Parametres of Politics in Judicial Appointments

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This study reflects the personal opinions of its author. It in no way whatsoever represents the opinions of the Commission.

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Executive Summary

A centrepiece of the Rule of Law in democratic states is the concept of judicial independence. The concept is usually invoked to explain how a judiciary that is free from interest or partiality in deciding disputes is essential to the notion of decision according to law, and why a judiciary that has a mind and will of its own under a doctrine of separation of powers is necessary to provide an effective check on the abuse of power by the political branches of government.

The concept of judicial independence is usually held to embrace four elements: neutral appointment, security of tenure, financial independence, and administrative autonomy. Historically the latter three can be traced to the *Act of Settlement in 1701* while the first was later to develop. The principle of *neutral* appointment is contested. In some democratic states, the notion that judges should be accountable to the people is invoked to justify the election of judges, a procedure that directly contradicts the neutrality principle, and in models presupposing re-election the security of tenure principle as well.

This paper assumes that judges will, at the end of the day, be selected through an appointments rather than an electoral process and that the other guarantees of the *Act of Settlement* will continue to be features of the system of Judicature in Quebec. The specific issue to be discussed is whether an executive appointments process is compatible with the principle of neutral appointment.

The paper begins by identifying what the principle of "neutral appointment" means. This involves exploring whether human decision-making – whether by judges themselves, by any type of judicial selection (or vetting) committee or by the executive – can be purged of subjectivity. It argues for the impossibility of "objective" cipher-like human decision-making, be this by judges or selection committees.

The paper then explores the types of criteria that have been advanced as necessary for identifying who is qualified to be named a judge. It illustrates that these are often incommensurable, and even when agreed upon, they are ranked differently by different people, and differentially applied to potential candidates for judicial office. It follows that there is rarely, if ever, an objectively "best candidate" for appointment.

The last sections of the paper attempt to illustrate the difference between an appointments process that expressly acknowledges the influence of subjective considerations in decision-making, and seeks to make these transparent, and a process that hides this subjectivity from public scrutiny. In so doing, a distinction is drawn between "political considerations" of the type that may legitimately enter into the appointments calculus, and "Political considerations" that must be extirpated from the appointments process.

The paper concludes with a series of recommendations relating to the manner in which the final steps in the judicial selection process in Quebec – appointment by the executive branch of government – may be designed so as to achieve as neutral an appointments process as possible and a concomitant enhanced public confidence in the independence of the judiciary.

Introduction[*]

Citizens in a democracy have a legitimate interest in the quality of justice that is delivered by the several governance institutions of the State. The assumption is that the difficult issues of inter-personal, social and economic justice will be settled by democratically-elected legislatures and that legislative enactments will be fairly administered by the agents of an accountable executive. Citizens also assume that should there be a disagreement about the meaning of a statute or other legal rule – whether the disagreement involves private parties, or a complaint between a citizen and a State agency – an independent, impartial third-party institution (invariably courts) will hear the dispute and render a just decision.

These citizen expectations are often summarized by two phrases with great popular currency: "the Rule of Law", and "a government of laws and not of men (*sic*)". In democratic states a central component of a governance system respectful of ideas captured by these two phrases is the concept of judicial independence. Judicial independence is usually invoked in explanations of (1) why a judiciary that is free from interest or partiality in deciding disputes is essential to the notion of decision according to law, and (2) why a judiciary that has a mind and will of its own under a doctrine of separation of powers is necessary to provide an effective check on the abuse of power by the political branches of government.

While citizen intuitions about the Rule of Law and judicial independence find confirmation in constitutional theory and in the institutional arrangements actually in place in most democratic states, the exact meaning of these concepts is often not well-understood by the general population. For this reason, citizen expectations about how a State's system of Judicature should

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[*] In several previously published essays I have considered basic choices in relation to judicial selection processes, qualities that judges should possess, remuneration, continuing judicial education, promotion, and destitution. This essay focuses on one specific feature of a system of Judicature: what is the proper role of political considerations in all matters relating to judicial selection, promotion, destitution and administration? To avoid burdening the text with footnotes, let me simply list here prior essays containing extensive bibliographies on all these questions: R.A. Macdonald, « La faculté de discernement / Exercising Judgement » in *Quel juge pour quelle société: Actes du Congrès de la magistrature 2008* (Quebec: Conseil de la magistrature 2009) 53-71; « Nommer, élire, tirer au sort, vendre au plus offrant? … à propos le choix des juges » in P. Noreau, ed. *Mélanges Andrée Lajoie* (Montreal : Thémis 2008) 731-806; « Le catéchisme de l'islamophobie » in M. Jezequel, ed, *La justice à l'épreuve de la diversité culturelle* (Montreal : Éditions Yvon Blais, 2007) 19-61 (with Alexandra Popovici) ; "Une phénoménologie des modes alternatifs de résolution des conflits – résultat, processus et symbolisme » in C. Eberhard et G. Vernicos, ed. *La quête anthropologique du droit* (Paris : Éditions Karthala, 2006) 275-296 (with Pierre-Olivier Savoie) ; "Le juge et le citoyen: une conversation continue" in A. Riendeau, ed., *Dire le droit: pour qui et à quel prix* (Montreal: Wilson and Lafleur, 2005) 3-22 (with Alexandra Law); "L'intégrité des institutions : rôles et relations dans le modèle constitutionnel" in R. Macdonald, ed., *Établir la rémunération des juges: perspectives multidisciplinaires* (Ottawa: Commission du droit du Canada, 1999) aux pages 7-23.; "Should Judges Be Legal Pluralists" in *Aspects of Equality: Rendering Justice* (Ottawa: Canadian Judicial Council, 1996) 229-234; *Study Paper on Prospects for Civil Justice* (Toronto: Commission de réforme du droit de l'Ontario, 1995) ; "Authors, Arbiters, Oracles, Performers" in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) 233-240.

or does function often do not align with what is possible or achievable in human decision-making.

The concept of judicial independence is usually held to embrace four elements: neutral appointment, security of tenure, financial independence, and administrative autonomy. Historically, in the common law constitutional tradition operative in Quebec, the latter three can be traced to the *Act of Settlement in 1701*. Once appointed judges should not be liable to removal at the whim of political actors; the salaries and remuneration of judges should not be reduced while they hold office; and the management of judicial business should be under the control of the collegium of judges. The operating assumption behind these latter three principles is that judges will be empowered to act as the law dictates without fear of consequences or the inducement of favour if they are protected in this way.

The first principle, neutrality of appointment, was later to develop and has been less thoroughly explored in constitutional theory. There is, in fact, significant debate both about what the concept means, and about how it may be achieved in practice. In part debate arises because of the competing notion in some democratic states that judges should be directly accountable to the people. This conception of accountability is invoked to justify the periodic election and re-election of judges. Yet, if judges must run for re-election, their decisions will inevitably be influenced by political considerations that the electorate advocates, and unless they are elected for life (or until normal retirement) this procedure will contradict the second principle of judicial independence – security of tenure.

Even a process of election for life does not fully square with the notion of judicial independence since the electorate will not necessarily be selecting judges exclusively on criteria that relate to competence, knowledge or personal integrity, but will also be influenced by political positions that candidates for judicial office either promise to uphold or are believed to support. The principle of neutrality of appointment will, consequently, be undermined in the name of direct democratic accountability.

For these reasons, this paper is written on the assumption that judges will, at the end of the day, be selected through an appointments process and that the other guarantees of the *Act of Settlement* will continue to be features of the system of Judicature in Quebec. Moreover, this essay assumes that, whatever other processes are put into place to ensure the competence, knowledge and personal integrity of candidates for judicial office (for examples an expert selection committee to pre-screen candidates), the ultimate appointment will be made by the executive. Admittedly, it is possible to imagine a process in which an expert judicial selection committee actually chooses judges. But such a process severely attenuates the notion of political accountability. As a result, the assumption here is that a two-stage will be adopted: an expert judicial selection committee passes on the qualifications of candidates for judicial office and certifies those who are entitled to be considered at a second stage. In some systems certified candidates then stand for election by citizens. Since direct election has never been part of the constitutional tradition in Quebec, it is assumed here that the second stage will involve the forwarding of the names of certified candidates to the political institutions of governance -- either a legislative assembly or the executive or both -- for final selection. In a two-stage system, the central issue then becomes whether an electoral process by a legislative assembly or an

executive appointments process as the ultimate stage in the selection of judges is most compatible with the principle of neutral appointment.

In undertaking an inquiry into selection processes it is first necessary to clarify what the principle of "*neutral appointment*" means. Without a good understanding of this principle, it is impossible to assess the relative merits of election by a legislative assembly or executive appointment as ultimate method of selection. And without a good understanding of this principle, it is impossible to evaluate how an executive appointments process can be designed to optimize the conditions for neutral decision-making.

To situate the considerations that must be addressed in determining if processes of human decision-making – whether by judges themselves, by any type of judicial selection committee, by the electorate, or by the executive – can be purged of subjectivity (that is, can be rendered absolutely neutral or "objective") I begin with a personal biography.

In my younger days I was a musical performer at clubs and coffee houses, typically performing songs written by others. I was puzzled by the variety of distinctive versions of these songs. The same lyrics on the page and the same notes in musical transcription could be performed equally as rock and roll, or in the idiom of folk, country and western, blues and jazz. Even within genres, instrumentation, tempo, key and even language were performance variables. A live concert was different from a studio recording. A female voice was different from a male voice. Occasionally words were elided, and sometimes codas were drawn out for emphasis. Every aspect of the performance had its own character.

My puzzlement about the variety of human experience increased after I began studying law. Even when cases seemed factually identical, every judgement seemed to be a slightly different rendition of the same legal rule. How, I wondered, could we have a "rule of law" in the presence of such human diversity? Some years later I had occasion to reflect on processes of judicial selection. I then had an epiphany. I realized that if rules and institutions populated by qualified persons performing their roles in good faith were incapable of eliminating the human element in judicial decision-making, how could we possibly imagine that similar constraints would eliminate the human element in judicial selection processes?

Given that realization, the themes of the present essay can be put in the form of four questions:

> First, is it possible or desirable to design a process for dealing with interpersonal and social conflict that either has no human element or that enables judges to decide cases submitted to them for adjudication in a manner purged of human judgement?
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> Second, is it possible or desirable to design a process for selecting those persons who will be called upon to exercise personal judgement in deciding cases submitted to them for adjudication that would have no human element built into it?
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> Third, if there is, in fact, an inescapable human dimension to all decisions about judicial appointments, is it possible to control judgement about judicial appointments so as to

ensure that all relevant considerations are taken into account and that inappropriate considerations do not colour its exercise?

Fourth, assuming that a distinction can be drawn between appropriate and inappropriate subjective considerations of a broadly political nature, what would be the necessary components of a process that both excluded inappropriate considerations and also rendered transparent the other subjective, but legitimate, considerations that inform judicial selection in particular cases?

The four parts of this essay address each of these questions in turn.

Part One: Is a judicial process purged of all human considerations possible?

Today, assessments of the judicial selection process usually assume the inevitability of something like the present constitutional system, and focus on inquiring into what selection process is best adapted to that system. By proceeding in this manner, commentators often miss how many key features of present systems are derived from postulated understandings of a society and of a system of liberal-democratic governance: that is, from choice, not necessity. Moreover, by moving immediately to an inquiry about selection processes, many studies leave unanswered questions about possible alternatives to human decision-making. As a consequence the reasons for the inevitability of a human dimension to judicial decision-making and of a human dimension to processes of judicial selection are not brought to public attention. The failure of popular education usually means that the public has an unrealistic view of what courts do, and how they do it. This in turn leads to unrealistic expectations about the design and operation of a judicial selection process. The purpose of this Part is to address the gap in public knowledge by posing the question whether it is possible to establish a judicial selection process that is purged of all human considerations.

A. Is a human judiciary necessary for the Rule of Law?

An initial step in assessing processes of judicial selection is to inquire into the question whether a society committed to the Rule of Law actually needs a human judiciary as a feature of its governance structure. Four separate conclusions underlie an affirmative answer to this query: first, that a society actually needs a "decider" to solve interpersonal disputes and social conflict; second, that if there is to be a decider, the decider must be a human being; third, that rational rather than irrational processes are to be preferred in human decision-making; and fourth, that strict formal rationality of the type associated with judicial adjudication is the optimal type of rational decision-making in all cases.

1. Is it the case that a society committed to the Rule of Law needs a decider to settle disputes and articulate a society's fundamental commitments? Many societies and social groups have no formal decision-making process, but ground all problems of social co-ordination in practices of conciliation or mediation. Sometimes these conciliators are officials named by the State; sometimes they are named through a consensual customary practice (for example, one involving elders or neighbours); and sometimes they are chosen by the parties through a contractual process. If the objective is to avoid violence and promote peaceful settlement of

conflict, whether the process involves a decider or a mediator, it cannot be purely optional. Some disputes (for example, family matters) have public order dimensions that argue for mandatory State involvement. In addition, absent a consensual private settlement of other types of dispute, the State would have to provide for a default, mandatory mediation process. Finally, however much it may be that mediation (including mandatory mediation) is an appropriate mechanism for dispute-resolution in private law, in much litigation involving the activity of government (whether administrative law or contract and state civil liability claims), and even in relation to some aspects of the criminal law (restorative justice and sentencing circles being examples), there are some tasks (typically involving the constitution: separation of powers, division of powers, *Charters of Rights*) where mediation does not seem appropriate. When we conclude that we need a decider in cases of high moment, we are also concluding that there is something inappropriate about mediation as an ultimate, unappealable, default dispute-resolution mechanism in all the other cases as well.

2. Is it the case that if there is to be a decider, the decision process necessarily must involve the exercise of human agency? Already, many of our life decisions are taken without resort to human judgment other than in the decision to resort to the decision-process. For example, we often take decisions by means of a deliberate resort to chance – flipping for it, drawing lots. The standard shot-gun clause in a partnership agreement, or the standard child-rearing rule "elder cuts, younger gets first pick" are also decision-rules of this type. Recently, some have argued that it is possible to design a legal decision-system that completely abstracts from human deciders; we could simply leave it all to a well-programmed computer. Whatever one thinks about the efficiency of these non-human decision processes, they are not always appropriate for decision-making that aims at the future (the *stare decisis* function) as well as the past (the *res judicata* function) of third-party decision-making. Not surprisingly, despite the role that these processes not involving human agency play as complements to social and legal decision-making, liberal-democratic societies typically conclude that the ultimate decision-making backstop must have a human dimension.

3. Is it necessary that the human decision-making process be organized around a system that Max Weber would characterize as "rational"? History teaches that human decision-making need not involve the presentation of proofs of pre-existing fact and arguments about pre-existing law to a third-person decider who will adjudicate the merits of the respective claims of parties. Sometimes the human element need not be grounded in an appeal to reason, nor the outcome rationally justified. We might, for example, incorporate a market mechanism into decision-making: the winner of the dispute is the person who pays the most to get the benefit. Or parties could solve cases by submitting their dispute to a simple voting process by a designated constituency. Or again, the decision-process could be one of Solomonic or *cadi* justice, or one of ritual reference to an oracle, or one involving an irrational mechanism like trial by battle. While these various processes involve the exercise of human judgement and often produce acceptable outcomes for disputing parties, their character does not provide effective forward-looking guidance for persons attempting to plan a future course of conduct. This is one of the key reasons why liberal-democratic societies have concluded that the ultimate decision-making backstop must be a decision-making process that involves rational justification.

4. Is it the case that the adjudication must be conducted under the precepts of what Weber called *formal* rather than *substantive* rationality? This question is more complex than first appears because the answer depends on beliefs we have about the character of human decision-making and the manner in which human judgement can be exercised. The point is more than just that judicial fact-finding is not a mechanical process; everyone acknowledges that. Nor is it that every dispute has only one correct legal characterization; everyone acknowledges that the same dispute can be characterized in multiple ways (for example, the famous case *Harrison* v. *Carswell* can be seen as a labour dispute, as an issue about trespass to land, as an issue of employment equity, as an issue of freedom of speech) and that there is no formula for deciding which characterization should prevail. Nor finally, is it that once the facts have been found, and the dispute has been characterized, the application of the relevant legal rule is an automatic matter; all adjudication involves interpretation, and all interpretation invites interpreters to attend to a variety of arguments and criteria of judgement. Even the choice to constrain interpretation to a so-called literal approach does not constrain the interpreter only to the discipline of formal rationality. Notwithstanding Weber's belief that legal rules could be written so that adjudication did not require judges to delve too deeply into contextual factors of the cases presented to them (that is, could be entirely organized on a principle of *formal* rationality) experience teaches that all judicial interpretation compels decisions attentive to the logic of *substantive* rationality.

Of course, choosing judicial adjudication as a default process does not mean that all other mechanisms of dispute resolution and value articulation have no place in the legal order. Very few human conflicts get to court, and even among those that get crystallized into litigious disputes, most are settled – either by abandonment of the claim, a negotiated outcome, reference to a mediator, or even submission to an arbitrator, or to a council of wise persons, elders, priests, imams or rabbis. In liberal democracies all these institutions coexist alongside courts. And most of them, most of the time do not engage in processes of dispute settlement that have a significant element of *formally* rationality. That is, what comes to distinguish judicial adjudication from these other processes is not that courts exclusively engage in *formally* rational processes while other deciders engage in *substantively* rational process. Rather, it is the particular manner by which the exercise of judicial judgement combines elements of *formal* and *substantive* rationality that gives everyday judicial adjudication its specificity.

Recognizing this feature of standard judicial adjudication provides a clue as to why the current institutional process has been designed as it has. We want a State-managed default decision process that is managed by human beings engaged in *formally* rational decision-making with a particular kind of overlay of *substantively* rational decision-making. From this desire comes the idea that we need (1) a professional cohort of judges, (2) functioning within a constitutional framework of accountability and independence, who are (3) given authority to exercise human judgement in deciding cases submitted to them. With this background in view, it is possible to examine more closely the actual tasks that judges are called upon to play in the existing constitutional order.

B. What does the system of Judicature in Quebec actually embrace today?

In the popular imagination, there is but a single institution called "a court", a single actor within that institution call "a judge", and a single task to be performed, "running a trial". Those citizens

who have personal familiarity with the system of Judicature in Quebec today know that none of these singularities captures what is really going on.

Take first the question "what is a court?" The inheritance of the British constitutional tradition is that there is, ultimately, only one omnicompetent court of general jurisdiction, staffed by professional judges selected from among the members of the legal profession. In Quebec today, this court is the Superior Court, the judges of which are appointed by the federal government. But the Superior Court is only one of many first-instance adjudicative bodies. To begin, there are other first instance courts – most notably the Court of Quebec, and its divisions such as the Human Rights Tribunal, but also Municipal Courts. These courts are no less a court and no less bound by the rules elaborated in the *Code of Civil Procedure* and the *Courts of Justice Act* than the Superior Court. Moreover, there are myriad other institutional decision-makers that exercise adjudicative functions. Many of these are located within administrative tribunals with a specialized multifunctional jurisdiction: transport commissions, labour commissions, workers compensation commission, landlord-tenant commissions, the professions tribunal, and so on. The impact of the decisions of these other bodies that are not officially called courts can often be just as great as those by courts. Substantively, they perform judicial-type functions (often called *quasi*-judicial functions) but their decision-making processes and appointments mechanisms are structured by the specific legislation that delegates authority to them. In addition, there is the *Tribunal Administratif du Québec* (TAQ), comprising several divisions with distinct expertise and jurisdiction, that sits in review of the decisions of many of these bodies. The TAQ is governed by the *Act respecting Administrative Justice* – a generic statute analogous to the *Courts of Justice Act* governing, among other matters, the Court of Québec and its divisions.

There are, of course, certain constitutional constraints like section 96 of the *Constitution Act, 1867*, section 11(d) of the Canadian *Charter of Rights and Freedoms*, and quasi-constitutional constraints like the *Courts of Justice Act* and its regulations (*e.g*. the *Regulation respecting the procedure for the selection of persons apt for appointment as judges*), and the *Code of Civil Procedure*, that determine how the National Assembly may go about constituting adjudicative bodies, what jurisdiction it may assign to such bodies, and whether it may delegate to the Government of Quebec the authority to name members of such bodies. But, even within these constraints, the National Assembly has a broad jurisdiction to create decision-making institutions, to organize their mandate and decision-making processes and to design processes through which decision-makers within these institutions should be named. So an initial consideration must be this: should there be a single process for determining who should be selected to serve on all these adjudicative institutions? Or some sub-set of them? or should this process be designed only for those who are to be named to *bodies* actually called "courts"?

This inquiry immediately leads to a second: "who or what is a judge?" Obviously, in many adjudicative institutions that are not courts, including the *Tribunal Administratif du Québec*, there can be a variety of decision-makers with a variety of backgrounds, professional training and competences; not everyone need be a member of the Bar with at least 10 years experience. There are notaries, scientists, and even members drawn from the general population with the requisite experience. These "judges" are not, in the manner understood by the public, "real" judges dressed up in real robes, even though their decisions are taken following an adjudicative process that closely resembles that of the courts, and their decisions are as executory as the decisions of courts.

In addition, within the official court system, there are a variety of officials who routinely perform adjudicative functions under the explicit or implicit delegation of the *Code of Civil Procedure.* These include prothonotaries, the special prothonotary, notaries drawing up inventories and assembling lots in succession disputes, experts in bornage or other matters, and referees. In many cases the function is purely adjudicative and the decision is effectively final. These observations raise the question whether there should be a single process for determining who should be selected to serve in all these positions, or whether the selection process should be designed only for those persons who are to be named to the *function* called "judge".

The third important inquiry concerns the diversity of tasks that we currently assign to those occupying decision-making functions under the authority of the National Assembly: "what do judges do?" The public has a model of judicial action that aligns with popular television programmes -- *La Cour en direct, la Facture* -- and takes as its paradigm the criminal trial. Certainly, much judicial action is of this type, whether criminal or civil. But much is not. Courts now exercise a gamut of functions that are themselves not classical adjudications. For several decades now, legislatures have delegated to courts a wide variety of governance tasks: sometimes they involve issues of distributive rather than corrective justice; sometimes they involve a balancing of interests rather than a determination of cold facts on the basis of cold law; sometimes, they are essentially political. That is, a clear distinction has to be drawn between the idea of a court and a judge (the formal dimension of the office) and the idea of adjudication as being only one of the third-party social ordering processes that judges actually undertake (the substantive dimension of the office). Even this understates the complexity of the office performed by those called "judge". Judges spend enormous amounts of time reading files, drafting reasons for judgement, hearing motions, performing administrative tasks within the court, and sometimes even debating, drafting and promulgating rules of practice. A judge's everyday functions are, in brief, not only judicial, but also administrative, and occasionally legislative.

From this list of considerations relating to the questions "what is a court?", "who is a judge?" and "what do judges do?" it follows that analysis must begin by rejecting the notions: (1) that all adjudicative bodies are courts and all courts are the same, (2) that all adjudicators are judges and all judges are the same, and (3) that all judges, in all courts, do the same thing in the same manner. The tasks given to judges are too varied, too complex and too multiple to be captured by a single template that fully describes the judicial role. It follows that, to think about judges and analogous decision-makers as only adjudicators, and to pick them only according to criteria relevant to adjudication, misconceives the nature of the problem that confronts those who would design a judicial selection process.

C. Is there such a thing as a neutral judge?

The above overview of the judicial process and the tasks assigned to judges permits a key question to be posed and answered more sharply. Is it even possible to expunge the human element from judicial decision-making?

Many citizens believe that there is something about the judicial function that points to neutrality and that judges must, in consequence, be neutral. By *neutral* they have in mind that there can be a judge who comes to every decision without any prior disposition to hear or to accept any

particular set of arguments. Before testing this hypothesis, it is important to distinguish the idea of neutrality from two other concepts which do properly inform our understanding of judicial adjudication: impartiality and independence.

A judge is *impartial* (or unbiased) when we can say that there are no extraneous factors that would bear on the individual decision to be taken. The judge must have no financial interest in the outcome, directly or indirectly; the judge must have no relationship that could affect the decision with either party, whether personal, social, political or ideological; the judge must not be sitting in appeal of his or her own decision; the judge must not be part of an institutional structure that is implicated in the case; the judge must not reveal an attitudinal bias that would affect the decision. Impartiality refers to the relationship of a judge (or any decision-maker) to a particular case. If we are concerned not to appoint a person who is, for example, a narrow-minded bigot, that is not a matter of impartiality, nor is it a matter of neutrality. It is, of course, an important consideration, but it relates rather to the question of judicial temperament, and of the qualities necessary for a judge to be a good judge. This topic is discussed in the next section.

A judge is *independent* when we can say that there are no institutional or political factors that will influence the manner in which he or she performs his or her role in general. Here the concern is to protect judges from the ongoing influence of politics or from the interests of those who made the appointment. Once again, the mechanisms for protecting ongoing independence going forward are important and need constant reinforcement. This is particularly true for what might be called post-appointment promotion or perks. This also is a topic to be discussed in the next section.

What, then, of *neutrality*? Is it possible that there can be a judge who comes to every decision without any prior disposition to hear or to accept any particular set of arguments, or without any prior disposition to think about a problem in the world in a particular way? Consider what it would mean to state that a judge could be neutral in this sense. For this to be the case, the judge would have to be completely unaffected by prior life experiences – personal, societal, cultural or political – that might affect his or her judgement. Logically, this could happen in two ways: either the judge actually has no such experiences; or the judge is able to *completely* ignore or disregard these experiences.

Take first the question whether it is possible for a human being to actually be *devoid of* prior life experiences. This is conceivable in one of two ways: either the judge is from Mars and has no prior understanding of life in this world; or the judge has lived her or his entire life in a vacuum. In either case, however, it is hard to imagine how litigants and their counsel could even communicate with the judge could take place, since to learn a language you have to have experienced it. Moreover, even if for a hypothetical moment this were possible, as soon as the judge decides the first case, he or she judge is no longer from Mars, or from a hermetic background. Already absolute neutrality has been corrupted. A variation on this idea is to select judges who may have experience in this world, but who come from an alien culture and who have no direct experience that could conceivably be relevant to judging in Quebec. Is it plausible to design a system to select jurist from, say, Kyrgyzstan to be judges in Quebec?

What about the possibility of *abstracting from* personal experience? The idea here would be to accept that judges have necessarily a human background, presumably by preference a background in Quebec rather than Kyrgyzstan, but that they should be tested to determine (1) whether that background should disqualify them, or (2) whether they are capable of abstracting from that background in performing their duties as judges without reference to it. These two questions are discussed further in the next section. For the moment, the question whether strict neutrality of the type such an idea implies is even a desirable objective in judicial appointments.

This fundamental issue calls into question our expectations about what it means to appoint a judge that is a human being. The act of judging is the act of exercising judgement. Good judgement is not an abstract quality of character that can be acquired from a book; it is acquired through experience and reflection. The very experiences that conduce to good judgement are the experiences that shape a person's character. Paradoxically, the judge who is most likely to be both wise and impartial is the judge who is least likely to be neutral in the sense that those who desire absolute judicial neutrality would wish. Indeed, one of the reasons that one seeks judges of a certain age is precisely because of the experiences they are likely to have had along the way. One wants judges who will *not* completely ignore or disregard their life experiences.

There is a further dimension to the idea of neutrality. The assumption that issues of neutrality may be solved if it were possible to find a neutral person at the *moment of appointment* misses the fact that judges are appointed for life (or until age 70) and can often serve 30-35 years. Are we to assume that any human being (let alone any judge) can live for 35 years and be unaffected by the experiences they have had during that period? There are numerous examples in Canada of judges who were apparently of a particular social and political viewpoint at the moment of appointment, but whose views changed over their time on the bench. The implication here is that asking whether a judge is neutral at appointment is to miss the key idea. Any normal human being is continually being influenced by experiences. Any normal judge is also being continually influenced by experience, both on and off the bench. If no judge can be absolutely neutral at the moment of appointment and the constellation of factors that shape of the experience and non-neutrality of judges is continually changing, the central criterion at appointment would be less "what does the person look like now?", but rather "on the basis of what this person looks like now, who can this person become?" This point is discussed in detail in the next section.

A final structural issue about neutrality is to note that in many cases involving quasi-judicial functions, an agency performing a judicial function is actually given a policy mandate. It is hardly surprising that a government that is strongly committed to regulating environmental matters would be concerned to name judges to environment protection tribunals that share this concern, and that a government that is more committed to other processes of environmental control would appoint judges who are inclined to see much value in public-private partnerships, co-regulation, self-regulation and other governance mechanisms. Of course, these considerations are much less present in appointments to generalist judicial tribunals. Still, the same general theme about knowledge and experience is present in both cases: how much, if at all, does the role of the judge or of an administrator adjudicator require him or her to be an agent of public policy, and what limits should be placed on that role?

All these considerations point to the fact that it is neither possible nor desirable to imagine that the judicial function in Quebec can be performed by judges in a manner that purges the decision-making process of all human or subjective elements. There is no such thing as an *absolutely neutral* judge.

D. Managing judicial subjectivity

If the judicial decision-making process necessarily involves an element of human subjectivity, then it becomes important to design processes that manage this subjectivity, whether in the judicial process itself or in the judicial selection process. This is the topic of Part Two of this essay. To conclude this first Part, I should like to reiterate three points.

1. The common law constitutional system operative in Quebec presupposes that the ultimate backstop for social conflict will be an institution of decision-making, rather than mediation, and that this institution will be a court staffed by human beings committed to an adjudicative process.

2. The common law constitutional system does not contemplate a career magistracy, but presupposes that human beings having passed a certain number of years as lawyers, and having lived engaged lives in the community where they have experienced the joys, frustrations, aspirations, and disappointments of life, are the kinds of persons who can bring an appropriate human dimension to the court.

3. There is an inescapable human dimension to all judicial decisions. The appointment of the *neutral* judge from nowhere is not only wrong-headed, it is impossible.

The next part of this essay will consider various mechanisms that have been put in place to manage judicial subjectivity in deciding cases, and trace the implications of these mechanisms and the conclusions just drawn for the design of judicial selection processes.

Part Two: Is a selection process purged of all human considerations possible?

Two distinct inquiries are presupposed by the title to this Part. First, if the judicial decision-making process necessarily involves an element of human subjectivity, does this mean that there is no way of managing this subjectivity so as to avoid inappropriate considerations influencing decisions in individual cases? Second, even if it is not possible to eliminate human subjectivity from the judicial process itself, might it nonetheless be possible to design a process for selecting those persons who will be called upon to exercise personal judgement in adjudicating disputes that would have no human element built into it? The first question is considered in this Part. The question whether is it possible to control judgement about judicial appointments so as to ensure that all relevant considerations are taken into account and that inappropriate considerations do not colour its exercise will be taken up in the next part of this essay.

A. A government of laws, not of men (*sic*)

Once the diversity and complexity of judicial tasks is understood, it becomes apparent that the whole idea of a regime of law assumes the phenomenology of human decision. A computer can

never get enough inputs plugged in to render human justice; “flipping for it” does violence to the very reason why we so many human disputes require a third party decision. Undoubtedly, in some cases, any decision will do; the parties simply want to end their conflict and move on. But in most disputes each party is driven by the belief that his or her position is right. Not only that, in most litigation each party is driven by the belief that the reasons he or she offers in support of that position are right. Because the adjudicative decision is meant to capture a pre-existing truth, it is important that the judge be both impartial as between the parties, and neutral as to the larger questions of policy presupposed by the conflict.

The two phrases already adverted to that capture the constitutional principles by which liberal democracies claim their political legitimacy are the “Rule of Law” and “a government of laws, not of men”. Both seem to suggest that institutional constraints alone can eliminate personal judgement in the exercise of the judicial function. But all judges, all lawyers, all thoughtful citizens know that, because legal rules are neither self-applying nor self-executing, they must be interpreted. However detailed the legal rule and however well-defined the institutional and procedural structures within which judges are meant to operate, there always remains an important place for the exercise of interpretive judgement. For many, this is a frightening idea. It leaves open the possibility that decisions will either be driven by political considerations that have nothing to do with the merits of the case at hand, or will be capricious, arbitrary, unpredictable and unfair because determined by personal preferences of judges.

The question, therefore, is to reflect upon how best to discipline the exercise of judicial discretion. What are the various structural features of a system of Judicature that enhance a judge’s self-sufficiency and reduce the likelihood of accepting bribes from litigants, being influenced by irrelevant considerations or succumbing to threats from governments? And what are the personal qualities and competencies necessary to the task of judging that would maximize disinterested judging? The first question aims at issues of *independence* and *impartiality* once a judge has been named. Security of tenure, guaranteed remuneration, and status are directed to independence; rules relating to recusal for bias and interest in individual cases are directed to impartiality. These are all important, and properly are themes that need to be addressed in designing systems of Judicature. They are not, however, of present interest.

Here the concern is with the structural and procedural conditions that would enable judges to decide cases on the merits according to law, uninfluenced by any factors not relevant to the matter at hand. These conditions are of two types: on the one hand, there are human qualities and capabilities intrinsic to individual judges that would enable them to discipline their subjectivity; on the other hand, there are processes internal to the judicial function – continuing education, informal peer evaluation – that will enhance the capacity of any judge to decide thoughtfully, fairly and with integrity.

Much has been written about the specific criteria that will enable the identification of the human qualities necessary for those seeking appointment to the judiciary. I do not propose to review that literature in detail. Nonetheless, it is worth noticing that both legislatures and scholars agree on three orders of qualities that are essential for evaluating candidates for appointment as judges: professional qualities; institutional qualities; and personal qualities. That is, in examining the essential qualities of candidates for judicial office, one quickly sees that “knowledge of the law”

is insufficient and, at least when understood as “prior knowledge of the law”, is probably unnecessary.

Among what may be called professional qualities one might note the following: (1) objectively measurable knowledge of the substantive law, of procedure and of professional ethics; (2) respect for institutional role and the adjudicative process; (3) impartiality – the quality of judging according to the file being presented, without reference to the particular characteristics of the parties, or the question to be decided; (4) independence – the idea that one must judge according to the case presented without reference to one’s personal advancement in career and the popularity that one may or may not acquire from so deciding; (5) good judgement and maturity – not only about the particular case being argued, but also about human nature and human experience.

When then of institutional qualities? Most authors emphasize judicial conduct during a hearing. However, being a judge implies institutional commitments that are broader. The judiciary is at once a big bureaucracy and a lot of little bureaucracies. Hence key institutional duties like collegiality, productivity, and support for other colleagues in difficulty are mutually reinforcing and nested. But there is more; judges must respect the institution itself. This means having the courage to speak to colleagues who are not doing their job. It also means accepting one’s role, even when one is not a superstar or media darling. Courts flourish because of judges who enjoy and excel at performing the crucial everyday administrative tasks that may not immediately enhance their “reputation”.

Establishing the necessary personal qualities is even more difficult. Obviously sobriety, courage, diligence, incorruptibility, modesty and reserve are traits that every judge should possess. Finding appropriate mechanisms for measuring these qualities, and in some cases, deciding upon proxies that will stand surrogate for direct measures is of course not so easy. But, to date in Quebec, the judicial selection committees have done a good job at assessing candidates for appointment on these bases. A discussion of how such proxies are used follows in Part Three.

What then of processes internal to the judicial function – that is, of attitudes that are operative once a judge has been appointed – that will enhance the capacity of any judge to decide thoughtfully, fairly and with integrity? Three come immediately to mind. First, a judge must show humility and exercise restraint in all things. Of course, this begs the question of how do judges come to learn the limits of their office, and especially the line between the political choices that are a necessary part of all exercises of judgement, and the types of political choices that are meant to be vested in a legislature. Mentoring by senior colleagues is a key component of learning humility and restraint.

Second, judges must bring a commitment to life-long learning: life-long learning about law and justice certainly, but life-long learning about themselves even more importantly. This explains the significance of programmes of continuing judicial education. Obviously, continuing judicial education is important for purely instrumental reasons: keeping up to date, sharing solutions to new challenges confronting the judiciary, learning about social diversity, and so on. Judicial continuing education must aim to embolden judges to resist the siren songs of conventional adulthood – most notably reputation and popular acclaim -- and to retain the precious idealism of

youth – those moments of wide-eyed wonderment that impel the constant discovery and rediscovery of self.

Third, judges must recognize that true independence derives from a commitment to one's colleagues and from a commitment to and respect for the judiciary as an institution. It is not enough to do one's job to the best of one's ability. One must welcome the critique and suggestions of one's peers. And this means, concomitantly, having the courage to speak to colleagues who are not doing their job. Openness to collegial peer evaluation is fundamental to disciplining human subjectivity.

To sum up, a "government of laws and not of men" requires judges to acknowledge how much of their understanding of the law, of justice and of their role is shaped by factors personal to them. This is the beginning of judicial wisdom. And yet, these personal factors are multiple and are anchored in the communities and contexts of every judge's experience. Nurturing this capacity for self-reflexivity in multiple dimensions is the necessary component of what has come to be labeled "context" education. A judge must learn to imagine himself or herself as he or she is imagined by others. The singularity of character that one associates with those holding judicial office is not the absence of subjectivity or *neutrality*, but rather the wisdom to recognize the appropriate kinds of and proper place of such subjectivity in decision-making. It is to recognize that no knowledge of self is possible without knowledge of the other – and *vice versa*.

B. Is there such a thing as a neutral selection process?

The considerations discussed in the previous section point to three distinct dimensions of the judicial selection process. First, what are the kinds of criteria that would enable decision-makers to determine the extent of non-neutrality that is tolerable in the persons that are appointed as judges? Second, what are the kinds of criteria that properly should be present in the minds of those who are charged with selecting judges? Third, what are the optimal constraints to both allow for, but discipline, the non-neutrality of decision-makers in both situations? Only the third of these questions will be addressed here.

If there is an inescapable subjectivity to judicial decision-making itself – perhaps the most highly constrained and disciplined of all our socio-political decision processes – it is inevitable that there will be a human dimension to all decisions about judicial selection, however, wherever and by whomever they are made. The idea of a neutral appointments process involving a decision by "selectors from nowhere" is not only wrong-headed, it is as impossible as neutral decision-making by judges. You can't pick judges by computers, or by flipping for it, or by mediation processes, or by selling offices to the highest bidder. The selection process is a human process. Moreover, the selectors, whether they are voters, members of the National Assembly, appointees to an arm's length appointments commission, Ministers of Justice, Cabinets or Prime Ministers, are human. They cannot be *neutral*; and even if that were conceivable it would be a ridiculous way of selecting those who are meant, on a continuing basis, to render human justice.

In order to think through the kind of person that should be appointed as a judge, selectors confront both ontological and epistemological questions: first, what criteria properly should be present in the minds of those who are charged with making selections of judges? second, how

can these selectors be certain that the person they are appointing meets these criteria? Ultimately the answer to the second question can be discovered only by inquiring into another matter: "What does a candidate think that she or he is meant to do as a judge?" Inevitably, this is a question that vexes anyone charged with selecting judges. Voters ask the question; Parliamentary vetting committees given an advise and consent role ask the question; arm's length selection committees ask the question; and it is the question foremost in the minds of political actors, whether their discretion to appoint is unfettered or whether it is constrained by a requirement to choose from a pool of candidates who have been certified as qualified by an expert evaluation committee.

Consider whether selection of judges by voters can be neutral. Elections presuppose that voters will express their subjective preferences, without being required to demonstrate any particular intellectual or moral qualification for voting. Nor are they required or expected to rationally justify the preferences they express. In the usual acceptation of the word "neutrality", popular election will never be a neutral process. This will be the case even if the eligible candidates have been certified as qualified by an expert evaluation committee.

Similar subjectivities will be present when the voting takes place through a Parliamentary process. Votes by MNAs in committees and in the National Assembly need not be rationally justified; they typically will reflect the subjective preferences of the caucus of the political formation to which the MNA belongs. While it may be that some candidates will attract all-party support, or votes that cross party lines, the experience in countries that deploy an advise and consent process for judicial nominations resembles the electoral process more than it does the process by which Parliamentary officers like the Citizens Protector in Quebec have been appointed. Even in the case where a candidate nominated for selection has been certified as qualified by an expert evaluation committee, the vote in the National Assembly would be politically driven, rather than neutral.

What then of appointment by a Minister, the Cabinet or the Prime Minister? Here also the final decision will be driven, at least in part, by subjective criteria. Historically, the Kings and Queens of England, and later the Prime Minister, had an unfettered discretion to appoint judges. Today in Quebec, the discretion of the Government is limited by section 88 of the *Courts of Justice Act*, which provides that a person may be appointed as a judge only if he or she has been previously selected according to the procedure established by regulation for the selection of persons apt for appointment as judges. Nonetheless, once a candidate has been approved by the selection committee, there are no formal limitations on the subjective criteria that may be considered in making the appointment.

It might be thought that the only mechanism to achieve neutrality in the selection process is to delegate the final decision to a committee of experts. But as the previous discussion of judicial decision-making itself reveals, no institutional structuring, no explication of detailed substantive criteria and decision rules will ever eliminate the exercise of personal judgment in decision-making. The consequence, therefore, is simply that the inevitable subjectivities will be vested in the committee, rather than in voters, the National Assembly or the Government. And if this is the case, then the nomination of persons to the selection committee will become the primary terrain on which political questions about judicial selection will be debated and decided. In a

democracy, the general principle is that accountability for political decisions should be vested in bodies and institutions that are most directly accountable to citizens. Presumably, therefore, vesting political discretion in a selection committee is less desirable that retaining ultimate political discretion in institutions like the legislature or the executive.

Discussion will turn shortly to the question of how the types of criteria that are deployed to discipline the exercise of everyday judicial discretion may be adapted so as to discipline the subjective decision-making discretion of expert judicial selection committee. But before this question is raised, it is worth considering why the *process of selection* has become the focus of reflection about the relationship between judicial independence and the influence of subjective, political considerations. Put differently, can we be certain that if we are able to depoliticize the appointments process we have resolved all the issues relating to the possible politicization of the judiciary? Should we not be more modest in our expectations about our capacity to judge our potential judges at the time of their appointment?

A close review of the extant legal literature suggests an excessive preoccupation with the judicial selection process, as if the integrity and quality of the judiciary were forever guaranteed by a good selection process. The assumption that the person selected as a judge at age forty or fifty is fully formed and will cease to grow and mature morally and intellectually is not borne out by human experience. Many of the characteristics that we desire in judges may not be completely identifiable at the time of selection and many only develop through time with experience in performing the very task of judging. Moreover, even if we could initially select excellent candidates, to assume that judges are possessed of some magical capacity of self-direction and, if need be, self-correction flies in the face of all we know about human beings acting within institutional settings. Many of the most important lessons judges learn about how to best perform the judicial task flow from a wise *encadrement* within and management of the court to which they are named. This means helping judges learn how to learn, surrounding them by others similarly motivated, and rewarding them for pursuing such a career path. Seen in this light, the function of an expert selection committee takes on a different hue. And since the function becomes more future-oriented the criteria for selecting members of the committee should themselves become more future-oriented.

In sum, if we can be reasonably certain about the kind of judge we might require for the kind of society we now have, and if we can be reasonably certain about some of the qualities that such judges should possess – incorruptibility and sobriety, courage, temperance and impartiality, diligence and carefulness, intelligence and learnedness, craft and skill, practical wisdom -- we still need to be able to determine whether any particular candidate for judicial office possesses these virtues and will continue to possess them throughout a judicial career. The same judgement can be made about the judicial selection process. We should not deceive ourselves into thinking that the process by which we select members of a selection committee can be any less subjective than the process by which selection committees determine which candidates are apt for judicial appointment. To an examination of how the subjective judgement of selection committees and members of the government charged with making the final selection may be appropriately disciplined, this essay now turns.

Part Three: Is it possible to discipline subjective judgement about judicial appointments?

The gravamen of the first two parts of this essay is that there is an inescapable human dimension to all decisions about judicial appointments, however, wherever and by whomever they are taken. The question, therefore, is whether it is possible to control judgement about judicial appointments so as to ensure that all relevant considerations are taken into account and that inappropriate considerations do not colour its exercise.

One might begin by reflecting upon the various structural features of a system of Judicature that enhance a judge's self-sufficiency and reduce the likelihood of accepting bribes from litigants, being influenced by irrelevant considerations or succumbing to threats from governments. Security of tenure, guaranteed remuneration, and collegial administration with financial autonomy are directed to *independence*; rules relating to recusal for bias and interest in individual cases are directed to *impartiality*.

Obviously, the very electoral character of the political process excludes the applicability of these structural features to any decision-making process within the executive branch of government. In a democracy, MNAs, Ministers and governments are elected specifically to take political decisions. They do not have, nor should they have, security of tenure, although the provision of pensions for MNAs aims to provide them with a margin of discretion to vote according to a Burkean rather than a Rousseauian conception of representative democracy. This said, some of the structural features meant to ensure the *independence* and *impartiality* of judges can be adapted to the decision-processes of expert selection committees, and to the criteria for and mode of nomination to these selection committees. To recall, the objective is to identify the kinds of processes, the kinds of criteria and the optimal constraints to both acknowledge, and discipline, the subjectivity of decision-makers who are charged with assessing the suitability of candidates for judicial office.

The following points flow from the discussion in previous parts of this essay.

1. No perfect system

Experience elsewhere suggests that there is no perfect system for appointing judges. The system cannot be objective (in the sense of being purged of all considerations that relate to subjective differences relating to matters of policy), and even if it this could be achieved, in a liberal democracy committed to the Rule of Law this type of objectivity is not desirable.

2. No system, however good, will always function perfectly

Judicial appointments are one of the most important functions of democratic governments. For this reason, great effort has gone into system design and ensuring the proper operation of the systems in place. But just as no human system can ever be perfect, the operation of no human system can ever be perfect. Mistakes happen. Sometimes even conscious mistakes happen. Sometimes systems fail. Still, the fact that there may have once been system failure does not mean that the entire system needs to be changed from the bottom up. Better detection, better

supervision, perhaps even a minor procedural adjustment may be a sufficient prophylaxis. The key is to undertake a careful diagnosis, identifying underlying pathologies (if any) and resisting the urge to simply address symptoms, and not attempting to fix parts if the system that are not broken.

3. Minimizing opportunities to "game the system"

Unfortunately, whatever the system – appointments, elections, drawing straws, adjudicating merit – and however well designed and managed it may be, there will be people who "game the system". Some candidates will act strategically. Some supporters of candidates will attempt to secure nomination by expending great sums (whether through election or appointment). Non-virtuous behaviours will generate temptation and pressure to let inappropriate considerations creep into the selection process. Selection processes must, therefore, be designed to minimize the opportunity for candidates and their backers to "game the system". The optimal means to control these unacceptable activities is publicity. All phases of the selection process should be accompanied by the maximum possible transparency in decision-making.

4. Optimality of "politically accountable" appointments system

In a liberal democracy committed to the Rule of Law, an appointments system must reflect political accountability, but must ensure the post-appointment independence of candidates that have been selected. Direct election and re-election of judges is inconsistent with independence. Unconstrained discretionary executive appointment is inconsistent with even a minimum degree of selection neutrality. An appointments system that is one step removed from the electoral process – that is, where accountability flows through the National Assembly -- is optimal for achieving a balance between the factors appropriate to judicial selection listed above. In other words, a form of indirect election where the persons elected are not single-issue electors (as they are in the U.S. Presidential Electoral College) achieves a good balance of independence and accountability.

The expression "single-issue electors" is meant to signal, using the U.S. Presidential Electoral College as an example, the fact that the only issue that voters selecting members of the Electoral College need focus on is who those electors have pledged to support for President. In an election to select MNAs, by contrast, voters are required to balance multiple considerations: who do they desire as a local MNA? what political party do they desire to form the government? what balance of policies proposed by competing candidates and parties do they find optimal? The plurality of issues that inform the voting decision tends to ensure that the second order political decision – the selection of judges either by vote of the National Assembly or through appointment by an accountable executive – is less politicized by partisan considerations. No form of direct election, and no form unfettered executive appointment is as effective as a "second-order process" in maximizing the role of appropriate criteria and minimizing the impact of inappropriate criteria in judicial selection.

5. Impossibility of "entirely objective criteria"

The central distinction between appropriate criteria and inappropriate criteria does not flow from differentiating between so-called "objective" criteria and so-called "subjective" or "political" criteria. This is because any criterion that can be advanced as "objective" is itself "subjective" in two senses. First, the choice of what criteria to adopt as indicative of a candidate's merit involves a choice between a multiplicity of factors. The choice necessarily includes some factors and excludes others. And there is not social agreement that the criteria actually chosen and only these criteria should count. Some all agree on, while others are highly contested. For example, some may believe that only those who have been litigators and who have extensive experience in court should be appointed judges, while others believe that anyone who has been a member of the *Barreau du Québec* for the requisite number of years should be eligible for appointment. Again, some may believe that candidates should be of a certain age and maturity before appointment, while others believe that only candidates below a certain age should be appointed. And again, some believe that achieving a gender, ethnic and socio-demographic diversity on the bench should be a criterion, while others believe that these are irrelevant considerations.

Whatever criteria are ultimately decided in any statute or regulation relating to judicial appointments will be the result of political decision-making and will not be "objective" in any transcendent sense. Moreover, the relative weight to be assigned to these criteria by statute or regulation will equally be the product of a political choice. The best one can hope for is an open, considered Parliamentary process for articulating and assigning weight to these criteria, and the possibility for revisiting them and their relative ranking by a similar open, considered process when new factors emerge.

6. Impossibility of "entirely objective application of criteria"

The second dimension of subjectivity in relation to the choice of selection criteria is present when the body making the selection comes to apply these criteria. Even if it were possible to agree on a list of criteria and on their relative ranking (or weight), the process by which these criteria would be applied to the assessment of the dossiers of particular persons who seek to become judges will have an inevitable dimension of subjectivity. That is, in applying these criteria, the decision-makers (whether they be citizens generally if judges are elected, peers if the selection is by other judges, the executive if the process is entirely discretionary, or a judicial selection committee comprising experts if there is a pre-qualification panel) will face exactly the same questions of choice that judges face in deciding cases.

No selection criterion or congeries of selection criteria can be so precise and self-executing that the subjective human factor is eliminated. Moreover, some of the most important criteria in contemporary selection processes are resolutely subjective: integrity, knowledge of the law, honesty, incorruptibility, courage, good judgement, and appropriate demeanour, to name just a few. The best one can hope for is a process where the decision-maker is genuinely committed to applying these criteria to the facts of the dossier of any particular applicant, and making an honest judgement in specific cases.

7. No such thing as an "objectively best" candidate

For this reason, even in situations where one has successfully eliminated all inappropriate considerations and is confronted only with appropriate considerations, there is no such thing as an "objectively best" candidate. It might, of course, be possible to articulate, find general consensus on, and apply a set of criteria that would enable decisions to be made about whether a candidate meets the minimum qualifications for appointment as a judge. While some may say the criteria currently being applied are not sufficiently strict, and some might say that they are overly strict and therefore eliminate worthy candidates who may have slightly non-mainstream backgrounds or experiences, there is a general consensus that they broadly ensure minimum competence of candidates, and that they are fairly applied to individual cases. But even when these criteria are agreed upon, they are ranked differently by different people, and then they are differentially applied to potential candidates for judicial office. In other words, the decision as to whether any given candidate is the "best" is subject to the same vagaries of decision-making as any other human decision-process.

Imagine a situation where decision-makers are in the presence of (1) an agreed list of, say, 50 criteria, and (2) an agreed weighting of, say, between 1 and 5 for each criterion. Imagine as well that the selection committee were required (3) to rank each candidate on each criterion, and (4) the selection committee were required to total the tallies of all its members. Does such a computational process guarantee that the candidate with the highest overall score would be the best candidate? Unless one stipulates that, by definition, the candidate with the highest total will be deemed the "best", all that such a tally indicates is that the aggregate of the individual subjective decisions taken by each member of the selection committee in respect of each candidate under steps (1) through (3) points to one candidate. Given all these subjectivities it would be tendentious to claim that a candidate with the highest total score, say 2753 points, is "objectively best" or even that such a candidate is "objectively better" than a candidate with 2748 points. Moreover, it is not implausible that, even though earning entirely different relative rankings on individual criteria, the top two candidates wind up with identical global scores, say 2751 points. On what "objective" basis would one then decide who the "best" candidate was? The most that one could deduce from such a process is that candidates above a certain threshold would be acceptable, and candidates above some other threshold would likely be excellent candidates. It follows that such a computational process will rarely, if ever, identify an objectively "best candidate" for appointment.

8. Differentiating criteria for assessment and loci of assessment

The difficulty of designing a system to identify excellent candidates does not mean, however, that it is impossible to design a system in which all these criteria – from the almost objective to the highly subjective – are identified, brought forward for debate and reflection, and structured within an appropriately designed decision-process. In designing such a system, a first issue will be to decide whether a single step process or a multiple step process should be adopted. A second issue is whether, if a multiple step process is adopted, the various steps should aim at evaluating different criteria, or whether they should simply represent the opportunity for conflicting opinion about the same criteria.

The radically different criteria that are appropriately considered in judicial selection suggest that a two- or multiple-step procedure with each site of evaluation focusing on different criteria is optimal. So, for example, a system involving an expert committee assessing criteria of merit that can be relatively clearly measured on a relatively objective scale, complemented by an executive appointments stage where more subjective factors are weighed, is more likely to produce credible results than a two-stage process involving executive nomination and legislative committee hearings. In the second alternative, there are two political bodies assessing the entire range of criteria, from the close to objective to the highly subjective, but without any particular expertise for evaluating a large number of these criteria. The next few sub-sections examine some of the kinds of criteria that are often present in judicial selection processes in order to illustrate the kinds of evidence and mechanisms for gathering evidence that can be used to provide information about candidates relevant to these criteria.

9. Bright-line standards as proxies for subjective evaluation

Many criteria proposed for judicial selection could be set out as a check-list of relatively bright-line standards. Invariably, there is no inherent merit in most of these standards, but they are easy to apply proxies for criteria that one considers important. One might, for example, decide that legal experience was a good thing, and rather than judge the detail of a candidate's career, one might adopt as a proxy a bright-line rule such as membership in a bar association of at least 10 years. Or again, one might decide that knowledge of the law was important, so that rather than attempt to solicit peer opinion on the question, one might adopt as a bright-line proxy a requirement that candidates pass all six bar admission exams in the year of their application.

In both these cases the bright-line standard serves as a proxy, and can only be useful if combined with other, more subjective input relating to the criterion that the proxy is meant to reveal. It is important to note, however, that both the choice of the criterion and the choice of the instrument to evaluate the criterion are subjective, not objective, choices. Whether adopted in a statute or regulation, or even elaborated by an expert selection committee, they reflect subjective judgements. The advantage of a bright-line standard is only that, once the choice has been made to use bright-line standards as proxies for a more subjective and substantive assessment of a particular criterion, their application to individual candidacies is relatively straightforward and the results that they produce are easily tabulated and compared.

10. Less-than-best-evidence for reputational criteria

Other criteria of merit do not easily lend themselves to the adoption of bright-line proxies. They invariably have less objective determinants of assessment and, even when some type of proxy that permits comparison is adopted, the instrument will be highly subjective. For example, if one wished to assess the moral merit of a judge – is the person an alcohol or drug abuser, a problem gambler, a money launderer, a child pornographer? – it would be difficult for any committee or appointer to conduct such assessment with a bright-line instrument. For such criteria the decision-maker may sometimes be able to rely on standard background checks: a police arrest notice, FINTRAC financial records, records of admission to detoxification clinics, etc. Yet these proxies are at best evidence that a problem might still exist. Given the nature of the criteria they cannot substitute for first-hand knowledge.

Other subjective criteria – competence, judgement, integrity, and so on – also do not lend themselves to bright-line proxies. Nor are there really any non-bright-line proxies that would provide "best evidence". Here the decider can only rely on the integrity and credibility of others. This could be the body performing the background check, itself no sure thing as we have learned from the recent actions of bond-rating agencies; or it could be the responses of a referee chosen by the candidate to a series of questions. In this latter case, moreover, little is gained by asking referees to respond according to seemingly objective standards – for example, on a five point scale, or even on a scale using graduated words like exceptional, excellent, good, average, below average, unacceptable – since the manner in which respondents understand these numerical rankings or the graduated lexicon is itself highly subjective. The best one can do in such cases is to carefully note the vocabulary deployed by the respondent when the reference is given free of prompts by the interviewer.

11. Subjective personal judgement for criteria relating to judicial methodology

Still other appropriately-considered criteria relate more to what a candidate believes or is likely to do as a judge. Because these are not matters upon which an on-off judgement may be made, they will rarely be enunciated in a statute or regulation or even in a guideline generated by the decider. They involve an assessment by the relevant decision-maker that a particular candidate is likely to approach the decision of cases in a particular way, or with a default presumption in one direction or another. Judicial methodology matters. Some candidates may be strict constructionists, while others may believe in a teleological approach to interpretation of texts. Some may believe in the sanctity of precedent, while others see the role of judges as keeping precedents contemporary and meaningful. Some may believe that courts should rely on a wide variety of interpretative sources – comparative international texts, doctrinal commentary, judgements of fairness and equity – in addition to statutes and precedents, while others may have a more narrowly circumscribed approach to judicial justification.

In judicial as in all decision-making, methodology can have a bearing on the outcomes of particular decisions, even when it does not speak to the actual outcome being decided. For this reason, a candidate's presumptive judicial methodology may well be a legitimate consideration for selectors. Let me be clear, however, that this does not mean that an expert selection committee should exclude a candidate on the basis of his or her presumptive judicial methodology. Only if it were apparent that a candidate did not have a clue about judicial methodology, or articulated incoherent or self-contradictory views about judicial methodology, might a selection committee be concerned. But in this latter scenario, the concern is not with methodology as such, but rather with intellectual and legal competence. If judicial methodology as distinct from competence is to be a criterion, it is properly and legitimately a matter for the executive that makes choices among qualified candidates already identified by an expert selection committee and not a matter for the expert selection committee itself.

12. Highly subjective personal judgment for ideological criteria

Undeniably an appointments process for selecting judges, like an electoral process for doing so, will give rise to considerations that, broadly speaking, may be considered as ideological. That is,

where the executive is selecting a particular candidate for appointment from among those who have been recommended by an expert selection committee, it will inevitably and not illegitimately attempt to discern the general ideological orientation of candidates. For example, some candidates may have a predisposition to enhancing freedom of contract wherever possible, while others may be more inclined to find an abuse of power in contracting situations and take a more active role in policing contractual behaviour. Some candidates may have a predisposition to protecting property rights while others may be more inclined to protect users and passersby and to uphold zoning regulations. Some candidates may have a predisposition to facilitate secured transactions and consumer credit while other may see security rights as exceptional and to be strictly interpreted. Some candidates may have a predisposition in favour of avoiding the revictimization of those who have suffered a sexual assault, while others may have a strong predisposition in favour of those charged with a criminal offence and the right to confront one's accuser.

In all these cases -- drawn from private law, administrative law, constitutional, criminal and *Charter* law -- the question is not that a judge would consciously overrule an inconvenient precedent or usurp the authority of a legislature that enacts a statute. Rather, it is that in the necessary margin of discretionary action that attends to all decision-making, there is room for overarching conceptions of judicial ideology to play. In other words, the wise judge is one who knows or learns the limits of the office, and especially the line between the substantive policy choices that are a necessary part of all exercises of judgement, and the types of substantive policy choices that are properly vested in Parliament.

As with judicial methodology, an expert judicial selection committee will typically not evaluate candidates on the basis of their legal philosophy, unless that philosophy runs directly contrary to the fundamental principles of the legal and constitutional order. For example, where a candidate that asserts that honour killings are not murder, or that torture is an acceptable punishment, or that parents have a right to inflict significant bodily harm on their children, the committee could well not recommend a candidate. But in such cases, the committee would not be rejecting the candidate not on the basis of legal philosophy, but on the basis that the candidate displays an ignorance of Canadian and Quebec law – that is, on the basis of competence. Conversely, if legal philosophy as distinct from competence is a criterion, this is properly and legitimately a matter for the executive that makes choices among qualified candidates already identified by an expert selection committee, and not a matter for the expert selection committee itself.

13. The act of judging changes judges

Together all these criteria and considerations suggest that the central issue is to come up with a process that enables the selection of judges based not only on what they know but also on who they are. Any criteria aimed at gaining information of the latter type will inevitably be more subjective than criteria of the former type. But there is a further dimension to the assessment about who a judge is. People change over time. People change according to the role they are performing. Whatever a forty year old candidate who has had little prior experience in an adjudicative process – whether this experience be gained assessing figure skating performances, judging prize bulls at an agricultural fair, or umpiring baseball games – may think about his or

her methodology of judging or his or her substantive orientations towards legal rules, at age 65 after 25 years as a judge, that person will likely have a different perception of the judicial role.

Human beings tend to be psychologically integrated personalities. The entire person is constantly engaged in all he or she does. A person cannot be only a part of who he or she is when he or she becomes a judge. One's past and all the other aspects of one's life cannot be parked at the courtroom door. Any criterion of this type also has a temporal dimension. It will play out differently depending on the age of the candidate. When one appoints a judge at age 60 or 65 the potential for great moral or intellectual transformation is diminished, but one has a very good sense of the kind of attitude to learning that person has. The converse is true for judicial appointments at forty. The assessment of what kind of person a judge is likely to be, and of the effect of the appointment on the judge's basic beliefs, cannot be separated from the subjective factors present in the appointer's own personal cosmology. It follows that the act of appointing changes appointers. All these factors cannot be eliminated from the selection process.

14. Context matters

Just as there is a great variety of judicial offices, a great variety of judicial tasks and functions, and a great variety of substantive areas with which judges must deal, there are a great variety of qualities and attributes that those called upon to serve as judges must possess. These criteria will play out differently depending on whether one is sitting in appeal hearing arguments from expert counsel who are well prepared, or listening to unrepresented litigants in Small Claims Court, or presiding over a criminal trial, or hearing a complicated custody dispute, or hearing a by-law enforcement case in Municipal Court. Not every office, function and substantive area of law requires the same abilities. Moreover, not every office, function or role requires them in the same balance.

The more we accept the need for differentiation not just in relation to the judicial role but also substantively, the more likely we are to pluralize our understanding of the characteristics and qualities we expect in judges. And the more we pluralize our understanding of the qualities we expect in our judges and the different relative balance we associate with different judicial tasks, the likelier we are to conclude that we must pluralize the processes of judicial selection by giving appropriate scope for decision-makers to make differentiated judgements about candidates. While the types of criteria evaluated by an expert selection committee may be relatively similar across judicial roles and tasks, this may be less true of other criteria, such as those best assessed by the executive when actually appointing a judge. That is, taking all criteria into account, there is no reason to conclude that a one size fits all approach will optimize the chances of selecting the best judges for all courts and for all cases.

15. Judicial selection processes are only one component of ensuring the Rule of Law

The reason for devoting attention to ensuring the integrity of judicial selection processes and the quality of those chosen as judges is because the Rule of Law presumes the post-appointment independence of judges. To protect the post-appointment integrity of judicial decision-making, judges are given life tenure. They neither have to stand for re-election (and be tempted to decide so as to curry voter favour) nor reappointment (and be tempted to decide to ensure political

favour leading to reappointment). There are, however, a number of other decision-makers charged with making decisions based on the application of *ex ante* norms to existing facts. That is, by contrast with executive decision-makers in departments or agencies, where forward looking decisions of policy or everyday decisions of administrative or bureaucratic structure are made, many administrative decision-makers are themselves engaged in rights-based adjudication.

Whatever arguments about the necessary politicization of the adjudicative process embedded in an agency may be made, these do not apply to adjudicative decision-making by courts. Quite the reverse, arguments about the integrity of the judicial selection process are equally applicable to processes for appointing administrative adjudicators. Moreover, where such adjudicators are part of a supervisory body such as the *Tribunal Adminsitratif du Québec* it is even easier to see the applicability of structural principles meant to ensure the integrity of the selection process. Indeed, given the several distinct divisions of the TAQ, it is easy to see how the differentiations of context applicable to different divisions of the Court or Québec and different judicial roles within that court are equally applicable to the TAQ. What is not as often appreciated, however, is that any administrative adjudicator – that is, any person performing a quasi-judicial function – is necessarily involved in a decision-making process of the type that argues for the incorporation into the selection process of many of the criteria and processes strictly applicable to judicial selection.

16. Selection processes are only one moment of assessment and accountability

The selection process for judges is clearly one of the central moments for ensuring the quality of those serving as judges. Along with guaranteed tenure, protected remuneration and collegial governance, appropriate selection processes are a key element for protecting the independence and impartiality of judges. Consequently, making certain that only appropriate criteria are adopted for making selections, and that the process of selection actually deploys these criteria, are central requirements for ensuring a "government of laws and not of men." But to focus on appointments misses the many other moments in a judge's career where decisions affecting the performance of the judicial function are made, and where opportunities for inappropriate criteria to enter into the process can arise.

Two merit notice: the moment a judge is promoted or transferred from one judicial body to another (for example, when a judge is promoted from a trial court to a court of appeal); and the moment a judge is selected as a Chief Justice or regional supervising judge, or named to some other judicial management function. Each of these further steps in the judicial career ought to involve the same sorts of criteria of nomination as the initial appointment. Yet in almost all systems of Judicature these moments of advancement are not seen as occasions where the independence of the judiciary may be compromised. The assumption is that decisions about promotion should be taken by the executive without invoking any advisory committee process or any pre-screening for merit. If a key feature for promoting judicial independence is to eliminate temptation or the offer of reward and favour, the process by which promotion within the judiciary is managed should be revisited. A process like the expert selection committee process could not work effectively for these decisions, but something analogous should be developed in

order to maximize the principle of administrative autonomy for courts, one of the key features of the concept of judicial *independence*.

Part Four: Can the selection process be purged of inappropriate Political factors?

This last part of the essay focuses directly on the problem of politicization of the appointments process. It begins with a brief discussion of what politicization means in this context. It then draws a distinction between "political considerations" of the type that may legitimately enter into the appointments calculus, and "Political considerations" that must be extirpated from the appointments process. The final sub-section attempts to illustrate how this may be accomplished. It argues that subjective factors will always be a part of the appointments process, whether the process involves only an expert selection committee, only an executive appointments process, whether or not accompanied by a legislative advise and consent process, or some combination of these processes. Consequently, the goal should be to elaborate an appointments process that expressly acknowledges the influence of subjective considerations in decision-making, and seeks to make these transparent. Concomitantly, the goal should be to eliminate all features of the process that serve to hide this subjectivity from public scrutiny.

A. When do political opinions become unacceptable Political criteria?

If there is no perfect system, if some candidates and their supporters will try to game the system, if there are no truly objective criteria, if there is no such thing as the "best candidate", if most bright-line criteria are proxies and most non-bright-line criteria depend on second-hand knowledge, and if choices about judicial methodology and about default presumptions as to substantive interpretative outcomes are appropriate considerations for the ultimate decision-makers to weigh, does this mean that there are no criteria that should be excluded from the appointment calculus? Answering this question first requires consideration of some basic principles of liberal democratic constitutionalism. It then demands a close analysis of the kinds of considerations that are often stigmatized as "unacceptable Political criteria".

Let me begin with basic principles of liberal democratic constitutionalism in relation to issues of Judicature. The following are fundamental.

The Rule of Law requires that once they assume office, judges should be free of influence extraneous to the performance of their function. Notably, they should be free of political interference from governments and politicians; they should be free of the need to curry favour of the electorate; and they should be free from and uninfluenced by attempts to sway their impartial judgement in individual cases. Judicial decision-making should be driven by the honest assessment according to law of the merits of the particular cases brought forward for judicial resolution. This conception of the judicial role can be set in contrast to the role assigned to decision-makers in many boards and agencies. Where a regulatory agency such as a transport tribunal is given a mandate to articulate and develop policy under the general direction of a statutory and subordinate legislative mandate, many of the stricter requirements for judicial independence are appropriately relaxed in so far as appointments to such agencies are concerned. Appointments may be for a term, subject to renewal. Candidates may properly be rejected or

appointed on the basis of their substantive views about policies to be pursued. Governments may properly issue guidelines and policy directives in particular cases. In these boards, by contrast with the situation of courts, decision-makers are explicitly the agents of government policy.

Democratic political theory also requires that all those exercising governmental powers in a state be accountable to citizens. Not only political actors such as MNAs and the executive, but also the judiciary must be ultimately accountable. However, judicial accountability is not the same as legislative or ministerial accountability. The government is accountable for its policies and its actions – including for its judicial appointments -- to the National Assembly and through the National Assembly to citizens. Members of the National Assembly are directly accountable to the electorate in their constituency. Judges are also accountable to citizens, although typically indirectly. Only in situations where judges are directly elected for limited terms and must be re-elected is there direct judicial accountability to citizens. In most liberal democracies of the common law constitutional tradition the accountability is indirect: at the moment of their selection the accountability of judges is reflected in the fact that they are appointed by a ministry accountable to a legislature; following appointment, their accountability to citizens is through the mechanisms of destitution through a highly formal process managed by a legislature. It is a necessary feature of a liberal democracy that judges are accountable to citizens, not to some special interest, or some elite such as lawyers, or to the political agency that appointed them. It is a necessary feature of a liberal democracy that this accountability is mediated through the political process. But it is important to note that in a liberal democracy committed to the Rule of Law, the ultimate accountability of judges is to the constitution and to the law. This, at bottom, is the reason why accountability to citizens is mediated through political institutions both at the time of selection and at the time (if any) of destitution.

Given the constitutional principle of accountability, political considerations will necessarily be a part of any process of judicial selection, no matter how scrubbed of such considerations the preliminary stages of appointment may be. Consider the case of a two stage process involving an expert judicial selection committee as a first step. Even if these judicial selection committees are relatively free from partisan politics because political considerations are reduced to the minimum by means of transparent and broadly legitimated processes of nomination to such committees, members are still political appointments. Even if these committees operate by means of numerous and relatively precise criteria of assessment, and through decision-making processes that are open and rationally defended, there is a moment of subjectivity in their decisions. Finally, even if all the procedural mechanics to ensure the most objective process possible were followed, these committees will still only be performing a pre-screening process to ensure that all those certified within the pool of potential candidates have met the minimum standards of competence. (The point would hold even if it were possible to imagine a system where the committee submitted only one name for possible appointment there is still, at some stage, a political decision to be made. For example, the government could refuse to make the appointment. More than this, for the reasons discussed in the section about the impossibility of picking an “objectively best candidate” whatever name is forwarded to the executive it will be of a person whose selection was coloured by subjective considerations.)

Once such a pool of candidates for possible appointment has been selected, the process shifts to the political arena. At this point, as a matter of constitutional theory, it is not inappropriate for

political factors related to democratic accountability to enter into consideration. However, this begs the question: what exactly are political factors related to democratic accountability? Put slightly differently, the real issue is not whether political factors should be purged from the appointments calculus – they cannot be, and in a democracy should not be. The issue is to identify which political factors may appropriately be considered, and which political factors are inappropriate to the appointments process, and the measure of transparency that is necessary to ensure political accountability in both cases.

To pursue this inquiry into the distinction between appropriate and inappropriate political considerations, one must begin with a brief discussion of what the idea of political considerations means.

A first idea is that there are two main types of political considerations. Most political considerations are a sub-set of subjective considerations. That is, political considerations are among those considerations whose evaluation involves the subjective exercise of judgement by the person making a decision.

Second, unlike subjective considerations that involve judgements about the integrity or honesty of a candidate, or the candidate's intelligence or wisdom, or the candidate's courage or incorruptibility – all of which point to personal traits of candidates for which no remotely objective evaluation standard exists – political questions do not normally involve the assessment of *ex ante* characteristics of candidates. Typically political considerations involve the appointer or selector assessing the future: what type of judicial methodology is this candidate likely to deploy in deciding cases? to what philosophy of adjudication and to what conception of the role of the judiciary does this candidate subscribe? what basic ideological commitments about the role of the state will influence this candidate's decisions? what are the substantive views about the nature of the individual, the family, society, and the economy held by this candidate?

Third, some political considerations are partisan and reflect party politics. Typically, these types of political considerations do involve *ex ante* behaviour of candidates. Is this candidate a member of the appointer's political party? Did this candidate financially support the appointer's political party?

Finally, some political considerations are more personal than institutional. These types of political considerations also tend to involve *ex ante* behaviour of candidates. Is this candidate someone to whom the appointer owes a favour? Is this candidate related to the appointer? Is this candidate a close personal friend of the appointer? Sometimes, however, they may be forward looking. Has this candidate or one of his of her supporters promised a financial or other reward in exchange for appointment?

In the mind of most citizens, all these considerations are indistinguishably "political" even though some are not "partisan political" and others are "personal". It is as if the expression "political" has come to mean whatever in the opinion of the public is inappropriate as a criterion for, or as a factor influencing, judicial appointment. In order to determine whether this popular opinion is a workable standard to apply in distinguishing between appropriate and inappropriate considerations in the selection, it is helpful to examine in detail the most common types of

situations that have been held out as examples of the inappropriate influence of politics in the appointments process. Six different scenarios are often mentioned, even though two of them are only remotely connected to political considerations as such and are, moreover, criminal offences.

1. Patronage

One of the most common complaints about politicization is framed in the language of "patronage". This type of complaint has been particularly prevalent in respect of recent rounds of federal judicial appointments. The complaint is that these are predominantly patronage nominations – rewards for loyal members of the Conservative Party of Canada. In the immediately following discussion of patronage, I leave aside the case where the loyal political service is reflected in a financial contribution. The particular situation of financial contributions is examined in the next sub-section. Here the idea of patronage is limited to the following type of situation: the fact that a person is a long-standing member of a political party and may have been active in its affairs. There are several ways in which a successful candidate for appointment might be considered to have been the beneficiary of patronage.

First, a candidate for appointment may have been (or may still be) a member of the National Assembly or a Minister.

Second, the person may have held a senior political staff position within the machinery of government (say as *Chef du cabinet* of a Minister), or may have held a senior position in the public service (say, as deputy-minister) having been appointed by the party making the appointment.

Third, the person may have been an official in the political party -- holding office as president, regional president, member of the executive, official agent, riding association executive, or fundraiser.

Finally, the person may simply have been a loyal foot soldier who, as a party member, worked on elections, attended policy conferences and served on party committees.

It is hard to see how any of the above activities should automatically *disqualify* someone from ever being appointed to the judiciary. Of course, the reverse is true as well. It is hard to see how any of the above activities should automatically *qualify* someone for appointment to the judiciary. The focus of the inquiry should be on substance: does the candidate possess the requisite intellectual, professional, institutional and personal qualities for appointment?

The remedy for concerns about patronage appointments is a robust selection committee process that would ensure that whatever the partisan background, a candidate is, independently of that background, qualified. Consider the case where a particular candidate has previously been a Minister or is a sitting MNA from a party now in opposition. If it is not inappropriate for a political party to appoint a qualified candidate who is politically active in another party, it should not be *automatically* inappropriate to appoint a qualified candidate who is politically active in one's own party.

This said, whenever a potential candidate has been politically active, additional criteria may need to be put into place so as to reassure the public that the appointment is not being made for inappropriate reasons. This is particularly the case where the appointee has been politically active in the party to which the person making the appointment belongs. Two such criteria may be imagined. First, it may be that we need a cooling off period (for example, two years), as we do for former MPs lobbying Parliament, or for former judges appearing before courts following retirement or resignation. This would be appropriate notably for appointments from the first and second categories, and would apply to MNAs, Ministers, and senior public servants regardless of the party for whom they worked and regardless of the appointing party. This requirement of a cooling-off period aims more at the overall integrity (and the overall appearance of integrity) of the selection process and the idea of separation of powers than at issues of patronage *per se*.

A second criterion relates to the process of certification by the expert selection committee. It may be imagined that candidates who transmit their dossiers to the committee should be required to disclose all prior and present political affiliations, and that the selection committee be obliged to pay particular attention to the substantive qualifications of any candidate that discloses prior or present political affiliation. If both of these criteria are added to the regular criteria applicable to all candidates, the transparency of the selection process would be enhanced and the chances that considerations that might be seen as involving patronage would have a determinant role in the final selection would be minimized.

2. Rewards for personal financial contributions

In recent years there have been consistent reports that persons appointed to the bench have made political contributions to the party that was in office when they were appointed. One example recently cited involved a donation of $300 to the Conservative Party of Canada. There are several problems with adopting a criterion under which a candidate that made a political donation to the appointing party would be *automatically* excluded from consideration for appointment, or even regarded as presumptively suspect.

First, citizens are actively solicited to donate money to political parties and it is public policy in Quebec to favour political contributions by citizens. For example, the *Income Tax Act*, which advances the policy objectives of ensuring a democratic Parliament, provides for a direct deduction for political contributions as against tax payable.

Second, financial contributions to political parties are publicly visible. Political contributions above a certain minimum amount are fully disclosed in the annual filings of political parties and are a matter of the public record. Moreover, in Quebec there are also limitations on the amount of money that individuals may give to political parties in a given year.

Third, in the case mentioned above, it is a stretch to suggest that because a lawyer once donated $300 to the Conservative Party his or her future appointment to a court is a patronage appointment. The sum of $300 is hardly a large sum – either for a political party or for a lawyer seeking judicial office. In addition, if there were an *automatic* exclusion, this would mean that a lawyer who gave money to a political party when he or she was 25 years old would be forever barred from being appointed to the bench by that party.

Fourth, if we assume that an average lawyer might bill $100 per hour (or more, in some cases much more) for his or her time, then all it would take is four hours of volunteer time canvassing during elections or working on party matters for a lawyer to exceed the value of a $300 cash contribution (with no consideration for the income tax benefits from a financial donation). Volunteering of this kind is common and is currently not publicly tracked. In terms of partisan involvement, however, it is probably more indicative of a commitment than a purely financial contribution.

Fifth, among lawyers (and law firms) it is frequently the practice to have members of the firm make political contributions to all major political parties. Sometimes individual lawyers contribute to only one political party, and sometimes they contribute to two or more (or all) parties. Should this *automatically* disqualify them from ever being appointed to the bench by *any* political party?

Sixth, if giving money to a political party is to be a disqualification for future consideration for judicial appointment, then those who feel inclined to support a political party financially will arrange to have a spouse or friend make the donation simply to avoid the appearance of having made such a contribution. Is it better that financial support of a political party be hidden (or dissembled), or that it be disclosed?

Seventh, sometimes people make gifts to political parties for reasons that have nothing to do with supporting the party or its policies. I have myself donated to former students who were running as Conservative, Liberal, NDP and Green candidates in various elections. Yet I have never once voted for candidates from two of these parties. My commitment was to my students and a reflection of my belief that, in a democracy, talented people who are willing to offer themselves as candidates for election should be encouraged to do so.

In other words, the mere fact of having made publicly-recorded financial contributions to a political party is not necessarily related to the kinds of qualities that should be present in the mind of a person making judicial appointments. A contributor to a political party may be fully qualified to be a judge, or in the view of a selection committee, may not be qualified. What matters is the substantive qualifications of the candidate and not his or her record of political contributions. An absolute disqualification of candidates who have ever made political contributions or a disqualification of candidates who have made political contributions within a certain period (say five years) preceding appointment is both unwise and unworkable. The reason why such a disqualification is unworkable is that a lawyer cannot know with a certainty (i) if or when he or she would be appointed, (ii) whether appointment would come from the party to whom the donation was made, or (iii) whether that political party would form a government within five years of the donation.

The appropriate response to the fact that lawyers who might ultimately seek judicial office have given to a political party is fourfold: (1) full public disclosure; (2) appropriate limits upon the maximum amount that may be given to political parties or candidates; (3) a specific provision in the election act that provides that the solicitation of political contributions as against the promise of a future judicial appointment is an offence; and (4) an appropriate screening mechanism by a

judicial appointments committee to ensure that any candidacies forwarded to the executive to form part of the pool of eligible candidates are fully qualified, regardless of their prior record of having contributed to a political party.

3. Responsiveness to requests from donors

A third recurring situation in which allegations of inappropriate partisan politics have been made does not involve patronage in the strict sense. Rather, it involves the criminal offence of corruption of a public official. The worry is that persons with resources will attempt to buy judicial office, either for themselves, or for friends and family. Several situations need to be distinguished.

Sometimes, there are situations where the pressure (financial or otherwise) comes from a member of the political party of the appointing government. On other occasions, there are situations where the pressure (financial or otherwise) comes from a stranger to the political party, and the operation is viewed simply as a business deal to corrupt the appointments process. On still other occasions the pressure is simply from someone who wants to do a favour for someone else and actually has no political or business interest to advance. In all these cases, there is an inducement being offered to engage in a corruption of office or breach of trust. Such actions are no less criminal than those involving payments meant to ensure the receipt of government contracts.

There are two many categories of cases where corruption of this sort occurs. First, the payment may be made to party officials, either to be used for political purposes or as an out-an-out bribe. Second, the inducement may be offered not to the political party as such but rather to the person making the appointment in his or her personal capacity. The mechanisms are multiple, and can involve cash payments and bribery, the holding out of post-political employment, black-mail and the promise of favours for friends or family of the recipient. Where the payment is made for the personal benefit of the appointer this is the classic case of corruption of office. Where it is made to a party official on the expectation that the official in question will attempt to influence an appointment, a distinction should be drawn between cases where the appointer knows of the payment and where he or she does not. In the former case, there is corruption of office; in the latter, there is corruption, but the offending person is the party official, not the appointer. Finally, in cases where payment is made to a party official for party purposes against the expectation of an appointment being made, the same distinctions apply. If the appointer does not know, and cannot reasonably be expected to know, of the payment, the guilty party is the party official, not the appointer. If the appointer does know, and makes the appointment, it may not be that the appointment was made because of the bribe, but the evidence required to disprove the inference would be difficult to generate.

In all these cases, the question is not so much one of patronage or inappropriate political considerations entering into the appointments calculus. These factors may be present, but the true characterization of the situation is that it is an example of a criminal corruption of the appointments process. For this reason there is no need to amend any statute or regulation governing the appointment of judges. The remedy is simply good police work and the enforcement of the existing provisions of the *Criminal Code* and the *Elections Act*.

4. Personal prejudice, favoritism or nepotism

Behind some of the contemporary allegations of impropriety in the appointments process are insinuations that appointments have been made not on the basis of merit but rather because of personal prejudice, favoritism or nepotism. As in the case of bribes and other forms of corruption, these situations are less about patronage than they are about a possible lack of personal integrity on the part of the person with the power to appoint.

The third of the three cases just noted – nepotism -- is the easiest to deal with. Most legislatures have enacted conflict of interest legislation, which identifies certain types of family relationships in which conflicts of interest are likely to arise and which, consequently, disqualify candidates from appointment to courts or other official positions where these relationships exist. Although there is no reason to think that existing conflict of interest guidelines are inadequate to this purpose, it may still be thought necessary to specify in some detail what these relationships are. That is, a case can be made that the regulations under the *Courts of Justice Act* should address not just nepotism in the strict sense – a direct family link to the appointer – but also nepotism in a broader sense – for example, a direct family link with any member of the government.

Allegations of personal prejudice or favoritism are much more difficult to handle. If I were Minister of Justice or Prime Minister and had a law school friend who was a very successful lawyer and in whom I had great confidence, would it be inappropriate political interference in the appointments process were I to approach that person and encourage him or her to put forward his or her candidacy to the selection committee? Would it be an inappropriate politicization of the appointments process if, after that candidate had been approved as fully qualified by the selection committee, I were to appoint him or her? It is difficult to see how my favoritism towards a colleague or friend would necessarily be an act of political interference in the process. After all, there is no guarantee that my friend is a member of the same political party as me. Would my selection be inappropriate if we were members of the same party, but appropriate if we were not? Presumably, as long as the candidate were adjudged by the expert selection committee as qualified for appointment, and as long as none of the disqualifying criteria already discussed were present, the mere fact of our personal relationship should not be seen as a reason for preventing the appointment.

The converse situation – personal prejudice leading to a refusal to appoint -- is not of concern where the issue is whether the appointments process has been inappropriately influenced by political considerations. No one has an entitlement to appointment. In brief, there is no constitutional norm that requires a government to appoint the “best” candidate (that is, a norm analogous to the principle of tendering for public contracts that obliges the government to accept the lowest bid submitted by a qualified bidder), and in any event, as has already been demonstrated, there can be no such thing as the “objectively best” candidate. Consequently, it is difficult to see on what basis it could be claimed that inappropriate political considerations influenced the decision. More than this, if my own personal judgement as appointer -- whether based on a full (even if erroneous) comparative assessment of legitimate factors relating to the merits of different candidates, or even whether based on illegitimate factors such as race, colour, sex, sexual orientation, creed or ethnicity – leads me not to appoint a candidate, it is not obvious why this should be seen as an inappropriate politicization of the process. In the second set of

hypotheses – illegitimate discrimination -- it might be conceivable that one day there could be some recourse under the Quebec *Charter of Rights and Liberties* or section 15 the *Canadian Charter of Rights and Freedoms*. But for this to happen there would have to be a revolution in the manner in which courts apprehend their jurisdiction to review discretionary decisions of the Cabinet.

5. Ensuring favourable outcomes in litigation involving particular persons

Although allegations of politicization of this character are sometimes made, they are rare. It is difficult, in a multi-member bench such as the Court of Quebec, to imagine that any particular appointment could be stage-managed in such a way that it would have a direct or immediate bearing on the outcome of particular litigation.

First, even if a particular candidate were appointed to bring about a desired result, in most situations several judges comprise the roster available to hear cases in a particular judicial district or in a particular division of the court. There is no guarantee that the nominated person would actually get to sit on the case in question.

Second, after the desired candidate is appointed, he or she would have to be assigned by the Chief Justice to hear the case. The opportunities for the government to influence assignments by the Chief Justice are limited, and any attempt to do so would constitute a grave infringement of the principle of judicial independence.

Finally, approaches to the Chief Justice in matters such as this have nothing to do with the appointments process as such. If the candidate in question has been certified by the selection committee as competent, the fact that he or she has been chosen because of a belief about how he or she would decide a particular case is not germane to the question of politicization of appointments.

Attempting to influence a judge that has been appointed on the expectation that he or should would decide a particular case in a particular way is a criminal offence. Trying to appoint judges who might conceivably promise to decide a certain way if appointed is not an offence, but could, nonetheless, lead one of the parties to the litigation in question to demand the recusal of the judge on the grounds of bias or partiality.

6. Stacking the bench with ideologues

The second of the most commonly recurring complaints about politicization is closely linked to the complaint that appointments are made on the basis of patronage pay-offs to loyal party members. One frequently hears lamentations that particular governments are trying to stack the courts with like-minded ideologues. Two years ago a number of journalists sought to link a round of federal appointments to a speech by the Prime Minister in which he was reported to have said that he would ensure that there would be no “left-wingers” appointed to the courts during his watch. This obviously political speech to party loyalists was meant to rally the troops rather than to announce a firm government policy. Nonetheless, let us assume that the Prime

Minister actually meant what he said and that he was intent on “stacking the bench” with right-wing ideologues.

The question to be examined were this to be the case is this. Is it an inappropriate practice for a government that was elected to pursue a certain economic and social programme to appoint otherwise qualified judges that are broadly sympathetic to that programme? Similarly, would it be wrong for a Parti québécois government to systematically appoint to the Court of Québec otherwise qualified candidates who were members of the Party or widely known to be supporters of Quebec independence? Recall the fundamental principles of liberal-democratic constitutionalism. Governments assume office because they have the confidence of the National Assembly. They are sustained in office because they are pursuing a policy agenda that is supported by MNAs who have been elected by citizens to represent them. In a democracy, elected governments that have the confidence of the National Assembly are entrusted with managing public affairs. This involves not only the conduct of public business and the development and implementation of policy, but also the taking of decisions, including decisions appointing people to courts, administrative tribunals and senior positions like ambassadorships and agents general. Democratically elected governments legitimately make numerous judicial appointments from among qualified candidates who are broadly sympathetic to their policy programme. Once a candidate has been certified as competent by the expert selection committee, it is not offensive to democratic constitutional theory for governments to appoint judges who are on the same general policy page as they are.

Of course, an entirely different set of criteria operate once a judge is appointed. The full panoply of guarantees aimed at ensuring the independence and impartiality of judges comes into play: life tenure (until age 70); removal only through a special legislative process and on very narrow grounds; guaranteed salary. However much a judge may have been selected on the expectation that he or she would be inclined to have a certain orientation in deciding cases, there is no mechanism post-appointment by which a government may compel or even induce a judge to follow that expected orientation. Furthermore, if litigants in particular cases feel that a judge’s philosophical or ideological orientations may prevent that judge from hearing the case impartially, they have the right to seek the judge’s recusal.

There are several other observations that may be made concerning a judge’s judicial ideology or policy orientation. First, the question that a judicial selection committee will consider is not whether a judge has such an orientation or, as long as it is not contrary to fundamental constitutional values such as the Rule of Law, what that orientation is. The committee will ask whether the judge has an open mind and is capable of deciding cases on the basis of the law and the facts presented to him or her. If so, the fact that a judge may have policy views broadly in sympathy with the government that will be making an appointment does not, in itself, constitute a reason for refusing to declare that the candidate is qualified to be appointed.

Second, there is not necessarily a direct overlap between the judicial ideology and policy orientation of a potential judge and membership in a given political party. This uncertainty of congruence works in both directions. On the one hand, and most importantly, political parties are not homogeneous on all issues. Presumably, all members of the Parti québécois are committed to Quebec independence, but some will find themselves on the political left, and some on the

political right. Whatever ideological orthodoxy is involved in the appointment, it would not touch social and economic policy, but only the political option. The same would be true of the Liberal Party. On the other hand, and conversely, sometimes governments might seek to choose candidates who share a policy orthodoxy, even if they belong to another political party. For example, it might be that a Conservative government in Ottawa would appoint a judge from the right wing of the Liberal Party, or a Liberal government might appoint a judge from the right wing of the NDP.

Third, over the vast range of tasks performed by judges, only a few will map onto questions where questions of judicial ideology or policy orientation have any possible impact. Most political activity concerns matters that are not justiciable, and most judicial activity concerns matters that are not party political.

Some commentators nonetheless make much of the fact that the pattern of judicial appointments by governments of all political stripes tends to show a clear preference for members or supporters of the political party making the appointment. However, it is not clear what this correlation is meant to demonstrate. It may mean nothing more than the fact that, faced with a choice between a candidate who is a member of another political party and an equally qualified candidate from one's own party, a Minister of Justice, a Cabinet or a Prime Minister is more likely to choose the familiar candidate. As long as the selected candidate has passed the screening test of the expert judicial selection committee and as long as the screening test is sufficiently rigorous to ensure a high quality among candidates deemed to be qualified, in a liberal democracy the choice of judges is a decision that quite legitimately belongs to the government of the day. There is nothing unconstitutional or illegitimate about appointing qualified candidates that share a policy perspective.

Still, while no candidates for judicial office have an entitlement to be appointed, it must be remembered that judicial office is a State benefit that is being allocated by a government. For this reason, all citizens, including those who never go to court, have an interest in ensuring that the judicial selection process results in the appointment of highly qualified candidates. Vigilance about who is named to the expert judicial selection committee, about the criteria to be applied by the committee and about the patterns of appointment from among qualified candidates is a democratic responsibility of citizens. The electoral process is the remedy when citizens perceive that patterns of appointment are not to their liking.

B. Ensuring the quality of the judicial selection panel and the ultimate decision

The above review of the types of considerations that have often been said to reflect an inappropriate politicization of the appointments process reveals five fundamental points about selection processes.

First, not all the considerations and factors that have been advanced by citizens, media and scholarly commentators as "political" criteria in judicial appointments are in fact political criteria. Some are examples of criminal corruption and are illegitimate on that basis alone. Some others are examples of considerations personal to the appointer that have nothing to do with partisan politics as such. They result from a personal relationship between appointer and

appointee. A few of these, like nepotism, are illegitimate because they put into question the future independence and impartiality of the judge. Others, like longstanding personal friendship, are not necessarily illegitimate, provided that the candidate has been certified as qualified by the judicial selection committee. An important outcome of any review of the judicial appointments process is, consequently, citizen education. It is important that citizens understand the nature of the judicial function, the manner in which appointments processes work, and the distinction between appropriate and inappropriate considerations bearing on appointments.

Second, among considerations that may be legitimately taken to be political criteria, some are unavoidable and, in a liberal democracy, reasonable considerations for a government to take into account. Others are political, and may be legitimate, but because they can give rise to an apprehension of partiality, they may be taken into account only after a certain period of time. These types of situations are best dealt with by conflict of interest guidelines, cooling off periods, and enhanced transparency of the decision process. Still others are political, and entirely legitimate. Appointing judges who broadly share a social, economic or political ideology is consistent with the underlying theory of democratic governance. However, in respect of these considerations as well, enhanced transparency of the decision process will increase citizen confidence in the independence and impartiality of the judiciary.

Third, many of the allegations about political partisanship in judicial appointments rest on an overly simplistic understanding of causation. Just because a candidate has been a member of a political party, or just because a candidate has made a publicly recorded financial contribution to a political party is not evidence that the candidate has been appointed *because of* that membership or *because of* that contribution. The number of candidates approved by the selection committee who have been members of the political party in power or who have given money to that political party far exceeds the number of available judicial positions available for appointment. Necessarily there are other criteria besides membership and contribution that are influencing a government to appoint qualified candidates to the bench. Unless the negative can be established, that membership in or contributions to a political is a *necessary* (even if not *sufficient*) condition for appointment, the causal claim cannot be made out. This said, because of the tendency of many citizens (and even of many scholars) to confound correlation with causation, full information about the political antecedents of candidates who are appointed can be an important factor enhancing public confidence in the appointments process.

Fourth, however important these mechanisms to ensure transparency of the decision process may be, the systemic lynch-pin of the entire system is the integrity of the expert judicial selection committee process. If the members of the committee are carefully selected, if the criteria to be applied by the committee are rationally developed and lexically ordered, and if these criteria are in fact rigourously applied, only qualified candidates will come forward to the government for possible appointment. This essay is not meant to discuss the actual mechanics for naming members and preserving the indepedendence of expert judicial selection committees, or to elaborate upon diverse processes of judicial selection. Nonetheless, it is important to elaborate a number of principles to govern the selection committee process because of the crucial role of the expert selection committee in ensuring the quality of candidates eligible for appointment. The point is to illustrate how a well-designed and well-managed expert selection process can prevent

unqualified candidates put forth for partisan political reasons from receiving the imprimatur of the committee. Seven main principles may be identified:

(1) The government should be constrained to appoint as judges only candidates who have been certified by the selection committee. *This is currently the case* under the *Courts of Justice Act*.

(2) The criteria to be applied should be elaborate, detailed, couched wherever possible as bright-line rules, and publicly available. They should be announced, in broad outline, in the *Courts of Justice Act*. *This is not currently the case.* Enactment by statute will give these broad criteria a public profile, and more importantly, will permit a debate within the National Assembly, and by the general public, about their appropriateness. In addition, the government should be empowered to elaborate them more fully by Regulation. *This is currently the case*. Finally, all these criteria, and any other information relating to the process for applying to be a judge, should be posted on the Internet. *This is not currently the case.*

(3) The Committee should be empowered to set a high standard for determining which candidates are qualified for judicial appointment. Since in most competitions, the number of applicants far exceeds the number of available appointments the Committee should not be reluctant to be rigorous in assessing competencies. If this involves requiring candidates to sit qualifying examinations – for example, examinations like those administered at the *Cours de formation professionnelle* -- the Committee should have the authority to administer such an examination or examinations. *This is not currently the case.* The Committee should also have the power within a general framework established by Regulation to enact additional directives about the kinds of information that must be provided in an application. In particular, it should how the power to require disclosure of prior or ongoing political party affiliation or financial contributions. *This is not currently the cas*e.

(4) While the deliberations of the Committee should remain confidential, candidates who have applied to the Committee and who have been declared not qualified should be entitled to see a copy of the reasons for the decision taken. *This is not currently the case.*

(5) Candidates who have applied and who have been declared qualified should be informed of that decision but reasons need not be given. Once declared qualified, they should be deemed qualified for a period of three years. *This is not currently the case.*

(6) The process by which members of the Committee are selected should be fixed by regulation. *This is currently the case*. The specific composition of the Committee – that is, the categories of persons who should be members of the Committee -- should be set out in the *Courts of Justice Act. This is not currently the case*. The

membership of the Committee should be designed to give appropriate weight to both professional and lay opinion. *Currently, this is partially the case.*

(7) Once appointed, the members of the Committee must be given a status that would conduce to their independence as decision-makers. This means, among other things, (1) granting them immunity from civil suit, (2) a tenure of a sufficiently long (say five years), but non-renewable, time to enable them to make a substantive contribution, (3) a difficult to invoke process for destitution from office, and (4) more than token remuneration for performing this service so as to enable persons of all socio-economic statuses to serve on the committee. *This is not currently the case.*

Fifth, after a candidate has been certified as qualified and eligible for appointment, the political dimensions of the process must be engaged in such a way that there is not only no actual impropriety in the process, but also that there is no appearance of impropriety. To achieve this goal, the entire process must be designed to maximize transparency. Four ideas are important to note.

(1) An initial need is for education of the public. Not only must the public know how the process before the selection committee works, it must be informed of how the political dimensions of the process work. In particular, the public needs to be educated about the fact that the mere fact of being a member of a political party, or having made a publicly recorded donation to a political party, does not disqualify a person from appointment, and does not mean that an appointment has been made for that reason. Public education can take place by posting general information on the Internet, and by making hard-copy explanatory information available at Court Houses, Registry Offices, Legal Aid Offices and similar locations.

(2) The integrity of the process also requires that each appointment be accompanied by a substantive "appointment statement" issued by the appointing government. *This is not currently the case*. This statement would contain basic information about the candidate or candidates being appointed. Among items that should, as a minimum, be included in such appointment statements are:

(a) a detailed curriculum vitae;
(b) a statement of the reasons of the expert judicial selection committee as to why this candidate has been adjudged qualified;
(c) a statement of all contributions to all political parties within the previous five years;
(d) a statement of membership in all political parties, and all offices held within political parties, within the previous five years;
(e) a statement of any other information related to political activity undertaken for any political party within the previous five years;

(f) a statement of all known contacts between the appointed candidate and the members of the Cabinet or cabinet sub-committee that signed off on the appointment;
(g) a statement of all persons (including MNAs, party officials, and other politicians and judges) that the appointing Minister contacted about the appointment;
(h) a statement of all persons (including MNAs, party officials, and other politicians and judges) that contacted the appointing Minister about the appointment;
(i) a statement of the annual taxable income of the candidate for the previous five years presented by tranche – e.g. less than 50% of the salary of the position to which appointment is being made; between 50% and 100% of that salary; between 100% and 200% of that salary; more than 200% of that salary.

All the above disclosure requirements are aimed at enhancing transparency and ultimately accountability. The first two – (a) and (b) – are meant to reveal that an independent expert judicial selection committee performed its mandate carefully and had good reasons for deeming the candidate qualified. The next six – (c) through (h) – are meant to show exactly the extent of all possible political contacts that the candidate has had with all political parties and all possible political and personal influences (both legitimate and illegitimate) that have been brought to bear on the appointments process. The last requirement – (i) – aims to correct any misapprehension in the public mind that a judicial appointment is a well-paid sinecure by revealing that many appointees take a significant cut in remuneration when they accept a judgeship.

(3) To ensure the credibility and broad transparency of the process, the government should be obliged to Table the above information in the National Assembly, along with a certification by the appointing Minister that the candidate has been deemed qualified by the judicial selection committee and that an appropriate security check has been undertaken by the relevant governmental agency. *This is not currently the case*.

(4) Finally, it may be objected that requiring such public disclosure will discourage the best candidates from applying for appointment to the judiciary. The response to this concern is simple. The criteria necessary to ensure the *independence* of the judiciary post-appointment, and the strong protections against removal, argue for a maximum of information and transparency about candidates before appointment so as to promote *accountability*. This information is also the best guarantee that influence of inappropriate criteria and considerations, whether political or personal, will be minimized. In brief, by requiring this information be made public:

(a) those candidates who are appointed, and about whom allegations of inappropriate political partisanship have been made, will be able to point

to a comprehensive record that justifies their appointment on the merits; and

(b) governments will be less likely to attempt to appoint marginally qualified candidates who have been deemed qualified but whose disclosure of extensive political involvement would suggest that criteria of this nature were the primary reason for appointment.

Those who are not willing to have the government make public basic information about their qualifications for appointment as assessed by an expert selection committee, about their prior and present participation in political life, and about their annual incomes prior to appointment should not be entrusted with one of the most delicate and sensitive tasks of democratic governance in a State committed to the Rule of Law.

Conclusion

Let me now attempt to bring the themes of this discussion together in a brief conclusion. Citizens, lawyers, politicians and judges are all concerned about the judicial appointments process because it is a fundamental component of the Rule of Law. Courts are a central political institution in our society. The key question is this: how can we design a system of Judicature and judicial selection that acknowledges that, in a liberal democracy, decisions about governance are meant to be politically given, through processes of political accountability, and yet ensure that the functioning of the judicial system is itself above partisan politics.

In answer, let me offer two observations. First, and most importantly, we should guard against expecting that all the constitutional goals we seek to achieve with the judicial system – independence, impartiality, quality, timeliness – can be achieved solely by perfecting the judicial selection process. Many of the expectations about desirable outcomes that we visit upon the process may in fact be better achieved through other institutional arrangements. In the grand scheme of things, the selection process is only a small part of the way a liberal democracy manages the overall endeavour of public governance as it relates to the judiciary. Equally important are decisions involving court administration, the assignment, promotion, transfer, discipline, dismissal and retirement of judges, the financing and staffing of courts, the framework of civil and criminal procedure, and so on. More than this, the selection process is not the only occasion where judgements about suitability and capacity should be (and are) made. In some measure, the fact that judges enjoy tenure of office till age 70 diminishes the significance of these other moments as governance endeavours. But, not unlike the situation of tenured professors at universities, there are a number of post-appointment occasions when a review of the performance and suitability of a judge can be undertaken.

Secondly, we should guard against expecting unrealistically that the judicial selection process will guarantee the “best” appointments and the absence of politics in the appointments process. The initial objective should be to recognize the necessary imperfection of the system, and to design mechanisms to reduce to a minimum the possibility of imperfections and the impact of imperfections that cannot be eliminated. The complementary objective should be to recognize the necessary political dimension of the system, and to design mechanisms that enable

distinctions to be drawn between political factors that legitimately influence the selection of judges in a liberal democracy, and partisan political factors that are illegitimate in these processes. One does not promote a healthy system of democratic accountability by exaggerating defects and obliterating crucial distinctions between philosophies of judging and partisan politics. One does not promote a healthy system by obliterating distinctions between legitimate commitments to a given political ideology, and partisanship that is corrupt, for sale, nepotistic rewarding of family and friends, and a *détourenement* of the objective of the appointments process itself.