1 Introduction

If you visit criminal courts in different Western European countries, judges look different and behave differently. In Sweden the young judge in the *tingsrätt* will be in ordinary clothes, sitting on a panel with lay assessors, probably even older than her parents, at the same level as the prosecutor, defence lawyer and the accused. It is more like a meeting than a common-law trial, with everyone joining in, often across the table, rather than speaking at the invitation of the presiding judge. In France, the three women judges, one middle-aged and two younger, will be in robes, on a dais raised above the accused and his lawyer. Alongside the judges, and at the same level, will be the prosecutor. The focus of the event is the discussion between the judges and the accused or the judges and witnesses, with occasional interventions of the defence advocate. The English, middle-aged trial judge is even more formal, wearing a wig, and raised above everyone. In front of him will be the advocates for prosecution and defence in robes, who do much of the talking, and the accused behind them, who says little. The lay jury will be in a separate box on the side. Such initial impressions offer a starting point for this book. People who are called 'judges' are of different ages and relate differently in the court setting to those around them. Most continental judges are women. So why the differences, and do the appearances indicate a real difference in what they are doing?

Such questions are complex, and my ability to answer them is limited by my knowledge of languages and understanding of how different legal systems work. I am content to try to take a substantial step by looking at a number of questions in relation to five judiciaries. This book aims to examine three aspects of the diversity of judiciaries in Europe. First, it aims to document and analyse four differing

continental European judicial systems, to study their structures and their specific character, and to compare these with the English judiciary as a representative of the common-law tradition. These chapters will not simply document differences in the recruitment, training and functions of judges in individual countries. They aim to identify a number of features that shape the way in which the work of a judge is performed and valued within particular legal systems. These more embedded features of the systems structure what I want to label 'a judicial culture'. Judges in different systems may perform a variety of tasks, some of which are similar between systems and some of which are specific to one system. But the 'judicial culture' focuses more on the institutional context within which judges operate and the particular way in which they perform their tasks. Each chapter will focus on a number of common themes, so that comparison between the systems can be made. Secondly, the chapters are written also to enable the reader to understand the system in its own terms and the factors that make it distinctive. Thirdly, the final chapter will draw out some overall conclusions about the factors that mould the character of judiciaries. In brief, I will argue that there is no single pattern or paradigm for the judge in Europe. Each judiciary is nested within a set of relationships to a legal community, to institutions of government and to the wider society which is unique. One can comment on whether it works effectively or as claimed within its own context, but comparative judgements of worth are more difficult.

This chapter aims to explain the approach taken to the study of the topic. My perspective will be an institutional comparison, looking at the judiciary as a social organisation within a context of expectations set by legal norms and by other institutions.

The centrality of the institutional perspective

Perspectives on judicial activity

There are three major perspectives from which the culture of the judiciary can be studied. The personal perspective looks at the way individuals perceive their role and career. The institutional perspective looks at the judiciary as a collective and examines the way in which the structures of the career and organisation of judges, as well as legal processes, affect the judiciary as a social institution. The external perspective looks at the judiciary from the perspective of its impact on the wider world.

Personal

If we start with the experience of the individual *judge*, the character of the tasks assigned and the career profile will be important. The attractiveness of the career and the opportunities that it makes available form a major part of any account of the judiciary. For instance, the ability of the career to permit social advancement, to provide personal fulfilment or to enable a person to manage family commitments is of high importance to many who prefer this career over that of private practice. The experiences among different social groups of life as a judge provide diverse perspectives on a common career, and this is a major factor in any account of the judicial culture.

The literature on such personal perspectives is limited. Only where judges are personages of the state, as in Britain or Sweden, or in the French Conseil d'Etat, is there much judicial biography which can offer insights into individual motivations. On the other hand, some countries, such as France, Germany and Italy, have a substantial literature of popular books and articles written by judges for a general public in which their individual motivations and perspectives on the judicial role are articulated. In addition, there are a few opinion surveys that have looked at the views of judges.

Sapir argued that the *locus* for a social culture is always the individual. The individual does the thinking and adopts attitudes, and if there is a group perspective then it has to be located in specific individuals who can be identified.[1] In studying institutional judicial culture, my focus is less on differences between individual judges than on the way individuals work within organisations. Individual testimonies provide evidence for an institutional culture, provided they are replicated sufficiently. These individual stories enable us to explain how the ideas and practices within organisations are developed and perpetuated.[2] Attitudes that individuals share from their activity on a common task form the basis for ascribing a culture to an institution. Naturally, within an organisation, there will be diversity. Individuals have a variety of opinions, so that the ascription of a particular culture to an organisation is really to take a point along the spectrum as 'typical' or representative. One is trying to identify a recurrent or pervasive set of characteristics.[3]

[1] See E. Sapir, *The Psychology of Culture. A Course of Lectures* (reconstructed and edited by Judith T. Irvine, Berlin 1994), 141.
[2] S. Derné, 'Cultural Conceptions of Human Motivation' in D. Crane (ed.), *The Sociology of Culture* (Oxford 1994), 267, 282.
[3] G. E. R. Lloyd, *Demystifying Mentalities* (Cambridge 1990), 5; Derné, 'Cultural Conceptions', above n. 2, 284–5.

Institutional

The institutional dimension focuses on the *judiciary* as both an organisation and a collective. Within a single legal system, there may be several collective groupings of judges, which need to be discussed separately (for example, in France civil, administrative and constitutional judges differ from commercial and labour court judges). As an institution of government, the judiciary has important relationships to political and social power. As a collective, it typically has a corporate life that relates to higher authorities (for instance the Ministry of Justice and a Judicial Council) and to society in general (such as through campaigns on particular issues and through the media). Corporatism involves both associative activity, through professional associations, and socialisation.

An institutional culture involves a set of beliefs and attitudes that give shared meaning to an activity. I would adopt the view of Garapon that one must include some unconscious features of the culture which explain why actions take place: 'To grasp a culture thus involves one in trying to formulate what is so obvious for the members that "it goes without saying". The best way of abstracting oneself from one's own culture is to look at it from the outside in confronting it with other cultures.'[4] The analysis of these implicit attitudes is a matter of interpretation. It has to be recognised that such analysis is a construction of the author. The reality of such an analysis depends on the degree of correspondence between it and the perception of the actors. Because these may be implicit rather than explicit, there is no suggestion that the actors would use the author's concepts to describe themselves and how they perceive what they are doing. All the same, there needs to be sufficient evidence that they could recognise themselves in the presentation without distortion.

External

The external perspective is interested in the *social and political impact* of judicial activity, both in court and outside. Political scientists find the relationship of the judges to politics to be of major importance, even if they are also concerned about the character of the judicial career. According to Guarnieri and Pederzoli, three factors affect the character of the judiciary – the judges themselves (especially how they are recruited), the legal system (especially the ease of access to the courts)

[4] A. Garapon, *Bien juger. Essai sur le rituel judiciaire* (Paris 1997), 150.

and the character of the political system.[5] For them, the priority is to be given to the political context: 'While judicial structures are important as a starting point in understanding why some judiciaries are more politically active than others, it is not just structures but political context (historical and contemporary) that ultimately determines the level of judicialisation in any country.'[6]

The classical area for examining the relationship of judges to politics is constitutional review. It forms the subject-matter of many studies of judges.[7] Political scientists have also focused on constitutional justice and its effect of 'judicialising' politics.[8] The first focus is on the way in which political issues can be contested in court, either by politicians or interest groups (e.g. through expanded rules on standing). A second focus pays attention to the impact of judicial review on the conduct of politics, either the juridification of political discourse and action, or the self-limitation which politicians undertake to avoid judicial sanctions.[9] Stone Sweet suggests that there is a fundamental difference in discourse and justification between law and politics: 'Legal discourse, that of judges and lawyers, tends to be rule-laden, and is structured by doctrinal norms and the demands of exegesis. Political discourse, that of politicians and political scientists, tends to be interest-laden and is conducted in the language of power or ideology.'[10] So the legal understanding of what occurs in judicial activity differs from a political science perspective on the political consequences of that activity.

Apart from this political dimension, there is also the perspective of the subjects of the law, in particular litigants. Friedman[11] considers this to be a major focus in understanding legal culture. His concern is both with the impact of law on individuals in their ordinary lives and with their picture of the law and of judges. Even though I have not adopted this 'popular legal culture' approach, the public opinion of the judiciary contributes an important part of the context in which the judicial culture develops. Judges are aware of the context in which they are called upon to consider issues, and they exercise a responsibility for the

[5] C. Guarnieri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford 2001) (hereafter 'Guarnieri and Pederzoli'), 3.
[6] Ibid., 182–3.
[7] See, for example, A. Stone Sweet, *Governing with Judges* (Oxford 2000).
[8] C. N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York 1995), ch. 1.
[9] M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialisation* (Oxford 2002), 189.
[10] Ibid., 187.
[11] L. M. Friedman, *Law and Society: An Introduction* (Englewood Cliffs, New Jersey, 1977), 76.

development of the law. So they will respond, where they consider it appropriate, to the demands of the external context. In addition, judges individually and collectively will take note of the regard in which they are held. This will affect initial recruitment – whether the job has an attractive status – and then the deportment of judges in performing their functions and in engaging with the media.

Clearly the political science and social perspectives on the consequences of judicial activity are important. My approach in this work will be more limited. It is valuable to use the insights of these other disciplines to understand how judicial institutions operate, including how the external context has an impact upon them. But my focus will be on the internal aspects of judicial institutions and cultures.

Why adopt an institutional perspective?

An institutional perspective is useful first because it relates to the nature of law, secondly because this is how one operates as a legal actor, and thirdly because it is how the law relates to the wider world.

The nature of law: law as institutional fact

The law is something more than simply a system of rules or legal standards. Those rules operate in a context of institutions, professions and values that form together a 'legal culture'.[12] Several prominent legal theorists[13] focus their analysis of law and legal culture as a set of ideas and attitudes held by lawyers or those subject to the law. But this is only part of the picture, since law is as much about practices, what people do, as about what they think. On the one hand, legal culture is a pattern of behaviour or an activity, which Bauman would describe as 'praxis'.[14] On the other hand, there is a set of ideas and values, which are communicated through language and signs that express attitudes and values towards the activity.[15] As praxis, legal culture is observable and as ideas it interprets reality.

The most helpful way to consider the relationship between the practical and ideological aspects of legal culture is to use Searle's conception

[12] J. Bell, *French Legal Cultures* (London 2001) (hereafter '*French Legal Cultures*'), ch. 1.
[13] See, e.g., R. Cotterrell, 'The Concept of Legal Culture' in D. Nelken (ed.), *Legal Cultures* (Aldershot 1997), 22–3 and 29, and L. M. Friedman, 'The Concept of Legal Culture: A Reply' in ibid., 35.
[14] Z. Bauman, *Culture as Praxis* (London 1973).
[15] See C. Geertz, *The Interpretation of Cultures* (1973, Basic Books edn, London 1993), 5; R. Williams, *Culture* (London 1981), 11–12.

of 'institutional fact'. An institutional fact is a fact which we invest with meaning within a particular set of social relations because it performs a particular function. Thus a green piece of paper having the right design may count as a 'dollar' in money. The paper has no intrinsic worth, but rules arising from social convention confer on it the value of money.[16] The same is true with law, for law is an institutional system. As MacCormick and Weinberger point out,[17] law is not a set of 'natural facts' that can be inspected directly. Rather it is an interpretative reality under which certain physical events take on a special significance. That assignment of meaning to natural facts depends on collective intentionality, not just the wishes or views of a particular individual observer or actor.[18] In law, agreed perceptions turn a set of facts into a 'trial' – the situation in which one person sits on a raised platform while another person stands silently in front of him and two others argue facing the person seated. The legal community creates the institutional reality which individuals can then use to explain events. But the institutional system and practices precede the ideas.

Applied to judicial practice, the institutional fact analysis would focus attention on the judge as an actor whose actions are invested with meaning by the legal community through shared understandings, some of which are expressed in legal norms. Performing correctly as a judge requires that an individual performs the appropriate actions and meets the expectations of the legal community, and in particular those who have a leading role in that community, which will include the judicial community. It is not enough that an individual judge decides according to what she thinks is right, she must decide according to the legal point of view.[19]

Operating as a legal actor

Because law is an institutional fact, becoming part of a legal culture, such as a judicial culture, makes it possible to understand and act from the appropriate point of view. As Zetterholm comments: 'The social

[16] J. R. Searle, *The Social Construction of Reality* (London 1995), 47.
[17] N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Dordrecht 1986), ch. 3.
[18] Searle, *Social Construction*, above n. 16, 46.
[19] Cf. the 'Magneaud phenomenon' where a judge applied his own sense of fairness, rather than the law, in dealing with a poor woman caught stealing bread to feed her child: Amiens, 22 April 1898, DP 1899.2.329, note Josserand; F. Gény, *Méthodes d'interprétation et sources du droit positif* (2nd edn, Paris 1919), vol. II, 287–307.

group creates, through the interaction of its members and their communication and acculturation processes, the coherence necessary for individual mental and cognitive development and day-to-day cooperation, and for the intergenerational transfer of knowledge.'[20]

Whatever individuals may think privately, in order to describe and to participate in a legal activity it is necessary to adopt a legal point of view. Hart labels this as an 'internal' point of view.[21] To do this it is necessary to act as part of a tradition. Our expectations of what is a 'legal' approach to a problem are set typically by a tradition. The approach of the judge is as an institutional legal actor, whose role and authority is defined not just by rules, but by an overall institutional culture.

A tradition is a body of norms and practices that is handed down. This practice of preserving and developing a tradition gives rise to a legal community, a group that will hand on and develop authentically the tradition, and induct new people into it. Taking part in the tradition is the way a person comes to understand the law from the legal point of view.[22] My argument has two aspects. First, as a general feature, in order to interpret legal texts or undertake legal practices in an effective manner, a person needs to become part of a tradition in which a text or idea becomes accessible. Being a judge involves being able to interpret legal texts and to perform legal procedures in ways that are considered appropriate not just by her, but by the legal community and, through it, by the outside world. Bourdieu emphasises more generally this *constitutive* function of culture – a culture makes it possible for a person to be able to interpret reality and to act.[23] Culture, in his view, involves both explicit training and implicit approaches and values. This analysis is in accord with the analysis of comparative lawyers such as Rudden who suggest that there are a range of features about the judiciary (which might apply to any lawyer) which have an impact on the kinds of assumptions that underlie judicial reasoning. For him, training and recruitment and even the place of work of a judge 'create a corpus of professional habits and assumptions which affects the

[20] S. Zetterholm (ed.), *National Cultures and European Integration. Exploratory Essays on Cultural Diversity and Common Policies* (Oxford 1994), 71.

[21] H. L. A. Hart, *The Concept of Law* (2nd edn, Oxford 1994), 89–91, 254–8 and N. MacCormick, *H. L. A. Hart* (London 1981), 37–40 on the hermeneutic point of view.

[22] J. Bell, 'Comparative Law and Legal Theory' in W. Krawietz, *Festschrift for R. S. Summers* (Berlin 1994), 19 at 29. See also M. Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237 at 255.

[23] P. Bourdieu, 'Systems of Education and Systems of Thought' in M. F. D. Young (ed.), *Knowledge and Control* (London 1971), 189 at 192–3.

judicial method and, through it, the legal order, and does so all the more strongly for being so rarely made explicit'.[24] The second, more specific, feature of law is that reasoning develops by analogy, such that one needs to be part of the tradition before one can select appropriate other parts of the legal system which can serve as analogies in solving legal problems.

How law relates to the wider world

In making decisions and engaging in activities, judges will be acting in an institutional, and not a personal capacity. They are expected to fulfil a role. Of course, the outside world can examine the work of judges by focusing on individuals. One can try to explain or even predict the outcomes of cases by reference to the presence or absence of particular individuals.[25] But the authority of decisions depends not so much on these personal elements as on the quality of the justification given. At that point, one is examining how far the decisions and actions can be defended in terms of what is properly expected of a person in that judicial role. The expectation relates to the institutional role, rather than the personal qualities.

The extent to which the judiciary as an institution relates and is accountable to the wider community will vary from one legal system to another. But it would be right to suggest that the judiciary as a public service could not simply be a self-authenticating community. The nature of the problem in explaining this can be illustrated by taking two issues, accountability for individual judicial decisions and accountability for performance as a whole.[26]

Lasser[27] usefully points to the way in which judges tackle accountability for the outcome of individual judicial decisions through the giving of reasoned justifications. He sees a spectrum between systems. At the one extreme, the French have a bifurcation of justification with public decisions that are formalistic, typically collegiate and offer little

[24] B. Rudden, 'Courts and Codes in England, France and Soviet Russia' (1974) 48 *Tulane Law Review* 1010 at 1014.

[25] E.g. D. Robertson, *Judicial Discretion in the House of Lords* (Oxford 1998), especially chs. 1 and 2.

[26] A. Le Sueur distinguishes accountability for content, process, performance and probity: 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24 *Legal Studies* 73 at 81. The issue of probity is important, but generally handled by discipline in the systems discussed here, and process is usually seen as part of performance.

[27] M. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford 2004), 14–20.

explanation of the substantive reasons for the result, but very elaborate and detailed private consideration of such issues. At the other extreme, the common-law judgment offers a unitary justification, incorporating substantive, policy-based reasons for decisions into personalised opinions. He suggests that the audiences for legitimacy are different at the two extremes. For the French, detailed justification is legitimated and accountable by its acceptance by a group of technical experts who know the issues in detail. For the common lawyers, the justification needs to gain acceptance not only by the community of lawyers, but also by the wider community, and so the language and content is open to inspection by both.

We will also see later that notions of judicial independence affect ideas of accountability for the overall performance of the judiciary. Such accountability will relate to matters such as the number of cases decided, public satisfaction with the process of reaching decisions, and the use of resources. In some systems, the autonomy of the judge relates not only to individual decisions, but also to performance issues. In very crude terms, the public purse is expected to pay for the judicial service and leave the judges to manage how it delivers justice. But judges usually only manage their own courts directly. The judicial service is then managed by either a constitutional or an executive agency. The overall accountability of judges for performance lies predominantly with the judicial service agency, which, in its turn, is accountable to the wider community, especially to the political community. Linked to this accountability comes also the possibility of political authorities issuing guidelines and controlling budgets for the agency. We will see that this area of accountability is of increasing importance.

Both these issues illustrate the way in which the external community is engaged by judicial activity, as an audience to which it relates, as an influence on its decisions and activities or as a body to whom the judiciary is responsible for what it undertakes.

Objections

The institutional point of view therefore focuses on the institutions which act as guardians of the legal tradition and of authentic actions in law, that decide what is appropriate or not. They will be involved in inducting, guiding and controlling actions in law. This will apply clearly to the judicial community.

In describing the legal community within which judicial decisions or activities take place, we need to map the roles which different