

SYMPOSIUM

introduction: should europe adopt the american way of law ... and has it done so? european political science and the law

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By contrast to the United States, European political scientists have tended to pay less attention to the political role of the law. In the US, law not only plainly frames the political system through the constitution, but also has become both more overtly politicised in many aspects of its operation and increasingly exploited as an alternative avenue to electoral politics for political action. Although constitutional judicial review, the judicial regulation of administrative action and interest group litigation have all grown in salience within Europe in recent years, the investigation of these phenomena has tended to be left to lawyers and jurists. Certain socio-legal scholars apart, they have typically focussed on the evolution of legal doctrine, viewed almost as part of the internal dynamics of the rule of law, rather than seeing the law as a political institution and the legal profession as just another set of political actors, to be explored in much the same way as other parts of the political system. Even though on the continent of Europe, if not the UK, political

scientists are often based in law schools or faculties, nothing comparable to the US discipline of political jurisprudence has developed (Shapiro, 1964).

That lacuna has become even more noticeable as European Union (EU) law impacts ever more on the domestic legal and political systems of the member states. Despite the EU being above all a system of law, political scientists again were slow to explore the role of the European Court of Justice as a key motor of European integration and to appreciate the significance of law more generally as a prime feature of the move from government to governance promoted by the EU's regulatory regime. The theme of law and governance in the EU was pioneered by lawyers and jurists, with political scientists being comparative late comers in acknowledging its importance. Indeed, the call for a more interdisciplinary approach, involving input from political scientists, often came from legal scholars (e.g., Weiler, 1994; Wincott, 1995; Shaw and More, 1995). Yet, these developments have potentially profound

consequences for the character of both law and politics within the member states, reinforcing the already existing national trends towards greater legalism. Perhaps because these European developments provide both similarities and contrasts to the juridification of American politics, political scientists based or trained in the United States have been leading players in their analysis – not least, the three US-based contributors to this symposium (see Kagan (1997), Conant (2002), Keleman (2004) and the pioneering work of Shapiro and Stone Sweet, e.g., Shapiro (1991) and Stone Sweet and Brunell (1998)). It was this consideration that prompted the ECPR to promote two panels at the 2006 APSA meeting in Philadelphia devoted to exploring respectively whether Europe should adopt American-style judicial review, and whether it is in the process of doing so.

The first panel addressed normative questions and in particular the legitimacy of rights-based judicial review by constitutional courts. Many of the most prominent and influential US political philosophers have held joint appointments in law and philosophy departments, but have had little engagement with political science. Their writings often appeal implicitly or explicitly to an idealised version of American constitutional arrangements, and argue that the Supreme Court ought to act as an exemplary reasoner on the matters of political principle embodied in the Bill of Rights (e.g., Rawls, 1993: 216, 231–40; Dworkin, 1996: 69–71). Of course, they acknowledge that in practice the Court often falls far short of their theoretical accounts of how it should reason. Indeed, much of the force of their argument turns on pointing to the wide gap between what they consider to be the best understanding of the egalitarian ideals underlying the American republic and the huge inequalities that characterise its social reality

(e.g., Dworkin, 2006). But they look to the Court rather than electoral democracy as the appropriate ‘forum of principle’ that should uphold their views, and are apt to attribute many of its current shortcomings to unwarranted political intrusions into the legal process rather than limitations of the Court itself (e.g., Dworkin, 1996: chapter 5). Moreover, they appear unaware of the body of empirical evidence suggesting how many of the features they deplore in contemporary democratic politics are in part the creature of the pre- and anti-democratic counter-majoritarian mechanisms they support (for an elegant summary, see Dahl (2002) and compare Dahl (2006) with Dworkin (2006), both books motivated by a concern with equality, in their diagnoses of the ills of American democracy).

This panel sought to redress the balance by asking whether the rights-based judicial review of democratic decisions could be normatively or empirically justified. Credit goes to the first panellist, Jeremy Waldron, who unusually has held major chairs at US universities in both politics and law departments, for having opened up this issue in his *Law and Disagreement* (Waldron, 1999a) and the *Dignity of Legislation* (1999b). These books sought to place legislatures rather than courts at the centre of philosophical thinking about law and to enrich work in legal philosophy with the resources of political theory. In focussing on the merits of democratic law-making as mechanisms for resolving deep and reasonable disagreements concerning justice and rights, Waldron challenged the right of constitutional courts to overturn such settlements. In his paper (now published as Waldron, 2006), he summarised the resulting case against rights-based constitutional judicial review in terms of output and process considerations. Though most defenders of judicial review grant that democracy scores better than

judicial review in terms of providing a process in which all citizens' views are treated with equal concern and respect, they contend that judicial procedures offer a more conscientious, impartial and reliable mechanism for securing equitable outcomes. By contrast, Waldron contends that even when judged by outcomes, democracy does as well as constitutional courts. Indeed, their shortcomings as fair processes often have an adverse rather than a positive effect on their capacity to secure just outcomes. The second panelist, I have recently developed Waldron's thesis to argue for the constitutionality of 'actual existing' democratic processes against deliberative democrats, on the one hand, and defenders of judicial review as an ideal deliberative democratic process, on the other (Bellamy, 2001, 2007). As my contribution to the symposium shows, far from being barriers to the protection of rights and the rule of law these constitutional goods are actually promoted by the very features of democratic decision-making legal constitutionalists are apt to criticise: namely, majority rule, party competition and the resulting responsiveness of rulers to ruled and their need to produce compromises to accommodate the competing demands of citizens and win their support.

A New Zealander and British citizen respectively, the criticisms of Waldron and myself were partly motivated by the move to something akin to American-style judicial review by the constitutional reforms undertaken in Britain and other commonwealth countries over the past two decades. The third panellist, the Canadian political scientist Janet Hiebert, has been an assiduous empirical evaluator of these changes. Summarising her past and ongoing work, she noted how the claims that Canada, New Zealand and Britain have developed a unique 'commonwealth' model of dialogue between constitutional courts and legis-

latures are largely unproven (Hiebert, 2005, 2006). Legislative decision-making has become increasingly legalised. As Alec Stone Sweet (2000: 204) has pithily put it, 'governing with judges also means governing like judges'. And if judicial processes prove less legitimate and, at best, no more effective than democratic ones, that development cannot be regarded with equanimity.

Unlike Britain, constitutional judicial review is not a new phenomenon on the continent of Europe. However, it has often been regarded as motivated by quite different substantive considerations to those found in the Anglo-American model, most notably a concern with social rights. That has not made European courts any less prone to exercise judicial review of legislation. In fact, the French, Italian and German constitutional courts have invalidated more national laws in the past thirty years than the US Supreme Court has over the course of its entire history (Stone Sweet, 2003: 2780). Yet, this development has been seen by many as a mechanism for locking in the European social democratic model. Indeed, such considerations motivated many of the advocates of the EU Constitution and especially the Charter of Fundamental Rights that it incorporated. The second panel explored how far this expectation proves founded. In particular, they examined how far the legalisation of politics fostered by the shift from government to governance promoted by the EU has led to Europeans adopting the American 'way of law'. According to this thesis, Americanisation involves adopting not only the adversarial litigation process typical of the US but also its neo-liberal outcomes. Robert Kagan begins by defending the resilience of European social democratic systems against such trends, while acknowledging their presence and impact. That defence is then challenged explicitly by Keleman and implicitly by Conant. Both contend that the EU's institutional

structure has created political incentives and functional pressures that encourage the emulation of the form and content of the American way of law. To some extent, their debate is more a matter of emphasis rather than of diametrically opposed views. Either way, though, there can be no doubting the centrality of the issue they raise. As such, it serves to underline how the political consequences of law are too important to be left to the lawyers and the jurists alone.¹

Note

1 That 'lawyers alone' should not be read as meaning 'no lawyers' was amply demonstrated by the way the panels were enriched by the interdisciplinary dialogue opened up by the two legal scholars who kindly agreed to act as discussants – Larry Alexander, for panel 1, and Oliver Gerstenberg, for panel 2. They defended respectively the integrity of constitutional law in general and European law in particular. I am pleased to be able to record the gratitude of all the panellists to their efforts.

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