COURTS

A COMPARATIVE AND POLITICAL ANALYSIS

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To J. A. C. Grant, Foster Sherwood, and Currin Shields
in whose undergraduate courses this book began.

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COURTS

PREFACE

This book has two purposes and so ought to have two prefaces. The first is very short and is addressed to those who teach courses in judicial process, comparative legal systems, and the like. This book has been written with an eye to such courses. It does not presuppose any previous knowledge of law or of the legal systems it examines. It is written in as direct a style as I can manage. Chapter 1 presents an overview of the conflict resolution, social control, and lawmaking activities of courts and of the relations between trial and appellate courts both as fact and law finders. The remaining chapters describe the common law, civil law, imperial Chinese, and Islamic legal traditions. The general propositions of chapter 1 are as applicable to American courts as to those of other nations and the chapter concludes with a brief survey of communist courts. So this book may be supplemented conveniently with additional materials on American or communist courts or both.

The second preface is more complex. I think it is fair to say that comparative law has been a somewhat disappointing field. For the most part it has consisted of showing that a certain procedural or substantive law of one country is similar to or different from that of another. Having made the showing, no one knows quite what to do next. Or, alternatively, comparison consists of presenting descriptions of a number of legal systems side by side, again with no particular end in view. The law reformer can sometimes use the knowledge built up in these ways to suggest the transplantation of a foreign legal device that seems to work better than a native one. His opponents will then use their comparative sophistication to show that most devices are too intimately connected with their own legal systems to travel well.

This book takes the hardly novel position that the comparative method is a substitute for the experimental method, not a terribly satisfactory substitute but one pressed upon us by the impossibility of putting laws and nations in test tubes and bubble chambers. The rationale of the book is simple. A number of propositions about courts are offered. My own position toward each of the propositions is then tested against the "worst case," that is against that body of known legal phenomena most likely to falsify my position. The accumulated scholarship of comparative law is used as a catalogue for searching out these worst cases. The purpose is to move toward a more general theory of the nature of judicial institutions.

Accordingly, chapter 1 first sets out the four propositions that define the conventional prototype of courts: independence, adversariness, decision according to preexisting rules and "winner-take-all" decisions. The conventional prototype can be most easily challenged by emphasizing the social control and lawmaking facets of the judicial function. The challenge is easiest in those realms partly because the prototype was really developed by focusing on a different function of courts, that of conflict resolution, and partly because assertions that courts are primarily engaged in social control and lawmaking are, and are intended to be, flat contradictions of elements of the conventional prototype. Precisely because I believe that the four prototypic propositions are incorrect, or at least incomplete and misleading, chapter 1 is devoted largely to the realm of conflict resolution, in which the best case can be made for them. It seeks to demonstrate that even in this realm courts are much less independent and adversarial than the prototype suggests and much less prone to follow preexisting legal rules or arrive at winner-take-all decisions. The main theme of this portion of the chapter is that courts seek to elicit the consent of the parties to their judgments by introducing important elements of mediation and compromise rather than simply imposing legally authoritative decisions in which the party whom they declare to be legally in the right wins and the loser is compelled to obey the court's command. More generally I argue that mediation and litigation are invariably intimately interconnected and interactive rather than distinct alternatives for conflict resolution.

Chapter 1 then does briefly survey social control and lawmaking by courts. In the process emphasis is placed upon the role of courts within political regimes. More particularly, the proposition is put forward that appeal, which is usually viewed as a process for the vindication of individual legal rights, is more properly seen as a device by which central political regimes consolidate their control over the countryside.

In each of the succeeding chapters a particular legal system is chosen for analysis because it is most likely to contradict a particular position I have adopted in chapter 1. Chapter 2 places my challenge to the judicial independence theme of the conventional prototype of courts in the context of English judicial experience. It does so because the conventional wisdom proclaims that it is in England that judicial independence has most clearly developed and flourished. Chapter 3 places the conventional prototype's insistence that judges decided by the application of preexisting legal rules in the context that appears to be most favorable to it and least favorable to my questioning of it. That context is the civil law system in which judges are supposed to be strictly bound by codes.

Because I have asserted in chapter 1 that mediation and litigation invariably intermingle rather than maintain themselves as distinct

alternatives, chapter 4 deals with the traditional Chinese legal system, which is often presented as having chosen the mediation and rejected the litigation alternative. And given that I have argued in chapter 1 that appeal is all but universal because it serves the purposes of hierarchical regimes, chapter 5 is a study of the one major legal system that is reputed not to have appeal at all, that of traditional Islam.

Both prefaces may now join hands in the thanksgiving ritual. Portions of the materials in this book have appeared previously in the *North Carolina Law Review* and the *Handbook of Political Science* published by the Addison Wesley Publishing Co. and appear here by their kind permission. Indeed Fred Greenstein, who together with Nelson Polsby edited the *Handbook,* is responsible for having goaded me into producing what is now chapter 1.

Most of my writing has flowed pretty directly out of my experiences as a student and a teacher so that I confess to being a bit puzzled by the research versus teaching bout featured in the academic ring. I owe a great deal to my undergraduate political science department at U.C.L.A., to three of whose members this book is dedicated. One of my former colleagues in the School of Social Sciences at U.C. Irvine says in a preface that there must be something special about a school and a dean, Jim March, who will buy a grand piano for a sociology lab. My own improvisations at Irvine were of a different sort but equally tolerated. And my continuing thoughts on the subject of this book are encouraged by my colleagues in the Law School at Berkeley and the Political Science Department at U.C. San Diego, whose joint tolerance allows me to temper the rigors of Berkeley law with occasional immersions in the warmth of San Diego political science.

Barbara Shapiro has made some contributions to this book, not all properly credited in the footnotes. Our daughter Eve, however, is not a fan of history and social studies.

CONTENTS

1 THE PROTOTYPE OF COURTS

Students of courts have generally employed an ideal type, or really a prototype, of courts involving (1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong. The growth of political jurisprudence[1] has been characterized largely by the discovery and emphasis of deviations from the prototype found in the behavior of particular courts, showing how uncourtlike courts are or how much they are like other political actors. While some political scientists and many lawyers have continued to protest against this approach, they have done so largely by reasserting the prototype.[2] Such a tactic is unconvincing because, if we examine what we generally call courts across the full range of contemporary and historical societies, the prototype fits almost none of them. Defense of the prototype thus seems fruitless. A study of courts that is essentially the measurement of deviance from a type that is rarely approximated in the real world would appear to be equally fruitless.

The Logic of the Triad in Conflict Resolution

Perhaps it would be wise to begin over, employing a root concept of "courtness" but more freely accepting the vast variety of actual social institutions and behaviors loosely related to that concept without worrying about where "true courtness" ends and something else begins. For in reality there are few if any societies in which courts are so clearly delineated as to create absolute boundaries between them and other aspects of the political system.

The root concept employed here is a simple one of conflict structured in triads.[3] Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.

The triad, however, involves a basic instability, paradox, or dialectic that accounts for a large proportion of the scholarly quarrels over the nature of courts and the political difficulties that courts encounter in the real world. At the moment the two disputants find their third, the social logic of the court device is preeminent. A moment later, when the third decides in favor of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one. To the loser there is no social logic in two against one. There is only the brute fact of being outnumbered. A substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one.[4]

CONSENT

The most fundamental device for maintaining the triad is consent. Early Roman law procedures provide a convenient example.[5] The two parties at issue first met to decide under what norm their dispute would be settled. Unless they could agree on a norm, the dispute could not go forward in juridical channels. Having agreed on the norm, they next had to agree on a judge, a third person who would find the facts and apply the previously agreed upon norm to settle their dispute. The eventual loser was placed in the position of having chosen both the law and the judge and thus of having consented to the judgment rather than having had it imposed on him.

The almost universal reluctance of courts to proceed in the absence of one of the two parties is less a testimony to the appeal of adversary processes than it is a remnant of this emphasis on consent, of both parties themselves choosing the triad as the appropriate device for conflict resolution. In early stages of English law, courts were frequently thwarted by the absence of one of the parties, and medieval procedure is full of elaborate devices for enticing or compelling the unwilling party into court rather than proceeding without him.[6] Modern British and American practice still prefers extended delay to the absence of one of the parties, and in many tribal societies the anthropologist encounters the same reluctance to proceed without all three members of the triad and comparable devices to cajole or coerce attendance.[7]

All of this can, of course, be put in the form of the classic political question: Why should I obey? The loser is told that he should obey the third man because he has consented in advance to obey. He has chosen the norm of decision. He has chosen the decider. He has thus chosen to obey the decision.

THE MEDIATING CONTINUUM

Nearly every triadic conflict resolver adds another device to consent in order to avoid the breakdown into two against one. This device is the

avoidance of the dichotomous, imposed solution. In examining triadic conflict resolution as a universal phenomenon, we discover that the judge of European or Anglo-American courts, determining that the legal right lies with one and against the other of the parties, is not an appropriate central type against which deviance can be conveniently measured. Instead he lies at one end of a continuum. The continuum runs: go-between, mediator, arbitrator, judge. And placement on the continuum is determined by the intersection of the devices of consent and nondichotomous, or mediate, solution.

The go-between is encountered in many forms. In tribal or village societies he may be any person, fortuitously present and not connected with either of the households, villages, or clans in a dispute, who shuttles back and forth between them as a vehicle of negotiation.[8] He provides communication without the dangerous physical contact between the disputants that would otherwise be required. In more modern guise we find him as the sovereign offering "good offices" in an international dispute or the real estate broker shuttling between seller and prospective buyer and carefully keeping them apart at the negotiation stage. The go-between seems to operate in a pure consent, pure mediate-solution situation. He cannot function at all unless both parties consent to his offices and the solution reached is the product of free negotiation between the parties and is mutually satisfactory. And in theory, all resolutions offered and accepted are purely those of the parties themselves.

In reality, however, the go-between is not a mindless communicator. He exerts influence by "rephrasing" the messages he delivers. He may manage to slip in a fair number of proposals of his own. And by his characterization of the flexibility or inflexibility of each side to the other, he may strengthen or weaken the bargaining position of one or the other.

The mediator is somewhat more open in his participation in the triad. He can operate only with the consent of both parties. He may not impose solutions. But he is employed both as a buffer between the parties and as an inventor of mediate solutions. By dealing with successive proposals and counterproposals, he may actively and openly assist in constructing a solution meeting the interests of both parties.[9]

The distinction between mediation and arbitration in any particular society is a matter of legal nuance and often the subject of bitter controversy, particularly in such areas as labor arbitration. Often too the distinction is made between voluntary and binding arbitration. For our purposes we may treat arbitration generically and speak of it as involving less consent by the parties and less mediate solutions than mediation. Persons are not normally compelled to consent to arbitration. In this sense the arbitrator, like the mediator and the go-between, cannot function without the consent of both parties. In modern societies, however, arbitration clauses frequently appear in contracts so that the consent is somewhat at-

tenuated. It is not consent of the moment to the arbitration of the moment but advance consent to future arbitration in general. Yet even such contracts almost invariably specify that the two parties must in each instance agree on who the arbitrator shall be.

The key distinction between the mediator and arbitrator, however, is that the arbitrator is expected to fashion his own resolution to the conflict rather than simply assisting the parties in shaping one of their own. And his solutions are not purely mediated in a number of senses. First, arbitrators, unlike mediators and go-betweens, usually work with a relatively fixed set of legal norms, analogous to that of the early Roman judge. The parties have consented to, or themselves constructed in advance, the norms to which they will now be subject. If in a given dispute one party has violated these norms more than the other, it is not expected that the arbitrator arrive at a compromise solution purely on the basis of the interests of the parties and quite apart from their obedience to the preexisting norms. Moreover, arbitration is frequently "binding" either by statute or under the terms of the contract. The arbitrator has the legal authority to impose his solution on both parties even if one or both do not voluntarily consent to the solution."[10]

Nevertheless, societies tend to turn to arbitration in situations in which, although overarching legal norms may exist, the most salient concerns are the interests of the two parties, neither of which is assigned greater legitimacy than the other. Mediate solutions acceptable to both parties are the goal, and, as a practical matter, few arbitrators would find much employment if they did not develop a record of providing such solutions.[11] Of course this is all the more true in "nonbinding" arbitration, in which the parties need not accept the arbitrator's resolution. In American labor law, for instance, a distinction is often made between "rights" arbitration and "interest" arbitration. In most labor-management contracts there are some provisions that set out with a relatively high degree of specificity the rights and duties of the two parties in relation to one another. When a dispute under one of these provisions is submitted to arbitration, both parties expect the arbitrator to decide who was legally right rather than provide a mediate solution. The same union and company may submit other kinds of disputes not covered by such precise contract terms to the same arbitrator and expect mediate solutions.

When arbitration is in no sense binding, it merges with mediation. When arbitration is binding, both in the sense that the two parties must go to arbitration on the demand of either and must then abide by the arbitrator's holdings, it tends to merge into judicial judgment. This is particularly true in instances such as "rights arbitration," when the arbitrator is expected to reach a legally correct rather than a mediate solution even though the "law" is that created by a mutually agreed contract between the

parties. When arbitration is binding and dichotomous solutions are expected, then the "arbitrator" in fact becomes a kind of private judge, that is one who judges rather than mediates but does not hold the governmental office of judge. The very fact that he does not hold such an office but is chosen by the parties, rather than imposed on them, preserves a greater element of consent that continues to distinguish him from the official judge.

Recently one of the favored tactics for relieving delay in the civil courts has been the adoption of systems of compulsory arbitration in which suits involving relatively small amounts of money are assigned to "arbitrators" rather than tried before a judge. Such a system is not really one of arbitration but one of cheap judging. The arbitrator is expected to arrive at the same decision under the same law as would a judge. The parties usually do not choose the arbitrator. He uses simpler procedures and carries a lower overhead of courtroom costs than a judge and thus handles more cases at smaller cost. Such systems thus allow the appointment of a great many temporary judges by avoiding constitutional, statutory, and budgetary limitations on formal judicial appointments.[12]

THE SUBSTITUTION OF LAW AND OFFICE FOR CONSENT

In turning now to judges, we return to the problem of consent and to our Roman example. As societies become more complex, they tend to substitute law for the particular consent of the parties to a particular norm for their particular dispute. They also substitute office for their free choice of a particular third man to aid in the resolution of their dispute. The earliest Romans might seek the aid of anyone in formulating a norm. They came more and more to turn to city officials for this assistance. The Praetorian Edict, which was the closest thing to a civil code that Rome as a city attained, long took the form of a series of norms that such an official announced he would supply to contending parties at their request. It was initially not a body of preexisting law but a catalogue of "ready-made" goods that replaced the still earlier practice of "tailoring" norms for each pair of disputants. As the practice grew under which each of the new praetors reenacted the edict of his predecessors, we can literally see what begins as a system of free legal advice to mutually consenting parties becoming a set of preexisting compulsory legal rules. A parallel development can be seen in the writings of the jurisconsults, which begin as professional legal advice to the praetors and litigants and end as operative parts of the Code of Justinian.[13]

The key factor in the shift from consent to law is specificity. Ethnographic and sociological materials make clear that in only a very limited number of special situations do litigants literally make their own rule of decision free of all preexisting norms.[14] At the very minimum there is a

social sense of appropriateness or natural justice, of how we always do things or what we never do, of the sort suggested by the Tiv informant who says of what we would call a lawbreaker that he "spoils the tjar."[15] We may express this consensus in terms of custom or fundamental principles of ordered liberty or, as the Tiv does, as a psychic harmony of men and nature. It creates the constraints under which prospective litigants shape a norm for themselves. Indeed, much of judicial ritual, particularly in the holding of public trials, consists of reminding the litigants that as good men they must consent to the overarching norms of their society. Yet the more nebulous these norms, the greater the element of immediate and real consent in achieving a precise working rule for a particular case. At one extreme we find two disputing villagers working with an elder to settle the ownership of a pig according to the ways of the ancestors. If any rule of decision is actually formulated, it is likely to arise out of the adeptness of the elder in eliciting the face-to-face consent of the parties. At the other extreme we find litigants in a modern industrial state who discover at trial that their earlier behavior was governed by a detailed preexisting rule, even the existence of which was unknown to them at the time and which they consent to only in the generalized, abstract sense that all citizens agree to live under the laws of the state. The judge, then, unlike the mediator, imposes "his" rule on the parties rather than eliciting a consensual one.

Moreover, the parties may not specifically consent even to who shall impose his rule or decide under it. The most purely consensual situation is one in which the disputants choose who shall assist them in formulating a rule and who shall decide the case under it, as the Romans initially did. In most societies, however, there seem to be instances in which it pays to choose a big man to do these tasks, whether a government official like the urban praetor or, as among the Papuans, the owner of many pigs.[16] The disputants may turn to the big man because he knows more of the law and custom, because he has the economic, political, or social power to enforce his judgment, or because his success or high position is taken as a symptom of his skill and intelligence at resolving disputes. Beyond and perhaps out of this tendency to consent to judging by big men, many societies develop the office of judge so that the parties do not choose their judge. If they choose to go to court at all, they must accept the official judge. The ultimate step, of course, is in those instances in which a legal system not only imposes the law and the officer of the law but also compels one or both parties to resort to legal processes, as in a criminal trial or civil suit. The judge, then, unlike the mediator, imposes himself on the parties rather than being chosen by them.

He also may impose his resolution of their conflict. It is possible to envision a system in which the parties were compelled to accept the rule

of decision and the person of the judge but were not compelled to accept his decision. Compulsory nonbinding arbitration sometimes comes down to this. That is, the parties may be compelled by statute or a contract provision to go to arbitration if a contract provision is in dispute, but the same statute and/or contract may not compel them to accept the arbitrator's award. Under the divorce procedures of many jurisdictions, ranging from some of the American states to many Communist countries, those seeking a divorce must first submit to "marriage counseling" by persons either licensed or employed by the government. They need not accept the "advice" of the counselor they are compelled to see. But they may only proceed with the divorce after they have heard the advice and rejected it. In some societies the losing party to one litigation might refuse the decision and resort to another forum or accept banishment. Appeal and pardon processes sometimes exhibit this feature, as for instance in "de novo" appeals, in which the dissatisfied party may get an entirely new trial from a higher court.

Nevertheless, in general, judges may impose a final resolution independent of the consent of the parties. Even when the third man must gain the consent of the parties to his resolution, as for instance the mediator must, it is possible for him to propose a dichotomous solution—one in which party A wins all and B loses all. But for obvious reasons he is unlikely to do so. When the specific consent of the parties is not required, such resolutions are more feasible. The go-between has little or no enforcement power. The mediator may do somewhat better by bringing to bear general social sentiment in favor of resolution. We often distinguish the arbitrator from the mediator on the basis that the arbitrator's decisions are subsequently enforceable by court action. Judges are furthest along the spectrum toward complete enforcement, typically having means to tap the organized forces of coercion in the society to enforce their solution. Moreover, where the judge is administering a detailed body of law whose building blocks are concepts of legal right and obligation, such resolutions are at least partially dictated by the rules of decision he has imposed on the parties.

Curiously enough it is precisely the need to elicit the consent of the loser to a decisional process that has been largely imposed on him that may lead to a decision stripping him of everything. To the extent that he believes that a third person whom he has not chosen is exercising discretion in behalf of his opponent, he may deny the legitimacy of the whole judicial system. Mediate solutions that split the difference between the two parties in various ways are likely to expose judicial discretion most clearly. Thus judges may find it preferable to issue dichotomous solutions, denying their discretion by arguing that under the preexisting law one party was clearly right and the other clearly wrong. The losing party may be unhappy with the resolution,

but so long as he accepts the legitimacy of the "law," he may not perceive the judge as acting with his opponent.

The substitution of law and office for consent entails very major destablizing pressures on the triadic structure. For it was essentially his consent at every preliminary stage that enabled the losing disputant to continue seeing the triad as a triad rather than as two against one. If the loser does not specifically consent in advance to the norm, he must be convinced that the legal rule imposed on him did not favor his opponent. Thus the yearning for neutral principles of law found among contemporary lawyers.[17] And if he did not consent to the judge, he must be convinced that judicial office itself ensures that the judge is not an ally of his opponent. Thus the yearning for a professional and independent judiciary.[18]

Yet it is frequently difficult or impossible to convince the loser of these very things. First of all, many disputants are in a position to know or suspect that the law to be applied in their cases does favor their opponents. Most laws in most societies favor some classes of persons and disfavor others. Second, where the judge is a governmental or religious officer, then a third set of interests quite independent of those of the two disputants is interjected. One or both prospective litigants may perceive that the interests of the government or the church is contrary to his own. It is for these reasons that the judges and their professional defenders in most advanced societies spend such a large proportion of their dialectic and ritual talents promulgating and defending the prototype noted at the beginning of this study. Contemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic.

COURTS IN THE MEDIATORY CONTINUUM

Having said all these things, if we could now focus exclusively on judging in any further discussion of courts, the path would be fairly clear. However, if we turn to the work of those persons and institutions to which we normally award the titles judges and courts, we shall see that in reality they are simply at one end of a spectrum rather than constituting an absolutely distinct entity. Courts are clearly the least consensual and the most coercive of triadic conflict resolving institutions. The conventional prototype of courts has concentrated so heavily on the coercive aspects of courts, however, that it has tended to isolate judging unduly from other styles of conflict resolution. It is because elements of mediation and remnants of consent are integral to most court systems that the conventional prototype of courts is often misleading. Courts share with their fellow triadic conflict resolvers along the continuum the need to elicit consent. Among other things this means that mediating is not to be seen as an

antithesis to judging but rather as a component in judging. Most judicial systems retain strong elements of mediation.

In chapter 4 we shall examine one of the longest-lasting judicial systems in history, that of imperial China. It so intimately intermingled mediation with imposed, dichotomous conflict resolution that it has often been mistakenly characterized as an entirely mediatory judicial system. In the English legal system discussed in chapter 2, we shall discover that, even before the Normans conquered England, the ideal of Anglo-Saxon jurisprudence was a resolution mutually agreed by the parties under supervision of, and recorded by, a court. Dawson has pointed out that arbitration played a very large role in the development of English equity in the sixteenth and seventeenth centuries and in the judicial business of the Privy Council. In the Roman formulary procedure described earlier, it appears to have been fairly common for the praetor to serve as or suggest an arbitrator rather than a judge to the contending parties. In these instances we use the term arbitration rather than mediation because the third party is supposed to take account of the legal rights or claims of the contending parties in framing a solution for their approval.

Indeed, it would not be difficult to move about the world's legal systems endlessly multiplying the examples of the intermingling of mediation and judging. Communist legal systems might seem to have a special penchant for "comradely mediation" between fellow members of the working class, since communists define law as an instrument of class oppression. Indeed, both in the West and in China, we encounter comradely courts that seek to resolve family, neighborhood, and work place disputes without formal judicial proceedings. But we also discover that these bodies tend to mix mediation with imposed solutions backed by the coercive authority of the party and the state. Moreover, comradely courts are almost invariably embedded in a conventional court structure staffed by professional judges applying law, or sometimes party policy that is treated as an integral part of law. Most communist states now operate their economies on a system of supply contracts entered into between industrial enterprises. Contracting parties engaged in a dispute are confronted by a range of arbitration and judicial proceedings quite similar to those in noncommunist states. Indeed, more generally, mediation and arbitration in the context of the opportunity to go into court if the parties cannot come to agreement is a typical pattern encountered in both communist and capitalist states.

Mediate solutions are most feasible when the disputed matter is divisible or can be converted into something divisible. At first glance it would seem to be injury or trespass that would be least amenable to mediation and most subject to the rule of "an eye for an eye." The common law system has often been taken as the model of dichotomous resolution, since it