

JUDICIARY

Ivan Hare

Centre for Public Law, University of Cambridge, UK / Trinity College, Cambridge UK.

Keywords: Civil law, Common law, Judicial discretion, Judicial independence, Judicial review, Judicial supremacy, National and international courts, Precedent, Separation of powers, Trial and appellate courts.

Contents

1. Definition and Variations
 - 1.1 Definition
 - 1.2 The Structure and Variety of National Courts
 - 1.3 International and Hybrid Courts
 - 1.4 The Examples Chosen
 2. The History of the Judiciary and its Justification in Principle
 3. The Separation of Powers
 4. Protections for Judicial Independence
 - 4.1 Judicial Independence
 - 4.2 Judicial Appointments
 - 4.3 Judicial Tenure
 - 4.4 Judicial Neutrality
 - 4.5 Other Legal Protections
 - 4.6 Protecting the Judicial Function
 5. The Limits of the Judicial Function
 - 5.1 The Limits of the Judicial Function
 - 5.2 The Doctrine of Precedent
 - 5.3 Procedural Limitations
 - 5.4 Judicial Dependence on the Executive
 - 5.5 Judicial Accountability
 6. The Reality of Judicial Power
 - 6.1 The Reality of Judicial Power
 - 6.2 Judicial Discretion
 - 6.3 Judicial Law-Making
 - 6.4 The Other Limitations on Judicial Power
 - 6.5 Judicial Supremacy
 - 6.6 The Philosophy of Judicial Power
 7. Conclusion
- Acknowledgements
Glossary
Bibliography
Biographical Sketch

Summary

The purpose of this article is to examine the characteristics that are thought to distinguish the judiciary from the other organs of government. There is always a risk in

a piece of this length that, in drawing examples from a broad range of national jurisdictions and international legal bodies, important variations and subtleties will be lost. However, this article argues that it is possible to generalize about the judiciary on the basis of certain common functions that emerge across a range of systems. These characteristics are then used to explain the traditional perception of the judicial role within the division between legislative, executive, and judicial powers. Many of the arguments used to locate the judiciary in a subservient role within this division are explored next and found to be undermined by counter-examples. The article concludes with an attempt to predict the major influences that are likely to modify the functions of the judiciary and the manner in which these functions are perceived in the future.

1. Definition and Variations

1.1. Definition

The Judiciary is the collective term for those employees or appointees of the state or the international community who staff the public courts and resolve issues of law and fact arising in the course of litigation between parties before them. This definition does not include those decision-makers who may be nominated privately to arbitrate on a dispute between parties even though this function may also involve the resolution of legal and factual issues. Likewise, it does not include those lay persons who, through participation in, for example, the Anglo-American jury system, or as part-time magistrates or justices of the peace, or as elders in tribal forms of dispute-resolution, may discharge important functions in the public administration of justice but are not professionally involved in it.

1.2. The Structure and Variety of National Courts

Something must be said about the type of courts in which members of the judiciary sit. The national judiciary is divided between criminal and civil courts. Criminal proceedings are generally brought in the name of the state against an individual, whereas in civil cases both the parties are likely to be private individuals or corporate entities. This classification also has an important effect on the available remedies. In criminal cases, punishments range from fines and forms of community service to long terms of imprisonment or even death. In civil cases, the remedies are usually compensatory rather than punitive but include, in addition to damages, injunctive orders to restrain the commission of forms of civil wrong and mandatory orders to compel defendants to fulfill their legal obligations. A further distinction of almost universal prevalence is that between courts at different levels in the judicial hierarchy and, principally, between trial and appellate courts. Trial courts, which are also known as courts of first instance, hear the initial case between the parties and arrive at a conclusion binding on the parties unless at least one side enters an appeal. Appellate courts vary in their procedure from engaging in a full re-trial of the issue, including re-hearing all the witnesses, to a purely written review of the findings of the court of first instance.

The extent to which it is possible to make further generalizations on a global scale about the judiciary is limited by a host of historical, political and social differences between the legal systems discussed below. Some important distinctions must be drawn at the

outset. First, even within western states there is a crucial dichotomy between those countries which base their legal systems on the civil law (most continental European nations, now followed in Latin America and parts of Africa and Asia) and those based on the common law (United Kingdom and those systems based on the English legal system including India, the United States of America, Canada, Australia, New Zealand, and parts of the Caribbean and Africa). Civil law systems tend to be rooted firmly in the tradition of Roman law; whereas the common law has developed more incrementally as principle was distilled from the experience of accumulated judicial decisions. The court procedures followed in civil and common-law systems are also markedly different. In civil law courts, the procedure is categorized as inquisitorial and the judge may play an active role in, for example, the cross-examination of witnesses. In the common law world, the judicial function is more passive and the parties are expected to produce all evidence relevant to the resolution of their dispute. This system is classified as adversarial.

Second, some national courts have the power to review the legality of the actions of all the other branches of government. In many countries, this may involve the court in setting aside even the acts of the representatives of the people gathered in their parliament or congress for non-compliance with a form of higher law such as the constitution (see *Constitutional Government*). This is more likely to be the case if the country has a federal structure as the courts in federal systems habitually have jurisdiction to decide disputes over the legislative competence of national and local government (see *Federal System*). Some courts derive this power from the express terms of the constitution itself; others have assumed the power themselves as a matter of constitutional interpretation (as was done most famously by the US Supreme Court in *Marbury v. Madison*, 5 US 137 (1803)). In some countries, the final word on the constitution is reserved to a particular body such as the Federal Constitutional Court (*Bundesverfassungsgericht*) in Germany; in others, constitutional review is diverse and may be exercised by courts at any level in the judicial hierarchy. In most countries judicial review of legislation occurs after the act has been passed, but in France review by the Constitutional Council (*Conseil Constitutionnel*) may only take place *before* the act has been adopted by the legislature. Courts in some parts of the world, such as the United Kingdom, have no domestic power to question an Act of Parliament and judicial review is there confined to whether members of the executive have correctly interpreted and implemented the intentions of the sovereign legislature (see *Legislature*).

The law applied by national courts derives mostly from the legislature, but a substantial quantity is found, especially in common law systems, in previous judicial decisions which form a body of case-law known as the doctrine or jurisprudence of the courts. A further source of law may be religious. For example, courts in parts of the Muslim world may be required to apply Sharia law alongside, or in preference to, secular law (see *Religion and Politics*). This provides a further contrast with many western legal systems in which the courts may superintend the religious neutrality of the state. The existence of the courts' jurisprudence means that the judiciary does not always have to pursue its core function of dispute-resolution actively. Like explicit legislative texts, the decisions of the courts in previous cases provide an adequate guide in the vast majority of situations to the manner in which a court would be likely to decide a given point. Hence, in almost all criminal cases, the defendant will confess his or her guilt and,

assuming the confession has been fairly obtained, the only issue then becomes the appropriate punishment. Similarly, in most civil disputes, the existing law provides the framework within which the parties negotiate a settlement without recourse to the expensive and time-consuming process of litigation.

1.3. International and Hybrid Courts

On the international plane, there is similar diversity. Some international courts and tribunals (such as the International Court of Justice-ICJ) are permanent; others are *ad hoc* bodies that are only convened when a case is referred to them. Some international bodies have global jurisdiction whereas others (such as the European Court of Justice-ECJ) have only regional competence. A further distinction is that some international bodies (like the ICJ) require the consent of the parties before they can address a particular question, whereas others possess compulsory jurisdiction over certain disputes (such as the International Tribunal for the Law of the Sea). Some bodies may receive complaints only from states (ICJ). Others, while having the jurisdiction to receive petitions from individuals, only have power to issue non-binding decisions (the Human Rights Committee). The law applied by most international courts does not derive from any one source as there is no international legislature. Instead, it emerges from a mixture of treaties ratified by sovereign states, peremptory norms (known as *jus cogens*), customary international law derived from state practice, judicial decisions, and the opinion of distinguished jurists.

Certain other bodies exercise a hybrid jurisdiction that mixes elements of domestic and international practice. The principal example of this phenomenon is the Privy Council, which sits in London and is staffed almost exclusively by judicial members of the House of Lords. The Privy Council hears appeals from domestic professional bodies, such as the General Medical Council, but is also the final court of appeal for some Commonwealth countries and hence may hear cases raising issues as fundamental as the legality of the infliction of the death penalty (*Guerra v. Baptiste* [1996] 1 AC 397).

1.4. The Examples Chosen

The temporal focus of this article is overwhelmingly on the twentieth century and predominantly on its latter half. This is because, with certain exceptions, the national judiciaries of the countries discussed assumed many of their present characteristics in this relatively recent period as a result of the upheavals of war, domestic revolution, or emergence from colonial or quasi-colonial domination. Moreover, the international judiciary is almost exclusively the product of the movement towards greater respect for fundamental human rights which began in legal terms after the Second World War (see *Human Rights*). The geographical focus is mostly on the legal systems of western industrial nations. In terms of offering a global perspective, this is less misleading than it might appear since, through a combination of colonial imposition, conscious or unconscious influence, and voluntary adoption, it is these Western systems which have provided models for the judiciary in most parts of the world. Unsurprisingly, given the period during which they were created, the Western powers also exerted a disproportionate influence on the structure of international legal systems. For the purpose of illustration the following discussion includes as broad a range of judicial or

quasi-judicial bodies as possible, even though some would question whether all of the examples given truly fall within the definition given at 1.1.

2. The History of the Judiciary and its Justification in Principle

It is an essential function of the state to provide a forum for the peaceful resolution of disputes between citizens and for the independent determination of conflicts between the individual and the state. Without a system for deciding on the guilt or innocence of those accused of criminal acts and the appropriate punishment for those convicted, there is a risk that society would degenerate into the anarchy of vengeance. Without a forum in which citizens could resolve private disputes between themselves, self-help remedies would rob commercial relations of the certainty necessary for economic growth.

And unless citizens have a mechanism for petitioning the state for the redress of grievances, they may be inclined to resort to methods of protest destructive of the public peace. It is interesting to note that even those political philosophers who are presumptively opposed to any intervention by the state in the lives of its citizens nevertheless regard the provision of a system of dispute resolution as one of the state's core functions. In such neo-libertarian systems the judiciary is often supplemented only by the provision of sufficient armed forces and police to protect the state's external boundaries and to preserve its inner tranquility.

The judiciary has not always existed as a specialist cadre of legal decision-makers: in early times it fell to the monarch to resolve disputes between their subjects. The concept of a professional judiciary in the Anglo-American world probably dates from the late twelfth century when the work of the King's Court became more than the sovereign and his advisers could decide personally. For this reason, Henry II appointed five professional judges in 1178.

In England the link between monarch and Bench is still visible: many of the higher courts are physically gathered in the Royal Courts of Justice; judicial office-holders of, or above, a certain level are called Her Majesty's Judges, and an important section of the High Court is still called the Queen's Bench Division. However, the functional separation between monarch or executive and judiciary is long-established. When King James I sought to argue that the Royal Prerogative extended to the power to decide individual cases, he received the following reply from the then Lord Chief Justice, Lord Coke:

[T]hat true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law...[The] King in his own person can not adjudge his own case...but this ought to be determined in some Court of Justice. (Prohibitions del Roy (1607) 12 Co Rep 63.)

In this judgment can be seen the nascent concept that the different functions of government should be discharged by different actors, that is the separation of powers.

-
-
-

TO ACCESS ALL THE 20 PAGES OF THIS CHAPTER,
Visit: <http://www.eolss.net/Eolss-sampleAllChapter.aspx>

Bibliography

Abraham H.J. (1998). *The Judicial Process*, 431 pp. Oxford: Oxford University Press. [Comparative account of staffing, structure and decision-making in the courts of the USA, UK and France.]

Cappelletti M. (1989). *The Judicial Process in Comparative Perspective*, 417 pp. Oxford: Clarendon Press. [Comparative account of judicial decision-making, including continental European examples.]

Devlin P. (1981). *The Judge*, 201 pp. Oxford: Oxford University Press. [Account of judicial decision-making by former member of the House of Lords.]

Finer S.E., Bogdanor V., Rudden R. (1995). *Comparing Constitutions*, 369 pp. Oxford: Clarendon Press. [Texts of and commentary on the constitutions of UK, USA, Federal Republic of Germany, France, Russian Federation and documents relating to the European Union and the European Convention on Human Rights.]

McIlwain C.H. (1947). *Constitutionalism: Ancient and Modern*, 180 pp. Ithaca, New York: Cornell University Press. [Historical account of the nature of constitutional government.]

Dworkin R. (1986). *Law's Empire*, 470 pp. London: Fontana. [Influential re-formulation of the liberal account of judicial decision-making.]

Ludwikowski R.R. (1996). *Constitution-Making in the Region of Former Soviet Dominance*, 631 pp. Durham and London: Duke University Press. [Texts of recent constitutional documents in the area with thematic commentary.]

Sands P., Mackenzie R., Shany Y. (1999). *Manual on International Courts and Tribunals*, 325 pp. London: Butterworths. [A reference guide to the procedures adopted by some 28 international tribunals.]

Sturgess G., Chubb P. (1988). *Judging the World*, 562 pp. Sydney: Butterworths. [An empirical account of judicial decision-making including interviews with judges from major common law jurisdictions and the Federal Republic of Germany, the ICJ, ECJ, ECHR and the Inter-American Court of Human Rights.]

Susskind R. (1998). *The Future of Law: Facing the Challenges of Information Technology*, 376 pp. Oxford: Clarendon Press. [A demonstration of how information technology is transforming legal practice and the administration of justice.]

Biographical Sketch

Ivan Hare holds law degrees from the Universities of London, Oxford, Harvard and Cambridge. He is Assistant Director of the Centre for Public Law and Lecturer in the Faculty of Law in the University of Cambridge. He is a Fellow of Trinity College, Cambridge. He is the joint editor of *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998) and *The Golden Metwand and the Crooked Cord-Essays on Public Law in Honour of Sir William Wade QC* (Oxford: Clarendon Press 1998) and the author of numerous articles on domestic and comparative public law.