Institutionalist and Populist Court Systems: A Comparative Assessment

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Introduction: The Role and Legitimacy of Courts

Modern states generally have a system or hierarchy of courts as part of their legal system. The authority of court systems seems to be based on a grant of power set forth in that state's constitution or organic document. This grant may be broad or narrow, vague or detailed.

Their organization and powers may vary widely, depending on the ideology, political system, culture and history of the state in which they are located. Many commentators, legal and otherwise, speak and think of courts as a mechanism that enforces a particular state's legal norms, which have been created by other institutions. Strictly speaking, this is not true. The state, with its monopoly on the legitimate use of force, and not the courts, is the true enforcer of legal norms. This is the case because judicial rulings and decisions are effective and enforceable only to the degree that the state is willing to use its power to enforce them.[1]

A noted commentator asserts that the universal pattern is that courts are an integral part of the mainstream of state political authority, rather than separate, non-political institutions. Since law and legal norms are tools of state social control, the courts are state seeks to establish or increase its legitimacy. Regimes gain legitimacy by providing services to its population that are perceived to be serving its needs well. Accordingly, a major function of courts in many societies is to increase support for the regime by exercising this social control function in a manner that is perceived to be efficient, fair and just. If they do so, the society's rules will be followed and adjudication or private disputes will be recognized as fair and legitimate.[2]

Courts generally can play a number of roles. These roles may vary or be applied in different ways, depending on the political system or regime in which they function. First and foremost, courts play a dispute settlement role, in which they hear and resolve cases involving private disputes of various types. Their resolutions of these disputes are enforced by the coercive power of the state. A second role of courts is the enforcement of state norms. In this role, Courts identify and punish violations of state norms. In many societies, they also monitor the use of the state's coercive power by the police and prosecutors, to ensure that it has only been used in a legitimate fashion. Courts may also have a supplementary law-making role, in which they fill in missing details of statutory or customary law, both in disputes between private individuals and between individual and the state or one of its entities.[3]

In democratic societies, courts may undertake two additional roles, both of which involve a voluntary delegation from the state to check its exercise of political power. First, courts may engage in administrative review, where a judge reviews the legal validity of the decisions, actions or non-actions of public administrative actors to whom aspects of state power have been delegated. Lastly, courts may have a constitutional review role, in which they ascertain whether law created by legislatures or interpreted and applied by governments, or both, is consistent with the constitution or organic act.[4] Although the delegation of these roles to courts by the state limits its power and sovereignty, it actually serves to increase its legitimacy.[5] By having courts monitor the exercise of power by the state, citizens will be reassured that the state is acting fairly and in accordance with its own rules.

Courts cannot successfully implement any of these roles unless its processes are viewed as fair and unbiased. Judicial processes are viewed as fair when all parties are given an appropriate opportunity to be heard and when courts rely on precedent, fixed and unbiased decisional procedures, and written records, in addition to articulating the reasoning behind their decisions.[6] Most importantly, however, courts cannot be viewed as legitimate and function successfully unless judges are thought to be independent and objective by all the actors that appear before them. Critical to the perceptions of judicial independence and objectivity are the mechanisms through which judges are selected, promoted, disciplined and removed.[7]

This perception of independence and objectivity can be achieved through different organizational templates. One such template, which I call the populist model, would assert that, in order to be fair and objective, the court system (and its actors) should be directly accountable to the people. Another, which I call the institutional model, seeks the complete opposite: it argues that, in order to ensure the independence and objectivity of the courts and the judiciary, they must be insulated from direct popular control or political pressures and, instead, be supervised by an independent professional body.[8]

In this article, I will examine the history, organization and functions of three different court systems, all of which derive their authority from a constitution. One of these systems follows the institutionalist model (that of Spain), another follows the populist model, (that of the state of Pennsylvania in the United States), and the third (that of the Federal courts in the United States) which follows a combination of both models. I will also examine the different notions of judicial independence and objectivity as implemented in the judicial selection, promotion and disciplinary systems in these three systems and will provide an assessment of these three court systems.

An Institutionalized Court System: Spain

History

The modern history of the Spanish court system can be traced to the Cadiz Constitution of 1812. Prior to that, the administration of justice was part of the unlimited power of the King, which was exercised by means of courts directly appointed by him. These royally created courts included permanent courts, known as common tribunals ("tribunales comunes") which would hear ordinary cases as well as special tribunals ("tribunals especiales") to handle exceptional cases. Ordinary courts were also involved in a number of administrative governmental functions.[9] In addition, the King could transfer the power to administer justice ("jurisdicción real cedida"), which included the power to establish courts, name judges and resolve civil and criminal cases in the name of the crown throughout a particular territorial area to a third party. As time went by, judgments issued by these "manorial" courts were treated as court of first instance judgments, which could be appealed to ordinary royal courts.[10]

The Cadiz Constitution, enacted after the abdication of Ferdinand VII in the midst of the Napoleonic wars,[11] by a popularly created legislative body known as the Cortes,[12] separated the judicial power from the executive and established a court system with three levels: courts of first instance with geographical jurisdiction, appellate courts known as Audiencias, which would deal with appeals from those courts, and a Supreme Court which was given the power to manage the judicial power.[13]

The Cadiz Constitution was abrogated after the return of King Ferdinand from exile. This derogation abolished the new system and reinstated the former courts. Shortly thereafter, (in 1820) the King was forced by an armed insurrection to restore the Cadiz Constitution and establish its court system. This restoration was short-lived, and in 1823 the previous system was reinstated.[14] In 1834, Queen Isabel the Second reestablished the Supreme Court and, shortly thereafter, a regulation for the administration of justice was enacted. A new constitution enacted in 1837 proclaimed the independence of the judiciary. Numerous reforms and reorganizations occurred between 1840 and 1875. The purpose of these reforms was to create uniform standards and processes for the courts, guarantee the independence of the courts, and professionalize the judiciary.[15]

The Constitution of 1978 reorganized the judicial system and created the current system of courts.

Current Organization and Functions

Spain's judicial system is regulated by its Constitution of 1978[16] and by Organic Law 6/1985 (July 1, 1985). [17]

The Constitution creates a centralized unitary system of courts throughout Spain and establishes service in the judiciary as a career.[18] It also creates a General Council of the Judicial Power (composed or judges and attorneys) ("the Council"), which is empowered to supervise and regulate courts and the professional judiciary[19] and indicates that an Organic Law will establish and regulate the courts and the judiciary.[20]

The OLJP establishes and sets forth the powers of the Supreme Court, a National Audiencia, Superior Courts of the Autonomous Communities, Provincial Audiencias, Courts of First Instance, and specialized courts. A separate Organic Law (Law 2/1979) establishes and regulates the Constitutional Court.[21]

The Supreme Court has original jurisdiction over civil and penal actions involving the King, certain enumerated senior executive and legislative officials, and civil or criminal actions against judges of the National Audiencia and the Superior Courts involving the execution of their duties.[22] It also has appellate jurisdiction to consider cassation, revision or other extraordinary writs involving civil, criminal, administrative and social matters, as well as recusal petitions against judges.[23]

The National Audiencia, which serves several functions, has several sections. The Penal section has original jurisdiction (to the extent not transferred by statute to the courts of first instance), *inter alia*, over criminal matters involving crimes against the Crown and senior government officials, terrorism, counterfeiting, drug trafficking, and crimes involving Spaniards committed abroad.[24] The Appellate Section has appellate jurisdiction over decisions of the Penal section.[25]The Administrative Section has original jurisdiction over certain enumerated administrative matters[26] and the Social Section has original jurisdiction over certain matters involving collective bargaining agreements.[27]

For regions that have been granted autonomic status under the Spanish Constitution (such as Catalonia), the Organic Law establishes Superior Courts. These courts essentially serve as a "supreme court" for the region, except in cases where appeal to the Supreme Court is authorized by law. The Superior Courts have appellate jurisdiction in cassation or revision over civil and criminal judgments (involving national or autonomic law) arising out of all lower courts located within the region. They also have jurisdiction involving matters arising out of decisions of local governmental entities and autonomic legislatures, as well as appeals from actions and decisions of administrative courts and other similar enumerated actions.[28]

Every province of Spain has a Provincial Audiencia, whose role is that of an intermediate appellate court. Provincial Audiencias hear appeals from decisions by Courts of First Instance, Courts of Violence against Women, and Minors Courts. They also hear appeals in civil matters on decisions issued by the Courts of First Instance, Mercantile Courts, Courts of Violence against Women and Minors courts, as well as original jurisdiction over certain criminal matters.[29]

At the trial level, the OLJP creates a network of Courts of First Instance, with general jurisdiction over civil matters, as well as jurisdiction over appeals from the decisions of Justices of the Peace.[30] In addition, a number of specialized trial courts (typically one per province) have first instance jurisdiction over certain specialized matters. These courts include: Mercantile Courts,[31] Criminal Investigative Courts ("Juzgados de Instrucción"),[32] Penal Courts,[33] Courts of Violence Against Women, Administrative Courts,[34] Social Courts,[35]Minors Courts[36] and Penitentiary Supervisory Courts ("Juzgados de Vigilancia Penitenciaria").[37] In communities where there is no Court of First Instance or Criminal Investigative Court, the law establishes a system of Justices of the Peace, with limited civil and criminal jurisdiction.

The LOTC created a Constitutional Court, which stands apart from the court system described above. The Constitutional Court has jurisdiction to hear disputes regarding the constitutionality of legislation, cases involving the constitutionality or international treaties, claims seeking protection for violation of constitutional rights ("Amparo" actions), constitutional conflicts between the state and autonomic communities, conflicts between different autonomic communities, and conflicts among the different branches of government regarding their constitutional powers. All decisions of the Constitutional Court are final and unappealable.[38]

This brief description of the Spanish Court system illustrates one of two key characteristics of an institutionalist system: a complex hierarchy of specialized courts which, in order to function, must be run by highly trained and expert specialists.

The Selection and Removal of Judges in Spain

The LOPJ establishes a professional judiciary based on merit and skill. All judges at all levels, with limited exceptions, are appointed through a process that includes a competitive examination,[39] which is scored by a committee composed of judges, district attorneys, law professors and practicing lawyers.[40] A proportion of the vacancies in appellate and higher-level courts must be filled by sitting judges, who must also compete for these vacancies.[41] Candidates are appointed to existing vacancies in accordance with their scores. In addition to the examination, candidates must successfully complete an academic and practical course at the Judicial School before commencing their duties.[42]

Unlike the case in the United States (in which all judges are essentially generalists), judges in Spain often specialize in particular areas of the law, such as mercantile, administrative or labor law. Promotion within the judiciary is also competitive, based on merit and skill, and subject to competitive examination. In order to sit for a promotion examination, a judge must have served a minimum period of time in her current position. Serving judges with a specialization who are seeking a position in a specialized course will be given preference over non-specialists.[43] All judges have continuing education requirements that they must comply with throughout their career[44] (Judges in Spain may also be transferred from one court to another throughout their career.[45] Judges in Spain can be disciplined, suspended or removed by the Council for incompetence, participation in political activity, partiality in a judicial proceeding, abuse of office, malfeasance or misfeasance in office, commission of a crime in the exercise of their judicial functions, conviction of an intentional crime, or permanent incapacity.[46]

This brief description of Spain's judiciary illustrates the second key characteristic of an institutional system: that of a highly trained, specialized and apolitical career judiciary managed by an independent and apolitical institution.

The situation in Spain (and in many civil law countries) is very different from that in the United States. In Spain, like in other civil law countries,[47] judicial independence and objectivity are assured, not by the intervention of the public or the legislature, but by the creation of a professional career path. Unlike their American counterparts, most Spanish judges spend their entire professional careers in the judiciary. Admission to and promotion within, the judiciary is determined by competitive examination, whose aim is to recruit and promote the most competent and skilled candidates. Professional judicial education in a specialized school is required throughout a judge's career.

Supporters of this system believe the Spanish Constitution's goal of an independent and objective judiciary is achieved by isolating the judiciary from both the political system (judges may not belong to a particular political party) and from the executive. A non-political, professional and career judiciary, supervised and regulated by an independent professional body, will be fair, objective and just, thereby ensuring the trustworthiness and legitimacy of the judicial system. Other commentators argue, however, that such a system, while ensuring that judges will be relatively neutral in proceeding involving private parties, creates a situation where the judiciary, as part of the state administrative bureaucracy, will be prejudiced in favor of the state in matter involving disputes involving state interests. Indeed, French public law instructs judges to favor the interests of the state over those of individuals when conflicts between the two arise.[48] The concern here is that, in an institutional system such as Spain's, the court system and the judiciary may not be fair and objective because they are completely removed from political or popular influence, supervision or control.

Courts in the United States: Populist and Hybrid Systems

Historical Background

In order to understand courts in the United States, a little bit of context and history is necessary.

The Pre-Independence Period

During the pre-independence period, there was no separation between the functions of the executive, legislative and judicial branches in the colonies that would become the United States. All three branches had a role in the judicial process, distinctions between different bodies were blurred, and individuals would hold several positions simultaneously.[49] Indeed, disputes during the early colonial period were generally resolved on an ad hoc basis by the governor or leader of the settlement, who generally acted on his own authority. On occasions, the governor would, in exercising judicial functions, associate members of his council as part of the process, and they would act both as judge and jury.[50] As the system evolved, executives began to establish some kind of judicial body on a regular basis. Originally, this new system would include the governor and his council acting as a court of general jurisdiction and justices of the peace operating courts of limited jurisdiction.[51] The addition to serving as committing magistrates, they would hold courts for civil matters (known as courts of common pleas), which had exclusive civil jurisdiction in cases involving amount of less than 40 shillings, and for criminal matters, which were known as courts of quarter sessions. The latter courts also had a series of administrative functions, which could include the supervision of the laying out of roads, the issuance of licenses for taverns and ferries, and the collection of taxes.[52] Appeals from these local courts would be taken to the governor and council, which would act as a court of appeals.[53]

As the number of cases grew, many local or regional courts were created, and an elaborate system of appeals arose, which could involve appeals to regional courts, the governor, or the colonial legislature, with a final appeal to the Privy Council in London.[54]

In summary, American colonial courts were part of an amalgamated system of government with no rigid separation of executive, legislative and judicial functions.[55] The executive exercised judicial powers, and the courts also exercised executive powers. Judges were appointed by, and under the control of, the executive, with the inhabitants of the colony having no say on these appointments. Since they were part of the government, it thus would be reasonable to assume that they were not independent or objective in disputes with the government or matters involving the enforcement of governmental norms. Moreover, judges were subject to the instructions and control of a far-off and unelected colonial government, not to the will of the people they served.

Independence

A principal tenet of the American Revolution was that government must operate through the consent of, and supervision by, the people and its elected representatives.[56] In implementing this concept in the creation of a new judicial system, the United States had no real North American precedent on which they could base themselves,[57] but clearly wished the judiciary to be under some sort of popular control.

A dispute thus arose regarding the role of the general public in the selection and discipline of judges. One position, based on populist notions, was that, as powerful policy makers, judges should be accountable to the people for their decisions. Accordingly, their selection and discipline should involve the people, either through direct election and removal by the people or appointment or removal by the legislature, the people's elected representatives or a combination of the two.[58] The counterargument, based on populist notions, was that public accountability of judges to the people or legislature was highly undesirable. Judges subject to the whim of the electorate or the legislature could not be independent or objective, since they depended on public opinion for their selection, promotion or removal and thus could not rule objectively in cases involving strong public opinions or desires about their outcome. To the contrary, judicial decisions should be based on an objective evaluation of the facts and reading of the law rather than on the view of their constituencies. They should perhaps be appointed by the executive through a meritocratic process.[59]

As we shall see below, Pennsylvania chose to follow the populist model, and the Federal government chose to follow a combination of both populist and institutionalist models.

A Populist Court System: Pennsylvania

History

In 1722, the Pennsylvania colonial legislature enacted the Judiciary Act, which created the Pennsylvania Supreme Court, as well as courts of common pleas (trial courts of general jurisdiction) in Philadelphia, Bucks and Chester Counties.[60] The Pennsylvania Supreme Court was given trial functions and appellate functions. The trial function was implemented through the use of writs of *habeas corpus*, *certiorari* and writs of error, which allowed it to remove a case from a trial court at any point. The appellate function was developed out of several discrete writs, which the English courts had used to review cases from inferior courts and to correct errors committed by the lower court or its officials, or by other branches of the reviewing court.[61]

After independence, the Pennsylvania Constitution of 1776 established Courts of Sessions, Courts of Common Pleas and Orphans' Courts in each of Pennsylvania's counties.[62] In 1809, the circuit court function of the Supreme Court was eliminated, as well as its power to remove cases from trial courts by writs of *habeas corpus* or *certiorari*.[63] From the mid-nineteenth century to 1874, the Supreme Court's workload increased exponentially, and the justices, through jurisprudence, sought to limit their original jurisdiction as much as possible.[64]

In 1874, a new Constitution was enacted in Pennsylvania, which gave the Supreme Court appellate jurisdiction by appeal, *certiorari* or writ of error. Some items of the Court's original jurisdiction remained, such as the power to issue writs of *habeas corpus* and *mandamus* to inferior courts, as well as the power to issue writs of *quo warranto* to officials with statewide authority. The new Constitution made it clear that the Supreme Court's principal task was the consideration of appeals from lower courts.[65]

The Pennsylvania legislature created in 1895 a new intermediate appellate court, which was designated the Pennsylvania Superior Court. This court was given the power to consider appeals from the courts of common pleas and had final jurisdiction (no further right of appeal to the Supreme Court) over certain Additional legislation enacted thereafter extended the Superior Court's jurisdiction and directed most appeals from trial court decisions to it.[66]

As we shall see below, Pennsylvania's courts were designed to be directly under popular control.

Current Organization and Functions

The current court system in Pennsylvania was established by the Constitution of 1968,[67] which provides that the judicial power of the state shall be vested in a unified judicial system which will consist of the Supreme Court, the Superior Court, the Commonwealth Court, the Court of Common Pleas and other minor courts established by law.[68]

The Supreme Court is the highest court in the state and exercises all powers that it had prior to the 1968 Constitution (as noted above).[69] The Constitution also provides that the accused in all cases of felonious homicide shall have the right of appeal to the Supreme Court[70] and gives the Supreme Court supervisory and administrative authority over all courts, including the authority to temporarily assign judges and justices from one court or district to another as it deems appropriate. It also has the power to prescribe general rules governing practice procedure and the conduct of all courts, including the right to assign or reassign classes of cases or appeals among the several courts. The Supreme Court also has the power to regulate admission to the bar and the practice of law.[71]

There are two intermediate appellate courts in the Pennsylvania system: the Superior Court and the Commonwealth Court. The Superior Court exercises for jurisdiction that was vested upon it prior to the 1968 Constitution.[72] It remains an intermediate court of appeal with authority to hear all appeals from decisions of the Common Pleas Courts.[73] The Commonwealth Court was created by the Constitution of 1968 and came into existence in 1970. It is a court with original jurisdiction to hear most cases filed by or against the state, as well as appellate jurisdiction over cases involving matters such as appeals from state agencies, regulatory criminal cases, civil and criminal cases involving local government agencies and eminent domain matters.[74]

The 1968 Constitution also provides that there shall be one Court of Common Pleas for each judicial district in the state.[75] There are currently 60 judicial districts in Pennsylvania.[76] The Courts of Common Pleas are

courts of first instance with unlimited jurisdiction over criminal and civil matters. All other existing courts of first instance, such as the orphan courts, were abolished and merged into the courts of Common Pleas.[77]

This brief description of the Pennsylvania court system reveals the complete opposite of Spain's: a relatively simple system of courts of general jurisdiction, which can run, and function without the need for expert specialists.

Selection, Discipline and Removal of Judges

As noted above, Pennsylvania, like many states of the United States have chosen to select their judges in a fashion, which reflects their desire for popular control over all branches of government. As we shall see below, Pennsylvania's system of judicial selection, promotion and discipline is based on the concept of direct popular election and retention of judges.

Pennsylvania requires judges at all levels, from Supreme Court justices to justices of the peace, to be elected.[78] Candidates for judgeships in all lower level courts must reside in the judicial district in which the court in which they wish to serve is located.[79] They generally state their political party affiliation and must campaign for office in the same fashion as candidates for non-judicial office. Elections are contested, and voters generally have very little information about each candidate other than their political party affiliation.[80] This affiliation, and their position on the ballot (which is chosen by lot) generally determine whether a candidate for judicial office is elected or not. Elections in Pennsylvania have sometimes yielded unusual results. One Asian-American candidate for judicial office in Philadelphia was elected because the voters thought his last name sounded Italian.[81]

Once elected to office, all judges other than justices of the peace (whose term of office is six years) serve for a term of ten years.[82] They cannot be transferred from one judicial district to another. At the end of that term, judges wishing to stay in office must run for retention in the next election. Judges running for retention are not listed by party affiliation and are listed in a separate area of the ballot.[83] Judges who run in retention elections are usually elected. Very few judges in the modern history of Pennsylvania have lost a retention election. It is important to note that one of these cases of non-retention involved a Supreme Court Justice who was not retained in 2005 as a result of voters' anger at a ruling upholding a highly unpopular legislative and judicial pay raise statute.[84]

If a judge dies or resigns before her term of office ends, the governor of the state may appoint a replacement, with the advice and consent of the Senate. Appointed judges must run for election (not retention) within a year of being appointed.

Judges in Pennsylvania are much easier to remove for misconduct in office than judges in the other systems. A Judicial Conduct Board, whose membership includes judges, attorneys and non-attorneys, is empowered to initiate or review complaints against an individual judge and file formal charges seeking her sanctioning or removal.[85] These charges are litigated in the Court of Judicial Discipline (also composed of judges, attorneys and non-attorneys). The Court has the power to order the sanctioning or removal of any judge. Appeals from an order of the Court of Judicial Discipline are heard by the Pennsylvania Supreme Court.[86]

Supporters of the Pennsylvania judicial selection system claim that elections allow the people to select judges, who are representative of the population at large, share their ideology and who will represent their interests. Retention elections and judicial disciplinary proceedings that allow for the removal of judges ensure that any incompetent, biased or corrupt judges can be easily removed. Opponents of the system argue, first and foremost, judicial elections, in which voters choose judges based on the only information they have about the candidates—their political affiliation—do not result in the selection of the most qualified individuals. Indeed, the argument continues, the public cannot, and is not interested in, selecting well-qualified individuals for judicial office.[87] As a result, many judges chosen by election are incompetent, biased or corrupt.[88] Moreover, judges who must submit themselves to a retention election in order to continue in office are not independent or objective, since they know that any widely publicized unpopular decision that they render may end their judicial career.[89] Indeed, a recent situation in Kansas recounted in a national newspaper seems to confirm this fear. It seems that

the Governor of Kansas and conservative Republicans, outraged over a series of decisions of the Kansas Supreme Court (the majority of whose members were appointed by a Democratic governor) that they deem too liberal, have organized a campaign to defeat four justices who will be subject to a retention vote in late 2016. Moreover, the Kansas Senate has also passed legislation authorizing the impeachment of justices whose decisions "usurp the power of the other branches."[90]

These criticisms clearly illustrate the substantial problems surrounding a court system organized exclusively on the populist model.

The U.S. Federal Courts: A Hybrid System

History

Article III of the United States Constitution, enacted in 1789, vests the judicial power of the Federal government into one supreme court, "and in such inferior courts as Congress may, from time to time, establish."[91] One of the first statutes to be passed by the Congress, established by the new Constitution, was the Judiciary Act of 1789, which assigned six members to the Supreme Court; created a United States District Court (as a court of first instance) in each state; and created a Circuit Court of Appeals (with both original and appellate jurisdiction) in each of three circuits. Each circuit court was to be staffed by a District Court judge and by two Supreme Court justices. This structure, as expanded and modified since then, forms the basis of the current Federal system.[92]

Congress has subsequently enlarged both the number and size of the Federal court system and greatly increased its power and jurisdiction.[93] The number of cases filed in Federal courts began to surge as the 1950's came to a close, and the surge continues to this day. Indeed, the number of cases filed in the Federal courts trebled between 1958 and 1988. There are several causes for this massive increase in workload. These include and expanded Federal effort to reduce drug trafficking (which has led to a surge in criminal cases); the continued growth of federal law (in particular the creation of many new federal rights through legislation and judicial interpretation); as well as a variety of procedural developments, which have increased Federal civil litigation. In order to deal with this avalanche of cases, Congress increased the number of Federal judges and created Federal magistrates, circuit executives and staff attorneys to whom the judges could delegate some of their work. Civil jurors in federal cases have been reduced from 12 to 6. Moreover, District judges have become much more aggressive in disposing of cases through settlement, summary judgment, or other methods.[94]

The Scope of the Federal Judicial Power

The Constitution grants the Federal courts the power only certain types of cases. This power is known in the United States as "Federal Jurisdiction." All Federal courts may hear cases arising out of the Constitution, Federal statutes and treaties: cases involving ambassadors, public ministers and consuls; cases involving admiralty and maritime jurisdiction; controversies involving the United States as a party; controversies between two or more states; cases between a state, or its citizens, and foreign states or their citizens; and cases involving citizens of different states.[95]

The latter category of cases, which are known as cases involving "diversity jurisdiction," allow a citizen of one state filing a civil action against a citizen of another state to choose whether to bring such an action in state court or in Federal court. Although the concept is obscure, most scholars agree that its purpose was to balance national interests with the independence of the states and allay any fears by litigants that they might be treated unfairly in the courts of a state in which they do not reside.[96] In an attempt to prevent the Federal courts with being clogged by small cases, a statute provides that only cases where the amount in controversy exceeds $75,000 may be considered.[97] A case where diversity jurisdiction exists, and which has been filed in a state court may be removed to Federal court by the defendant. This removal is automatic.[98] In deciding these cases, the Federal court applies the law of the state in which the case was filed.[99]

The Supreme Court has original trial jurisdiction in cases involving ambassadors and in cases involving a dispute between two states. In all other cases, the District Courts have original trial jurisdiction and the Supreme Court has discretional appellate jurisdiction.[100]

The Current Organization and Functioning of the Federal Court

With the exception of the Supreme Court, all of the Federal Courts currently in operation have been created by a statute passed by Congress.

Currently, there are ninety-four United States District Courts located in geographically determined Federal judicial districts throughout the United States. Each district includes a U.S. Bankruptcy Court as a unit of the District Court. There are also several special trial courts in the Federal system, including the United States Court of International Trade, whose cases involve international trade and customs law,[101] the United States Tax Courts, whose cases involve tax disputes,[102] and the United States Court for Federal Claims, whose cases involve most money claims made against the Federal Government.[103]

There are currently thirteen U.S. Courts of Appeals in the Federal system. Twelve of these are geographically determined to hear appeals from the U.S. District Courts located within its circuit, as well as appeals from decisions of Federal administrative agencies. The thirteenth court, the United States Court of Appeals for the Federal Circuit, has nationwide jurisdiction to hear appeals in certain types of specialized cases, such as those involving patent laws.[104]

With limited exceptions, the Supreme Court has discretionary power to decide which cases it considers. A party who wishes for the Supreme Court to consider a case that was decided by one of the courts of appeal must file a petition known as a writ of *certiorari* asking the court to consider the case.[105] A writ of *certiorari* may also be filed in cases involving a decision of a state supreme court, where that court has called into question the validity of a Federal statute or where a state statute is being challenged as being inconsistent with the Federal Constitution.[106] Approximately 7,000 *certiorari* petitions are filed with the U.S. Supreme Court every year. Of these, the Court agrees to hear between 100 and 150 cases a year.[107]

The Federal court system is more complex than that of states like Pennsylvania. In spite of the facts that its courts are principally generalist courts of general jurisdiction, it is supplemented by a number of specialized courts dealing with highly technical issues, which might not be suitable for adjudication by non-experts. It is in essence a hybrid with both populist and institutionalist features.

The Federal System and the Selection and Removal of Judges

The United States Constitution essentially enacted a compromise between the institutionalist and populist models in its provisions relating to judicial appointments and removals. Article II Section 2 of the Constitution[108] provides that Federal judges at all levels, from courts of first instance to the Supreme Court, must be appointed by the President of the United States, and must also be confirmed by the majority of the Senate, which is part of the legislative branch. This confirmation by the Senate adds popular control to the judicial selection process, since Senators can, and often do, vote on a judicial candidate based on political, and not professional, criteria. Neither the Constitution nor any Federal statutes establish minimum requirements for the selection of judges, and mandate no formal training requirements.

Once a judge is appointed, he or she has lifetime tenure. The Constitution states that judges hold their office "during good behavior" and that they may be removed only by impeachment for "treason, bribery or other high crimes and misdemeanors".[109] Impeachment requires that the House of Representatives vote specific charges by an absolute majority vote and that the Senate holds a trial on those charges and finds the accused guilty by a two-thirds majority.[110] Not surprisingly, only fifteen Federal judges have been impeached and only eight removed by impeachment since the Constitution became effective in 1792.[111] Federal judges are appointed to a position in one particular court and/or district and may be moved to another position only by going through another appointment process.

The Federal system of judicial selection and tenure is a hybrid of populist and institutionalist features. Its supporters argue that judicial objectivity and independence by following both the populist and institutionalist models at the same time. Appointment by the executive branch ensures that candidates to the bench are competent and qualified and confirmation by the legislative branch ensures that no candidates that are

objectionable to the people are appointed.[112] Lifetime tenure and an extremely difficult removal process ensure that, once appointed, judges are independent, since they are not beholden to the legislature, the executive or the electorate for their continued tenure of office. The thought, then, is that independence creates objectivity.

The criticism from supporters of both models is that the Federal system is highly flawed, especially with regard to the appointment and confirmation of judges. The result of the appointment and confirmation process for Federal judges results in a very non-diverse judiciary in terms of gender, ethnicity, education and ideology. In fact, the majority of the members of the United States Supreme Court are graduates of two law schools and have remarkably similar backgrounds.[113] Moreover, critics also argue that the system is highly politicized because a political party that controls both the presidency and the Senate is in a position to "pack" the courts with appointees sharing their ideology and political persuasion, to the detriment of litigants who do not share them. Moreover, if one party controls the executive branch and another is in control of the Senate, the opposition can, and often does, block the nominations of judicial candidates, resulting in extensive judicial vacancies.[114] In sum, judges chosen in this manner are biased and unrepresentative of the people they serve.

Conclusion

The perception by society that judges within its legal system are fair, objective and independent is a key component of a legal system's legitimacy. The notion of judicial objectivity and independence varies among countries. In many civil law countries, such as Spain, judicial objectivity and independence is sought through the creation, maintenance and promotion of specialist judges through an institutional system based on skill and merit and selected and supervised by a non-political body. Because this system has no popular or political participation, critics note, its judges and courts tend to be biased in favor of the state and disconnected from the people.

In the United States, judicial objectivity and independence are different. In many states of the United States, the thought is that competence, fairness and objectivity are best ensured through a populist model with popular control in the selection and appointment of judges. In these jurisdictions direct election by the people of judges for limited terms, and retention elections thereafter, result in a system with substantial political influence, where generalist judges are elected for reasons other than competence and judges issuing unpopular ruling may be removed from office. As noted above, this model has a number of substantial problems, which may engender corruption, result in the election of incompetent judges, and subject judicial rulings to political pressure.

The United States Federal judicial system seeks to strike a balance between the institutionalist and the populist models. As we have seen, this approach has been subject to substantial criticism, from partisans of both the populist and institutionalist models.

This brief examination of examples of the institutionalist and populist court system model does lead, I believe, to some generalizations. First, which model is chosen for a nation's court system depends substantially on its history, political system and national ethos. Secondly, clearly neither model is perfect and free of problems. Although the institutionalist model seems to lack popular and political checks and balances and the populist model seems to be prone to political interference, both seem to be generally accepted and found to be legitimate and trustworthy within the societies that have adopted them. Perhaps the better approach, however, is one that, in order to minimize each model's problems, incorporates appropriate elements from the two.

NOTAS AL CALCE

[1] Alter, K., *The New Terrain of International Law: Courts, Politics, Rights,* (Princeton U 2014) at 32, 36 [hereinafter *Alter*].

[2] Shapiro, M. *Courts* (U. of Chicago P. 1981) at 22-24 [hereinafter *Shapiro*].

[3] Alter, *supra* note 1, at 37.

[4] *Id.*

[5] *Id.*

[6] Shapiro, *supra* note 2 at, 1, 17, 20.

[7] *Id.* at 31-32.

[8] *See* Notes 58-59, *infra,* and accompanying text.

[9] Consejo General del Poder Judicial, *Historia del TS, available at* http://www.poderjudicial.es/cgpj/es/Poder-Judicial/tribunal-Supremo/Informacion-institucional/Historia-del-TS (Last visited 6/21/2018)[hereinafter *Historia*].

[10] Adinolfi, G., *El Tribunal Supremo de Justicia en España en el Tránsito hacia la Conformación Liberal,* Revista de Estudios Histórico-Jurídicos (No. 29, 2007)

[11] *Constitución 1812: Contexto Histórico, available at*

http://www.juntadeandalucia.es/educacion/webportal/web/la-pepa/visitas (last visited 4/9/2019) [hereinafter *Contexto*].

[12] *Id.*

[13] Adinolfi, *supra* note 10.

[14] *Id.*

[15] *Id.*; *See* Historia, *supra* note 9.

[16] Constitución Española (17 dic. 1978) B.O. Del E. 311.1 [hereinafter *Constitución*].

[17] Ley Orgánica Del Poder Judicial 6/1985 (1 julio 1985), BOE-A-1985-12666 [hereinafter *LOPJ*].

[18] Constitución, *supra* note 16, at Art. 122(1).

[19] *Id.* at Art. 122(2,3).

[20] *Id.*

[21] Ley Orgánica del Tribunal Constitucional (3 octubre 1979), BOE-A-1979-23709

[hereinafter *LOTC*].

[22] LOJP, *supra* note 17, at Arts. 55-57.

[23] *Id.* at Arts. 55-60.

[24] *Id.* at Art. 65.

[25] *Id.* at Art. 64 bis.

[26] *Id.* at Art. 66.

[27] *Id.* at Art. 67.

[28] *Id.* at Arts. 70-75.

[29] *Id.* at Arts. 80-83.

[30] *Id.* at Arts. 84-85.

[31] *Id.* at Art. 86 bis.

[32] *Id.* art Art. 87.

[33] *Id.* at Art. 89 bis.

[34] *Id.* at Art. 90.

[35] *Id.* at Art. 92.

[36] *Id.* at Art. 96.

[37] *Id.* at Art. 94.

[38] *Id.* at Art. 93.

[39] *Id.* at Art. 301.

[40] *Id.* at Art. 304.

[41] *Id.* at Art. 311.

[42] *Id.* at Art. 301.

[43] *Id.* at Arts. 311, 326, 329.

[44] *Id.* at Art. 307.

[45] *Id.* at Art. 350.

[46] *Id.* at Arts. 379, 383.

[47] Shapiro, *supra* note 2, at 22.

[48] *Id.* at 32-33.

[49] Erwin C. Surrency, *The Courts in the American Colonies*, 11 Am. J. Leg. Hist. 253 (1967).

[50] *Id.* at 257-58.

[51] *Id.*

[52] *Id.* at 267-68.

[53] *Id.* at 269.

[54] John P. Frank, *Historical Bases of the Federal Judicial System*, 23 Ind. L. J. 238, 243 (1948) [hereinafter *Frank*].

[55] *Id.*

[56] U.S. Const. art. 1.[hereinafter *US Constitution*].

[57] Frank, *supra* note 54, at 243.

[58] Blum, L., *Electing Judges* in L. Epstein (ed.) *Contemplating Courts* (Congressional Quarterly Press 1995) at 42 [hereinafter *Blum*].

[59] *Id.* at 19.

[60] The Unified Judicial System of Pennsylvania, *Courts-History, available at* http://www.pacourts.us/learn/history (last visited 6/21/2018) [hereinafter *PA Courts*].

[61] Erwin C. Surrency, *The Development of the Appellate Function: The Pennsylvania Experience,* 20 Am. J. Leg. Hist. 173, 173-74 (1976) [hereinafter *Development*].

[62] PA Courts, *supra* note 60.

[63] Development, *supra* Note 61, at 182.

[64] *Id.*

[65] *Id.* at 187.

[66] *Id.* at 189.

[67]Constitution of Pennsylvania (May 16, 1978) 1977. P.L. 365, J.R. 4 [hereinafter *PA Constitution*].

[68] *Id.* at Art V., Judiciary § 1.

[69] *Id.* at Art. V, Courts, § 1.

[70] *Id.*

[71] *Id.* at. Art. V, Courts, § 10.

[72] *Id.* at Art. V, Courts, § 3.

[73] Pennsylvania Judiciary Act, 42 Pa. Cons. Stat. §§101-742 [hereinafter *PA Judiciary Act*].

[74] *Id.* at §§ 761-762.

[75] PA Constitution, *supra* note 67, at Art. V, Courts, § 4.

[76] PA Courts, *supra* note 60.

[77] PA Constitution, *supra* note 67, at Art. V, Courts, § 4.

[78] *Id.* at Art. V, § 13.

[79] *Id.* at Art. V, § 12.

[80] Blum, *supra* note 58, at 21.

[81] Obituary, Judge William M. Marutani, (November 19, 2004), *available at* https://www.legacy.com/obituaries/philly/obituary.aspx?n=william-m-marutani&pid=2834166 (last visited 04/09/2019).

[82] PA Constitution, *supra* note 67, at Art. V. § 15(a).

[83] *Id.* at Art V, § 15(b).

[84] For an interesting analysis of the history of retention elections in general, and the 2005 retention election in particular, *see* Shira J. Goodman & Lynn A. Marks, *Lessons from an Unusual Retention Election, available at* https://www.pmconline.org/uploads/1/0/8/8/108820081/cr42-3goodmanmarks.pdf (last visited 04/09/2019) [hereinafter *Goodman & Marks*].

[85] PA Constitution, *supra* note 67, at Art. V. § 18(a).

[86] *Id.* at Art. V. § 18(b).

[87] *See* Blum, *supra* note 58, at 21, 41.

[88] For a description of different examples of misbehavior by Pennsylvania Supreme Court justices, *see* A. Staub, *Justices Behaving Badly: PA Supreme Court has Embarrassing History*, *available at* http://levittownnow.com/2014/10/23/justices-behaving-badly-pa-supreme-court-has-embarrassing-history/ (last visited 04/09/2019).

[89] *See* Goodman & Marks, *supra* note 84.

[90] Erik Eckholm, *Outraged by Kansas Justices 'Rulings, Republicans Seek to Reshape Court*, New York Times (April 1, 2016) at https://www.nytimes.com/2016/04/02/us/outraged-by-kansas-justices-rulings-gop-seeks-to-reshape-court.html.

[91] US Constitution, *supra* note 56, at Art. III, § 1.

[92] Lino A. Graglia, *The growth of National Judicial Power,* 14 Nova L. R. 53, 56 (1989).

[93] William M. Wiecek, *The Reconstruction of Federal Judicial Power*, 13 Am. J. Leg. Hist. 333, 333-34 (1969).

[94] Federal Judicial Center, *Report of the Federal Courts Study Committee* (April 2, 1990), *available at* https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf*,* at 5.

[95] US Constitution, *supra* note 56, at Art. 1 § 2.

[96] Diversity of Citizenship, The Free Dictionary, *available at* https://legaldictionary.thefreedictionary.com/Diversity+of+Citizenship (Last visited 04/09/2019).

[97] 28 U.S.C. § 1332.

[98] 28 U.S.C. § 1441.

[99] Erie v. Tompkins, 304 U.S. 64 (1938).

[100] US Constitution, *supra* note 56, at Art. III § 2.

[101]*See About the Court*, United States Court of International Trade, *available at* https://www.cit.uscourts.gov (Last visited 04/09/2019).

[102] *See About the Court*, United States Tax Court*, available at* https://www.ustaxcourt.gov/about.htm (Last visited 04/09/2019).

[103] *See United States Court of Federal Claims: The People's Court, available at*

https://www.uscfc.uscourts.gov/sites/default/files/USCFC%20Court%20History%20Brochure_1.pdf (Last visited 04/09/2019).

[104] *See About the Courts of Appeal*, United States Court*, available at* http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (Last visited 04/09/2019).

[105] 28 U.S.C. § 1254.

[106] 28 U.S.C. § 1257.

[107]*See About the Court*, The Supreme Court of the United States*, available at* https://www.supremecourt.gov/about/about.aspx (Last visited 04/09/2019).

[108] US Constitution, *supra* Note 56, at Art. II, § 2.

[109] *Id.* at Art. II, § 4.

[110] *See Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, Senate, *available at* https://www.senate.gov/artandhistory/history/resources/pdf/3_1986SenatesImpeachmentRules.pdf (Last visited 4/09/2019).

[111] *See Impeachment in the United States,* Wikipedia, *available at* https://en.wikipedia.org/wiki/Impeachment_in_the_United_States (Last visited 4/09/2019).

[112] Shapiro, *supra* note 2, at 32.

[113] *See About the Court-Current Members*, Supreme Court of the United States, *available at* http://www.supremecourt.gov/about/biographies.aspx (Last visited 4/09/2019).

[114] *See, e.g.* Spencer S. Hsu, *Waiting for Next President*, *Confirmations of Federal Trial Judges Stall,* The Washington Post (June, 5 2016), *available at* https://www.washingtonpost.com/local/public-safety/waiting-for-next-president-confirmations-of-federal-trial-judges-stall/2016/06/05/9b626aa4-222f-11e6-9e7f-57890b612299_story.html?utm_term=.d6cc7b6c489d (Last visited 04/09/2019); *See also Current Judicial Vacancies*, United States Courts, *available at* http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies (Last visited 04/09/2019).