Michigan Law Review

Volume 81 | Issue 4

1983

The Politics of Judicial Reform

Michigan Law Review

THE POLITICS OF JUDICIAL REFORM. Edited by *Philip L. Dubois.* Lexington, Mass.: D.C. Heath & Co. 1982. Pp. xi, 187. $24.95.

Court reform involves much more than the modernization of outdated practices of judicial administration. By changing the organization and procedures of courts, court reform redistributes power within the court system and the larger community. The eleven essays in *The Politics of Judicial Reform* explore some of the ways that reform proposals create political conflicts among competing groups and interests and in turn shape the outcome of reform proposals.

Although earlier commentators have recognized the political significance of judicial reform, the literature on the subject is sparse.[1] *The Politics of Judicial Reform* does not attempt to present a comprehensive survey, for as editor Philip L. Dubois notes, no single book could hope to treat comprehensively a topic as broad as the politics of judicial reform (p. 11). By highlighting some of the political ramifications of reform, however, Dubois illustrates the breadth of the subject and demonstrates the importance of its continued study.

The essays begin with an introduction to some of the basic political dimensions of court reform. Henry R. Glick emphasizes the role political parties play in court reform. Since state-level reforms generally "shift judicial administration from local control and independence to centralized court management" (p. 17), groups with vested interest in locally managed courts often oppose the reforms. According to Glick, these groups include local judges and court employees; the Democratic Party, which has a strong influence on judicial elections in its urban strongholds; and general-practice and trial lawyers, who are accustomed to existing structures and who are usually Democrats (pp. 23-25). The proponents of reform often include bar associations,[2] the federal government, middle class civic organizations, the Republican Party,[3] and "high-status" lawyers, who are often bar activists and Republican partisans (pp. 20-23). Although proponents have achieved recent successes in streamlining and consolidating the courts, Glick observes that state court systems remain highly decentralized.[4]

Glick probably overstates the partisan aspect of court reform. First, Republican advocacy of court reform may be limited to cities, where the party lacks power. As Glick notes, legislative opponents of court reform "come

1. Geoff Gallas has observed the political aspect of court reform and suggested that it needs to be explored. *See* Gallas, *Court Reform: Has it been Built on an Adequate Foundation?*, 63 JUDICATURE 28, 37 (1979). For other works on the political aspects of judicial reform, *see* notes 13 & 14 *infra*.

2. Glick suggests that bar associations became involved in court reform to improve the image and economic status of lawyers and the image of justice in general. One of their prime concerns has been the elimination of partisan influence in the selection of judges in favor of merit-based selection. P. 20.

3. Glick notes that Republican officials frequently oppose the link between judges and local party politics in order to lessen Democratic influence in urban politics. P. 24-25.

4. For example, Glick notes that state courts remain largely dependent upon local government for funding. P. 27.

more often from rural areas where traditional values and local control are more important" (p. 25). In states with large urban populations, the rural or outstate legislators have come predominantly from the Republican Party.[5] Second, Glick presents no solid evidence linking general-practice and trial lawyers with the Democratic Party. He notes only that these lawyers occupy lower rungs on the socioeconomic ladder than do "high-status" lawyers (p. 24). If socioeconomic status is taken as a measure of partisanship, general-practice and trial lawyers may be less likely to be Republicans than their "high-status" counterparts. Given the relatively high socioeconomic status of lawyers as a group, however, lower status lawyers do not necessarily share a strong Democratic predisposition.

The essays in Part II examine court reform in a broader political context. Frank Munger argues that popular political upheavals have influenced the major court reform movements of this century (pp. 51-67). Court reform, according to Munger, has been led historically by legal elites which "carry out a self-appointed mandate to improve the court system" (p. 53). Although these elites have sought to protect their own interests, they also have attempted to restore legitimacy to threatened governmental institutions by strengthening the credibility of the legal system (pp. 61-62).[6] During the Progressive Era, court reformers strove to assist those classes with little political influence by attacking cumbersome procedures and poor administration of local courts (pp. 55-56). During the New Deal, realist legal theory helped reformers rationalize the transfer of policy enforcement from the courts to administrative tribunals as ensuring greater popular control over government decisionmaking (pp. 57-59). Since the 1960's, court reformers have attempted to divert relatively unimportant cases from the courts to accommodate the increasing number of cases involving important political issues that other branches have not handled (pp. 59-61). Thus, although court reform is commonly justified in terms of efficiency, the ideals of court reform have changed when differing demands have been placed on the government and the courts (p. 62).[7]

Against this backdrop, Richard Gambitta and Marlynn May suggest that reforms designed to increase access to the courts and reduce court congestion have combined to create popular dissatisfaction with the courts (pp. 69-83). Under these reforms, more people have contact with the judicial system, but their disputes are often settled through informal negotiation and reconciliation rather than formal adjudication. Gambitta and May ar-

5. *See* T. DYE, POLITICS IN STATES AND COMMUNITIES 104 (2d ed. 1973); V. KEY, AMERICAN STATE POLITICS 230-34 (1956).

6. Munger's analysis modifies the views of Lawrence Friedman, who sees judicial reform solely as a self-serving activity undertaken by elites in the legal profession to maintain their control within the profession and create a favorable public image. *See* Friedman, *Law Reform in Historical Perspective,* 13 ST. LOUIS U. L.J. 351, 357-58 (1969). Munger argues that Friedman "does not devote sufficient attention to the continuous pressures on lawyers to maintain compatibility between the legal system and other institutions in the society." P. 54.

7. During the Progressive era, efficiency, Munger suggests, meant greater access to governmental institutions. In the New Deal-Realist period, it meant doing away with normative distinctions between judiciary and administration and accepting the bare fact of authority or power. Recently, it has had a strong overtone of excluding unimportant, minor, and new rights. P. 62.

gue that courts derive legitimacy from popular acceptance of "the myth of the triad" (p. 73). The elements of the triadic model are (1) a neutral judge who resolves disputes by (2) applying preexisting rules to cases presented in adversarial proceedings and (3) publicly explaining the reasons for the decision.[8] Reforms, Gambitta and May conclude, are eroding the triad's acceptance and contributing to reported increases[9] in popular dissatisfaction (p. 79).

Gambitta and May, however, lack the necessary empirical evidence to support their position.[10] Without such evidence, one could assert with equal plausibility that informal methods of resolving disputes actually limit popular disillusionment with the courts. Formal proceedings are often costly and time-consuming. In spite of reforms aimed at reducing congestion, they also may be marked by long delays. Informal methods allow parties to avoid these obstacles. Moreover, parties may be more satisfied with a result to which they have agreed than with a court-imposed result. Further empirical study seems necessary to determine the popular impact of informal dispute resolution.

Following a collection of legislative and administrative case studies in Parts III and IV, Larry Cohen attacks current "depoliticized" methods of evaluating the competency of judges. These methods, Cohen argues, preclude public input, because they attempt to measure qualities, such as "legal ability" and "judicial temperament," that are "either unobserved by those outside the legal process or simply inaccessible to the objective assessment" (p. 170). Cohen asserts that "repoliticizing" the competence issue would give the public a genuine role in evaluating the courts. Somewhat vaguely, Cohen advocates repoliticization through surveying "lawyers, other court actors, clients, interest-group representatives, and the various sectors of the general public" (p. 173). Cohen concedes that a repoliticizing process will be difficult to develop and operationalize, but he contends that methods can be developed from current social science models (pp. 172-73).

Although consonant with current trends in the critical legal studies movement, Cohen's proposal cuts against the grain of modern court reform. To promote professionalism in the judiciary, reformers have sought the depoliticization (or "professionalization") that Cohen assails, largely through efforts to abolish judicial elections.[11] Curiously, Cohen does not advocate elections as a possible means of repoliticization,[12] and he fails to explain

8. The triadic model as an ideal legitimating the courts has been proposed by many scholars. *See, e.g.,* T. ARNOLD, THE SYMBOLS OF GOVERNMENT (2d ed. 1962); Arnold, *Law Enforcement — An Attempt at Social Dissection,* 42 YALE L.J. 1 (1932); Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence,* 14 LAW & SOCY. REV. 371 (1980); Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978); Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes and Behavior,* 3 AM. POL. Q. 1 (1975).

9. *See* YANKELOVICH, SKELLY & WHITE, INC., THE PUBLIC IMAGE OF COURTS (1978).

10. Gambitta and May admit that an empirical study is necessary to validate their argument. P. 80.

11. Glick notes these efforts in his essay. Pp. 19-20.

12. Cohen's admitted aim is to "invigorate the political element in competence discussions while retaining the admitted expertise of those particularly well suited to observe judicial behavior . . . ." Pp. 171-72.

why elections do not give the public sufficient input in those jurisdictions that retain them. Yet even though he avoids this sensitive issue, leaders of the bar are likely to view his proposal skeptically, as too great an intrusion on judicial professionalism.

The Politics of Judicial Reform sketches a broad outline of its subject, focusing on some of its aspects and leaving others unexplored. The essays, while provocative, are at times speculative and lacking in depth. Dubois suggests that interested readers should supplement this book with the few other collections[13] and case studies[14] in the area (p. 11). Still, *The Politics of Judicial Reform* offers a unique introduction to "aspects of judicial reform [that] have been too long neglected by court-reform leaders and students of the courts" (p. 2).

---

13. *E.g.,* L. BERKSON, W. HAYS & S. CARBON, MANAGING THE STATE COURTS (1977); R. WHEELER & H. WHITCOMB, JUDICIAL ADMINISTRATION (1977). While somewhat more detailed than Dubois's collection, these works do not share its strong emphasis on the political factors underlying judicial reform.

Dubois has edited another collection designed to complement this one. *See* P. DUBOIS, THE ANALYSIS OF JUDICIAL REFORM (1982).

14. *E.g.,* L. BERKSON & S. CARBON, COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION (1978); P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973). Berkson and Hays focus upon state court reform, presenting some detail on campaigns to achieve court reform. Fish's work, as the title suggests, deals solely with federal reforms, offering an historical survey beginning in the early days of the republic.