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CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

# **Judiciaries within Europe**

**A Comparative Review**



**JOHN BELL**

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## Judiciaries within Europe

An in-depth study of the careers and roles of judges in France, Germany, Spain, Sweden and England, this book is based on original-language materials and investigations of judges and judicial institutions in each country. On the basis of these detailed case studies, the book suggests factors that shape the character of the judiciary in different countries, focusing on issues such as women's careers and the relationship between judicial careers and politics. Bell's investigations offer lessons on issues which the English judiciary is having to confront in its current period of reform.

JOHN BELL is Professor of Law at the University of Cambridge. He is an Honorary Queen's Counsel and a Fellow of the British Academy. He worked previously at the Universities of Oxford and Leeds. He has written on judicial reasoning and on various aspects of French law. He has been a visiting professor in Paris, Brussels and Le Mans and a stagiaire at the Conseil d'Etat in Paris.

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

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## Preface

My interest in judiciaries in different European countries was stimulated by a series of workshops I helped to run in the 1990s with Antoine Garapon of the Institut des Hautes Etudes de la Justice in Paris, Giuseppe di Federico, Carlo Guarnieri and Patrizia Pederzoli from the University of Bologna, and José Juan Toharia from the Autonomous University of Madrid. These workshops were attended by judges from a number of countries – up to eighteen in one instance. Listening to the similarities and differences of the experiences that they related to each other, and having to produce concluding remarks for sessions, I was made not only to identify similarities and differences, but to reflect on the reasons for them. Discussion on these issues with academic colleagues and judges helped me to formulate the basis of a research project of which this is the fruit. The project was generously supported by the British Academy, which awarded me a Readership in 1999 to 2001, together with funds to undertake research visits to France, Germany, Sweden and Spain. In each of those countries, I was given generous assistance by academic colleagues and by those with responsibilities for the judiciary, as well as by judges themselves. I was able to complement reading of key materials with interviews and observation of court processes.

I owe a debt of gratitude to a large number of people who have helped in numerous ways to provide information and ideas on this research. Among the judges and judicial officials who deserve particular mention are Tora Wikström of Domstolsverket, Michael Gressmann of the German Ministry of Justice, Jacques Debû and Irène Carbonnier. Among academic colleagues, Antoine Garapon, Luis Diez-Picazo, Kjell-Åke Modéer, Torbjörn Vallinder, Ulf Bernitz, Carlo Guarnieri and José Juan Toharia were particularly helpful in providing introductions for my visits and commenting on my ideas or even drafts. In addition, I have benefited

from comments arising from talks, particularly in the Universities of Cambridge and Nottingham, as well as in Hardwicke Buildings which has made me an honorary member of its chambers. Support and interest from colleagues in the Universities of Leeds and Cambridge, often through informal discussion, has been invaluable. It remains my fault if I have not made the most of these different supports and stimuli to research.

## Abbreviations

Abel, <i>Legal Profession</i>	R. L. Abel, <i>The Legal Profession in England and Wales</i> (London 1988)
Abel, <i>Market and State</i>	R. L. Abel, <i>English Lawyers between Market and State</i> (London 2003)
Algotsson	K.-G. Algotsson, 'Lagrådet, rättstaten och demokratin' in T. Håstad and L. Lewin, <i>Politik och Juridik. Grundlagen inför 2000-talet</i> (Uppsala 1999), 37
<i>Annuaire Statistique</i>	Ministry of Justice, <i>Annuaire Statistique de la Justice, édition 2003</i> (Paris 2003)
Auld	R. Auld, <i>Review of the Criminal Courts of England and Wales</i> (2001) ( <a href="http://www.criminal-courts-review.org.uk/ccr-oo.htm">http://www.criminal-courts-review.org.uk/ccr-oo.htm</a> )
Baas	N. J. Baas, <i>Onderzoeksnotities 2000/8: Rekrutering en (permanente) educatie van de rechtsprekende macht in vijf landen</i> (Ministry of Justice, Netherlands 2000)
Baer	A. Baer, <i>Die Unabhängigkeit der Richter in der Bundesrepublik Deutschland und in der DDR</i> (Berlin 1999)
BGB	Bürgerlichesgesetzbuch
Bodiguel	J.-L. Bodiguel, <i>Les magistrats, un corps sans âme</i> (Paris 1991)
BOE	Boletín Oficial del Estado
Brown and Bell	L. N. Brown and J. Bell, <i>French Administrative Law</i> (5th edn, Oxford 1998)
CE	Spanish Constitution



CEFJC	Centre d'études et de formation des juridictions commerciales
CGPJ	Consejo General del Poder Judicial
CGTC	Conférence Générale des Tribunaux de Commerce
CSM	Conseil Supérieur de la Magistrature
Currie	D. P. Currie, <i>The Constitution of the Federal Republic of Germany</i> (Chicago 1994)
DCA	Department of Constitutional Affairs
DDR	German Democratic Republic
Diesen	C. Diesen, <i>Lekmän som Domare</i> (Stockholm 1996)
DRiG	Deutsches Richtergesetz
DV	Domstolsverket
EDCE	Etudes et Documents du Conseil d'Etat
Ekelöf	O. Ekelöf, 'Teleological Construction of Statutes' (1958) 2 <i>Scandinavian Studies in Law</i> 75
Elites	J. J. Ruiz-Rico (ed.), <i>Monográfico dedicado al estudio sobre la 'Elite juridical española'</i> (1987) 53 <i>Documentacion Juridica</i>
ENA	Ecole Nationale d'Administration
ENM	Ecole Nationale de la Magistrature
<i>French Legal Cultures</i>	J. Bell, <i>French Legal Cultures</i> (London 2001)
Garapon and Papadopoulos	A. Garapon and I. Papadopoulos, <i>Juger en Amérique et en France</i> (Paris 2003)
GG	German Basic Law ( <i>Grundgesetz</i> )
Guarnieri and Pederzoli	C. Guarnieri and P. Pederzoli, <i>The Power of Judges. A Comparative Study of Courts and Democracy</i> (Oxford 2001)
HD	Högsta Domstol
JO	Justitieombudsman
Judicial Elite	T. Vallinder, 'Who is Included in Sweden's Judicial and Legal Elite?', unpublished conference paper, Bellagio Conference Centre, 1985
JUSTICE	JUSTICE, <i>The Judiciary in England and Wales</i> (London 1992)

Kommers	D. P. Kommers, <i>The Constitutional Jurisprudence of the Federal Republic of Germany</i> (2nd edn, Durham 1997)
LCD	Lord Chancellor's Department
<i>Les Conseils supérieurs</i>	T. Renoux, <i>Les Conseils supérieurs de la magistrature en Europe</i> (Paris 1999)
<i>Libro Blanco</i>	Consejo General del Poder Judicial, <i>Libro Blanco</i> (Madrid 1997)
Lieber and Sens	H. Lieber and U. Sens (eds.), <i>Ehrenamtliche Richter. Demokratie oder Dekoration am Richtertisch?</i> (Wiesbaden 1999)
LOPJ	Ley Organica del Poder Judicial
LR	Lagråd
Massot and Girardot	J. Massot and T. Girardot, <i>Conseil d'Etat</i> (Paris 1999)
MEDEF	Mouvement des Entreprises de France
<i>Memoria 2003</i>	CGPJ, <i>Memoria Anual 2003</i> (Madrid 2003)
<i>Memoria 2004</i>	CGPJ, <i>Memoria Anual 2004</i> (Madrid 2004)
Merino-Blanco	E. Merino-Blanco, <i>The Spanish Legal System</i> (London 1996)
Modéer, <i>Domarkulturen</i>	K. Å. Modéer, <i>Den svenska domarkulturen – europeiska och nationelle förebilder</i> (Lund 1994)
Moreno	J. D. Moreno, <i>Los Jueces de Paz</i> (Madrid 1987)
Morgan and Russell	R. Morgan and D. Russell, <i>The Judiciary in the Magistrates' Courts</i> (RDS Occasional Paper No. 66, Home Office 2000)
Peach	<i>Report on Judicial Appointments and QC Selection, Main Report</i> (London 1999)
Peczenik and Bergholz	A. Peczenik and G. Bergholz, 'Statutory Interpretation in Sweden' in D. N. McCormick and R. S. Summers (eds.), <i>Interpreting Statutes</i> (Aldershot 1991)
<i>Precedent</i>	D. N. McCormick and R. S. Summers (eds.), <i>Interpreting Precedents</i> (Aldershot 1997)
<i>Principles of French Law</i>	J. Bell, S. Boyron and S. Whittaker, <i>Principles of French Law</i> (Oxford 1998)
RF	Swedish Constitution

RR	Regeringsrätt
Ruiz Miguel and Laporta	A. Ruiz Miguel and F. J. Laporta, 'Precedent in Spain' in D. N. MacCormick and R. S. Summers (eds.), <i>Interpreting Precedents</i> (Aldershot 1997)
Schmidt	Folke Schmidt, 'Construction of Statutes' (1957) 1 <i>Scandinavian Studies in Law</i> 155
Scholz	J.-M. Scholz, <i>Gerechtigkeit verwalten. Die spanische Justiz im Übergang zur Moderne</i> (Frankfurt am Main, 2003)
Skyrme	T. Skyrme, <i>The Changing Image of the Magistracy</i> (London 1979)
Smith, Bailey and Gunn	S. H. Bailey, J. P. L. Ching, M. J. Gunn and D. C. Ormerod, <i>Smith, Bailey and Gunn on the Modern English Legal System</i> (4th edn, London 2002)
SOU 1994:99	SOU 1994:99, <i>Domaren i Sverige inför framtiden – utgångspunkter för fortsatt utredningsarbete</i>
<i>Statutes</i>	D. N. MacCormick and R. S. Summers (eds.), <i>Interpreting Statutes</i> (Aldershot 1991)
Stevens, <i>Independence</i>	R. B. Stevens, <i>The Independence of the Judiciary. The View from the Lord Chancellor's Office</i> (Oxford 1993)
Stone Sweet	A. Stone Sweet, <i>Governing with Judges</i> (Oxford 2000)
TC	Tribunal Constitucional
TFN	Tjänsteförslagsnämnden för domstolsväsendet
Toharia	J.-J. Toharia, <i>Opinión pública y justicia. La imagen de la justicia en la sociedad española</i> (CGPJ, Madrid 2001)
Troper and Grzegorzcyk	M. Troper and C. Grzegorzcyk, 'Precedent in France' in D. N. MacCormick and R. S. Summers (eds.), <i>Interpreting Precedents</i> (Aldershot 1997), ch. 4
<i>Vår författning</i>	E. Holmberg and N. Stjernquist, <i>Vår författning</i> (Stockholm 2000)

# Contents

	<i>Preface</i>	<i>page</i> ix
	<i>List of abbreviations</i>	xi
<b>1</b>	<b>Introduction</b>	<b>1</b>
	The centrality of the institutional perspective	2
	Inside the judicial community	13
	Judges and the legal community	34
	Judges and the wider community	37
	Conclusion	40
<b>2</b>	<b>The French judiciary</b>	<b>44</b>
	Organisational structures	44
	Values: conceptions of judicial independence	64
	Judicial roles	69
	Professional judges and the legal community	79
	Lay judges	89
	Judges and the wider community	94
	Conclusion: what shapes French judicial cultures?	102
<b>3</b>	<b>The German judiciary</b>	<b>108</b>
	Organisational setting and the judicial career	109
	History and values	127
	The judicial role	134
	Professional judges and the legal community	148
	Lay judges	151
	Professional judges and the wider community	158
	Conclusion: what shapes German judicial culture?	169

<b>4</b>	<b>The Spanish judiciary</b>	<b>174</b>
	Organisational setting and the judicial career	176
	History and values	197
	The judicial role	200
	Professional judges and the legal community	204
	Lay judges	207
	Professional judges and the wider community	214
	Conclusion: what shapes Spanish judicial culture?	231
<b>5</b>	<b>The Swedish judiciary</b>	<b>234</b>
	Internal organisational structures and character	235
	History and values	253
	Judicial roles	265
	Professional judges and the legal community	277
	Lay judges	282
	Judges and the wider community	289
	Conclusion: what shapes Swedish judicial culture?	294
<b>6</b>	<b>The English judiciary in comparative perspective</b>	<b>298</b>
	Introduction: can continental Europe offer any useful lessons?	298
	The judicial career	299
	The internal judicial culture	312
	Judges and the legal community	326
	Judges and the wider community	329
	Conclusion	345
<b>7</b>	<b>Factors shaping the character of the judiciary</b>	<b>350</b>
	History	351
	Task	356
	Organisational structure	359
	Values	372
	Conjunctural events	378
	External expectations	380
	Conclusion	382
	<i>Index</i>	384

# 1 Introduction

If you visit criminal courts in different Western European countries, judges look different and behave differently. In Sweden the young judge in the *tingsrätt* will be in ordinary clothes, sitting on a panel with lay assessors, probably even older than her parents, at the same level as the prosecutor, defence lawyer and the accused. It is more like a meeting than a common-law trial, with everyone joining in, often across the table, rather than speaking at the invitation of the presiding judge. In France, the three women judges, one middle-aged and two younger, will be in robes, on a dais raised above the accused and his lawyer. Alongside the judges, and at the same level, will be the prosecutor. The focus of the event is the discussion between the judges and the accused or the judges and witnesses, with occasional interventions of the defence advocate. The English, middle-aged trial judge is even more formal, wearing a wig, and raised above everyone. In front of him will be the advocates for prosecution and defence in robes, who do much of the talking, and the accused behind them, who says little. The lay jury will be in a separate box on the side. Such initial impressions offer a starting point for this book. People who are called ‘judges’ are of different ages and relate differently in the court setting to those around them. Most continental judges are women. So why the differences, and do the appearances indicate a real difference in what they are doing?

Such questions are complex, and my ability to answer them is limited by my knowledge of languages and understanding of how different legal systems work. I am content to try to take a substantial step by looking at a number of questions in relation to five judiciaries. This book aims to examine three aspects of the diversity of judiciaries in Europe. First, it aims to document and analyse four differing

continental European judicial systems, to study their structures and their specific character, and to compare these with the English judiciary as a representative of the common-law tradition. These chapters will not simply document differences in the recruitment, training and functions of judges in individual countries. They aim to identify a number of features that shape the way in which the work of a judge is performed and valued within particular legal systems. These more embedded features of the systems structure what I want to label 'a judicial culture'. Judges in different systems may perform a variety of tasks, some of which are similar between systems and some of which are specific to one system. But the 'judicial culture' focuses more on the institutional context within which judges operate and the particular way in which they perform their tasks. Each chapter will focus on a number of common themes, so that comparison between the systems can be made. Secondly, the chapters are written also to enable the reader to understand the system in its own terms and the factors that make it distinctive. Thirdly, the final chapter will draw out some overall conclusions about the factors that mould the character of judiciaries. In brief, I will argue that there is no single pattern or paradigm for the judge in Europe. Each judiciary is nested within a set of relationships to a legal community, to institutions of government and to the wider society which is unique. One can comment on whether it works effectively or as claimed within its own context, but comparative judgements of worth are more difficult.

This chapter aims to explain the approach taken to the study of the topic. My perspective will be an institutional comparison, looking at the judiciary as a social organisation within a context of expectations set by legal norms and by other institutions.

## **The centrality of the institutional perspective**

### *Perspectives on judicial activity*

There are three major perspectives from which the culture of the judiciary can be studied. The personal perspective looks at the way individuals perceive their role and career. The institutional perspective looks at the judiciary as a collective and examines the way in which the structures of the career and organisation of judges, as well as legal processes, affect the judiciary as a social institution. The external perspective looks at the judiciary from the perspective of its impact on the wider world.

## Personal

If we start with the experience of the individual *judge*, the character of the tasks assigned and the career profile will be important. The attractiveness of the career and the opportunities that it makes available form a major part of any account of the judiciary. For instance, the ability of the career to permit social advancement, to provide personal fulfilment or to enable a person to manage family commitments is of high importance to many who prefer this career over that of private practice. The experiences among different social groups of life as a judge provide diverse perspectives on a common career, and this is a major factor in any account of the judicial culture.

The literature on such personal perspectives is limited. Only where judges are personages of the state, as in Britain or Sweden, or in the French Conseil d'Etat, is there much judicial biography which can offer insights into individual motivations. On the other hand, some countries, such as France, Germany and Italy, have a substantial literature of popular books and articles written by judges for a general public in which their individual motivations and perspectives on the judicial role are articulated. In addition, there are a few opinion surveys that have looked at the views of judges.

Sapir argued that the *locus* for a social culture is always the individual. The individual does the thinking and adopts attitudes, and if there is a group perspective then it has to be located in specific individuals who can be identified.<sup>1</sup> In studying institutional judicial culture, my focus is less on differences between individual judges than on the way individuals work within organisations. Individual testimonies provide evidence for an institutional culture, provided they are replicated sufficiently. These individual stories enable us to explain how the ideas and practices within organisations are developed and perpetuated.<sup>2</sup> Attitudes that individuals share from their activity on a common task form the basis for ascribing a culture to an institution. Naturally, within an organisation, there will be diversity. Individuals have a variety of opinions, so that the ascription of a particular culture to an organisation is really to take a point along the spectrum as 'typical' or representative. One is trying to identify a recurrent or pervasive set of characteristics.<sup>3</sup>

<sup>1</sup> See E. Sapir, *The Psychology of Culture. A Course of Lectures* (reconstructed and edited by Judith T. Irvine, Berlin 1994), 141.

<sup>2</sup> S. Derné, 'Cultural Conceptions of Human Motivation' in D. Crane (ed.), *The Sociology of Culture* (Oxford 1994), 267, 282.

<sup>3</sup> G. E. R. Lloyd, *Demystifying Mentalities* (Cambridge 1990), 5; Derné, 'Cultural Conceptions', above n. 2, 284-5.



## Institutional

The institutional dimension focuses on the *judiciary* as both an organisation and a collective. Within a single legal system, there may be several collective groupings of judges, which need to be discussed separately (for example, in France civil, administrative and constitutional judges differ from commercial and labour court judges). As an institution of government, the judiciary has important relationships to political and social power. As a collective, it typically has a corporate life that relates to higher authorities (for instance the Ministry of Justice and a Judicial Council) and to society in general (such as through campaigns on particular issues and through the media). Corporatism involves both associative activity, through professional associations, and socialisation.

An institutional culture involves a set of beliefs and attitudes that give shared meaning to an activity. I would adopt the view of Garapon that one must include some unconscious features of the culture which explain why actions take place: 'To grasp a culture thus involves one in trying to formulate what is so obvious for the members that "it goes without saying". The best way of abstracting oneself from one's own culture is to look at it from the outside in confronting it with other cultures.'<sup>4</sup> The analysis of these implicit attitudes is a matter of interpretation. It has to be recognised that such analysis is a construction of the author. The reality of such an analysis depends on the degree of correspondence between it and the perception of the actors. Because these may be implicit rather than explicit, there is no suggestion that the actors would use the author's concepts to describe themselves and how they perceive what they are doing. All the same, there needs to be sufficient evidence that they could recognise themselves in the presentation without distortion.

## External

The external perspective is interested in the *social and political impact* of judicial activity, both in court and outside. Political scientists find the relationship of the judges to politics to be of major importance, even if they are also concerned about the character of the judicial career. According to Guarnieri and Pederzoli, three factors affect the character of the judiciary – the judges themselves (especially how they are recruited), the legal system (especially the ease of access to the courts)

<sup>4</sup> A. Garapon, *Bien juger: Essai sur le rituel judiciaire* (Paris 1997), 150.