

Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms

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The relationship between courts and democracy is the central question of this book, and the principal claims can be set forth simply. First, adjudication is proto-democratic, in that courts were an early site of constraint on government. Even when judges were required to be loyal servants of the state, they were instructed to “hear the other side” and told not to favor either the rich or the poor. When resolving disputes and sanctioning violations of their laws, rulers acknowledged through public rituals of adjudication that something other than pure power legitimated their authority.

Second, democracy changed adjudication. “Rites” turned into “rights,” imposing requirements that governments provide “open and public” hearings and respect the independence of judges. Courts developed alongside the press and the post as mechanisms for the dissemination of knowledge about government. Yet adjudication made a special contribution, providing a space in which ordinary persons gained, momentarily, the ability to call even the government to account. The circle of those eligible to come to court enlarged radically, and the kinds of harms recognized as wrongful multiplied.

Not only did “all persons” gain rights to equal treatment and dignity, they were also recognized as entitled to occupy all the roles—litigant, witness, juror, judge—in courts. The nature of rights changed as well, as whole new bodies of law emerged, restructuring family life, responding to domestic violence, reshaping employee and consumer protections, and recognizing indigenous and civil rights. Courts rescaled in local and national contexts to cope with rising filings. Crossing borders, governments came together to create multi-national adjudicatory bodies, from the “Mixed Courts of Egypt” and the Slave Trade Commissions of the nineteenth century to the contemporary regional and international courts, such as the European Court of Justice and the International Criminal Court. The evolving norms reorganizing the role of the judge and imposing new obligations for courts moved from local and national to regional and trans-national institutions.

Third, both the longevity and the transformation of courts can be seen through tracing the shared political icons of the female Virtue Justice and of buildings called courthouses. Looking at the evolution and changing configurations of places designated as courts enables one to map dramatic shifts in the scope and ambitions of governments. Over time, Justice became a symbol of government and courts, and an obligation of governance. Further, as everyone became entitled to use courts, conflicts emerged about whether and how to personify Justice, what “she” should look like, and which symbols deserved places of honor.

Fourth, democracy has not only changed courts but also challenges them profoundly. Most governments do not adequately fund their justice systems to make good on promises of equal justice before the law. Contemporary responses depend on various modes of privatization,

including reconfiguration of court-based processes to manage and settle disputes outside the public purview, devolution of fact-finding to agencies and tribunals where judges are less visible and independent and the processes less public, and diversion of decisionmaking to private arbitration and mediation. These incursions are masked by a spate of courthouse building projects creating architecturally important structures that are, in some respects, distant from the needs for adjudication and the daily activities of judges. Most of the new courthouses, often clad in glass to mark justice's transparency, celebrate courts without reflecting on the problems of access, injustice, opacity, and the complexity of rendering judgments.

Fifth, the movement away from public adjudication is a problem *for* democracies because adjudication has important contributions to make *to* democracy. Adjudication is itself a democratic process, which reconfigures power as it obliges disputants and judges to treat each other as equals, to provide information to each other, and to offer public justifications for decisions, based on the interaction of fact and norm. Thus Jeremy Bentham's insistence on "publicity," Jürgen Habermas's interest in the "public sphere," and Michel Foucault's understanding of the power of surveillance inform our thesis of the distinct place for courts in producing, redistributing, and curbing power.

Sixth, in many respects, courts as we know them today are recent inventions. The possibility offered—of what Nancy Fraser has called "participatory parity"—is an outgrowth of social movements pressing governments to treat all persons with dignity and accord them equal status under law. Yet while monumental in ambition and often in physical girth, the durability of courts as active sites of public exchange before independent judgments ought not be taken for granted. Like the other venerable institutions of the eighteenth century—the postal service and the press—courts face serious challenges in the twenty-first.

Our task is to document these six claims. In this book, we trace the imagery that became the political iconography of town halls and the elaboration of purpose-built structures that came to be called courthouses. We move across oceans and ideas to trace the elaboration of rights that shifted the paradigm of legitimacy for governments. From the eighteenth through the twentieth centuries, the interactions among lawyers, architects, judges, and government administrators captured political commitments and economic support for courthouses. We illustrate these phenomena through sketches of the development of courts in the United States, of major building projects in France and a few other countries, and of regional and international courts of the Americas, Europe, and the United Nations. After examining transnational efforts to develop alternatives to adjudication, we turn to the future of courts, which occupies the final segment of the book. Drawing on examples from South Africa, Mexico, Australia, and Minnesota, we provide images of what a democratic iconography of justice—struggling to deal with failures and challenges as well as with authority—could entail.