

Courts and the Making of Public Policy

Democracy, the Courts and the Making of Public Policy

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Executive Summary

- Since World War II, there has been a significant increase in judicial involvement in the making of public policy. This trend is the result of a number of related social and political developments throughout a wide range of countries. These include: the expanded role of the state; executive dominance and legislative decline in an age where government is increasingly complex; the development of a politics of rights, where political claims are phrased in terms of rights and pursued through judicial, rather than majoritarian, channels; the continuing spread of democratisation across the world; and the rise of globalisation, marked by the growing significance of international law.
- As a consequence of these developments, courts have been able to influence and determine policy outcomes in a wide range of areas. This raises questions as to the democratic legitimacy of their actions, since they frequently displace political institutions such as legislatures, who owe their legitimacy to the fact of their popular election. We may ask two normative questions of judicial policymaking: first, whether it is democratic; and second, whether it is justifiable. The first is often answered in the negative, on the ground that judges are not elected, which for some, is sufficient to render judicial policymaking unjustifiable. There are, however, many understandings of democracy, each giving a different answer to these two questions.
- Some theorists advocate procedural understandings of democracy, whereby an outcome is democratic insofar as it is reached by a particular procedure. Some procedural understandings see judicial policymaking as undemocratic, insofar as it involves non-elected institutions overruling bodies whose mandates are based on their popular election. However, proceduralists may view some forms of non-majoritarian decision-making as democratic – if, for example, one believes that the constitution itself is a part of the democratic procedure, or where courts act specifically to uphold the integrity of democratic procedures, such as to ensure citizens' voting rights. Alternatively, one may simply deny that elected legislatures are sufficiently democratic in procedural terms. Even if one does accept that some or all judicial policymaking is undemocratic in nature, it does not follow automatically from this that it is therefore unjustified. It is open to the procedural democrat to hold that democracy itself is of limited (though nonetheless possibly great) value, and so maintain that particular instances of non-democratic judicial policymaking are justifiable.
- The alternative to a procedural understanding of democracy is a substantive approach, which assesses the content of a particular decision, rather than how it was reached. Thus, populists may maintain that an outcome is democratic only if it reflects the will of the majority. Others look to the principle of equality underlying democratic theory to maintain that the intervention of the courts can further democracy in cases where it advances the interests of particular minorities, unfairly excluded under majoritarianism.
- Quite where the boundaries of justifiable judicial public policymaking lie will depend on one's own understanding of democracy. Most will agree that there is value to policy outcomes possessing democratic legitimacy, but that this should not mean that the rights of minorities are routinely ignored. A range of different answers to the legitimacy and justifiability of judicial policymaking have been advanced. When judges seek to make public policy, they must be mindful of the instrumental need to work within popular understandings of legitimate judicial involvement. But they will also have to come to conclusions on these issues themselves.

Democracy, the Courts and the Making of Public Policy

There seems to be little disputing the proposition that, in the years since World War II, many countries have seen significant increases in the political power of the judicial branch of government. Courts are increasingly playing a significant role in the public policymaking process and, in the view of many, assuming a legislative and policy-influencing role which, on a traditional separation of powers model, has belonged to legislatures and executives. This policy brief seeks to provide an empirical and theoretical introduction to the controversy over such judicial intervention, and to the work of the FLJS programme on 'Courts and the Making of Public Policy'. The key question at the heart of this brief concerns not the extent of judicial power, but its character. To what extent, if at all, can judicial policymaking be characterised as democratic? And if it is not democratic, does that mean that it should not occur? It is clear that a number of related social and political developments, replicated across a wide range of countries, have contributed to the phenomenon in question. The following changes are amongst the most commonly cited.

The nature and extent of contemporary government

Contemporary policymaking is a complicated business. It is often claimed that, with the industrialisation of the modern state, government has become an increasingly technocratic enterprise, where specialised administration is more important than broad legislation. This has happened alongside a significant increase in the role of the state, as governments have assumed responsibility for the well-being of their people through extensive state-run welfare programmes. The consequence is that executives have come to dominate legislative processes – policy is often formulated not at a parliamentary level, but by bureaucrats acting within

the executive. In many states, cohesive, disciplined parties have afforded executives control over the legislative process, limiting the ability of opposition parties to vote down legislation within Parliament. The courts have become an alternative forum for political debate and decision making, both in terms of enacting legislation and ensuring governmental accountability. Although accounts of the 'decline of the legislature' are often overstated, most accept that legislatures are increasingly shifting from a legislative to a scrutinising function. As such, members of legislatures often themselves use the courts to seek to hold executives to account. When Alec Stone labels the French Constitutional Council 'the third legislative branch', he does not simply mean that the Court has an independent legislative power. Rather, the Council has become a focal point for conflict between political parties, as opposition parties have sought to exploit its constitutional status to restrict government activity.

The development of a 'politics of rights'

Post-industrial politics are characterised by a shift from broad questions of societal class and wealth redistribution to issues which often cut across traditional political cleavages, and are often of great importance to particular minority groups. Thus, many political actors are keen to phrase their demands in terms of rights and so keep their demands out of the hands of majoritarian decision-making institutions. Much of recent political history has been characterised by struggles for equality and against discrimination, initially on the basis of race and gender, and more recently on grounds such as sexuality, disability and age. Such struggle has typically taken the form of a fight for legal entitlement, typified by the civil rights movement in the US. The NAACP embarked on a judiciary strategy in the 1920s, a course of action which was to bear fruit in cases such as *Brown v. Board of*

Education (1954), as the Supreme Court took decisions where Congress seemed immobilised. The twentieth century witnessed a trend towards increasing constitutionalism and the development of Bills of Rights – even the UK, with its traditional focus on the sovereignty of Parliament, saw the passage of the Human Rights Act in 1998. Such developments clearly enhance the power of the judiciary, as it falls to judges to hear claims from individuals that their rights have been infringed; this in turn can afford the courts a significant degree of latitude as to how these rights should be interpreted. In some cases, single issue interest groups have deliberately sought to cast their political agendas in terms of rights to bring them within the purview of the courts and challenge majoritarian decisions. In other cases, democratically elected political institutions have been willing, even eager, to let the courts decide on particular issues. This can take place for a number of reasons, ranging from the unwillingness of popularly elected politicians to take stands on certain controversial issues, to a recognition that, in an age where there is widespread disillusion with other governmental institutions, courts in many countries have retained a significant degree of public trust, and so can legitimate unpopular policy outcomes.

The spread of democratisation

The second half of the twentieth century witnessed two waves of democratisation, with the retreat from colonialism being followed by the collapse of communism in most of the world. The existence of democratic institutions generally means a key role for the courts in arbitrating between government and citizens, particularly when the rights of citizens are guaranteed in constitutional texts. Since the American model of government has typically been the most influential on emerging democracies, this is usually the case. Many writers have traditionally seen democratisation as necessary to the existence of significant levels of judicial influence on public policymaking, but recent years have also seen some moves towards judicialisation in nondemocratic states, most notably in China, where recent constitutional amendments have acknowledged the rule of law and the importance of human rights, affording a notable, though unquestionably limited, degree of political power to the Chinese courts.

Globalisation

Increasing levels of cooperation and interdependence between states, the growing importance of international institutions and the emergence of commonly accepted principles of international law have led to the ‘legalisation’ of international politics, as the interaction between nations has been governed by treaties and agreements. The rising number of international contacts in areas such as trade, transport, migration and the environment has meant more demand for regulation and an enhanced role for bodies such as the International Monetary Fund and the World Trade Organisation, and the emergence of an international consensus on human rights is reflected in the signature of the Universal Declaration on Human Rights in 1948 and the European Convention on Human Rights in 1950. Such international law has been constitutionalised in a number of countries, for example, the German Basic Law specifies that ‘the general rules of public international law are an integral part of federal law’.

This, then, is the context within which the courts have been able to influence and determine policy outcomes, in areas ranging from welfare spending to environmental protection, and from the regulation of industrial action to abortion and euthanasia. In some cases, it appears that the role of the courts has been welcomed (or at least tolerated) by elected representatives, in other cases their involvement has been heatedly contested and resisted. How should we assess the normative character of such intervention? Is it democratic? Is it justifiable? It is fairly commonplace for writers on the subject simply to assert that judicial power is undemocratic, on the grounds that judges are not (typically) democratically elected representatives. In what follows, I challenge this assertion, and lay out a range of different understandings of democracy, each of which gives a different answer to the question as to when judicial policymaking is democratic. It follows that an assessment of the democratic legitimacy of judicial activism will depend upon both the understanding of democracy being employed, and the character of the judicial intervention in question.

Procedural models of democracy

Some theorists advocate *procedural* understandings of democracy. On such an account, an outcome is democratic insofar as it is reached by a particular procedure. For example, policy outcomes in a democracy are often seen as democratic if they reflect the decisions or intentions of a majority of the elected representatives of the people in the legislature (subject, perhaps, to the legislature following basic principles of the rule of law). It is important to note here that it does not necessarily follow that the policy outcome which will result will be that which a majority of the population would have chosen, if, for example, the issue had been put to a popular vote in a referendum. On some understandings of representative democracy, those elected should seek to put whatever they believe to be the best policy for society as a whole into place. As Edmund Burke argued in his 'Speech to the Electors of Bristol', 'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion'. As long as the procedure by which the representatives are chosen is seen as democratic, this characteristic of the process legitimates the outcome. Such a view need not adhere over-rigidly to a simplistic understanding of the separation of powers, whereby it is the role of the legislature to make laws, of the executive to enact the laws and of the judiciary merely to interpret and uphold the laws. 'Open texture' descriptions of the nature of law suggest that judges will inevitably make policy while interpreting laws, given that legislators cannot pre-empt every contingency in their formulation of legislation. But on this view, when a court goes against the stated intentions of an elected legislature it acts undemocratically. So it seems as if judicial intervention which goes against the wishes of a majority of an elected legislature must be seen as undemocratic in procedural terms. As such, for a representative system to be truly democratic it must subscribe to some form of the traditional Westminster model of parliamentary sovereignty, wherein there is no external authority able to overrule the legislation of the Parliament, regardless of the content of said legislation.

Such a procedural view can certainly form the basis of a condemnation of judicial public policymaking, on the grounds of its undemocratic character. But a procedural democrat need not necessarily reach this conclusion. A variety of procedural views will now be outlined which allow for certain kinds of judicial policymaking.

First, it is common to extend the idea of a democratic procedure to include not only majoritarian legislative decision-making, but the wider constitutional structures within which these institutions operate. Crucially, this can include the constitution itself, which often contains (in the form, for example, of a bill of rights) explicit constraints on majoritarian decision-making, the policing of which is entrusted to the courts. The crucial claim here is that such constitutions can themselves be said to have democratic backing, either as the result, at the start of a political regime, of some form of explicit popular mandate such as a referendum; or more indirectly, through general levels of popular support for the constitution. On this understanding, judges can in fact carry out the will of the demos by overriding legislative majorities on constitutional grounds. The debate over the legitimacy of judicial intervention thus focuses on the extent to which the ruling in question does in fact reflect a democratically endorsed higher constitutional law.

Secondly, a procedural democrat may accept the legitimacy of counter-majoritarian intervention when its intention is to protect democratic procedure itself. This idea lies at the heart of John Hart Ely's 'participation-oriented, representation-reinforcing' justification of judicial review. In an American context, he argues that judges can justifiably make law by 'filling in' constitutional provisions, but only when seeking to further fair representation and electoral participation. Thus courts are only justified in counteracting majoritarian institutions when they do so to protect certain conditions deemed necessary for proper democratic practice. As such, courts only act as checks on majoritarian institutions to protect the integrity of the very institutions in question.

More controversially, a procedural democrat need not necessarily attach anything more than *prima facie* value to democracy itself. The procedural account can be seen simply as a description of what democracy is; a further normative argument is needed to show why democracy is a good thing. The internal logic of majoritarian proceduralism – treating citizens as equals and giving majorities what they want – may have its own justification on certain issues (deciding which colour to paint the town's buildings, for example), but a different kind of argument is needed to show why we should necessarily follow the will of majorities, rather than judges, on questions of right and wrong. As such, it is perfectly coherent for a procedural democrat to argue that a particular non-democratic outcome is superior to the decision, which she acknowledges is one that has resulted from a democratic procedure, on, for example, moral grounds. It would follow that judicial intervention in public policymaking may well be undemocratic, but is justified in those circumstances where it is 'better policy' than the democratic alternative. The policy may be judged to be better in a number of ways: morality, efficiency and human rights protection all being obvious examples. Thus, for example, a pro-choice procedural democrat might accept that judicial intervention to overrule a legislature and prohibit the outlawing of abortion is undemocratic, but nonetheless maintain that the intervention is justified, and perhaps desirable, on moral grounds. Clearly, such an approach cannot provide anything like a blanket endorsement for judicial policymaking. Rather, each case must be judged on its merits, and those with different views will likely see the judicial intervention in question very differently.

Finally, it is possible to be a procedural democrat, and thus maintain that outcomes are democratic insofar as they represent the outcomes of a particular procedure, without maintaining that contemporary forms of indirect elected representation constitute such a procedure. Some theorists are sceptical of the extent to which representative government can itself be said to be democratic. Jean-Jacques Rousseau, for example,

famously opposed the idea that a legislative assembly made up of elected representatives could translate the will of the people into policy, maintaining that democratic self-government is only possible within the context of a direct democracy, where each citizen votes on major policy issues:

'Every law the people has not ratified in person is null and void – is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of Parliament. As soon as they are elected, slavery overtakes it, and it is nothing'.

In modern times, one might associate this position with scepticism as to the workings of contemporary democratic institutions. When voters often find themselves with highly constrained choices between two relatively similar party manifestos, when they vote only once every few years, when politicians take decisions on issues which were not current at the time of their election, and when political parties are increasingly institutionalised into the workings of the state and operate in a context of popular ignorance of many of the most important political issues of the day, how meaningful is it to maintain that a majority legislative vote represents 'the will of the people'?

In recent years, such worries have been compounded by the work of social choice theorists, who have challenged the idea that there is a single fair or objective way to aggregate preferences and count votes, arguing that different decision-making procedures can often lead to very different outcomes. In such a context, some have concluded that the value of contemporary democratic institutions is not so much in the way they reflect the preferences of the people, but in the instrumental goods they tend to secure for example, in terms of political stability, effective government, the avoidance of political corruption and the promotion of certain basic human rights. And if it is felt that such ends can be better served by courts than by legislatures, in particular cases, there seems no democratic reason to object. Again, such an approach would look at the content of courts' intervention in the public policymaking process, and also scrutinise the effects of their actions on the

workings of the political system as a whole. Typically, judicial intervention would be supported insofar as it led to better policy outcomes, but a degree of restraint would be urged on judicial actors, lest they lose their legitimacy in the eyes of the public and so damage their ability to influence policy in the long term.

Substantive models of democracy

The alternative to the procedural models of democracy is to adopt a substantive model. Such an approach assesses the substance of policy outcomes, and asks to what extent the outcome is 'democratic', as measured by some separate index, quite aside from the procedure by which it came about.

The most straightforward substantive model is based on a populist understanding of democracy. On such an account, an outcome is democratic if and only if it reflects the will of the majority of the people. Such a model gives clear directions to elected representatives – they should act, when voting within the legislature, in the way which their constituents would wish. It follows that it is theoretically possible, in a straightforward manner, for a democratically elected assembly to act in an undemocratic fashion, if the legislators substitute their own views for those of their constituents (whether on purpose, or as a result of ignorance as to the majority's will). It equally follows that there is a sense in which other non-elected political figures who contravene the will of the assembly, but do so in keeping with the wishes of the majority, are acting democratically. Such an argument clearly does not provide a blanket justification for judicial intervention in the policymaking process, but it does provide a simple test by which the democratic legitimacy of such judicial action may be judged. And indeed, a variety of political science studies in the US have shown that judgments of the US Supreme Court tend to reflect majoritarian popular opinion more closely than the decisions of either Congress or the Presidency.

A rather different, but equally substantive, approach rejects the majoritarian focus of the populist model. Some writers assess the democracy of policy outcomes by appealing to the principle of equality which underlies

democratic decision-making, and is embodied in the principle that each vote is to count for one, and only for one. Two related arguments may be made in this context, both of which challenge the necessary link between majoritarianism and democracy. The first maintains that individuals are entitled to exercise an equal degree of influence over policy outcomes. If a persistent minority is regularly outvoted by majority groups, there is a sense in which they are being treated unequally, since their votes are counting for less than those of others. So advocates of proportionality suggest that counter-majoritarian intervention may be justified, in explicitly democratic terms, when its purpose is to extend the control and influence of under-represented minorities. Pluralist theorists point to the ways in which intense minorities form pressure groups to seek to bring about political change when their wishes are denied by majoritarian institutions. Insofar as they are successful in judicial strategies, the change they bring about may be seen as democratic if the degree of their influence is proportional to (or less than) that which they would have within a fair system.

In related fashion, some theorists have argued that the underlying democratic principle of equality in fact places substantial limitations on what it is that the majority may legitimately do. Frank Michaelman argues that such an approach underlies Ronald Dworkin's understanding of democracy: 'on Dworkin's conception, "democracy" points not to a procedure but to a state of affairs... [it] points to government treating "all members of the community, as individuals, with equal concern and respect.' If democracy consists of a state of affairs, where each individual is treated by the government with equal concern and respect, then the will of the majority as to how such individuals are to be treated is irrelevant to whether an outcome is democratic or not. Of course, this is not to say that the courts are necessarily the best placed institutions to make a judgment as to what exactly does constitute being treated with equal concern and respect. But nonetheless, the debate over whether a given instance of judicial intervention is democratic or not will here depend on the character of the intervention, and its relation to the egalitarian values which themselves underlie the democratic process.

Conclusion

What to make of this plurality of conceptions of democracy? I have argued that each model will seek to examine, and judge, judicial intervention in the public policymaking process in different ways. Thinkers differ on what makes a policy outcome democratic, and they also differ on the degree of importance they attach to this judgment. For some, good policy is good policy, regardless of how it comes about, and its soundness is sufficient reason to implement it. For others, democratic legitimacy is the primary value, and once a democratic verdict is reached, it must be implemented, regardless of its content. Both approaches have the virtue of simplicity. But I would suggest that those who think carefully about such matters will be loath to give wholehearted backing to either. Writing in 1962, Richard Wollheim identified what he described as 'a paradox in the theory of democracy'. In cases where I think that the right policy for my community is A, but where a majority votes for B, what do I, as a democrat, think should be done – A or B? This tension is at the heart of the debate over the democratic legitimacy of judicial public policymaking. It is evidenced in, for example, the conflicted disquiet which many observers feel in connection with the judgments of the US Supreme Court in the Civil Rights era, when they judge the Court to have acted morally, but to have gone beyond the bounds of its own constitutionally allotted powers. Giving an all considered answer to what should be done in such cases is a difficult business. Most will agree that there is value to policy outcomes possessing democratic legitimacy, but that this should not mean that the rights and interests of minorities are routinely ignored. Quite where the boundaries of justifiable judicial public policymaking lie will depend on one's own understanding of the nature and value of democracy. Different individuals and groups will have different answers, and when judges seek to make public policy, they must be mindful of the instrumental need to work within popular understandings of legitimate judicial involvement. But they will also themselves have to come to conclusions on these issues. It is often asserted that activist judges seek to promote their own ideological beliefs and policy goals. It should

not be forgotten that judges' own democratic theories are an important constitutive part of such beliefs and goals. A proper understanding of how and why judges intervene in the public policymaking process must examine and understand judicial thinking on such issues.

Further Reading

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