

Yale Law School
Yale Law School Legal Scholarship Repository

SELA (Seminario en Latinoamérica de Teoría
Constitucional y Política) Papers

Yale Law School SELA (Seminario en
Latinoamérica de Teoría Constitucional y Política)
Papers

1-1-2004

THE JUDICIARY AND DEMOCRACY: TO THE RESCUE OF THE SPIRIT OF THE SPIRIT

Rodrigo P. Correa
Universidad Adolfo Ibáñez

Follow this and additional works at: http://digitalcommons.law.yale.edu/yls_sela

Recommended Citation

Correa, Rodrigo P., "THE JUDICIARY AND DEMOCRACY: TO THE RESCUE OF THE SPIRIT OF THE SPIRIT" (2004).
SELA (*Seminario en Latinoamérica de Teoría Constitucional y Política*) Papers. Paper 37.
http://digitalcommons.law.yale.edu/yls_sela/37

This Article is brought to you for free and open access by the Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

THE JUDICIARY AND DEMOCRACY: TO THE RESCUE OF THE SPIRIT OF *THE SPIRIT*

Rodrigo P. Correa G.

Profesor Asociado

Universidad Adolfo Ibáñez

rodrigo.correa@uai.cl

Judges exercise public power. The ideal of democracy demands that every exercise of public power should express the will of the people. The popular or general will does not exist, however, as a brute fact, given that the people or the nation can only be conceived as a unity in normative, not natural terms. In other words, the people or the nation has no will because it is not a subject with mental states. The popular or general will must therefore be attributed normatively to a people or nation, itself also a normative construct. This means that, in principle, every exercise of public power, not only judicial power, is problematic from the point of view of democracy. Taken to the extreme, one might even put in doubt whether the legislative powers of our states live up to the ideal of democracy. This is not a merely academic question. The rising level of political apathy that characterises some of our political systems but does not necessarily imply a rejection of democracy as governmental ideal, suggests its increasing practical relevance.

The question of the relation between public powers and democracy thus evolves into the question of the necessary and sufficient conditions under which the exercise of public powers can be attributed to the people or the nation. In other words, at issue is the concept of representation. Again, this is a normative question which must be answered starting from moral and political convictions. Nonetheless, it is the responsibility of academic professionals to submit

the leading moral and political convictions of our societies to rational scrutiny or even the most barbaric exercises of power could be justified in the name of democracy.

Fortunately, our political institutions are not built out of thin air. They are the outcome of a tradition whose doctrinal foundations can be traced back to the Enlightenment and whose institutions have their origin in the revolutions of the end of the Eighteenth Century. This tradition provides some answers to the problem of representation. The French Revolution first established that the nation's representatives were the legislative body and the king (Constitution of 1791, title III art 2). Starting from the abolition of the monarchy on September 21, 1792, the legislative body becomes the only representative of the nation. To the extent that the right to vote and be elected was expanded, it became possible to speak of representative democracy. This answers the question about the attribution of legislative power to the people or nation: this is possible to the extent that the legislators are citizens elected for a certain period of time in public elections open to practically the entire adult population. The United States tradition leads to a similar response. But what about judicial power?

Doctrinally, the classic answer can be found in Montesquieu. It is interesting to note that the doctrine holding that the power “to judge is in some sense next to nothing” consists of two parts.¹ The first concerns judges as organs and the second relates to the judicial function. About the former Montesquieu wrote that,

[t]he judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently

¹ [Montesquieu, 1748 #734 @bk XI ch 6 p 72 (I substituted “power to judge” for “judiciary”, for being more faithful to the French ‘puissance de juger’)].

with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.

By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.²

This marks out a considerable difference with the other two branches of government that “may be given rather to magistrates or permanent bodies”.³

The other part of the doctrine is found in these famous words: “the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour”⁴ At stake here is not the organization of the courts, but the nature of their function.

Montesquieu’s doctrine profoundly influenced the French Revolution, giving rise to the very peculiar institutions of the *Tribunal de Cassation* and the *référé législative*.⁵ The *Tribunal*’s function was to police the application of the law. It was invested with the power to strike down judicial decisions, but without going into the merits of the case. The impenetrability of the merits concerned both facts and law. In other words, when striking down a decision, the *Tribunal* simply established that the law had been manifestly wrongly applied, but without making a positive determination of what would have been its correct application. Due to its exclusively negative function, the *Tribunal* might be asked to examine the same case twice. Given that a

² [Montesquieu, 1748 #734 @bk XI ch 6 p 70].

³ *Ibid.*

⁴ [Montesquieu, 1748 #734 @bk XI ch 6 p 73].

⁵ The analysis of the *Tribunal de Casación* and the *référé législative* are based on [Geny, #1629].

decision by the *Tribunal de Cassation* did not resolve the legal issue in a way binding upon lower judges, the law might once again have been wrongly applied by the lower court. A second cassation, however, was sufficient proof that, rather than a ‘manifest’ misapplication of the law, a more profound interpretive difficulty was at stake. Resolving this interpretive difficulty was not the proper task of judges but befell to the legislator. In such cases, the *référé législative* was the mechanism by which the legislative body resolved interpretive doubts concerning the judicial application of the law.

The *référé législative* was therefore a considerable limitation of the *Tribunal*. As a matter of fact, the *Tribunal* was originally conceived as a kind of legislator’s police, rather than as a body in charge of unifying judicial decisions. This is confirmed by the constitutional mandate to create the tribunal *auprès du Corps législatif*, that is, next to the legislative body. (Constitution of 1791 title III ch V art 19)

It is true that the French revolutionaries did not follow Montesquieu’s suggestion to create temporary courts. Still, the spirit of the ideal of Montesquieu was paid some tribute to in two ways. First, through the vigilance of the courts by the *Tribunal de Cassation* as already described. Second, through the arrangement of juries.

The revolutionary design of the judiciary did not survive for long. The legislative *référé* found almost no practical application. The declaration that the *Tribunal de Cassation* would be established next to the legislative body was of no practical relevance. In time, the *Tribunal de Cassation*, transformed into the *Cour de Cassation*, obtained a role of primary importance through the development of judicial legal doctrine. Notwithstanding the transitoriness of revolutionary excesses, the ideal of separation of powers, based on a conception of the power to judge as categorically different from legislation, and the conception of the judiciary as a

negligible power, has been constitutive for the republican ideal in many Latin American countries. It seems to me that in the republican constitution of Chile it has played an important role.⁶

Times have changed however. Today it seems anachronistic to insist on the French Revolution's conception of the judiciary. Various intellectual movements inspired by different, sometimes even contradictory, visions of the world, coincide in rejecting this conception and embracing a judiciary that is more committed to justice than to statutory law. The shortsightedness of this overlapping consensus between rightwingers and lefties, conservatives and liberals, does not fail to surprise. They all seem to believe that 'justice' will correspond to their conception of it, and that judges will have no problem in discerning it, even if outside and above the laws. This has led to a severe loss of prestige of formalism and an enthusiastic commitment to a jurisprudence of rights. The agreement is moreover taken advantage of by judges to promote their corporate interests. We have pathetically renounced the arms the Enlightenment provided us with to confront the judiciary's claims to larger spheres of autonomy and increased freedom from statutory law.

It would be unwise to advocate a return to revolutionary discourse without taking account of the reasons for its failure. Perhaps their examination will force us to conclude that the discourse was entirely utopical and that reviving it would be a mistake. But even in that case it would be possible to try to rescue the spirit behind the idea of the judicial power as "in some sense next to nothing", defended by Montesquieu in the *Spirit of the Laws*. This is precisely my aim in this paper. In other words, to come to the rescue of the Enlightenment ideal of justice while leaving behind its institutional naivety.

⁶ Cf. [Figuerola Quiteros, 1982 #1630].

I. The Judiciary

Montesquieu's ideal concerning the judicial function has significant consequences for the organization of the judiciary: judges must be independent from the other two powers. In fact, the idea that judges be the mouth that pronounces the words of the law only constitutes a safeguard for political liberty to the extent that those same judges do not make law nor execute it. This is affirmed by Montesquieu himself. Judicial independence is in accord with the ideal organization of the judiciary as envisioned by him.⁷

In continental legal systems, judges constitute a bureaucracy. The absence of juries strengthens the bureaucratic character of the judicial organization. At the institutional level, the organization of our courts is a far cry from Montesquieu's ideal. And if in his ideal world the independence of judges were unproblematic, exactly the opposite occurs in bureaucratic judiciaries.

In Montesquieu's scheme, judges are independent from the legislator and the executive for being "persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires." Given the actual organization of the judiciary, however, their independence is much more problematic. Judicial bureaucracies are permanent, not temporary. In fact, in a democratic republic judges hold their offices for a considerably longer

⁷ "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." [Montesquieu, 1748 #1372 @bk XI ch 6 p 70].

period of time that members of government and parliament. This makes judicial independence doubly problematic.

In the first place, bureaucratic structures typically submit their activities to bureaucratic controls. Ascension within the structure is closely related to those controls. Inevitably, a vigilated subject loses independence towards the vigilante. Controls can be external or internal. When they are external, there exists the risk that judges lose their independence from the other powers of the state. When they are internal, the subordinate loses his independence from his hierarchical superiors. The preservation of judicial independence requires therefore a careful look at both internal (internal independence) and external (external independence) controls.

In the second place, bureaucracies tend to generate their own interests. For this reason, internal controls may be as threatening to independence as external controls. The existence of interests proper to the judicial bureaucracy also corrodes Montesquieu's ideal of a power "in some sense next to nothing". The judiciary, just like any other bureaucracy, will use part of its power to obtain the satisfaction of its own interests.

The situation as described here would not be so serious were we clearly aware of it. The most troubling, however, is that we have lost our guard. We have completely forgotten the institutional dimension of the judiciary as a power "in some sense next to nothing." Due to our forgetfulness we have lost track of the meaning and original value of judicial independence and stand unarmed against judicial demands for more autonomy from the other branches of government. Hence, it should not come as a surprise that the superior courts of justice in some countries, under pretence of strengthening judicial independence, try to increase their bureaucratic control over judges and, in many instances, weaken the intensity of their submission to the law.

Chile is a good example of this phenomenon. Upon reestablishing democracy, the Supreme Court disposed of many more political powers than it had at the time of the coup. It elected (and still elects) three senators, two of its own former Justices and a former General Comptroller of the Republic (Political Constitution art 45 inc 3 letters b and c). Its opinion had to be heard (and still has to be heard) about any bill purporting to modify judicial organization or powers (Political Constitution art 74 paras 2ff). Over the last years, Congress and the Constitutional Court have extended this norm such that the opinion of the Court must be heard on any minor modification of the most insignificant judicial procedure. The Supreme Court elected (and still elects) three out of seven members of the Constitutional Court (Political Constitution art 81 para 1 letter a).⁸ The President of the Supreme Court is *ex officio* member of the National Security Council (Political Constitution art 95 para 1).⁹ Additional to these institutions, heritage of the military government, the Supreme Court has created its own “ethical commission”. This commission investigates indictments of unethical behaviour by judicial officials, and allows the Court to apply sanctions. Even one of the Supreme Court’s own members was removed in this way.

⁸ There exists agreement within the Senatorial Commission on Constitution, Legislation, Justice and Rules to modify this arrangement. The number of members of the Constitutional Court would be increased to nine, and the three justices of the Supreme Court would be temporarily suspended from their functions in said Court to dedicate themselves exclusively to the Constitutional Court for the period of their appointment. After completion of this period, they would reassume their functions in the Supreme Court. *Senado, Comisión de Constitución, Legislación, Justicia y Reglamento*, Second report published on N°s 2.526-07 and 2.534-07 (March 18, 2003).

⁹ There exists agreement within the Senatorial Commission on Constitution, Legislation, Justice and Rules to modify the functions of the National Security Council. *Ibid.* However, the President of the Supreme Court would still take seat in this new Council.

There have been some reforms pointing towards the opposite direction, in particular concerning the Judicial Academy. The Academy has been important mainly for having substantially diminished the influence of judges in the selection of future members of the judiciary. The other institutional reform that should be mentioned concerns the incorporation of Supreme Court members from outside the judicial career track. However, this has not had the positive impact many had hoped for.

The institutional framework is complemented by a critical public opinion of the judiciary. The Supreme Court has responded to public opinion using three different strategies. First, it has instigated a policy of investigation and sanctioning of disciplinary misbehaviour by judges and judicial officials, most visibly through the creation and functioning of the Ethical Commission already mentioned. Second, it has created a press office. The press officer in charge has even published columns in the press defending Court decisions that had been subject to criticism. Third, the Court has developed a judicial reform agenda meant to strengthen its institutional independence. The agenda includes increase of financial means assigned to the judiciary, more autonomy for the Supreme Court to distribute these resources, absolute control over the Judicial Academy, more administrative autonomy to determine the creation and dismantling of courts, transfers and removals of judges. During the last months, the Court has given such priority to its agenda that its last President was forced to retire prematurely for having reached an agreement with the Ministry of Justice on a package of reforms that was considered insufficient by the majority of his colleagues.

The current position of the judiciary within the Chilean constitutional system is quite uncomfortable. The Supreme Court seems to perceive this and has reacted in the ways just described. Should its agenda prevail, this would simply aggravate the problem. Remarkably, its

pronouncements in terms of increased independence has not been challenged by law professors nor by practising lawyers (with some exceptions, these do not actually constitute two different groups, the former being simply a subdivision of the latter). But this is less odd considering that we have forgotten Montesquieu's original idea that the independence of judicial power should go hand in hand with its virtual non-existence as a branch of government.

Can the judiciary be organized in such a way as to make the power to judge equal “next to nothing”? I suggest that it can, and that the way to proceed is by debilitating its corporal structure.¹⁰ Even if it is inviable to confer judicial power to “persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires”, it is possible to organize the judiciary in such a way as to minimize the generation of corporative interests. This, for sure, is easier said than done. Its success requires taking account of, at least, institutional and cultural factors. From an institutional point of view, minimizing the generation of corporative interests could be achieved by eliminating the main bureaucratic characteristics of the judicial organisation, particularly the existence of a judicial career track. It cannot be ignored though that the elimination of the judicial career would go against a long established tradition in Latin American countries. Better therefore to concentrate on some critical points, like the salaries of trial court judges and the mechanisms for the qualification and appointment of judges.

Bureaucratic culture may be challenged by other than institutional reforms. Perhaps more important even than these is the legal culture. It must be insisted that the independence of the

¹⁰ Similarly, Juan Enrique Vargas, “Independencia *versus* Control del Poder Judicial”, paper presented at the International Conference of Experts on Democratic Transition and Consolidation, Gorbachev Foundation for North America and Fundación para las Relaciones Internacionales y el Dialogo Exterior (Madrid, October 2001), published at <www.cejamerica.org>.

power to judge requires independent judges, not an autonomous judicial organization, and that the judicial organization should not constitute a branch of government equivalent to the other two. Such insistence would contribute to the development of a culture in which claims such as presently made by the Chilean Supreme Court would have to be defended more persuasively than by a mere appeal to the ‘independence of the judicial power’.

Intents to reduce the bureaucratic nature of the judiciary should avoid the danger of transferring power from the superior courts to the trial court level. The judiciary should not be ‘democratized’ in the sense that the power to take decisions affecting corporative interests would simply be displaced internally. The example of Italy would show that, where this happens, the judiciary does not gain but lose independence.¹¹ Where mechanisms that control professional functioning become less important, less prepared judges will be allowed to ascend. Less well trained judges are more susceptible to pressures of all kinds. Corporativism, hierarchical or ‘democratic’, seriously affects the power to judge.

II. The judicial function

Independence is a necessary but insufficient condition for judges to be “the mouth that pronounces the words of the law”. This ideal of the judicial function is based on a naive distinction between creating and applying the law. But acknowledging as much should not make us eager to renounce the ideal of Montesquieu. The law is the expression of the popular will. If we renounce to judges being bound by law, we also give up on the manifestation of democratic will through judicial decisions. We should therefore ask ourselves, how can judges be bound by law?

¹¹ Guiseppe Di Federico, . . .

This question requires a much more careful and paused examination than I could possibly engage in here. I will only suggest a thesis that addresses part of this problem: that judges can only be constrained by law where there exists a vigorous differentiated legal doctrine. In very complex and dynamic societies like ours, with a high level of legal regulation embracing all spheres of social life, fidelity of judicial decisions to legislation requires a means that only complex argumentative traditions can provide. Because of their complexity, these argumentative traditions obtain considerable autonomy which translates into its own body of literature, centers of study and professionals. The ideal of democratic law understood as law that can be understood by any lay person, is an illusion.

It is true that laws are expressed in natural language... but only up to a point. However rich natural language may be, it falls short of taking account of the subtle but important differences presented by apparently similar situations. Accumulated experience, sometimes for centuries, sometimes for months or years only, has distinguished these situations and labelled them. Thus we distinguish between possession and property, embezzlement and theft, taking and regulation. These respective linguistic conventions are preserved and developed by professionals dedicated to the study of law. Statutes make use of these conventions. Thus the legislator increases its range of possible actions, as it needs less time to express the content of its will with more accuracy.

Moreover, given that the democratic legislator is not individual but collective, the technical language of the law is the meetingpoint where to constitute its will. Therefore it is only partly true that laws are expressed in natural language. In truth, they are expressed in a mixture of natural and legal-technical language. The expansion of the democratic legislator's range of action necessarily results in a legislation that is not easily accesible to the lay person. The law,

democratic to the extent that it expresses the will of the people, cannot be democratic in the sense of easily understood by all.

Legal doctrine not only expands the potential range of action for the legislator, it also fulfills a vital role in binding judges to the law. The will of the democratic legislator does not exist as a natural will. Only individual wills exist and even these are only partly accessible to their agents. The will of the legislator is therefore the will that may justifiably be attributed to the text of the law. If however the legislative language were read as an exclusively natural language, too many (and sometimes too few) meanings would be attributable to the text. Legal doctrine fulfills the task of limiting the universe of meanings that may justifiably be attributed to a legal text and in this way binds the judge to the legislator.

The two functions of legal doctrine just described are complementary. On the one hand, it provides the democratic legislator with technical concepts required to lay down the law. On the other hand, it constrains the judge who attributes meaning to a legal text by recurring to the same conceptual framework of references. Thus it ties the power to judge to the democratic law in a way that would be unavailable under a superficially more democratic legal system.

In Chile, and I have no reason to think that Chile is the exception in Latin America, the fidelity of judges to law has become too feeble, due to a weakening of the argumentative tradition. I see two major causes for this debilitation. On the one hand, the level of scientific production is very low and stands in no relation whatsoever to the legislative needs. This should be unsurprising, because it simply reflects the non-existence of a scientific community.

The second cause is found in the jurisprudence of rights that comes hand in hand with the direct application of the constitution to all sorts of cases.¹² Constitutional rights are considered limits to the legislative power. The recognition of their justiciability already implies a relaxation of the submission of judges to law. There are some who for this reason alone reject all judicial recognition of constitutional rights. But I need not take that position to argue that constitutional rights have weakened the fidelity of Chilean judges to law. Even accepting that the justiciability of fundamental rights is necessary to subject democratic will to certain limits, one would have to conclude that the rights jurisprudence has unnecessarily loosened the relationship between the judge and the law. In this respect, the second debilitating cause is confluent with the first. The jurisprudence of rights has produced this effect in Chile because there practically exists no doctrine on constitutional rights.

Conclusions

The democratic will is an institutional fact. In modern States we take it that laws are attributable to the people or nation when they are the outcome of a public legislative process conducted by a group of representatives elected by popular vote. Even though judges are not directly elected by the people, we understand that their power is democratic when it is constrained by law. The constraint of law cannot be direct but must be mediated by relatively autonomous argumentative traditions. No truly democratic justice can exist if not for legal doctrine that necessarily distances law from the lay person.

¹² On another occasion I referred to this phenomenon as “Vulgarization by Constitutionalization”, paper presented at the I Student Conference on Constitutional Law, Universidad de Chile, Santiago, August 2003.

The law can only bind the power to judge when judges are independent. A judge is not independent when vigilated by persons whose interests in controlling him are not primarily motivated by the supremacy of the law. The bureaucratic organization of the judiciary generates its own interests other than the interest of law. Hence, internal controls may affect judicial independence as much as external controls.

We must come to the rescue of Montesquieu's ideal of the power to judge as "in some sense, next to nothing", which embraced both organizational and functional aspects. The naivety of Montesquieu's institutional arrangement should not bring us to abandon an ideal that seems particularly appropriate for the judicial power in a democratic republic.