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Reviewed by Bryant G. Garth*

The Judicial Process, published originally in 1962, is now in its fourth revised edition, no doubt testimony to a very successful career as a political science textbook. Its admirable qualities include a close attention to detail, a balanced mixture of political realism and respect for the judiciary, and a richness in anecdotes and quotations that makes the book fun to read. The scope of the book, furthermore, borders on the extraordinary. There are chapters on judges, civil and criminal procedure, the Supreme Court, and judicial review, and a serious effort has been made to complement the U.S. materials with comparative data, especially from France and Great Britain. A nearly 200-page bibliography also adds further to this book's impressive contents.

For readers of this journal, however, The Judicial Process is bound to be a disappointment. The foreign materials add information and description to the basically American orientation, but they are not selected with enough care or developed sufficiently to turn this book into a truly comparative text. The comparative sections do not document or add insight to important trends in comparable societies, nor do they provide a coherent perspective on a problem or phenomenon shared by similar societies. They often do not even serve well the more descriptive purpose of showing how certain political functions are fulfilled by the judicial branches of various countries.

One problem with the comparative materials may relate to the book's general approach. It tries to cover too much in a field that has mushroomed in recent years. A book entitled The Judicial Process in 1962 could perhaps take a strongly Supreme Court-centered approach to the judiciary and to the courts. But changes since the date of the original publication of this book make such an approach no longer as defensible. In particular, Supreme Court interpretation of the Constitution, the key feature of judicial politics during the

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Warren Court era, has given way increasingly to a process characterized by federal statutes into which courts must breathe life. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Rehabilitation Act of 1973, and a large number of other recent federal laws have to a great extent shifted the attention of students of the judicial process from the declaration of rights to the means by which they are enforced.\footnote{1}{See, e.g., Goldman & Sarat, eds., American Court Systems: Readings in Judicial Process and Behavior (1978); Horowitz, The Courts and Social Policy (1977).} Indeed, there is a new awareness of the difficulties of enforcing declarations of rights, whether proclaimed by Congress or the Supreme Court.\footnote{2}{See, e.g., Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Society Rev. 95 (1974); Handler, Social Movements and the Legal System (1978).}

This new attention to enforcement has shifted the focus of judicial scholars and policymakers from the Supreme Court to the federal District Courts, where litigation is brought involving federal rights and where remedies are fashioned.\footnote{3}{See, e.g., Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L. Rev. 1281 (1976).} In addition, the mechanisms by which the victims of violations of legal rights seek a legal or other remedy have gained considerable recent attention, forcing students of courts and procedures to consider in greater detail such matters as the organization of the legal profession, the fees paid to lawyers who help vindicate rights in the public interest, and the role of alternatives to courts and litigation in modern societies.\footnote{4}{A recent effort to study this phenomena comparatively was the Florence Access-to-Justice Project, directed by Mauro Cappelletti, which published four volumes in 1978-79. See, e.g., Cappelletti & Garth, "Access to Justice: The Worldwide Move-\"ment to Make Rights Effective," in Cappelletti & Garth, eds., Access to Justice: A World Survey 1 (1978). For a comparison of England and the United States, see Jolowicz, "Some Twentieth Century Developments in Anglo-American Civil Procedure," 7 Anglo-Am. L. Rev. 163 (1978).} The absence of any consideration of these significant recent scholarly and policy concerns makes Professor Abraham’s title somewhat misleading and the discussions of lower courts, trial judges, and civil and criminal procedure incomplete.\footnote{5}{Compare the scope of the coverage in Goldman & Sarat, supra n. 1. Of course, as suggested below, Abraham might avoid this problem by focusing in this book only on Supreme Courts and analogous institutions. That part could be expanded to include more comparative data, leaving the possibility of another book on the judicial process as it relates more directly to the mobilization of legal institutions at the local level.}

A few specific examples may illustrate this general problem as it relates to the book’s merits as a comparative text. In the chapter on staffing the courts, the discussion of the United States is quite elaborate and sensitive to the politics of judicial selection.\footnote{6}{At 23-50, 53-92.} Yet the sections on England represent mainly a description of the Lord Chancellor’s office and division of the legal profession into solicitors and barristers, finishing with a paean to the quality of the English
judiciary.\textsuperscript{7} We get no sense even of the number of judges, much less a feeling for their political role in modern England.\textsuperscript{8} For example, the decision to bypass the courts for the enforcement of most welfare state legislation in England sheds some light on their perceived political posture.\textsuperscript{9} There is no mention of the role of the administrative tribunals in the modern English state.

The discussion of the judiciary on the Continent is still less illuminating, consisting mainly of a description of the bureaucratic nature of the judiciary and how judges are educated. Again, the number of judges is not even discussed, nor how their roles may be changing over time.\textsuperscript{10} Further, politics can be extremely important in the judiciaries of Continental countries. Most obviously, the appointment of Constitutional Court judges is quite similar to the appointment of American judges,\textsuperscript{11} but even within the judicial bureaucracy in France and Italy, organizations of career judges with specific political goals are a political development of considerable importance in determining how laws are enforced.\textsuperscript{12}

Similarly, the discussion of criminal law enforcement fails to benefit significantly from comparative descriptions. There is a brief discussion of the limited jury in France,\textsuperscript{13} the decline of juries in England,\textsuperscript{14} and the idea of juries generally,\textsuperscript{15} but the more interesting and better-studied situation of mixed lay and professional judges in Germany is barely mentioned in this book.\textsuperscript{16} As a result, an opportunity for insight prompted by comparison of the role of lay participation in the judicial system is missed.\textsuperscript{17}

The same handicap weakens the sections on criminal procedure. A vastly over-simplified picture of the common law “accusatorial” vs. the Continental “inquisitorial” systems of criminal prosecution marches quickly to an ambivalent comparative conclusion, but the rich recent debates—again centered on Germany—about plea bargaining, guilty pleas, and police and prosecutor discretion in the United States and on the Continent are omitted from the discussion.\textsuperscript{18}

\textsuperscript{7} At 51-52.
\textsuperscript{8} The relevance of the number of judges and lawyers to the social functions of courts is discussed in Rueschmeyer, “The Legal Profession in Comparative Perspective,” in Johnson, ed., \textit{Social System and Legal Process} 97 (1978).
\textsuperscript{9} See, e.g., Street, \textit{Justice in the Welfare State} 6 (1968).
\textsuperscript{13} At 93, 101.
\textsuperscript{14} At 116-17.
\textsuperscript{15} At 136-40.
\textsuperscript{16} At 135.
\textsuperscript{17} Campare Caspar and Zeisel, “Lay Judges in the German Criminal Courts,” 1 \textit{J. Leg. Stud.} 135 (1972).
\textsuperscript{18} At 143-45. See Goldstein & Marcus, “The Myth of Judicial Supervision in
The most notable problem in comparison in this book, however, in my opinion, arises in the discussion of Supreme Courts and judicial review. This is the heart of the book and clearly where the author's own interests lie. Although it may be too much to ask for more comparative elaboration elsewhere in the text, the key parts of the book certainly deserve a more thorough introduction to comparative data. The critical issues of the legitimacy of "anti-majoritarian" Constitutional review in countries with a different tradition than the United States are left unexamined. One could consider, for example, whether the Italian and German Constitutional Courts have gone through stages in establishing themselves comparable to those pointed out by Professor Abraham for the U.S. Supreme Court. The emerging efforts of the French Conseil Constitutionnel to establish its power suggest similar political developments in France. And the example of England, where there has been considerable recent debate about whether a judicially enforceable bill of rights would be desirable, illustrates many of the political issues. Support seems to be gaining for such a bill of rights in England, and it is interesting to see how the political parties and interest groups approach this issue.

A particularly important omission from a comparative book on judicial review in Europe and the United States is the role of the Court of Justice of the European Community and, to a lesser extent, the role of the European Convention for the Protection of Fundamental Rights. One cannot discuss the role of higher law and constitutional review in Western Europe without considering the recent growth in power of the European Court of Justice. Indeed, that court's increase in prestige and power in a loose federal system provides an interesting parallel to the rise of the U.S. Supreme Court and its role in unifying our federal system. It would be very useful if the author could explore this European dimension to the judicial process in Europe.

Finally, I think the comparative aspects of the book would be enriched if the author could bring his political insights and sensitivity to detail to bear on high courts outside the United States. I have already mentioned that no attention is paid to the politics of the appointment process for judges to courts comparable to the U.S.

21. See id.
22. See id.
23. See, e.g., Cappelletti & Cohen, supra n. 20, at 113-98.
Supreme Court. Similarly, there is no discussion of the workload of high courts outside the United States, or of the means by which Constitutional courts outside the United States adjust their workload. Doctrines that enable courts to avoid premature decisions on tough political questions might also be investigated. Cappelletti, for example, in 1971 suggested that while the "ability to say not 'yes' or 'no,' but rather 'maybe' to a constitutional question is a hallmark of the American Supreme Court,"24 "there are signs of attempts by the Constitutional Courts in civil law countries to develop their own flexibility."25 Further, important questions about law and policy, such as the Supreme Court's use of empirical research, could profitably be examined in courts outside the United States.26 Unfortunately, the discussion of controversial issues of judicial review, as opposed to the mechanisms of review, is confined to the U.S. materials. Thus, while the book's concluding chapter on the maxims of judicial restraint is a fascinating one, it is unclear what relationship, if any, it has to judicial review outside the United States.

In conclusion, the author states at one point that "the comparative element is one of the essential characteristics of this work."27 Obviously it would be extremely difficult or impossible to treat other countries with the same depth given to the United States. I do think, however, that the comparative materials need to be expanded, or at least changed, to provide more inspired and instructive comparisons than the book now contains. It is an interesting and informative book, but I think that results in spite of "the comparative element." As a comparativist, I wish the comparative analyses would be brought closer to the level of the analyses of American courts.


Reviewed by Wilhelm Karl Geck*

These volumes contain thirty-two contributions—twenty-four in

27. At 260.

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