

THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES

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THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES

Also by Jerold L. Waltman

COPYING OTHER NATIONS' POLICIES

DILEMMAS OF CHANGE IN BRITISH POLITICS

(editor with Donley T. Studlar)

THE POLITICAL ORIGINS OF THE US INCOME TAX

Also by Kenneth M. Holland

WRITERS' GUIDE: POLITICAL SCIENCE

Preface

This book grew out of a conversation the editors once had lamenting the lack of materials for their courses in comparative judicial politics. Even basic information about the court systems of the major democracies has been very difficult to find in English. What we have sought to provide, therefore, is an accessible guide for students and teachers of comparative judiciaries.

We have done more than compile a catalogue, however. Each chapter not only provides information but also addresses the important question of the courts' political roles and how these may be changing. The authors pose other specific queries, such as: How do courts allocate values? What are their links with other political institutions? Who are the judges and what difference does their social background make?

The governments of modern democracies are under stress from several directions, and the courts' political roles may be expected to undergo a metamorphosis as the political system both reacts to and generates change. These stresses have, in fact, made the question of whether democracy will continue, at least in the form we know it, within the bounds of respectable political discourse. Economic uncertainty, increasing crime and wanton terrorism combine to interrupt the routines of peaceful and stable democratic government. If democracy's fate is not certain, the question of the evolving judicial role is urgent indeed.

Courts, logically and historically, have been undemocratic institutions. An increased role for the courts, then, could render a political order less democratic. At the same time, courts have often maintained individual rights in the face of majoritarian pressure, thereby helping to keep intact the substratum upon which democracy rests. Citizens of the modern state, especially given its size, may need judicial protection for their liberty as much as they need to secure participation in the governmental process. Thus, there is a tension inherent in any expanded or altered role for the courts. The result could serve either to enhance or undermine democracy.

To be sure, the context of judicial change varies markedly from country to country. A fascist heritage, especially where the courts co-operated with the fascist regime, engenders a different political climate from that of the more long-standing democracies. The legacy

of anti-unionism in Britain and the sovereignty of Parliament, as further examples, contrast sharply with conditions in Sweden. Yet, in spite of these and other examples, there are common threads of change and several of them are developed in the concluding chapter.

We would like to thank Mr T. M. Farmiloe of The Macmillan Press for both his initial enthusiasm concerning the project and the patience he showed during its development. Our thanks are also due the contributors. They laboured under our deadlines and acceded gracefully to our requests for alterations, some of which must have seemed unreasonable.

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*To James B. Christoph and
the memory of Herbert J. Storing*

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1 Introduction

Jerold L. Waltman

No less than their pre-industrial counterparts, modern democracies find courts indispensable political institutions. At a minimum, those accused of crime must be adjudged guilty or innocent and a legal forum has to be provided for settling the multitude of disputes that emanate from an advanced industrial society. Often, of course, courts are also connected to channels that lead more directly to the seats of political influence.

Courts remain, however, both suspect and little understood. The suspicion flows in the first place from the difficulty in reconciling democracy with the operations of judicial institutions. Law cannot be both democratic and untainted by partisan politics. Every attempt to democratise the courts therefore opens them to the seamier side of politics and soon brings law into disrepute. On the other hand, to the extent that courts are insulated from democratic accountability, the state is less than fully democratic by definition. And the greater the role of courts in the political system, the thornier this dilemma becomes.

The suspicion is exacerbated by the courts' links, where applicable, with pre-democratic monarchical and aristocratic political orders. They are the only survivors of the autocratic polity still to exercise real power. In Germany, Italy, and Japan the politicisation of the courts under fascism has left another bitter legacy. How to protect judges from another such episode while not giving them too much power, sometimes in fact to rely on the very laws and traditions of that era, is a vexing question. Furthermore, in some countries the courts are still tinged with anti-progressive stances judges took in the late nineteenth century and during much of the twentieth century.

The lack of understanding derives in part from the fact that courts tend to play such different roles in each political system. In part, too, modern research has been stifled by the fall of public law from its once central place in political science and the concomitant emphasis on parties, elections, and the like, and more recently on economic policy. Moreover, the immense role played by courts in the United States has inhibited political scientists there from seeing the important functions judicial institutions perform in other polities, diminished though they may be by United States standards.

The vitality of the democratic state is a concern of democratic theorists everywhere. Buffeted by international economic upheavals and changing socioeconomic structures, *immobilism* seems an apt description of political systems some distance from the Fourth Republic in time and space. Whether created by these events or whether flowing from other sources, there has been a seeming erosion of the legitimacy of the state. While it is not yet deep enough to label a 'crisis' of political authority, the sense of unease is widespread.

The legitimacy of the state cannot be disconnected from law, for law is what connects people to government both substantively and symbolically. It provides a frame of reference for the conduct of ordinary citizens as well as linking the state with a moral order. Consequently, the courts will be one of the first institutions to suffer from a decline of legitimacy. At the same time, the courts' activities will also help arrest or push forward an incipient decline in legitimacy.

Our authors were asked to add the theme of the courts changing role in each country's democracy to their descriptive material. We believe the ensuing chapters will demonstrate that important changes are occurring in most of the countries analysed here. Even though it is difficult to discern exactly what commonalities exist, an attempt is made in the final chapter to extract a few common threads. What does seem evident is that debates are taking place in several nations about the structural interrelationships among the major political institutions, including the role accorded the courts.

As Western societies move toward the twenty-first century, such a political evolution is not unexpected. The institutional configuration of the post-war era could not be expected to remain static. New issues were bound to generate demands for new decision making structures. To take two examples, an amorphous set of concerns labelled 'quality of life' and a resurgence of questions about individual rights have forced their way on to the political agenda in several nations. Nowhere has the response of executive and legislative institutions been entirely satisfactory, and courts have been pulled into these areas. Indeed, these two issues illustrate two of the forces shaping the agenda of contemporary politics. One is the shift to a post-industrial economy, bringing with it an altered social and economic structure, the other a resurgence of the fundamental issue of how the individual relates to the polity.

Whatever the political future holds for the courts, though, they are performing important functions in contemporary politics and worthy of sustained analysis. We asked the authors to work from a common

general outline, although each was free to organise his material as he believed appropriate. It consists of six dimensions: legal culture, the structure of the courts, judicial personnel, the scope of authority, decision making, and links with other political institutions.

Legal culture can be defined as one scholar defined 'legal tradition', as 'a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected, and taught'.¹

A distinction should probably be drawn between mass and elite legal cultures. At the mass level, the legal culture interacts with the general political culture, usually in a supportive way. Of major importance are mass perceptions of the nature of law and the general expectations citizens have of the law and legal actors.

Moving to the general political elite, it is important to know what role is ascribed to law. It could be that law is revered in some abstract sense, but not seen as important in the political process. Or, it could be that law is factored into certain policy areas, say family issues, but left out entirely in others, for example economic questions. Furthermore, it is relevant to ascertain how decisions of parliament and executive agencies are viewed. Are they 'law'? If so, how much respect is accorded them by virtue of that fact?

For the legal elite, the legal tradition is of paramount importance. Legal elites are socialised into certain habits and approaches, making the philosophy of law they share the starting point for any analysis of the legal system. It is also an interesting question how much this legal philosophy is linked to elite political ideologies. Does one segment of the political elite share the legal philosophy and another not? Do the legal elites keep the legal philosophy on narrow grounds to avoid running counter to the political elite? Of course, much depends on whether the legal elite is part of or isolated from the mainstream political elite.

No institution can be studied apart from its *structure*. We need to know how many courts there are and whether or not there are specialised courts. If there are specialised courts, what are they and who uses them? Most especially, are there special courts for constitutional interpretation? Analysing structure also means describing how the courts are linked together. Are there separate hierarchies? If so, do they converge at some point?

Turning to *personnel*, legal institutions are almost always composed

of people appointed by others, at least formally. Are there, though, different recruitment patterns for different levels and types of courts? What kinds of career patterns are observable? Is a judgeship a capstone for a successful legal career or is it a lifetime occupation entered soon after completing one's legal education? Is the judiciary attractive to the best of the legal profession, or is it a burial ground?

Is any special training required for judges? Are there special requirements for certain courts, either formal or informal? Are there any lay judges, say at the lowest levels, and how are they selected? In lateral entry systems, do certain occupations, for instance legal academia, provide expedited access to the bench? And, of course, what about retirement and removal?

What socioeconomic backgrounds do judges come from? Quite naturally, one would expect them to be overwhelmingly from elite backgrounds, by virtue of their educational attainments if nothing else. But how much of an elite? And are there differences according to the level of court? What is the standing of judges compared to other political elites?

Scope of authority is akin to the legal idea of 'jurisdiction', but with a political accent. On the one hand, it can be asked what is the range of judicial authority? Are courts confined to narrow areas, or do they roam over wide turf. On the other hand, what is the depth of their authority in areas they touch? Do they have a large degree of control over the areas they deal with, or do they share authority with other institutions?

Courts, more than any other public body, are for the purpose of *making decisions*.² How they go about it, though, naturally varies from country to country and from one type of court to another. At the trial court level, is there a single judge or a panel? Is the judge full time? Is there lay participation, either as jurors or quasi-judges? What is the role of counsel or advocates? In criminal cases, what is the role of the prosecuting authorities? At the appellate level, are there panels or does the whole court sit on each case? Is there a screening device for appeals? If panels are present, who selects the panels? Is there a chief judge, and if so what is his influence? What of the influence of those outside the court: legal academics, prominent counsel, the nation's chief legal officer?

What role does precedent play, formally and informally? What deference is accorded trial or intermediate appellate courts? What can be said of dissents? Are they kept private or made public? Do the judges' political perceptions, or the politically possible, colour their decisions?

Without question, the most important and continuing *link* a court can have with *other political institutions* is judicial review, the power to invalidate acts of legislators and executives.³ When courts possess this power, they will inevitably be involved in delicate political manoeuvring of the first order.

Even when there is no judicial review, courts are often structurally linked with the bureaucracy, providing a channel for communication and numerous occasions for co-operation and conflict. Even without formal links, courts often hear cases involving government officials and, of course, interpret statutes, and everywhere judicial decisions require implementation by other officials.

Courts are, in sum, part of every political system, and the politics of none can be understood without an appreciation of their role. Yet modern political science has tended to downplay or even ignore judicial institutions, and to the extent that it has done this, its analyses of politics remain incomplete. As we more fully comprehend the roles of courts in each modern democracy, we will be in a better position to construct genuine comparative theories both about courts themselves and modern political development.

NOTES

1. John H. Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969), p. 2; quoted in Henry Ehrmann, *Comparative Legal Cultures* (Englewood Cliffs, N.J.: Prentice-Hall, 1976), p. 8.
2. For a thorough analysis, see Lawrence B. Mohr, 'Organizations, Decisions, and Courts', *Law and Society Review* (Summer, 1976) pp. 621-42.
3. See the review essay by Donald Kommers, 'Comparative Judicial Review and Constitutional Politics', *World Politics*, XXVII (January, 1975), pp. 282-97.

2 The Courts in the United States

Kenneth M. Holland

INTRODUCTION

In most political communities, courts play a secondary role in governing. John Locke, who helped articulate the separation of powers concept for the modern world, designated the three powers of government as legislative, executive, and federative ('the power of war and peace, leagues and alliances').¹ He spoke of the judicial function as a part of the legislative one and did not insist upon their separation. For the most part, courts have resolved disputes in accordance with rules made by other institutions. Regarding judges during the colonial period as agents of the tyranny of the British crown, the eighteenth-century authors of the state and federal constitutions envisioned a limited role for courts in the United States. Even the embodiment of the judicial dignity of the new nation, the United States Supreme Court, failed to distinguish itself during its first fifteen years. The first Chief Justice of the United States, John Jay, relinquished his unexalted post to serve as governor of New York in 1795. His successor, Oliver Ellsworth, resigned as chief justice in 1800 to become ambassador to France.²

The Supreme Court took on new life and greater dignity with the appointment of John Marshall as the third chief justice in 1801, a position he held until his death in 1835. Marshall exerted great influence upon the political and economic development of the fledgling nation through a series of landmark judicial decisions supporting the growth of federal power and authority. The most important decision of the Marshall Court occurred in *Marbury v. Madison*,³ where the court claimed the power of judicial review, the authority to declare null and void laws repugnant to the Constitution. In 1832, Alexis de Tocqueville saw that this power had given courts in the United States a unique role: