

Justice For Sale

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Abstract: The judicial system is essential for resolving disputes peacefully, reducing conflict and maintaining social order. It is a system established by a political and legal structure which, if rational and legitimate, operates in such a manner which coheres with the basic societal structure and produces reasoned decisions by judges who apply the law to the relevant facts of the case. A rational society, which must include a rational judiciary, is one which must choose the most efficient means to achieve its ends, here assumed to be that of a representative democracy similar to that outlined by John Rawls and others. These necessary means to achieve these goals are the rule of law, meritocracy, stability and legitimacy.

Keywords: justice, meritocracy, legitimacy, rule of law.

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The rule of law requirement deals with the formal dimension of the legal system not the substantive content of law but, as will be shown below, it has implications for that as well.² The ideal of the rule of law understands laws as supreme rules which define how all individuals and institutions within a given society should function. The rule of law stabilizes social interaction and provides for social order while setting a limit on governmental power. It promotes a social structure within which persons can pursue their goals with some security and predictability. These basic norms which define the fundamental rights and duties of persons Rawls terms the “basic structure” of that society.

The rule of law ideal involves certain logical and formal conditions to perform the function of law. First, the laws must be well-defined, consistent and a complete nexus of rules structuring society. As well-defined laws must be clear and eschew vague and ambiguous terms to achieve their function as action guides. If laws are to determine acceptable behavior the law must be consistent for contradictory laws would make impossible demands on individuals. Laws must be understandable by most people if they are to regulate behavior. Similarly, retroactive laws must be avoided for they cannot provide guidelines for behavior that has already happened. The set of laws ideally must be complete for laws to be action guides in all contexts and must be of sufficient number to leave no area of the domain under-determined and un-structured by law. In a rational society laws must be rational in the sense that they are based on factual evidence not falsehoods or unwarranted assumptions. Further, the rule of law means the law must be promulgated or made public since secret laws could not serve the function of guiding behavior. Finally, it means that no punishment is possible unless it involves a violation of some law.

Regardless of the substantive content, the rule of law ideal must conform to the truism that “ought to implies can” no law can ask the impossible of its subjects. In essence the rule of law ideal is a conditional of rationality as consistency itself requiring that similar cases must be treated alike.³

The defense of the rule of law ideal is not oblivious to the issues concerning the limits of rules and laws. It is clear that laws are, to varying degrees, vague, because language is vague and subject to change, laws cannot anticipate all circumstances but are a reaction to a problem, it is partially a matter of subjectivity which cases are sufficiently similar, etc. Further, it is clear laws do not apply themselves but human beings do so and how they are applied is, in part, a function of the persons who apply them. However, these limits of the rule of law do not negate the rule of law as an ideal of reason but merely reinforce the need for greater clarity in the formulation of laws and the need for judges of the highest level of knowledge and moral integrity.

² Cf. *Tebbitt, Mark, Philosophy of Law, London: Routledge, 2000, pp. 37-46.*

³ *Fuller, Lon, The Morality of Law, New Haven: Yale UP, 1969.*

The rule of law ideal in a rational society also presupposes a meritocracy in the sense that meritocracy will maximize the rational implementation of the rule of law. A meritocracy is a social system of allocating personnel where individuals are selected for positions based on meeting criteria relevant to the maximal performance of their function, not on any other criteria. These criteria usually include intelligence, knowledge, motivation to perform the function and a sufficiently moral character to perform the function in the prescribed manner. The ideal of meritocracy is implied in the rule of law for the rule of law ideal will be most fully actualized by institutional structures and individuals who have the desired qualities of knowledge of the law, intelligence and rationality to properly apply the law and sufficient moral virtue to act in conformity to the rule of law and their institutional function, not for purely personal gain or benefit incompatible with the role definition.

In addition to the rule of law and meritocracy, a rational society needs what John Rawls calls “stability.”⁴ A stable society is one where the social structure is consistent with human nature, its abilities and limitations, and widely accepted ethical principles such as ‘ought implies can.’ A stable system does not ask the impossible of persons such as is the case in utilitarianism where Rawls claims it may ask persons too much as far as contributing to the welfare of others.⁵ Rawls goes on to explain that a stable constitutional society is one which must define clearly the basic structure rights and liberties to promote orderly social system and stable expectations. In addition, the basic structure of the society encourages the virtue of “fairness” understood to mean that the benefits and burdens of society are distributed consistent with the basic structure so that no one has an unfair advantage. Clearly, stability presupposes the rule of law since fairness implies that similar cases are treated similarly, which is the essence of the rule of law. The rule of law is a barrier against arbitrary power and sees law as the basis of social order and stability.

The rule of law, meritocracy and stability promote the value of legitimacy of the political system.⁶ Legitimacy is the sense that the government has the moral and legal right to rule as it does. It means the political system has widespread support from the populace who see the government providing benefits and distributing them in a manner they consider fair or consistent with the basic values and beliefs they hold. A society based on the rule of law will be more efficient in providing benefits as a well-defined and implemented system of law will facilitate the interaction and coordination of the various institutions which must collaborate to make the political system function harmoniously and efficiently. Again, stability implies fairness which means in part that the laws are applied impartially and the rule of law will maximize legitimacy.

⁴ Rawls, John, *A Theory of Justice, Revised Edition*, Cambridge: Harvard UP, 1999, pp. 119, 398.

⁵ *Ibid*, pp. 154-9.

⁶ Levasseur, Alain, “Legitimacy of Judges”, *The American Journal of Comparative Law*, Vol. 50, 2002, pp. 43-85; Campbell, Tom, *Separation of Powers in Practice*, Stanford: Stanford UP, 2004; Hirschi, Ran, *Towards Juristocracy*, Cambridge: Harvard UP, 2004.

Given the criteria of the rule of law, meritocracy, stability and legitimacy, let's examine the alternative means for selecting state judges and whether they are consistent with these criteria. Focusing here on state courts, five methods have been suggested for determining which individuals should be judges: first, election (partisan or non-partisan), second, appointment by a governor (with or without approval of legislature), third, selection by the state legislature alone, fourth, the "Missouri Plan" consisting of a non-partisan committee recommendation to the governor who selects one (with a retention election later), and fifth, the civil service merit plan which I defend.

Let us consider reasons for the election of judges, a means still in force in many states for state judgeships.⁷ In electing judges individuals would stand for various judgeship during elections, whether on a party ticket or in a nonpartisan manner. This manner of selecting judges seems most consistent with the idea of democracy which means the people are sovereign and choose individuals for government positions to fulfill certain necessary functions to serve the needs and rights of the people. Judicial decisions are political in that they affect society in general and as such in a democracy, political matters should be subject to democratic election. Elections would make the judiciary independent of the other branches of government and so enhance the rule of law. Elections give people a chance to get to know the candidates and their qualifications. It would improve public discourse and expand understanding of the law among the citizenry and it may also promote greater political participation in elections in general. It may also assure greater accountability on the part of the judges to make sure they function according to the law not their own personal beliefs or ideological commitments. Finally, electing judges is superior to political appointments of judges which are open to political corruption and cronyism which are inconsistent with impartiality and the rule of law.⁸

These reasons are not sufficient to establish the election of judges as the superior means of selecting judges.⁹ Democracy does require that those who serve the people must be made subject to the will of the people but how this is implemented depends on the matter in question. Even in a system where judges are not initially elected, the people could express their democratic sovereignty by removing the judge by impeachment for illegality or by a recall election.

It is also true that judicial decisions are 'political' but the term is ambiguous. 'Political' in its primary sense means something that concerns the community as a whole and as such is something that is a matter for the government and the populace as a whole to consider. However, the actions of the judiciary are political also but in a different sense, the decisions of the court may impact the community as a whole, but certainly not all decisions of the state courts do. In another sense, actions of the court are political in the sense they are a function of the political structure which means it must be consistent with democratic principles but not

⁷ Minkow, Aaron, "Why Judges Should Be Elected", *Social Policy*, Fall 2010, Vol. 40, Issue 3, pp39-42; David E. Pozen, "The Irony of Judicial Elections", *Columbia Law Review*, Vol. 108, No. 2, March 2008, pp. 265-330; Shugerman, Jed H., "Economic Crisis and the Rise of Judicial Elections and Judicial Review," *Harvard Law Review*, Vol. 123, March 2010, N. 5, pp. 1061-1150.

⁸ Pozen, David, "Judicial Elections as Popular Constitutionalism," *Columbia Law Review*, Vol. 110, pp. 2047-2134.

⁹ Hull, Elizabeth, "What's Wrong With Electing Judges," *Social Policy*, Fall 2010, Vol. 40, Issue 3, pp. 43-47; see also Pozen, *op. cit.*, "Irony"; Souders, Ryan L. "A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States," *The Review of Litigation*, Vol. 25:3, pp. 529-74; Vago, Steven, *Law and Society*, Upper Saddle River, : Prentice Hall, 2003, p.360.

necessarily by a direct election. The democratic will of the people can be expressed indirectly if they approve a merit system of selecting judges.

Electing judges is one way in which the judiciary can be made independent of the other branches of government, but not the only way. Although he was speaking about federal judges, Alexander Hamilton in *Federalist Papers* #18 argued the opposite claiming that judges should not be elected since judges must be independent of the masses.¹⁰ Selecting judges in a merit system with objective criteria and with standards for their removal by impeachment or other procedures is another way of promoting independence of the judiciary.

Elections can give the people a chance to get to know the candidates and enhance public discourse of the law, but this are not the only means to achieve these goals. The credentials of the judges and their decisions can be placed online and court proceedings could be televised as well. Seminars can be held free of charge at local schools, colleges and online to educate the public. Schools could change their curriculum to reflect the need for a better informed citizenry with regards to the law. Finally, let us not forget that most elections are hardly the paradigm of political discourse but are usually a Machiavellian circus-like theatrical spectacle with sound bites, photo ops, emotional oversimplifications, hyperbole, ad hominem attacks, unwarranted vague innuendos and irrational manipulations.

Electing judges may improve political participation but again, this is not the only means of improving participation. Making election day a holiday, same day registration, internet voting, even making not voting illegal as is the case Australia, and other suggestions can do the same. Having judges on the ballot could actually decrease participation since many voters would be alienated from a process which required them to decide on matters they were not qualified.

As suggested above, accountability can also be enhanced by impeachment and by recall elections when necessary.

Traits needed to run a successful election campaign are not the traits necessary for a qualified and fair judge but, in fact, are mostly contrary to such a judge. The traits necessary to run a successful political campaign are, first, sufficient funds to run a campaign which are increasingly costly with some state supreme court campaigns costing over a million dollars. If the money is obtained through private contributions, then there is a danger of bias based on a quid pro quo.¹¹ In addition, acquiring contributions takes time away from judges' other duties. The potential bias was used in the case of *Caperton v. A.T. Massey Coal Co.* (2009) where an individual contributed over \$3 million to elect a judge who he believed would be more favorable to his case. The majority of the US Supreme Court found that large contributions can create the appearance and/or the reality of bias in judges. (Unfortunately, it did not see potentially the same problem when it voted for *Citizens United v. FEC* (2010).)

¹⁰ Hamilton, Alexander, James Madison, John Jay, *The Federalist Papers*, originally published in 1788.

¹¹ Liptak, Adam, "Looking Anew at Campaign Cash and Elected Judges", *New York Times*, 1/29/2008, p. A14.

If the campaign money is publicly provided, then there is a lesser danger of inappropriate influence but problems still exist. There may still be bias if the money is provided by a political party in which case there is the danger of contamination by a political ideology. If the funds are provided in a general election fund, problems still may arise. For example, some key traits needed for a successful campaign are charisma or a pleasing and outgoing personality. A pleasing personality is a good trait but not necessary for a good judge. A judge could be highly intelligent, educated and honest, yet be a poor campaigner and hence lose the election. Indeed, one would expect that those best suited with a temperament for the judiciary would not in general be well suited to the circus-like demands of the election campaign.

A recent ruling of the Supreme Court has exacerbated the problem of electing judges. The court ruled in *The Republican Party of Minnesota v. White* (2002) that the Minnesota law which required judges not to discuss political issues during the election campaign in which they were a candidate, was unconstitutional because it violated the right to free speech guaranteed by the First Amendment. Hence, judges must be allowed to discuss their political views and they must do so and articulate their ideas in a manner appealing to a sufficiently large body of voters. However, political ideology is not relevant to a judge but to the legislative branch. To politicize the judiciary is to undermine the separation of powers and more importantly, undermines the objectivity of the judge and the rule of law.

More than the politicization of the judiciary, there is the problem of what John S. Mill called “the tyranny of the majority.”¹² Since elections are won or lost whether or not a majority of the electorate, (in a two candidate race) the minorities and individuals may be overlooked or denied their fair chance in a court of law. There is evidence that judges apply tougher sentences during election years including applying the death penalty.¹³ This politicization of the judicial system raises the real potential of the violation of the rule of law since the rule of law requires that the law be applied to the facts without consideration of the political implications or whether one is in a majority or minority or whether one is going to be re-elected or not.

If it is a nonpartisan election, the judge must still explain his or her views on certain issues. This will again politicize the process in an ideological manner to appeal to the majority and other issues with elections mentioned above.

Finally, the general citizenry does not have the knowledge to make judgments about the qualifications of the candidates for judgeships. Assessing the education and prior experience of the judicial candidates is generally beyond the scope of most people who are not lawyers or judges and some who do not EVEN have a high school or college degree or the time and interest to become educated about these matters. Judges can be made accountable to the people in several ways not just by elections; corrupt and/or incompetent judges can be impeached and removed by a trial.

Selecting judges by the governor alone has obvious advantages and disadvantages. This method is quicker and less expensive than electing judges and, as mentioned above, Alexander Hamilton saw it as safeguarding the independence of the judiciary from the ignorant masses. There are also fundamental problems with the appointment method as well. Appointed judges are not necessarily the most qualified and there is the danger of the corrupting influences of money, cronyism, and inappropriate political influences. This method of selection is most prone

¹² Mill, John Stuart, *On Liberty*. London: John W. Parker & Son, 1960.

¹³ Brace, Paul, “State Public Opinion, The Death Penalty, and the Practice of Electing Judges,” *American Journal of Political Science*, Vol. 52, No. 2, April 2008, pp. 360-372.

to a violation of the rule of law due to political influence which weakens legitimacy and stability.

Obviously, selection by the legislature alone has the same problem mentioned above, i.e., politicization, lack of a merit based approach, cronyism, bribery, etc.

The Missouri Plan was developed as a merit selection process to respond to the weaknesses of the election and the appointment models of selection. This plan was created in 1940 and about a dozen states use it currently. It involves the bar association selecting the selection committee which consists of three lawyers, three citizens selected by the governor and the state chief justice as chair of the committee. The committee considers various candidates and decided on three it considers best and submits their name to the governor who selects one. The judge then faces a retention election in the first state general election.

Former Justice Sandra D. O'Connor has proposed a similar method.¹⁴ She has been outspoken against the election of state judges and supports a nonpartisan nomination commission which interviews and selects top candidates whose CV is posted online. This commission would hold open meetings and would include not just lawyers but past judges, experts on the law and the like. The commission would select three names as qualified and send them to the governor who would select one as judge for a limited number of years. After the term of office is over the judge could stand for election to retain or terminate.

This method, which we can call the Missouri-O'Connor method, is clearly superior to the election and appointment methods but clearly also has serious limitations.¹⁵ The superiority lies in that it eliminates, at least for the initial appointment, the potential corrupting effect of private monetary contributions to election campaigns, but this problem could reoccur for the retention election. Merit can clearly play a large role in this selection method, but, again, not sufficiently since there are members of the committee who may not be qualified to judge the merits of candidates. The additional weaknesses of the Missouri-O'Connor plan are that there is a question of how and who selects the nominating commission and what criteria are used to choose members of the commission. The role of the governor obviously leaves additional room for the influence of politics and other extraneous factors. The retention election, again, introduces all problems associated with elections.

The fifth method for selecting judges is the fully merit based method where judges are part of the civil service system. The civil service method of selecting government officials was established in the US in the 19th century to replace the spoils system where individuals were appointed to non-elective government positions based on political allegiance, campaign contributions, and the like, not merit. In the federal government, all such persons served at the

¹⁴ O'Connor, Sandra Day, "Take Justice off the Ballot" *New York Times*, 5/22/10, "Stop Electing Judges", www.HuffingtonPost.org, 9/14/09; Michael S. Greco & Stephen J. Wermiel, "Sandra Day O'Connor," *Human Rights*, Vol. 36, Issue 1, pp. 25-6; Sandra Day O'Connor, *The Majesty of the Law*, New York: Random House, 2003.

¹⁵ Carp, Robert A., & Ronald Stidham, & Kenneth L. Manning, *Judicial Process in America*, 7e, Washington. DC: Congressional Quarterly Press, 2007, pp. 99-108.

pleasure of the president and could be fired for any reason. When a new administration came into power, many of these persons were terminated and replaced by those loyal to the new administration.

The civil service system must be extended to the judiciary if the values of the rule of law, stability, legitimacy and meritocracy are to be more fully part of the process of selecting judges. Individuals who graduate from professional institutes or universities with degrees in law and judging would be appointed as judges based on their professional competence, objective examinations and experience, not by elections, political appointments or quasi-political appointments by committees. This method exists in many parts of Europe and whereas the current American system at the state and federal levels does not have specific training for judges and some lower level courts do not even require a law degree.¹⁶

In this more meritocratic expanded civil service system, judges would be assigned to various positions based on objective merit-based criteria. These criteria, as mentioned above, are intelligence, education, knowledge, experience, and moral character. To be sure, the last category of moral character is somewhat subjective but the system proposed here would require that this criterion be based on factual grounds of legal convictions for felonies or misdemeanors and other factors based on empirical evidence, not rumor or innuendo. The appointment of judges would be based on knowledge, experience and character not political ideology, money, political party, personality, looks, height, skill in using TV, charisma or other irrelevant factors. In this merit system, judges would be assigned positions as judges based on standards which would enhance the values of the rule of law, stability, legitimacy and meritocracy.

The appointment in the civil service system would not be for life but for a set number of years. Tenure would be renewable and promotion achieved based on competitive examinations and overall performance evaluation. Of course, impeachment would always be an option for criminality and other valid reasons.

As Rawls states in the beginning of his *A Theory of Justice*, “Justice is the first virtue of social institutions, as truth is of the system of thought.”¹⁷ This means that the conditions which maximize truth would also apply to the maximization of justice, which is allegiance to the facts, logic and an impartiality based on the love of truth and justice.

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¹⁶ Abraham, Henry J., *The Judicial Process*, 7e, New York: Oxford UP, 1998, pp.34-5; Stanley Anderson, “Judicial Accountability: Scandinavia, California & the USA”, *The American Journal of Comparative Law*, Vol. 28, 1980, pp. 393-422; C. Neal Tate, & Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power*, New York: NYU Press, 1995, pp.289-323.

¹⁷ Rawls, *op. cit.*, p.3.

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