges cannot avoid making political choices. The line that they are expected to tread is so thin as to be nonexistent. Indeed, the drawing of the line is itself contested and political. It is not a matter of whether to make choices, but only a question of which choices to make and how. As I have argued, there is no way to interpret the Charter or any other constitutional provision without resorting to contested political values. Adjudication is choice, plain and simple.

When it is accepted that there is no one right or exclusive way to apply the Constitution, the charge of being political and activist loses much of its force. The only thing left to debate is whether a particular ruling is better or worse, not correct or incorrect, in its informing political ideals and commitments. And that is exactly what the critics try to avoid: they want to occupy the neutral territory of formal constitutional technique rather than contested turf of substantive political

alignment. But such ground does not exist. If you look a little more closely at those occasions on which the critics raise the spectre of activism and those on which they do not, it will be seen that the difference is a blunt ideological one. Those decisions that do not fit their political agenda are condemned as activist and those that do fit are defended as appropriate. The constitutional line is one of their own political making. Although claimed to be made in the name of merit and neutrality, there is a definite ideological cast to these condemnations.

In general, those decisions which promote greater equality (e.g., gay rights, aboriginal land claims, etc.) are dismissed as activist and illegitimate, whereas those which defend greater liberty (e.g., election spending, male property rights, etc.) are showcased as valid exercises of judicial authority. Yet, in terms of their fit with the opaque constitutional text and legal doctrine, there is nothing to choose between them. It is only that some substantive values are preferred over others. Accordingly, the claim of "activism" is simply a veiled criticism that the courts are being too progressive and making decisions that do not reflect desirable conservative values. Any court that stands by and lets constitutional values be ignored or belittled is at fault. But there is no technical or purely legal way to decide what those values are – law is politics by other means. The Charter is a site for debate, not a definitive contribution to it.

Of course, we need to be vigilant about what the courts are doing. Any court that tramples too often on the policy-making prerogative of Parliament and legislatures is asking for trouble. Judges need to recognize that they are part of democracy's supporting cast, not its star performers. But that democratic watch should itself be open and honest. It is what the courts are being active about which is the key. It is no more or less political to maintain the status quo than it is to subvert it; conservatism is as ideological as progressivism. It hardly advances the democratic cause to deploy subterfuge and to pass off political commitments as constitutional mandates. Decisions should be celebrated or condemned for the substantive values that they uphold, not for their vague failure to respect some spurious formal distinction between making and applying law. The fact is that any judge who stands by and lets his or her sense of constitutional values be ignored or belittled is at fault.

If we are to have a genuine debate about what makes a "good judge," let alone a great one, it is essential that we understand and accept that merit and ideology are inseparable companions. For example, in the recent and high profile case of *Chaouli* (in which the Supreme Court struck down as unconstitutional certain provisions of the Canada health care system), the judges split along predictable political lines. As they have consistently done in their lengthy judicial careers, Chief Justice McLaughlin and Justice Major emphasized the liberty dimensions of the constitutional compact. In contrast, Justices Binnie and LeBel placed more emphasis on its equality demands. That division of views was not technical or formal, but was clearly and expressly based on disagreements about contested and substantive political commitments.

This critical claim that "judging is inescapably political" should not be taken as tantamount to suggesting that judges simply legislate their political preferences and camouflage them behind legal doctrine and rhetoric. While the occasional judge

might do that, those rogue officials are and should be roundly condemned. The great bulk of judges perform their allotted task with genuine integrity and good faith. But they act no less politically for that. And the middle-of-the-road judge is no less political for that either. Ironically, some of Canada's most celebrated judges are not praised solely for their formal qualities or analytical prowess. Brian Dickson and Bertha Wilson, for example, were justly celebrated for the way that they left their substantive mark on the law and the Constitution. It was because of their "large and liberal" political views that they are remembered, not in spite of them. How they creatively interpreted freedom and equality was a mark of greatness, not a stain on their largely meritorious careers. Their merit as judges was not only indistinguishable from their ideology, but also was in large part reducible to that same ideology.

Of course, judges are rarely ideologues in the sense that they pursue a dogmatic or even consistent line throughout their adjudicative careers. Judges are not only divided among themselves, but within themselves. Their political commitments provide a context or framework within which they approach issues and nudge them in certain directions or justifications. But those deep-seated preferences do not determine in any mechanical manner the cut or content of their decisions. Adjudication is political, but it is not crude or arbitrary for that. Judges play with the law's norms as they work within them. It is not that they are entirely free to do what they want or are fully constrained by the laws.

MOVING FORWARD

It should be clear that the upshot of the merit-ideology debate is that, when we select judges, we should pay attention to their values, not try to ignore them. Pretending to do otherwise is not only a mistake, but also a fraud on democracy and the Canadian people. If adjudication is and must be about values and ideals, then we owe it to ourselves to inquire into the values and ideals of those who are or are about to be judges. By this, I do not simply mean look for candidates who are more representative of Canada's diversity. This is important, but there is no necessary connection between a person's gender or ethnicity and his or her particular political views. A diverse judiciary is a necessary component of a strong judiciary, but not a sufficient one.

Because adjudication is inescapably political, it is important that we know more about some of the basic leanings and values of those people with whom we continue to entrust some of the most heated and crucial matters in contemporary affairs. This is not to pry or undermine the legitimacy of the legal system. If adjudication is and must be about values and ideals, then we owe it to ourselves to inquire into the values and ideals of those who are judges. This demands a process that allows for and facilitates such inquiries. Mindful of the increasingly potent role of the Supreme Court in Canadian politics, it is now even more incumbent on those committed to democratic change that they ensure that this opportunity is not lost. Indeed, the government should be encouraged to have the political courage of its

democratic convictions; it should go the whole nine yards in democratizing the courts through the appointment of judges.

One of the better ways to achieve that is by way of judicial appointments through a democratic process. There is an inevitable politics to judicial appointments; there always has been and always will be, even if it masquerades under the dubious label of "merit." But the choice is not between a political and a non-political process of judicial appointments. Rather, it is a straightforward choice about whether the politics of the judiciary or the politics of the public at large, as expressed by its elected representatives, should prevail. While many will consider this a weak or even dangerous reform, it is necessitated by the nature and performance of the judicial function in a 21st century constitutional democracy. Such a politically informed and politically charged process will not contribute to a greater politicization of the judiciary; judges are already and inevitably a thoroughly political group. It will instead bring those politics into public view and render them more available for public scrutiny. After all, the politics of the public has more democratic legitimacy than that of the judges.

The need to ensure judicial independence is not resolved by abandoning all efforts at political accountability. There needs to be a democratic trade-off between independence and accountability. If judicial independence is to mean that judges are left almost unregulated in their activities and behaviour, it is vital that the process by which they are appointed be as democratic as possible. This most certainly does not mean that the legislative branches have no role to play as the present debate seems to suggest. Indeed, it is only with the involvement of these branches of government that the courts can be entrusted to fulfill their adjudicative responsibilities in a meaningful, if strained, democratic manner.

While there are more radical measures which might be taken, there are several less extreme steps that could be adopted which would better incorporate the understanding that "law is politics" and that judicial decision-making requires judges to make contested and controversial political choices. The most important innovation would be to create a more democratic appointments process. This could be achieved by establishing an independent commission. Any such body would need to be as diverse and as representative as possible. Accordingly, it might consist of about 15 members of whom 5 would be appointed from the House of Commons, 5 would be judges, and 5 would be citizens; tenure on the committee would be limited to three years and the chair of the commission would be one of the lay members. Confident that no particular constituency (i.e., judicial, political or lay) had a lock on the commission's work or decisions, the commission's task would be to establish appropriate criteria for appointment which took seriously the need for a diverse and talented judiciary.

Candidates could be identified either by application, nomination or search: interviews would be held and candidates would be subject to an intensive vetting. There could be rules to ensure both geographical representation (as presently exist – three each from Quebec and Ontario, two from the West and one from the East) and diversity in terms of women and visible minorities. Also, threshold rules for

eligibility in regard to professional experience and qualification might be relaxed to ensure that otherwise meritorious candidates are not excluded. Contrary to the received view that "it is at lower levels of the judiciary that the criteria might need to be re-examined," such innovations are best made at the highest level in order to confirm the sincerity and importance of the commitment to diversity and change. In all its activities, the commission would ensure that diversity was not a secondary consideration, but a primary component of "merit."

The recommendations of the commission would be final and direct. The diverse composition and democratic operation of the commission would obviate the need for approval by the prime minister or confirmation hearings in Parliament. This is not because such procedures are inconsistent with the move to take the Supreme Court out of the political arena, but because the commission itself will perform such a role more effectively. So structured, it will be less likely to turn the appointments process into a media circus as in the United States. Also, there should be a public register of "judicial interests" and a tougher set of conflicts rules under a comprehensive code of judicial conduct which could be administered by the appointments commission. Judges should also have a fixed tenure of appointment of no more than 12 years. While the commission would have the power to receive complaints and discipline judges, it would not be able to dismiss judges without formal approval by Parliament.

CONCLUSION

While this package of reform proposals will not guarantee both the democratic accountability and institutional independence of the judiciary, it will better deal with the realities of judicial authority and power in a constitutional democracy. At a minimum, it will get beyond the simplistic dichotomy of the merit-ideology debate that presently holds the appointment process in its paralyzing grip. Genuine progress in judicial appointments will only be made when it is accepted that acknowledging the irrepressible ideological dimension to good adjudication will improve the democratic validity of the appointment process. Moreover, the fear that exposing judges or their politics to increased democratic scrutiny will undermine their legitimacy is a canard. More, not less, information about our rulers is the best route to an improved democratic polity. Better the devil you know than the devil you don't.

III

ISSUES AFFECTING THE LEGITIMACY OF THE SUPREME COURT OF CANADA

10

REFORMING THE SCC: RETHINKING LEGITIMACY AND THE APPOINTMENT PROCESS

Nadia Verrelli

L'auteure réfute dans ce texte la nécessité, la légitimité et l'efficacité des modifications qu'on voudrait apporter au processus de nominations des juges de la Cour suprême du Canada. Car une réforme qui accroîtrait le rôle des provinces et la transparence du processus – pour régler respectivement les difficultés liées au fédéralisme et au déficit démocratique – échouerait à résoudre le problème fondamental de la Cour, à savoir sa légitimité d'organe non élu investi du pouvoir judiciaire de contrecarrer ou de confirmer les volontés et avis du gouvernement élu d'un État démocratique. C'est plutôt une compréhension juste et universelle du rôle et des rouages de la Cour suprême qui légitimerait à la fois son fonctionnement et les décisions de ses membres, soutient l'auteure, qui envisage plus précisément la créativité et l'indépendance judiciaire de la Cour comme des éléments intrinsèques de validation.

INTRODUCTION

The prime minister's power to unilaterally appoint justices to Canada's final court of appeal has long been regarded as controversial. Jacob Ziegal (1999), Peter McCormick (2000) and Ted Morton (2006), for example, argue that the appointment process suffers from both a democratic deficit – it is a non-transparent, non-accountable process – and a federalism deficit – the federal government alone appoints justices to a court that rules on, among other things, federal-provincial relations. According to Lorne Sossin (2008, 12), the appointment process ought to be reformed because it is out of step with our legal and political culture. The prime minister alone, with no formal or binding input from provincial premiers or other advisors and with no public scrutiny, determines who sits on Canada's highest bench – a bench that wields a lot of power as in most instances it has the final say in the way the Canadian Constitution is understood. Moreover, the perceived democratic and accountability deficits are magnified when the "activist" court

renders decisions that seemingly contradict dominant ideologies and the will of the majority, or when the court intrudes upon or overtakes policy decisions that should be made by elected governments (Cotler 2008, 133). Today, court watchers are very interested in the activist stance of the court, particularly in connection with the *Charter of Rights and Freedoms*. Coupled with the old-fashioned system of prime ministerial appointment, this activism seems to contradict Canadian democratic and federalism principles and leads critics to question the legitimacy and credibility of a court fashioned under the system.

The SCC in the post-Charter era plays a central role in Canadian life and this can be construed as problematic, controversial or even a conundrum. According to Irwin Cotler, the court represents the "anti-majoritarian paradox where unelected, unrepresentative and unaccountable judges [usurp] the decision-making process" (ibid., 132). Given the growing importance of the court, which deals with high profile cases on the *Charter of Rights and Freedoms* and federalism, among other things, and given the ongoing debate regarding the prime minister's unfettered power to appoint the SCC justices, many would argue that the time is ripe indeed to reform the appointment process. The question thus becomes: Should the appointment process be reformed to address the democratic and federalism deficits of the institution? The short answer is no.

The main issue underpinning common criticism of the Court and fuelling contemporary calls to reform how justices to the SCC are appointed is the Court's power of judicial review and its ability and tendency to usurp the democratic decision-making process. How do we reconcile the fact that a non-elected body exercising judicial discretion and creativity has the power to overturn the decisions of a democratically elected government and the indirect power to alter and shape the substance and understanding of the Canadian Constitution? This paper argues that reforming the appointment process so as to ensure a provincial role to address the federalism deficit or a more transparent appointment process to address the democratic deficit does not deal with this fundamental concern. Rather, we need to recognize that judicial discretion and creativity are not absolute nor are they immune from challenges by governments or by the public (because of various institutional mechanisms in place that facilitate challenges). And we need to expand our understanding of legitimacy to acknowledge the importance and necessity of judicial discretion and creativity. Both these observations may help us resolve this anti-majoritarian paradox. That said, the paper proposes that a proper understanding of the role of the Court *and* the mechanisms built into the Canadian political and judicial system to ensure that the Court properly and faithfully fulfills its role help to ensure the Court's legitimacy and the legitimacy of its decisions far better than a reformed appointment process.

The first part of the paper focuses on the role of the Court, followed by a review of how SCC justices are appointed and the criticism often associated with this informal process. The second part looks specifically at judicial independence and the judicial creativity of the Court in reviewing legislation and giving meaning to the Canadian Constitution and argues that judicial independence and judicial creativity and discretion do indeed legitimize the Court and judicial review. For

the purposes of this paper, the concept of judicial independence is understood as an institutional matter. The principle was well defined by then Chief Justice Brian Dickson in *Beauregard v. Canada*, 1998: "Judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusion by, or even intertwining with, the legislative and executive branches" (S.C.R. 56 at p. 77). Judicial creativity and discretion, used interchangeably, are understood as the court establishing new legal standards or adapting existing principles and legal standards to new situations based on their understanding of the principles and of the facts of the case before them.

THE ROLE OF THE SCC[1]

Generally speaking, the SCC as an institution is understood to be an arbiter/adjudicator – the Court resolves disputes between two parties by applying law and legal principles as determined in the political arena and by the courts themselves to the facts of the case. This understanding of the Court's task embraces the idea that an independent body is needed to settle disputes that arise between the parties before them (Knopff 1983, 586). Additionally, the Court can be seen as a policy-maker: the Court conducts itself as a political actor by making policy choices and giving these choices the force of law (Weiler 1974, 6). Paul Weiler writes: "In deciding the appeal, judges move gradually, but inevitably from applying the law to interpreting the law to creating the law" (ibid., 7). The SCC acts as both the arbiter/adjudicator and the policy-maker; the two roles are interconnected in the sense that reviewing the impugned legislation or interpreting provisions of a constitution can lead to a new understanding of either a law or a constitutional power.

This power and the ability of the judiciary to review legislation and government action have come to be viewed as fundamental for three reasons. First, the language of the constitution is broad so as to ensure that it is adaptable to a changing society. However, the broadness of the language leads to the overlapping or ambiguity of powers or rights. Thus the courts, through judicial review, ensure the adaptability of the constitution while clarifying the meaning of it. Second, judicial review of a constitutional issue by an impartial body is necessary as none of the parties, including the government, can be both judge and jury in its own cause. Third, in public law cases, it is up to the courts to determine which aspect of the impugned legislation is the most important one; the government cannot tell them this (Lederman 1965, 110). In short, judicial review helps give practical meaning to the words and concepts of the law and the constitution, all of which can be vague and ambiguous.

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[1] We need to note that the Canadian judiciary and more importantly, the SCC, is not, by the Constitution, established as a separate branch of government. As such, its role is not clearly defined or articulated in the Constitution. Despite this however, "it has become increasingly separate in practice" and has carved out a role for itself, even if this role has not always been nor is always clear (Russell 1987).

In order for the court to fulfill its role, and to legitimize its adjudicative function and maintain the confidence of the public, it must be a genuinely independent and impartial third party; this is a normative requirement. Peter Russell writes: "Judicial independence is a hallmark of liberal democracy" (2001, 18). In *R v. Valente*, the Court identified three conditions that secure this independence: first, security of tenure; second, financial security; and third, administrative independence ((No. 2) [1985] 2 S.C.R. 673). Judicial independence contributes to the idea that the Court is neutral and impartial when it reviews government legislation. However, the judiciary, and more specifically the SCC, are tied to and are "an integral part of a country's political system" (Russell 1987, 21). First, the appointment of judges is dependent on the political system; second, the enforcement and effectiveness of court decisions is dependent on the actions of other branches of government; third, a cooperative relationship is needed between the judiciary and the other branches of government in order to ensure the maintenance of judicial institutions; and fourth, judges are aware of the particular ideological leanings of the laws and adjudicate accordingly (ibid., 21).

Essentially, this means that there is a tension between judicial independence and judicial impartiality. Where judicial independence is an institutional matter secured through, amongst other factors previously mentioned, the freedom from unwarranted intrusion by other branches of government on the judicial domain, judicial impartiality is a personal trait. It "refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case" (*R v. Valente* at 15). The objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality: "judicial independence is but a means to an end" (Sossin 2008, 20). Though independence is the cornerstone, a necessary prerequisite for judicial impartiality – securing the independence of the courts – it does not necessarily guarantee their impartiality. The review of impugned legislation and the interpretation of the constitution are not simply technical and non-political actions of the SCC. In deciding cases, judges do consider and are influenced by socio-political factors. Thus a judge could very well be both independent and partial. Further to this, the decisions of the SCC are not isolated, nor do they occur in a vacuum. The courts in general, and the SCC in particular, "do promote change in public policies and assist individuals and groups who are challenging the activities of other branches of government" (Russell 1987, 3).

Acknowledging that there can be a tension between judicial independence and impartiality does not mean that these two concepts are meaningless in the real world of politics (ibid., 22). A degree of impartiality, or at least the illusion of it, must be in place in order to sustain the legitimacy of the judiciary and, in turn, the laws of the state. However, this tension does raise the ubiquitous issue of subjectivity – is the law what judges say it is? For McCormick, Morton and others, the answer is yes, and this is why the appointment process needs to be open, transparent and accountable.

HOW ARE SCC JUDGES APPOINTED?

The *Supreme Court Act, 1985*, states that any person, provided that they are or "have been a judge of a superior court of a province or a barrister or advocate of at least ten years at the bar of a province," can be appointed to the SCC (*Supreme Court Act*, 1985). The Act further mandates that three of the nine SCC justices, all of whom are appointed by the Governor in Council on the recommendation of the prime minister, be from Quebec, where they are trained in the civil law. Other than these legislative requirements, the Act stipulates no other obligation for the Governor in Council to follow in the appointment of justices. However, conventions have developed over the years that ensure regional representation on the court. Typically, the remaining six seats of the SCC are filled by one judge from British Columbia, one from Alberta, Manitoba or Saskatchewan, three from Ontario and one from any of the four Atlantic provinces.

In addition, an informal process of consultations is in place. In devising a short list of candidates, the justice minister consults various actors within the legal community, such as the Chief Justice of the SCC, other SCC judges, the Chief Justice of the provincial superior court and the attorney general of the province where there is a vacancy, and at least one senior member of the Canadian Bar and a senior member of the law society from the province where there is a vacancy. Once a shortlist is devised, the justice minister consults with the prime minister and assesses the candidates according to their judicial record, professional capacity, personal characteristics and likely contribution to the court. A candidate is chosen by the prime minister, approved by cabinet and finally appointed by order in council (Peach 2005). Despite this informal process and the consultative conventions developed over the years, the ultimate choice of who is appointed to the court rests with the prime minister.

DEMOCRATIC AND FEDERALISM DEFICITS

According to critics, though mechanisms are in place to secure judicial independence, the appointment process muddles it by compromising the perceived impartiality of judges. The question of judicial independence is not necessarily whether government can influence the SCC in its decision-making process, but whether the prime minister can influence the direction of the Court, be it left or right-leaning, provincialist or centralist, through the appointment process. As it is now, there are no mechanisms in place to prevent this from happening, as the prime minister can choose whomever he pleases to sit on the bench and this can influence the direction the court takes when giving meaning to the Constitution. So, because the process is perceived to be tainted, the impartiality of the judiciary could also be perceived as tainted.

Consequently, the problem facing the Court today is an apparent lack of legitimacy stemming from how its judges are appointed. The appointment process is undemocratic and accordingly the Court is criticized for the lack of transparency in its staffing and for being too removed from public scrutiny. According to

critics, neither the judge who exercises judicial discretion when interpreting the Constitution nor the prime minister who appoints the judge to the court seems to be accountable to anyone (Sossin 2008, 11). Thus, the Court appears to suffer from a democratic deficit.

In addition to the democratic deficit, the SCC "suffers from a federalism deficit" because one order of government unilaterally appoints the judges (McCormick 2000). Impartiality and independence are seemingly compromised: the court rules on the federal – provincial division of powers and because it does not mechanically interpret text "but reads purposes into policy consequences out of a constitutional document, it is wrong for one order of government to name the judge on its own" (ibid., 9).

Both the democratic and the federalism deficits lead critics to call for a more transparent and accountable process when appointing justices. Such a process would be more in tune with Canada's democratic and federalism principles and would help legitimize the SCC when fulfilling its role as an independent and impartial arbiter. A process reformed in the manner suggested by Harper and the critics – an ad hoc committee either to confirm or review the nominees to address the democratic deficit or a role for provinces to address the federalism deficit – appears to address these problems. But it does not affect the underlying theme fuelling current criticisms of the court – how do we reconcile the Court's power of judicial review and its use or misuse, according to critics, of judicial discretion with liberal democratic principles?

ACCOUNTABILITY

For the critics, the legitimacy of the SCC as an institution is partially gained through a process of selection that is transparent and accountable. This includes the idea of the prime minister being prepared to justify his or her choice to legislators. He or she ought to account for the thought process employed when deciding on the next judge. But the legitimacy, transparency and accountability the critics seek to ensure begin and end with the appointment process. It seems that they are only concerned with executive accountability. While this may satisfy the current concerns regarding the perceived independence and impartiality of the courts, it does not address the underlying issue fuelling calls for a more transparent process, namely the discretionary choices of judges on the bench. Peter McCormick, for instance, is concerned with the change of the Court's direction regarding aboriginal rights (*R v. Marshall*, 1999) and the rape shield law (*R v. Ewanchuk*, 1999) since Justice Beverley McLachlin assumed the role of Chief Justice. He implies that her new position and her "left leaning" tendencies evident in *Marshall* and *Ewanchuk* clearly demonstrate that discretionary choices and the scope of rights and powers guaranteed in the constitution "are handled differently by different judges" (McCormick 2000, 9). McCormick argues that the Court in *Marshall* "abruptly changed its ground" despite the fact that "neither the law nor treaty had changed" (ibid., 8). In *Ewanchuk* the Court "meekly retreat[ed] from the position it had so firmly proclaimed a few years ago [in *R v. Seaboyer,* 1991]." This would be more palatable if the process employed to appoint new justices to the SCC

were open and transparent and more inclusive (ibid., 9). While he is correct that an appointment process that eliminates prime ministerial unilateralism or involves legislative scrutiny of nominees would strengthen the credibility and legitimacy of the SCC as an institution, it would not address the underlying issue of judicial creativity or discretion, in particular when judges give an expansive reading of the rights or powers guaranteed in the Constitution. Once judges are appointed in a new "open, transparent and accountable" process and the legitimacy of the court as an institution is strengthened, what mechanisms are in place to ensure that the court does not abuse its discretionary power and that its decisions continue to be regarded as legitimate?

LEGITIMACY, AND JUDICIAL CREATIVITY AND DISCRETION

For legal positivists, the legitimacy of the court when rendering decisions rests upon the idea that it applies set and already established principles to the case before it (Weiler 1968, 426); anything that deviates from this ideal, like judicial discretion or creativity, damages the court's legitimacy and consequently the legitimacy of its decisions. The reality is that the law must change in order to adapt to an evolving society. However, the changes cannot be so radical as to upset the system in place by swerving dramatically from the values of the society at large.

For the late Chief Justice Bora Laskin (1955–56), judicial creativity was required to fill in the gaps of the law. Gaps are sometimes simply there in the law, or they arise because society changes in a way that the Fathers of Confederation could not have imagined possible. Good examples of the latter are the environment or the Internet, wholly new subjects of legislation. It is, therefore, the duty of the courts to ensure that the law is in tune with society.

Judicial creativity is also necessary to correct mistakes (Réaume 1985, 448). Sometimes a rule is, simply put, wrong. As such, it becomes necessary for the courts to re-evaluate and re-assess law, making it acceptable, in certain situations, for the courts to overrule precedents as strict adherence to them may lead to the stifling of justice. The idea of serving social ends should guide the courts. Nonetheless, the courts, when articulating the new "aspirations of society" (Weiler 1968, 427) or establishing new standards or principles or applying existing principles to new situations, need to be attuned to the present Canadian system of representative democracy and the reality that their views may be different from those of the government.

For this reason, judicial creativity must be constrained (Laskin 1955–56). First and foremost, change brought about by court decisions should be gradual; judges should only formulate principles that are already evident in society. Second, in restricting the sources used by the courts, the judicial process necessarily constrains creativity. For instance, Laskin proposes that sources should be limited to social consensus. This would limit change to that which society is ready to accept (Réaume 1985, 459). Third, if a statute is ambiguous, the courts should then refer to the policy behind the statute with a focus on parliamentary discussion and legislative history. If this is of no help, then the judge "would have to use his or her knowledge of the

trend of social forces" (ibid., 461). Judicial creativity does not necessarily mean that the law is what judges say it is, but it is a recognition that judicial review is not simply about the objective application of already established principles.

Further to this, judicial creativity is not absolute. Indeed, our constitution has built-in mechanisms to ensure that it is limited and to ensure that courts are accountable to the constitution and the principles that underpin it, including the rule of law. To be absolute means that judicial decisions need not be questioned, studied, analyzed or revised. This is not the case in contemporary Canada. Academics and lawyers have made careers in the analysis, criticism, review and challenge of court decisions. Governments as well have the opportunity to review and challenge court decisions, and thereby can protect the legislative intent and the principle of parliamentary supremacy when they think the court simply misjudges public sentiment. A good example is the government's response to the court decision in *R v. Seaboyer*, 1991. In this case, the Court struck down provisions of the *Criminal Code of Canada* known as the rape shield law for violating s. 7 (life, liberty and security of the person) and s. 11(b) (presumption of innocence) of the Charter. The government, instead of accepting the decision at face value, decided to revise the rape shield law. After consultations with women's groups and the close scrutiny of the revised legislation vis-à-vis the Court's reasoning in *Seaboyer*, by a parliamentary committee's (set up to review the proposed new legislation), a new law was passed and subsequently upheld in *R v. Ewanchuk*, 1991.[2] In this case, the Court did not, as McCormick accuses, "meekly retreat from its positions" articulated in *Seaboyer*. Rather, the Court considered the new law, the government's objective in enacting the law, and balanced these with the rights of both women and accused sexual offenders before finding that the new rape shield law does not infringe upon the rights of the accused.

Further to governments' ability to revisit court decisions, built-in mechanisms in the Charter ensure that governments have the opportunity to protect parliamentary supremacy and ensure that the SCC is accountable to the will of the people. Section 1 of the Charter forces the Court to consider societal values and principles when interpreting sections of the Charter and when determining whether an impugned law contradicts the rights and freedoms entrenched therein. Similarly, section 33 of the Charter, the so-called notwithstanding clause,[3] enables the legislature to override specified rights in its law-making process if it thinks that its legislative purpose requires such an action. In fact, in reaction to a decision of the SCC, the Quebec government subsequently invoked section 33 to shield its signage law

[2] This is a brief account of the process of revising the rape shield law. For a more detailed account, please see Hiebert, J., *Charter Conflicts: What's Parliament's Role?* (Kingston & Montreal: McGill-Queen's University Press, 2002).

[3] Section 33 of the Charter enables governments to override sections 2 and 7-15 of the Charter.

from the reach of the Charter.[4] The use of section 33 was also contemplated by the Alberta government of Premier Ralph Klein soon after the *Vriend* decision. In *Vriend*, the court ruled that the equality provision in the *Alberta Human Rights Code* includes sexual orientation. In the end, the Klein government responded to public disapproval of its inclination by deciding against the use of section 33, and sexual orientation continues to be protected in Alberta's code.

Measures built into the constitution to ensure that judicial creativity is not absolute and that the court continues to be accountable to the constitution and to the rule of law are strengthened when we consider the history of the court's decisions on the Charter. Analysts on the political right often refer to the court's expansive understanding of Charter rights as judicial activism, arguing that the court enables "court parties" to succeed in promoting and effecting the will of the minority irrespective of the will of the majority.[5] Miriam Smith (2002) effectively demonstrates that this is in fact false. Studying the evolution of the gay, lesbian and transgendered movement, Smith argues that the court in effect rendered decisions that reflected society's changing and expanding understanding of equality. The fact of the matter is, while Canadians understand the importance of judicial creativity, we also understand the necessity of it not being an absolute. More importantly, the court understands the importance of not abusing the power it has to overturn government legislation or to create new legal principles or adapt existing principles to new situations: it must maintain its legitimacy. As Marc Gold argues, "our courts are acutely aware of the principal role that they have assumed in Canadian society and they want their decisions to be deemed acceptable to the society" (1985, 15). At the same time, however, the court needs the freedom and ability to ensure that the constitution remains relevant. This inevitably means expanding or creating new legal principles to adapt to a constantly evolving society. Accepting this does not necessarily lead to questioning the legitimacy of the court and of court decisions.

Recognizing that judicial review requires more than merely the objective application of principles need not colour the role of the court, the importance of it, or even its legitimacy in performing its function. It is essential for the legitimacy of the court that the decisions that shape the law and give meaning to vague terms of the law are based on "the most reasonable application of our law" and not arbitrary rules (Russell 1987, 26). This does not mean that the appointment process need not be transparent or free from possible political manipulation. However, an open and transparent appointment process only partially legitimizes the court. It does not necessarily eliminate the reality of the subjectivity of judges or judicial discretion when judges interpret and apply laws and legal principles. The puzzle of juggling

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[4] After the Court found that the signs law in Bill 101 was unconstitutional as it infringed upon the freedom of expression protected under the Quebec Human Rights Charter and the Canadian Charter, the Quebec government reinstated the law by invoking the notwithstanding clause (s. 33).

[5] See Rainer Knopff and Ted Morton, *Charter Politics,* (Scarborough: Nelson Canada, 1992).

the accountability and legitimacy of the court and its decisions as well as addressing the anti-majoritarian paradox still lingers with a reformed appointment process.

CONCLUSION

It is not clear how the reforms proposed by government and other academics reviewed in this paper would ensure a better SCC than we have had to date. Without doubt, the appointment process would be more transparent and the prime minister held formally accountable to the legislators for his or her appointment, and the appointment process might continue to evolve, as Sossin argues. But the process in place today, though not prescribed by law, is not as arbitrary as the critics imply. It is a well thought-out process, one that involves input from various actors in the legal profession as well as elected politicians. Furthermore, simply reforming the appointment process does not ensure that the court remains a legitimate institution or that its decisions, especially if they seemingly contradict popular opinion, continue to be accepted as legitimate. To date there has not been a decision rendered that has offended the country or put our judicial system into doubt. In fact, the Standing Committee on Justice, Human Rights and Emergency Preparedness stated that "the Supreme Court exercised [its] responsibilities in an exemplary fashion and that its excellence resonated beyond its borders" (Cotler 2008, 132).

The legitimacy of the SCC is, of course, contingent on how well it and its decisions reflect the mores and values of our evolving society. I would suggest, however, that this legitimacy is more a function of how the Court exercises its power of judicial review than it is of how its members are appointed. Legitimate decisions are products of a review process that provides latitude for the exercise of judicial discretion and creativity. But this latitude must be constrained by the constitutional mechanisms that enable governments and citizens to review, analyze, challenge and, if need be, ultimately to reject – either by re-enactment or by resorting to the notwithstanding clause – court rulings. It is these constraints, and the manner in which they are exercised, that are the sources of legitimacy.

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THE LEGITIMACY OF CONSTITUTIONAL ARBITRATION IN A MULTINATIONAL FEDERATIVE SYSTEM: THE CASE OF THE SUPREME COURT OF CANADA*

Eugénie Brouillet and Yves Tanguay

La légitimité des tribunaux et celle des juges chargés d'opérer un contrôle de constitutionnalité des normes adoptées par les organes politiques de l'État appelle une réflexion constante sur les façons de concilier démocratie et constitutionnalisme. À cette question de la légitimité de la justice constitutionnelle en régime démocratique, s'ajoute, au sein des fédérations, celui portant sur la légitimité fédérative. En contexte fédératif, les tribunaux et les juges sont investis du rôle d'arbitre des différends juridictionnels qui ne manquent pas de naître entre les ordres de gouvernements fédéral et fédéré relativement aux sphères de compétence que leur réserve la Constitution. Dans l'exercice de cette fonction arbitrale, les juges sont appelés à jouer un rôle fondamental dans le maintien d'un équilibre entre les pouvoirs respectifs des ordres de gouvernement. À cet équilibre fédéral/fédéré pourra également s'ajouter celui entre majorité/minorité(s) nationale(s) au sein des fédérations multinationales. Dans une première partie, sera d'abord esquissé un cadre analytique de la légitimité fédérative des cours constitutionnelles articulé autour de trois axes : la légitimité institutionnelle, la légitimité fonctionnelle et la légitimité sociale. Dans une seconde partie, sera évalué le plus ou moins grand degré de légitimité fédérative de la Cour suprême du Canada à l'aune de ce triple point de vue. Cet exercice permettra de mettre en exergue certains problèmes eu égard à la légitimité de cette dernière en sa qualité d'arbitre ultime des différends fédératifs.

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INTRODUCTION

Legitimacy is inherent in any study of power because it lays the foundation of the authority to impose volition, that is, to compel others to act in accordance with a directive.[1] Legitimacy may be defined as "the morally and socially acceptable and accepted attribute beyond strictly legal considerations of an institution, a decision or an object."[2] It is never wholly acquired nor lost: its ever-changing existence constitutes its inescapable characteristic (ibid., 687). It is forever up for evaluation and can never be settled. In this regard, an institution (or power) will always be to a greater or lesser extent "legitimate."[3] Hence, we may refer to a spectrum of legitimacy.

The issue of the democratic legitimacy of judicial power is far from being a novelty.[4] It is unceasingly questioned and debated for purposes of its own protection. To these incessant enquiries into the legitimacy of constitutional justice within a democratic regime, one may add the notion of federative legitimacy within federations. Within a federative setting, courts and judges are invested with the role of arbitrating jurisdictional disagreements which inevitably spring from the realms of federal and federated governments pertaining to the area of jurisdiction reserved to them under the Constitution.

Contrary to its democratic dimension, the federative dimension of the notion of legitimacy has seldom been a subject of interest since the entrenchment of the Charter in 1982.[5] As such, it is this issue upon which our analysis is focused. In the first part, an analytical framework is drafted illustrating the federative legitimacy

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[1] Février, Jean-Marc, "Sur l'idée de légitimité," (2002) 92 *Revue de la recherche juridique* 367, p. 368 and 369.

[2] Frémont, Jacques, "La légitimité du juge constitutionnel et la théorie de l'interprétation," in the *Rapports canadiens au Congrès international de droit comparé*, *Droit contemporain*, Cowansville, Éditions Yvon Blais, 1994, p. 644, p. 687.

[3] Verdussen, Marc, *Les douze juges. La légitimité de la Cour constitutionnelle*, Bruxelles, Éditions Labor, 2006, p. 49.

[4] Since the renowned work by Édouard Lambert published at the beginning of the century dealing with "government by judges in the United States," from time to time this runs through all democratic societies: Lambert, Édouard, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, Paris, Dalloz, 2005.

[5] Also sharing this opinion: Beaud, Olivier, "De quelques particularités de la justice constitutionnelle dans un système fédéral," in Grewe, Constance et al. (dir.), *La notion de "justice constitutionnelle*," Paris, Dalloz, 2005, p. 50: "More surprisingly, on the other hand, is the fact that jurists working within federative structures evade this aspect [the link between federalism and constitutional justice]"; for a Canadian viewpoint, see Baier, Gerald, *Courts and Federalism : Judicial Doctrine in the United States, Australia, and Canada*, Vancouver, UBC Press, 2006, p. 1: "Only the Charter is currently getting its due. Judicial review of the division of powers remains a topic of neglect despite its genuine importance to the study of Canadian government."

of constitutional courts[6] as it gravitates around three axes: institutional legitimacy, functional legitimacy and social legitimacy. In the second part, an evaluation is made of the greater or lesser federative legitimacy of the Supreme Court of Canada as measured from this triple point of view. This exercise will make it possible to illustrate certain problems pertaining to the legitimacy of the Supreme Court of Canada acting in its capacity as the ultimate arbitrator of federative disagreements.

GUIDELINES UNDERPINNING A FEDERATIVE LEGITIMACY THEORY WITHIN A MULTINATIONAL ENVIRONMENT

Before discussing the three-dimensional character of federative legitimacy, we shall first focus upon the role of constitutional courts as arbitrators of federative disagreements.[7]

The Constitutional Court as the Arbitrator of Federative Disagreements

Federated states generally have a judicial authority that handles the resolution of federative disagreements and ensures that the rules governing the distribution powers are duly observed.[8] This is, of course, owing to the autonomy principle of the orders of government in their sphere of jurisdiction, which means that none of them can amend the rules of the game to its own advantage.

In the exercise of its arbitration function, the constitutional court is called upon to interpret and apply the contract or the agreement concluded between the parties. In addition, it must adapt these rules based upon the evolution of societal conditions. It must strive to maintain equilibrium between the respective powers of each order of government (federal/federated equilibrium), and in a multinational context, between the national majority and national minorities.

The issue of the legitimacy of a constitutional court cannot be raised without first paying specific attention to the nature of the designated federative system, and more specifically one must closely scrutinize the contents of the original federa-

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[6] For the purposes of this paper, we shall use the expression "constitutional courts" to designate both the courts specialized in constitutional matters and the final courts of appeal in such cases (supreme courts).

[7] When discussing "federative disagreements," we are referring to conflicts concerning the distribution of legislative powers, as well as such cases that call into question fundamental aspects of the federative structure of the State, for instance: the constitutional amendment procedures, the legal status of federal and federated entities, their territories, or their possible secession.

[8] Aubert, Jean-François, *Traité de droit constitutionnel suisse,* Neuchâtel, Éditions Ides and Calendes, 1967, p. 242.

tive pact. Underlying the notion of pact, one finds the "constituent principle"[9] of any federative system. The fundamental *purpose* of the pact or federative *contract* has to do with a distribution of the legislative functions between two orders of government, either autonomous or unsubordinated amongst themselves within a given range of subjects reserved for each ones' exclusive legislative power. Once this agreement has been reached, it is then constitutionalized, which confers upon it a particularly strong compulsory power. Henceforth, it may only be amended following the consent of each order of government. If the constitutional court is the "pinnacle of the federal structure,"[10] then the constitutional pact forms the base or foundations thereof.

The interpretation, application and adaptation of the constitution by the constitutional court in its function as arbitrator in the settlement of a federative disagreement may be perceived by a majority or minority of citizens as having the effect of amending the original federative pact. Such a situation does, in fact, raise the problem of the federative legitimacy of such a constitutional court.

In the exercise of its task of adapting the federative system to new societal conditions, the constitutional court must attempt to maintain a certain *equilibrium*[11] between the specific and common interests of the groups involved. The manner in which the constitutional court will settle the various federative disagreements with regard to that which is being perceived as being adequate federal/federated equilibrium, will have considerable influence on the evaluation of its federative legitimacy.

In a federation where there is one or more national minority communities, respect for the federative nature of the constitutional structure is vital because this makes it possible to give meaning politically and legally to the minority communities' collective cultural aspirations. From this point onwards, wherever there may be found within one and the same federation both majority and minority nationalisms, the issue of federal/federated equilibrium comes to the fore with particular acuity. The arbitral function exercised by the constitutional court in a multinational context can never forego such responsibility without seeing its federative legitimacy put into question.

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[9] Greber, Anton, *Die vorpositiven Grundlagen des Bundesstaates,* Bâle, Helbing & Lichtenhahn, 2000, p. 239, quoted in Beaud, Olivier, "Du nouveau sur l'État fédéral," (2002) 42 *Droits* 229, p. 235.

[10] Verdussen, Marc, *supra* note 4, p. 27.

[11] [Translator's Note :] French language dictionaries offer the following definition: [Translation] "an acceptable relationship, a satisfactory proportion between opposing elements or a fair settlement between the parts of a whole." *Le Robert*, Montréal, Dicorobert inc., 1995, p. 802. The American College Dictionary (Random House, 1960, p. 406) proposes a satisfactory equivalent: "a state of rest due to the action of forces that counteract each other; equal balance between any powers, influences, etc."

The Three-Dimensional Character of Federative Legitimacy

From our standpoint, the federative legitimacy of a constitutional court may be appreciated from its tripartite nature of institutional legitimacy, functional legitimacy and social legitimacy.[12] Such an appreciation may only be made by taking into account the dialogical relationship that exists between these three components which are considerably interdependent with one another. Indeed, the scope of guarantees serving as a basis for the institutional legitimacy of the court is dependent upon the importance of its functions in the evolution of the federative system. Furthermore, one must note that the notion of legitimacy always takes on a social dimension since in the end it rests "upon the consent of the governed."[13]

1. Institutional legitimacy

Institutional legitimacy requires that the constitutional court be perceived as being impartial and independent. In a federative context, it must offer sufficient guarantees of objectivity or neutrality so that it cannot be exclusively likened to the institutions of the federal entity or the federated entities.

The legal status of the Court. The constitutional court derives its first legitimacy from its legal status. Since it must appear as being independent of both orders of governments, its legitimacy will obviously be strengthened if the Court's existence and jurisdiction emanate from the federative Constitution. If its status and attributions are broadly dependent upon the will of one of the orders of government, it could more than likely be perceived as playing a dual role of "judge" and "litigant" in any proceedings questioning the rights or interests of that one specific order of government.

The composition of the Court. The issue of the composition of the Court may be analyzed from the angles of complementarity, pluralism and representativeness.[14] Complementarity issues from the quest for balance among the various professional experiences of the judges, a balance that contributes to establishing the

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[12] This classification was developed and applied by Guy Scoffoni to assess the scope of the powers of United States Supreme Courts Judges and their democratic legitimacy: Scoffoni, Guy, "La légitimité du juge constitutionnel en droit comparé : les enseignements de l'expérience américaine," (1999) 2 *Revue internationale de droit comparé* 243. We have taken our inspiration from him by adapting the issue of assessing the federative dimension of legitimacy. Also taken into account is the thinking of Professor Verdussen who, in his appreciation of the legitimacy of the Belgian Constitutional court, privileges an approach that is simultaneously organic, procedural and functional. Verdussen, Marc, *supra* note 4, p. 65.

[13] Février, Jean-Marc, *supra* note 1, p. 368-69.

[14] Favoreu, Louis, "La légitimité du juge constitutionnel," (1994) *R.I.D.C.* 557, p. 575-78.

court's credibility. As for pluralism, it requires "that a single line of thought or sensitivity not be exclusively represented, otherwise such judicial authority would have no real legitimacy" (ibid., 575). This may involve political leanings in the partisan sense of the word, or social or economic tendencies, including various sensitivities regarding the judge's political and constitutional vision of the country. Representativeness, a co-runner close to pluralism, evokes the variety inherent in society, whether national, cultural, linguistic or otherwise, in the make up of the constitutional court. This final objective is even more essential in the context of a multinational federative system.

How Court members are called to the bench. Nonetheless, it remains that the court's institutional legitimacy ultimately rests upon the manner in which its members are designated (ibid., 571). In a federative system, both orders of government should participate in the nomination of judges. This is an essential condition for preserving the appearance of neutrality that a judicial arbitrator must display.

2. Functional legitimacy

Functional legitimacy requires that the duties performed by the constitutional court are acceptable with regard to the guarantees of institutional legitimacy that it sets forth.

The Court's jurisdiction. The fact that the constitutional control is entrusted to the entire judicial system or specifically to a court instituted for such purpose may have an impact upon how legitimacy is to be considered. In the first case (the *judicial review* model), the general jurisdiction of the supreme court means that it may benefit from several potential seats of legitimacy. The deficit of legitimacy with which the court may be confronted in federative issues is compensated by solid legitimacy as an ordinary court of law of final resort and of ultimate jurisdiction for matters of rights and freedoms. Such is not the case of a specialized court (the *constitutional review* model) which may only count upon its legitimacy as a constitutional court.

The type of constitutional control exercised and the mode of referral to a court. To ground its legitimacy, the functions exercised by the constitutional court must be perceived as being essentially of jurisdictional and not of a political nature. Nonetheless, the line between these two situations is not always well defined, which means that the modalities of constitutional control may influence the perception of the jurisdictional nature of the proceeding that the court exercises, and in doing so may have repercussions for the appreciation of its legitimacy. Therefore, the more opportunities the court has to exercise constitutional control, for instance by means of auto-referral or *a priori* control following the exercise of a consultative function, the more opportunities there are to play an important role in the evolution of the federative system and to present forceful institutional guarantees of independence with regard to political powers.

The interpretative paradigm. Any interpretative activity implies some form of creation. As such, judges have always had discretionary margin for stating the meaning of the law. However, such discretion assumes considerable proportions when constitutional issues are at stake. The generality of the terms used in constitutional texts are an open door to a multitude of plausible meanings. In federative disagreements, the greater the margin in interpreting a constitutional text, the greater is the court's important role in the evolution of the federative system and the danger of it being perceived as usurping the constituent's role. The choice of the interpretive paradigm privileged by the court in determining the meaning of the constitutional provisions will affect its role and its legitimacy.

Essentially, two broad forms of interpretation in constitutional matters may be distinguished: the original intent approach and the progressive approach.[15] In the first approach, the court must grant great importance to the constituent's intent in determining the meaning of a provision within the constitutional text. As such, it must establish the provision's original meaning and take this into account when adapting the text to the evolving framework of society. Now in the second, progressive approach, if there is a disparity between the constitutional text and the societal conditions in which it is to be applied, the judge is empowered to assume the constituent's role and decide what may be the most desirable constitutional prescriptions in light of their political consequences.

It is quite obvious that the second interpretive paradigm offers the constitutional court a far greater margin for weighing pros and cons than does the original intent approach. The act of granting no weight or tenuous weight to the constituent's contentions in interpreting the distribution of powers may be perceived as effectively denaturing the original federative pact, thereby undermining its legitimacy.

The power of having the "last word." Under a democratic system, the legitimacy of the judiciary rests upon the premise that it shall not have the last word in constitutional issues. It is the ultimate possibility of resorting to the constituent process that legitimizes constitutional control.[16]

3. Social legitimacy

The social component remains the centrepiece underpinning the concept of legitimacy: public recognition is the key.[17] This situation leads judges to resort to legitimization and rhetorical means to justify their decisions. In this respect, the use

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[15] Verdussen, Marc, *supra* note 4, p. 44; Brun, Henri, Tremblay, Guy, Brouillet, Eugénie, *Droit constitutionnel*, 5e éd., Cowansville, Éditions Yvon Blais, 2008, p. 199-204; Carignan, Pierre, "De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles," (1986) 20 *R.J.T.* 27, p. 32.

[16] See also Scoffoni, Guy, *supra* note 13, p. 260: "… democratic theory presupposes the existence of possible constitutional revision to counter balance constitutional control."

[17] Mercadal, Barthelémy, "La légitimité du juge," (2002) 2 *Revue internationale de droit comparé* 277, p. 277.

of principles of constitutional interpretation will play an important role. The choice of principle depends entirely on the discretion of the judge resorting thereto for the purpose of convincing her or his audience that the decision is not only reasonable, but also justifiable in law.[18]

In a multinational federative context where one finds a dynamics majority / national minority(ies), the taking into consideration of public opinion can have the effect of favouring the majority opinion to the detriment of minority opinions. In such a context, the more a variety of viewpoints is taken into account in the interpretation and implementation of the federative constitution, the more the activity of the court will rouse popular support essential for its legitimacy.

An appreciation of the extent of social legitimacy benefiting a constitutional court can be made by analyzing not directly the opinion or reactions of citizens or groups of citizens in this respect but those of their elected representatives. As such, it would be difficult to find a high degree of legitimacy for the constitutional court whose legal status, functions and decisions are continuously the subject of dissent and contention within the orders of federal or federative government.

THE LEGITIMACY OF THE SUPREME COURT OF CANADA AS THE ULTIMATE ARBITRATOR OF FEDERATIVE DISAGREEMENTS

Since the 1960s, the issue of the reform of the Supreme Court of Canada periodically is on the politico-legal agenda. It takes its place at all major federal-provincial constitutional conferences and is the subject of many reports or white papers.[19] The many efforts invested over past decades in brainstorming the status or role of the country's highest judicial body leads one to conclude that this institution is confronted by a legitimacy deficit in the Canadian constitutional order.

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[18] Perelman, Chaïm, "La motivation des décisions de justice, essai de synthèse," in Perelman, Chaïm, Foriers, Paul, *La motivation des décisions de justice*, Bruxelles, Bruylant, 1978, p. 412; Côté, Pierre-André, *Interprétation des lois*, 3e éd., Montréal, Éditions Thémis, 1999, p. 25-26; Frémont, Jacques, *supra* note 2, p. 679.

[19] To name but a few: Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Report*, 1972 (referred to as the Molgat-MacGuigan Report); Rapport du Comité sur la Constitution, Association du Barreau canadien, *Vers un Canada nouveau*, Montréal, 1978; *Task Force on Canadian Unity* , *A Future Together*, Ministry of Supply and Services, Canada, Ottawa, 1979 (referred to as the Pepin-Robarts Report); Livre blanc du gouvernement du Québec, *La nouvelle entente Québec-Canada, Proposition du gouvernement du Québec pour une entente d'égal à égal – la souveraineté-association*, 1979; Rapport de la Commission constitutionnelle du Parti libéral du Québec, *Une nouvelle fédération* canadienne, Montréal, 1980.

The Supreme Court of Canada and Arbitration

It is fitting to begin with a review of the original federative pact and its evolution in light of Quebec's identity as a nation. The Canadian state was born in 1867 following the resolve expressed by three North American British colonies[20] to join as one within a federative type of government.[21] One of the determining centrifugal factors in choosing the federative principle as the basis for the new constitution was the presence on the territory of Quebec of a majority belonging to a different national group aspiring to keep its political autonomy with respect to all issues related to its cultural identity. For Quebec, the possibility of having a twofold national allegiance (Quebecer and Canadian) was at the heart of the Canadian federative project. The birth of a Canadian nation was conceived so as to permit and foster the thriving of intrastate cultural identities. This state would not replace senses of identity or pluralism, but would be born and prosper side by side with them. Respect for the federative principle and for the autonomy of each order of government in exercising its powers was inextricably linked to the will to ensure the survival and flourishing of this unique cultural identity within the new Canadian national community (ibid., 140-45).

The prime difficulty experienced by the Canadian constituent in formally amending the constitution was to propel constitutional jurisprudence into position as the preferred means of guiding federative evolution. Hence, the complex burden of progressively adapting constitutional texts into the uncharted conditions of Canadian society fell to the courts and ultimately to the Supreme Court. This evolution, while less easily perceptible and less spectacular than a formal amendment to the constitution, became nonetheless the determining factor in constitutional change.

An analysis of Supreme Court jurisprudence since the court assumed the role of ultimate arbitrator of federative disagreements has chartered a trend toward the centralization of powers[22] that may be seen both in constitutional doctrines[23] as well

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[20] The Province of Canada (which at that time included present day Québec and Ontario), New Brunswick and Nova Scotia: the *Constitution Act, 1867*, R.S.C. 1985, app. II, No. 5.

[21] The preamble of the *Constitution Act, 1867*, Ibid, is in this respect unequivocal and states that "the Provinces (…) have expressed their Desire to be federally united (…)." As for the signification of the regime, it clearly provides for the implementation of a federation in all legal meanings of the word, namely that essentially it creates a division of legislative powers between two autonomous orders of government within their respective fields of jurisdiction. See Brouillet, Eugénie, *La négation de la nation. L'identité culturelle québécoise et le fédéralisme canadien*, Québec, Septentrion, 2005, p. 150-68.

[22] For a more exhaustive study, see ibid., p. 255-322.

[23] *Kirkbi v. Gestion Ritvik Inc*., [2005] 3 S.C.R. 302 (pertaining to trenching power); *Rothmans, Benson & Hedges Inc*. v. *Saskatchewan*, [2005] 1 S.C.R. 188 (the federal paramountcy doctrine). For a summary of the metes and bounds of these constitutional doctrines, see Brouillet, Eugénie, "The Federal Principle and the 2005 Balance of Powers in Canada," (2006) 34 *Supreme Court Law Review* (2d) 307. The Supreme Court has, nonetheless,

as in the scope of many heads of federal jurisdiction.[24] Since the 1970s, Supreme Court analyses regarding the distribution of powers have become increasingly driven by efficiency-oriented considerations to the detriment of diversity.[25] This functionalistic logic requires a decompartmentalization of the areas of legislative powers of each order of government and it evolves within a so-called modern concept of the distribution of powers,[26] which mainly works to the advantage of the central order of government.[27] It is obviously impossible, especially in this time of multiplication and complexity of state actions, to completely avoid "zones of

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recently limited the application of the interjurisdictional immunity doctrine, on behalf of a modern conception of the distribution of legislative power. *Banque canadienne de l'Ouest* v. *Alberta*, [2007] 2 S.C.R. 3; *British Columbia (P.G.)* v. *Lafarge Canada Inc*., [2007] 2 S.C.R. 86. However, this doctrine is still directed in practice only at provincial norms thereby still creating asymmetrical effects in favour of the federal government order.

[24] See in particular *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 and *Reference re: Firearms Act (Can.),* [2000] 1 S.C.R. 783 (pertaining to federal authority over criminal law); *General Motors of Canada Ltd*. v. *City National Leasing*, [1989] 1 S.C.R. 641 and *Kirkbi* vs. *Gestion Ritvik Inc*., [2005] 3 S.C.R. 302 (pertaining to federal authority in matters of trade and commerce); *R*. v. *Crown Zellerbach Canada Ltd*., [1988] 1 S.C.R. 401 and *Re*. *Anti-Inflation Act*, [1976] 2 S.C.R. 373 (pertaining to the federal power as to legislate in matters of national interest or by virtue of its emergency power). For an in-depth analysis, see Brouillet, Eugénie, *supra* note 24.

[25] The jurisprudence of the Supreme Court is indeed increasingly driven by a functionalist-oriented reasoning with regard to the division of legislative powers, for instance in matters dealing with the doctrine of national interest, federal authority over trade in general and trenching power: Leclair, Jean, "The Supreme Court of Canada's Understanding of Federalism : Efficiency at the Expense of Diversity," (2003) 28 *Queen's Law Journal* 411; Brouillet, Eugénie, *supra* note 24, p. 319-22; Otis, Ghislain, "La justice constitutionnelle au Canada à l'approche de l'an 2000: Uniformity or Pluralistic Legal Constructs," (1995-96) 27 *Ottawa Law Review* 261; Brun, Henri, "L'évolution récente de quelques principes généraux régissant le partage des compétences entre le fédéral et les provinces," in the *Congrès annuel du Barreau du Québec (1992)*, Québec, Service de la formation du Barreau du Québec, 1992.

[26] *SEFPO* v. *Ontario (P.G.)*, [1987] 2 S.C.R. 2, p. 17-18; *General Motors of Canada* v. *City National Leasing*, [1989] 1 S.C.R. 641. *Première Nation de Westbank* v. *B.C. Hydro*, [1999] 3 S.C.R. 134, p. 146-47. Quite recently the Court has restated its faith in the flexible approach to Canadian federalism in *Banque canadienne de l'Ouest* v. *Alberta*, *supra* note 27, paragraphs 35 et seq. For an in-depth study of modern and classical paradigms of legislative powers and their jurisprudential applications, see: Ryder, Bruce, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations," (1991) 36 *McGill Law Journal* 308.

[27] With regard to the exclusiveness principle see Brouillet, Eugénie, "Le fédéralisme et la Cour suprême du Canada. Quelques réflexions sur le principe d'exclusivité des pouvoirs," (2010) 3 *Revue québécoise de droit constitutionnel* (available soon at www.aqdc.org).

contact"[28] between both orders of government. On the other hand, federalism cannot in the end survive if there is a total decompartmentalization of legislative powers.

The constitutional evolution of the Canadian system operated by the Supreme Court of Canada has thereby caused a federative imbalance between the orders of federal and provincial governments in favour of the former. For a minority nation such as Quebec within Canada, the federal/federated imbalance has legal and political consequences regarding its capacity for self-determination in a number of indispensible issues considered vital to its collective development.

The Federative Legitimacy of the Supreme Court of Canada

We shall now attempt to situate the highest court of the country within the framework of federative legitimacy in light of the three-sided viewpoint developed earlier. We shall limit this paper to aspects falling within the theoretical considerations that cause difficulties in the case of the Supreme Court of Canada.

1. A defective institutional legitimacy

The legal status of the Court. Section 101 of the *Constitution Act, 1867*[29] confers upon the federal Parliament the exclusive power for the "Constitution, Maintenance, and Organization of a General Court of Appeal for Canada." Under this provision the Supreme Court of Canada was established in 1875.[30] In 1949, the possibility of making appeals to the Judicial Committee of the Privy Council was abolished in the wake of which the Supreme Court then became the final appellate court in all matters[31] and, consequently, the ultimate arbitrator of federative disagreements.

This purely statutory origin of the highest court of the country comes as a total surprise within the context of a federative system. As the ultimate arbitrator of federative disagreements, the existence and essential characteristics of the constitutional court should be rooted within the constitution, thereby protecting it from the arbitrary one-sided actions of one or more parties to the federative agreement.[32] The statutory implementation of the Supreme Court does not create a general frame of reference allowing a "reasonable and right minded person"[33] to perceive it as an independent tribunal vis-à-vis the federal government.

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[28] Beetz, Jean, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867," in P.-A. Crépeau and C.B. Macpherson (dir.), *L'avenir du fédéralisme canadien*, Toronto, University of Toronto Press, 1966, p. 123.

[29] *The Constitution Act, 1867*, *supra* note 23.

[30] *Supreme Court Act*, R.S.C. 1985, ch. S-26.

[31] *An Act to Amend the Supreme Court Act*, S.C. 1949, ch. 37.

[32] As it would happen, they come under the authority of the *Supreme Court Act*, *supra* note 34, sections 3, 35 to 43, 52, 53 and 56 to 78 (with regard to its authority); articles 4(1), 6, 12 to 24 (with regard to its organization).

[33] This criterion was developed in the *Valente* v. *La Reine* case, [1985] 2 S.C.R. 673, p. 684.

Since the constitutional amendment of 1982, one may maintain that the existence and essential characteristics of the court have been implicitly constitutionalized.[34] Little does a debate on this subject matter since the Supreme Court is essentially a federal institution based upon its organization and modus operandi. The legal obscurity surrounding its status is hardly a sound footing for its federative legitimacy.

The composition of the Court. The composition of the country's highest tribunal is provided under the *Supreme Court Act*. Under this Act, the Court "consists of a chief justice (…) and eight puisne judges."[35] With respect to the judiciary's *pluralism* considering the judges' political and constitutional vision of the country, more specifically their concept of the federative system and the way in which it is called upon to evolve, the fact that they are all appointed by the federal government certainly partially explains the centralist evolutionary trend of the Court's federative jurisprudence.

As to the question concerning the *representation* of the variety inherent in Canadian society (national, cultural, linguistic or otherwise), the *Supreme Court Act* obliges the federal government to appoint three judges from Quebec out of a total of nine appointees (ibid., s. 6). This legislative requirement which, since 1982, has likely acquired constitutional status,[36] aims at ensuring a Supreme Court bench with judges trained in Quebec civil law. It is also possible to consider an underlying desire to ensure the adequate representation of Quebec on the court owing to its distinctive culture.

Aside from this rule dealing with Quebec's representation, the federal government is in no way restrained in the exercise of its discretionary power of appointment. Although the Court has always assigned to the bench a given number of French-

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[34] Certain academic commentators, of whom we are a part, maintain that sections 41d) and 42(1)d) of the *Constitution Act, 1982,* S.C.R. 1985, app. II, no. 44 provide from now on complex amendment procedures to abolish or modify the current composition of the Court and its jurisdiction of final appeal. Among those who support this view are: Brun, Henri, Tremblay, Guy, Brouillet, Eugénie, *supra* note 18, p. 232-235 and 814; Lederman, W.R., "Constitutional Procedure in the Reform of the Supreme Court of Canada," (1985) 26 *C. de D.* 195, p. 196-197. As for other authors, sections 41 and 42 of the 1982 Act only serve to indicate constitutional amendment procedures to be followed in order to enshrine in the Constitution the current provisions of the *Supreme Court Act*. Those who hold this interpretation include: HOGG, Peter W, *Constitutional Law of Canada*, Looseleaf Edition, Toronto, Carswell, 2008, p. 4-21, 4-22 and 4-27; Woehrling, José, Morin, Jacques-Yvan, *Les constitutions du Canada et du Québec : du régime français à nos jours*, 2e éd., t. 1, "Études," Montréal, Éditions Thémis, 1994, p. 482-83; Tremblay, André, *Droit Constitutionnel : principes*, 2e éd., Montréal, Éditions Thémis, 2000, p. 43 and 46.

[35] *Supra* note 34, s. 4(1).

[36] The failed constitutional amendment projects of 1971 (Victoria Charter) and 1987 (Meech Lake Accord) would have effectively and formally constitutionalized this requirement.

speaking and English-speaking judges, bilingualism nonetheless does not constitute a criterion of appointment. For the past year, there has been debate on this issue and a federal legislative bill is presently under discussion.[37] Bilingualism among the country's highest ranking magistrates seems to us to be a foregone fundamental requirement in a federation that officially proclaimed itself to be a bilingual state in 1969.[38] Last but not least, may it be said that native peoples have never been represented on the court, nor for that matter has any visible cultural community been represented.

How judges are appointed. As we have seen, the judiciary is that branch of state government that least reflects the federative nature of the country. One single level of government, namely the federal government, has the discretionary power to appoint all superior court judges throughout the country, including those of the Supreme Court.[39]

In matters of individual independence and impartiality, this one-sided process for appointing judges is a source of significant problems with regard to the legitimacy of the federal judiciary as the arbitrator of federative disagreements. It does not allow judges to be perceived as being independent of the federal order of government. In federative disagreements, the latter may be perceived as the arbitrator of its own interests in any such proceedings, which at the very least creates an atmosphere of partiality. Canadian provinces' absence from participation in the process of appointing Supreme Court judges constitutes a significant breach in the federative principle.[40] The appointment of Supreme Court judges by the federal government alone is thereby detrimental to its federative legitimacy.

Since the federal government also retains exclusive power to appoint all judges of provincial superior and appellate courts[41] and since in a very great majority of all cases, Supreme Court judges are chosen from among such courts, a real reform

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[37] This involved the federal private bill C-232. If it were to be adopted, it would require the government to choose future Supreme Court judges from amongst those "able to understand the French and English languages without the assistance of an interpreter." This bill has passed its second reading in the House of Commons and is currently being examined in parliamentary committee. It has the benefit of support from the Commissioner of Official Languages, Graham Fraser.

[38] *Official Languages Act*, S.R.C. 1970, ch. O-2.

[39] *The Constitution Act, 1867*, *supra* note 23, sections 96 and 101; *Supreme Court Act*, S.C.R. 1985, c. S-26, s. 4(2).

[40] See in particular: Wheare, Kenneth, *Federal Government*, 3rd ed., London, Oxford University Press, 1947, p. 55, 56 and 71; Brossard, Jacques, *La Cour suprême et la Constitution*, Montréal, Les Presses de l'Université de Montréal, 1968, p. 123; Morin, Jacques-Yvan, Woehrling, José, *Les constitutions du Canada et du Québec du régime français à nos jours*, Volume I, Montréal, Éditions Thémis, 1994, p. 546-47; Brun, Henri, Tremblay, Guy, Brouillet, Eugénie, *supra* note 18, p. 411-12.

[41] *Constitution Act, 1867*; *supra* note 23, section 96.

of the process for appointing judges to the Supreme Court should also include appointment of judges to provincial superior courts. A joint appointment procedure by federal and provincial governments seems to us to be the only viable way for eradicating this federative legitimacy deficit.

In addition to this problem of legitimacy linked to the one-sided process of appointing Supreme Court judges, many observers have emphasized its essentially political nature. One thing is certain, the opacity of the process does not enable the court to be reasonably perceived as independent of the federal government,[42] nor does it instill in citizens' minds the conviction that judges are in possession of all requisite neutrality for the performance of their duties, especially in federative disagreements.[43]

Under the heading of institutional federative legitimacy, the Supreme Court presents its share of problems. Yet it obviously exercises highly important functions in the evolution of the federative system, as examined hereafter.

2. A fragile functional legitimacy

Reference proceedings. The *Supreme Court Act* provides the possibility for the federal government to seek consultative opinions from the Supreme Court within the framework of reference proceedings.[44] In such instances, the court is then bound to reply unless questions are essentially political in nature,[45] in which case it will then have to justify its refusal. Although in principle this is deemed only to be a court opinion, it is considered to have the same legal bearing as a decision handed down in a case of specific litigation.

Reference proceedings raise questions with regard to the functional dimension of federative legitimacy, because in a sense they lead to an *a priori* jurisdictional control of norms,[46] namely before they have been duly promulgated by state political bodies. The line between judicial and political functions in such a context

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[42] This concerns criterion adopted by the Supreme Court with regard to judiciary independence: *Valente* v. *La Reine*, [1985] 2 S.C.R. 673, p. 689.

[43] Especially see the article written by nine colleagues published in the Montréal daily *Le Devoir* on May 17, 2005 entitled "*Mode de nomination des juges – Un tabou dans la communauté juridique*."

[44] *Supreme Court Act*, *supra* note 34, s. 53. Some provincial governments may also address such a procedure to the highest provincial tribunal. Such is the case in Quebec, see: *Court of Appeal Reference Act*, R.S.Q. c. R-23., s. 1. The Quebec Statute, as in the case of other provincial statutes, provides for the possibility of appealing such advisory opinions to the Supreme Court (sect. 5.1).

[45] *Reference: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, p. 768 and 884; *Reference re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, p. 805; *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, p. 235 et seq.

[46] Gélinas, Fabien, "La primauté du droit et les effets d'une loi inconstitutionnelle," (1988) 57 *R. du B. Can.* 455, p. 459.

becomes very thin, far more difficult to identify. Such proceedings draw the court into a kind of exercise that it would not allow itself to embark upon in ordinary litigation. Reference proceedings allow the government, for instance, to seek the court's opinion on the constitutionality of proposed legislation, or answers to questions, even on highly political issues. Such was the case notably in the *Reference concerning the secession of Quebec* rendered in 1998.[47]

The Supreme Court of Canada may be called upon not only to exercise an *a posteriori* constitutional control of norms within the framework of a specific dispute submitted to its consideration, but also *an a priori* control, by means of reference proceedings. This plurality of means of redress by jurisdictional control increases its role in the constitutional evolution of the Canadian federation. In such a context, the necessity of institutional guarantees of independence and neutrality with regard to political powers is thereby only increased for purposes of maintaining its legitimacy.

The hegemony of the progressive approach. When exercising its task of adapting constitutional texts to new societal conditions, the court must elaborate guidelines[48] without which those wielding judicial power would be perceived as usurping constituent power, thereby potentially endangering their legitimacy.

The progressive interpretation principle has over recent decades been the one preferred by the Supreme Court of Canada in constitutional issues.[49] The principles

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[47] *Reference re: Secession of Quebec, supra* note 50, par. 25: "In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise that it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet 'ripe' for decision."

[48] Inherent discretion in the interpretation process was exercised by the Judicial Committee of the Privy Council mainly in following three guidelines: statutory rules of interpretation, the rule of *stare decisis* and the federative principle. The Supreme Court of Canada, for one, has largely freed itself from the statutory rules of interpretation and has considerably diluted the application of the rule of *stare decisis* and the federative principle: Brouillet, Eugénie, *supra* note 24, p. 201 to 218 and 255 to 266; and Brouillet, Eugénie, "La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada," (2004) 45 *C. de D.* 7-67.

[49] In the case of the *Re: Anti-Inflation Act,* [1976] 2 S.C.R. 373, p. 412, the Supreme Court stated that one must consider: "[…] that a Constitution designed to serve this country in years ahead ought to be regarded as a resilient instrument capable of adaptation to changing circumstances." Several years later, in the *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357, p. 365 and 366, it is explicitly stated that the interpretation of the Canadian Charter must be dynamic and progressive, in reference to the living tree metaphor of the Judicial Committee. See also, *Québec (Commission des droits de la personne et des droits*

of interpretation, as we have seen, play an unmistakable rhetorical role in the art of adjudicating. These are the tools that judges use to justify and legitimize their decisions. The problem then is that of the audience.

The weakening of the federative principle as a normative principle generally reflects the expectations and dominant values in Canadian society, at least amongst its elite, which favours the centralization of powers. This centralist yearning is intimately linked to a strong feeling of belonging that English Canadians generally feel towards the central government.[50] As such, they believe that this order of government is the one that should enjoy the greatest concentration of powers to achieve Canada's national destiny. Professor François Rocher emphasizes the point: "The legitimization of the Canadian political system no longer rests upon a greater or lesser conformity with federal principles, but rather on the equivalence between public policy and the needs expressed by citizens as a whole. In other words, federal legitimacy is no longer essential for the stability of the Canadian political system, at least from the viewpoint of the dominant approach in Canada."[51]

The margin of judicial discretion inherent in the process of constitutional interpretation seems to have significantly expanded in the wake of the Supreme Court's decision to privilege a broad and progressive interpretation of constitutional provisions. Yet in a federative system which is home to a national minority community, respect for the federative nature of the constitutional structure is vital.

Its power to have the last word. As we have seen, the legitimacy of the judiciary in a democratic system rests upon the fact that it does not have the last word in constitutional matters. Yet, in federative disagreements, the Supreme Court has this power *de facto*. In such cases, the only way to by-pass the interpretation given

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de la jeunesse) v. *Maksteel Québec Inc*., [2003] 3 S.C.R. 228, par. 11. That same year, in the decision *Hunter* v. *Southam*, [1984] 2 S.C.R 145, p. 155, the Court reiterates its preference for the progressive interpretation of the Constitution, this time in its entirety. In this instance, the Court once again refers to the analogy between the Canadian Constitution and the "living tree" conceived of by Lord Sankey in the case of *Edwards* v. *A.-G. for Canada*, [1930] A.C. 124, p. 134. See, with the same effect, *R*. v. *Beauregard*, [1986] 2 S.C.R 56, p. 81.

[50] With regard to this English Canadian sense of identity, Professor Philip Resnick had this to say: "In a more general sense, […] the English Canadian sense of nation has itself been very much a by-product of the creation of the central government in 1867, the year of Canada's Confederation. The sense of identity and citizenship for most English-speaking Canadians has been caught up with that level of government. Though regionalist sentiment has not been lacking, especially in the Atlantic provinces or in western Canada, the vast majority of English-speaking Canadians define themselves as Canadians first." Resnick, Philip, "The Crisis of Multi-National Federations: Post-Charlottetown Reflections," (1994) 2 *Rev. Const. Stud*. 189, p. 191.

[51] Rocher, François, "La dynamique Québec-Canada ou le refus de l'idéal fédéral," in Gagnon, Alain-G. (dir.), *Le fédéralisme canadien contemporain : fondements, traditions, institutions*, Montréal, Les Presses de l'Université de Montréal, 2006, p. 136.

by the Supreme Court to a constitutional provision consists in either convincing it to reverse its position in a later decision or to amend the constitution so as to neutralize the effects of its jurisprudence.

Currently in Canada, constituent authority is, so to speak, paralyzed. This *de facto* situation is due, on the one hand, to the rigidity of the main amendment procedures themselves[52] and, on the other, to the development of competing visions of the future of the Canadian federation amongst Quebeckers and other Canadians. Generally, Canadians outside Quebec tend to be in favour of a centralist evolution of the Canadian federation and symmetry with regard to provincial legislative powers, whereas Quebeckers generally favour greater decentralization of powers and the institution of an asymmetric federalism.[53] This profound disagreement notably explains the failure of the last two attempts at constitutional amendments[54] and the absence of new propositions made by the current federal political parties. The maintenance of the federative balance and the protection of provincial autonomy are, within the Canadian federative system, especially dependent on the constitutional interpretation of the courts, namely the Supreme Court. We can thus assert that the Supreme Court benefits as such from a power of the "last word," if not *de jure*, then *de facto*.

This observation serves to emphasize the need in this context of reforming the institutional guarantees of neutrality of Canada's highest and last court of appeal, especially with regard to how its judges are appointed.

3. Social legitimacy called into question in Quebec

In the end, as we have seen, legitimacy rests upon public recognition. It would have been interesting and relevant to survey by using empirical methods the support enjoyed by the Supreme Court in Canadian civil society and in the Canadian legal community. Recourse to such methods goes beyond the scope of this study. This being as it is, we shall treat the issue of the social dimension of the Court's legitimacy from a narrower more restrictive, hence imperfect, spectrum, namely the positions taken by the Quebec government over the past decades.

Since the end of 1940, all Quebec governments, regardless of the political party in power, have proposed constitutional amendments regarding Canada's highest court of appeal.[55] These proposals have addressed both institutional and functional

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[52] The vast majority of constitutional amendments require either the unanimous consent of federal and provincial assemblies, or the consent of the federal parliament and the legislative assemblies of seven provinces whose population represents fifty percent (50%) of Canada's population: *The Constitution Act, 1982*, *supra* note 38, part V, s. 38, 41 and 42.

[53] Brouillet, Eugénie, *supra* note 24, p. 376-78.

[54] Meech Lake Accord, 1987; Charlottetown Accord, 1992.

[55] Québec, *Québec's Positions on Constitutional and Intergovernmental Issues, from 1936 to March 2001,* Ministère du Conseil exécutif, Secrétariat aux affaires intergouvernementales canadiennes, en ligne http://www.saic.gouv.qc.ca/institutionnelles_constitutionnelles/positions_1936-2001.htm.

issues. They have raised questions concerning how bench members are appointed, the Court's composition and its general appellate jurisdiction. All of them have conveyed a desire to protect the cultural specificity of the Quebec nation within the Canadian federative system.

With regard to the process of appointing the judges, the Quebec government since 1947 has persistently requested appointment by the federal government *and* the provincial governments, but regarding the previous second part, by the Quebec government for the three Quebec judges.

As for the Court's composition, in addition to this joint appointment procedure the Quebec government also advanced the principle of alternating the language (French/English) of successive chief justices.[56] All governments have spoken out for formally enshrining the presence of three Quebec judges in the constitution (ibid.).

As for the functional dimension of federative legitimacy, a proposition submitted by the government of René Lévesque following the sovereignty-association referendum in 1980 is in our view well worth being mentioned here owing to its inherent merits illustrating a viewpoint of federative balance and respect for the dual-national nature of the original federative agreement. It involved the creation within the Supreme Court of a specific bench of judges made up equally of judges from Quebec and the other Canadian provinces for purposes of settling federative disagreements (ibid., 63). From an institutional point of view, this proposition has the advantage of ensuring a composition truly reflecting Canada's national duality. From a functional point of view, this could perhaps act as a counterbalance to the evolutionary trend towards centralization of the Canadian federation, which is unwanted by a large segment of the people of Quebec. This being stated, the likelihood of such a proposition being accepted is virtually nil within a federation whose overwhelming majority of English-language proponents are against the recognition of Quebec as a distinct society in the form of a mere interpretative clause in the Constitution.

CONCLUSION

The fundamental role that the Court performs in the evolution of the Canadian federative structure and, as such, in maintaining equilibrium between the powers of the federal and provincial government orders, explains the steadfast attention that this has always aroused in Quebec. The federative principle and its essential corollary of the autonomy of government orders in the exercise of their legislative powers constitute for Quebec far more than some mere technique of governance, but rather the guarantee of its thriving as a national community within the Canadian federation. It thus becomes vital that the institution upon which its fate largely depends be endowed with essential guarantees of independence and therefore federative neutrality.

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[56] Government of René Lévesque (1980–1985); Government of Pierre-Marc Johnson (1985), in ibid., p. 63 and 68 (respectively).

We are, however, of the opinion that a purely institutional reform of the Supreme Court essentially involving the appointment process of judges would not in itself put an end to the deficit of federative legitimacy which it faces, at least in Quebec. Indeed, as has been emphasized by professors Morin and Woehrling, such a reform "…would provide the Court with a federative legitimacy that it currently lacks and which could paradoxically shield it from criticism without in any way undermining the centralizing orientation of its interventions."[57]

If federalism still means something to Canada, we hold that an institutional reform of the Court must be accompanied by an enhanced theorization of the federative principle within its jurisprudence,[58] which would tend towards an improved equilibrium of powers within the federation and, henceforth, greater protection of Quebec's sphere of autonomy. Only in this manner shall the court finally acquire its letters of nobility in Quebec as the ultimate arbitrator of federative disagreements.

[57] Morin, Jacques-Yvan, Woehrling, José, *supra* note 38, p. 546-47.

[58] Brouillet, Eugénie, *supra* note 52.

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RÉFORMER LE PROCESSUS DE NOMINATION DES JUGES DE LA COUR SUPRÊME ?

Andrée Lajoie

The author argues that judges are much more influenced by the dominant values of society when rendering rulings than by the appointment process. The author then forcefully supports her point by arguing that since Canada does not really have a federal constitution, it is not surprising that the Court's rulings have been of a centralizing nature.

Des membres de l'*Institut des affaires intergouvernementales* de l'Université Queen's s'interrogent sur l'utilité de réformer le mode de nomination des juges de la Cour suprême, actuellement prévu « par lettres patentes du Gouverneur général revêtues du grand sceau »[1], auxquelles le premier ministre Harper a ajouté, lors de la nomination du juge Cromwell en 2008, une audience publique d'examen de la candidature, maintenant néanmoins l'ensemble du processus sous le contrôle exclusif des autorités fédérales. Certains estiment en effet que la légitimité de la Cour resterait affectée encore maintenant d'un « déficit de fédéralisme », si tant est que les modifications apportées par le premier ministre Harper à ce processus aient supprimé le « déficit démocratique » antérieur.

Ma réponse – qui en étonnera sans doute certains – est non, je ne crois pas qu'il y ait lieu de modifier ce mode de nomination, comme je l'expliquerai dans la deuxième partie de ce texte, après avoir d'abord soulevé dans la première deux questions préalables : quels facteurs orientent les opinions des juges de la Cour suprême ? et le Canada est-il une fédération ?

[1] *Loi concernant la Cour suprême du Canada*, S.R.C, ch. S-19, art. 4 (2).

1- QUESTIONS PRÉLIMINAIRES

a) Quels facteurs orientent-ils les décisions de la Cour suprême ?

Je m'intéresse depuis longtemps aux facteurs suceptibles d'orienter les décisions de la Cour suprême du Canada portant notamment sur le partage des compétences et sur le sens à donner à l'expression « société libre et démocratique » insérée à l'article 1 de la Charte[2]

S'agissant en premier lieu de l'analyse de l'interprétation par la Cour du partage des compétences dans la fédération canadienne, c'est – comme l'indique son titre[3] – l'objet de l'étude proposée par la *Commission royale sur l'union économique et les perspectives de développement du Canada* qui a entraîné mon questionnement et l'hypothèse centrale relative aux facteurs politiques du comportement de la Cour. Le produit constitutionnel de la Cour entre la fin de la guerre et la Charte a donc été analysé dans un premier temps, pour dégager ses effets relativement au partage des compétences et les justifications interprétatives invoquées au soutien des solutions retenues, de façon à pouvoir le mettre en rapport avec les faits et les idées politiques dominantes et minoritaires pendant la même période.

Il s'agit d'une analyse constructiviste[4] dans le sens où le choix du corpus et de l'hypothèse n'est pas indépendant de la situation socio-historique de la Commission qui les formule ni de celle des chercheures qui ont tenté d'y répondre. Cette démarche était au surplus dépendante au départ d'une analyse des conséquences juridiques de ces décisions et des cheminements interprétatifs par lesquels la Cour y est arrivée et présupposait, par ailleurs, non seulement que les facteurs politiques étaient susceptibles d'influer sur le produit constitutionnel de la Cour, mais que, sans impliquer de véritable causalité, ils étaient centraux et pouvaient être étudiés séparément pour eux-mêmes.

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[2] Incluse à l'Annexe B de la *Loi constitutionnelle de 1982*, 1982 ch.11 (R.U.).

[3] A. LAJOIE, P. MULAZZI, et M. GAMACHE, « Les idées politiques au Québec et le droit constitutionnel canadien », dans I. BERNIER et A. LAJOIE (dirs.), *La Cour suprême du Canada comme agent de changement politique,* Études, Commission (MACDONALD) royale sur l'union économique et les perspectives de développement du Canada, n° 47, Ottawa, Approvisionnements et Services Canada, 1986, pp. 1-110.

[4] Voir entre autres : P. Walslawick, E. von Glasserfeld, G. de Vico, D. Hume, L. Wittengenstein, E. Morin, et plus particulièrement : P. BOURDIEU, J.-C. CHAMBORDERON et J.-C. PASSERON, « La construction de l'objet », dans *Le métier de sociologue, préalables épistémologiques*, 4e éd., Paris-La Haye, Mouton, 1983, pp. 51-80, et sur l'apport respectif de l'histoire et de la sociologie et leurs rivalités à cet égard : *Le Débat*, n° 79, Paris, Editions Gallimard, mars-avril 1994, textes regroupés sous le thème « le territoire du sociologue » et plus particulièrement : J. REVEL, « Histoire, sociologie, histoire », pp. 105-110 ; P. VEYNE, « Une distinction rhétorique », pp. 110-114 ; J.-C. PASSERON, « Homo sociologicus », pp. 114-133.

Cette présupposition selon laquelle les facteurs politiques prédominaient largement dans l'interprétation judiciaire des concepts flous me laissait pourtant mal à l'aise et j'ai cherché à la remettre en question dans une étude ultérieure portant sur le sens que la Cour a donné à l'expression « société libre et démocratique », en adoptant cette fois une approche différente de la précédente, où les facteurs politiques ne seraient pas pris en compte au point de départ. Persuadée que les convictions personnelles des juges comptaient dans leurs choix de valeurs, j'ai posé l'hypothèse que les interprétations proposées, par chacun des juges de la Cour, de cette expression insérée dans la *Loi constitutionnelle de l982*, varieraient, notamment, selon leur conception respective antérieure de « société libre et démocratique », de même qu'en fonction du contexte factuel et juridique et des attentes des auditoires, ces derniers facteurs relevant des hypothèses rhétoriques que Perelman[5] avait mises de l'avant sans pouvoir les vérifier à cause de la forme elliptique des décisions des tribunaux européens continentaux. Ce sont ces hypothèses que j'ai vérifiées[6] sur le corpus formé des écrits juridiques pré et post-Charte des juges qui siégeaient à la Cour suprême lorsque, à partir de 1984, elle a dû interpréter cette expression.

C'est à livrer les résultats de ces deux entreprises de recherche en suivant le fil du cheminement théorique qui a guidé leur analyse que j'ai par la suite consacré un ouvrage[7] dont je reprends en partie certaines conclusions[8], où j'ai tenté d'illustrer la marge de discrétion que le texte et le contexte constitutionnel accordent à la Cour, notamment dans les interstices créés par les concepts flous qui caractérisent le partage des compétences et les limites des droits fondamentaux dans la Constitution canadienne et de montrer aussi comment la Cour a utilisé cette discrétion, recouvrant ces interstices d'un tissu précaire et sans cesse renouvelé, au fil de ses interprétations successives des mêmes textes.

Il resssort clairement de cette synthèse de ces deux études (dont je ne peux livrer ici que le résultat sans en reprendre la démonstration faute d'espace) que ce sont les valeurs dominantes dans la société canadienne au moment où intervient une décision de la Cour en cette matière qui la surdéterminent[9], même si les juges – on l'aurait deviné – invoquent pour la justifier d'autres modifs, généralement déductifs, positivisme obligeant… En effet, il apparaît que le rapport entre les facteurs politiques et la jurisprudence constitutionnelle de la Cour repose sur une macro-coïncidence entre des idées, des attentes et des réclamations formulées dans le champ politique,

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[5] PERELMAN, C. (en collaboration avec P. Foiriers), *La modivation des décisions de justice*, Bruxelles, Etablissements Émile Bruylant, 1978.

[6] LAJOIE A., ROBIN R., GRAMMOND S., QUILLINAN H., ROLLAND L., PERRAULT S. et CHITRIT A., Les représentations de « société libre et démocratique » à la Cour Dickson, la rhétorique dans le discours judiciaire canadien, (1994) 32 *Osgoode Hall Law Journal*, 295.

[7] *Jugements de valeurs*, Paris, Presses universitaires de France, 1997.

[8] *Id.,* extraits des pages 28-53 et, plus loin, 202, 203.

[9] Sur le concept de surdétermination, voir les travaux de Gérard Timsit sur l'analyse systémale, notamment : « Sur l'engendrement du droit », (1988) *Revue de droit Public* 39.

et un produit judiciaire résultant de décisions intervenues dans des litiges individuels auxquels, dans la plupart des cas, les agents politiques n'étaient pas partie et ne sont pas intervenus. Sans refaire le procès de la causalité en sciences sociales, ce n'est pas de cela dont il est ici question mais tout au plus d'une corrélation. Car si cette corrélation permet de croire à une incidence des facteurs politiques présents au pays durant cette longue période sur le produit constitutionnel de la Cour suprême durant la même période, elle se situe à un niveau trop macroscopique pour laisser voir *comment* ces facteurs agissent sur cette jurisprudence, et ne permet pas de distinguer quand et à quelles conditions elle opère.

Pourtant, on peut, malgré cela, tirer des conclusions intéressantes à partir des limites mêmes de ces résultats. Il faut d'abord noter que l'absence de lien direct entre les facteurs politiques et les décisions avec lesquelles ils sont néanmoins en corrélation indique déjà que ce ne sont pas nécessairement les arguments politiques invoqués ou même pertinents à un litige qui orientent son résultat. C'est autrement, à travers le climat social et la conjoncture dans laquelle ils baignent qu'éventuellement les juges seraient rejoints par ces facteurs, et tiendraient compte du résultat éventuel de leurs décisions sur l'ensemble de la société, comme en témoigne entre autres l'évolution de leur conception du fédéralisme, qui passe par trois degrés inégaux de centralisation dans les interprétations qu'en a livrées la Cour entre la guerre et la Charte : un fédéralisme unilatéral, qui va durer jusqu'en 1960, suivi d'une brève pause, matérialisée par un fédéralisme dialogique, puis d'une reprise, à partir de 1975, d'une centralisation désormais normalisatrice.

Que ce ne soient pas nécessairement les *arguments* politiques qui orientent le résultat des décisions, n'a rien pour étonner à une époque où les preuves « extrinsèques », celles qui font état des facteurs sociaux et économiques reliés à un litige, ne sont pas admises devant les tribunaux[10]. L'examen des motifs des décisions, du type de justification que les juges invoquent, confirme d'ailleurs ce constat sur une longue période. Jusqu'aux années quatre-vingt en effet, la Cour fera montre d'un comportement doublement réservé, comme si l'exercice d'un contrôle constitutionnel sans assises explicites épuisait son énergie, sinon son capital de légitimité : elle se contente en effet de prononcer, sur un mode qu'elle représente comme strictement interprétatif, la validité ou la nullité des lois, sans utiliser – mise à part l'interprétation atténuée et la dissociation – les instruments qui marqueront plus tard son intervention active et n'invoque, pour s'en justifier, – à quelques exceptions près, qui serviront de précurseurs à son comportement ultérieur – que des motifs techniques.

Dans les années d'après-guerre en effet, la Cour se contente de valider la plupart des lois fédérales, appliquant des techniques d'interprétation qu'elle donne comme neutres et non-interventionnistes[11], et que l'on pourrait qualifier dans l'ensemble

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[10] En matière constitutionnelle, elles le deviendront après 1975.

[11] Ce constat est dû à la vérification d'une hypothèse surgie d'une discussion avec mon collègue Jacques Frémont, et dont Paul Weiler avait d'ailleurs déjà documenté, sans le savoir, la première partie : P. WEILER, *In The Last Resort, A Critical Study of the Supreme*

d'essentialistes, comme précisément la théorie de l'essence[12], de l'aspect[13], de la compétence incidente ou accessoire[14] et celle des éléments intrinsèques[15]. En fait, sur l'ensemble des décisions qui constituent le corpus du partage des compétences entre la guerre et la Charte, 87%[16] se confinent à des motivations fondées sur ces théories étroitement liées au texte, rivées à des interprétations classiques, terminologiques, grammaticales, basées sur des étiquettes[17].

Les autres 13% invoquent au contraire des motivations transparentes, même à travers leur libellé, quant à leur caractère politique, comme l'urgence, les dimensions nationales ou la prépondérance fédérale. Mises à part trois de ces décisions qui visaient le droit criminel, toutes les autres concernent des domaines comme

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Court of Canada, Toronto, Carswell/Methuen, 1974 et « The Supreme Court and the Law of Canadian Federalism », (1973) 23 *U. of T. L. J.* 307. Plus généralement, sur le non-interventionnisme de la Cour, voir : M. MANDEL, *op. cit.*, note 74, p. 77 ; P. RUSSEL, « The Political Purposes of the Canadian Charter of Rights and Freedoms », 1983 (61) *R. du B.C.* 30, P. 49 ; B. HOVIUS et R. MARTIN, « The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada » 1983 (61) *R. du B.C.* 354.

[12] Il s'agit d'une technique fondée sur une théorie positiviste et essentialiste, dite du *pith and substance*, selon laquelle les lois doivent être classées sous un chef de compétence constitutionnelle d'après leur « aspect essentiel », leur « caractère véritable », comme si la détermination de ce caractère essentiel pouvait être univoque et ne constituait pas, en elle-même, un enjeu politique.

[13] Variante de la technique précédente selon laquelle une loi peut présenter plusieurs « aspects » (ou objets formels) relevant respectivement des compétences fédérale et provinciale. Elle permet donc l'adoption éventuelle de lois fédérales et provinciales, sur le même objet matériel concret, parce que leur objet formel diffère.

[14] Les compétences n'étant pas complètement étanches les unes par rapport aux autres, on les qualifiera d'incidentes lorsqu'elles « effleureront » certaines matières relevant d'une autre compétence (François CHEVRETTE et Herbert MARX, *Droit constitutionnel*, Montréal, P.U.M., 1982, p. 303) ; il s'agira au contraire de compétence implicite ou accessoire (*necessarely incidental*) en cas, non plus d'effleurement, mais d'« empiètement » (*Id.,* p. 305). Ce fondement n'est susceptible d'appuyer la validité d'une loi que si son adoption est nécessaire à l'exercice de la compétence principale qu'invoque le législateur.

[15] La théorie des éléments intrinsèques ne s'applique pas à une loi, mais aux activités d'une entreprise. Elle se caractérise par l'inclusion, dans l'objet présumément visé par une compétence constitutionnelle, de tout élément relié de près, mais plus généralement de loin, aux activités « essentielles » de l'entreprise.

[16] Pour une analyse détaillée, quantifiée par la suite par Me M. C. Gervais. voir : A. LAJOIE, P. MULAZZI, M. GAMACHE, « Les idées politiques au Québec et le droit constitutionnel canadien », dans *I. BERNIER* et A. LAJOIE, *La Cour suprême du Canada comme agent de changement politique*, Étues, (Commission MacDonald) sur l'Union économique et les perspectives de développement au Canada, no 47, Ottawa, Approvisionnements et Services, Canada. 1986. pour une analyse détaillée, quantifiée par la suite par Me M. C. Gervais.

[17] Sur cette question, voir : P. WEILER, *op. cit.,* note 11, p. 161.

l'aménagement du territoire, l'aéronautique, les communications, le contrôle de l'inflation, les échanges, le commerce et les affaires corporatives : elles portent donc très majoritairement sur des objets liés au développement économique spécifique à cette époque, un domaine d'intervention alors nouveau pour l'État et dont les éléments se prêtent mal à une classification essentialiste dans des catégories établies au milieu du XIXe siècle. La Cour devra dès lors renoncer aux apparences de la neutralité et donner les raisons véritables de ses décisions centralisatrices.

Ce n'est qu'à partir des années quatre-vingt que, continuant d'interpréter le partage des compétences malgré la prédominance des pourvois relatifs à la Charte, elle commencera à invoquer expressément des motifs moins techniques, étendant la portée de la théorie de l'aspect et incluant l'*intérêt* national dans celle des « dimensions nationales », avant de renoncer à dissimuler ses motifs politiques derrière quelqu'écran « théorique » que ce soit, avouant, sous la plume du juge La Forest[18], que :

> « les anciennes règles de common law relatives à la reconnaissance et à l'exécution avaient leur origine dans une conception périmée du monde qui mettait l'accent sur la souveraineté et l'indépendance, souvent au détriment de l'équité (...) De toutes façons j'ai indiqué que les règles traditionnelles qui mettent l'accent sur la souveraineté semblent absolument contraires à l'intention manifeste de la Constitution d'établir un seul et même pays. »

La Cour prend dès lors acte du caractère politique des affaires constitutionnelles dont elle est saisie et motive ouvertement ses décisions en conséquence. Certes, elle avait déjà donné quelques signaux en ce sens, d'abord en décidant que le rapatriement unilatéral de la Constitution, bien que contraire aux conventions constitutionnelles, était néanmoins légal, et en discutant ouvertement les limites des principes de la séparation des pouvoirs et du fédéralisme. Pourtant, même si elle a été précédée de signes avant-coureurs, la rupture au début des années quatre-vingt dans le comportement de la Cour est nettement perceptible : longtemps marquées au sceau d'une grande timidité par la modestie des techniques d'interprétation, qui se veulent d'une neutralité extrêmement formaliste dans le ton, les décisions vont dorénavant mieux laisser voir, parfois, les motifs politiques qui les orientent. Elles vont bientôt s'éloigner aussi de la retenue absolue que la Cour avait manifestée au plan de ce qu'elle estimait être de l'interventionnisme judiciaire et dont elle s'était jusque-là refusé les instruments. Jusqu'au début des années quatre-vingt, elle se contente en effet de valider certaines lois, au besoin au moyen d'une interprétation atténuée, et d'en invalider d'autres, en employant parfois la dissociation, mais ne songe même pas aux instruments – plus apparemment envahissants à l'égard de ce que les essentialistes estiment être le rôle du législateur – qu'après 1982, elle proposera, sans d'ailleurs tous les utiliser.

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[18] *Hunt* c. *T&N PLC,* [1993] 4 R.C.S. 289, p. 320 et *Morguard Investment Ltd*. c. *De Savoye,* [1990] 3 R.C.S. 1077, pp. 1099-1110.

On peut sans doute l'expliquer de plusieurs façons. D'aucuns croient y lire un effet de contamination de l'interprétation de la Charte, où les éléments politiques seraient incontournables : la Cour ne pouvant plus se cacher à elle-même son rôle politique dans ce domaine, deviendrait plus transparente, sinon plus audacieuse, en matière de partage des compétences, et ferait plus candidement état de ses véritables motifs. Mais la jurisprudence relative à la Charte reste elle-même longtemps formaliste avant d'avouer ses couleurs...

Paul Weiler, écrivant avant cette rupture[19], explique pour sa part cette longue période de formalisme judiciaire et la crise qu'elle a suscitée par le fait que les tribunaux aient pu se contenter d'une interprétation littérale des termes d'un compromis fédératif dans les années qui suivent sa signature, quand les conditions qui lui ont donné naissance restaient inchangées et sa légitimité, entière. Il constate en effet qu'avant les années soixante-dix, la Cour formule ses motifs selon un certain nombre d'« étiquettes », jouant le jeu du nominalisme, si ce n'est celui de l'essentialisme, jusqu'à ce qu'elle se voit confrontée à ranger des matières nouvelles dans des catégories de compétence mal faites pour les contenir à une époque où des facteurs politiques, économiques, et plus largement sociaux, ont complètement modifié la base d'un compromis désormais ininterprétable.

Il se pourrait bien qu'il n'ait pas tort... Roderick Macdonald non plus, qui proposerait sans doute sa théorie du « jouet neuf »[20], selon laquelle lorsqu'un tribunal se voit confier l'application d'une nouvelle loi[21], il l'applique d'abord avec intransigeance et un maximum de formalisme, puis devient plus souple et tient compte des facteurs de réalité en démontrant une certaine tolérance. Cette courbe, que Macdonald dit avoir souvent observée dans le domaine du droit privé comme dans celui du droit public, devrait selon lui faire partie des hypothèses quand on analyse la mise en oeuvre d'une nouvelle législation et son interprétation initiale par les tribunaux. Quoi qu'il en soit, il faut noter déjà ce comportement répété de la Cour qui déguise longtemps ses décisions sous des motifs techniques et formalistes, avant d'en admettre finalement la dimension politique ou interventionniste, inévitable compte tenu de leur lien avec le contexte politique.

Enfin, le fait que le peu de chemin parcouru par les idées politiques professées au Québec dans le droit constitutionnel canadien au cours du dernier demi-siècle n'ait pas, à une exception près, emprunté la voie des pratiques constitutionnelles, ni encore moins celle des modifications du texte de la Constitution, mais de la jurisprudence, mène à poser l'hypothèse d'un rôle supplétif du judiciaire à l'égard du constituant, sinon du législateur ordinaire. Il y aurait peu de constitutions vraiment rigides, seulement des constitutions qui évoluent par des chemins alternatifs, suivant les conjonctures. Quand la voie politique est doublement bloquée, par un mode d'amendement formel inaccessible et par l'absence de volonté politique

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[19] *Supra,* note 11.

[20] *Théories et émergence du droit*, Séminaire, Montréal, Université Mc Gill, hiver 1995.

[21] Car même si le partage des compétences date de la *Loi constitutionnelle de 1867,* ce n'est qu'à partir de 1949 que la Cour suprême en devient l'arbitre final et autonome.

d'une majorité de prendre en compte les aspirations d'une minorité qui dispose d'un rapport de forces utile mais non dominant, la voie judiciaire prendrait le relais, en procédant par interprétation aux ajustements constitutionnels nécessaires, surtout à cette période, au maintien de l'intégrité d'un État né dans la modernité et qui en conserve certains réflexes, même s'il amorce la transition vers des formes bientôt pluralistes[22].

On commence déjà à apercevoir que l'orientation des décisions de la Cour suprême a plus à avoir avec la conjoncture dans laquelle elles sont rendues, qu'avec les idées antérieurement énoncées par ceux qui deviennent juges et par conséquent avec le mode de nomination de ces derniers. Mais pour que l'influence, si minime soit-elle, de ce dernier procédé induise au surplus un « déficit de fédéralisme » dans le contexte constitutionnel canadien, encore faudrait-il que le Canada soit une fédération. Est-ce bien le cas ?

b) Le Canada, une fédération ?

Comme on l'aura compris de mon utilisation du vocabulaire dans *Jugements de valeurs* en 1998 (fédéralisme : unilatéral, dialogique, normalisateur), j'ai cru au fédéralisme canadien longtemps, bien que mes travaux sur le pouvoir déclaratoire aient commencé d'ébranler cette conviction dès 1969[23]. Mais il a fallu que l'on me demande une comparaison de la constitution canadienne avec celle que se proposait d'adopter l'Union européenne en 2004 pour que je reconnaisse mon erreur. En effet, cette démarche m'a permis de vérifier avec encore plus de précision que tous les auteurs s'entendent à fixer le seuil entre la décentralisation et le fédéralisme au point où la souveraineté parallèle des entités cède le pas au pouvoir de modifier unilatéralement le partage des compétences entre lui-même et les unités constituantes de l'État, qui devient alors unitaire. Or l'examen du texte constitutionnel canadien, des théories interprétatives que les tribunaux en ont données, aussi bien que des pratiques gouvernementales autorisées ou non par la constitution, permet de déceler pas moins de dix mécanismes différents par lesquels les autorités fédérales peuvent modifier unilatéralement le partage des compétences prévu par le texte constitutionnel lui-même.

Le texte constitutionnel et le partage initial

Sauf en ce qui concerne un chef de compétence fédérale et certains pouvoirs de l'éxécutif sur lesquels je reviens plus loin, ce n'est pas tant le texte constitutionnel initial qui est responsable de la centralisation actuelle, dans la Constitution canadienne, du partage des compétences législatives – et, partant, des pouvoirs exécutifs qui leur sont reliés. Cette centralisation découle plutôt des interprétations

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[22] Pour une confirmation au moins partielle de cette hypothèse, en ce qui concerne spécifiquement le fédéralisme, voir : M. MANDEL, *op. cit.*, note 11, p. 238 et 254.

[23] *Le pouvoir déclaratoire du Parlement, augmentation discrétionnaire de la compétence fédérale au Canada*, Montréal, Presses de l'Université de Montréal, 1969.

judiciaires auxquelles ce partage a donné lieu, et des pratiques gouvernementales qui se sont élaborées à sa marge.

Les théories interprétatives

Les origines coloniales de la Confédération canadienne lui ont longtemps valu un régime judiciaire paradoxal : l'arbitre des conflits d'interprétation inévitablement suscités par le partage des compétences législatives entre le Parlement fédéral et plusieurs législatures provinciales sur notre territoire a longtemps été étranger. C'est en effet le Comité judiciaire du Conseil privé qui, de Londres, décidait ces matières en dernier ressort jusqu'en 1949, donc après même l'institution de la Cour suprême du Canada en 1875. L'ensemble des constitutionnalistes est d'accord pour considérer la jurisprudence de ce tribunal colonial comme la plus décentralisatrice qu'ait connue notre Constitution : André Tremblay estime que c'est le Conseil qui a le mieux actualisé les potentialités fédérales de la constitution canadienne en affirmant un modèle dualiste de fédéralisme propre à atténuer les éléments centralisateurs de la *Loi constitutionnelle de 1867* et à garantir les provinces contre l'effritement de leur autonomie[24]. Le phénomène s'explique précisément par le statut étranger du tribunal : ce sont les valeurs dominantes en Angleterre, indifférentes au partage des compétences entre groupes de colonisés, qui orientaient le Conseil. Tout au cours de cette période, le Conseil privé a donc affirmé l'autonomie juridique des provinces à l'égard de toute tutelle fédérale, et plus encore la compartimentation stricte du partage des compétences : on verra un élargissement des compétences provinciales énumérées et un rétrécissement parallèle des compétences fédérales susceptibles de les envahir, comme celles qui portent sur la paix, l'ordre et le bon gouvernement et les échanges commerciaux.

Pourtant, avant de céder la main à la Cour suprême, le Conseil privé avait déjà conçu une partie des instruments du renversement de sa propre tendance, sans pourtant les appliquer d'emblée. C'est donc par la construction de théories interprétatives, élaborées au fur et à mesure des nécessités pratiques, que le Conseil privé a forgé les instruments de centralisation que la Cour suprême allait mettre à profit par la suite en définissant un fédéralisme successivement unilatéral, dialogique et normalisateur, déjà évoqué. On en dénombre cinq principales, dont les trois premières sont liées à la facture du texte constitutionnel : soit les théories de la compétence accessoire implicite, de la prépondérance fédérale et des pouvoirs résiduaires, alors que les deux autres se présentent comme des exceptions dans l'application du partage énoncé : celles des dimensions nationales et de l'état d'urgence. Sans procéder ici à l'analyse des arrêts qui leur ont donné naissance et qui les ont par la suite appliquées, il convient de montrer en quoi elles favorisent toutes la centralisation.

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[24] André TREMBLAY, « Judicial Interprétation and the Canadian Constitution », [1991/92] 1 *N.J.C.L.* 163, 165. La présente section de ce texte est largement inspirée, avec l'accord de l'auteur, de cet article qui constitue une excellente synthèse sur cette période.

Compétence accessoire implicite. La compétence implicite, (accessoire ou ancillaire), permet au Parlement fédéral de légiférer dans les domaines de compétence provinciale « exclusive » si l'exercice efficace des siennes propres l'exige[25]. Comment une compétence peut-elle être à la fois exclusive et, en même temps, validement envahie par un autre ordre législatif que celui auquel elle a été attribuée ? L'effet envahissant de cette technique eût exigé pour le moins une interprétation stricte du critère de nécessité, et la logique du concept, son application égale aux compétences provinciales : tel n'a pas été le cas, comme l'illustre la seconde période de l'évolution du fédéralisme canadien.

Prépondérance fédérale. En cas de conflit entre deux législations, l'une provinciale, l'autre fédérale, toutes deux validement fondées au départ, portant sur un objet identique et incompatibles dans leur application, le Conseil a décidé[26] que la législation fédérale prévaudrait. Par la suite, on pourra le constater, les tribunaux canadiens étendront la portée de cette théorie en l'appliquant à des conflits d'application *potentielle* entre deux normes[27].

Compétence résiduaire. Le Conseil, se fondant sur le paragraphe 29 de l'article 91 de la *Loi constitutionnelle de 1867,* qui attribue expressément à la compétence fédérale « *les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces* » a confirmé la compétence fédérale sur toute matière résiduaire, c'est-à-dire non énumérée dans la liste des compétences provinciales, à moins qu'il ne s'agisse d'une matière clairement locale[28]. On imagine facilement l'effet centralisateur de cette théorie un siècle et demi après la rédaction de la Constitution, lorsque les matières innomées – parce qu'alors inexistantes ou non susceptibles d'être régies par l'État libéral du XIX^{e} siècle, telles l'aéronautique, les télécommunications et la capitale nationale – auront pris dans la législation contemporaine l'importance que l'on sait.

Dimensions nationales. De la compétence résiduaire à la théorie des dimensions nationales, il n'y avait qu'un pas, un pas hors du texte constitutionnel, que le Conseil a allègrement franchi, déclarant de compétence fédérale une loi prohibant la vente et la consommation publique de l'alcool, au motif que ce fléau avait pris des « dimensions nationales »[29] Jumelée avec l'état d'urgence dont elle ne se distingue pas toujours clairement, cette théorie allait être appliquée à quelques reprises par

[25] *Cushing* c. *Dupuy*, (1880) 5 A.C. 409 (C.P.).

[26] *A.G. Ontario* c. *A.G. Canada* [1896] A.C. 348 (C.P.).

[27] *Banque de Montréal* c. *Hall*, [1990] 1 R.C.S. 121.

[28] John Deere Plow c. Wharton, 1915 A. C. 330.

[29] *Russell* c. *R.*, (1882) 7 A.C.829 (C.P.).

la suite. Elle a eu un regain de vigueur récemment à cause de sa connexité avec le concept de subsidiarité[30].

État d'urgence. Par la suite, l'état d'urgence a par ailleurs été invoqué pour lui-même et sans l'appui de la théorie des dimensions nationales[31]. Il a au surplus servi de fondement à des « mesures spéciales pour faire face à des situations de crise, qu'elles proviennent de troubles civils, d'insurrections, de guerres ou de perturbations économiques. En fait, le Canada a été assujetti à une quelconque forme de législation d'urgence durant environ 40 % du temps depuis le début de la première guerre mondiale »[32].

Mais c'est cumulativement qu'il faut apprécier ces théories : que reste-t-il aux États constituants d'une fédération où les autorités centrales peuvent légiférer d'abord dans leur propre domaine, puis sur les matières résiduaires, et enfin dans le champ même des compétences provinciales « exclusives » chaque fois que cela est « nécessaire » à l'exercice de leur compétence, qu'il y a conflit potentiel d'application à un même objet, que l'objet présente des « dimensions nationales » ou que l'on appréhende un état d'urgence ?

Pourtant cela n'a pas suffi aux autorités fédérales, qui ont voulu aller plus loin encore dans la centralisation en se servant d'une compétence attribuée par la constitution et de pouvoirs valides ou usurpés de l'éxécutif.

Compétence législative attribuée par la constitution

Pouvoir déclaratoire. Prévu dans les constitutions de plusieurs pays dits fédéraux, le mécanisme constitutionnel du « pouvoir déclaratoire » implique la faculté pour un parlement fédéral de modifier de son propre chef, au détriment des constituantes de la fédération et sans leur consentement, la sphère de sa compétence législative en l'étendant aux « travaux » qu'il déclare être à l'avantage général de la fédération. Au Canada, son libellé à l'article 92 (10) c) de la *Loi constitutionnelle de 1867* autorise de telles déclarations discrétionnaires.

Avant que ce pouvoir ne tombe faussement en désuétude après 1961 faute de légitimité, le Parlement a proclamé 470 de ces déclarations[33]visant non seulement des chemins de fer, des routes, et autres moyens de transport intraprovincial, mais les tramways de Montréal, Québec et Ottawa, des réseaux d'autobus locaux, des hôtels, restaurants et théâtres, des entreprises de commerce du bois, d'élevage des bestiaux, de construction, des usines de fabrication d'air liquide, de produits chimiques, des raffineries de métaux, des aqueducs, des parcs, sans parler des Pleines

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[30] *R.* c. *Crown Zellerbach*, [1988] 1 R.C.S. 401 ; *Friends of the Oldman River* c. *Canada*, [1972] 1 R.C.S. 3.

[31] *Fort Frances Pulp and Paper Co*. c. *Manitoba Free Press*, [1923] A.C. 330 (P.C.).

[32] François CHEVRETTE et Herbert MARX, *op. cit. supra*, note 14, p. 389.

[33] Andrée LAJOIE, *op. cit. supra*, note 23, p. 123 et suiv.

d'Abraham[34] Depuis lors une tentative de (re)déclarer à l'avantage général du Canada les anciennes voies ferroviaires du CN entre le port et la gare de Vancouver qui avaient été privatisées est morte au feuilleton, mais une autre déclaration a été votée l'année suivante par le Parlement relativement aux voies d'accès aux ponts internationaux[35]. Faut-il insister davantage sur les effets de ce mécanisme, dont les tribunaux ont été complices, se refusant à contrôler la discrétion du Parlement ?

Pouvoirs de l'exécutif

La constitution attribue également deux pouvoirs à l'éxécutif qui lui permettent de modifier le partage des compétences, (désaveu et acquisitions de propriétés publiques), sans parler d'un aure pouvoir que l'exécutif s'est attribué, et qui reste inconstitutionnel : le pouvoir de dépenser.

Pouvoir de désaveu. La *Loi constitutionnelle de 1867* prévoyait à ses articles 56 et 57 le pouvoir de *désaveu* et de *reserve* des lois, y compris provinciales, par le Gouverneur général. Il s'agit dans le premier cas, de l'annulation discrétionnaire d'une loi au moment même de son adoption et, dans le second, d'une suspension crépusculaire allant jusqu'à un terme final de deux ans. Utilisés surtout à l'égard de la législation des provinces de l'Ouest dans les débuts de la Confédération, ces pouvoirs sont tombés en désuétude – le désaveu en 1943, après 112 utilisations, et la réserve en 1961, après 70 utilisations[36] – le principe du fédéralisme en ayant triomphé rapidement (?) après 1867, du moins selon l'avis récent de la Cour suprême[37].

Acquisition de propriétés publiques. Le Parlement ayant la compétence législative sur la propriété publique[38], il suffit par ailleurs au gouvernement d'acquérir des immeubles pour les y assujettir. Avant la dernière guerre mondiale, l'État canadien s'est généralement limité à des achats constitutionnellement valides, notamment au centre des villes les plus importantes du pays. Officiellement prévues pour permettre l'implantation des édifices publics fédéraux, ces acquisitions visaient en fait le contrôle du développement urbain – matière locale s'il en est – et originairement dévolue de ce fait à la compétence provinciale, ainsi évacuée par le jeu combiné de la propriété publique et de la théorie de la prépondérance fédérale. Ces pratiques, ajoutées à des attributions de terres publiques aux sociétés (fédérales) notamment de transport, et jumelées à leur compétence déjà établie sur les

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[34] *Loi concernant les champs de bataille nationaux de Québec,* 7-8- E. VII, S.Can 1908, ch. 79, art 2.

[35] *Loi modifiant la Loi sur les transports au Canada et la Loi sur la sécurité ferroviaire et d'autres lois en conséquence*, Première session, trente-deuxième législature, 55-56 Élizabeth II, 2006-2007, Projet de Loi C-11, art. 38 (mort au feuilleton) *et Loi sur les ponts et tunnels internationaux*, 55 Élizabeth II, S.Can.2006, ch,1, art.2 et 5.

[36] *Op. cit supra*, note 35, p. 25.

[37] *Renvoi relatif à la sécession du Québec*, précité, note 4, par. 55.

[38] *Loi constitutionnelle de 1867, art. 91(1) a.*

ports et les aéroports nationaux, ont donné aux autorités fédérales la maîtrise du développement du territoire urbain des provinces, à l'époque cruciale où les États n'avaient pas encore privatisé leurs compétences en cette matière. Plus tard, les autorités ont procédé aux mêmes fins à des expropriations excédant nettement les finalités invoquées, dont la validité constitutionnelle était conséquemment loin d'être établie. La brèche était ouverte qui allait désormais permettre à l'exécutif fédéral de sortir des bornes de la Constitution...

Pouvoir de dépenser. Le prétendu « pouvoir de dépenser » des autorités fédérales fait partie de ces pratiques inconstitutionnelles. Le libellé même de cet instrument fédéral de centralisation porte à confusion, réussissant là l'un des effets de légitimation idéologique les plus spectaculaires du vocabulaire constitutionnel : quoi de plus normal pour un gouvernement, en effet, que de dépenser ? Un gouvernement peut-il agir de quelque manière sans dépenser ? Imagine-t-on que le fédéralisme puisse impliquer que les gouvernements d'une fédération soient dépourvus du pouvoir de dépenser ? Bien sûr que non, de sorte qu'en posant son pouvoir de dépenser comme fondement d'une intervention, un gouvernement fédéral invoque par association l'orthodoxie constitutionnelle et semble conférer à son action une validité inattaquable. Pis encore, cela est justifiable en partie : il est en effet certain que les autorités fédérales comme provinciales peuvent dépenser dans la sphère de leurs compétences législatives puisqu'il s'agit d'une modalité essentielle de mise en œuvre des mesures législatives qu'elles adoptent. Ainsi par exemple, les autorités fédérales peuvent acquitter les dépenses de l'armée, des affaires étrangères ou de la poste et les autorités provinciales celles de la fonction publique, des tribunaux, des prisons et des hôpitaux sans contrevenir à la Constitution. C'est également le cas lorsque la Constitution le prévoit expressément, comme pour la péréquation introduite à l'article 36(2) de la *Loi constitutionnelle de 1867*[39] par la *Loi constitutionnelle de 1982*[40].

Mais loin de désigner ces pratiques valides, l'expression « pouvoir de dépenser » telle que consacrée par le discours constitutionnel canadien réfère à l'affirmation idéologique d'un pouvoir fédéral constitutionnellement inexistant, de dépenser dans les champs de compétence des provinces en imposant des conditions équivalentes à une intervention normative. Au terme d'une analyse fouillée, j'ai pu montrer que la validité constitutionnelle de ce pouvoir, sur laquelle la doctrine est divisée, n'a

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[39] *Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada,* (R.U.) 1982, c. 11).

[40] *Loi constitutionnelle de 1867*, précitée, note 2, art. 36(2), qui s'énonce : « *Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables* ».

pas été non plus confirmée par la jurisprudence[41], la Cour suprême ayant même expressément refusé de se prononcer sur sa validité constitutionnelle[42]ce qui n'a évidemment pas empêché les autorités fédérales de l'invoquer au soutien de leurs interventions depuis la dernière guerre mondiale, sous la forme de subventions conditionnelles, attribuées successivement aux gouvernements provinciaux (qui se sont prêtés à l'exercice plutôt que de renoncer au fruit des impôts de leurs contribuables), notamment dans le domaine de la santé et de la sécurité sociale, puis aux individus (notamment par des bourses et des chaires dans le domaine de l'éducation et des dégrèvements d'impôts à des fins spécifiques), et plus récemment aux municipalités, qui relèvent, comme la santé et l'éducation, de la compétence des provinces.

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Au terme de l'examen de toutes ces possibilités constitutionnelles – et sans même tenir compte de celles qui ne sont pas valides – pour les autorités « fédérales » canadiennes de modifier unilatéralement le partage des compétences entre le Parlement et l'exécutif fédéral et les législatures provinciales, il faut bien conclure que la constitution du Canada en fait un pays unitaire avec une certaine mesure de décentralisation administrative. Dans ce contexte le terme « fédéralisme » constitue un vocable idéologique visant à faire paraître vraiment fédérale une constitution qui ne l'est pas. Dans ces circonstances, comment la Cour suprême pourrait-elle, en contexte contemporain, induire un « déficit du fédéralisme canadien » puisque l'on ne peut supprimer ou même diminuer que ce qui existe déjà, ce qui n'est visiblement pas le cas au Canada pour le fédéralisme.

Il nous reste à voir, dans la seconde partie de ce texte, comment les facteurs qui jouent sur le contenu des décisions de la Cour et l'absence constitutionnelle de fédéralisme au Canada éclairent une éventuelle décision à prendre en matière de modification du processus de nomination des juges de la Cour suprême du Canada.

2- RÉPONSE RÉFLÉCHIE

Un premier éclairage découle de la réflexion proposée ici sur le rôle du juge dans la production du droit. On y voit en effet plus clair maintenant dans le rôle que joue l'interprétation judiciaire dans la production du droit et l'on perçoit mieux le cadre dans lequel elle se déploie : si la conjoncture est le facteur le plus important dans l'orientation des décisions judicialres, c'est que c'est à travers les exigences de la légitimité sociale et de la reproduction politique que la surdétermination[43] pèse sur

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[41] « Le pouvoir fédéral de dépenser », Annexe 2 du *Rapport de la Commission sur le déséquilibre fiscal*, Québec, Bibliothèque nationale du Québec, 2002.

[42] *Sindicat national des employés de l'Aluminium d'Arvida* c. *P.G. Canada*, 2008 R.C.S. 68.

[43] Voir *supra,* note 9.

l'interprétation, par ce qui se présente comme des interdits et parfois même des indications, moins nombreuses pourtant que les simples incitations.

Qu'elle procède par interdit ou par indication, la surdétermination semble parfois impérative. Dans le champ interne – celui du droit substantif – lorsque l'inscription dans le droit de valeurs trop antagoniques aux valeurs dominantes pour fonder des normes acceptables par la majorité a pour effet d'écarter aussi bien la norme du droit que le juge du tribunal, qui risque lui aussi le discrédit s'il approuve, ne serait-ce qu'implicitement, ces valeurs. Dans le champ externe – celui du droit constitutionnel qui nous importe particulièrement ici – lorsque l'inscription dans le droit de valeurs susceptibles de mettre en danger les formes étatiques qui garantissent la reproduction matérielle et identitaire d'une société peut mener à la réalisation de ce danger, savoir la disparition d'une société dans sa forme distinctive ou d'un État, du moins dans son intégrité d'origine.

Dans un cas comme dans l'autre, c'est alors littéralement la légitimité – et conséquemment la survie – du juge ou du tribunal (champ interne) quand ce n'est pas de celle du système judiciaire, de l'État lui-même ou de la société qu'il personnifie (champ externe) qui est en jeu dans le choix des valeurs et fonde l'efficace de la surdétermination. Surdétermination d'autant plus lourde lorsque les impératifs découlant du champ interne et externe se superposent sur une même situation interprétative, par exemple si la crédibilité du système judiciaire tout entier, en tant qu'appareil d'État, était affectée suite à une décision entérinant des valeurs inacceptables dans le champ interne : ce sont alors à la fois la situation du juge lui-même, le maintien de l'institution dans laquelle s'inscrit son action et la survie de l'État dont ils dépendent tous deux qui sont en cause.

Si donc ce sont les valeurs dominantes des auditoires universel et particulier de la Cour[44] qui orientent ses décisions, il en résulte que le mode de nomination des juges n'a pas l'importance que lui accordent ceux qui veulent le modifier. En effet, peu importe que ce soit l'exécutif en privé ou un comité de la législature exerçant ses pouvoirs en public qui effectue la nomination des juges, ceux-ci une fois en place – surtout lorsque, comme en Cour suprême du Canada, leur nomination est permanente – ne sont pas liés par les valeurs de ceux qui les ont nommés, ni même par celles qu'ils ont eux-même professées dans le passé, mais plutôt soucieux de justifier leur crédibilité en suivant l'évolution des valeurs dominantes de la société canadienne à laquelle ils adressent leurs décisions. Dans ces circonstances, celui ou ceux qui nomment les juges n'ont pas vraiment d'influence sur eux par la suite. Pour illustrer : est-ce que le gouvernement libéral qui a nommé Antonio Lamer juge en chef de la Cour suprême aurait pu souhaiter ou même imaginer la décision qu'il a rendue dans la *Référence sur la Sécession* ?

S'agit-il pour autant d'un « déficit démocratique » ? Au contraire, il me semble que l'influence des valeurs dominantes de l'auditoire universel sur les juges est une bien meilleure garantie de la production démocratique d'un droit tel que souhaité par la société à laquelle isl s'adressent, que son orientation par un comité d'un

[44] Perelman, C., *op.cit. supra*, note 10.

parlement qui, de toutes façons, dans le meilleur des cas où ce gouvernement est franchement majoritaire, ne pourrait renforcer cette même tendance qu' à court terme. Car dans le long terme, c'est la société qui gagne.

En ce qui concerne par ailleurs le « déficit de fédéralisme », pourrait-on s'il existait, le contrer par la participation des autorités provinciales à la nomination des juges de la Cour suprême ? Pour cela, il faudrait qu'il y ait un fédéralisme à atténuer. Or j'ai montré plus haut que la constitution canadienne, si elle l'a jamais été, n'est plus maintenant fédérale.

Mais imaginons que j'aie tort : la présence de représentants des provinces dans l'éventuel comité de nomination changerait-il qurelque chose au contenu des décisions prises pas la suite par les juges ainsi nommés ? Il me semble bien que non, pour la même raison évoquée plus haut : les juges vont dans le sens des valeurs dominantes, et ils interprêtent en conséquence consciencieusement la constitution unitaire quelque peu décentralisée qui est la nôtre à la lumière des valeurs dominantes de l'ensemble du Canada, qui ne cherche pas, que je sache, à la décentraliser davantage, sans parler de la rendre vraiment fédérale…

C'est donc dire que, plutôt que de modifier le mode de nomination des juges de la Cour suprême, ceux et celles qui veulent remédier à un éventuel déficit démocratique dont l'existence au surplus n'est pas démontréee, au contraire, auraient avantage à diriger leurs efforts vers l'exercice démocratique de la défense de leurs valeurs de façon à les rendre dominantes. Du moins est-ce là la voie la plus utile pour les minorités sociales, dont les valeurs se sont en effet déployées dans la société avant que la Cour ne les confirme, du moins en partie et sans toutesfois nuire à celles qui y dominent vraiment[45]. Quant aux membres des minorités politiques – Québécois et Autochtones – qui voudraient (ré?)introduire une dimension véritablement fédérale dans la constitution canadienne, la route est plus longue pour eux, sinon complètement bloquée, par le fait qu'il ne s'agit pas là d'une option privilégiée – maintenant, ni même dans un avenir prévisible – par la majorité des Canadiens, dont les valeurs ne peuvent évidemnent que dominer au Canada. Ce texte n'aura pas été inutile s'il les dissuade de poursuivre des chimères, et les amène à considérer avec réalisme les options qui sont vraiment les leurs : rester au Canada s'ils estiment que cela implique des avantages suceptibles de les faire renoncer à leurs valeurs propres, ou bien établir un pays qui y corresponde et les respecte.

[45] Voir : Andrée LAJOIE, *Quand les minorités font la loi*, Paris, Presses universitaires de France, 2002.

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REFORM OF THE SUPREME COURT OF CANADA FROM WITHIN: TO WHAT EXTENT SHOULD THE COURT WEIGH IN REGARDING CONSTITUTIONAL CONVENTIONS?*

Peter C. Oliver

L'auteur traite d'une question controversée liée à la définition que la Cour suprême du Canada donne de son propre rôle, à savoir son apparente volonté de s'exprimer sur l'existence ou non de conventions constitutionnelles dans des cas de référence tout autant que dans des litiges courants. Il inscrit ici le rôle de la Cour dans le contexte des demandes croissantes qui lui sont faites d'arbitrer des questions comme le droit de prorogation ou de dissolution du gouverneur général. Puis il propose des lignes directrices relatives au traitement des conventions constitutionnelles. C'est ainsi que dans les cas de référence, soutient-il, la Cour devrait uniquement énoncer les conventions clairement établies alors qu'elle devrait s'y référer le moins possible dans les litiges courants, et refuser de se prononcer sur les conventions constitutionnelles.

INTRODUCTION

Many of the contributions to this collection rightly focus on reforms to the Supreme Court of Canada that can be accomplished from without: by the prime minister and cabinet, by Parliament, by the provinces and by the various procedures for

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constitutional amendment. In this paper, I propose to discuss reform to the Supreme Court of Canada that occurs from within: that is, the important ways in which the Court of its own accord alters understandings of its proper judicial role, in particular with regard to the recognition and enforcement of constitutional conventions.[1]

The most famous and most-debated change in judicial self-conception is associated with the *Canadian Charter of Rights and Freedoms*.[2] I do not propose to discuss this change, important though it is. As is well known, Supreme Court of Canada judges have defended the adoption of a new role on the basis that the *Constitution Act, 1982* mandated that Canadian courts interpret and apply the Charter as supreme law.[3]

Another controversial role performed by the Supreme Court of Canada is that of providing advisory opinions in reference cases. Decisions such as the *Patriation Reference*,[4] the *Quebec Veto Reference*,[5] *Reference re: Manitoba Language Rights*,[6]

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[1] See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991). See also Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2009) NJCL 217; Mark D. Walters, "The Law behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 *Journal of Parliamentary and Political Law* 127; Peter H. Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) and Peter Aucoin, Mark D. Jarvis and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011).

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] See, e.g., quotation from Dickson C. J. as reported in R. J. Sharpe, "Brian Dickson: Portrait of a Judge" (1998) 17: 3 Advocates' Soc J 13 at 31.

> The then prime minister, Mr. Trudeau, announced publicly that when it came to the preservation and protection of civil rights of Canadians, he preferred to have that responsibility entrusted to the courts rather than to the majority party that happened to be in office at a particular time in Parliament or in a particular legislature of a province. So it was clear that there was going to be a shift of power, and a very serious one, and one carrying a great deal of weight.

For a more detailed discussion of this issue, see. R.J. Sharpe & K. Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 378.

[4] *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*].

[5] *Reference re: Amendment to the Canadian Constitution,* [1982] 2 SCR 79 [*Quebec Veto Reference*].

[6] re: *Manitoba Language Rights*, [1985] 1 SCR 721 [*Reference re: Manitoba Language Rights*].

Reference re: Canada Assistance Plan (B.C.),[7] the *Provincial Judges Reference*[8] and the *Secession Reference*[9] come immediately to mind.[10] Again, the Court defends its long-standing advisory role partly on the basis that it was mandated to perform this task, in this instance by section 53 of the *Supreme Court Act*.[11] The Supreme Court of Canada confirmed the constitutionality of section 53 in the *Secession Reference*.[12]

At the same time, the Court in the *Secession Reference* had important things to say about how it should determine whether a question is justiciable, or appropriate for judicial determination. It quoted[13] with approval the following statement in *Reference re: Canada Assistance Plan (BC)*:[14]

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, *the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government*. . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or *whether it has a sufficient legal component to warrant the intervention of the judicial branch*. (emphasis added)

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[7] *Reference re: Canada Assistance Plan (B.C.),* [1991] 2 SCR 525 [Reference re: Canada Assistance Plan (B.C.)].

[8] *Ref re: Remuneration of Judges of the Prov. Court of P.E.I.; Ref re: Independence and Impartiality of Judges of the Prov. Court of P.E.I.,* [1997] 3 SCR 3 [*Provincial Judges Reference*].

[9] *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

[10] Regarding advisory opinions in general, see my colleague Carissima Mathen's "The question calls for an answer, and I propose to answer it: The Patriation Reference as Constitutional Method" forthcoming in the *Supreme Court Law Review*. See also Carissima Mathen, "Mutability and method in the marriage reference" (2005) 54 UNBLJ 43 and F. Chevrette & Grégoire C. N. Webber, "L'utilisation de la procédure de l'avis consultatif devant la Cour suprême du Canada: Essai de typologie" (2003) 82 Can Bar Rev 757.

[11] *Supreme Court Act*, RSC 1985, c S-26 s 53:

> 53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
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> *(a)* the interpretation of the *Constitution Acts*;
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> *(b)* the constitutionality or interpretation of any federal or provincial legislation;
>
> *(c)* the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
>
> *(d)* the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

[12] *Supra* note 9 at para. 15.

[13] Ibid. at para. 26 (emphasis added by the Court in the *Secession Reference*).

[14] *Reference re: Canada Assistance Plan (B.C.), supra* note 7 at 545.

In the case of most advisory opinions, such as the current *Reference re: Proposed Canadian Securities Act*,[15] both the propriety of the Court's role and the sufficiency of the legal component are reasonably clear.[16]

In this paper I would like to focus on a more controversial case of the Court's self-definition of its role: the Supreme Court of Canada's apparent openness to weighing in regarding the non-existence (and eventually, one wonders, existence) of constitutional conventions not only in reference cases but in ordinary litigation through the remedy of judicial declaration. It seems to me that it is all the more important to consider the Supreme Court of Canada's role regarding constitutional conventions in the context of increasing calls for the Court to arbitrate matters such as whether the governor general should grant prorogationor dissolution.[17] My argument is that the Supreme Court of Canada should be extremely careful in doing so in the context of a constitutional reference, articulating only conventions that are clearly established rather than participating in the creation of new previously controversial conventions; and that it should refuse outright to make declarations regarding constitutional conventions in the context of ordinary constitutional litigation, referring only occasionally to well established conventions as part of the relevant factual context, but only at its own initiative.[18]

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[15] *Reference re: Securities Act (Canada),* 2011 ABCA 77; *Québec (Procureure générale) c. Canada (Procureure générale)*, 2011 QCCA 591; 2011 SCC 66.

[16] For a more detailed and nuanced discussion of justiciability see Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at 2 and 230. See also T. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), quoted in *Friends of the Earth v. Canada (Governor in Council)* 2008 FC 1183 para. 25 to the following effect:

> The justiciability of a matter refers to it being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.

[17] See, e.g., Rebecca Ross, "The Prime Minister and Prorogation: Time for a New SCC Reference?" (15 December 2008), online: The Court <http://www.thecourt.ca/2008/12/15/the-prime-minister-and-prorogation-time-for-a-new-scc-reference/>. See also the scenario described by my colleague Adam Dodek in his "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" forthcoming in the *Supreme Court Law Review*.

[18] The focus of this paper is the courts' treatment of conventions *as* conventions; that is, as I would put it, the *judicial* enforcement of rules that were designed (in aid of our democratic political constitution) to be enforced *politically*. My argument should not be understood to exclude any and all judicial intervention simply because constitutional conventions are present. However, such judicial intervention should in that case be based on distinct legal arguments, not on declarations regarding constitutional conventions using the relatively

Prior to 1981, it was controversial even to suggest recognition of constitutional conventions in reference cases. Immediately following the *Patriation Reference* and *Veto Reference*, I believe that most commentators would have stated matters much as I did in the previous paragraph.[19] And yet by the early part of the 21st century, parties in high profile cases had begun to seek declarations regarding constitutional conventions in the context of ordinary litigation.[20] How did this evolution with respect to the courts' role regarding constitutional conventions come about? In my view, an important part of the explanation relates to changes in the courts' jurisprudence since the early 1980s and to an altered understanding of the 1867 preamble phrase: "a Constitution similar in principle to that of the United Kingdom."

JURISPRUDENTIAL CHANGES SINCE THE EARLY 1980s AND "A CONSTITUTION SIMILAR IN PRINCIPLE TO THAT OF THE UNITED KINGDOM"[21]

Discussion of reform of the Supreme Court of Canada's self-definition of its role is complicated by important jurisprudential developments which have occurred

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weak standard of Jennings' three-part test; and, furthermore, the presence of constitutional conventions is often an indication that even judicial intervention based on distinct legal arguments it not appropriate.

[19] See, e.g., P. W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 16 who reflected:

> In my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and should not have gone beyond the legal question to exert any further influence over the negotiations. On the other hand, it could be argued that the Court was about to be given a function that was quasi-political in interpreting and applying the new Charter ..., and that this prospect served as a kind of mandate to play a larger role in the Patriation Reference.

[20] See, e.g., *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [2000] 2 SCR 409 [*Public School Board Association of Alberta*]; *Ontario English Catholic Teachers' Association v. Ontario (Attorney General)*, [2001] 1 SCR 470 [*Ontario English Catholic Teachers*] [collectively, the *School and Teachers' Association* cases 2000-1]; *Conacher and Democracy Watch v. Canada (Prime Minister)*, 2009 FC 920 [Democracy Watch FC]; *Conacher and Democracy Watch v. Canada (Prime Minister)*, 2010 FCA 131 [*Democracy Watch FCA*].

[21] I have written about and presented papers on the "Constitution similar in principle to that of the United Kingdom." See, e.g., "The Supreme Court of Canada: Constitutional Conventions, Constitutional Principles and 'A Constitution Similar in Principle to that of the United Kingdom,'" panel on the Politicization of the Judiciary/Judiciarization of Politics, Canadian Political Science Association, 1 June 2010; and "A Constitution Similar in Principle to that of the United Kingdom," contract research for Justice Canada, June 2006. The main theme of these papers is that "a Constitution similar in principle to that of the United Kingdom" originally signalled the fact that important parts of the Canadian constitution are subject to

since the early 1980s. In the *Patriation Reference* the Supreme Court of Canada applied an essentially positivist approach to the distinction between law and politics. From within that approach, the Court agonized and the majority and minority disagreed about whether the Court should be discussing politically charged conventions at all. The highly exceptional (viewed from the perspective of British and Commonwealth precedents[22]) discussion of constitutional conventions was justified in the majority's view by the legally mandated reference power itself,[23] and by the broad understanding of the word "Constitution"[24] that our British legal traditions require. The majority on the conventional issue in the *Patriation Reference* agreed that courts should not *enforce* constitutional conventions but insisted that conventions are nonetheless key *components* of the Constitution, citing the 1867 Preamble ("a Constitution similar to that of the United Kingdom") by way of support (emphasis added) (ibid., at 882-883):

> This conflict between convention and law which prevents the courts from *enforcing* conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.

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political rather than judicial overview: parliamentary privilege, parliamentary sovereignty and, most significantly, constitutional conventions (many of which served, and continue to serve, to our system of responsible government). While the Constitution has evolved, the political constitution is still an important feature. If these assertions are correct, then the Supreme Court of Canada should not view "a Constitution similar in principle to that of the United Kingdom" as an invitation to courts to fill perceived gaps in the Constitution – that would turn its meaning on its head. Justifications for gap-filling must be found elsewhere, on this argument.

[22] See, e.g., A. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 14th ed. (Harlow, England: Pearson Longman, 2007) at 29; S. de Smith & R. Brazier, Constitutional and Administrative Law, 8th ed. (London: Penguin, 1998) at 29ff; G. Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984) at 12ff; and Commonwealth references at note 29, infra. For a contrary interpretation of the British and Commonwealth precedents, see F. Gélinas, "Les conventions, le droit et la Constitution dans le renvoi sur la 'sécession' du Québec : le fantôme du rapatriement" (1997) 57 *Revue du Barreau* 291.

[23] See Marshall, Ibid. at 16-17:

> The Canadian courts only felt able to declare the existence of the convention because under widely drawn provincial and federal statutes providing for the furnishing of advisory opinions, they were specifically authorized to give such opinions on questions of either law or fact. The power to recognize the conventions derived therefore from statute. Where such statutes exist the law will treat the existence of a convention as simply a question of fact – though not a simple question of fact – since the conclusion may need to be established by a complex process involving both argument and historical exegesis (with politicians providing expert factual evidence).

[24] *Patriation Reference, supra* note 4 at 883-884 ("constitutional conventions plus constitutional law equal the total constitution of the country)."

> It is because the sanctions of convention rest with institutions of government other than courts, such as the Governor General or the Lieutenant-Governor, or the House of Parliament, or with public opinion and ultimately, with the electorate, that it is generally said that they are political.
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> ...
>
> It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. *Also they form an integral part of the constitution and of the constitutional system*. They come within the meaning of the word "Constitution" in the preamble of the *British North America Act, 1867*.

In other writing and presentations,[25] I have argued that the 1867 preamble reference to "a Constitution similar in principle to that of the United Kingdom" was intended to be a reminder that while the 1867 Constitution set out important, judicially reviewable (for the most part), legal components to the Canadian Constitution, other components, such as constitutional conventions, were not set out, and though constitutionally important (in the broad British usage of the term "Constitution"), were not intended to be judicially reviewable. The 1867 preamble phrase "a Constitution similar in principle to that of the United Kingdom" signalled that constitutionally important matters such as constitutional conventions, parliamentary privilege and even parliamentary sovereignty itself (as distributed in our federal system) were subject to political and democratic rather than judicial regulation.

In my respectful view, the Supreme Court of Canada has turned the meaning and message of "a Constitution similar in principle to that of the United Kingdom" on its head, and this with the potent assistance of a new jurisprudential approach. Since the 1990s the Court has cited this phrase from the 1867 preamble not as it was originally intended – as a reminder that constitutional regulation in our system remains political where conventions and the like are concerned – but as a justification for judicial intervention and constitutional gap-filling.[26] In support of this new direction, the Supreme Court of Canada has moved since the early 1980s from an essentially positivist jurisprudential approach[27] to one that shows the influence of

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[25] See references above, note 21.

[26] See *Provincial Judges Reference*, supra note 8 at para. 95, where Lamer CJ states that "[a]s such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme." In my view, such use of principle to fill gaps need to be justified on its own terms rather than by why I view as a misleading reference to the 1867 preamble.

[27] See G. Grant Amyot, "A Matter of Philosophical Preference" (2011) 29 NJCL 1; Luc Tremblay, "La théorie constitutionnelle et la primauté de droit" (1994) 39 McGill LJ 101 at 104; Peter C. Oliver, *The Constitution of Independence : The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford : Oxford University Press, 2005); F. Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur

the principle-led[28] anti-positivist or modern-day natural law theories of Ronald Dworkin.[29] This move is controversial as a general trend, but particularly confusing in the case of constitutional conventions. A brief explanation as to why points to the heart of the issue of reform of the Supreme Court of Canada from within.

CONSTITUTIONAL CONVENTIONS AND CONSTITUTIONAL PRINCIPLES

According to the British constitutional writer Sir Ivor Jennings (cited with approval by the Supreme Court of Canada in the *Patriation Reference*),[30] constitutional conventions require three elements: (1) precedents indicating a constitutionally significant rule; (2) the relevant political actors indicating that they are bound by the said rule; and (3) a principled reason for the rule, such as democracy, good governance or, as in the case of the *Patriation Reference*, federalism. The Court (following Jennings and virtually all British and Commonwealth writers on the subject[31]) acknowledged that it is of the essence regarding constitutional conventions

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la 'secession' du Québec : le phantôme du rapatriement" (1997) 57 R du B 291 at 321ff.; Walters, *supra* note 1.

[28] Rt Hon Beverley McLachlin P.C., "Remarks" (Remarks delivered at the 2005 Lord Cooke Lecture in Wellington, New Zealand 1 December 2005), online : The Supreme Court of Canada website <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm05-12-01-eng.asp> where she refers to new natural law approach by the Supreme Court of Canada.

[29] Dworkin's earliest analysis of the importance of principle appeared in book form in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977). The most widely read version was *Law's Empire* (Cambridge: Belknap Press,1986). Dworkin's principled-based analysis seems clearly to be at the base of the *Reference re: Manitoba Language Rights*, though Dworkin is not cited. Other references indicate, however, that the Court was aware of Dworkin's writing. See, e.g., early references to Dworkin in re: *Residential Tenancies Act*, [1981] 1 SCR 714 at 735; *Attorney General of Quebec v. Grondin*, [1983] 2 SCR 364 at 374; *Operation Dismantle v. The Queen*, [1985] 1 SCR 441 at para. 101; *R. v. Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 208; *R. v. Paré,* [1987] 2 SCR 618. See Oliver, *supra* note 28 at 318n.

[30] *Patriation Reference*, supra note 4.

[31] Certainly then, but also, to a very large extent, now: Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 12ff; A. Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), p. 10; P. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed. (Wellington: Brookers, 2001) at 299ff; P. Hanks & D. Cass, *Australia Constitutional Law*, 6th ed. (Sydney: Butterworths, 1999) at 29. It should be acknowledged that, since the Patriation Reference, a minority of British writers have come increasingly to accept the possibility of the "crystallization" of conventions and to view them as part of a spectrum of constitutional obligation that is appropriate subject matter for judicial regulation. For an excellent, quite sympathetic, account of this approach, see N. Barber, *The Constitutional State* (Oxford: Oxford Univer-

that they are enforced not by courts but by the relevant political actors and by constitutional observers intent on ensuring respect for this political form of morality.[32]

Accordingly, even the mere *recognition* by the *Patriation Reference* Court of a constitutional convention in evolution was controversial. In the British and Commonwealth tradition, the best known judicial treatments of constitutional conventions involves recognition of well established constitutional conventions as part of the essential factual context (what might be viewed as a form of judicial notice)[33] or on the way to determination of the merits of a case based on other *legal* grounds. The English case of *Attorney General v. Jonathan Cape* provides an example of this exceptional judicial discussion of constitutional convention,[34] as does the Canadian decision in *Reference re: Canada Assistance Plan (B.C.)*.[35] The fact that one finds virtually no mention of constitutional conventions in British and Commonwealth law reports then speaks volumes regarding the essentially political nature of this constitutional phenomenon.

This British and Commonwealth tradition of judicial self-restraint with respect to constitutional conventions also perhaps explains why the majority (on the conventional question) in the *Patriation Reference* was only willing to recognize the weaker, amply demonstrated "substantial provincial consent"[36] convention rather than the more controversial "unanimous provincial consent"[37] convention that most provinces had in fact asserted, and for which there was considerable though not unequivocal evidence; and it perhaps also explains the Court's unwillingness to

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sity Press, 2010) ch. 6. However, it should at the also be pointed out that this recent British trend is itself influenced by the same Dworkinian approach that I argue is inappropriate (or, at the very least, potentially misleading) regarding constitutional conventions. For an early proponent of the Dworkinian approach, and for its application to constitutional conventions, see T.R.S. Allan, *Law, Liberty, and Justice* (Oxford: Oxford University Press, 1993), p. 240.

[32] See D. Feldman, ed., *English Public Law* (Oxford: Oxford University Press, 2004) at 16: "a sharp line can be drawn between principles of constitutional law and conventions. The former may be enforced by courts, while the latter may not."

[33] Marshall, *supra* note 32 at 17.

[34] [1976] QB 752 [*Jonathan Cape*]; At first blush, this case appears to involve judicial enforcement of a convention. However, a closer look reveals that the judicial discussion of a convention was a finding of fact necessary to a legal conclusion turning on a separate legal (or equitable, in this case) doctrine. If one asks "would the Court have accepted the Attorney-General's contention if it had been based on the convention alone?", the answer is clearly "no." This tells us that it was the equitable doctrine of breach of confidence that was doing the legal work rather than the convention.

[35] *Canada Assistance Plan*, *supra* note 7. Sopinka J. was careful to focus on the legal rather than the conventional question, noting that question as presented by the parties regarding the constitutional convention was really a question of the legal doctrine of legitimate expectations.

[36] *Patriation Reference*, *supra* note 4 at 905.

[37] Ibid. at 867.

recognize a conventional veto for Quebec in the *Quebec Veto Reference*, despite so much evidence in support of that still-evolving rule. I have elsewhere criticized the Court for not recognizing a conventional Quebec veto,[38] but with the benefit of greater hindsight the Court's reticence is understandable if one assumes, as I here suggest is appropriate, that the Court was intent on recognizing only fully formed incontrovertible conventions rather than participating in the completion of still-evolving controversial (and therefore arguably inchoate) ones.[39]

All the worrying by the Court in 1981–82 regarding the propriety of identifying a constitutional convention in a reference case must now seem quaint to some, given the Court's later jurisprudential boldness. Beginning in 1985 with the *Reference re: Manitoba Language Rights*, the Supreme Court of Canada began to make use of constitutional principles where existing constitutional rules failed to provide satisfactory solutions. In 1985, the constitutional principle was the rule of law. A decade later, in the *Provincial Judges Reference*, it was judicial independence and, most famously, in the *Secession Reference*, it was the interaction between the incommensurable principles of democracy, rule of law, federalism and protection of minorities that produced the solution so admired by so many constitutional observers across the globe.

Those decisions deserve praise or criticism according to their own merits.[40] The point that I would like to emphasize here is, first, that the use of principles to fill gaps in the constitution should not have been justified using an 1867 preamblular phrase that was a reminder of precisely the opposite phenomenon;[41] and, secondly, that the Court's current willingness to use principles to create constitutional (com-

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[38] Peter Oliver, "Canada, Quebec and Constitutional Amendment," 49 *U Toronto LJ* 519 (1999) at 89.

[39] If this is a fair description of what the Court was trying to do in the *Patriation Reference*, and I am now of the view that it is, then I would still have preferred for the Court to spell this out more clearly, that is, to say that while the evidence of a Quebec veto was not sufficient for the Court to take something like judicial notice on account of its incontrovertible nature, this was not to say that the convention did not exist; rather the situation was not clear enough for the Court to say so, and accordingly it was for the relevant political actors and constitutional commentators to determine.

[40] My own view is that in the *Reference re: Manitoba Language Rights* and *Secession Reference* the Court was called upon in exceptional circumstances and with regard to exceptional questions to identify the key underlying structural principles of the Canadian constitutional system and its responses were in that respect admirable. In the *Provincial Judges Reference*, the Court, in circumstances that were not in my view exceptional, weighed in regarding a controversial political matter. As I have argued above, the Court's use of "a Constitution similar in principle to that of the United Kingdom" to justify its role in filling a constitutional gap turned the original meaning of that phrase on its head.

[41] That is, the fact that important parts of the Canadian constitution remain under political regulation. Another way of making the same point, and one which I will develop later in this paper, is that there is no gap to fill.

mon) law presents difficulties and dilemmas regarding constitutional conventions. I will elaborate below only on the second point, though the first point is worthy of closer attention at some other time.

In the brief discussion of the *Patriation Reference*, we have seen (1) that constitutional conventions can be recognized by courts (often in an uncontroversial, factual way) but that they exist to be enforced by political pressure rather than by judicial intervention, and (2) that following the Court's approval of Jennings' test for the identification of constitutional conventions, they are all clearly based on at least one constitutionally important principle (for example, democracy or federalism). It should be apparent that the emergence of a (Dworkin-inspired) jurisprudential trend in favour of using constitutional principles to fill gaps places observations (1) and (2) in tension.

According to observation (1), courts should not, for example, enforce the alleged convention that the governor general should refuse to take the advice of the prime minister in deciding whether to dissolve Parliament in, say, the six months following an election. However, according to observation (2), if a relevant constitutionally important principle – democracy, say – can be identified then a constitutional question not addressed by the written text – a "gap," to use Chief Justice Lamer's term – could theoretically be filled in by the Court in its continuing development of constitutional common law.

I am not suggesting that the Court would take this step, nor am I suggesting that it is obliged by existing case law to do so; however, this last example should send up red flags and remind us that greater clarity is required in this area. Is the Supreme Court of Canada required to determine whether evolving, possibly controversial constitutional conventions exist? In constitutional references? In ordinary litigation?

GUIDING REFORM OF THE SUPREME COURT OF CANADA'S APPROACH TO CONSTITUTIONAL CONVENTIONS FROM WITHIN

From a theoretical perspective, the Supreme Court of Canada may have worked its way into a sort of logical lobster trap regarding constitutional conventions, one from which, as the trap analogy implies, it cannot easily extricate itself. The logical steps into this trap are roughly (on my account rather than the Court's) as follows, points 1 to 5 emerging from the *Patriation Reference* and points 6 to 9 from cases such as the *Reference re: Manitoba Language Rights*, *Provincial Judges Reference* and *Secession Reference*:

1. *The Supreme Court of Canada must answer virtually any constitutional question asked of it in a reference case, provided that the question is justiciable.*
2. *Under the broad understanding of the word "constitution" used in the British tradition, the Canadian "Constitution" is made up of "the law of the constitution" and "the conventions of the constitution."*
3. *As part of the "Constitution" writ large, constitutional conventions can be said to have a sufficient "rule-based" component to satisfy justiciability requirements, at least in so far as the court's expertise is concerned.*

4. *All constitutional conventions, according to Jennings and now the Supreme Court of Canada, are based on at least one important principle, such as democracy, good governance or federalism.*
5. *Despite the fact that constitutional references are officially only advisory opinions, there is a long-standing practice of respecting and abiding by what the Court has to say in references, making it difficult to distinguish between mere recognition of a convention and enforcement of that convention.*
6. *Furthermore, according to the now-prevailing Dworkinian jurisprudential approach, constitutional principles can be used to fill gaps in the constitutional fabric where constitutional rules (in the text of the Constitution and in the relevant case law) do not provide an answer to a constitutional question.*
7. *Questions regarding constitutional conventions (a) usually exist in the gaps viewed from the perspective of the law of the constitution, and (b) potentially engage, by definition (see Jennings' test), a constitutional principle.*
8. *In appropriate cases the Court can fill the gap (noted in 7(a)) by means of the principle (noted in 7(b)) made relevant by the prevailing constitutional approach (noted in 6).*[42]
9. *All of which appears at first blush to be legally justifiable, especially in the context of other decisions in which constitutional principles have been deployed to important effect.*

From within this sort of perspective, if the Supreme Court of Canada can recognize conventions, if the Court's views in references are invariably respected by political and other relevant actors, if, in any event, the principle at the base of conventions can be converted into a legal rule by means of contemporary jurisprudential methods, and if that rule can fill any gaps in the constitutional fabric, then it is difficult to see why it should not be possible for

10. *parties to achieve their desired outcome by seeking declarations regarding conventions in the context of ordinary litigation.*

This, in my view, is roughly the logic that may have got the Court some way along the road to the sort of reform from within regarding conventions from which I would respectfully suggest it should back away. In order to explain why I disagree,

[42] One of the first, if not *the* first, constitutional observer to notice the jurisprudential development described above was Fabien Gélinas (see "Les conventions, le droit et la Constitution dans le renvoi sur la 'sécession' du Québec : le fantôme du rapatriement" (1997) 57 *R du B* 291), though Gélinas raises this argument in part to argue that the Supreme Court of Canada could have gone further in 1981–82, allowing, for instance, the crystallization of conventions into law. See also Fabien Gélinas, "La Cour suprême du Canada et le droit politique" (2008) 24 *C du Conseil Const* 72.

I will restate the propositions that I have set out above, and add what I take to be important qualifications and rejoinders.[43]

1. *The Supreme Court of Canada must answer any constitutional question asked of it in a reference case, provided that the question is justiciable.*

   As the Court reminded us in the *Secession Reference* quoting the *Reference re: Canada Assistance Plan (B.C.)*,[44] justiciability[45] is not just about whether the question has "a sufficient legal component to warrant the intervention of the judicial branch." The Court's "primary concern" is "to retain its proper role within the constitutional framework of our democratic form of government." Therefore even the presence of a "legal component" does not always dictate judicial intervention.

2. *Under the broad understanding of the word "constitution" used in the British tradition, the Canadian "Constitution" is made up of "the law of the constitution" and "the conventions of the constitution."*

   This statement chimes with "the Constitution similar in principle with that of the United Kingdom." However, that "Constitution similar in principle" also reminds us that certain parts of the constitutional law – constitutional convention, parliamentary privilege and parliamentary sovereignty – emphasize the importance of the political and democratic regulation as opposed to judicial review.

3. *As part of "Constitution" writ large, constitutional conventions can be said to have a sufficient "rule-based" component to satisfy justiciability requirements, at least in so far as the court's expertise is concerned.*

   As stated under 1, however, justiciability is more than a question of "expertise"; it is also a question of the court's "proper role."[46]

4. *All constitutional conventions, according to Jennings and now the Supreme Court of Canada, are based on at least one important principle, such as democracy, good governance or federalism.*

   The existence of such principles was, relatively speaking, a neutral phenomenon (in litigation terms) under a positivist conception of law; however, these

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[43] The repetition here is intended not to exasperate readers but to acknowledge that they should not be expected to have photographic recall of the first 10 propositions.

[44] *Reference re: Canada Assistance Plan (B.C.), supra* note 7.

[45] See note 16, *supra* for references regarding wider literature on justiciability.

[46] And this on the terms set out by the Supreme Court of Canada itself, as discussed above.

principles take on a law-generating role in a Dworkinian conception of law and adjudication.[47]

5. *Despite the fact that references are officially only advisory opinions, there is a long-standing practice of respecting and abiding by what the Court has to say in references, making it difficult to distinguish between mere recognition of a convention and enforcement of that convention.*

Even before the principles underlying constitutional conventions acquired a law-generating potential by means of the adoption of Dworkinian jurisprudential method, it was already difficult for the Canadian public at large to distinguish between the Supreme Court of Canada's recognition in a reference case of a (judicially unenforceable) convention and a legal rule. It was this understandable blurring of political and legal lines that made it inevitable that Prime Minister Trudeau would heed the convention identified by the Supreme Court of Canada in the *Patriation Reference*. In practice, this means that judicial declaration of a constitutional convention in any context is, practically speaking, indistinguishable from a judicial declaration of the law. The effect of both is a function of the authority of the court rather than the classification (politically or legally enforceable?) of the matter at issue.[48]

6. *Furthermore, according to the now-prevailing Dworkinian jurisprudential approach, constitutional principles can be used to fill gaps in the constitutional fabric where constitutional rules (in the text of the Constitution and in the relevant case law) do not provide an answer to a constitutional question.*

This would seem to be the critical stage in the argument. If we equate the Constitution with the *law* of the Constitution, then there would seem to be a gap where neither the text nor the case law covers the point. However, if we equate the Constitution with the law of the Constitution *and* the conventions of the Constitution, then *there is no gap*. This is the real meaning, in my view, of "a Constitution similar in principle to that of the United Kingdom."[49]

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[47] Principles can also play an important part in certain positivist conceptions of law and adjudication. See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978).

[48] On this point, see L. Sossin, "The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion and the Limits of the Rule of Law," (2010) 55 McGill LJ 661 at paras 61-62 and Mathen, supra note 10, *Sup Ct L Rev*, final section.

[49] For a similar view, see Newman, "Of Dissolution", above note 1, p. 229. For a contrary view, see, M. Walters, "Prorogation an issue of law, not just a technicality" *Law Times* (Toronto, 24 January 2010) and Walters, *supra* note 1.

7. *Questions regarding constitutional conventions (a) usually exist in the gaps, viewed from the perspective of the law of the constitution, and (b) potentially engage, by definition (see Jennings' test), a constitutional principle.*

   We have already seen, in the comment under 6, that 7(a) would not be accurate without the proviso "viewed from the perspective of the law of the constitution." Constitutional conventions in fact fill space they were intended to cover under "the Constitution similar in principle to that of the United Kingdom," with the result that, properly understood, there is no gap that needs filling. However, 7(b) would seem to be correct: questions regarding constitutional conventions do indeed engage important constitutional principles (ibid.).

8. *In appropriate cases the Court can fill the gap (noted in 7(a)) by means of the principle (noted in 7(b)) made relevant by the prevailing constitutional approach (noted in 6).*

   As I have just argued, first, there is no gap to fill because the constitutional convention was designed to fill the constitutional space, at least according to our long-established constitutional tradition; and, second, it is not appropriate for the Court to transform the principle underlying the convention into a rule of law if to do so would be to make the convention *judicially* enforceable. This would contradict the essence of constitutional conventions, in that they are *politically* rather than judicially enforceable.

9. *All of which appears at first blush to be legally justifiable, especially in the context of other decisions in which constitutional principles have been deployed to important effect.*

   As reaction to the *Provincial Judges Reference* amply demonstrated,[50] it is controversial even for courts to deploy constitutional principles to fill genuine gaps in the constitutional text and relevant case law. It would be wrong, in my view, for the court to take a further step and to deploy constitutional principles to fill with the law of the constitution a space that was already filled by a convention of the constitution, and which was intended to do so according to our constitutional traditions.

   And so we escape from the lobster trap – the apparent imperative to transform conventions into law by means of principle is removed.

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[50] See, e.g, Hogg, *supra* note 19 at 7.1(e). The Supreme Court of Canada added its own gentle criticism of the *Provincial Judges Reference* in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)* [2005] 2 SCR 286 at paras 10-11.

Having said this, there is no denying that when the Supreme Court of Canada discusses constitutional conventions in a constitutional reference, it will always be difficult, some would say impossible, to distinguish between the effect of recognizing a constitutional convention and recognizing a legal rule.[51] I have already stated that this perhaps explains why the Court is reluctant to state conventions even in reference cases and that even when it does so it could be said to recognize only conventions which are beyond doubt. If this analysis is correct, then it would perhaps be helpful if the Court articulated this practice more clearly, making explicit that many fluid constitutional conventions continue to evolve around the more established, solid conventional matter (identified by the Court more as a question of unambiguous fact). In this way, we can imagine the Court in the *Quebec Veto Reference* declaring that the Court was not in a position to recognize a solid, incontrovertible Quebec veto convention as a question of unambiguous constitutional fact, but that this was not necessarily to deny that a fluid constitutional convention was evolving or had already evolved in that direction, the resolution of that question being left, by definition, to political actors and political processes. Understood in this way, the Court in a reference case involving conventions should be seen, where appropriate, to establish an unambiguous bottom line or a solid core rather than to resolve the entire conventional matter definitively one way or the other.

10. *Parties to achieve their desired outcome by seeking declarations regarding conventions in the context of ordinary litigation.*

If the two key arguments that I have made above are accepted – (a) that only clear, unambiguous constitutional conventions should be recognized in constitutional references and that (b) the principle underlying constitutional conventions should not be deployed to allow courts to fill with a legal rule the very gap that the convention was designed to fill – then it should be clear why I also argue that courts should reject outright parties' attempts to achieve their desired outcome by seeking declarations regarding constitutional conventions in the course of ordinary litigation. In order to make this argument clearer, I propose to elaborate on it in the following section.

CONSTITUTIONAL CONVENTIONS IN ORDINARY LITIGATION

In the *Secession Reference*, the Court repeated the orthodox position regarding non-enforcement of constitutional conventions, citing the *Patriation Reference*:[52]

> The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In

[51] See Dodek, *supra* note 17.

[52] *Supra* note 4 at para. 98.

> the *Patriation Reference*, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the *law* of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme. (emphasis in original)

It is not clear, therefore, why the appellants in *Public School Boards Association of Alberta*[53] – in the context of ordinary litigation – were permitted to challenge the constitutionality of Alberta legislation on the basis, inter alia, of a constitutional convention, and why the Supreme Court of Canada stated and answered a constitutional question in the following terms:

> Are [the relevant sections] of the School Act … *unconstitutional to the extent that they violate the principle of reasonable autonomy for municipal institutions*, including school boards, *as may be contained* in the Constitution of Canada, including the preamble … or *in a constitutional convention*? (emphasis added)[54]

Instead of repeating that it was inappropriate to ask a court to vindicate one party's interpretation of a convention, and to distinguish the exceptional advisory context of the *Patriation Reference* and *Veto Reference*, Major J. went ahead and applied the three-part Jennings test for the identification of a convention, as set out in the *Patriation Reference*, concluding that the convention had not been made out. Intended or not, this way of stating matters gave the impression, of course, that a party in a future case could obtain such a declaration if the constitutional convention in question was properly established.

One year later, in the *Ontario English Catholic Teachers* case, the parties were once again permitted to argue the "invalidity" of Ontario legislation on the basis, inter alia, of a constitutional convention. The constitutional question was set out as follows:[55]

> If the answer to questions 1, 2 or 3 is in the affirmative with respect to Roman Catholic separate school rights, are those provisions, or any of them, also *invalid* with respect to public school supporters and public school boards, *by virtue of* either s. 93 of the Constitution Act, 1867, or constitutional convention? (emphasis added)

Iacobucci J. cited the orthodox position regarding the legal non-enforceability of constitutional conventions and the need to seek political recourse instead, citing both the *Patriation Reference* and the *Secession Reference*, as quoted above. However, instead of stating that the appellants had no right to seek a judicial declaration

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[53] *Public School Boards Association of Alberta*, *supra* note 20 (emphasis added).

[54] Ibid. at para. 30. It should be noted that while constitutional conventions are part of "Constitutional Law" in Canada, they are not, it would seem, part of the "Constitution of Canada" as set out in s. 52 of the *Constitution Act, 1982*, given the consequences of that status, so the drafting of this question is doubly odd.

[55] *Supra* note 20 at para. 26.

regarding the existence of a constitutional convention, he stated instead that *in this particular instance* a convention had not been made out.

> The OPSBA appellants nevertheless seek a declaration that a constitutional convention exists regarding the right of school boards in Ontario to levy and determine property taxes for education purposes, presumably so that they could then seek a remedy for a violation of this convention in the appropriate forum. I cannot agree that such a convention exists. Constitutional conventions relate to the principles of responsible government, not to how a particular power, which is clearly within a provincial government's jurisdiction, is to be exercised. (Ibid., para. 65)

Once again, though the party failed to obtain a declaration, the implication was that a party in a future case could do so if the test for the existence of a convention was made out. An alternative, and to my mind preferable, answer would have been to say that declarations regarding constitutional conventions are simply not available in ordinary litigation. With all due deference to the contrary view, let me explain why.

THE CASE AGAINST GRANTING DECLARATIONS REGARDING CONSTITUTIONAL CONVENTIONS IN ORDINARY LITIGATION

The broadly drafted legislation which provides for advisory opinions has been interpreted so as to allow Courts of Appeal and the Supreme Court of Canada to determine whether a particular constitutional convention exists. And I have already stated that, in my view, courts should only recognize well established, solid conventions, even at that. In ordinary litigation, however, I would argue that conventions should only be recognized to assist a better understanding of the constitutional context, not sought by way of declaration in order to make out one side's claim of constitutional invalidity. Judicial enforcement of a constitutional convention in the latter way would contradict the very essence of constitutional conventions, that is, the political or democratic manner of their enforcement. This is what is implied by having a system which is still to a considerable extent "a Constitution similar in principle to that of the United Kingdom."

How did we come to a stage in our constitutional progress where the political constitution risks being subsumed into the legal constitution?[56] It is one thing for Canada to decide legally to codify its conventions, and to make them judicially enforceable, as we did with rights and freedoms. But we have not yet decided to do so. If we decide instead, as many including me think we should, to make the political effort to put into an agreed orderly but non-legal written form many of

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[56] On the meaning of "political constitution" and "legal constitution," see Adam Tomkins, *Public Law* (Oxford: Clarendon, 2003, pp. 18-23. The distinction is of long standing in the United Kingdom. For an example of its use, see Sopinka J in *Osborne v. Canada (Treasure Board)*, [1991] 2 SCR 69, p. 87: "Underlying this distinction between constitutional law and constitutional conventions is the contrast between legal and political constitutionalism." See discussion in Newman, *supra* note 1, p. 227.

the key conventions of responsible government – a sort of Manual of Canadian Government – it would be strange if the Supreme Court of Canada felt the need to become the authoritative arbiter of that "manual" on the basis of gap-filling or principle-based reasoning. So why should the Court be any more involved even in the absence of such a manual? How then did the courts begin this journey down the road to judicial treatment of constitutional conventions?

Part of the explanation lies in the nature of constitutional references or advisory opinions, as we have seen, (and probably also the resulting availability of the three-part Jennings test for identification of constitutional conventions). However, I argue that what avails for a constitutional reference should not apply in ordinary litigation. In the former, once again, the Court is bound by the extremely broad wording of the statutes which set up the reference power, and the Court's function is effectively advisory. In the latter, the Court has only the ordinary powers of a court, and in the British and Commonwealth tradition these had not typically included the power to grant a declaration regarding a constitutional convention. Given the respect which is rightly accorded to our courts, a "mere" declaration of a convention by a court would ensure that the convention was followed.[57] While it is true that opinions which the Court expresses in constitutional references usually avail in ordinary litigation,[58] this is not the same as saying that every question

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[57] On the power of declarations, see K. Roach, *Constitutional Remedies in Canada* (Aurora, Ontario: Canada Law Book, 1994):

> Courts and litigants will often be presented with a choice between declarations and injunctions. Owen Fiss has explained that in many situations injunctions and declaratory judgments are "functionally equivalent." The injunction, by declaring rights and threatening the use of the contempt powers only "gives the defendant one more chance" while the declaratory judgment "gives the defendant two more chances" because "the plaintiff cannot get a contempt order, but only an injunction to prevent another act of disobedience." (section 12.20)
>
> Declaratory relief is preferred to injunctive relief in Canada for a variety of reasons ... Finally, Canadian governments have, by and large, complied with judicial declarations and courts assume that there will be prompt and good faith compliance with the letter and spirit of their declarations. (section 12.30)
>
> Declaratory relief is an important and flexible public law remedy. It can be used to respond to either past or future violations of the Constitution so long as a declaration could have a practical effect in settling or avoiding disputes. Courts can declare in general terms what is necessary to achieve compliance with the Constitution and allow the government flexibility to decide what precise steps to take to achieve this compliance. If there will not be prompt and good faith compliance with general declarations, more specific declarations and injunctions may be required. (section 12.63)

[58] Hogg, *supra* note 19 at 8.6(d).

which a Court is willing to answer in a constitutional reference should also be the subject of a declaration in ordinary litigation.[59]

An important part of the case against granting declarations regarding constitutional conventions lies in the slippery distinction between recognition and enforcement.[60] Those who favour declarations regarding constitutional conventions may in the future argue that a declaration does not amount to "enforcement" of a convention, something that is excluded on most accounts. Only an injunction would go too far, presumably. However, this is to misunderstand the nature of contemporary public law, in my view. Where public actors are concerned, injunctions are almost never required.[61] An authoritative statement of the law by the court suffices. This way of looking at things is confirmed in our legal theory. Not since Austin has law been equated with the manner of its enforcement. [62] Rather, as theorists such as Joseph Raz point out,[63] law's essence, at least in terms of its coordination function, lies in its ability to provide an authoritative and therefore *legal* guide to

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[59] If, however, the Court restricts itself to recognizing well-established, uncontroversial conventions, then issues regarding more controversial conventions should not normally be the subject of subsequent pleadings in ordinary litigation in any event.

[60] Dodek, *supra* note 17.

[61] Hence the furor in the United Kingdom caused by the case of *M. v. The Home Office* [1994] 1 AC 377. See also Roach, *supra* note 53.

[62] J. Austin, *The Province of Jurisprudence Determined* (New York: Prometheus Books, 2000) (first published London: Murray, 1832) in which law is explained as orders (by the sovereign) backed by threats. The most important point in HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) was to observe that most law is not explained by threats or their equivalent. Hart replaced Austin's sovereign with a rule of recognition. The point of the rule of recognition, as opposed to the sovereign, was to identify what counts as law. In theoretical terms, the point being discussed in this article is whether constitutional conventions are included amongst the criteria identified by the Canadian rule of recognition. According to contemporary conceptions of law, qualifying as a law has more to do with recognition than with enforcement. Given the tendency of officials to see obligation absent enforcement, as noted by Hart, authoritative declaration by a court, and especially by the Supreme Court of Canada, suffices to give law its obligatory force. Canadian courts, such as the Supreme Court of Canada in the *School and Teachers' Association* cases of 2000-1, risk giving the impression that they wish to add constitutional conventions to the rule of recognition, though they are not yet declaring that the constitutional conventions alleged thus far are made out. To my mind, it is more appropriate to say that constitutional conventions are not amongst the criteria in the rule of recognition. UK theorists such as Hart himself never included constitutional conventions in the rule of recognition. To do so would have been to transform conventions from a species of political normativity to one of legal normativity.

[63] Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (New York: Oxford University Press, 2009); J. Raz, "Authority, Law and Morality" in *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) ch. 10; *Joseph Raz, Practical Reasons and Norms*, (Oxford, UK: Oxford University Press, 1999) at 35ff on the idea of exclusion reasons.

relevant actors, one which excludes wide-ranging back-and-forth discussion of other alternatives (that is, the very political world where conventions supposedly reside).

If I am right that a declaration in ordinary litigation is more like "enforcement," one might well ask, "what then is the difference between a declaration regarding a constitutional convention and 'recognition' of the same?" This is arguably where we allowed ourselves to be led off the right track by the *Patriation Reference* and *Veto Reference*. Prior to those cases, we knew well, along with all countries in the British parliamentary tradition, that one cannot seek to enforce a convention before a court of law. The most that one could do was to ask the court to "recognize" a constitutional convention as part of the generally accepted factual context. One could not seek a declaration regarding a constitutional convention, but one could, for example, ask the court, say, to take into account that cabinet discussions are secret by virtue of the convention of cabinet responsibility on the way to seeking an injunction and damages based, not on enforcement of a convention, but on the equitable doctrine of breach of confidence.[64] That is because the legal or equitable rule does the work while the recognition of the convention simply assists the necessary factual finding.

As we have seen, the Canadian cases, notably the *Patriation Reference*, are very clear about how unusual it was for a court to discuss conventions. I have already argued that the reference legislation and the exceptional circumstances of the period probably justified the Court's discussion of conventions in that instance, and I have already pointed out that the Court attempted to discuss only versions of those conventions that were beyond doubt. In my view, rather than assuming that "recognition" of conventions by the Court in 1981–82 justified the constitutional novelty of "recognition" by way of declarations in ordinary litigation, we should have reverted to the general practice regarding "recognition" described in the previous paragraph.

Perhaps a further reminder of the answer to "how did we get here?" lies in the formulation of the constitutional question in the *Public School Boards Association of Alberta* case, the first Supreme Court of Canada decision after the *Secession Reference* in which constitutional conventions were the subject matter of a constitutional question in the context of ordinary litigation. In the *Alberta School Association* case, in one breath, the Court put together constitutional principles, the 1867 preamble and constitutional conventions. Perhaps, as the (questionable) logical progression discussed earlier indicated, constitutional conventions were seen as so closely related to constitutional principles (and the "Constitution similar in principle" of the 1867 Preamble) that their inclusion in a constitutional question in ordinary litigation now seemed unremarkable.

I have already attempted to explain why this supposedly unremarkable slippage between conventions and principles should be avoided. But what practical difference does all this make? Does it matter whether or not courts can make declarations regarding constitutional conventions?

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[64] This is what occurred in the *Jonathan Cape* case, *supra* note 35.

We have already seen that the Supreme Court of Canada in the *School and Teachers' Association* cases of 2000–1 thought that it was appropriate to respond to constitutional questions seeking declarations regarding constitutional questions, even if it did not agree that the conventions were made out. It is difficult to determine the Court's reasons for doing so in each case, but I would assume that it was a mix of some of the reasons that have already been explored in this paper. However, there are a few bottom lines which are worth emphasizing. First, a party who might benefit from performance of a constitutional convention is normally limited to promoting his or her interpretation of that convention in the democratic political arena, but if the courts open the door to issuing declarations regarding conventions, that same party will, assuming he or she has the financial means to do so,[65] inevitably redeploy in the legal arena. Second, I repeat, constitutional conventions, by their very nature, are enforced in the political sphere rather than by courts. Courts may recognize established conventions where it is necessary to describe in uncontroversial ways how the unwritten or uncodified parts of our constitutional system work in fact, but they do not sit in judgment regarding whether and if so how an alleged new or newly evolving constitutional convention exists and functions. Reference cases may be a special instance due to the nature of the advisory role that legislation sets out, but even there courts are historically careful to recognize what objective observers would regard as uncontroversial political-constitutional facts, and even there where the facts are firmly demonstrated, the courts' role in recognizing them is acknowledged to be highly politicized and controversial. Thirdly, the courts' care in recognizing only clearly established conventions is entirely justified given that it is the fact of authoritative determination by a court that gives legal quality to questions which would otherwise be determined according to many political actors' attempts to convince each other as to the best, most appropriate formulation of a rule. This is to say that whether a court refers to a matter as law or convention, the very act of authoritative disposal of the question by the highest court of the land gives the matter the veneer of law and legal validity. This was amply demonstrated by the events following the *Patriation Reference*. If we believe that the "substantial provincial consent" convention was uncontroversially correct, then we have to accept that it is the existence of the constitutional reference device that is responsible for those events. If we believe that the Court's rendition of the convention in the *Patriation Reference* and/or its nonrecognition of a convention in the *Veto Reference* were highly debatable then we may feel that the Court should not have waded into the conventional question at all, even in a reference case, as the majority (law) in the *Patriation Reference* would have recommended. And yet there would seem to be room, whether in references or in ordinary litigation, for effectively taking judicial notice of the uncontroversial, unwritten or uncodified facts of our constitutional system along the way to a decision based on other, justiciable legal grounds. The

[65] Exceptionally, as my colleagues Mark Power and François Larocque discuss, parties may seek public interest cost awards to argue such cases. See M. Power & F. Larocque, "Advance cost awards and access to justice", *Lawyers Weekly* (15 April 2011).

Reference re: Canada Assistance Plan (B.C.) provides an example of the former and the *Jonathan Cape* case from the UK mentioned earlier provides an example of the latter. But this is a long way from seeking a declaration from a court regarding a constitutional convention in order to use the court's authoritative determination to alter the *rapport de force* as between two parties to a legal dispute. And yet this seems to be the territory into which the Court has begun to lead us.

CONTEMPORARY EXAMPLES OF PARTIES SEEKING DECLARATIONS REGARDING CONSTITUTIONAL CONVENTIONS IN ORDINARY LITIGATION

It may be helpful to examine whether the possibility of seeking declarations regarding constitutional conventions is being taken up by litigants. Two prominent cases in the past decade – *Pelletier*[66] and *Democracy Watch*[67] – indicate that this possibility is not being ignored.

Pelletier involved the dismissal of Jean Pelletier from his position as Chair of the Board of Directors of Via Rail. The order in council that terminated Pelletier's appointment was adopted by the Governor in Council under the recommendation of the federal Minister of Transport. The Federal Court found in the first round of litigation that the Minister of Transport had not respected the rules of procedural fairness in dismissing Pelletier. The Governor in Council made efforts to remedy this procedural failing and came to the same conclusion regarding dismissal. Pelletier challenged this second dismissal as well, principally on the grounds that the decision had been biased, but his lawyers also added an argument regarding constitutional convention: "(3) The second termination order had been adopted after the federal election was called, breaching the constitutional convention limiting the Cabinet's power to act once it has lost the confidence of the House of Commons."[68] Mr. Justice Lemieux did not see the need to discuss this point in his judgment, but the fact that it had been noted at first instance caused the Federal Court of Appeal to comment. And far from ignoring the question, Décary J.A. chose to deal with the question of constitutional convention at the outset of his analysis:[69]

> **Analysis**
>
> *Existence of a constitutional convention*
>
> [18] I deal first with an argument put forward late in the process by the respondent that a transition of government constitutional convention exists, whereby a government that has lost the confidence of Parliament cannot nominate or terminate the presidents

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[66] *Pelletier v. Canada (Attorney General),* 2007 FC 342 [Pelletier FC] and *Pelletier v. Canada (Attorney General)* 2008 FCA 1 [Pelletier FCA].

[67] *Democracy Watch FC*, *Democracy Watch FCA*, *supra* note 20.

[68] *Pelletier FC*, *supra* note 69 at para. 6.

[69] *Pelletier FCA*, *supra* note 69 at paras 18-21.

> of Crown corporations. According to the respondent this argument was advanced not so that this Court quashes the second termination order because of a violation of the constitutional convention, but rather because a violation is further evidence of the government's bias.
>
> [19] This argument has no merit. As a general rule, and it is a well known rule, Courts will avoid making pronouncements on the existence of constitutional conventions, which are not rules of law that are subject to judicial enforcement (see *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at pages 880, 882; *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 26, 98, 99).
>
> [20] Furthermore, the evidence does not establish the existence or scope of the alleged convention: what is required is not only the proof of precedents, but also proof that the political actors themselves believe that there is a rule they are obliged to respect (*Re: Resolution to amend the Constitution*, *supra* at page 888; *Re: Objection to a resolution to amend the Constitution*, [1982] 2 S.C.R. 193 at pages 814, 816, 817 and 818).
>
> [21] In any event, because the constitutional convention argued by the respondent would have an effect on the validity of the second termination order, the respondent was required, as set out in section 57 of the *Federal Courts Act*, to file a Notice of Constitutional question and to serve that Notice on the Attorneys General of Canada and the provinces, which he did not do.

We see here that whereas Décary J.A. begins, rightly in my view, by reminding us that courts should not make pronouncements regarding constitutional conventions, his reasons then advert confusingly to the merits of the argument and conclude by noting that the correct procedure for stating a constitutional questions (including one regarding constitutional conventions) was not followed.

In the litigation surrounding Prime Minister Harper's decision to advise the Governor General to dissolve the 39th Parliament in September 2008, Mr. Duff Conacher and Democracy Watch argued, as was their right,[70] that the Prime Minister contravened s. 56.1 of the *Canada Elections Act*[71] in seeking an election in advance of the date set out in that Act. However, their argument did not stop there. They also argued that "a constitutional convention exists that prevents a Prime Minister from advising the Governor General to dissolve Parliament except in accordance with s. 56.1 of the *Canada Elections Act*."[72]

This is not, in my view, a proper issue to put before a court in ordinary litigation, nor does doing so promote a vibrant democracy. It is one thing to ask the court, in the course of making a related legal argument for instance, to recognize the uncontroversial fact that in our constitutional system the governor general, as

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[70] *Democracy Watch* FC, *supra* note 20.

[71] SC 2000, c 9.

[72] *Democracy Watch*, *supra* note 20 at 2.

a matter of convention, generally takes the advice of the prime minister in matters of dissolution. It is quite another to ask the court to use its authority to declare the controversial content of a conventional rule. This moves from recognition, which should be used sparingly in any event, to enforcement, for the reasons which I have already set out. Or put differently, it removes constitutional conventions from the political realm where they are created, developed and usually enforced to the legal realm where the court's declaration effectively ends debate.

The trial judge in the *Democracy Watch* case clearly struggled with the issues just raised. All Shore J.'s instincts appeared to go in the direction of not ruling on the convention point, but given the Federal Court of Appeal's refusal to banish the convention argument outright in the earlier *Pelletier* case, the trial judge did not feel able to ignore the question entirely (ibid., paras. 32-33). Like the Supreme Court of Canada in the *School and Teachers' Association* cases of 2000–1, and like the Federal Court of Appeal in *Pelletier*, he refused to confirm the alleged convention, but not before spending numerous paragraphs applying the Jennings' test for conventions first set out in the *Patriation Reference* as if it was an accepted and enforceable legal doctrine (ibid., paras. 37-47). At the end of his judgment, Shore J. felt the need to provide a reminder regarding the danger of providing declarations regarding political issues:

> The Applicants ask this Court to interpret Section 56.1 in a manner that would make political issues justiciable. If their submission that Section 56.1 is intended to force the Prime Minister to only request dissolution after a vote of non-confidence is accepted, litigants could take the Prime Minister to court to determine whether or not a government had lost the confidence of the House of Commons. Similarly, a court would be able to force the Prime Minister to dissolve Parliament, effectively dictating to the Governor General to exercise his or her discretion. (Ibid., para. 74)

Shore J.'s comments proved to be prescient. During the dissolution/prorogation crises of 2008 and 2009, and more recently, there have been calls for questions regarding constitutional conventions to be resolved by the courts, either in ordinary litigation or by means of a constitutional reference.[73] It strikes me that it would be helpful for the Supreme Court of Canada to take the next opportunity to clarify what I take to be the excessively open rules regarding the justiciability of constitutional conventions.

When the *Democracy Watch* case reached the Court of Appeal, Stratas J.A. rightly noted that there is an inevitable connection between constitutional law and constitutional conventions in the study of the Canadian constitution.[74] Regarding some matters, such as dissolution of Parliament, mention of a context including constitutional conventions is essential to a proper understanding of the issue at hand. Stratas J.A. also rightly determined the outcome of the case according to

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[73] See, e.g., Ross and scenarios envisioned by Dodek, *supra* note 17. See also Walters, *supra* note 1.

[74] *Democracy Watch*, FCA, *supra* note 20 at paras. 5-6.

the law rather than the conventions of the Constitution, in that case section 56.1 of the *Canada Elections Act*.[75] However, given the confusing signals provided by the Supreme Court of Canada in the *School and Teachers' Association* cases 2000–1 and by the Federal Court of Appeal in *Pelletier*, it was understandable that Stratas J.A. stopped short of saying that a court could never make a declaration regarding a constitutional convention:[76]

> [12] Finally, we *decline* to make a declaration that there is a new constitutional convention that limits the ability of the Prime Minister to advise the Governor General in these circumstances. The court below found as a fact that no such convention exists. That finding is amply supported by the evidentiary record in this case. (emphasis added)

I suspect that judges, litigators and interested citizens, not to mention constitutional observers, would be grateful for increased clarity on this front from the Supreme Court of Canada, ideally in advance of a full-blown constitutional crisis. What then are the rules that we should adopt regarding the use of constitutional conventions before the courts?

CONCLUSION: WHAT ARE THE RULES THAT SHOULD GOVERN COURTS' TREATMENT OF CONSTITUTIONAL CONVENTIONS?

I have already rehearsed these conclusions a number of times in the course of writing this paper, so I will try to summarize as briefly as possible what I see as a sensible set of rules for Canadian courts' treatment of constitutional conventions:

1. In the context of ordinary litigation, courts should refuse parties' requests, by way of declaration or other remedy, to rule on the existence or non-existence of a constitutional convention in order to determine the outcome of the case.

2. In the context of ordinary litigation, in which (consistent with 1) the dispute turns on something other than the existence or non-existence of a constitutional convention, courts may sometimes find it necessary in the course of their reasoning to describe (or recognize) a well established constitutional convention in order to account sensibly for our constitutional arrangements.

3. In the context of a reference case, the court should accept requests to rule on the existence or non-existence of a constitutional convention, only to the extent that some appreciable core of the conventional rule is clear and well established. If the convention itself is in flux, or if the question relates to a peripheral aspect of the convention which is likewise still in flux, then the courts should regard the question as non-justiciable, both because of the court's lack of expertise

[75] S.C., 2000, c. 9

[76] Democracy Watch, FCA, *supra* note 20 at para. 12.

regarding evolving political dynamics, and because of the need to maintain a proper balance between the judicial and political parts of the constitution.

4. In the context of a reference case, the court should perform an important educative function in explaining that many constitutional conventions, and the political parts of our constitution in general, are in constant evolution, and that the public's democratic responses to perceived breaches of convention are critical to that political process.

IV

SUPREME COURT APPOINTMENTS BEYOND CANADA

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REFORMING THE SUPREME COURT: THE ONE-COURT PROBLEM AND THE TWO-COURT SOLUTION

Peter McCormick

La Cour suprême du Canada est la fois la plus haute cour d'appel sur les questions juridiques (une « cour d'appel générale » selon la section 1 de la Loi constitutionnelle*) et un tribunal constitutionnel ayant autorité de dernière instance quant au sens et à l'application de la Constitution, y compris de la* Charte des droits et libertés*. Cette double responsabilité est la norme dans les pays de common law auxquels nous nous comparons généralement, mais elle n'est aucunement la règle dans les systèmes civils d'Europe continentale et d'ailleurs, ni dans l'actuel système de common law de l'Afrique du Sud de l'après-apartheid. L'auteur étudie ici la possibilité de réduire la compétence de la Cour suprême en créant un nouveau tribunal constitutionnel, distinct et autrement constitué, qui s'inspirerait des modèles en usage ailleurs dans le monde, puis il examine les éventuelles conséquences d'une telle réforme.*

INTRODUCTION

Canada has a national court of final appeal, the Supreme Court of Canada, which carries out the standard and obvious functions of all such courts: first, it is the ultimate resolver of legal disputes, the authority beyond which there is no further (legal or judicial) appeal as to which of the two parties prevails in the immediate case; and second, it is the mechanism for promoting the uniformity of law within the country, either by taking the lead proactively on the precise meaning of new legislation (e.g., *Proulx*[1]) or by deciding which of two or more reasonable and "not simply wrong" formulations of doctrine by provincial, federal or territorial courts of

[1] *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, where the Supreme Court set down guidelines for lower courts regarding the new "conditional sentence" measures that Parliament had passed into law only two and a half years before the Court heard oral arguments on this appeal.

appeal is the one that is to apply to all Canadian jurisdictions. It is the final arbiter for all types of disputes, including *(inter alia)* civil law, criminal law, public law and administrative law issues. Theoretically, there is no question of law presented to any court in Canada that could not under certain circumstances come before the Supreme Court, although practical issues such as the expense to litigants and the constrained case load of a single collegial court make some issues unlikely ever to rise so high. (While speeding tickets, for example, might be a perennial headache for all drivers, they seldom appear on the Supreme Court docket – but note that I say "seldom," not "never," because they have in fact been the occasion of at least one Supreme Court decision.[2]) Indeed, the Supreme Court of Canada has an unusually extensive general appeal jurisdiction as compared with its counterparts; the United States Supreme Court, for example, does not hear appeals on issues of state law or even of state constitutional provisions (unless they trigger constitutional issues under the United States Constitution as well).

Canada also has a constitutional court, the Supreme Court of Canada, which resolves questions about the validity of legislation within the framework of the constitution, including the power of judicial review – that is, the power to declare legislation null and void in whole or in part, on the grounds that it is "inconsistent" with the constitution (to use the wording of s. 52 of the *Constitution Act, 1982*). Because Canada is a federal nation, this function was long deployed almost exclusively to uphold the terms of the federal-provincial division of legislation authority (sections 91 through 95 of the *Constitution Act, 1867*), with provincial legislation being struck or trimmed back when it infringed on exclusive federal jurisdiction and (less frequently) vice versa. More recently, in Canada as in a growing number of other nations, the review function has extended to the protection of constitutionally entrenched individual rights (Shapiro 1999), which has not only extended the scope of the traditional remedies of striking or trimming offending legislation to include a wider range of issues, but has also generated a wider variety of remedial measures.[3]

It will have escaped no reader's notice that these two are in fact the same court. Those of a certain vintage may remember a television commercial where twins argued about whether something was a candy mint or a breath mint, only to have the announcer interrupt to say, "Stop! You're both right! New Certs is two, two, two mints in one!" Similarly, the Supreme Court of Canada is two courts in one – a "general court of appeal" (as Section 101 of the *Constitution Act, 1867* has it), and a constitutional court.

This duality will probably not strike many as being unusual, or as calling for any real explanation, but in fact this is not the standard way for countries in the modern world to deal with the two functions. The standard way – in the double sense of being adopted by more countries, and being accepted by a larger share of

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[2] *Bilodeau v. A.G. (Man.),* [1986] 1 S.C.R. 449.

[3] Most specifically spelled out in *Schachter v. Canada*, [1992] 2 S.C.R. 679, and even more expansively in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62, [2003] 3 S.C.R. 3.

the planet's total population – is to assign the two functions to two different courts, with different personnel and different procedures.[4] In global terms, it is not the separation of the two functions, but their agglomeration in a single institution, that is something out of the ordinary, and that calls for an explanation.

Let me explain from two different angles why the two functions might be different enough, might raise different enough questions and challenges and problems, to call for two different mechanisms; and then let me go on to suggest what the implications and the possible benefits might be were Canada to follow through on my advice by replacing the single dual-function Supreme Court with two single-function institutions.

For one thing: the "court of general appeal" concept fits nicely within the concept of the political system (the foundation of contemporary political science), which sees government output in terms of a three-stage process: legislatures make rules, executives (working through public officials, including the police) apply rules, and courts "interpret" rules by dealing with disputes over the application of rules to specific actions or situations. There is no inherent conflict between the three different elements of this process; although a particular government may from time to time be inconvenienced or even embarrassed by particular judicial decisions, on balance there are many ways in which governments in general benefit from interacting with an independent judiciary. But the "constitutional court" concept on the very face of it calls for a different language. Although Jim Kelly (2005) has eloquently and effectively warned us from assuming a "court vs. government" logic as the central or complete operational reality of the Charter, nonetheless the notion of judicial review necessarily involves courts that are willing at least some of the time to enforce binding restrictions of government activity that may be highly inconvenient to the government of the day, and that cannot be easily gotten around, if indeed they can be gotten around at all.

For another thing: the "court of general appeal" approach suggests the capstone to a set of institutions that basically deals with secondary and derivative (albeit still important) matters – clarifications of rules, resolutions of ambiguities, accommodation of apparent contradictions or inconsistencies, enforcement of appropriate procedures and presumptions, application of prescribed penalties or consequences. But constitutional courts deal with much grander issues, and they do so in ways that often pre-empt any serious prospect of meaningful response. Ran Hirschl (2008)

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[4] In saying that the "two-court" solution is the "standard" way of dealing with it, I do not mean to understate the considerable variety that exists in the ways that various countries have provided for the two functions to be carried out. The German Constitutional Court is quite different from the French Constitutional Council, but both are distinct and separate from the "ordinary" court system, and both play an important and prominent role within the governmental process. See Alec Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000). Nor, of course, do these two examples exhaust the full range of possibilities; for a tabular presentation of the diversity of provisions for constitutional judicial review, see Mavcic's impressive website at Concourts.net.

and others have used the term "mega-politics" (or, alternatively, "pure politics"[5]) to describe the way that courts are increasingly taking the responsibility of dealing with the issues that in the past we would have expected (and democrats would still prefer) to be addressed by the citizenry itself through its elected representatives. As one example: on one reading, the Supreme Court of Canada in its *Quebec Secession Reference* [6] effectively decided that there is a "right to secession" (not easily invoked, and with significant procedural difficulties) contained within the Canadian constitution, something that I would have thought was at least contestable and perhaps simply false until the moment they delivered their decision. This is hardly a small matter, since our neighbour to the south fought a major civil war to establish the opposite position.

To be sure, neither of these considerations remotely supports the idea that courts should not deal with constitutional issues just because they involve meta-political issues and/or the very real potential to come into serious confrontations with specific governments; but they do suggest, at least to me, that we should consider whether the dual purposes are best served by a single set of procedures and personnel, let alone by a single body.

To be specific: I am suggesting that we should do away with the existing Supreme Court of Canada with its personnel, procedures and powers, and replace it with two distinct and separate institutions. The first – we could still call it the Supreme Court of Canada[7] – would be a general court of appeal, dealing with all matters except constitutional issues and enjoying its full set of remedial powers save for the power of judicial review (i.e., the capacity to find legislation or other official acts null and void by reason of inconsistency with the constitution). The second – we could call it the Constitutional Court of Canada – would deal exclusively with constitutional issues, in which matters its findings would be binding on all other courts including the Supreme Court. There are a variety of procedural choices about the relationship between the two[8] that I will leave to one side in order to focus on the basic issue: why would we want two courts where we now have one?

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[5] See e.g., Russell E. Miller "Lords of Democracy: The Judicialization of 'Pure Politics' in the United States and Germany" *Washington & Lee Law Review*, Vol. 61 (2004) 587; Ran Hirschl "The New Constitutionalism and the Judicialization of Pure Politics World-Wide" *Fordham Law Review* Vol. 75 (2006) 721.

[6] *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217.

[7] Purists might suggest that without the power of judicial review, the name would no longer be appropriate because the Court would no longer be truly supreme, but such a criticism is overdrawn; we called our court "the Supreme Court" for decades, from 1875 to 1949, even though any and all of its decisions could be appealed to a quasi-court in London, the Judicial Committee of the Privy Council.

[8] Perhaps most importantly: would it be possible to mount full appeals from provincial, federal and territorial courts of appeal to either or both the Supreme Court and the Constitutional Court for full resolution, depending (of course) on the subject matter? Or would other courts address specific questions on constitutional issues to the Constitutional Court, waiting

What Is the Problem?

The oldest caution in the arsenal is this: if it ain't broke, don't fix it – so what is it that I am saying is broken, and why does it need to be fixed, and why is this the best way to fix it? Let me take a step back: what is it that a "normal" appeal court does, and what is it that a "normal" appeal court must look like, that makes me wonder if it is optimally suited to perform double duty as a constitutional court?

In general terms, what an appeal does is to re-open the decision in the immediate case – generally not the entire decision, to be sure, but always the most critical elements of the decision. These issues are once again "live" and all the options for outcome and consequences enjoyed by the initial trial court are at least theoretically back on the table for the appeal court panel, which can "re-decide" them as they feel appropriate. But this necessarily and inevitably means that appeal court judges have to be precisely the same kind of people as the trial court judges were in the first place – that is to say, trained professional lawyers of established competence and reputation, preferably with directly relevant experience. Thus it is hardly surprising that a significant and apparently growing proportion of the appeal court bench consists of judges elevated from the lower courts. Given our tradition of general jurisdiction courts and judges, we can ramp this up a notch: they need to be something approaching encyclopedic legal experts, able to deal authoritatively with criminal law cases on Tuesday and insurance law cases on Thursday and tax law cases the following week. This requirement further constrains the choices.

The general appeal process means that all levels of court have to be staffed by the same kind of legal professionals, differing from each other only in detail or degree and not in kind. And this necessarily aggravates the democratic problems implied by the very notion of judicial review itself – it is not just that the decisions of elected accountable politicians are subject to review and possible overruling, but that the people who do the review are unaccountable, appointed experts drawn from an elite profession which has its own standards and methods for reaching decisions and explaining those decisions. They are not just an appointed elite, but a "triple-distilled" elite.

For decisions involving the meaning and the application of statutes, this is as it should be; legislation (and the shrinking but still important back-stop provided by the common law) is a very complex business that through a combination of evolution and conscious design has created the framework within which millions of people make their calculations and decisions. As Rod Macdonald has put it, "Today, many regulatory statutes are cast in highly recondite language … directed to a highly specialized audience, and meant to be interpreted by a highly sophisti-

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for its answer on that part of the case before dealing with its other aspects (something like the old practice of "appeal by way of stated question"). Or – between the two – would we follow a practice like the French "cassation" where a successful appeal to the Constitutional Court settles only the constitutional question but returns all other aspects of the matter to the originating court for final resolution?

cated judge … Even statutes ostensibly directed to the public at large – marriage, divorce, and family legislation; home warranty acts; occupier's liability laws; landlord and tenant enactments – are beyond the ken of most citizens."[9] Devising and refining the appropriate framework for statutory interpretation is an ongoing preoccupation of the Supreme Court, continually addressed and re-addressed. A second staple issue involves "standards of review" (crudely: how big a mistake of what kind did the initial decision maker have to make before appellate intervention is appropriate, this having different answers depending whether the initial decision maker was a judge or an administrative board).[10] I am not suggesting for a moment that matters of this sort should be turned over to some less formally and narrowly professional body.

As the Supreme Court itself keeps telling us, however, interpreting a constitution is quite a different exercise from interpreting a statute.[11] Unlike statutes, constitutions tend to be couched in rather general terms, because to do otherwise risks a rigidity that would quickly and unacceptably "date" the constitution rather than allowing it to adjust appropriately to changing circumstances.[12] But the practical effect of this laudable intention is that interpreting a constitution is less like following the detailed instructions of a statute than it is like unravelling the meaning of a piece of poetry. If the instructions are calculatedly imprecise, then the responses necessarily allow for a range of discretion and flexibility.

And the flexibility can be considerable indeed, to the extent that what was unthinkable yesterday can become constitutionally entrenched tomorrow. Nobody who followed the debates in the early 1980s can doubt for a moment that the parliamentarians, provincial and federal alike, had no intention whatever of entrenching gay rights in the constitution; when the argument was made in legislative debate, it

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[9] R. A. Macdonald, "The Fridge-Door Statute" *McGill Law Journal*, Vol. 47 (2001) 11 at 15.

[10] The current "last word" on statutory interpretation is probably re: *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; the major modern decision for "standards of review" was *Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235 until the Supreme Court explicitly rewrote the guidelines in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190. Based both on the Court's own headnotes, and my own studies of citation patterns, I would suggest that these are the most recurrent pair of issues on the Supreme Court docket.

[11] The "classic" and most frequently cited statement of this is Dickson's reasons in *Hunter et al. v. Southam Inc.* [1984] 2 S.C.R. 145 at 155: "The task of expounding a constitution is crucially different from that of construing a statute" such that meanings "cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction."

[12] Hence the argument in the American law journals about whether the United States Air Force is unconstitutional, given that the US Constitution only contemplates a Congressional power to establish an army and a navy. See e.g., Samuel Issacharoff, "The Elusive Search for Constitutional Integrity" *57 Stanford L. Rev.* Vol. 57 (2004) 727. (The point of the argument is usually to critique the originalist style of constitutional interpretation.)

was derisively dismissed as simply ridiculous. The same was true of any suggestion that the entrenchment of the Charter would settle the abortion issue in a way that completely bypassed Parliament. But today, sexual orientation has unquestioned status as a prime example of the "analogous categories" under s.15; and the right to abortion is widely believed to enjoy constitutional status.[13] Whether this is a good thing or a bad thing depends on whose ox is being gored, or whose lottery ticket turned out to be a winner; but whether it happens at all is almost entirely up to the judges, whose reasons are sometimes surprisingly candid about the fact that they may simply change their mind in the future about something they are "settling" today.[14] Even Peter Hogg – a supporter rather than a critic of the Charter project and the Supreme Court's pre-emptively important role – delicately admits that judges "have a great deal of discretion in 'interpreting' the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges."[15] Precisely.

The judges often say their decisions are strictly contained by the written text, but this is trying to turn poetry back into detailed directions and, with respect, it does not convince. On the face of it, the words protecting freedom of expression in the American Bill of Rights and the Canadian Charter are similar enough that one could not predict from the words alone which of the two countries would make free speech pre-emptively important and which would be much readier to accept policy-driven reasons for restricting it.[16] Similarly, compare the German Basic Law and the Canadian Charter, and you would be hard-pressed to explain *simply from the words* why one country has found that the unborn has a right to life that sharply limits legally permitted abortions while the other has found a "security of the person" guarantee that makes it all but impossible to limit abortion at all. This is not to say that the judges are making the whole thing up out of whole cloth[17] – such a

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[13] The actual wording of the badly fragmented reasons in *Morgentaler* [1988] 1 S.C.R. 30 actually suggests a more nuanced position, but good luck to any politician who tries to explore these apparent openings.

[14] See e.g., *Gosselin v. Quebec* 2002 SCC 84, [2002] 4 S.C.R. 289, esp. McLachlin's reasons at para. 82 and 83: "One day, s. 7 may be interpreted to include positive obligations." And again, "I leave open the possibility that a positive obligation to sustain life, liberty and security of the person may be made out in special circumstances."

[15] Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" *Osgoode Hall Law Journal* Vol. 35 (1997) 75 at 77.

[16] See Grant Huscroft, "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada" *University of Queensland Law Journal*, Vol. 25 (2006) 181.

[17] Although even before the entrenchment of the Charter, Paul Weiler was complaining about the fact that sometimes it seemed as if the Supreme Court was just making the law up as they went along – see Paul C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974).

suggestion insults the conscientious members of an honourable profession – but it does strongly suggest that there is something more complicated and discretionary involved than (in former SCC justice W.Z. Estey's homey tailoring metaphor) simply putting the cut cloth of a statute up against the printed pattern of the entrenched constitution and saying whether or not it fits.

There is a further problem, namely, that we want judges to settle legal issues for us, while the constitution (and decisions about its meaning) is necessarily and unavoidably saturated in politics. It is no longer fashionable (and rightly so) to assume a sharp dichotomy with "law" over there and "politics" over here, but we can nonetheless identify a continuum running from "mostly law, partly politics" through to "mostly politics, partly law" and constitutional decisions are usually the latter. Indeed, as Hirschl (2008) points out, they typically include the most fundamentally political issues imaginable, the ones that define the very political community and its purposes. Judges handle these issues by saying (on the one hand) that the answers are to be found in the very words of the constitution even though (on the other hand) they completely dismiss out of hand the most direct and unambiguous indications as to what the drafters of those words intended them to mean.[18] The situation is aggravated by the fact that different courts can draw dramatically different meaning from apparently similar words, and even the same court can change its mind over time about what the words actually mean.

This is especially and most transparently true for the type of Charter decisions that have dominated the jurisprudence for the last decade or so. It is clearly not the case that Canadian governments today wake up some morning determined to arrest all the red-heads, outlaw the Presbyterian Church, or ban all books on astrology, such that the Supreme Court's Charter mission is to ring the fire alarm to deal with the transparently offensive legislation that emanates from these unacceptable intentions. Rather, Charter decisions are typically of two types: first, it is a question of balancing two different rights (for example *Seaboyer*,[19] one of the Supreme Court's most controversial and immediately unpopular decisions, balancing the rights of victims against the right of the accused to a fair trial); or second, it is a question of some limited and secondary side effect of legislation that on the face of it has a defensible, even a laudable, purpose (for example *Multani*[20] where a school policy of "zero tolerance" on weapons collided with a young Sikh's religious obligation to carry a *kirpan*). I do not mean to trivialize the issues in either case, simply to point out that we are not looking at an uncaring government deliberately riding roughshod

[18] The "pure" case is *Reference re: B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, and the decision not to consider the intentions of the drafters is explicit at paragraphs 51 to 53.

[19] *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577.

[20] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

over minority rights,[21] but rather of balancing issues at the margins of the central stakes – and balancing is quintessentially a political, not a judicial, function.[22]

But under the imperatives of legal professionalism, the Court must act as if it were a straightforward and purely legal issue, not a political one; and this even though it is becoming more common for politicians of various stripes to seek intervener status and press their issues there – in appropriately veiled language, of course, given that in this context politics is the temptation that dare not speak its name.[23] Not only are the credentials and qualifications of the judges built on legal rather than political matters, not only are they chosen specifically for that particular ability, but when they deal with matters that are saturated with politics, they are obliged to find a language and a logic that tries to keep the politics invisible.

What Would We Gain?

First: We could look at different personnel, with a wider variety of expertise and experience. If it is only judges – the elite, appointed members of an elite profession – who can enjoy the final and exclusive authority to determine constitutional meaning, then the circle has been drawn very narrowly indeed. [24] The suggestion

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[21] Although of course this is the way it tends to be portrayed in the media, for the double reason that headlines must oversimplify and qualified statements are much less attention grabbing. If we once worried about the fact that the Constitution means what the judges say it means – as USSC Chief Justice Hughes once said – we now have to worry whether ultimately the constitution really means what the public understood the media to say the judges had said. For an excellent discussion of this, see Florain Sauvageau, David Schneiderman and David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (UBC Press, 2005).

[22] And if we wanted an example of someone "riding roughshod" over a minority, it would be hard to improve on McLachlin's decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, concluding that if Alberta's requirement for photographs on drivers' licenses causes a hardship for the Hutterites, it is not something imposed on them "'simply because they do not share such religious belief,' but rather because they meet the statutory requirements for issuance of a licence – which include having a photo taken." [at para. 107]. Memories of *Bliss*?

[23] The case that I have in mind is *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791, 2005 SCC 35, where no fewer than ten politicians filed briefs as interveners – not, I stress, a group of ten politicians who jointly filed a single brief, but ten different politicians who were listed as individual interveners.

[24] Actually, we can make the point even more strongly: it is increasingly taken for granted, in this country as in the United States, that the only experience which is relevant to service on the Supreme Court, such that its absence is virtual disqualification, is prior experience as a judge in a (state, provincial or federal) court of appeal – eight of the Canadian nine, and all nine of the American nine, share this background. For a discussion of the concerns resulting from the lack of diversity on the highest court, see Lee Epstein, Jack Knight & Andrew D.

that the judges are in some mystic way responsive to broader public opinion in this process not only belies the absence of an institutional mechanism or resources for accomplishing this but also sits strangely with the notion that the real virtue of an independent judiciary is its capacity to generate principled outcomes that are indifferent to public pressure or shifting moods. But once we separate the constitutional court from the court of general appeal, then we can consider a broader range of credentials and experiences as suggesting potentially useful contributions, all the more so if we take advantage of the opportunity to create a body that is larger than the Supreme Court's nine. Judges would continue to be present, perhaps even to dominate the membership, but we could also consider statesmen[25] and academics and respected senior bureaucrats and distinguished lawyers who had never served on the bench. I would prefer to draw the line at current members of provincial or federal parliaments, and would also want to insist that they all be Canadian citizens, but there is in principle no reason why an even broader pool of candidates could not be considered as well. Bell (2001) notes the firm expectation that the membership of the French Constitutional Council will include individuals with legal experience, legislative experience, and government or administrative experience, again with some kind of balance between the three. The normal practice in many countries is for fixed non-renewable terms, and I find this idea attractive as well.

Second: A different and wider set of actors involved in the appointment process. The current appointment process highlights lightly constrained government actors working toward a single specific vacancy to be filled by a single individual who can be defended in terms of pre-emptive merit, complicated by the regional allocation of Supreme Court seats. However, this "winner take all" situation is an artifact of the current model and not built into the concept of a constitutional court at all. Since the variations are endless, I will not confuse the issue by suggesting a single appointment model, but instead confine myself to general points. For one thing, we would not be filling single seats on an "as vacated" basis but rather all the seats or some specific portion of them (say, one-third) on a regular basis. For another, we need not privilege specific single actors but could instead involve a number of political and official actors in the process. The German Constitutional Court is constituted on the basis of the major political parties being entitled to a share of the appointments based on their current level of representation; this (on the one hand) prevents a single party's monopoly by virtue of holding office for an extended period and (on the other hand) permits parties other than the govern-

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Martin, "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the US Supreme Court" *California Law Review* Vol. 91 (2003) 903; and Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, "Circuit Effects: How the Norm of Federal Judicial Experiences Biases the Supreme Court" *University of Pennsylvania Law Review*, Vol. 157 (2009) 101.

[25] Which one might cynically define as former politicians who have subsequently been useful enough that we have forgotten how they annoyed us when they were politicians, the point being that not all of them (perhaps even not many) succeed in clouding our memory.

ment to "buy into" the process and therefore into the outcomes. Since Canada is a federal country, and the constitution is about the division of powers as well as about rights, there should be some role for the provinces, too. The clutter of actors that can become paralyzing if only a single individual is to be selected becomes more manageable if we are looking at allocating some larger number. More pragmatically, the stakes are reduced as well: not one-ninth of the ultimate deciding body, but one-fifteenth or possibly some smaller fraction;[26] and not an appointment that could be for a term as long as thirty years,[27] but rather for some shorter and fixed period.

Third: We could use different processes and procedures for making decisions. For example: the Constitutional Court could solicit public input (as the Ontario Court of Appeal did for the Catholic education reference); it could invite academic and professional briefs; it could consider public opinion polls on relevant issues or even conduct its own. The Supreme Court of Canada has done some comparable things itself – for example, taking the initiative of appointing an *amicus curiae* to argue one side of the matter in the Quebec secession reference when the Quebec government pointedly refused to do so – but this sort of openness to the expression and the direct consideration of overtly political viewpoints and concerns should be the norm, not the exception, for major constitutional issues. And there should certainly not be a close adherence to the doctrine precedent and the notion of *stare decisis* (although this should not be controversial since the Supreme Court itself, both in theory and in practice, has renounced a strict following of precedent).

Fourth: we could use different formats for explaining and justifying the outcomes. Specifically, the Constitutional Court could deliver reasons that are less like current judicial opinions (the dull clang of logical inevitability) and more like a reasoned canvas of a range of alternative frames and responses. I acknowledge, and very much appreciate, the way that the Supreme Court over the last few decades has deliberately changed the delivery of its opinions to make them accessible to a wider audience,[28] but there is only so far that a formal professional court can go in this respect, and it seems to me that the Supreme Court is pretty well there.

Why Tilt at Windmills?

Why make this proposal? Clearly, it is rather unlikely to be picked up by any set of relevant actors, and in any event the experiences with the Martin/Harper experiments on modifications to the current appointment process are less than encouraging. But I intend this to be similar in principle to the current academic proposals in

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[26] Tracey E. George & Chris Guthrie make the same observation in connection with their proposal to expand the size of the USSC; see their "Remaking the Supreme Court in the Courts' of Appeals Image" *Duke Law Journal* Vol. 58 (2009) 1439.

[27] Should current Chief Justice McLachlin serve until the mandatory retirement age of 75, she will have served on the Supreme Court for just under twenty-nine and a half years.

[28] See Peter McCormick, "Patterns of Judgment: How the Modern Supreme Court Organizes Its Reasons" *Dalhousie Law Journal*, forthcoming.

the United States that are suggesting changes such as a dramatic increase in the size of the USSC accompanied by the adoption of three-judge panels and possibly term limits or retirement ages for judges.[29] Like them, I want us to remember that the past is more varied, and the future presents a wider range of alternatives, than the apparent rigidity of the status quo suggests; and I want to use my proposals to highlight particular problems that tend to be overlooked as we take the current format for granted.

For one thing: let me emphasize that the Supreme Court of Canada performs a double function, but the credentials and experiences of its members are based on only one of those functions; when it acts as a constitutional court, and deals with the "hot" controversial public issues of the day, it is reaching beyond that expertise, which means that it is then obliged to misrepresent what is going on – to wrap inherently political issues in pristine judicial wrapping – to make up for this.

Second, it must be stressed that the constitution of Canada does not belong to the Supreme Court but to the people of Canada, and they are the ones who should be involved in some way (if only an indirect one) when decisions are made that change the constitution in ways that could not realistically have been foreseen by the attentive lay observer. I am profoundly uncomfortable with the standard orthodoxy (directly stated by Peter Hogg in his influential textbook) that Supreme Court decisions about the constitution are themselves part of the constitution. I understand the practical issues involved in the assertion, but I think it goes too far; we need to preserve the conceptual space for citizens (even – heaven forbid! – politicians) to be able to suggest that the Court has made a mistake without branding themselves as constitutional apostates.

Third, people need to be alerted to the fact that inherently political issues do not somehow lose their political content to become purely legal/judicial issues simply because the Supreme Court has decided to deal with them. The *Quebec Secession* decision still leaves me profoundly uneasy (although many of my colleagues praise its statesmanlike conclusions); and the inconclusiveness of *Chaoulli* does not assuage my concern about the way the Court let itself be dragged into the Medicare debate. The *Same-Sex Marriage Reference* demonstrates everything that is wrong about the constitutional status quo (not saved by the fact that in the end the Supreme Court simply refused to answer the only question that mattered, the only question that was really in doubt).[30]

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[29] See e.g., Jonathan Turley, "Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century" *Perspectives on Political Science* Vol. 33 (2004), 155; Tracey E. George & Chris Guthrie, "'The Threes': Re-imagining Supreme Court Decisionmaking" 61 *Vanderbilt Law Review* Vol. 61 (2008) 1825; Tracey E. George & Chris Guthrie, "Remaking the Supreme Court in the Courts' of Appeals Image" *Duke Law Journal* Vol. 58 (2009) 1439.

[30] The *Same-Sex Marriage Reference* has convinced me that we should do away with the reference procedure for both provincial and federal governments, but this is another matter.

Finally and most cogently: recent decades have seen a dramatic expansion in the role of the courts within the processes of democratic governance, a development that we tend to attribute to the Charter but in fact is so globally pervasive as to call for broader and more systemic explanations. But I cannot help feeling that one factor in the rapid expansion of the political role of judges in protecting rights and defining broader constitutional values is a widely shared dissatisfaction with the processes and practices of contemporary democratic politics, a "dissing" of elected officials of all parties in favour of appointed professionals, an attraction to the apparent purity of principle rather than the transparent messiness of pragmatic compromise. I am not saying that we should try to turn the clock back even if we could (which I doubt), just that one day we may feel that the pendulum has swung rather further than is welcome, and that we would be well served by an institution that reaches toward a blended middle ground between judges and politicians where these society-defining matters could be worked out in a way that drew from both worlds. Just as Clemenceau famously said that war is too important to leave to the generals, I am suggesting that the constitution is too important to leave (exclusively) to the judges.

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15

THE UNITED KINGDOM'S NEW SUPREME COURT

Alan Trench

Le Royaume-Uni a créé en 2009 une nouvelle Cour suprême pour prendre en charge les fonctions judiciaires de la Chambre des Lords et du Comité judiciaire du Conseil privé. C'est le gouvernement du pays qui a pris cette initiative, de façon unilatérale et sans guère consulter les administrations décentralisées du royaume. Bien que la dévolution de 1999 ait suscité très peu de litiges jusqu'en 2009, les choses tendent à changer et la Cour a désormais une influence grandissante sur son fonctionnement et plusieurs autres questions. Son rôle a aussi provoqué une controverse politique entourant l'application au droit pénal écossais d'obligations inscrites dans la Convention européenne des droits de l'homme, controverse amplifiée par l'éventualité d'un référendum sur l'indépendance de l'Écosse. Reste à voir comment un tribunal fondé sur une série d'hypothèses touchant la neutralité de la loi peut fonctionner dans un environnement politiquement conflictuel.

On 1 October 2009, the United Kingdom got a new top court – the UK Supreme Court, replacing committees of the House of Lords and Privy Council as the final court of appeal for all domestic matters. This has introduced a new, real, separation of powers into the British Constitution. It also raises the prospect of British judges taking on a more active, interventionist role in public and constitutional life more generally.

BACKGROUND

Since 1876, the highest court of law for most cases in the United Kingdom has been the Appellate Committee of the House of Lords.[1] The situation abounded

[1] To be precise: its jurisdiction included civil and criminal cases from the courts of England and Wales, Ireland (until 1922) and Northern Ireland (since 1922), and civil cases only from Scotland. The High Court of Justiciary, sitting as the Court of Criminal Appeal, has

with anomalies. Not only was it a committee of a legislative chamber, its members included any member of the House who had held "high judicial office," not just the law lords appointed for their judicial expertise. Formally it did not even deliver judgments, but rather members of the committee delivered "speeches" for the consideration of the House as a whole. (Those speeches were always accepted, as a matter of practice, but it was their adoption by the House as formal advice to the Sovereign that gave them their power.) Significantly, the most senior member of the Appellate Committee was the Lord Chancellor, who also presided over the House of Lords as a legislative chamber and was a government minister responsible for the courts and legal system in England and Wales.

In typically British fashion, these anomalies were regulated by a series of conventions: the limited involvement of Lords of Appeal in Ordinary (as the law lords were formally called) in the normal legislative business of the House of Lords, the abstention of those not appointed as law lords from sitting on the Appellate Committee, and successive Lord Chancellors excusing themselves from Appellate Committee business to varying degrees, particularly if matters concerning the government were before the Committee.

The practical problems of a top-level court that was also part of the legislature were also considerable, though. The Appellate Committee had no dedicated staff; it had limited resources, drawn from the staff of the House of Lords (few of whom were lawyers). Until 2001 its members did not even have research assistance, let alone law clerks or even proper secretarial support (they now share four researchers between the 12 members). For information support it depended on the House of Lords Library and parliamentary information technology services, both principally designed for the rather different needs of a legislative chamber. It held its hearings in a room at the end of the Committee Corridor in the Palace of Westminster – where there were few suitable facilities like consultation rooms for counsel to discuss the case.

Overlapping with the Appellate Committee was the Judicial Committee of the Privy Council, a body only too familiar to scholars of the Canadian Constitution. While the Judicial Committee's remit has shrunk, with many Commonwealth countries barring appeals during the last part of the twentieth century, it is still the final court of appeal for a number of the smaller jurisdictions in the Caribbean. It also acquired a jurisdiction in relation to "devolution issues" following devolution to Scotland, Wales and Northern Ireland.[2] In practice, there have been few such cases

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remained the highest court for Scottish criminal cases since Union in 1707. Certain domestic matters, such as appeals against bodies like the General Medical Council regulating certain professions, were considered by the Judicial Committee of the Privy Council.

[2] "Devolution issues" are defined in the three devolution Acts and include intergovernmental challenges to the legislative competence of Acts and actions of other governments. A devolution issue (in this sense) is fast-tracked to the Judicial Committee, and the law officers of each administration have special rights to be heard in the proceedings relating to such cases. The definition is by no means exhaustive, and other cases may well raise issues of importance to the devolution settlements but fall outside it.

(most of which have concerned the rights set out in the *European Convention on Human Rights*), but the existence of two courts with similar jurisdictions created a problem of a "dual apex," with two courts of final appeal reaching divergent rulings on the same point of law. Moreover, in practice participation has been a matter only for law lords – reducing the amount of time they had to sit on cases referred to the House of Lords.[3]

SETTING UP THE SUPREME COURT

Although there had been some discussion of the desirability of reform of the UK's top courts, the announcement of the plan to create a Supreme Court came as a surprise when it materialized as part of a UK cabinet reshuffle in June 2003.[4] (The announcement also included the planned abolition of the office of Lord Chancellor.) As comparatively little thought had been given to the idea within government, there followed a rather urgent period of consultation, leading to the introduction of legislation into Parliament passed as the *Constitutional Reform Act 2005*.

The 2003 announcement had not been discussed with the UK's devolved administrations beforehand, though central to the plans was the idea of incorporating the "devolution issues" jurisdiction of the Privy Council in the jurisdiction of the new court. It therefore amounted to a significant change in the constitutional position of the devolved institutions. This failure was quite contrary to the principles for intergovernmental coordination set out in the *Memorandum of Understanding* (the master intergovernmental agreement); this was neither the first nor the last breach of it.

While this process was underway, two significant changes were taking place in the relationship between judiciary and government. The first was an increasingly political profile for the courts. This has followed the growth in judicial review of government action since the early 1980s, and the implications of membership in the European Community/Union, and the scope for finding Acts of Parliament void for breach of EC/EU (European Union) law. (That happened first in 1991, in the *Factortame 2* judgment: [1991] 1 A.C. 603.)

Further, the courts, and most of all the House of Lords, have found themselves making judgments on matters of high sensitivity. Some have concerned grave issues of personal status, such as whether assisting someone with a terminal illness to commit suicide is lawful (R. on the application of *Purdy v. Director of Public*

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[3] In principle, though, the Judicial Committee has a large membership. Any judge of the Court of Appeal in England and Wales or Northern Ireland or of the Inner House of the Court of Session in Scotland is qualified to sit on it, as are senior judges from Commonwealth countries that send appeals to it, though this seldom happens.

[4] See for example A. Le Sueur and R. Cornes *What Do the Top Courts Do?* (London: The Constitution Unit, 2001); A. Le Sueur and R. Cornes *The Future of the United Kingdom's Highest Courts* (London: The Constitution Unit, 2001). Available at http://www.ucl.ac.uk/constitution-unit/publications/subject/courtslegal.htm.

Prosecutions [2009] UKHL 45), or issues related to the use of stem cells and other forms of assisted reproduction (e.g., *Quintavalle v. Human Fertilisation and Embryology Authority* [2005] UKHL 28). Others have been much more obviously political, for example the application to extradite former Chilean dictator Augusto Pinochet (*R. v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1998] UKHL 41 and [1999] UKHL 17. The case also raised issues of judicial conduct, as judges on the first panel failed to declare an interest as supporters of an intervener in the case). As a result, there is a widespread media and public perception that the judiciary has been taking a more active role in recent years. Given that such cases are brought to the courts for resolution, it would be impossible for judges to avoid these difficult issues; and judges including the law lords have shown no desire to duck them.

The second significant change arises from the *Human Rights Act 1998* (HRA), which made the European Convention of Human Rights enforceable in the UK's domestic courts. The Act authorizes the courts to issue "declarations of incompatibility" if UK legislation is in breach of Convention rights.[5] It also required ministers introducing legislation into Parliament to certify that it is compliant with the Convention rights.[6] While the HRA has generally had more effect within government than through litigation, the introduction of an external standard by which to judge both legislation and executive action has had a significant effect in general terms – and rather more practically with action to control terrorist threats such as "control orders" (held by the House of Lords to breach Convention rights, to the Government's anger). This in turn has fuelled criticism by some commentators (often conservative ones) to argue against the judiciary's more activist role.[7]

This has been accompanied by issues about the role of the courts in society more generally, and very tangibly about their financing. Over the last few years, the approach to management of the courts has drawn increasingly on approaches derived from "new public management," with an insistence on managerial efficiency and on the courts "paying their way" (which inter alia has resulted in charges for court time levied on parties to a case). The combination of managerial and financial pres-

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[5] By contrast, devolved legislation is void and a nullity if (and to the extent that) it does not comply with Convention rights.

[6] The position is somewhat different for legislation passed by the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly, which is void as it is ultra vires if it breaches the Convention rights.

[7] This has also led to criticism of the HRA, resulting in proposals by the Conservative Party to repeal it and replace it with a "British bill of rights" that would better reflect domestic traditions. In 2007, the UK Government suggested it would seek to establish a British bill of rights to complement the HRA. Replacing the HRA would have only limited effect unless the UK were also to withdraw from the European Convention – which would also entail withdrawal from the Council of Europe. A British bill of rights complementing HRA raises a number of problems, including polarizing the situation in Northern Ireland, and has made very limited progress.

sures with political ones has led to a more difficult relationship between judges and government than the UK is used to. This has been aggravated by the government's (failed) attempt to abolish the office of Lord Chancellor. The abolition of the office was announced in June 2003. Although it proved impracticable to abolish the office completely, its role has been changed and reduced. The House of Lords is now presided over by a Speaker; the President of the new Supreme Court is head of the judiciary; and the title of Lord Chancellor has become a subsidiary one of the Secretary of State for Justice, a government minister, with an obligation of having some legal knowledge. In addition, there are now statutory safeguards for the independence of the judiciary. However, these changes mean that a minister no longer directly speaks in government for the judges and their concerns. The judiciary have lost their voice in government, and that appears to mean that ministers are more likely to criticize them in public.

PRACTICAL ARRANGEMENTS FOR THE NEW COURT

Inevitably, setting up the new court presented a number of practical challenges. One was identifying suitable premises, and then fitting them out. The choice of Middlesex Guildhall was initially controversial (some preferred a new building not an existing one, some preferred a location nearer the other principal law courts and more distant from the Palace of Westminster). The refurbishment and conversion of a nineteenth-century building took some time, with the usual problems of such projects. Construction did not start until June 2007, and it was ready in the autumn of 2009. It has two court rooms, an interesting and useful website, and resources to film and webcast its hearings.

Second is the issue of judicial personnel. The first 11 judges were the sitting law lords, who were also appointed as justices of the new court, so Lord Phillips of Worth Matravers moved from being the Senior Law Lord to the presidency of the new Court. Subsequent appointments are being made on merit, following public advertisement and selection, and with no peerage to be conferred.[8] Having been an appeal court judge is not necessary experience (judges must have held "high judicial office" for two years or been a qualified practitioner for 15) – there is no longer a ladder stretching through the lower courts to the Supreme Court. But the appointment process remains a private one, with appointments made by a selection committee chaired by the president of the Court, and no public hearings to approve or confirm an applicant. Moreover, the need to secure territorial balance is not written into statute. By custom, the House of Lords included two law lords from Scotland and one from Northern Ireland. The only requirement now is that the court as a whole must include "knowledge of, and experience of practice in, the law of each part of the United Kingdom." There are concerns in Scotland that its distinctive legal system might be represented by only one Scottish judge, and in Wales that Wales's increasing legal distinctiveness may not be recognized at all.

[8] There should be 12 justices, with one vacancy at present.

THE ROLE OF THE NEW COURT

The big question for the new court is how assertive and activist it will be. On one hand, it grows out of a tradition of judicial restraint, and a belief that contentious issues should be resolved by elected legislators not appointed judges. On the other, some of the factors that helped such an approach to work no longer do. In any event, external rules of law – the binding ones of EU law, the less binding but still authoritative ones of the European Convention on Human Rights – mean the court's increasing salience as an actor in public affairs.

However, one set of issues it is unlikely to deal with to any great extent are ones about the devolution settlements. The UK arrangements have been remarkable for the absence of division-of-powers litigation.[9] While it is conceivable such issues could arise in the future, especially if challenges are brought by third parties, they are unlikely to become central to debates about devolution, which will remain in the political rather than legal sphere.[10]

FURTHER READING

Website of the UK Supreme Court: http://www.supremecourt.gov.uk/index.html

Useful commentary by practitioners: http://www.ukscblog.co.uk/

Le Sueur, A., ed. 2004. *Building the UK's New Supreme Court National and Comparative Perspectives*. Oxford: Oxford University Press.

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[9] There has been some internecine litigation in Northern Ireland, about rights and obligations arising under the Belfast/Good Friday Agreement.

[10] For further discussion, see A. Trench, "Keeping The Judges Out: Why do the courts play such a limited role in devolution in the United Kingdom?" Paper presented at ESRC Seminar on "Dispute Prevention and Resolution: the role of the civil service and the courts," Edinburgh, 19-20 June 2009.

16

CHOOSING THE DECIDERS: THE SUPREME COURT NOMINATION AND CONFIRMATION PROCESS IN THE UNITED STATES

Aman L. McLeod

Consacré au processus de sélection et de confirmation des juges de la Cour suprême des États-Unis, ce chapitre décrit comment le président américain en sélectionne les candidats et les qualités que ceux-ci doivent posséder. Puis il examine comment le pays lui-même envisage les nominations, de même que les règles qui gouvernent ce processus. Analysant enfin les considérations politiques qui influent à chaque étape sur le processus de nomination et de confirmation des juges, il soutient que ce processus est devenu plus participatif depuis les années 1940.

INTRODUCTION

Any understanding of the nomination and confirmation process for justices of the Supreme Court of the United States (SCUS) must begin with the acknowledgement that it is suffused with political considerations from start to finish. Because the justices of the court have life tenure, and because it is the court of last resort for all federal legal questions in the United States, the SCUS is the most influential court in the country, and presidents view their appointments to it as an important part of their political legacy (Epstein and Segal 2005). Accordingly, filling a vacancy on the court often precipitates great partisan conflict and always receives intense media scrutiny. However, this paper argues that the intense scrutiny and partisan conflict that surrounds each nomination to the court are evidence of the participatory nature of the nomination and confirmation process, such that the process has begun to resemble a national election.

THE NOMINATION PROCESS

Article II, s. 2 of the United States Constitution grants the president the power to appoint the justices of the SCUS with the advice and consent of the United States Senate. The Constitution is silent about all of the other details of the process.

Most importantly, it establishes no criteria for service on the court, which leaves presidents a great deal of freedom to use their nominations to drive their partisan, personal and policy agendas.

The process of choosing a nominee begins with the president's advisers gathering a list of potential nominees (ibid.). Most recent presidents have asked to have a list of potential nominees prepared prior to a vacancy occurring, so that a nominee can be chosen and sent to the Senate in relatively short order when a vacancy happens (Baum 2007). Different presidents have relied on different advisers to varying degrees, but most presidents have relied heavily on senior officials in the Department of Justice, especially the attorney general, and the White House counsel (Yalof 1999). These advisers, in turn, consult a variety of sources for suggestions, including state and federal politicians, bar associations, and interest groups (Epstein and Segal 2005). Some presidents are more deeply involved in the selection process than others, in that they play a larger role in formulating the candidate list at the initial stage, and in seeking opinions about who should be on the list (Yalof 1999).

After the initial list is evaluated and screened, the remaining candidates are sent detailed questionnaires about their personal lives which they return to the Department of Justice. The department sometimes contacts the American Bar Association's (ABA) Standing Committee on the Judiciary, asking it to evaluate the candidates on this initial list.[1] The Federal Bureau of Investigation (FBI) is then assigned to run security checks on all of the candidates. Once the FBI reports are done, the president decides which candidate to nominate, and transmits the nomination to the Senate (Rutkus 2005).

It is important to note that each vacancy on the court requires a separate nomination and confirmation. Therefore, when the position of chief justice of the United States becomes vacant, a person must be nominated and confirmed to that post, even if that person is already a sitting justice of the Supreme Court (Rutkus and Tong 2005). The selection process to find a nominee for the position of chief justice proceeds in much the same way as the process does to find nominees for a position as an associate justice on the court, except that when the position to be filled is

[1] Rutkus, D.S. 2005. "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate." *CRS Report for Congress*. Presidents sometimes referred potential candidates to the ABA for its advice from the 1950s until 2001. In that year, Republican President George W. Bush ended the ABA's role at this stage in the selection process, noting the unfairness of allowing one organization to play such a influential role in the selection process when others wanted to participate, but some observes speculated that this decision stemmed from the animosity that some in Bush's party felt towards the ABA since it gave an unfavorable evaluation to Judge Robert Bork when he was nominated to the Court in 1987 by fellow Republican Ronald Reagan. Goldstein, A. 2001. "Bush Curtails ABA Role in Selecting U.S. Judges." Washington Post. 23 March, A1. However, in 2009 President Barack Obama restored the ABA's role in prescreening candidates for Supreme Court nominations. Liptak, A. 2009. "As the Bar Gets Its Voice Back on Judges, Advice Rings Familiar." New York Times. 31 March, A14.

that of chief justice, presidents sometime look for qualities in nominees that are of greater importance due to that office's responsibilities for the court's administration and its control over the justices' opinion writing duties (ibid.). For example, some presidents have put special emphasis on leadership abilities, interpersonal skills, and administrative prowess when filling chief justice vacancies (ibid.). Given that the chief justice speaks first at the conference where the justices discuss cases and vote for their favoured outcomes, and that the chief always assigns opinion writing duties if he or she is in the majority coalition in a given case, leadership and interpersonal skills are especially important qualities for a chief justice (ibid.). Presidents also have to consider whether to choose a nominee from outside of the court, or to nominate a sitting associate justice, which, if successful, results in the need to fill the resulting vacancy for the associate justice seat. Of the 17 chief justices of the United States, three have been associate justices at the time of their nominations (ibid.).

CONFIRMATION: THE SENATE'S ROLE

The path of the nomination in the Senate begins in that chamber's Committee on the Judiciary (hereinafter, Judiciary Committee), and as soon as the nominee is announced, its staff begins the committee's own exhaustive investigation of the nominee. Before the committee begins its hearings on the nomination, the nominee is asked to fill out another detailed questionnaire for the committee staff to study (US Senate n.d.). The questionnaire typically asks the nominee to disclose information about finances, group affiliations, judicial decisions, past public statements, and other matters.[2] Some information from the questionnaire is made public, while other information that might be of a sensitive nature is kept confidential (Rutkus 2005). The ABA also does a detailed evaluation of the nominee to determine the individual's qualifications to serve on the court, culminating in a rating of "highly qualified," "qualified," or "not qualified," which it reports to the Judiciary Committee (ibid.). Also during this period the nominee meets with key senators (often party leaders and members of the Judiciary Committee), to give them an opportunity to acquaint themselves with the nominee prior to the hearings.[3] Next, the Judiciary Committee holds hearings in which members question the nominee and other witnesses (Judicial Confirmation n.d.), to determine whether the nominee is suitable for confirmation. After the hearings, the committee members might ask for additional materials in writing from the nominee to answer any questions remaining after the hearing. Most of the hearings are public, but the committee usually holds a confidential hearing with the nominee in order to address any sensitive issues

[2] See e.g., Doyle, M. 2009. Sotomayor's Finances Look A Lot Like The Average Person's. McClatchy Newspapers. 4 June. LoBianco, T. 2009. White House Gives Sotomayor Papers to Panel. Washington Times. 5 June, A11.

[3] See e.g., Herszenhorn, D.M. and C. Hulse. 2009. Parties Plot Strategy as Sotomayor Visits Capitol. New York Times. 3 June, A20.

that might have been revealed by the investigations conducted by the FBI or the committee's staff (Rutkus 2005).

When the committee is ready, it votes on the nomination, usually within a week after the hearings have ended. The committee has several choices: it can vote to issue a report about the nomination to the full Senate that is favourable, unfavourable or with no recommendation, although members who disagree with the report are entitled to have their views included in the report as well. Senate rules allow the committee to refuse to transmit the nomination to the full Senate if a majority of the members opposes the nomination, which would kill the nomination. However, by tradition, the committee always transmits a nomination to the full Senate, even if a majority of its members opposes it (Epstein and Segal 2005). Furthermore, failure to receive a favourable report is often a sign that the nomination will receive considerable opposition when the full Senate considers it (ibid).

Once the nomination has been submitted to the full Senate, typically, it is scheduled for debate and a final vote.[4] A simple majority is required for confirmation, but actually proceeding to a final vote on a nomination is not always a simple proposition. This is because Senate rules allow unlimited debate on most bills,[5] as long as any senator wishes to continue to speak about that bill (Beth and Palmer 2003). The debate can only end and the final vote taken on a nomination if three-fifths of the Senators who are present vote to invoke "cloture" (ibid.). Perhaps the most notable casualty of the filibuster was Justice Abe Fortas, whose nomination to be Chief Justice of the United States was withdrawn after his supporters failed to muster enough votes to invoke cloture in 1968.[6] There have only been two other cloture votes since Fortas' vote, the first involving William Rehnquist's initial confirmation to the court in 1971, and the second involving his elevation to the office of Chief Justice in 1986. Rehnquist was confirmed the first time despite the failure to muster the required supermajority, and was confirmed the second time after the cloture vote succeeded (Rutkus 2005). The rarity of cloture motions is indicative of the fact that senators tend to be reluctant to use filibusters as way to kill these nominations (ibid.). Under Senate rules, immediately after the Senate has voted to confirm a nomination, any senator who has voted for confirmation has the option to call for a second vote on the nomination, although this has never happened (ibid.).

It is important to note that although the Constitution requires the Senate to confirm SCUS nominations, the Senate does not have to act on a nomination if it does

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[4] The full Senate has the power to send a nomination back to the Judiciary Committee. There have been eight attempts to do this, but only two have been successful. Ibid.

[5] Senate rules limit debate on some budget bills. Keith, R. 2008. "The Budget Reconciliation Process: 'The Senate's Byrd Rule.'" *CRS Report for Congress*.

[6] Silverstein, M. 2007. *Judicious Choices: The Politics of Supreme Court Confirmations, 2nd ed*. New York: W.W. Norton & Co. The percentage of votes required to invoke cloture was three-fourths prior to 1975, when the Senate voted to lower the required percentage to its current level. Beth, R.S. and B. Palmer. 2005. "Filibusters and Nominations." *CRS Report for Congress*.

not choose to, and some nominations have been withdrawn when the Senate has refused to take a final vote on them, although most of these withdrawals occurred in the context of significant Senate opposition to the nominee.[7]

At this point, it is appropriate to mention senatorial courtesy. This custom gives senators from a nominee's home state the power to kill the nomination if either senator opposes it. Although the tradition has worked differently in different eras (Epstein and Segal 2005; Palmer 2005), the custom has usually functioned so as to give each nominee's home state senator the ability to kill a nomination either in committee or on the Senate floor if they are of the same party as the president. Although, the opposition of home state senators has played a role in the defeat of at least seven Supreme Court nominations (Hogue 2008), senatorial courtesy has not figured in the defeat of any recent nomination (Epstein and Segal 2005). The relative passivity of home state senators with respect to invoking senatorial courtesy regarding Supreme Court nominations stands in marked contrast to the more central role that they play in nominations to the lower federal courts from their home states (Epstein and Segal 2005; Goldman 1997).

RECESS APPOINTMENTS

Article 2, s. 2 of the United States Constitution also gives the president the right to fill "…vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." This is an alternative path that allows a president to fill a seat on the court without Senate approval, when the Senate is in recess. However, these appointments expire at the end of the next Senate session unless the Senate confirms the justice before the end of that session.[8] Presidents have made 12 recess appointments to the court, the last being in 1958, when President Dwight Eisenhower named Potter Stewart to the Court (Halsted 2005). Although it has never happened, the Constitution allows the president to reappoint the same recess-appointed justice to the court when that justice's term expires, but federal legislation would prevent the justice from receiving a salary (Hogue 2008).

PRESIDENTIAL GOALS

Scholars have found that presidents often seek to pursue a number of goals when deciding whom to appoint to the Supreme Court. Presidential goals can be broadly broken down into three categories: partisan, policy, and personal (Epstein and Segal 2005). Because of the power and high profile of the court, presidents often consider their parties' reactions to the nominee and the nomination's potential electoral con-

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[7] See Rutkus, D.S. and M. Bearden. 2009. "Supreme Court Nominations 1789–2009: Actions by the Senate, the Judiciary Committee and the President." *CRS Report for Congress*.

[8] See Hogue, H.B. 2008. "Recess Appointments: Frequently Asked Questions." *CRS Report for Congress*.

sequences. For example, President Richard Nixon went out of his way to appoint a southerner (Louis F. Powell) to the court as a part of plan to bolster his party's popularity in that region of the country (Parry-Giles 2006). Also, Ronald Reagan named Sandra Day O'Connor to the court to fulfill a promise that he made during his election campaign to appoint a woman to it, presumably to win favour with female voters (Davis 2005). Scholars have found evidence that the policy preferences of justices, as shown by their votes, tend to match the policy preferences of the presidents who appointed them, at least initially (Epstein and Segal 2005). Some presidents have been quite open about the ideological characteristics that they will look for when choosing nominees, and have used this as a way to appeal to various groups in the electorate (ibid.). On the other hand, given that the court has the power to overturn legislation and issues authoritative interpretations of federal law, it is logical for presidents to appoint people to the court who will not frustrate their policy objectives (Epstein and Segal 2005). Finally, personal factors such as friendship or a recommendation from a trusted aide or friend can play a large role in deciding whom a president nominates (Yalof 1999). Presidents also place great importance on a nominee's professional qualifications for a seat on the high court, and there is evidence indicating that, on average, the more qualified a nominee is perceived to be by the public, the more votes that nominee will receive for confirmation (Epstein and Segal 2005).

THE CHARACTER OF SENATE DEBATE

When the Senate debates a SCUS nomination, typically many senators make statements for the record detailing their reasons for voting as they intend to vote on the nomination (Rutkus 2005). Many senators focus their remarks on a nominee's qualifications, background and character, although the major focus of Senate debate is usually the nominee's judicial philosophy, political ideology, or about how the nominee is likely to vote on some controversial issue of the day (ibid.). Evidence indicates that along with a nominee's professional qualifications, there is an inverse relationship between the ideological distance between a nominee and a senator, and the probability that the senator will support the nominee's confirmation (Epstein and Segal 2005). As a result, it is less likely that a senator who is not from a president's party will vote for that president's nominees, all other things being equal.

THE DEMOCRATIC CHARATER OF THE SUPREME COURT SELECTION PROCESS

Although the federal judiciary in the United States is not directly chosen by the people at the ballot box, more than one observer has noted that the Supreme Court nomination and confirmation process is one in which public participation plays a vital role (Silverstein 2007). Richard Davis (2005) has likened the process to a national election in which nominees are scrutinized by the national media, much like presidential candidates, polls are taken about the public's attitude towards the nominees' confirmation, and nominees campaign to win favour among both the

public and political elites. Certainly senators take public opinion into account when deciding whether to approve the nomination. This is in marked contrast to the situation as it was in the 1940s and earlier when presidents consulted with relatively few individuals and groups before making a nomination, and the Senate Judiciary Committee rarely held public hearings on nominations (Silverstein 2007). For example, before 1930, the Judiciary Committee only held public hearings on two Supreme Court nominations, and before 1916 the Committee had held hearings on only one previous occasion (Rutkus and Bearden 2009), which shows the extent to which the nomination and confirmation process was a closed-door affair.[9] Since the late 1940s, however, the nomination and confirmation process has been opened to greater public participation. For example, presidents have consulted with more individuals and groups before choosing a nominee; the Senate Judiciary Committee has consistently held well-publicized hearings about each nomination; and special interest groups have become heavily involved in trying to sway elite and public opinion in favour of and against nominees (Davis 2005; Silverstein 2007).

Naturally, there are observers who criticize the current process, particularly the Senate's handling of confirmations. For example, some critics claim that senators' tendency to focus on the political ideology of the nominees and the votes that they are likely to take on specific issues (e.g., abortion) that could come before the court is a threat to the independence of the judicial branch and its ability to act as a counter-majoritian defender of the rule of law (Carter 1993). Other critics decry the Judiciary Committee hearings as a waste of time, since nominees typically refuse to provide answers that might in any way excite controversy that could imperil their confirmation prospects (Kiehl and Tucker 2006). Whatever these faults, there is no strong movement to revise the selection and confirmation process, and no apparent likelihood that it will cease to be a highly contentious affair.

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[9] In fact, nominees did not even testify at the hearings until 1939, which Felix Frankfurter became the first to do so. Shapiro, N. 2009. "Hearings a Mere Formality." *Monterey County Herald*. 29 July, A8.

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17

THE FEDERAL CONSTITUTIONAL COURT OF GERMANY: A CENTRAL PLAYER IN A FEDERAL STATE

Arthur Benz and Eike-Christian Hornig

La Cour constitutionnelle fédérale d'Allemagne a été consacrée en 1949 par la Loi fondamentale du pays afin de protéger la démocratie, la règle de droit et les droits individuels, sans parler de sauvegarder le fédéralisme et le pouvoir des gouvernements des länder, *ni de régler les différends constitutionnels entre ces derniers et l'État fédéral. Étant donné les particularités d'un processus décisionnel mixte qui complique la gouvernance du pays et amène ses gouvernements à transformer des enjeux stratégiques en litiges constitutionnels, la Cour est ainsi devenue un acteur clé du système fédéral. Pour expliquer ce rôle particulier, les auteurs décrivent les fonctions et compétences de la Cour, son organisation, le mode d'élection des juges et la logique interne de son fonctionnement. Quoique influencée par des intérêts partisans plutôt que régionaux ou nationaux, la Cour a maintes fois démontré sa capacité de façonner le système fédéral. Mais au lieu de lui superposer sa propre doctrine, certaines de ses récentes décisions sur des questions de compétence, financières ou d'intégration européenne dénotent sa capacité de s'adapter à l'évolution du discours public sur le fédéralisme.*

INTRODUCTION

Germany can be considered a state with a powerful constitutional court. After the failure of the democratic constitution of the Weimar Republic (1919–1933), the founders of the West German Federal Republic in 1949 felt the need to set up an independent guardian of the constitution. The Federal Constitutional Court was entrenched in the Basic Law as a court that specialized in constitutional matters. After the Nazi dictatorship had not only ended democracy and civil rights but also abolished the *Länder* governments, the founders were determined to maintain federalism and saw in the Court an institution for the purpose. Thus federalism and the existence of the *Länder* are entrenched in the constitution and protected against

constitutional amendments (article 79 section 3 Basic Law). The role of the Court was to settle conflicts between the federal government and the *Länder* governments.

In this paper we want to shed some light on the court's role in this respect – in particular, its impact on the structures and mechanisms of federalism. We start by explaining the functions and competences of the court. Then we outline its organization and the election of judges in order to reveal the internal logic of operation. Although it is influenced rather by partisan than by regional interests, the court has repeatedly been able to shape the federal system. However, it has followed debates in politics and society instead of superimposing its own doctrine of federalism. Recent decisions on disputes about competences, financial issues and European integration show this very clearly. That the Federal Constitutional Court became a central player in German federalism can be explained as a consequence of a particular pattern of joint policy-making, which complicates a political resolution of conflicts, in particular where constitutional matters are concerned.

FUNCTIONS AND POWERS

Inaugurated in 1951 in Karlsruhe, a peripheral city that is distant from the sites of government and Parliament in Bonn, the Federal Constitutional Court became a powerful and widely accepted institution in the political system. Its basic function is to defend the constitution against infringements by any holder of state power, be it decisions made in the legislative or the executive arena. While most of the *Länder* established their own constitutional courts, the Federal Constitutional Court has the final say in matters of conflict between federal and state law due to the legal superiority of federal law. The Court only decides if it is called upon to do so by governments, parliaments, party groups or citizens who claim to be affected in their basic rights. The Basic Law defines four main areas of jurisdiction of the Court (German Constitutional Court n.d.):

1. The Court is supposed to act as a final arbiter in conflicts between constitutional bodies that are on the same level with one another or different levels. Issues may concern the law on political parties, electoral law or parliamentary proceedings. Conflicts between different levels of government usually concern the allocation of power or fiscal equalization. In quantitative terms, between 1951 and 2008, only 1.53 percent of all procedures concern this matter. In qualitative terms, decisions include matters of high constitutional and political relevance.
2. At 2 percent are proceedings in the Court which concern abstract or specific constitutional reviews of law. Authorized to initiate abstract reviews of a law (independent of its application) are the federal government, the *Länder* governments and one-third of the members of the *Bundestag*. All courts can call upon the Federal Constitutional Court to decide whether in a specific case the relevant law conforms to the constitution.
3. Introduced in 1951 and entrenched in the Basic Law in 1969, constitutional complaints mounted up to 169,592 in 2008, i.e., 96.42 percent of all judicial

proceedings. Every citizen who thinks that his or her constitutional rights have been violated has recourse to the Court, provided that he or she has failed in inferior courts originally responsible for the matter. At only 2.5 percent of all complaints, the success rate is quite low. Issues of federalism can be raised in this context, in particular if the competence of the federal legislature is disputed.

4. The fourth area of jurisdiction includes different instruments to maintain democratic procedures and institutions, such as the ban of a political party, the impeachment of the President of the Federal Republic or of judges and the verification of elections. With the exception of two successful and one failed attempt to ban extremist parties, these procedures are rarely utilized.

In principle, the Court can declare a law invalid because it does not conform to constitutional norms. For this reason it can be characterized to act as a passive veto-player in the political process. However, more often than not decisions or reasoning of the Court provide guidelines for legislation. Hence it can also influence the agenda of governments and Parliament, which it has done in matters of federalism.

ORGANIZATION AND ELECTION OF JUDGES

Since 1971, 16 judges constitute the Federal Constitutional Court. They are assigned to one of the two senates, each with eight judges. Both senates are supported by scientific assistants and an administrative staff. The internal organization of the court does not follow any regional or federalist logic, even though it is the second Senate of the court which usually decides conflicts between constitutional bodies and thus often on fundamental issues of federalism. Judges are elected by a two-thirds majority of the *Bundestag* and the *Bundesrat* for a twelve-year term, with each chamber electing half of the members of each senate. Both chambers also determine the president and the vice president of the Court.[1] After being elected, the President of the Federal Republic officially appoints the judges.[2]

Judges are elected for a twelve-year term, but they must retire at the age of 68. They cannot be re-elected. In principle each person, who is at least 40 years old and qualified in law (first and second state examination), is eligible. In practice, parties nominate members of higher federal courts or professors of law, and in

[1] The need of a two-thirds majority is not provided for in the Basic Law, but determined in a law passed in 1956. An election by simple majority is considered to contradict the spirit of the constitution. In practice, *Bundestag* and *Bundesrat* apply different election procedures. In the *Bundesrat*, the ministers of justice of all *Länder* meet to establish an ad hoc Commission which nominates candidates. Elections take place in the plenary of the *Bundesrat* with each candidate needing 46 of the 69 votes. The *Bundestag* sets up a standing committee to elect the judges. Of the 12 members, a candidate obviously needs eight votes (Kau 2007: 199f.).

[2] The President only confirms the correctness of the elections process and is not supposed to deny the appointment of a regularly elected judge (Kau 2007: 193).

rare cases, former ministers or members of Parliament. Thus both senates mainly consist of professional lawyers who made their career either in the judiciary, public administration or universities.

The election of the judges reveals a federalist element. The *Länder* governments are involved via the *Bundesrat*. According to the proportionality principle applied in order to reduce the impact of political interests, half of the judges must find the support of two-thirds of the *Länder* governments. However, this does not compel the judges to represent *Länder* interests. Moreover, the selection of candidates does not follow a regional logic. Rather it is the political parties that have an impact on the selection. The rule of qualified majority compels the leading parties to find an agreement over nominations.[3] Following informal party agreements, the right to fill a vacant position on the court will be assigned to the party which already nominated the previous judge. If more than one judge is to be elected, the two big parties usually agree on a package deal approved unanimously in the *Bundestag* and the *Bundesrat*. Conflicts between *Länder* premiers occur from time to time, but they never concern particular *Länder* interests; instead they reveal different opinions about the expected "positions" of a candidate. There is no empirical evidence that the *Länder* governments aim at regional proportionality, which would be difficult to apply in practice. If such considerations play a role at all, they only are of minor relevance. All in all, it is the professional reputation of a lawyer that counts (see Hönnige 2007). Political disputes have overshadowed some of the recent elections of judges, but judges hardly follow the line of a political party or a government (Kneip 2009).

THE IMPACT OF COURT DECISIONS ON GERMAN FEDERALISM

Nonetheless, the court's decisions are of a highly political nature. They have influenced procedures of decision-making in Parliament, electoral law, financing of political parties and the deployment of the armed forces outside Germany. Many decisions have had an impact on economy and society. And even though the organization of the court does not reflect the federalist patterns of the German state, it is an important player in federal-*Länder* relations.

As mentioned above, arbitration of conflicts between the federal and the *Länder* governments has immediate repercussions for federalism. The abstract review of statutes may indirectly lead to a shift of powers, for instance if the court questions the competence of the federal legislative. Such decisions can induce the federal governments to initiate an amendment of the constitution. Moreover, with its decisions on social equality, the court supports uniform policies and centralization, too.

Of particular importance in this context are decisions on the principles guiding the allocation of legislative powers and financial resources in the federal system.

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[3] Following the logic of the party coalitions in government, the bigger parties usually gave one seat to their smaller partners. Especially in the second Senate this practice ceased in 1987. See Hönnige 2007, 972.

When it comes to decisions on these constitutional issues, federal and *Länder* governments regularly are caught in the joint-decision trap (Scharpf 1988) due to the zero-sum character of conflicts. To amend the status quo, they have to come to an agreement which can be ratified by a two-thirds majority in the *Bundestag* and the *Bundesrat*. In the context of redistributive conflicts on the allocation of power and resources, constitutional amendments are likely to fail. In this situation, governments tend to pass the problem to the court. Usually, the court provides no definitive solutions but rather outlines an agenda for legislation. Moreover, its decisions are interpreted by governments and members of Parliament as highlighting those problems which require amendment. Hence it is the interplay between dispute settlement by the court and legislative or constitutional policy which drives the dynamics of federalism.

Court decisions on federal issues do not reveal a particular doctrine of federalism. Rather, they tend to follow political discussions in the public sphere. Therefore, after supporting unitary and cooperative federalism until about the 1970s, the court now emphasizes decentralization, the autonomy of governments and a clear separation of powers. Again, it is not the impact of *Länder* governments on the recruitment of judges but the interplay between politics and jurisdiction which explains the effect on federalism, as the following examples illustrate.

After German unification (1990), economic disparities between the *Länder* affected debates about German federalism. Throughout the 1990s, Western *Länder* governments, burdened by payments for fiscal equalization, initiated legal proceedings in order to alter the equalization scheme. Given clear constitutional rules, the court had limited leeway to question existing law. Moreover, it supported the concept of "unitary federalism." In legal disputes on the application of the right of equal treatment in social policy and taxation, the court requested harmonized public policies all over Germany. The demand for uniform solutions provided reasons for federal legislation in matters of concurrent competences, but also required that all *Länder* governments could dispose of appropriate financial resources. Despite the attempts of the rich *Länder* governments to promote change, the court ultimately affirmed fiscal equalization regulations.

However, during the late 1990s, the Court changed its opinion on federalism and began to support the *Länder* governments arguing for decentralization. With its 1999 decision on fiscal equalization, it required a more explicit and precise definition of norms of distributive justice. Given that definitive constitutional norms already existed, the court was not able to change the constitution implicitly. In legal terms, it demanded a law setting out these norms explicitly. But in political terms, this decision launched a debate as to how the level of equalization can be justified.

In matters of legislative competence, the impact of Court decisions was different. According to the Basic Law, the conditions for using concurrent and framework competences allowed the federal government to make laws in order to achieve or preserve equal living conditions in all regions, a clause which was open to diverse interpretation, even after it had been specified in 1994. Until the 1990s, the federal government had made extensive use of this clause and had left the *Länder* parliaments little room for autonomous legislation. The Court had accepted this as it

considered the allocation of legislative powers a matter of politics rather than legal reasoning. In 1994, the constitution was amended and since then the court has been obliged to decide on the matter. Following constitutional change, some *Länder* governments challenged federal competence for a number of laws and instituted legal proceedings to get that competence denied. By revising its former opinion on this issue, the court now interpreted the conditions for federal legislation very restrictively. This way *Länder* could prevent federal legislation – although only with the help of the court. The federal government had to accept that even its power to change existing law can be constrained. As the court had altered the status quo to the benefit of the *Länder* governments, the balance of power in constitutional policy shifted as well (Scharpf 2006).

As a result, implicit constitutional change was turned into explicit change. In November 2004, following a fourth decision of the Court on legislative competences, the federal government became aware of the consequences of this new legislative environment. A commission working on the reform of German federalism delivered a catalogue of legislative competences which should be transferred to the *Länder* level. The *Bundestag* and the *Bundesrat* passed constitutional amendments to this end that came into force in 2006.

A similar interplay between governments and the court influenced the agenda of a second constitutional reform of the federal system. It was prompted by the government of Berlin's attempt to compel the federal government to bail out the debt-ridden city-state. Deviating from an earlier judgment, the Court ruled against Berlin and emphasized the responsibility of governments for their fiscal policy. In its reasoning, the Court confirmed the constitutional principles of fiscal equalization and the existing law. However, it called for an improved constitutional regulation to prevent excessive public debt. The commission working on a reform of fiscal federalism reacted to this "clear order of the Federal Constitutional Court" by making the issue a matter of high priority. It proposed new constitutional rules for reducing public debt and for coordinating the fiscal policy of federal and *Länder* governments, rules that have been in force since 2009.

The court also strengthened German federalism by its decision on European treaties. By acting as a guardian of national statehood against the evolution of a European federal state, it emphasized the constitutional principles of German federalism. In its ruling on the Maastricht Treaty, the Court stated in 1993 that the process of European integration should not weaken democracy or statehood, since the European Union was considered to be only a union of states and Germany one of the "masters of the treaties." In this context, the participation of *Länder* governments in European policies was guaranteed by a constitutional amendment. In a similar vein, the Court's decision on the Lisbon Treaty in 2009 marked the constitutional limits of European integration and stipulated a revision of procedures concerning the role of the federal Parliament and required the participation of the *Bundesrat* in particular matters.

CONCLUSION

To summarize, we can characterize the German Federal Constitutional Court as a central player within the political system in a double sense of the term. First, it is an institution at the federal level. Accordingly, selection of judges is dominated by party politics rather than by any attempts to represent regional interests. Second, the Court is a central actor in the evolution of German federalism. With its decisions concerning the allocation of powers and fiscal resources between levels, the Court supported cooperative federalism until the turn of the century, but recently has emphasized the autonomy of governments, requested a clear division of powers and strengthened the position of the *Länder*. At the same time, it defended the federal order of Germany in the context of European integration. Thus the Court's "judicial doctrine" of federalism (Baier 2006) has changed.

Theories of constitutional courts have revealed at least two principal mechanisms to explain their decisions and impacts on federalism. First, it is the institutional position of courts in a federal system and the election of judges that determines outcomes (e.g., Bzdera 1993). From this perspective, the German Federal Constitutional Court should tend to favour the federal government in conflicts with the *Länder* governments. However, recent decisions disconfirm this assumption. Therefore, a second theory seems to apply better to the German case (e.g., Vanberg 2004). It states that courts tend to follow general trends in political discussions. This way they increase the chances of their decisions to be implemented by legislation or constitutional amendments. In fact, by emphasizing decentralization, the autonomy of governments and diversity instead of centralization, intergovernmental cooperation and uniformity, decisions of the Federal Constitutional Court on federalism clearly responded to the changing discussion on federalism. This paper cannot provide empirical evidence in favour of one of these theories or the other. Presumably, further conditions have to be taken into account, which may be revealed in a comparative study.

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18

CONSTITUTIONAL COURT APPOINTMENT: THE SOUTH AFRICAN PROCESS

Yonatan T. Fessha

La création de la Cour constitutionnelle d'Afrique du Sud est l'un des éléments clés du projet de démocratie constitutionnelle qui caractérise la période de l'après-apartheid. Offrant un aperçu du processus de nomination de ses juges, ce texte examine les questions les plus pertinentes touchant la représentativité et la transformation de la magistrature sud-africaine. On y voit notamment que le processus de nomination des juges de la Cour constitutionnelle et d'autres tribunaux, extrêmement secret sous le régime d'apartheid, est aujourd'hui beaucoup plus transparent. Mais certains commencent à s'inquiéter de la politisation de la commission chargée de nommer les juges, même si aucune voix n'appelle pour l'instant à modifier son fonctionnement.

INTRODUCTION

An important part of the constitutional democracy project that characterizes post-apartheid South Africa is the establishment of a constitutional court. The strong constitutional culture entrenched in the new South Africa is to a large extent attributable to the establishment, work and stature of the Constitutional Court. The aim of this paper is to provide a brief overview of the appointment process to the Constitutional Court. It also touches on the most relevant issues pertaining to the appointment of judges in South Africa, which is not only applicable to the Constitutional Court but extends to all other courts in the country. As a point of departure, the paper introduces the Constitutional Court. It then proceeds to discuss the Judicial Service Commission, the body responsible for the appointment and dismissal of judges. The appointment process for judges is briefly discussed after which the role of provincial representation in the appointment of judges is evaluated. Finally, the issue of racial and gender transformation of the judiciary is given brief attention.

THE CONSTITUTIONAL COURT

The Constitutional Court (CC) exercises jurisdiction only over constitutional matters and issues connected with decisions on constitutional matters.[1] Declared by the Constitution as the highest court on constitutional matters (ibid., s. 167(3)(a)), the Court consists of the chief justice, the deputy chief justice and nine other judges (ibid., s. 167(1)). A matter before the court must be heard by at least eight judges (ibid., s. 167(2)). At all times, at least four members must be persons who were judges at the time of their appointment to the Constitutional Court (ibid., s. 174(5)). To date, the Court has attracted judges, academics, activists, practising advocates and practising attorneys. Richard Calland (2006, 23) notes that "the first batches of Constitutional Court judges have rich personal histories, and in many cases they too have professional and personal journeys scarred by apartheid." The judges must be properly qualified and must be "fit and proper" South African citizens (Constitution s. 174(1)). This requirement cannot, however, be seen in isolation. Of great importance is the constitutionally sanctioned imperative of transformation, meaning that the judiciary needs broadly to reflect the racial and gender composition of South Africa (ibid. s 174(2)).

In contrast to the commonly held practice of appointing judges for life, a judge of the Constitutional Court in South Africa is appointed for one term of 12 years, but must retire at the age of 70, whichever occurs first (ibid., s. 176(1)). The Constitution envisages the promulgation of an act of Parliament that extends the term of office for constitutional court judges. This was realized in 2001 when the Parliament promulgated the Judges' Remuneration and Condition of Employment Act No. 47 of 2001. The Act extended the term of the judges of the Constitutional Court to 15 years in a situation where the 12-year term has expired or they have reached the age of 70 before they have completed 15 years of active service as a judge. This is subject to the exception that they do not reach the age of 75 before this point. In addition to the usual advantages of having fixed security of tenure, some argue that the periodic renewal of the court ensures a membership that "is more likely sensitive to the realities of South African society" (Motala and Ramaphosa 2002, 58). Furthermore, "[w]ith the periodic renewal of the Court's membership, there is no spectre of a judiciary appointed for a life term, imposing opinions that belong to the previous era" (ibid.). Currently, there is a proposal to allow constitutional court judges to serve until they reach the age of 70, regardless of how long they had already served on constitutional court. This is criticized by some on the ground that it introduces the American model which allows the president who appoints the federal judges to maintain influence long after he or she has exited the political scene.

[1] Section 167 (3) (b) Constitution of South Africa, 1996 (hereafter referred to as Constitution).

THE JUDICIAL SERVICE COMMISSION

In a definite break from the past, where the appointment of judges was the exclusive domain of the executive,[2] the post-apartheid South African government has chosen to adopt the model that establishes a special body to deal with the appointment and dismissal of judges. In South Africa, this is called the Judicial Service Commission (JSC), a bulky, wieldy institution that plays an important role in the appointment and dismissal of judges. The JSC consists of three representatives of the judiciary (the Chief Justice, the President of the Supreme Court of Appeal and Judge President designated by the Judges' President), the cabinet member responsible for the administration of justice (i.e., the minister of justice), four legal practitioners (nominated by the professions and appointed by the president), six members of the National Assembly, at least three of whom must be members of opposition parties, four members of the National Council of Provinces (i.e., the South African Senate), one law teacher designated by the law teachers of the university law faculties, and four persons designated by the president (Constitution s. 178). With its 22 members, the JSC, as an institution, provides a broadly based selection panel for appointments to the judiciary. Although some have suggested that the large size of the commission makes decision-making difficult, others emphasize that it has allowed for the representation of different interest groups making it imperative for candidates to "win wide support from across the different groups" in order to be appointed to the bench (Malleson 1999).

Although limiting the composition of a body responsible for the appointment of judges to members of the legal fraternity is no longer acceptable and there is a consensus that members outside the legal community must be included (Hatchard, Ndulo and Slinn 2004), it is often claimed that the Parliament and the executive are over-represented on the JSC, that there is a disproportionately high number of politicians on the JSC. More specifically, the constitution allows the president ample opportunity to participate, both directly and indirectly, in selecting members of the JSC. The president appoints the minister of justice, the chief justice of the CC and four members of the JSC. The president also has the power, in terms of section 178(2) of the Constitution, to select nominees of the professions if there is a disagreement within a profession as to who its nominees should be. The president, however, is only required to do this after consulting the profession concerned. It

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[2] In apartheid South Africa, the selection process was entirely secret. The responsibility of appointing judges rested with the president, in consultation with minister of justice. Carmel Rickard notes that "all the appointments were decided on behind closed doors; there was no prior scrutiny by the public or the profession and the result was a bench that was largely a mirror of the political establishment: virtually all male, all middle-class and largely Afrikaans-speaking." Rickard, C., "The South African Judicial Services Commission," (paper from the conference on Judicial reform: function, appointment and structure, centre for public Law, University of Cambridge, 4 October 2003. Available online at http://wwww.law.cam.ac.uk/view_doc_info.php?class=12&order=doc_title=asc&doc=879&page=1&start=0>.

seems that at least nine members on the JSC are appointed by the legislature and the president. This also means that the ruling party is guaranteed a plurality voice on the JSC. As Calland (2006, 218) has succinctly put it, the ruling party "does not have an explicit inbuilt majority" but "with three of each of the MPs' and NCOP's allocations, plus the minister of justice and the four persons designated by the president, totaling eleven, the ruling party virtually has veto power." The strong majority of non-lawyers and more specifically the domination of political representatives in the commission, some feared, "would preserve the role of political patronage and provide a means for the executive to maintain political control of the selection process" (Malleson 1999, 39). Marius Olivier and John Baloro (2001, 36) argue that the plurality of politicians could "not only jeopardize the independence of the commission, but also the perception of independence. The impression could be created that the views of the majority party in Parliament will be sustained." The Constitutional Court does not, however, seem to think so.

In certifying the Constitution, the Constitutional Court held that the mere fact that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with judicial independence. The court stated: "In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the executive or by Parliament or by both."[3] For the court, the key to the separation of powers and the independence of the judiciary is that "the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive" (ibid.). Pointing to the fact that the JSC consists of members of the judiciary, the legal profession and the opposition parties, the Court argued that the JSC "provides a check and balance to the power of the executive to make [judicial] appointments" (ibid., para. 124). Even the official opposition party, the Democratic Alliance, which is cognizant of what is in effect the dominance of the ruling party in the composition of the JSC, has no intention of seeking a constitutional amendment to reconfigure the JSC. In a paper that outlines the party's position on the current threats to judicial independence in South Africa, it "notes that many western democracies – France, Germany and the UK, for example – do not have such an independent process for appointing judges" (Democratic Alliance 2006, 16).

THE APPOINTMENT PROCESS

It seems that the actual process of appointment as adopted by the commission has eased any apprehension that detractors may have about the dominance of the JSC by particular grouping. In contrast to the high level of secrecy that characterized the selection process during apartheid, the commission has made efforts to ensure that the process by which judges are selected to the Constitutional Court is as transparent as possible. Calland (2006, 218) notes that "[w]hat is clear is that the

[3] Ex parte Chairperson of the Constitutional Assembly: in re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) para. 123.

process of open interviews that the JSC follows has introduced a large element of accountability into the system."

The commission's procedure for nominating judges is outlined in the *Government Gazette* (*Government Notice* R. 423, *Government Gazette* No. 24596), published by the minister of justice in 2003. The process of appointment is put into effect when the head of the relevant court informs the JSC that there is a vacancy. After the advertisement of the vacancy, the JSC will call for the nomination of suitable candidates. An application to nominate an individual to the vacancy must be in writing and accompanied by the relevant documents including the candidate's resumé, completed application form and letter of consent to the nomination. The application takes the form of a questionnaire that the nominator must complete by providing, among other things, information about the applicant's personal and professional life, financial interests, practice and other relevant experience. The applicant's contribution in the struggle against apartheid and his or her commitment to the principles underlying the constitution must also be included in the application form. Typical of any job application, the application and hence the nomination would not be complete without the inclusion of a letter from a professional organization stating or verifying the good behaviour of the applicant. The completed application forms are then distributed to members of the JSC. The drawing up of a short list of the candidates, however, is left to a subcommittee appointed by the JSC. The short list must nevertheless be approved by the JSC. The names of the shortlisted candidates for interviews are then published.[4]

With regard to the vetting process, one particular issue that has been raised as a major concern relates to the process of short listing of candidates by the subcommittee of the JSC. Basically, the decision-making process in relation to short listing for interview is held in private. The names of the candidates who are nominated but not shortlisted are not published. As a result, the criteria that the committee uses in the shortlisting of candidates are not known to the public. Therefore, the secrecy within which the vetting process takes place raises questions about whether the process could exclude people on the basis of their political or even sexual preferences (Andrews 2006). At the very least, the secrecy has bred rumours and fuelled speculation about how and on what basis decisions were made. This notwithstanding, the JSC continues to keep the public and the media in the dark by maintaining the secretive process of short listing by the subcommittee and not disclosing the identities of those who are not shortlisted. The commission argues that the nondisclosure policy protects the privacy of those individuals who were nominated but failed to make it to the short list.

In the early days of the JSC, one of the controversial issues with regard to how it should conduct its business was whether the interview should take place in private or public. Initially, the commission decided to conduct interviews in public. This was controversial and as a result the commission was forced to conduct the first

[4] The procedure applies both to those who are seeking judicial appointment for the first time and those who are seeking promotion to the higher courts or transfer to other courts.

round of interviews in closed session. But since then the commission has resorted to public interviews, which have now become a firmly established practice and an indication of the transparency with which the commission conducts its business. Even in cases where there is only a single candidate for the position, holding a public interview has become an indispensable requirement. In the latest round of judicial appointments, there was only one candidate contesting for judge president in North West and KwaZulu-Natal; that did not discourage the JSC from conducting a full scale public interview.[5] The transcripts of these reviews are also accessible on the Constitutional Court's website.

Following the interview, the JSC prepares a list and submits it to the president. The list must contain three more names than the number of appointments to be made. The president makes an appointment from the list and provides an explanation for the rejection of any of the nominees. The president may request the JSC to supplement the list if any of the nominees is unacceptable and an appointment remains to be made. The JSC must then supplement the list with further nominees and the president must make the remaining appointment from the list (Constitution s. 174(4)). This process of appointment does not, however, apply to the appointment of the chief justice and the deputy chief justice. Unlike other judges who are appointed by the president from a list of names submitted by the JSC, the role of the JSC is limited in the appointment of the two most senior positions of the judiciary. The appointment of the chief justice and the deputy chief justice is at the discretion of the president. The single requirement is that the president should make the appointments only after consulting the leaders of the parties represented in the National Assembly (ibid., s. 174(3)).

PROVINCIAL REPRESENTATION

Unlike the other two branches of government that reflect elements of federal arrangement by dividing executive and legislative powers between the national and sub-national level of government, the judiciary is organized under a single hierarchical system. In other words, the sub-national units do not have their own judiciary. While the Constitutional Court and the Supreme Court of Appeal exercise a nationwide jurisdiction, the higher courts exercise geographical jurisdiction, with at least one high court in each province. The absence of a parallel system of courts, however, has not excluded the representation of provincial interests in the appointment of judges.

The issue of provincial representation in the JSC was raised in a recent case that involved the JSC and a judge president of one of the high courts. Section 178(1) (k) of the constitution provides for the representation of provinces in the commission through their respective premiers, or their alternatives, when it considers matters

[5] "Despite being the only candidates for the job, [the two candidates] were not given an easy ride by the JSC." See Rabkin, F. (2010) Lack of judge candidates "disturbing," *Business Day* 19 April 2010.

relating to a high court in their respective provinces.[6] The case under consideration involved the judge president of Cape High Court (Kamaldien 2010). Judge President John Hlophe was accused of trying to influence Constitutional Court judges in a case involving Jacob Zuma, the current president of South Africa. A hearing by the JSC eventually cleared the judge president of all allegations. Helen Zille, Premier of the Western Cape Province, where the Cape High Court is situated, challenged the decision before the Constitutional Court on the ground that she, as an ad hoc member, should have "acted as a commissioner" when it deliberated on the matter as it involves a specific high court of the province of which she is the premier. The Commission, she argued, was not properly and lawfully constituted when it decided on the Hlophe matter. The JSC, on the other hand, maintained that the matter is not about a specific high court but the conduct of a particular individual judge and there was no constitutional obligation on the JSC to invite the premier to the hearing. The question was, therefore, what would constitute "matters relating to a High Court."

Obviously, the composition of the High Court is a matter relating to a high court. That is why the premier joins the JSC when it decides on appointments to the High Court in his or her province. Similarly, a disciplinary hearing against a judge relates to the composition of the court as it may result in the removal of the judge concerned and thereby affect the composition of the court. The implication is that a case that involves the possible removal of any judge is a matter relating to a high court and, as a result, the relevant premier must form part of such hearing (Vos 2009). The court, therefore, agreed with the premier and found that section 179(1) (k) of the Constitution requires that the premier must act as a commissioner when it decides on the disciplining of judges of that court as this is "unquestionably a matter which relates to a specific high court of which the judge is a member because of the consequences of its outcome to that Court."[7] This means that provincial representation must be ensured both in the appointment and dismissal of judges of high courts.

THE TRANSFORMATION OF THE JUDICIARY

One important issue that continues to occupy the agenda of the commission is the extent to which it has been successful in ensuring the representativeness of the composition of the bench. As indicated earlier, the constitution makes the transformation of the judiciary a constitutional imperative by requiring the selectors to give due regard "to the need for the South African judiciary to reflect broadly the racial and gender composition of South Africa." This does not introduce a quota system. It does not mean that the composition of the judiciary should be redesigned to reflect exactly the proportions of the different population groups. Rather, it makes

[6] In addition to the premier, the judge president of the specific high court must, as well, be invited to the Commission as ad hoc member.

[7] *Premier of the Western Cape Province v. Acting Chairperson: Judicial Service Commission and Others* (25467/2009) [2010] ZAWCHC 80 (31 March 2010) para. 14.

race and gender relevant factors that must be taken into account in the appointment of judges. The underlying premise is that the court, to do justice, must have the capacity to understand and relate to the experience of all South Africans. And doing so requires constituting the court "from a wide enough spectrum of South African society."

In post-apartheid South Africa, the transformation of the judiciary has become a thorny issue with some claiming that "the pace of transformation is too slow" while others express their "dismay" about what they regard as the overlooking of suitable white candidates and lament that pale male candidates should not apply to be judges.[8] The South African judiciary has traditionally been largely white, male and Afrikaner speaking, a reflection of the overwhelmingly white and male legal profession. In 1994, as South Africa started to move away from the apartheid era, of the 200 judges that presided at the different levels of the judiciary, more than 99 percent were white and male (Andrews 2006). Since then, South Africa has come a long way in creating a diverse judiciary. The number of black judges has increased. According to a recent report, there are over 200 judges, of whom more than one-third is black. A significant proportion of the provincial judges presidents are black. In this regard, the Constitutional Court is the most diversified. The first round of constitutional court judges included three black, one Indian and seven white people. Today, there are eight black people on the court.

However, there seems to be a consensus that the transformation of the judiciary as regards gender leaves much to be desired. Women continue to be grossly underrepresented on the bench, making up less than 10 percent of the overall South African judiciary (Andrews 2006). This has prompted the minister of justice to organize a conference examining questions regarding gender transformation of the judiciary and the appointment of female judges.[9] Although transformation of the judiciary as regards race has gone a long way compared to the transformation as regards gender, the need to address both racial and gender imbalance will continue to constitute an important factor in the appointment process. In this regard, the need to address the racial and gender distortion in the legal profession is often emphasized because the profession represents the pool from which competent judges are drawn. As noted by one author, "[t]ransformation of the judiciary without transformation of the organized advocates' profession ("the bar") is, quite simply, a pipe dream" (Moroka 2010).

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[8] Carmel Rickard called on the Judicial Service Commission to "be frank with the legal profession and say that white male lawyers should no longer apply for positions on the Bench." Rickard, C. (2004), 'The Bench is closed to pale males, struggle credentials or not,' *Sunday Times*, 18 July 2004.

[9] Minister of Justice, Opening Address by Ms. Bridgette Mabandla, MP, Minister of Justice and Constitutional Development, South Africa.

CONCLUSION

Under the aegis of the JSC, the process of appointments to the Constitutional Court and all other courts has moved away from the secrecy that characterized judicial selection during the apartheid regime and is now a much more transparent process. This transparency has mitigated any concern that arises from the plurality of politicians in the composition of JSC. As a result, it seems that there is no appetite for altering the composition of the JSC. This is not to say that concerns do not exist. The recent appointments to the JSC have raised eyebrows, with some claiming that they cannot be expected to act impartially in discharging their duty as members of the commission. If this fear, real or perceived, continues, the demand for change in the composition of the JSC is likely to grow.

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19

THE COURT OF JUSTICE OF THE EUROPEAN UNION: FEDERALIZING ACTOR IN A MULTILEVEL SYSTEM

Achim Hurrelmann and Martin Manolov

Ce texte consacré à la Cour de justice de l'Union européenne (CJUE) montre que si l'Union européenne (UE) n'est pas à proprement parler une fédération, le rôle joué par la CJUE dans le système multi-niveaux de l'Europe s'apparente à celui d'« arbitre fédéral » souvent associé aux cours suprêmes des fédérations classiques. Mais vu la composition et les compétences juridiques de la CJUE, l'exercice de cette fonction d'arbitre tend à favoriser l'UE par rapport aux États-membres, comme l'ont confirmé plusieurs décisions marquantes ayant accentué le caractère supranational de l'UE et, du même coup, son orientation fédérale. Or, cet effet « fédéralisateur » des décisions de la CJUE est de plus en plus contesté par les États-membres. Mais étant donné la réticence des dirigeants de l'Union à modifier significativement les traités de l'UE, la CJUE devrait en fait voir ses pouvoirs renforcés dans la période à venir et rester par conséquent un acteur clé de la fédéralisation progressive de l'Europe.

INTRODUCTION

The European Union (EU) is a highly institutionalized multilevel system, but not formally a federation. In spite of the considerable power and sophisticated legal architecture of the EU institutions, sovereignty formally rests with the 27 member states. Both in a historical and in a legal sense, the EU is their creation. It was established through international agreements concluded between the member states, and all changes of the EU Treaties (the Union's so-called "primary law") still require member-state ratification. The member states also exercise ultimate control over the EU's finances, and it is their administrative agencies that are charged with implementing most EU rules. Nonetheless, in the past decades, the political autonomy of EU institutions and the legal impact of EU rules have grown immensely.

It is now fair to say that the EU possesses quasi-federal features. In its legislative processes, supranational institutions that are not controlled by the member states –

most importantly the European Commission and the European Parliament – act as crucial agenda setters and veto players, and the EU's main intergovernmental body – the Council – decides most issues by qualified majority voting, which means that individual member states can be overruled. Moreover, once passed, EU legislation (the Union's "secondary law") is binding on all member states. Lastly, and most importantly for this paper, disputes about the EU's primary and secondary laws are also decided by a body with a distinct supranational character, the Court of Justice of the European Union (CJEU).[1]

In this paper, we analyze the role of the CJEU in the EU's quasi-federal system. We begin by outlining the CJEU's structure and composition, as well as its competences in deciding various categories of cases. In this first section, we demonstrate that the court's powers in the EU's legal system allow it to play a role closely resembling the function of "federal arbiter" that is often associated with supreme courts in full-style federations. In the second section, we describe how the CJEU has used these powers to make a number of far-reaching decisions that have propelled the EU further into a federal direction. These decisions, with some justification, have led to the perception of the CJEU as a federalizing actor in the EU system, one whose neutrality in controversies between EU institutions and the member states has sometimes been disputed. In the third and final section, we show that dissatisfaction with some CJEU decisions has resulted in attempts legally or politically to rein in the powers of the CJEU. We argue, however, that the effects of these attempts have been – and are likely to remain – limited. The CJEU will continue to be a core actor in the incremental federalization of Europe.

COMPOSITION AND COMPETENCES

The CJEU was established in 1952, originally as part of the European Coal and Steel Community (ECSC). With the growth of the European construction, its caseload grew rapidly, necessitating an internal differentiation of the once unitary institution. Since 2005, the CJEU consists of three component courts, all located in Luxembourg: (a) the Court of Justice (CJ), charged with making decisions on the most important controversies of EU law, including all cases in which member states are a party to the proceedings; (b) the General Court (GC), which deals with cases of a more routine nature, such as legal challenges by business corporations against decisions that the European Commission makes on mergers and acquisitions under the EU's competition policy; and (c) the Civil Service Tribunal (CST), which decides in disputes between EU institutions and their staff.[2] The three courts

[1] Before the reforms of the Lisbon Treaty, which came into effect in December 2009, the CJEU used to be called European Court of Justice (ECJ). While the old name is still used quite frequently in political and academic debates, this paper follows the new terminology.

[2] It is important not to confuse the CJEU with the European Court on Human Rights (ECtHR), located in Strasbourg, which is not part of the EU, but governed by the Council of Europe.

stand in a clear hierarchical relationship to each other. Under some conditions, rulings by the GC can be appealed to the CJ, and rulings by the CST to the GC. The CJ and the GC each deal with about 500 to 600 new cases per year, the CST with about 100 to 150 cases.[3] Between all three levels of the judiciary, the CJEU employs a workforce of about 1500 permanent and 500 temporary staff members.

The CJ and the GC are each made up of 27 judges, one per member state. The CST consists of seven judges. In the CJ, judges are assisted by eight advocates-general, who are charged with an initial assessment of the incoming cases that often forms the basis of the court's eventual decision.[4] Under Article 253 of the Treaty on the Functioning of the European Union (TFEU), judges and advocates-general are appointed "by common accord of the governments of the Member States" to a renewable six-year term. The judges in turn elect one of their number as president. In the past, each government has tended to nominate its judge more or less autonomously. This might change as a result of a new provision in Article 255 TFEU, which establishes an expert panel to scrutinize national nominations, but it is too early to assess the precise effects of this change. There has always been more intergovernmental debate about advocates-general. According to an informal convention, the five largest member states can each nominate one advocate general, with the remaining posts rotating among the other member states. Article 253 of the TFEU specifies that judges and advocates-general must "possess the qualifications required for the appointment to the highest judicial offices in their respective countries" or be "jurisconsultants of recognized competence." This leaves open the possibility of nominating personalities without previous judicial experience; many CJEU judges in fact have held governmental or academic positions before taking office in Luxembourg.

While the appointment of judges and advocates-general is controlled by member-state governments, the CJEU's working methods clearly mark it out as a supranational institution. Most importantly, cases are not heard by the full court, but usually by chambers of three or five judges. The judges' nationality is not a factor in the allocation of cases to the chambers. Article 18 of the Statute of the Court explicitly forbids parties to demand a change in chamber composition based on a nationality argument.[5] While the GC always meets in chambers, the CJ will convene a Grand Chamber of 13 judges if an EU institution or a member state so requests, but only about 10 percent of cases are decided in this fashion. The connection between the judges and the nominating governments is also severed by the fact that judges may not issue separate (concurring or dissenting) opinions. Rather, the court always speaks with one voice.

The judicial competences of the CJEU encompass two main categories of cases: *Direct action* cases are brought directly to the CJEU to challenge either the

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[3] For detailed statistics, see the CJEU's Annual Report (CJEU 2010).

[4] The composition of the CJEU is regulated in Articles 251-255 TFEU. For more details about the court's composition and working methods, see Arnull 2006, 7-25; Nugent 2010, 214-18.

[5] The Statute of the Court has formal treaty status as Protocol (No 3) TFEU.

legality of activities by an EU institution or the way in which a member state has transposed and/or implemented EU legislation. *References for a preliminary ruling*, by contrast, are cases that originate in national judicial proceedings; they reach the CJEU because member-state courts are required to request the CJEU's legal opinion whenever a case before them hinges on an interpretation of EU primary or secondary law.[6] In practice, most direct action cases in which activities of an EU institution are at issue are decided by the GC. The most important types of cases in this respect are intellectual property cases in which decisions on EU trademarks are being challenged (36 percent of all new GC cases in 2009) and other actions for annulment in which individuals or companies seek legal remedies against acts by EU institutions that directly concern them, most importantly decisions by the Commission in competition cases (38 percent of GC cases). By contrast, the CJ deals with all references for a preliminary ruling (54 percent of new CJ cases in 2009). The other main types of cases handled by this court are direct action cases brought by the Commission against member states for incorrectly transposing and/or implementing EU legislation – so-called infringement procedures or procedures for failure to fulfill an obligation (25 percent of CJ cases) – as well as appeals from the GC (19 percent of CJ cases).

While many decisions by the CJEU concern fairly technical matters, the court's judicial competences give it important powers to shape the EU's legal system. Most crucial from the perspective of federalism is the court's ability to decide on questions that concern the distribution of powers between the EU and its member states. The internal architecture of the CJEU ensures such cases tend to be decided by the CJ. They originate most frequently in the preliminary reference procedure, which gives the court the power to determine the scope and limitations of the powers conferred to EU institutions in primary and secondary law. However, infringement procedures are also significant in this respect, as they allow the court to define the duties that the member states incur by becoming part of the EU legal system. Both procedures allow the court to play a role that closely resembles the function of a "federal arbiter" that is often associated with supreme courts in classic federal systems.

It is important to note that in the CJEU's exercise of this function, the internal logic of both the preliminary reference and the infringement procedure tends to favour decisions that expand the EU's competences at the expense of the member states. Preliminary rulings are usually initiated by private parties in national courts who argue that member-state authorities have not granted them their rights under EU law; infringement procedures are started by the European Commission when it considers a member state to be in violation of EU rules. By contrast, cases against EU institutions under the action for annulment procedure can be brought

[6] The Treaty articles governing the most important direct action cases are Articles 258-260 TFEU (failure to fulfill an obligation) as well as Article 263 TFEU (application for annulment). The preliminary ruling procedure is governed by Article 267 TFEU. For details about CJEU procedures, see Arnull 2006, 34-155; Nugent 2010, 218-23.

by private parties *only* if an EU act directly affects them (which is usually not the case because the implementation of EU law occurs at the member-state level); such cases are handled by the GC, but may reach the CJ on appeal. Cases in which member states challenge an EU institution for overstepping its legal powers exist on paper (they go to the CJ), but are virtually nonexistent in practice – only one such case was brought in 2009. The absence of such cases is mainly due to the fact that member states tend to address such constellations politically before a contentious decision is even made. If a state is seriously concerned that a piece of EU legislation would undermine its legal competences, the Council – where a consensual policy-making style prevails – will usually not go ahead with the decision, even if qualified majority voting rules would make it possible in principle to overrule the member state in question.

THE CJEU'S FEDERALIZING ROLE

However, the political mechanisms that prevent unacceptable shifts of powers from the national to the supranational level do not apply to power shifts brought about by the jurisprudence of the CJEU itself. As we have seen, the composition and modus operandi of the court secure its independence from direct national influence. The court hence possesses the ability to use its powers in a way that strengthens the scope and autonomy of EU law against national law. As we will show in this section, the court has made deliberate use of this ability by developing an activist jurisprudence which has generally tended to drive the European integration process forward even over objections from individual member states.

The federalizing impact of CJEU decisions can be seen most clearly in a number of paradigmatic decisions on the constitutional nature of EU law. These established two legal principles that do not appear explicitly in the Treaties, but are now widely accepted as the fundamental principles of EU law – direct effect and supremacy.[7] *Direct effect* means that EU law directly creates rights and obligations for the citizens of the member states, and not just for the member states themselves. This principle was established by the CJEU in a series of "landmark" decisions. In the first of these, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62 [1963] ECR 1), the court held that citizens can take legal action against a member state's failure to comply with a Treaty provision preventing the creation of new trade barriers. Even though the provision in question – Article 12 of the Treaty Establishing a European Community (TEC, now Article 30 TFEU) – was explicitly addressed only to the member states, the court argued that EU primary law which is clear, unconditional and not qualified by any reservation should be

[7] On the development of these principles, see the detailed analysis in de Witte (1999), Stone Sweet (2004, 45-107), as well as Arnull (2006 149-252). Since the entry into force of the Lisbon Treaty, the principle of supremacy (or primacy) is indirectly acknowledged in Declaration 17, annexed to the TFEU.

seen as generating rights and obligations for natural and legal persons as well.[8] This logic was later expanded in several directions: from Treaty provisions that impose *negative* obligations for the member states (i.e., outlaw certain behaviour) to provisions that create *positive* obligations (i.e., require member states to act in a specific way);[9] from direct effect of EU *primary law* to direct effect of some pieces of EU *secondary law* (most regulations and some directives);[10] and from *vertical* direct effect – between the citizens and member-state governments – to *horizontal* direct effect between various private parties.[11]

By dismissing the initial claims of the member states that EU law only establishes a relationship between their governments, the court created the nucleus of what would later be called EU citizenship. The idea of direct effect means that citizens of EU member states may bring to their national courts proceedings that seek to ensure that their rights under EU law are not being infringed upon; these can then be forwarded to the CJEU via the preliminary reference procedure.[12] Therefore, the development of direct effect is not only the first but also the most significant example of CJEU decisions that have expanded the competences of the EU and restricted those of the national governments, moving the EU from a classic international organization towards an entity with quasi-federal characteristics.

The second fundamental principle of EU law established by the CJEU is that of *supremacy*. It implies that both the primary and the secondary EU law take precedence over national laws. This means that national laws, including constitutional principles, which are incompatible with EU law must be set aside by the member-state judiciaries. The supremacy doctrine was established in two major cases. The first case that raised the issue was *Costa v. ENEL* (Case 6/64 [1964] ECR 585). In this case the court ruled that national law running contrary to EU law must be considered as inapplicable or invalid. The court's main argument was that if member states could avoid their obligations under EU law by a simple act

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[8] The CJEU has also ruled on a number of cases where direct effect was not applicable to the Treaty provisions, in these cases the court has followed the basic formula of clarity and unconditionality. The most important of these cases are *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn* – Case 28/67 [1968] ECR 143, *Tribunale civile e penale di Bolzano v. Casati* – Case 203/80 [1981] ECR 2595, and *Hurd v. Jones* – Case 44/84 [1986] ECR 29.

[9] *Lütticke v. Hauptzollamt Saalouis* – Case 57/65 [1966] ECR 205.

[10] *Van Duyn v. Home Office* – Case 41/71 [1974] ECR 1337.

[11] The most significant cases on horizontal direct effect are: *BRT v. SABAM* – Case 127/73 [1974] ECR 51, *Walrave v. Union Cycliste Internationale* – Case 36/74 [1974] ECR 1405, and *Defrenne v. Sabena* Case 43/75 [1976] ECR 455. Horizontal direct effect of EU directives (as opposed to treaty provisions) was denied in *Marshall v. Southampton and South-West Hampshire Area Health Authority* – Case 152/84 [1986] ECR 723.

[12] The existence of this procedure, which would have little meaning if there was no direct effect, is in fact one of the strongest legal arguments supporting the CJEU's interpretation that the EU Treaties were intended to create individual rights for natural and legal persons.

of national legislation, this would call into question the very legal basis of the Community as a whole. The second case, *Internationale Handelsgesellschaft mbh v. Einfuhr-und Vorratsstelle Getreide* (Case 11-70 [1970] ECR 1125) was different in that (a) the national law conflicting with EU law was enacted before the entry into force of the Treaties, and (b) the national law was in fact a constitutional provision. Still, the CJEU upheld the unconditional supremacy of EU law even in this case. In further cases, it established the rules that are to govern how national judiciaries may remedy breaches on the basis of the supremacy doctrine.[13] In essence the development of the doctrine of supremacy ensured that national law, regardless of its time of inception (prior to, or following the coming into effect of EU law) or legal standing (constitutional provision or legislative acts), cannot be employed to trump the effects of EU law. The significance of this is evident. The broad interpretation of the Treaty by the court has effectively awarded the Treaty a quasi-constitutional status, thus providing legal protection to the former and future expansions of EU competences.

The federalizing role played by the CJEU is evident not only in major constitutional decisions, but also in its more policy-oriented jurisprudence. For example, the court greatly facilitated efforts to create the EU's flagship project, a *single market* in which goods, services, people and capital can move freely across internal borders, by establishing a very sweeping interpretation of the trade barriers that are to be abolished under Article 34 TFEU. According to its decision in *Procureur du Roi v. Benoît and Gustave Dassonville* (Case 8/74 [1974] ECR 837), this provision can be applied to any national measure that may "directly or indirectly, actually or potentially hinder" intra-EU trade. This decision was later reinforced in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, better known as the "Cassis de Dijon" case (Case 120/78 [1979] ECR 649), in which the court held that there is generally no valid reason why a product that is lawfully marketed in one member state should not be introduced in another member state.

These principles of the single market have in turn been used by the court to justify decisions that have a major impact on other policy areas. For instance, in a number of much-discussed recent decisions on social policy – an area in which the EU's legislative competences are explicitly limited by the Treaties – the CJEU has used the single market as an argument to strike down national wage and employment legislation or to put restrictions on the rights of trade unions to initiate industrial action.[14] These cases have raised concerns among some commentators,

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[13] In *Amministrazione delle Finanze dello Stato v. Simmenthal* (Case 35/76 [1976] ECR 1871), the court decided that even lower level judges at the national level are able to determine that provisions of national law that violate EU law do not hold "legal effect". This decision is reiterated in *Ministero delle Finanze v. IN. CO. GE.'90 and Others* (Joined Cases C-10/97 to C-22/97 [1998] ECR I-6307), where the court clarified that the national court "was merely obliged to 'disapply' the inconsistent rule of national law" (Arnull 2006, 183).

[14] Much discussed cases in this context include the following: *Werner Mangold v. Rüdiger Helm* – 144/04 [2005] ECR I-998; *International Transport Workers' Federation and*

particularly from the political left, who have perceived a neoliberal bias in CJEU decisions (Scharpf 2009; Lillie 2011). They might also – perhaps unintentionally from the perspective of the court – lead to more involvement of EU's political institutions in redistributive social policy, a domain thus far considered protected from EU influence. Be that as it may, the most important insight for the purposes of this paper is that the CJEU in its jurisprudence now regularly intervenes in member-state spheres of competence. Such interventions occur in virtually all policy areas. They indicate that the member states have lost full sovereignty and are now operating in a quasi-federal system in which the EU constitutes a legal and political entity with considerable autonomy. CJEU decisions are not the only reason for this federalization of Europe, but have been a major force driving this development.

LIMITS ON THE CJEU'S FEDERALIZING TENDENCIES

The federalizing impact of CJEU decisions is not without its critics. As mentioned above, criticism has been particularly vocal from the political left, but it has not been limited to this part of the political spectrum. In Germany, for instance, both Roman Herzog, a conservative law professor,[15] and Fritz W. Scharpf, a social scientist with social-democratic leanings, have recently issued strongly worded – and strikingly similar – indictments of the CJEU, accusing it of engaging in "judicial legislation" in areas where EU activities are explicitly prohibited by the Treaties (Herzog and Gerken 2008; Scharpf 2009). Both argue that the CJEU is systematically undermining the competences of the member states, and thus their ability to address the concerns of their citizens. This criticism raises the question of legal and political limits to the CJEU's federalizing abilities.

The most obvious legal limit of CJEU activities lies in the provisions of the EU Treaties which regulate the powers of EU institutions. It is significant that in policy areas which are particularly important for member-state sovereignty, the Treaties explicitly rule out CJEU jurisdiction. Most importantly, the court is prohibited from hearing almost all cases relating to the EU's Common Foreign and Security Policy (Article 275 TFEU). Nor does it possess jurisdiction over activities of national law enforcement agencies in implementing EU justice and home affairs policies (Articles 276 TFEU). Furthermore, the member states in principle retain the ability to change the Treaties to overrule specific CJEU decisions (Garrett et al. 1998).

Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, – 438/05 [2007] ECR I-1077; *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* – 341/07 [2005] ECR I-11767; *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen* – 346/06 [2008] ECR I-1989; *Commission of the European Communities v. Grand Duchy of Luxembourg* – 319/06 [2008] ECR I-4323.

[15] Herzog, of course, is also a former President of the Federal Republic, former Chief Justice of the German Constitutional Court, and former chair of the convention that drafted the EU Charter of Fundamental Rights.

This possibility is emphasized in many intergovernmentalist theories of European integration, which claim that the member states still dominate all important developments in the EU. There are, however, only a few examples of Treaty changes triggered by CJEU judgments. The clearest of these is the addition of the so-called "Barber Protocol" to the Maastricht Treaty (now Protocol No 33 TFEU), a provision that rules out the retroactive application of the CJEU's decision in *Barber v. Royal Guardian Exch. Assurance Group* (C-262/88 [1990] IRLR 240), a case on gender equality in pension systems. This example shows that member states can use their role as "masters of the Treaties" to rein in the CJEU. At the same time, it is clear that the unanimous agreement of all member states that is required for a Treaty change is difficult to bring about politically. Hence this mechanism of limiting the CJEU's powers is significant only in few and truly exceptional cases.

A second kind of legal limitation on the powers of the CJEU can emerge from opposition to its decisions in the high courts of the member states. A number of such courts, most prominently the German Constitutional Court, have never unconditionally accepted the supremacy of EU law; rather they have reserved the right, at least as an *ultima ratio*, to review whether EU law is in accordance with core principles of national constitutionalism (de Witte 1999; Albi 2007). This challenge to the supremacy of EU law has thus far been only rhetorical; even the most EU-skeptical courts have shied away from ever declaring that a particular EU law – or a judicial decision by the CJEU – violates the national constitution. Nevertheless, decisions by national courts may contain important messages to political and judicial decision-makers at the EU level. For instance, in its *Lisbon Treaty Judgment* (BVerfGE 123, 267), issued in June 2009, the German Constitutional Court erected significant legal obstacles to any further expansion of EU competences by claiming that EU powers have all but reached the maximum scope permitted by the German Basic Law. The Court explicitly declared a fully federal EU incompatible with the Basic Law[16] and insisted that not only formal Treaty changes, but also incremental transfers of competence from the member-state to the EU level, which the EU Treaties enable (e.g., in Article 352 TFEU), require ratification by the German Bundestag. Crucially, however, the judgment did not address the incremental federalization of the EU brought about by CJEU decisions. It is much more difficult for national high courts to set limits to this type of federalization than to politically agreed-on policy transfers, as federalization by judicial means lacks an explicit authorization at the member-state level that could form the basis of a legal challenge under national law.

[16] This is stated, in a rather convoluted way, in para. 264 of the judgement: "A structural democratic deficit that would be unacceptable pursuant to […] the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level."

For this reason, both Herzog and Scharpf have argued that it is necessary to create an additional judicial or political counterweight to the CJEU. While Herzog prefers a judicial body – he envisages a "European Court for Competence Issues" as a more neutral arbiter between the EU and the member states (Herzog and Gerken 2008) – Scharpf argues that competence questions are best decided politically. His suggestion is to empower the European Council, the institution that brings together the member states' heads of state and government for regular summits, to review CJEU decisions (Scharpf 2009, 199-200). In this proposal, member states would be able to refer CJEU judgments to the European Council, which would then decide by simple majority whether to affirm or set aside the decision. Irrespective of the merits of these proposals, it is important to note that both suggestions are evidence of a high degree of dissatisfaction in some parts of the legal community with the perceived lack of neutrality of the CJEU in exercising its quasi-federal arbiter function. While this dissatisfaction must be taken seriously by the CJEU, and might even serve as a kind of informal constraint on further decisions with an all too radical federalizing impact, the idea of creating a formal institutional counterweight to the CJEU is not at present seriously considered by EU or member-state policy makers. The formal limitations on CJEU activities in the EU legal system continue to have relatively little bite.

CONCLUSION

In the EU's multilevel system, the CJEU exercises a role that is comparable to that of some of the strongest supreme courts in full-style federations. As we have seen, the court is empowered to play the role of an arbiter between the EU and the member-state level, and it has used this power in a distinctive way: based on procedures that implicitly privilege EU competences over those of the member states, the court has developed an activist juridical practice that has turned it into a major driving force of the integration process. This development, surprisingly perhaps, has not generated sustained opposition from the member-state governments. The main reason for this is that more often than not, member states actually profit from the existence of a strong court that prevents other EU states from undercutting common European rules to achieve a competitive advantage. As Bruno de Witte (1999, 195) has put it: "[A]ll member states have an interest that the rules which they made in common, or which were adopted by the institutions which they set in place, should stick. The fact that *their* national laws should occasionally be set aside is the price to be paid for the guarantee that *all* national laws shall be in conformity with [EU] law, thus protecting the achievements of the integration process." In other words, competition – and a considerable degree of mistrust – between the member states have been important enabling factors that have allowed the CJEU to play its federalizing role.

Recently, there has been increased criticism of CJEU decisions in a number of member states. For the time being, however, it is unlikely that this criticism will have a major impact on the CJEU's position in the EU multilevel system. As a matter of fact, it is not implausible to expect that the court's importance for the

EU's development will even increase in the future. Given the current reluctance of EU leaders to contemplate major Treaty changes, after the many failed referendums on EU reform, and considering the hard-line position taken by the German Constitutional Court against any further political supranationalization, the future progress of the EU might come to depend increasingly on incremental integration strategies. This would leave much room for the CJEU to shape European integration, most likely resulting in further steps towards the federalization of the EU.

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JUDGING EUROPE: DRAWING LESSONS FROM THE EUROPEAN COURT OF HUMAN RIGHTS

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La Cour européenne des droits de l'homme (CEDH) est une cour d'appel dont peuvent se prévaloir quelque 800 millions d'Européens. Exerçant ses compétences par la voie de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et des 47 États-membres du Conseil de l'Europe, elle rend des jugements exécutoires dans des affaires relatives aux droits civils et politiques individuels entendus au sens large. Devenue en 1998 un élément permanent du système du Conseil de l'Europe, la CEDH contribue depuis lors à l'élaboration d'un régime européen des droits de l'homme global et détaillé auquel participent le Conseil de l'Europe, l'Union européenne, l'Organisation pour la sécurité et la coopération en Europe et autres instruments internationaux. Ses juges sont à l'avant-garde du droit international relatif aux droits de la personne. À cet égard, et vu son importance dans l'intégration européenne, il est particulièrement intéressant de faire une appréciation critique du processus de nomination de ses juges. D'autres cours, et notamment celles qui officient dans des entités composites, auraient beaucoup à apprendre de la CEDH, qui doit sans cesse trouver un équilibre entre la souveraineté de ses États-membres et l'universalisme d'une Convention « européenne » tout en évoluant dans un environnement hautement politisé qui regroupe des États de toutes formes, dimensions et tendances idéologiques, des ONG aux visées innombrables et une foule de groupes d'intérêt. Or, on verra dans ce chapitre que la CEDH fonctionne très bien en dépit des nombreux problèmes juridiques, juridictionnels et politiques susceptibles d'en saper l'efficacité.

INTRODUCTION

> Leading jurists have hailed the Strasbourg court as an embryonic constitutional chamber, or a supreme court in utero. (Goldhaber 2007, 2)
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> An overeager journalist went so far as to argue that the US Supreme Court "is being upstaged in its traditional role as the world's most powerful and innovative legal body." (Ibid.)

Once thought a second-tier court, a superfluous judicial body monitoring a "soft law" instrument (i.e., the European Convention for the Protection of Human Rights and Fundamental Freedoms; hereafter "the Convention" or ECHR), the European Court of Human Rights (ECtHR) is now every bit the normative and *empirical* force its framers had hoped it would be.[1] It would seem national lawmakers are beginning to take the Court's opinion seriously, complying with decisions, and many times "voluntarily" changing laws and legislation to conform to the Convention;[2] non-governmental organizations (NGOs) are utilizing the Court to pressurize European lawmakers; individuals are looking to the Court for redress in matters unresolved at the national-state level; and Europeans are citing the Court's articulations, and using its juridical weight to advance an encompassing, pan-European, human rights program. The ECtHR has become instrumental in determining the scope, character and validity of human rights in Europe, and its judges are at the centre of what amounts to a modern-day human rights revolution.

Today, the Court is an important institution, and since 1998, when it became a permanent feature of the Council system, has been considering, hearing, and adjudicating thousands of appeals a year. It was after 1998, as well, that judges became full-time "employees" of the Court. Before then, prior to the adoption of

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[1] Working to develop an overarching constitutive instrument, Western European leaders agreed to the Council of Europe in 1949, and the European Convention of Human Rights opened for signature and ratification shortly after in 1950, taking force in 1953. The goal was to secure certain fundamental human rights in the ratifying states, insofar as "the Contracting States must secure these rights and freedoms to 'everyone within their jurisdiction' [and most significantly] these words do not imply any limitation as to nationality" (van Dijk and van Hoof et al., 1998: 3).

[2] For instance, Dixon (2007) argues "the UK has adopted this approach [of formally incorporating the Convention into their national law] with the entry into force of the Human Rights Act 1998 on 2 October 2000. This implements (albeit in a unique way) many of the Convention rights in UK law. In addition, the government has established special procedures within the executive, legislature and judiciary to ensure that both existing law and new legislation comply with the substantive rights of the Convention" (p. 353).

Protocol No. 11, judges sat part-time and were paid per diem.[3] All 47 judges are now full-fledged adjudicators, working for the Council of Europe, and charged with upholding the Convention and the human rights norms that now flow from the Convention's eighteen core articles. At the chamber level, seven judges are selected by lot for each case, while the Grand Chamber consists of seventeen judges selected in similar fashion. At no time do all 47 judges hear a case together. Moreover, the Parliamentary Assembly votes on all 47 judges, one from each respective state party to the Convention. It can be said, therefore, that judges are "elected" by the wider membership, and thus carry with them a kind of democratic legitimacy their counterparts at the national state level simply do not have. And as judgments go, one need only read two or three Grand Chamber judgments to realize just how competent and professional ECtHR judges are.

This paper will proceed in three sections: first, a (very) brief historical overview of the Court will be offered, taking effort to stress its importance vis-à-vis the ECHR, the Council, and broader notions of human rights and justice; second, I will outline the existing appointment process, looking to show how ECtHR judges find their way to the bench, and under what circumstances this happens, and; third, I will present a short case study that goes a long way in illustrating the Court's impact and influence on Europe's nascent human rights regime. The conclusion will offer three specific reasons why the Supreme Court of Canada (or rather Canadian parliamentarians) should look to the Strasbourg model if, or when, it considers changing the way SCC justices are appointed.

HISTORY OF AN IDEA (IDEAL?)

The Council of Europe, established in 1949, together with the ECtHR, which sat for the first time in 1959, began to promote human rights as a continental concern, an aspect of Europe's post-War atonement and the then nascent economic and political union. Ultimately, jurisprudence and case law would be used to settle disputes between Europeans and their respective governments, with such settlements serving as the basis for a pan-European human rights regime. As Christoffersen and Madsen (2011, 1) argue, "the master plan of many of these legal and political actors [c. 1949] was that the ECHR, as upheld by the … ECtHR, was to produce a common conscience for all of (Western) Europe." It is important to recognize, also, that while an altogether separate intergovernmental process, the Council's development has occurred more or less lockstep with the European Community's. Today,

[3] Article 21 (Council of Europe, Protocol 11, 1998): Criteria for office: 1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence; 2. The judges shall sit on the Court in their individual capacity; 3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

the ECHR and Charter of Fundamental Rights of the European Union (the Charter) work together to establish the boundaries, scope and character of human rights in Europe. The Preamble to the Charter recognizes and underscores the importance of both the Convention and the ECtHR for the establishment and maintenance of human rights and transnational law in Europe.

In terms of the juridical and litigious atmosphere in Europe today, it goes (almost) without saying that Europeans perceive the ECtHR as a court of last resort; a final appellate court at their disposal for perceived miscarriages of justice at the national state level. The large volume of applications received by the Court annually would seem to bear this out.[4] As Stolfi points out,

> European citizens have learned that, once all remedies available domestically have been exhausted, they can directly apply to Strasbourg, whenever they feel that their rights under the Convention have been violated. States have learned to enforce the Court's decisions, by adopting the measures requested for each case, but also, more broadly speaking, by amending, whenever necessary, their domestic legislation. (Stolfi 2007, 219)

In this way, the ECtHR has become a part of the judicial system, and a part of the political opportunity structure within which NGOs and activists take decisions.

Appreciating this, and recognizing the ECtHR's role in shaping human rights discourse in Europe, it becomes not only important, but altogether necessary, to critically appraise the appointment process of ECtHR judges. In this section, I hope to offer a snapshot of how these appointments occur, and why it is worth our while to investigate them. I argue that lawmakers, specifically Canadian parliamentarians, could learn a great deal from the ECtHR, its appointment process, and the way in which it has managed to balance member-state sovereignty with the universalism of the European Convention. Potential problems abound, (i.e., inter-state rivalry, different and varied regime types, legal systems and political institutions) but the ECtHR has succeeded, many times in spite of member-state objections, to deliver robust, well informed and cogent decisions. It stands to reason, then, that a strong, large, appellate court *can* and *will* work in a compound system like Canada that is both politically charged and juridically diverse. Court decisions are binding, and the Committee of Ministers of the Council of Europe (hereafter, the Committee) has authority to recommend general measures and monitor compliance of Court decisions. Also, when damages have been awarded to an applicant, i.e., "just satisfaction" has been awarded, the Committee will ensure the sum indicated in the judgment is paid to the applicant in a timely manner. The Court, which covers 47

[4] In 2011, the ECtHR received 64,500 applications. This number reflects those "applications which are allocated to a judicial formation are those for which the Court has received a correctly completed form, accompanied by copies of relevant documents. These applications will be examined by a single judge, a Committee or by a Chamber of the Court. These figures do not include applications which are at the pre-judicial stage (incomplete case file)" (The ECHR in Fact and Figures, 2012).

sovereign states and approximately 800 million people, is now, at the start of the 21st century, exhibiting many of the characteristics one would normally associate with a supreme or appellate court.[5] Unlike other appellant courts, however, the ECtHR has no sheriff or police force at its disposal, and it cannot sanction states unilaterally, without the Council acting upon the Court's recommendations. Decisions are widely circulated, however, with many NGOs making a point to communicate "wins" and "losses" to their membership. The European Roma Rights Centre (ERRC), for instance, routinely summarizes and analyzes decisions on their website (www.errc.org). The attention is warranted, for as Forowicz (2010, 2) argues, "the ECtHR became one of the most experienced and efficient human rights enforcement bodies, on to which other judicial or quasi-judicial bodies have looked for guidance."

As the European Union (EU) continues to expand eastward, and begins accession talks with states from the former Yugoslavia and Balkan Peninsula, there is growing pressure on associate and candidate countries to adopt and conform to the *acquis communautaire* – the corpus of European Union law states are subject to. At the same time, however, many of these same states are already members of the Council of Europe, and have been able to demonstrate their democratic credentials vis-à-vis the Convention. Such institutional isomorphism, or convergence, can only strengthen *both* the Council system and the European Union.

THE APPOINTMENT PROCESS

Other jurists have long considered ECtHR judges to be stalwarts, as every single year the Court deals with thousands of complaints, and sometimes 50 times as many applications. In 2011, the Court issued a staggering 1,157 judgments (ECtHR 2011 Annual Statistics).[6] To compare, the Supreme Court of Canada hears approximately 80 appeals a year, though it does deal annually with upwards of 600 leaves of appeal (SCC Factsheet). To put these numbers in some sort of perspective, in 2011 the ECtHR issued 174 judgments against Turkey alone (ECtHR 2011 Factsheet).

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[5] The Council of Europe (as of 9 September 2012) consists of Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

[6] Both the *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration* (2012) and the *Wise Persons Report* (2006) identify the Court's popularity (in terms of the number of applications it receives) as a serious and potentially severe problem. As the Wise Persons report point out, "It should be stressed that over 90 percent of cases brought before the Court are declared inadmissible." The hope is to discover a way to expedite applications without inhibiting individuals' right to petition the Court.

The Court is very busy, and is getting busier, but has been working to improve efficiency by permitting single judges to rule on the admissibility of applications, three-judge Committees to rule on "the admissibility and merits of cases that are already covered by well established case-law of the Court," and seven-judge chambers to render a decision by a majority vote (ECtHR, 2012). The Grand Chamber comprises 17 judges, and sits from time to time when cases are referred to it. The "national judge," that is the judge from the country named in the application, always sits when a seven-judge chamber or a seventeen-judge Grand Chamber is utilized. This way, an impartial jurist with expert knowledge (and familiarity with the national legal system) is positioned to hear complaints brought forward against his or her country of citizenship.

The way in which ECtHR justices are selected is, perhaps surprisingly, relatively straightforward given the size and complexity of the Council system. The appointment process reflects the intergovernmental character of the Council, in that state parties themselves determine the composition of the bench. In fact, each member-state is permitted to implement "its own" selection process, so long as the nominees are "of high moral character" and "possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence" (ECHR, Art. 21 § 1). When a vacancy occurs, the affected state submits three names (along with their CVs) to the Parliamentary Assembly of the Council of Europe. Of the three, the judge with a plurality of votes wins a nine-year non-renewable term on the Court.

Nominations are at the discretion of each member-state, though the final decision rests with the Parliamentary Assembly. State parties are able to nominate whom they wish, so long as the nominee conforms to ECtHR criteria. From time to time this process captures the attention of news media, but usually occurs without much fanfare at all. Given the political nature of these appointments and the fact that Council states have a vested interest in the Court's composition, appointments are subject to the same rational calculative process as any other foreign policy. Despite the potential for problems, inside and outside the Court has done well to stay above the fracas. Having examined the Court over time, Voeten (2008, 418) concludes that "[t]he findings are generally optimistic for the possibility of impartial review at the international level. There is no evidence that legal culture and geopolitics are important sources of bias among ECtHR judges." This is good, considering many of the decisions have far-reaching implications. As former ECtHR President Luzius Wildhaber points out,

> All sorts of cases reach our Court. Issues of the Communist nationalizations of property in Czechoslovakia, Slovakia and Eastern Germany and the question of whether the Czech Republic after the fall of the Iron Curtain could restrict the restitution of nationalized goods to Czech nationals only were declared inadmissible. Two applicants elected to the Parliament of San Marino refused to take the required oath on the Holy Gospels and were disqualified from sitting in the Parliament, which our Court qualified as a violation of the freedom of religion in the *Buscarini* case. A French-Moroccan drug trafficker held in custody was beaten up so severely by the police that medical

> certificates listed about 40 visible injuries all over his body, for which no plausible explanation was given, so our Court had to decide in the *Selmouni* case that he had been tortured. (Wildhaber 2007, 528)

The Mahoney Affair

The appointment process is not without controversy, and to think the best "man" or "woman" will prevail in all instances is simply wishful thinking. In fact, the installation of Britain's new ECtHR judge serves as a lesson on how politics, ideology and backroom shenanigans can take over, or undermine, the appointment process (allegedly). It is difficult to argue one way or the other about the nomination process in the UK, because shortlisting occurs in secrecy, without public debate, and is not subject to committee scrutiny. However, the recent appointment of Paul Mahoney to the Court (effective November 2012), or more accurately the non-appointment of civil liberties barrister Ben Emmerson, has left some observers scratching their heads.

At 65, Mahoney is just five years from the Court's mandatory retirement age (Art. 23 § 2). This means Mahoney will serve only five years of what would (or could) have been a nine-year term. There were two other persons in the running for the ECtHR vacancy, Ben Emmerson, QC, and Raquel Agnello, QC. The three, Mahoney, Emmerson and Agnello, were selected by the Ministry of Justice for the upcoming vacancy, and also vetted by a committee of MPs. Emmerson, 48, is a well known human rights jurist. He has experience with human rights tribunals and high profile cases, and as Owen Bowcott of the *The Guardian* asserts, "is among the most eminent barristers of his generation" (22 May 2012). Joshua Rozenberg, also writing for *The Guardian,* wrote, "Having tipped Emmerson as the favourite, I then learned that the Conservatives at Westminster were mounting a campaign on behalf of a candidate they regarded as more right-wing (27 June 2012). The candidate he is referring to is Paul Mahoney. So it would seem, state parties do have favourites, and are willing use back channels and good old-fashioned diplomacy to get what they want.

While the mechanics of the appointment process are straightforward enough, the politics behind the selection process, that is just how member-states go about establishing a shortlist of three, are a separate matter altogether. Such politics are inevitable so long as member-states are able to select judges according to their own formula, and governments remain keen to nominate judges that complement their ideological orientation. However, the Court would not have developed as it has, if states were not accorded this "right" – the right to nominate judges autonomously, secretively, even. This aspect of the Court is unequivocally intergovernmental and demonstrates a key component of international law: the sovereign equality of states. While judges are instructed, compelled even, by the Convention to sit as individuals and not as representatives or agents of their respective states, there is always pressure, real or perceived, to conform to the policies and preferences of

the national state – the nominating state.[7] The following case demonstrates that the Court can (and will) go against national judges, fashion prescriptive decisions when necessary, and uphold the Convention at the cost of upsetting a state party.

CASE STUDY

I will briefly discuss a single case that illustrates the function of the ECtHR, the contentious nature of many of the cases it adjudicates, and the discursive power of the rulings. While the case in question concerns discrimination on the basis of race and ethnicity, it does help orient the reader to the sorts of cases brought before the Court. In *D. H. and Others v. the Czech Republic*, the Court was asked to rule on alleged discriminatory policies and practices with regard to the education of Romani children in so-called "special schools" (zvláštní školy). The case is fascinating for a number of reasons, but my task below, apart from providing a short synopsis, is to discuss the precarious position of the national judge, Judge Jungwiert, during deliberations. The judgment nicely captures the tension or friction that exists between the idea of state sovereignty and the ethos of European universalism, to which I previously alluded, and shows the Court to be an independent actor committed to "European law."

The Court's judgment in *D. H. and Others v. the Czech Republic* established the primacy of equality in education. The European Roma Rights Centre (ERRC) wrote on their webpage:

> For the first time, the European Court of Human Rights has found a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in a particular sphere of public life, in this case, public primary schools. As such, the Court has underscored that the Convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial or ethnic groups. (ERRC 2012)

First, the Court had to consider the legality and legitimacy of "special schools" in the Czech Republic, which were initially designed for children with severe learning difficulties, behavioural problems, or cognitive impairments. They were not intended for Roma, per se. However, children of Romani origin are now more likely to attend these schools than their non-Roma counterparts, even in the same region. As the 2007 judgment points out, "[t]hough they make up only about two-percent of the population of the Czech Republic, Roma children account for at least fifty-percent of students enrolled in special schools. The practice of placing Roma children in schools for the mentally retarded began in the Czech Republic in 1945" (ECtHR 2007). Second, in what is really ground-breaking judgment, the ECtHR ruled that this practice, the practice of de facto segregation, which was prevalent in many parts of the Czech Republic, constitutes a form of racial discrimination.

[7] ECHR, Article 21, § 2: "The judges shall sit on the Court in their individual capacity."

The origins of the case date back to 2000, when several Romani between the ages of 16 and 22 lodged a joint complaint with the ECtHR believing they had been "discriminated against on racial grounds and deprived of their basic right of access to education" (EurActiv 2007). The Convention Articles in question were 14 and 2 of Protocol One.[8] The ECtHR was in fact the petitioners' third stop in their pursuit of justice. This matter was presented, first, to the Ostrava education authority (the authority governing education policy in Ostrava, Czech Republic). It dismissed the complaint outright. The case was then submitted to the Czech Constitutional Court. Their 1999 ruling determined special schools to be sanctionable and appropriate given existing legal statutes. As Devroye (2009, 81) explains:

> Two bases were given for this decision. The Court dismissed the case in part because thirteen of the eighteen applicants had failed to exhaust the school system's appeal process for special school placement and, therefore, did not have grounds for a petition to the court. The Constitutional Court also claimed a lack of competency to hear the case, because no legal provision had been interpreted or applied in an unconstitutional manner.

The ECtHR decided to hear the case, ultimately ruling in favour the Romani complainants. The decision reverberated, as the Court suggested that "legislation in all member states of the Council of Europe … will have to be revised" (AP 15 November 2007). The Roma complainants would likely not have won their case, and certainly not been awarded monetary damages, had it not been for the ECtHR, which in this instance acted like an appellate court.

The dissenting opinion of Judge Jungwiert, which is well articulated, substantive, and reasoned, very much echoes the Czech government's view on "special schooling." Czech authorities have long held that Roma children are unlike their non-Roma counterparts, as they lack basic numeracy and language skills, and are more likely than not to leave school early or not progress past the elementary level. In this way, the reasoning utilized by Judge Jungwiert, which comes across clearly in his dissenting opinion, is similar to opinions expressed by Czech lawmakers. Referring to judges of the majority opinion, Judge Jungwiert wrote:

> However, this is but another excellent illustration of their lack of realism. It is, in my view, illusory to think that a situation that has obtained for decades, even centuries, can be changed from one day to the next by a few statutory provisions. Unless the idea is to dispense with the tests altogether or to make them an irrelevance. (*D. H. and Others* 2007)

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[8] ECHR, Art. 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; Art. 2: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

The majority was unable to persuade the national judge, in this instance Jungwiert, that the Czech Republic was in violation of the Convention. Given the entrenched nature of prejudice toward Roma in the Czech Republic (see Fawn 2001) it seems, in retrospect, the ECtHR was the only judicial body capable of adjudicating such a contentious and polemical case. The Court functions not for European states, or state parties to the Convention, but for the good of Europeans and the broader notion of universal human rights. A cursory examination of ECtHR rulings and decisions would seem to support this claim, and also goes a long way in explaining why Europeans are keen to advance their legal and political rights through Strasbourg.

CONCLUSION

This paper sought to elucidate the ECtHR's appointment process, the consequences of the model it employs, and why jurists in Canada should look more closely at the Strasbourg court. The Council of Europe is an intergovernmental organization, which means, among other things, its Court does not exercise the same level and degree of juridical sovereignty as, say, the Supreme Court of Canada does – or any national constitutional court, for that matter. It does, however, exert pressure on member-state governments, and has changed the way national-states go about creating human rights law. The United Kingdom, as Dixon explains, introduced the Human Rights Act in 1998 to bring British law and legislation into conformity with the ECHR and ECtHR case law. The goal was to reduce the number of appeals originating from the UK, and most importantly, perhaps, recapture some of the juridical power lost to the ECtHR. Alas, the ECtHR is an important part of the new European human rights regime, and its 47 judges key to its character, ethos and vitality.

Three things can be gleaned from the discussion: (1) the ECtHR has been able to exert pressure on Council member-states, even influencing the formulation of domestic laws, to the extent the Court is *prima facie* a part of European jurisprudence; (2) the appointment process, while subject to politicking from time to time, permits member-states to put forward the names of judges they trust, know, and fully support, thus empowering and legitimating the Court in a way that is generally unfamiliar to federations; and (3) despite the intergovernmental nature of the Court, the Council and the appointment process, ECtHR judges have proven themselves a competent, trustworthy and creative bench. For example, the current Czech government is beginning to phase out "special schools" and revamp the educational system in consideration of the *D. H. and Others* judgment, explicitly referring to it in correspondence with the Secretariat General of the Council of Europe (See Item reference 1115th meeting DH, 7-9 June 2011). Policy changes of this sort underscore the Court's legitimacy at the European level, and work to validate the Strasbourg model.

Canada could implement a very similar appointment process, devolving power to the provinces and increasing the number of judges without diminishing the SCC in any way whatsoever. Similar to the way it works at the Council level, each province and territory could nominate three judges, allowing Parliament to reserve final

judgment. Extrapolating, such an appointment process would empower provincial and territorial premiers and present provincial assemblies with an opportunity to participate in federal decision-making. Such a scheme would provide input legitimacy to Supreme Court nominations (by way of provincial oversight), ensure equitable provincial and territorial representation, and democratize the nomination process.

Based on the ECtHR's recent successes, and the Court's ability to deliver robust judgments and decisions, sometimes with a bench of seventeen (i.e., the Grand Chamber), it seems entirely plausible that the SCC could grow in size without losing any of its effectiveness. The Strasbourg model is worth investigating for the above reasons, and for the simple reason that the ECtHR has proven itself capable and worthwhile despite an ever-growing caseload and increasingly demanding membership.

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CONTRIBUTIONS TO A COHERENT AND CONSISTENT JUDGES' APPOINTMENT PROCESS OF A CONSTITUTIONAL COURT: THE CASE OF THE SUPREME COURT OF ARGENTINA

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À partir d'analyses et de données empiriques et quantitatives, ce texte met en relief les incohérences du processus de nomination des juges de la Cour suprême de l'Argentine. Il s'interroge aussi sur la validité des travaux d'une cour établie sans vision stratégique de son rôle institutionnel. Car si l'on désire un « tribunal fourre-tout », au moins faut-il réunir tous les éléments propres au concept de représentativité sociologique, puisqu'il s'agit d'établir au niveau institutionnel un portrait fidèle de la composition de la société. Sinon, on peut former une cour techniquement homogène, qui gagnerait toutefois à se donner pour priorité de limiter ses compétences au rôle de chien de garde du processus politique démocratique, à tout le moins en période de grave crise institutionnelle. Il serait aussi recommandé d'exiger de la totalité ou de la majorité des juges qu'ils aient une expérience du droit public leur assurant de comprendre les problèmes des États nationaux d'aujourd'hui.

INTRODUCTION

The removal and appointment of judges of the Argentinean Supreme Court that took place after the Argentinean crisis of 2001–02 have provoked some controversy. The decree No. 222 of the former President Kircher, 20 June 2003 – "Procedure for the exercise of the power that paragraph 4 of section 99 of the Constitution of Argentina gives the President's Office for the appointment of judges of the Supreme Court's Office. Regulatory framework for the selection of candidates to fill vacancies" – raises questions about the factors to be taken into consideration when appointing justices to the court.

Section 3 of the decree specifies that the "diversity of gender, specialty and regional origin" be pursued to address the serious crisis of legitimacy of the Court in the framework of the institutional and economic crisis that Argentina has suffered since December 2001. Thus, judges have been appointed for their criminal law expertise (Zaffaroni and Argibay); civil law background (Highton and Lorenzetti); gender (Argibay and Highton); for being provincial (Lorenzetti); for having centre-left-wing views (Zaffaroni, Argibay); for having centre-right-wing views, for being apolitical, or for not having any known political or ideological party linkages (Highton).

Within this range of criteria, other factors could have been considered, like socio-economic background, or labour, tax and constitutional expertise. In any event, it seems that there is a "catch-all Court"[1] in which judges arrive for very different reasons and justifications, in some cases contradictory and exclusionary ones. Evidently, it is held that the diversity of cleavages plays some positive role in the work of the Court. But the lack of coordination and coherence in the Court's output belies this notion.

Of course, the minimum threshold of selection is beyond question: technical ability, honesty and sufficient professional and academic background. All appointments mentioned above respond satisfactorily to such requirements. But what is sought by appointing judges for such qualities as being born in Buenos Aires or in the provinces, gender, "public law experts" or "civil law experts"? Is there a coherent and consistent approach that meshes with the assignment of a specific institutional role that is expected of the Supreme Court? Do any of these cleavages of selection affect the work of the Court? Is there any evidence that the criteria used produce mixed results?

On 15 December 2006, Act 26,183 came into force. It prescribes the gradual reduction, as vacancies occur, of the number of judges on the court to five members – historically, the Court has always had five members except for a brief interregnum. The drop in membership means a loss of representation and democracy proposed by decree 222/03. How can five members reflect gender concerns, federalism issues, socio-economic considerations and the various socio-legal ideologies?

Why is the same government that pushed the decree 222/03 now driving the decrease in the number of judges? In other countries, constitutional courts are up to 35 members, but if we prefer a Court of 5, then the decree 222/03 was logically inconsistent and unenforceable according to what is stated in its preamble, and what is being looked for institutionally from the court is another type of operation. I am not arguing about the appropriate number of justices for the court. Rather, I limit

[1] To paraphrase Otto Kircheimer and his "catch-all party" or "everybody party" idea that he conceived in his paper, "The road to the everybody party" in *Critical Theory and Sociology of Political Parties*, Lenk and Neumann (Barcelona: Anagrama, 1989). The name coined by Kirchheimer refers to a type of political party, the catch-all party, which is not directed to a particular social class, but is intended to reach as many people as possible, thus comprising a heterogeneous mass audience, trying to meet as many demands as possible.

myself to noting the inconsistencies and the opportunism of strategic decisions for institutional design.

This paper uses empirical-quantitative evidence and analysis to demonstrate the inconsistencies just described. The statistical database produced for a broader research project on the Supreme Court of Argentina that I have already developed is used here.[2] (Currently, I am applying the same methodology to research on the Supreme Court of Canada.)

VARIOUS JUSTIFICATIONS

1. Technical Characteristics

The option of the appointment of judges for technical expertise looks to their training or academic and scientific expertise. Such matters are verifiable by the record of research, publications, the teaching prowess and postgraduate specialization studies.

It is obvious that for a family court it will be more appropriate to designate a specialist in that area. A tax court requires a fiscal tax expert, and so on. But for a court like the Supreme Court of Argentina, what should the recommended technical characteristics of its members be? In an interview published in a Buenos Aires newspaper when he had not yet joined the Court, Raúl Zaffaroni[3] defended his application, stating that "there has always been a criminal law expert on the court." However, the cases in which criminal matters are heard and that have reached the High Court – at least for the exercise of judicial review – are relatively few and do not seem to justify a designation supported by the criminal law expertise of the proposed judge. I wish to clarify that in my opinion, Zaffaroni's contribution to the court stemmed not from his status as a criminal law expert but his academic background generally and his institutional and political experience, which make him a "public law expert."

The cases that have involved criminal matters are relatively few. Only 8 percent of the total since 1936 and less than 10 percent since 1983 – the year since Argentina has had continuity of the democratic political system. Staying with criminal matters, for the period 1935–83, there were only 24 judgments (9 percent of the total) in which some rule was declared unconstitutional. Only six national criminal acts and nine low-ranking national rules were declared unconstitutional, representing just over 6 percent of that species.[4] The statistics surveyed do not seem to justify an appointment for the reason of criminal law expertise. Even less do they justify two criminal law experts in Court (Zaffaroni and Argibay). In Canada, by contrast,

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[2] See Jorge Bercholc, *The Independence of the Supreme Court Through Judicial Review, Regarding the Other Branches of the Federal Power (1935-1998)* (Buenos Aires: Ediar, 2004, 276 pages).

3 Winner, with the Canadian scholar John Hagan, of the 2009 Stockholm Prize in Criminology.

4 Source of statistical charts: own database, see Bercholc 2004, 218-219, 225-226 and 228.

the Supreme Court resolves a lot of criminal issues that arise out of the *Charter of Rights and Freedoms*.

Quantitative empirical data, in any case, justify the appointment of judges who are experts in tax, labour or public law rather than criminal law, if the option is to select them based on their technical characteristics. In short, it makes no sense to appoint excellent criminal lawyers if the Court decides few cases involving rules of that area.

2. "Public Law Experts" or "Civil Law Experts"?[5]

The categories of public law or civil law expertise are intended to define the profile of each judge and they can be useful variables to explain their behaviour and their judgments. I consider "civil law expert" to mean the judge who has training and work history in the judicial or academic field in civil matters or private law and has not held political office. I consider a "public law expert" to be the judge who has received the training for his role in the judicial or academic field in public law matters or has served as a civil servant or held positions in public administration.

A judge with civil law expertise will naturally be more concerned with making strict technical judgments, and will want to establish himself as a protector of individual subjective and substantive rights in opposition to administrative abuse. He is legitimized by his proximity to citizens through the exercise of jurisdiction. There is an element of unpredictability to his decisions that could be dangerous for the governability of the political system.

A "public-law-expert" judge, given his training and his familiarity with the world of politics, will be more inclined to favour predictability in his decisions, and to know in advance the political, economic and social implications of them. So he will be a judge who is more likely to protect the political system, to aim at the optimal functioning of the system and to that end he will interact harmoniously and functionally with the executive and legislative branches. His action will be focused on the protection of social and public rights and he will be responsive to the changes occurring in political and social processes.[6]

Authors such as Cappelleti (1986, 314) have frequently stressed the idea that the experts in civil law are not prepared for the exercise of the constitutional jurisdiction. The German jurist Otto Bachof, analyzing the role of constitutional judicial review and defending a special tribunal composed of specialized judges, stated: "... the work, full of responsibility, normative interpretation of the constitution and protection of its system of values, needs a specialized instance in these matters, requires persons of recognized experience in matters of law and constitutional practice, an experience that no ordinary judge has, neither will have. This func-

[5] These are translations of the Spanish words "civilista" (which means "expert in civil law") and "publicista" (which means "expert in public law").

[6] In the way of Peter Hogg's idea of "dialogue" between courts and legislatures.

tion also requires a body with a fully representative nature that can decide on its own with sufficient authority to such momentous political consequences. A special Constitutional Court is required for this ... " (Bachof 1985, 55).

Of all the judges who served between 1935 and 2002 in the Court, 62 percent predominantly feature public-law-expert characteristics and 38 percent have predominantly "civil-law-expert" characteristics. Among the public-law-expert judges, 73 percent joined the court during democratic governments and 27 percent during military rule. From the civil-law-expert judges, 50 percent joined the court during democratic governments and 50 percent during military rule. During democratic governments, the court was composed of 71 percent of public-law-expert judges and 29 percent of civil-law-expert judges. During military rule, the court was composed of 42 percent of public-law-expert judges and 58 percent of civil-law-expert judges (Bercholc 2004, 99).

The military governments worried about the court. Therefore, they appointed magistrates that were supposedly apolitical or without political record. This justified the concept of "public law expert" and the appointment process. Ultimately this was a "naïve" attempt to address the politicization of the Court, as depoliticizing the Judge had no effect on the judicialization of politics.

During the appointment process of the current Chief Justice Lorenzetti, his civil-law-expert status was downplayed precisely because the court already has two specialists in the area (Belluscio and Highton) (La Nación 2004). It could be argued that the designation of "civil law experts" is consistent with the increasing activity that has been required by the court in the judicial review of rules involving property. But if this is sustainable according to the quantitative empirical evidence, it contradicts the current beliefs of the majority of the specialists, according to whom the court should only deal with cases that involve important federal and constitutional questions that are raised in the protection of the political and democratic system.

From the national acts that were declared unconstitutional between 1935 and 1983, 80.65 percent dealt with economic issues and 19.35 percent non-economic issues. Since December 1983, 64 percent have dealt with economic issues and 36 percent with non-economic issues (Bercholc 2004, 219-20). Hence, the appointment of "civil law experts" can be justified by the production of the court considering the variety of the economic rules declared unconstitutional. However, this shows a strengthening activist role by the court with an excess of cases to be resolved and with a permanent exhibition of economic and social conflicts that can cause damage to its institutional legitimacy.

If this is the predominant doctrinal position, the appointment of civil-law-expert judges, without prejudice to their qualities as such, is inconsistent and incongruous with the new role that is recommended for the court. This activism, especially generated by the incursion of the court into economic issues, and performed mostly by civil-law-expert judges, is confirmed by the increased activity in the exercise of judicial review – measuring that activism by the number of declarations of unconstitutionality – that has occurred during the military governments, in which the civil-law-expert judges have prevailed in the court.

3. The Question of Fender

Until the appointments of Argibay and Highton, only one woman had served on the Argentinean Supreme Court. Margarita Argúas was appointed on 7 October 1970 by the then military president General Levingston and she remained in office until 24 May 1973, when Campora assumed power as president-elect from the "Justicialismo" by replacing General Lanusse.

Argúas was the first woman who agreed to such a post in America. The first woman appointed to the US Supreme Court was Sandra Day O'Connor, appointed by Reagan in 1981 (Pellet Lastra 2001, 296). The historical record shows that the first female appointment was made in Turkey in 1934, in East Germany in 1949, in West Germany in 1951, and in Canada in 1982 (Cook n.d.), and in Israel in 1989 where two women were appointed to the Court (Edelman 1992, 39).

The data about the performance of Argúas on the court are not conclusive. She is a single case and she remained on the court for only a short period of time. Was it expected that she would perform differently by virtue of her womanhood?

Some doctrine holds that there is no reason to expect a particular performance because of the gender issue. However, that contradicts the assertions by the current vice president of the court, Elena Highton, who said in an interview: "... I think there is intuitively greater empathy for women, more imbued with the possibility of conflict in depth, different perspectives on the problems, which are clearly not being denied to men, but they allow women to tackle different issues differently, including aspects that are not only limited to law" (Buenos Aires Bar Assn. J. n.d.).

While this impression and prejudice can be attractive as a hypothesis, there is no empirical support for it. In our country, given the limited experience of women on the court and the data on the performance of Argúas, it cannot be verified. Empirical data indicate that the performance of Argúas has some distinctive features compared to that of the male judges who were her contemporaries. It shows a higher percentage of declarations of unconstitutionality and minor votes for refusing appeals, which would mean a greater level of independence than her peers. However, this hypothesis requires additional qualitative corroboration.

The gender feature does not possess empirical verification sufficient to support the view that a woman will produce different judgments based on her empathy or her different look at the conflicts to be resolved, as has been suggested by Highton. The gender standard then is not sustainable by the different features that a woman can offer in court, but for reasons of true democratic representation of the composition by gender that society has. In that sense, there has existed and remain a serious representative deficit of women on the Argentinean Court, considering that 51 percent of the population consists of women.

The gender criterion, based on a representative sociological concept that stands for an accurate representation of society's composition that must be reflected at the institutional level, introduces us to another problem. There are other sociological representative cleavages that could claim the same treatment. Examples include the socio-economic background of the judges, the class stratification of the society, religious tendencies, the ideological or partisan leanings, and place of birth and

study. In this scenario, the "catch- all Court" would have to count on a bigger number of judges than today. Note that, on the other hand, there are doctrinal opinions that suggest, for various reasons, a return to the court of five or at most seven members.

4. Socio-economic Background of Judges and Social Stratification

A study by sociologist Ana Kunz (2000) shows that the social background of judges who served on the National Supreme Court of Justice of Argentina in the period 1930–83 was highly elitist. Dividing the possible social stratification into four categories,[7] 17 percent of the judges belong to the category "patricians" and considering that only 2 percent of society belongs to that stratum, there would be 750 percent of overrepresentation of that stratum on the court. The second category, called "upper stratum," has 40 percent of judges on the court and represents 8 percent of society implying 395 percent of overrepresentation. The third category, the "middle stratum," has stabilized rates of 39 percent and 30 percent respectively. Finally, the "lower stratum" has 4 percent on the court and represents 60 percent of the population. These data confirm that the most advantaged classes of society in Argentina are over-represented in the highest court and the lower class and the majority of the population are under-represented.

According to Kunz, this reflects a trend also observed in the United States. As far back as 1956, Mills investigated the social background of the political class and concluded that 58 percent of high-ranking political positions (president and vice president of House of Representatives, chief justice, a member of cabinet) belong to the upper and upper middle class (patricians and upper stratum according to Kunz), 38 percent to the middle class and lower middle class and only about 5 percent to the lower class (Mills 1956). In Germany, a study by Judge Walter Richter, 1959, on a database built with personal information of 856 judges, revealed that the majority came from judges' or lawyers' families and generally tended to perform their jobs in the jurisdictions in which they were born and to marry persons of the same status. In addition, 60 percent belonged to the upper stratum (free professionals, top state officials, businessmen) and 35 percent to the lower stratum (workers, artisans, small traders). It was also noted that judges belonging to the upper stratum moved faster up the career ladder than those of lower grade (Richter 1960).

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[7] This categorization is taken by Kunz from Juan Carlos Agulla in *The Promise of Sociology*, Editorial de Belgrano 1985. According to Agulla the composition of the levels of analysis would be the following: the category "*Patricians*" is formed by the patrician families who have been in the historical past participation in the power structure in the colonial era, independence and national organization; the category *Upper stratum* is formed by families of business and professional men economically and socially important; the category *Middle stratum* is made up of businessmen of medium capital, skilled workers and administrative employees; the category *Lower stratum* is composed of semi-skilled workers, unskilled workers and labourers.

The great concern that Hamilton and Madison expressed in *The Federalist* seems to have been solved. If the legislatures were going to represent the majority, they argued, a system of checks and balances was needed to ensure that the minorities could participate in the system as well. The court and the exercise of the judicial review seem to fulfill that purpose according to the social background of its members that makes them "reliable" from the standpoint of the advantaged classes in the society.[8]

5. Ideological Orientation

The definition of this cleavage and the adaptation thereof to the ideological characteristics of the members of the court are highly complex and subjective tasks.

The definition and analysis of the epistemic plausibility and validity of the ideological factor, as well as its scope, definitions and boundaries are not tasks that are faced in this paper. What matters is that it is a cleavage around which revolves controversy about appointments to the court. The media and those in power are sensitive to the subject. According to Kunz, the choice of categories "conservative," "liberal" and "independent" is to a large extent a concern about social stratification and social mobility. Members of senior levels bow towards conservative positions, accepting and upholding values of the traditional type.[9]

It is common in the literature, both in Argentina and the United States or Spain, to admit the existence of courts influenced in their judgments by the ideological "conservative" (centre-right) or "liberal" (in its meaning if you like progressive or centre- left) characteristics of its members.[10] In the study cited by Kunz, it has been determined for the period 1930–83 that the ideological cast of the court was markedly conservative (Kunz 2000, 42).

6. Judges from Buenos Aires or from the Provinces? The Federal Composition of the Court According to Judges' Place of Birth

In terms of an effective federal representation, the regional origin of the judges of the court is one of the cleavages cited by the executive decree No. 222 and has been, according to the circulating comments, one of the arguments for promoting the nomination of Judge Lorenzetti. But taking into account the pretension of "the ideal

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[8] See Roberto Gargarella, *Justice against the government*, pages 32 to 42, Ariel, 1996.

[9] In this sense Karl Mannheim, *Ideology and Utopia* (Madrid: Aguilar, 1973).

[10] In this sense we can see in the Argentinean literature, Julio Oyhanarte, *History of the Judiciary* and *Everything is History* 1972; Arturo Pellet Lastra, *Political History of the Court (1930–1990)* (Ad Hoc 2001); Jorge Bercholc, *The Independence of the Supreme Court Through Judicial Review, Regarding the Other Branches of the Federal Power (1935-1998)* (Buenos Aires: Ediar 2004). For the case of the USA, see Lawrence Baum, *The Supreme Court*, Congressional Quarterly Press, Washington, 1985. For Spain, Eduardo García de Enterría, *Democracy, judges and management control*, (Madrid: Civitas, 2000).

of representation of a federal country," according to the decree, is appointment by the regional origin or place of birth plausible? What is sought by trying to answer to the category of "the ideal of representation of a federal country"?

Federalism will always have to aim at an optimal and effective political, social and economic integration of the member states, without losing sight of their particularities and non-delegable powers, but at the same time, contributing to a systemic and sufficiently centralized organization for the purposes of the effectiveness of the federal power. It seems plausible to understand that the "ideal of federal representation" tends to have provinces duly respected by the federal power. At the same time, the powers which are not delegated to the provinces must be balanced with the requirements of the federal central power for the purpose of union and the systemic effectiveness of public administration.

More Decisions on National Rules, More Percentage of Unconstitutionalities about Provincial Rules

Between 1936 and 1983, 62.55 percent of the cases before the court were about national rules, 31.41 percent about provincial rules and 6.04 percent about local ones. The court declared unconstitutionalities in 44.85 percent of the cases involving provincial rules and in 22.59 percent of the cases involving national rules.

From all the rules challenged between 1936 and 1983, 63 percent are national and 36.62 percent are provincial, but just 21.57 percent of the national rules were declared unconstitutional, as opposed to 44.93 percent of the provincial ones. With the exception of the refuse appeals variable, 28.55 percent of the national rules and 57.69 percent of the provincial ones were declared unconstitutional.

Since 1983, 73 percent of the rules challenged have been national and 27 percent provincial. In this period, 26 percent of the national rules challenged and 53 percent of the provincial ones have been declared unconstitutional. It is clear, considering the two units of analysis (judgments and rules), that inversely proportional to the larger number of cases in which national rules at issue are challenged, a higher percentage of provincial rules are declared unconstitutional.

More disaggregated analysis shows that the unconstitutionalities on provincial rules have been equated with national ones from the early 1960s, although the issue of provincial taxes to income-generating activities was very contentious during the end of the 1960s (Bercholc 2004, 86-91 and 197-223). It is also confirmed that the cases on provincial tax rules are the most numerous and result in more unconstitutionalities. In particular this has occurred from 1936 to 1958, when the provincial tax conflict was higher.

The two previous findings lead us to another one: the court seems to have more courage declaring provincial rules unconstitutional than it does federal rules. If this is true, then we will have to note that in order to achieve an "ideal of representation of a federal country," there must be guaranteed a symmetric, egalitarian, an equal judicial review for national and provincial rules and a necessary adaptation and adjustment of the provincial rules to the national ones. This last requirement should happen without affecting the powers and the institutional efficiency of the

provinces, in order to avoid permanent conflict between the states and the central federal power.

Judges from the Provinces in the Court during the Period of Greatest Conflicts about Provincial Rules

It remains to check yet another variable that adds more complexity to the issue of federal representation on the court, namely, the regional place of origin of its members. According to the claimed formula of regional origin, we will observe the paradoxical structure which the court had during times of increased conflict between the federal power and legislatures and provincial executives.

The Supreme Court, during the period 1935–58, with a membership of 5 members, consisted of 20 different judges. Twelve of them were provincial (2 from the province of Buenos Aires), which represents 60 percent, and 8 from the City of Buenos Aires,[11] which represents 40 percent. During that period, with mostly provincial judges and under different governments, the court dared more to contradict the decisions of the provincial executive powers and legislative branches. About 60 percent of rules that were declared unconstitutional were provincial.

During the period 1960–66 (with a membership of 7 members), the Court had 11 different judges, including 5 from the City of Buenos Aires (45 percent) and 6 from the provinces (although 3 were from the province of Buenos Aires, 55 percent). During this period, in spite of having a higher percentage of judges from the City of Buenos Aires and half of them from the province of Buenos Aires, only 20 percent of the rules declared unconstitutional by the Court were of provincial jurisdiction.

During the 1966–83 period (again with 5 members), 26 judges sat on the court, of whom 16 were from the City of Buenos Aires (62 percent) and 10 from the provinces (5 from the province of Buenos Aires, representing 38 percent); 30 percent of the rules declared unconstitutional were provincial.

From the restoration of democracy until 1998 (5 members until 1990 and then 9) 19 different judges were appointed, 12 from the City of Buenos Aires (63 percent) and 7 from the provinces (27 percent). From all the rules declared unconstitutional during this the period, 42 percent were provincial (ibid.).

The pattern observed through the statistical analysis tells us that, paradoxically, the larger the number of provincial judges on the Court, the more it was prepared to antagonize provincial powers via the strict exercise of judicial review of the rules issued by the provinces, declaring them unconstitutional in a greater percentage. On the contrary, when the court was made up of a majority of judges from the City of Buenos Aires, there was a sharp decline in the declarations of unconstitutionality of provincial rules.

The mere fact of the regional origin or place of birth of the appointed judges reflects no predilection to defend provincial interests. When a territorial representative is sworn into office, it is assumed and expected from him to defend the interests of his region of origin. This is what characterizes the action of a governor. It is also

[11] Capital city of Argentina and federal district with special status as autonomous city.

the raison d'être of the Senate and its members, representatives of member states irrespective of territorial size or number of inhabitants, which are guaranteed to the provinces as a final barrier against the feared subjugation of their autonomy by the central state or the member states (by size of their economies and their populations). That senatorial role was the great idea of James Madison that allowed the union of the 13 states in the first modern federal state, the United States of America. It is therefore consistent to argue that the country's federal representation must relate to a system of rights for the effective division of powers between the member states and the federal state that includes, in particular, the interests of smaller members, according to their specific population and territorial and economic weight.

In this complex plot, there is no empirical corroboration, according to statistics analyzed in the history of the Argentinean Court, which allows us to hold that the mere fact of birthplace or regional origin promotes the ideal of a federal state, which is understood as an efficient system of unity and security in the division of powers for the member states to save their peculiarities and differences. Rather, it notes the opposite paradox: the more provincial judges on the court, the more the court contradicted the wishes of the provincial institutional powers.

It therefore seems plausible to check what reasons can objectively compel a provincial representative to pursue the interests of his province in the ongoing bid for the division of powers with the central power. The periodic submission to the people's will as a legitimate tool of the conferred mandate, which is absent in the current scheme for appointing Supreme Court judges in Argentina, leaves the provincial judge unconnected (no delegation, no legitimacy) regarding the region from which he comes. What really matters is the willingness of the national executive to support a judge who is required to respond to any kind of public challenge of his decisions.

In the recent sequence of changes on the Court, the national executive supported all judges originally proposed, although some got hundreds and even thousands of objections.[12] Such mechanics can mean the judge in question comes to his office weakened and indebted to the president who appointed him even against thousands of objectors.

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[12] According to an article by Adrian Ventura for the newspaper *La Nación*: "Lorenzetti is the only candidate which drew more positive than negative opinions: about 764 compared to 80 unfavorable to favorable considerations. At the other extreme, Argibay was the candidate who received more objections. After stating in an interview that she was an "activist atheist" and she was in favor of the decriminalization of abortion, the adverse opinions about her candidacy multiplied: she received 16,295 against and 2243 pro. Nor was it easy the period of objections to Elena Highton, who received 4444 negative opinions and 1402 positive. As in the case of Argibay, the "civil-law-expert" judge was challenged on his stance on abortion. Perhaps because of being the first time that the mechanism of objections was used, Zaffaroni suffered several weeks of heavy wear, to total 833 positive and 131 negative opinions. In this case the controversy revolved around his security liabilities and his liberal positions on procedural rights."

Turning to regional origin, it should be observed if the specific interests and objectives of the proposed provincial judge in fact are rooted in his place of birth. This would require establishing some sort of prior residence required to ensure that the candidate has been carrying out his judicial, professional, academic and business in his place of origin.

Another point to note is the university from which he graduated. For example, a provincial judge who has completed his studies at the University of Buenos Aires and has not resided in his birthplace for a long time is unlikely to be an effective representative of his region or origin. For the latter question, the statistics show that 48 percent of the judges of the court were born in the City of Buenos Aires and that 60 percent graduated from the University of Buenos Aires (UBA). The percentages increase if we consider, on the one hand, the City of Buenos Aires and the Province of Buenos Aires-born judges (59 percent) and, on the other hand, those graduated from the UBA and the University of La Plata (71 percent).[13]

CONCLUDING REMARKS

What will the work be of a court designed with no strategic vision of the institutional role it is expected to play? If what is sought is a "catch-all court," an effective tribunal for that purpose will have to be formed. A court of this kind must supply all items that respond to a representative sociological concept, since it seeks an accurate and representative mirror of society's composition that must be reflected at the institutional level.

The "catch-all court" needs a bigger number of judges than there are today. It would not be the first case of a multifaceted court that responds to a representative approach and that is composed of many judges. In Switzerland, the Federal Supreme Court has 41 members; in Venezuela the Supreme Court has 32 members divided into six halls; in Costa Rica the Supreme Court has 22 judges; Denmark has a Supreme Court composed of 19 judges; the Japanese Supreme Court has 15 members; the Italian Constitutional Court is also composed of 15 judges; and the Polish Constitutional Court has 15 judges.

On a larger court, the representative deficit could be overcome, giving the court a wealth of political legitimacy that will allow it to interact systemically with the other branches of the government from a position of greater effective power. This

[13] The City of Buenos Aires is a federal district with the status of an autonomous city. The province of Buenos Aires is a state member of the federal state. The city of La Plata is the capital city of the Province of Buenos Aires and has its own national university. The City of Buenos Aires along with its suburbs concentrate about a third of country's population. In fact, the urban area largely exceeds the City and its suburbs, virtually linking Buenos Aires and La Plata with almost no interruption. Taking this into account, I consider that judges that were born in that area and/or have completed their studies at one of the two universities mentioned above are not as linked to their province of birth as to identify and represent its interests.

could be then combined with a mechanism of election more democratic than the current appointment by the executive followed by the approval of the Senate.

Although this alchemy can be attractive from a democratic perspective, there is not, as we showed in this paper, empirical evidence that allows us to make judgments or plausible predictions about a conformation like that. Another way is to form a technically homogeneous court, considering the institutional role to be assigned to the constitutional court, removing appeals of annulment and clearly defining its roles as State political power.

For this kind of court, it is advisable to have as a priority in its conformation to confine its jurisdiction – at least in times of serious institutional crisis – to play a watchdog role of the democratic political process, as a moderator worried about the systemic needs of the State. It also seems advisable to require the judges on the Court – or at least most of them – to have a public law background to ensure the understanding of the problems that a national state with the characteristics of Argentina faces these days.

This requirement is most urgent in countries like Argentina that are subjected to immense pressure from various internal and external sectors and have little ability to manoeuvre around them: "... the excessive use of the Tribunal may have located in certain cases at dangerous intersections to their prestige, as the distortion of the function of an institution can denature its original and correct raison d'être ..." (Valiente 1993, 50).

The excessive use of the Court has both a quantitative and a qualitative aspect. The activism of a court acting as a court of individual constitutional rights in a system of judicial review overloads it with the treatment of common issues that could be filtered or treated by lower courts of the judiciary without compromising the highest court in it. Regarding the qualitative overload I think especially about the always latent tension between the federal and provincial states. The issue of federalism and the distribution of responsibilities will require new responses in the near future through the public policy design and a new constitutional engineering to be assumed by the inevitable progress of the processes of supranationality and conformation of extended geopolitical spaces. For a technically homogeneous Court that must deal with these complex scenarios, it is not important that judges be appointed to fill any deficit of representation.

What it will be necessary and important is to have judges with a public law background, political experience and strategic perspective. These technical requirements can be met by experts in constitutionalism, administrative law, political sociology, theory of state and other political science, legal and institutional disciplines.

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APPENDIX

THE SUPREME COURT OF CANADA: A CHRONOLOGY OF CHANGE

Jonathan Aiello

21 May 1869 *Bill for creation of a Supreme Court is withdrawn*	Intent on there being a final court of appeal in Canada following the country's inception in 1867, John A. Macdonald, along with statesmen Télesphore Fournier, Alexander Mackenzie and Edward Blake, propose a bill to establish the Supreme Court of Canada. However, the bill is withdrawn due to staunch support for the existing system under which disappointed litigants could appeal the decisions of Canadian courts to the Judicial Committee of the Privy Council (JCPC) sitting in London.
18 March 1870 *Second bill for creation of a Supreme Court is withdrawn*	A second attempt at establishing a final court of appeal is again thwarted by traditionalists and Conservative members of Parliament from Quebec, although this time the bill passed first reading in the House.
8 April 1875 *Third bill for creation of a Supreme Court passes*	The third attempt is successful, thanks largely to the efforts of the same leaders – John A. Macdonald, Télesphore Fournier, Alexander Mackenzie and Edward Blake. Governor General Sir O'Grady Haly gives the *Supreme Court Act* royal assent on 17 September.
30 September 1875 *The first five puisne justices are appointed to the Court*	The Honourable William Johnstone Ritchie, Samuel Henry Strong, Jean-Thomas Taschereau, Télesphore Fournier, and William Alexander Henry are appointed puisne judges to the Supreme Court of Canada.

The primary source used to compile this chronology is: James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society for Canadian Legal History, 1985). Various sources were used for all applicable events after 1985.

6 October 1875 *Memorandum to prohibit appeals to the Privy Council fails*	Minister of Justice Edward Blake drafts and sends a memorandum to Prime Minister Mackenzie suggesting that the Parliament of Canada, as the governing body of the new Dominion of Canada, should have the ability to abolish all appeals from Canadian courts to the JCPC. Mackenzie forwards the memorandum to the Colonial Office, which ultimately rejects it.
8 October 1875 *The first chief justice is appointed to the Court*	Governor General Haly administers the oath of office to the first chief justice, the Honourable William Buell Richards. The first registrar (responsible for all administrative work in the Court), Robert Cassels, is gazetted on 9 October. The other five puisne justices are sworn into office on 8 November, and arrangements for the functioning of the Court commence.
18 November 1875 *Supreme Court's inauguration*	The *Supreme Court of Canada* is inaugurated at a state dinner.
11 January 1876 *SCC judicial functions take effect*	The judicial functions of the court are officially proclaimed into force.
17 January 1876 *Supreme Court sits for the first time*	The inaugural sitting of the SCC takes place. However, no cases are heard, and the sitting is adjourned. The court transcript reads: "There being no business to dispose of, the Court rose." Not the most auspicious start.
1877 *Right of appeal to the Judicial Committee is restricted*	The JCPC refuses leave to appeal from the Supreme Court in cases dealing with small sums of money (*Johnston v. St. Andrews*), 1877.
1878 *Bill amending the rules of the Court is ultimately dropped*	The government proposes to increase the number of court terms from two to four, as well as to apply a monetary minimum to appeals from the Maritime provinces, but eventually abandons the initiative.

21 April 1879
Bill moving for abolishment of the Court is ultimately defeated

Joseph Keeler, Conservative member for Northumberland East, Ontario, introduces a bill to abolish the Supreme Court and the Exchequer Court (a court of equity modelled after that of the same name operating in the United Kingdom, and which at the time held jurisdiction primarily over tax issues, but would eventually become the Federal Court of Canada and hear judicial reviews from federal agencies). The proposal is defeated.

February 1880
A second bill for abolishment of the Court is defeated

Joseph Keeler introduces a second bill to abolish the Supreme Court, which is again defeated.

December 1880
A third bill for abolishment of the Court is defeated

Joseph Keeler introduces a third bill to abolish the Supreme Court. Following his death in January 1881, the bill is picked up by Phillipe Landry, Conservative member for Montmagny, Quebec, but it is rejected again.

1880
Power to order a new trial is established

The Court makes several procedural changes, including the addition of the power to order a new trial.

1881
Amendment to publication procedure of Supreme Court Reports

The government authorizes the court reporter, Georges Duval, to submit his personal notes of case decisions to the major law journals (under the pretext that such notes lack legal authority).

7 February 1881
Measure for limiting Court jurisdiction fails

Désiré Girouard, MP and member of the Montreal Bar, introduces into the House of Commons a measure to limit the appellate jurisdiction of the Court by abolishing its jurisdiction over provincial law in all matters a) relating to property and civil rights, b) of a local or private nature, and c) coming within the exclusive jurisdiction of the provinces. However, the measure is ultimately defeated.

1882
The Court takes new accommodations

The Macdonald government refurbishes a two-storey building at the foot of Parliament Hill for the SCC to allow the Court to move out of the Railway Committee Room in the Parliament buildings.

12 April 1882 *A fourth and final bill to abolish the Court is defeated*	Phillipe Landry, Conservative member for Montmagny, introduces a fourth bill proposing the abolition of the Court. The bill is given first reading on 12 April, but is not heard of again, and marks the final attempt of its kind.
1882 *Suggestion to eliminate certain Quebec appeals is made*	Justice H.-E. Taschereau suggests to Prime Minister John A. Macdonald that appeals from Quebec courts should cease in all but criminal, constitutional and election law cases, but the suggestion is not adopted.
1883 *Right of appeal to the Judicial Committee is further restricted*	The JCPC declares that appeals will only be permitted in cases involving substantial sums of money and/or matters of grave legal or public interest, thus making the decision of the SCC final in cases regarding lesser matters.
1883 *Resolution passed to protect Court's appellate jurisdiction*	The (largely English-speaking) Montreal Bar passes a resolution condemning any reduction of the Court's appellate jurisdiction.
1883–86 *Measure for limiting Court jurisdiction fails*	Auguste Landry re-introduces Girouard's proposal of 1881 each year in an attempt to limit the Court's jurisdiction, only to have the proposal fail each time.
Late 1885 *Additions to the Court staff are made*	In an attempt to improve the expediency of the Supreme Court Reports, an assistant reporter, C.H. Masters, is added to the Court's staff to work in conjunction with Duval, and a separate clerk is hired to work for the justices directly.
1887 *Supreme and Exchequer courts severed*	In an attempt to free up time and effort for the SCC, which was sharing its staff with the Exchequer Court, Henry Strong's recommendation of severing the two legal entities is adopted.
1887 *SCC Registrar authority increased*	The Supreme Court Registrar receives permission to sit as a judge in chambers, thus granting the position of Registrar with the authority to hear motions and issue minor orders.

1888
Appeal to the Privy Council in criminal cases is abolished

John Thompson, Minister of Justice, brings a measure to abolish appeals to the Privy Council in criminal cases. The measure is adopted in legislative form by the Parliament of Canada.

1888
Court appointment moves away from strict regional representation

Sir John A. Macdonald alters the system of appointments to the court, which adhered to strict regional representation, by replacing the deceased Justice Henry with Christopher Patterson of the Ontario Court of Appeal rather than an expected nominee from the Maritime provinces.

1890–91
Amendments to the Supreme Court Act and Reference procedure expansion suggested

Amendments to the *Supreme Court Act* are suggested: 1) the right of appeal to the Judicial Committee be made explicit, 2) justices be required to give reasons for judgments, and 3) provision be made for the representation of different interests before the justices in the hearings. Also, Edward Blake proposes an expanded use of the reference procedure to offset the federal government's use of its power to disallow provincial legislation. The changes reinforce the Court's image as an impartial institution.

1892
First Criminal Code of Canada is passed; SCC jurisdiction in criminal matters further restricted

Between 1876 and 1892, the SCC's jurisdiction over criminal matters becomes increasingly restricted by various laws. In 1892, the government drafts and Parliament passes Canada's first Criminal Code. Sections 742 and 743 of the Code restrict the range of allowable appeals from the provincial appeal courts to the SCC.

1895
Judicial Committee Amendment Act is passed

The *Judicial Committee Amendment Act, 1895* is brought into effect and allows the monarch to summon a limited number of colonial justices to the Imperial Privy Council. The justices would sit on the JCPC.

1895
Judicial Committee gains Canadian representation

The British government reforms Canadian representation on the JCPC. Until 1954, it would consist of at least one Canadian, with every chief justice of Canada receiving an appointment.

1896 *Bill to reduce minimum quorum size becomes law*	The Conservative government introduces a bill to allow the court quorum to consist of only four judges in cases of temporary absence or incapacitation, should the parties to the case consent to it. The bill is adopted.
1902 *Bill to reduce SCC's provincial law jurisdiction fails*	Liberal member L.-P. Demers introduces a bill to end the SCC's jurisdiction over provincial law. After the bill's rejection, he introduced it again in 1903, only to have it fail once more.
1903 *Railway reference procedure installed*	The *Railway Act* empowers the Board of Railway Commissioners to utilize a reference system by which it can refer any question of law to the SCC.
1904 *Supreme Court Act revision*	E.R. Cameron, registrar of the Statute Revising Commission, revises the *Supreme Court Act* in an attempt to eliminate problems regarding the court's jurisdiction. The proposed changes are circulated to the bar associations and attorneys general for comment, and the final draft is then approved by Parliament.
1905 *Shift in responsibility over the Supreme Court Reports*	In an attempt to alleviate delays in the production of the judgments of the court, responsibility over the printing and production of the Supreme Court Reports is given to a private publishing firm.
1907 *New rules regarding jurisdiction are adopted to increase court efficiency*	E.R. Cameron and Chief Justice Fitzpatrick create a new set of rules stating that every appeal to the court requires an order from a judge of the SCC in chambers confirming jurisdiction. The purpose is to eliminate the time spent by the court deciding whether in fact it can hear the appeal.
1907 *Courtroom limits are established to increase trial succinctness*	The number of counsel to be heard by the court for each side is limited to two, while the amount of time for argument is also limited – to three hours.

1907 *New monetary rules regarding provincial appeals to the Court*	E.R. Cameron proposes monetary minima of the amount in controversy for appeals from every province and territory. The change is made in an effort to alleviate frivolous appeals and increase court efficiency.
1908 *Staff addition*	A French-language stenographer is appointed to the Court's staff.
April 1908 *Resolution for the abolition of the appeal as of right is dropped*	J.J. Foy, Attorney General, introduces a resolution to the Ontario legislature calling for the appeal as of right to the JCPC to be abolished. The resolution in large part is a response by the Ontario government to public opinion hostile to the *Street Railway* (1901) decision, but it was ultimately dropped in 1909.
1910 *Proposed change to Court structure ignored*	Frank Anglin, SCC justice, proposes legislation to allow the appointment of ad hoc judges to the Court, but finds that there is no interest in the idea.
1917 *Debate over the role of the SCC continues*	A bill to remove disputes involving property, civil rights, or local matters of provincial jurisdiction from the Court's jurisdiction is introduced in the Senate and defeated.
1918 *Approved appointment of ad hoc judges*	Parliament approves a measure to allow the appointment of ad hoc judges from either the Exchequer Court or the provincial superior courts to the SCC.
1919 *Commerce reference procedure installed*	The *Board of Commerce Act* empowers the Board of Commerce to utilize a reference system by which it can refer any question of law "in a stated case" to the SCC.
1920 *Shift in responsibility over the Supreme Court Reports and growth in circulation*	Responsibility over the printing and production of the Supreme Court Reports is assumed by the government, which proceeds to make the reports available on a mass-subscription basis.

13 May 1920 *Proposition to abolish appeals from Ontario is withdrawn*	William Edgar Raney, Attorney General of Ontario, brings forth a proposition for the abolition of any and all appeals from Ontario courts to the JCPC. Although the bill was born of the idea of national self-government, it was opposed by the Canada Law Journal, the Law Society of Upper Canada, and the Ontario Bar Association, and ultimately withdrawn.
June 1922 *Proposition to alter appeals is again withdrawn*	William Edgar Raney introduces a second bill, this time to alter the appeal process by requiring that all appeals are first made to the SCC, from which leave to appeal to the JCPC can then be granted. The Law Society of Upper Canada opposes the proposal, and the bill is withdrawn.
1922 *Supreme Court Act amendment*	An amendment to the *Supreme Court Act* is made which permits appeals of provincial references to the SCC from the provincial courts of appeal.
1923 *Court Reports combine into an all-Canada report series*	The reports of the SCC and Exchequer Court are combined into the "Canadian Law Reports" series.
1926 *Federal appeal statute quashed*	In *Rex v. Nadan*, the JCPC strikes down the 1888 federal statute barring appeals to the Privy Council in criminal cases, considering it to be ultra vires of Canada's authority and therefore invalid. The board says Parliament's jurisdiction does not extend beyond the Dominion itself, and thus it cannot abolish appeals from Canadian courts to the board.
1926 *Memorandum supporting the termination of appeals to the Judicial Committee*	Chief Justice Anglin sends a memorandum to Prime Minister King to the effect that, as a self-governing and independent nation, Canada's litigation should be settled on Canadian soil.
1926–29 *Proposal for the centralization of provincial law reports publication fails*	E.R. Cameron, Court registrar, travels to various provincial bar associations, as well as the annual conventions of the Canadian Bar Association, advocating his proposal to centralize the publication of all provincial law reports under the editorship of the court staff in Ottawa. His proposal, however, is not adopted.

1927
Amendments to the Supreme Court Act

Two amendments are made to the *Supreme Court Act*: 1) the number of permanent members of the Court is increased to seven, and 2) retirement of members of the Court becomes mandatory at age seventy-five (applied retroactively).

1930
Proposal to ease provincial alienation fails

The editor of the *Manitoba Bar News* suggests that the SSC travel to various provincial capitals on an annual basis (i.e., go "on circuit"). The idea is to combat the sense, widely felt at the time, that the Court was not geographically representative. The proposal is reiterated a few years later by P.G. Thomson, an Edmonton solicitor, who suggests that the court hold a sitting once a year in each of the four Western provinces. The proposal is rejected.

1931
Statue of Westminster is enacted

The *Statute of Westminster* is passed, granting Canada full legislative authority while still allowing cases from the SCC to be appealed to the JCPC.

1933
S. 1025 of Criminal Code re-enacted

The Bennett government re-enacts s. 1025 of the *Criminal Code* rendered invalid in the *Nadan* case once again ending appeals to the JCPC in criminal cases. The validity of the legislation is challenged in *British Coal Corp. v. The King*, 1935, yet now sustained by the JCPC in the light of the *Statute of Westminster*.

1938–39
Bills to abolish appeals to London fail

Charles Cahan, a Quebec lawyer, brings a bill to abolish appeals to the JCPC in London before the House of Commons in both 1938 and 1939, but to no avail, despite considerable parliamentary support.

May 1939
Government conducts lone instance of retirement waiver

The government waives the compulsory retirement of Chief Justice Sir Lyman Duff and extends his term for a further three years. Chief Justice Duff would receive a second extension in 1943 before finally retiring on 7 January, 1944, having served thirty-seven years and three months on the bench, the longest tenure of any SCC justice to date. It is the only retirement waiver in the history of the Court.

January 1940
SCC declares Ottawa's authority to abolish appeals to London

A panel of the SCC hands down a majority decision declaring that legislation to abolish appeals to the JCPC is intra vires. The issue had been argued by counsel representing the attorneys general of Canada before the panel in June of 1939, and the proposed bill would make the SCC the ultimate judicial tribunal for all Canadian cases.

13 January 1947 *Judicial Committee confirms parliamentary authority to introduce appeal termination bill*	The JCPC renders judgment confirming the power of Ottawa to end appeals to London and to make the judgments of the Supreme Court of Canada final and conclusive.
1948 *Call for law clerks rejected*	Justice Locke puts forward the idea of appointing law clerks to serve each of the justices of the SCC to carry out background research on the cases being considered by the court. The proposal was aimed at improving the quality of the Court's work, but was ultimately rejected by the St. Laurent government.
February 1948 *Meeting of the Minds considers possible changes to SCC*	F.P. Varcoe, Deputy Minister of Justice, and G.H. Steer, Edmonton lawyer, organize a meeting in Ottawa of leading lawyers from all ten provinces, as well as representatives from the provincial law societies and the Canadian Bar Association, to discuss SCC policies and problems. Among the changes suggested are 1) expanding the bench to nine members, with no even-numbered panels sitting, 2) raising the salaries of the judges, 3) having the Court sit only in Ottawa rather than on circuit, and 4) removing any mention of *stare decisis* from the *Supreme Court Act*. However, the proposals took some time to reach fruition.
1948 *Liberal convention favours appeal termination*	Prime Minister Mackenzie King defers the issue of abolishing appeals to the JCPC to an upcoming Liberal convention (August 1948), during which a resolution favouring termination is adopted.
23 December 1949 *SCC is declared the final Court of Appeal*	Legislation to abolish appeals to the JCPC in London is reintroduced in Parliament and passes, giving the SCC "exclusive ultimate appellate civil and criminal jurisdiction," making its judgments "in all cases, final and conclusive." The legislation receives royal assent on 10 December, and comes into force on 23 December.
1949 *Call for a transfer of a Quebec seat rejected*	An attempt is made to persuade the government that one of the Court's Quebec seats should be reassigned to a representative of the English-speaking community, but to no avail.

1949
Suggestion made to have SCC constitutionally enshrined fails

The Barristers' Society of New Brunswick and the Law Society of British Columbia put forth parallel resolutions to expand section 101 of the *British North America Act, 1867* in order to include the *Supreme Court Act*, thereby removing the court from the legislative control of Parliament and constitutionalizing its status. However, the resolutions fail.

23 December 1949
SCC bench increased to nine members

Legislation is passed adding two new puisne justices, one of whom must come from the bar of Quebec, thus bringing the total number on the court to nine, a third consisting of civil law jurists. A larger bench was deemed necessary in order to avoid the frequent use of *ad hoc* justices throughout the 1930s and 1940s to cope with the increased case load, and to permit civil cases to be heard by a majority panel trained in that legal tradition.

1949
Appellant access to SCC expands

SCC jurisdiction is expanded when clauses of the *Supreme Court Act* are modified in order to enable the Court to grant leave to appeal from judgments of the highest provincial courts in areas in which appeals previously could only be made directly to the JCPC. Authority to grant leave to appeal *in forma pauperis* was also bestowed upon the SCC.

1953
Second call for law clerks rejected

Justice Locke reasserts his proposal to appoint law clerks to the SCC, and is again denied by the St. Laurent government.

1950s
Quebec calls for SCC reform are largely ignored

The Tremblay Report expresses lobbies for three major changes to the SCC: 1) that the Court's jurisdiction and appointment process be entrenched in the *British North America Act, 1867*, 2) that the Court should not deal with all legal disputes throughout Canada via appeal, but rather should be a court of supervision of the provincial appeal courts, and jurisdiction of the SCC should be limited to federal matters (but failing that, a five-justice panel consisting of three justices legally trained in Quebec should be required to hear any civil-law cases, with a unanimous decision among the Quebec justices required to reverse a decision of the highest Quebec court), and 3) that there be greater provincial influence over the appointment process or the Court divert constitutional issues to a separate tribunal designed specifically for such a purpose. However, the report is not widely distributed and has no immediate impact upon the SCC.

10 August 1960 *Parliament passes the Canadian Bill of Rights*	Passage of the Canadian Bill of Rights potentially alters the role of the Court, theoretically obligating it to question the validity of legislation based on notions of civil liberty, and to apply the entirety of Canada's laws in such a way as not to infringe upon the rights and freedoms guaranteed by the new statute. However, the bill is not entrenched in the Constitution and only applies to federal laws. As a result, the Court is very hesitant to apply the bill to strike down other legislation as it is merely a statute. The only successful application of the Bill of Rights to federal legislation occurs ten years later in the *Queen v. Drybones* (1969).
1968 *Government appoints law clerks to the Court*	Nine law clerks are assigned to the SCC to assist the judges, whose workload is now extensive.
23 March 1970 *First non-Christian appointed to the bench*	Pierre Trudeau's Liberal government appoints Bora Laskin to the bench of the SCC. Laskin, a Jew, is the Court's first ever non-Christian justice.
1970 *Civil appeal access to SCC limited*	An amendment is made to the *Supreme Court Act* preventing civil appeals from being brought before the Court *by right* in cases involving questions of fact alone. John Turner, minister of justice, brings forth the bill in an effort to prevent cases with little legal significance from consuming the Court's time.
1971 *Increased provincial participation in SCC appointments*	At the Victoria constitutional conference, the federal government agrees to make appointments to the SCC subject to provincial scrutiny. However, no formal agreement is reached and the Victoria Charter itself is not ratified. Thus appointments to the SCC continue to be made solely by the federal government.
1973 *Second call for a transfer of a Quebec seat rejected*	Douglas Abbott meets with Otto Lang, minister of justice, in another attempt to persuade the government that one of the Court's Quebec seats should be reassigned to a representative of the English-speaking community. The idea is once again rejected.

Early 1975
The Court's jurisdiction over civil appeals is expanded

An amendment is made to the *Supreme Court Act* preventing appeals being brought before the Court *by right* (with the exception of criminal trials where there is a dissent in the Court of Appeal). Leave to appeal is only to be granted in a case that the SCC determines to involve an issue of "public importance" or legal significance, or is "for any other reason, of such a nature or significance as to warrant decision by it," thereby granting the Court the ability to determine its own docket. The amendment is the result of another bill brought forth by John Turner, minister of justice, in a further effort to reduce the Court's workload.

30 March 1982
First female judge appointed to the Court

The Honourable Bertha Wilson is appointed as puisne justice, becoming the first woman to hold a seat on the SCC.

1982
Composition of SCC requires provincial consultation under Constitution Act, 1982

The *Constitution Act, 1982*, establishes a formula to amend the composition of the SCC that requires unanimous consent of both the federal Parliament and the provincial legislative assemblies. The Court's jurisdiction can be altered with the consent of both the federal Parliament and two-thirds of the legislatures.

17 April 1982
The Canadian Charter of Rights and Freedoms takes effect and imposes a policy-making role upon the SCC

Her Majesty Queen Elizabeth II proclaims the *Constitution Act, 1982*. The *Canadian Charter of Rights and Freedoms* is adopted under the Act, and brings with it a new requirement that the Supreme Court is to oversee any action on the part of the federal and provincial governments which aims to restrict the basic rights and freedoms of Canadians. Such restrictions must be deemed by the Court to be both "reasonable" and "demonstrably justified in a free and democratic society" in order to be permissible.

1987
Meech Lake Accord fails to constitutionally enshrine the Court

Constitutional entrenchment of the SCC is agreed upon and included in the Meech Lake Constitutional Accord, thereby enhancing the prestige of Canada's final appellate court. The constitutionalization of provincial consultation and the presence on the Court's bench of three justices from the province of Quebec is also agreed upon. However, the accord ultimately fails.

28 June 1990 *First female registrar appointed to the Court*	Anne Roland is appointed as registrar, becoming the first woman to hold that office.
26 October 1992 *Charlottetown Accord fails to constitutionally enshrine the Court's appointment process*	Constitutional entrenchment of an appointment process to the SCC that mandates provincial consultation is included in the Charlottetown Constitutional Accord as is a requirement that three of the justices be from the province of Quebec. However, Canada ultimately rejects the accord in a national referendum.
13 January 2000 *First female chief justice appointed to the Court*	Madame Justice Beverley McLachlin is appointed as chief justice, becoming the first woman to hold that position on the SCC.
2004 *Justice appointment process is modified to include parliamentary review*	Liberal Prime Minister Paul Martin establishes an ad hoc parliamentary committee for the purpose of reviewing the nominations to the bench of the SCC, beginning with those of justices Rosalie Abella and Louise Charron. The formation of the committee is intended to promote greater parliamentary consultation and transparency in the SCC appointment process. A more formal advisory committee is subsequently instituted, to be put into action each time a position behind the Court's bench becomes available. In each instance, the federal minister of justice provides the committee with a list of seven candidates, from which three are chosen by the committee and presented to the prime minister for a final choice.
2006 *Advisory Committee is given greater access to SCC candidates*	Conservative Prime Minister Stephen Harper permits the parliamentary selection panel directly to question SCC justice nominee Marshall Rothstein prior to his ascension to the bench, (Rothstein has been selected from the remaining three candidates of the original seven by the committee of the former Liberal government). Previously strictly prohibited from directly questioning candidates, the committee now converses with the minister of justice acting on behalf of the nominee(s). The change is an attempt to provide the advisory committee with greater access to SCC judicial nominees. However, this increased access is not to function as a veto power over the prime minister's final choice of candidate.

5 September 2008 *Advisory Committee appointment review process is bypassed*	Prime Minister Stephen Harper selects the Honourable Justice Thomas A. Cromwell for appointment to the SCC without the parliamentary advisory committee having provided a three-person shortlist. The committee fails to select three nominees from the standard list of seven when two of its scheduled meetings are cancelled due to the refusal to participate by all three opposition members of Parliament. Prime Minister Harper also declares that Justice Cromwell will not be officially appointed to the bench until he has been questioned by an ad hoc House of Commons committee. The questioning never actually occurs, however, and Cromwell takes his seat on the Court anyway.
27 October 2011 *Parliamentarian Committee questions nominees before official appointment to bench*	Following appointment by Prime Minister Stephen Harper, Justices Andromache Karakatsanis and Michael Moldaver are sworn in as justices of the Supreme Court. Both nominees were made to answer questions before an ad hoc, public committee composed of 12 parliamentarians prior to cabinet making their respective appointments official. Karakatsanis also becomes the first Greek-Canadian judge to serve on Canada's highest court.

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