Lecture five: Judiciaries

Liberal democracies such as the United Kingdom and the United States, have an independent judiciary which is charged with responsibility for upholding the rule of law. Even those in power, be they Presidents or British ministers, have the same duty to act within the law. Any transgression of it should not go unchallenged. The rule of law is a cardinal principle in any democracy.

The functions of judiciaries

There are three main functions of the judicial branch of government. Judiciaries:

• resolve disputes between individuals, adjudicating in controversies within the limits of the law;

• interpret the law, determining what it means and how it applies in particular situations, thereby assessing guilt or innocence of those on trial;

• act as guardians of the law, taking responsibility for applying its rules without fear or favour, as well as securing the liberties of the person and ensuring that governments and peoples comply with the 'spirit' of the constitution.

A key function of the judiciary is that concerning **judicial review**, under which the courts are granted the power to interpret the constitution and to declare void actions of other branches of government if they are found to breach the document. Judicial review is particularly important in federal systems to ensure that each layer of government keeps to its respective sphere. The function was not written into the American Constitution, but the ruling of the Supreme Court in the case of *Marbury v Madison* in 1803 pointed to the key role of the Court in determining the meaning of the Constitution. In exercising its power of review, the Court normally decides on the basis of precedent (*stare decisis* – stand by decisions made), but on occasion it has spectacularly reversed a

previous decision and thus enabled the Court to adapt to changing situations and give a lead.

On the other hand, Britain has no provision for judicial review. No court can declare unconstitutional any law that has been lawfully passed by the British Parliament, which is the sovereign law-making body, a principle that has never been challenged. In the absence of a written constitution, there is –as Heywood points out – 'no legal standard against which to measure the constitutionality of political acts and government decisions'. What it does have is what the same writer refers to as 'a more modest form of judicial review, found in uncodified systems', which allows for the review of executive actions, deciding whether the executive has acted *ultra vires* (beyond its powers).

However, a new trend has developed in Britain in the last few decades that is **judicial activism which refers to the** view that the courts should be a co-equal branch of government, and act as active partners in shaping government policy – especially in sensitive cases, such as those dealing with abortion and desegregation. Supporters tend to be more interested in justice, 'doing the right thing', than in the exact letter of the text. They see the courts as having a role to look after the groups with little political influence, such as the poor and minorities.

In both Britain and America, there is provision for decisions of the courts to be overridden. In Britain, this requires only the passage of an Act of Parliament, although in cases involving law emanating from the European Union this takes precedence over British law and cannot be so changed. In America, on many issues Congress can pass a law to deal with court decisions it dislikes and ensure that future rulings are different. If the matter is a constitutional one the arrangements for amending the Constitution are more complicated.

The operation of the courts in Britain and America

In both countries there is an elaborate network of courts which have responsibility for upholding the law. In Britain, there is one basic judicial system for criminal law and a second handles civil law. The United States has a more complex judicial structure. As a federal country, it has two court systems: a series of federal courts and a series of state/local ones. It is the state system which is used in the overwhelming majority of cases.

In Britain and America, courts operate along adversarial lines, with the prosecution and defence each seeking to discredit the arguments advanced by the other side and persuade the judge and/or jury of the merits of their case. Whereas in America, those who handle cases are all lawyers, in Britain there is a distinction between barristers who in most cases put forward the arguments before judge and jury and the solicitors who are the initial point of contact for those in need of legal assistance. Solicitors do much of the preliminary, out-of-court work.

The independence of the judiciary

It is generally acknowledged at least in theory that courts should be subject to no political pressure from the political leaders of the day. Independence may imply freedom from what Blondel refers to as the 'norms of the political and social system itself'. In other words, judges operate within the context of the principles on which the society is based, so that they are separate rather than fully independent of the government. In reality, they tend to act in defence of the existing social order rather than as 'independent bodies striving for justice or equity'.

The independence of the judiciary is dependent on the existence of certain Conditions:

- *The selection of judges*

Their appointment should not ideally be influenced by political considerations or personal views. In practice, there are two methods of selection:

appointment, as is practised in most countries (especially for senior judges –the American Supreme Court, for example), or election, as is the means by which most American state judges are chosen. Appointments may also be made on the basis of co-option by existing judges.

It does not follow that because judges are appointed for political reasons they will necessary act in the way that those who choose them predict. Several appointees to the US Supreme Court have exhibited a remarkable degree of independence when on the Bench, like the Nixon appointee Chief Justice Warren Burger was a disappointment to the President. It was Burger's Court which insisted in 1974 that the Nixon White House handed over the damaging tapes in the Watergate controversy.

The appointment of British judges is less overtly partisan than in America. Appointments are made by the Lord Chancellor, who will consult the Prime Minister when dealing with the most senior posts. This provides an opportunity to favour those who broadly share his views, but in practice the pool of barristers from whom the choice is made tend to be of a similar background and type. Many of those selected have, at some time, had to pass examinations in order to demonstrate their abilities, before they are even allowed to be considered for service as judges.

- *The security of tenure of judges*

Once installed in office, judges should hold their office for a reasonable period, subject to their good conduct. Their promotion or otherwise may be determined by members of the government of the day, but they should be allowed to continue to serve even if they are unable to advance. US Supreme Court judges normally serve for a very long period, their appointment being initially made for their life even if they decide to retire after several years of service. Although theoretically they may be removed by impeachment before Congress if they commit serious offences, this provision has never successfully been employed. In Britain, judges are hard to remove, and those who function in

superior courts are only liable to dismissal on grounds of misbehaviour, and this only after a vote of both Houses of Parliament.

- *Judges are politically neutral*

Judges are expected to be impartial, and not vulnerable to political influence and pressure. They need to be beyond party politics, and committed to the pursuit of justice.

The political involvement of judges in Britain and America

In America, the Supreme Court is clearly a political as well as a judicial institution. In applying the Constitution and laws to the cases which come before it, the justices are involved in making political choices on controversial aspects of national policy. The procedures are legal, and the decisions are phrased in language appropriate for legal experts. But to view the Court solely as a legal institution would be to ignore its key political role. A Chief Justice Hughes once put it: 'We are under the Constitution, but the Constitution is what the judges say it is'. In interpreting the Constitution, the nine justices must operate within the prevailing political climate. They are aware of popular feelings as expressed in elements of the media and in election results. They know that their judgements need to command consent, and that their influence ultimately rests on acceptance by people and politicians. This means that the opinions expressed on the bench tend to be in line with the thinking of key players in the executive and legislative branches, over a period of time.

The question of how to use its judicial power has long existed in the American Court, and different opinions have been held by those who preside over it. Some have urged an activist Court, whilst others err on the side of **judicial restraint**. The latter is the notion that **the Court should not seek to impose its views on other branches of government or on the states unless there is a clear violation of the Constitution.** This implies a **passive role**, so some justices have urged that they should avoid conflict, and that one way of doing so is to leave issues of social improvement to the appropriate parts of the

federal and state government. Advocates of this position have felt that it would be unwise and wrong to dive into the midst of political battles, even to support policies they might personally favour.

By contrast, judicial activists argue that the Court should be a key player in shaping policy, an **active partner** working alongside the other branches. Such a conception means that the justices move beyond acting as umpires in the political game, and become creative participants.

❖ *Growing judicial activism in Britain*

In recent years a new breed of judges has begun to emerge. The number of applications for judicial review in Britain has increased sharply, and judges have been markedly more willing to enter the political arena by declaring government policy invalid. Few governments have been subjected to more scrutiny in the courts than those of the Conservatives between 1979 and 1997. In addition, several eminent judges argued publicly for the incorporation of the European Convention on Human Rights into British law, a goal achieved by the passage of the Human Rights Act 1998 which gives judges the opportunity to make judgements based on cases brought under the European document.

In Britain, judges have in the past taken a more conservative stance and confined themselves to strict interpretation of what the law says, although this attitude is changing. With the passage of the Human Rights Act, there is the prospect of a politicization of the judiciary in Britain which could become embroiled in the political arena as judges seek to decide on the interpretation and/or validity of a particular piece of legislation.

Judicial activism has a longer history in America than in Britain. Its written constitution, federal system, traditional of judicial independence, preference for limited government and ease of access to the courts all point in this direction.