1937

Role of the Bar in Electing the Bench in Chicago

Ernst W. Puttkammer

THE ROLE OF THE BAR IN ELECTING THE BENCH IN CHICAGO. By EDWARD M. MARTIN. Chicago: UNIVERSITY OF CHICAGO PRESS, 1936. pp. xxi, 385. $5.00.

Probably not one of the larger urban centers in the United States has a system of judicial selection which is proving satisfactory. In all, there very likely is more or less agitation for change of some sort. It is this fact which gives general interest and importance even to a book which limits its examination rigidly to the experiences encountered in one city.

The author is a member of the committee on judicial selection both of the American Judicature Society and of the National Municipal League. He is also the Public Affairs Secretary of the very active Union League Club of Chicago. As a result of these connections he has long had an unusual opportunity to observe not only how the machinery of judicial selection was supposed to function, but also how the wheels in fact went round. While in his book he has limited himself in the title to the part played by the bar in the selective process, he has in fact—and fortunately—been forced in many instances to look more broadly at the selection process, with all of whose phases he appears equally acquainted.

To commence with a description of the contents of the book, the first third of the volume contains an historical sketch of the participation of the bar generally, and the Chicago Bar Association particularly, in the selection of judges in Cook County. The period covered runs from the first election under the present state constitution (*viz.*, 1870) to the latest election prior to that of last November. The different forms of bar participation are uncritically described, as are the results of the elections. Having thus established the factual background, the author proceeds to examine more minutely the recommendations made during this period, to determine what they were, and hence presumably their worth. This part he commences with a chapter headed, rather ambiguously, "Are the Ratings and Recommendations of the Chicago Bar Association Reliable?" In it he analyzes on what factors a recommendation should be based, whether the recommendations are based on these factors, and to what extent given factors are reflected in the recommendations. His conclusions are definitely favorable as to the discrimination and judgment shown. Next he asks, are the recommendations impartial? and in concluding that they are denies assertions that the Association is influenced by religious or racial considerations to any noticeable degree. Finally, in this evaluation of the recommendations, he deals with the extent to which the Chicago Bar Association is representative of the entire Chicago and Cook County bar, including, as it does, only thirty-six per cent of the licensed attorneys in that area.

Then follows an exhaustive treatment of the question, to what extent the approval or disapproval of the bar association has in fact influenced voters and elections. Obviously merely counting the number of bar recommendations which have prevailed and comparing it with the number where an unrecommended result was reached will set up no valid measure. Thus in the November 1936 elections, with the solid Democratic victory, the fact that certain indorsed candidates, who happened also to be Democrats, were elected cannot be set down as in any sense a bar victory. The author, therefore, has some difficulty in setting up an objective measure of the influence actually wielded, in the sense of affecting voters one way or the other. Nowhere is his ingeniousness more evident than at this point, still further complicated as it is by the high degree of variation of that influence in different racial and national groups in the community.

A very interesting part of the book is that which immediately follows, and in which he examines why that influence has not reached a greater height and is so very far from paramount. The adverse factors all bear familiar names, the long ballot, a hostile or partial press, indifferent or hostile voters, and partisan politics. Each, however, and especially the last, is treated in a fresh manner and with many pointed local illustrations. Thus, as an example of the frequently novel viewpoints, he concludes that separate judicial elections, at a time when none but a few judges is to be voted on, may well heighten the power of the partisan organizations, rather than diminish it, inasmuch as the controlled voters belonging to these groups are certain to vote diligently while the independent voters will almost surely form a large part of the indifferent ones who stay away—the smaller the total vote, the more important, proportionately, is the definite partisan backlog.

The result of all this is a pessimistic attitude as to what the bar recommendations have accomplished and what they can in the future accomplish. Events since the appearance of the book have only confirmed this attitude. The autumn election marked the defeat of certain Republican candidates who were regarded as "fit" by about ninety per cent of the bar voting in the primary, while it also saw the election of a Democrat who was voted "fit" by only a hundred-odd of the 1800 who participated. The protest resignation from membership by a group of judges, because the Chicago Bar Association adversely criticized the fact that they were actively participating in partisan political meetings not involving their own candidacies, is a further indication of its present lack of power to enforce the standards of fitness and conduct that it has set up.

What, then, shall be done about it? This forms the last part of the book—the part that is particularly of national rather than merely local importance. The author's carefully developed premise is that we are in fact now operating under an appointive system, the power of appointment being lodged in the party bosses. The real issue, to use his own words, "is between the different methods of appointment." After a survey of the devices proposed for other jurisdictions, he suggests that popular election be confined to the choice of the chief justice of each court,[1] believing that so much restricted a call on the voters would awaken them to interest and a sense of responsibility. His term would be fixed at six years. He would be given the power to appoint the associate judges, each of whom would be required to run every six years on the question of whether he should continue in office. If approved, he would continue another six years. If disapproved, the vacancy would be filled by appointment as before.[2] Appointment, however, would be limited to those on a list of eligibles to be drawn up by a commission on judicial nominees. This commission in turn would be selected by the vote of the local bar. In the main these suggestions are wholly orthodox. But it is more than doubtful whether in the forseeable future any change would have the slightest chance of adoption, which placed even this much authority in the hands of the local bar. The author, in his chapters on the influence of the bar recommendations, has shown such a degree of hostility as, it is submitted, himself to have demonstrated the factual impossibility of getting his own plan set up. In view of this it is interesting to

[1] He also advocates, incidentally, a reduction in the number of separate courts functioning in Cook County.

[2] The author provides also for earlier retirement of unfit judges, as, for example, by removal by the state supreme court, after charges and hearing. Limitations of space prevent further details here.

contrast with Mr. Martin's plan, the plan just adopted by the Board of Managers of the Chicago Bar Association itself,[3] which will have been made public by the time this review appears. This plan would put the entire appointive power in the hands of the governor of the state with judges running against their record every ten years, and the appointments to be based on an eligible list supplied by a commission named by the judges of the appellate court. By this means the signal difficulty in the Martin plan is removed. It is doubtful whether as much can be said for the other major deviation from his plan, *viz.*, substituting the governor for an elected chief justice. It would put the authority into the hands of the head of another branch of the government, neither directly nor indirectly responsible for the functioning of the court. And by taking this step of uncertain wisdom it would only make the adoption of the plan all the more doubtful, by reason of its total suppression of all popular voice in the selection of the judicial personnel. More significant than these differences, however, is the fact that both plans for the correction of an undesirable state of affairs advance so many similar or identical changes. As any sort of a change can only be reached by a constitutional amendment,[3] and as the amending process is locally so difficult that not a single amendment has succeeded of adoption since the adoption of the present constitution, success in reform is doubtful at the best. Without unity of action it will be about hopeless.

E. W. PUTTKAMMER*

THE KING AND HIS DOMINION GOVERNORS: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions. By THE HONOURABLE MR. JUSTICE HERBERT VERE EVATT. New York: OXFORD UNIVERSITY PRESS, 1936. pp. xvi, 324. $5.00.

The recent constitutional crisis in England drew the attention of the world to the British Crown. The abdication of Edward VIII made it clear that the King must play the part assigned to him as a symbol of unity in the British Commonwealth and as the upholder of a simple domestic life. The constitutional and democratic aspect of the monarchy was strongly emphasised: the King's will had to give way before the will of his ministers, even on so personal a matter as marriage. All of this served to maintain the impression that the Crown is a purely negative quantity in the British system of government, devoid of any direct political power and merely giving effect to the Cabinet's decisions. Nothing, of course, could be farther from the truth.

Mr. Justice Evatt's book is devoted to showing how wide a degree of discretion the Crown not only possesses but may exercise in relation to such vital matters as the dissolution of Parliament, the dismissal of ministries, the appointment of Peers to the House of Lords, and even the refusal of assent to legislation. British democracy depends upon a fair and wise use of these powers, yet the law of the constitution leaves them open to abuse by an arbitrary governor or monarch. While there is a strong tradition that the king should keep out of politics, this is a mere convention of no legal force. In normal times under a two-party system, it is true, the rule is always now followed that the Crown, or its representative in the Dominions,

---

[3] This is not true of the Chicago Municipal Court, which is a legislative creation.

* University of Chicago.