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Martine Kaluszynski

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THE JUDICIARISATION OF SOCIETY AND POLITICS

a paper given by

Martine KALUSZYNSKI, sociologist and research director at the
Centre National de la Recherche Scientifique (CNRS) – PACTE IEP Grenoble

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In studies and discussions on justice, more and more attention is being paid to the phenomenon of judiciarisation. This term refers to the growing recourse of the social actors to the courts, to the ever increasing requests for the courts to deal with the key problems of society and an ever more pronounced trend for the treatment of issues to be shifted from the political arena to the court room.

Today, there are many signs to indicate that the judicial, administrative and constitutional courts are playing an increasing role in the management of public, social and political affairs.

The emergence of the *Conseil constitutionel* and its positioning as a fully-fledged player in the French political system at the turn of the 1970s and the more recent development of checks on constitutionality in parliamentary systems like that of Canada have not only given more weight to the judiciary in relation to the executive and the legislature but have also placed the constitutional courts and law in a position of authority and indeed supremacy.

This development of a whole swathe of law and its claim to act as arbiter over political and legislative acts contributes to the extension of judicial rule and control.

At the same time, we are seeing an intensification of judicial activity at the level of relations between individuals and between institutions not only in France but also in the countries of the European Economic Area. We are seeing a shift in debate from the political sphere to the judicial sphere, for example with the trial of various actors from the Vichy period of French history or of people involved in the contamination of blood transfusion patients with the AIDS virus; with a significant increase in the number of so-called politico-financial cases being brought onto the public stage by a coalition of actors and managed in the judicial space; with criminal law entering public life through decision-makers being placed on trial when catastrophes or large-scale accidents occur; and with the victim making an appearance on the criminal law stage.

In many respects, therefore, it seems that justice is making its presence increasingly felt in the daily life of society; it "has become the democratic representative and, through the coalitions that it is capable of assembling, it succeeds in mobilising resources that enable it, in greater or lesser degree depending on the field, to have its authority recognised.

Raising the phenomenon of the judiciarisation of politics serves to reveal the growing role played by law and justice, whereby the latter is extending its field of action to political issues, an area effectively occupied by the actors as a political arena, in which they assert their claims and seek new rights.

It is important to examine the significance of this recourse to law and justice in as much as it tends to make the judge an alternative figure of social and political authority and so a competitor of the politician.

Judiciarisation: a contemporary phenomenon?

The phenomenon appears to have multiple causes, of which we can cite, in no particular order:

- the growing influence of the market

- the influence of the media as instigators of direct democracy

- the advent of democratic individualism, explaining why the satisfaction of individual rights is sought through the justice system

- a contractualisation of social relations, suggesting that a contractualised State is in the process of replacing a regulatory State and, correlatively, a judiciarised State is substituting itself for a state-controlled State (*État étatique*).

This process of contractualisation may itself be connected with a redefinition of the status and role of the State, a State less and less able to act on its own and having increasingly to come to terms with a multiplicity of actors, the outcome being a proceduralisation and judiciarisation of exchanges, particularly through the contract as an instrument for balancing the claims of divergent interests.

More generally, the crisis of political representation, the disorganisation of a body politic no longer capable of representing itself and the erosion of the main political doctrines, the landmarks for public action, all tend to make justice an institution vested with - or which would like to vest itself with a mission of guardian of the political principles of living together, in other words justice as the "Third Power" (*Tiers Pouvoir*).

To all of these causes, it would of course be necessary to add the effect generated by the dynamics specific to the judiciary and its personnel (for example, the change in ethos and working methods of the judges).

It goes without saying that, as all of these causes have merely been advanced, they need to be further specified and substantiated.

What are the interpretations?

The increased recourse to the courts may reflect the following:

1) a rejection of tutelary models for public action since the State increasingly has to interact with polycentric wholes, a situation resulting in a growing requirement for judicial mediation,

2) an inadequacy of the conventional processes for channelling conflicts in the face of new forms of collective action, leading to increasing recourse to the courts,

3) an inability of the political level to rule on particularly sensitive social issues and to delegate the task to the courts instead.

This calling into question of the tutelary character of public action is inseparable from the decline in the main political doctrines, which used to see in scientifically enlightened public action the guarantee of unlimited progress. However, with the removal of some of the main landmarks, the solution tends to be shifted to the courts (e.g. the *Conseil d'Etat* in France, some of whose members have been led to play a crucial role in the formulation of norms in various cases).

The *Conseil d'Etat* regularly claims recognition as a player in the game of politics. Through its role in drawing up administrative law and through its jurisdictional and consultative functions, it plays an important role in the framing and orientation of public action, though this role is being undermined by competition from new actors such as the *Conseil constitutionnel*, independent administrative authorities and European judges. Such critiques nurture a strategy leading the *Conseil d'Etat* to become ever bolder in the field of litigation and to develop its upstream influence in the process of producing law, particularly through the extension of its consultative function (prospective studies on subjects of far-reaching importance, such as bio-ethics and the Internet).

Public law, on which France's rule of law is founded, is by nature mainly case-law. Here, the judge plays a role that is crucial if ambivalent, since he acts for the State not only as judge but also as counsel. This room for manoeuvre can give the judge increased political weight and hasten the contemporary process of the judiciarisation of politics, the judge being able to formulate norms of conduct in the place of the political elites.

Changes affecting legal professionals

Let us now turn to the legal professionals. Though they alone cannot explain this phenomenon of judiciarisation, it is nonetheless striking to observe the extent of the changes in the practice of these professionals and in their vision of the world. This observation would seem to apply above all to the judges, as if their new relationship with society and politics supposes a cultural revolution and a programme of action from which the lawyers are not exempt but which the judges have been involved in for a long time (as may be seen from historical works). Thus, there is advanced the notion of a change in the practice of judges, manifested in a new relationship to legality through new actions with regard to forms of illegality (corruption, financial scandals, etc).

Judges are more and more ready to engage in dealing with cases involving politicians, in which, paradoxically, judicial criticism of politics or the judicial disqualification of certain political practices is accompanied by an autonomisation of the judicial profession. The commitment of the judges is possible at the price of an autonomisation in relation to the political world, particularly because the social and professional career path of the judges is no longer integrated into the universe of local notables. This represents a new relationship to politics.

From this point of view, what is thus developing gradually is a new professional identity, a new model of judicial excellence, in which the treatment of economic and financial corruption, possibly involving the political sphere, appears as a favoured attribute of competence.

It is in this spirit that the increasingly broad area occupied by justice in the public space and the growing affirmation of the judge as a social authority and as a political authority may be interpreted as the expression of a new form of social critique or political critique and that the recourse to law and the courts may be seen as one of the modes of perception of the social world and as one of the modes for the resolution of public problems.

This would explain the fact that the judges have set themselves up as - or aspire to set themselves up as - producers of new instruments to understand and appraise the functioning of the social world and more particularly the political world, a move that could place them in a role competing with that of the historian (e.g. in Italy, with "the writing of contemporary Italian history").

When we observe the processes by which legal norms are produced, it is apparent that this legislative production is, on the one hand, decentralised and, on the other, socialised. In short, legality is established through social interaction, through social exchanges arising out

of balances of power or attempts to reach a compromise. In this context, the legal professionals play a strategic role, one expression of which is judiciarisation. Thus, it is acknowledged that the law constitutes a particularly valuable instrument for them. The ability of the legal professionals to exploit the uses of the legal resource to the full makes them important actors in the analysis of the process of social and political regulation and establishes judiciarisation as the best means identifying these key moments. The judges pronounce judgement only if they are seized of a matter. Today, however, everybody goes to court. We can no longer speak of "red" or "revolutionary" judges. The judges are only mediators who derive their power from the laws, laws which have accumulated and all of which have increased their power. The judges and above all the politicians who in fact participate actively in this movement of judiciarisation are denounced. The state is the prime consumer of justice and the history of recent decades is that of a continuous deployment of the political function in favour of experts, independent authorities, higher councils and the like.

The judiciarisation of social affairs

There is a new use of law, justice and particularly criminal justice. The courts are used by everyone, and above all by the politicians, as a new political forum. Justice, previously confined to the resolution of minor conflicts (family, property, crime) is being transformed into a political resource at the disposal of all. Thus, the more frequent recourse to the courts must be interpreted as the search for a new public space that is at once closer and more remote. It is closer because the courts offer a deliberating body that is easier to access and more visible than the bodies concerned with political deliberations at the national or territorial level. However, the principles implemented in them are more remote, less well known both in their form and their content.

Thus, through this social use of law and justice, we can speak of a juridicisation of social relations and a juridicisation of social problems. We can take note of the importance of forms of recourse to law and justice as a programme of collective action in France, Germany, England, etc.

The law may be used as a resource at various levels of mobilisation. Certain social groups are confronted with the state-controlled legal order, for example through the procedures for allocating social benefits. They seek to affirm a conflictual approach to the law, for example by occupying the offices for the homeless, thus recalling that the law may be at the same time an instrument of state authority and a means of counter power (*contre-pouvoir*).

The conclusions reached on these militant uses of the legal reference correspond to those reached in other domains (e.g. personal rights, right to housing, etc) where the denunciation of the existing rights and the claim of new rights is accompanied by an appeal to fundamental rights as a means of legitimising a collective action (e.g. the European Convention on Legal Protection, Strasbourg 2001).

The use of the law as a resource effectively operates as a means of passing from the individual to the collective. The law as an instrument for the defence of individual interests becomes a means of promoting a public cause. This is all the more likely to be defended in so far as the right of non-professionals is professionalised. These forms of juridicisation effectively determine an increasing recourse to law by social activists. The specific effects of this recourse to law and the task of putting into form or into conformity that this entails on the part of the legal professionals remain to be examined in detail. These strategies could lead to various social uses of legal work following the intervention of a multitude of actors who make use of justice as a weapon in their arsenal.

In these strategies of recourse to law and the courts as resources by the social actors, groups of actors and social movements, the initiatives of civil society are combined with the action of legal professionals.

The new forms of social mobilisation call into question certain modalities of political action, certain forms of use of the rule of law but certainly not necessarily the very legitimacy of public intervention. They not only preserve the social rights inherited from the past but also seek to extend the field of action of the rule of law to fields such as the environment, biotechnology and the like (e.g. European "environmental" movements).

Alongside the traditional forms of intervention, the associations, in their efforts to limit or even redress the arbitrary action of the public powers and to ensure respect for the law and rights are increasingly having recourse to the courts. At the same time, this intervention is all the more decisive in that it is associated with the mobilisation of public opinion through the media. The balance of power between the state apparatus and the associations is changing. And so too is the scale. If the action of the national associations sometimes remains vigorous, the collapse of the national collective frameworks, the distrust of the national political system and the increase in local powers, all favour collective action at neighbourhood, district or regional level. Local mobilisation may take over from national mobilisation. This general transformation has favoured a proliferation of political commitments (people's commitment stemming less from social background than from an individual, reasoned, conditional and temporary decision) and the shrinking of the public space. Increased recourse to law is not necessarily a slight on politics but rather perhaps the affirmation of new modalities for action and a wish to establish counter powers (*contre-pouvoirs*) where there had previously been few or none.

The discourse of judiciarisation

Beyond whatever reality it may have in practice, judiciarisation falls within a discourse. Judiciarisation has a rhetoric and we need to find its function. It has been suggested that these incantatory references to judiciarisation could constitute a pressure or at least contribute to a movement in favour of the establishment of supranational judicial system within the European framework.

We cannot deal with the phenomenon of judiciarisation as though it were naturally universal. The influence of cultural contexts is crucial in this regard. For example, law and thus also justice potentially have a status that is not the same in the United States as in France. In France, the law is conceived of as being associated with the State whereas in the United States it is conceived of as being a right of citizens to defend themselves against the all-powerful State. This implies that there are genuine uncertainties in the search for the causes of a phenomenon that is, to say the least, uncertain. Thus, the study of judiciarisation permits us to examine what is seen as the return of the law and the judiciary among the actors in the foreground of the regulation of politics, as well as to reflect on this rise in the position of justice in relation to politics. This thrust of law constitutes one facet of the multifarious processes of the reorganisation of contemporary states. These new uses of law result from more general changes in the focus of political regulation. They refer us both to the emergence of a less tutelary concept of citizenship and to modifications in the modes of governance and to the position of States in polycentric structures

Can we really speak of judiciarisation?

Any term that appears to describe the facts of social reality and that is referred to frequently by the social actors can only call forth an attitude of critical vigilance on the part of the researcher in the social sciences. That is certainly the case here. Judiciarisation is a term used to designate an assumed extension of the role of justice as an institution in dealing with

the problems of society, certain of which involve politics, problems which justice was not previously called on to resolve or in which it did not envisage intervening.

Such a definition clearly raises a number of questions. The first concerns the status to be assigned to the term itself: that which is in the order of a statement of fact is often confused with that which belongs to a conceptual approach or a model of analysis. If we decide that it is a fact, it is of course necessary to check that it exists, i.e. in this case the reality of a development implied by the term "judiciarisation". Here, however, we have to concede that a confirmation of the phenomenon in a quantitative form is difficult to imagine and doubtless represents only part of the question.

Moreover, what are we supposed to be quantifying? A process of development of recourse to "ordinary" justice? An increase in the judicial processing of social problems or political issues serving as a test case?

The uncertainties are all the greater the more the recourse to law and justice as a programme of action or as a resource in the struggles of the social actors against the State or the executive - in other words processes, the existence of which helps to justify the use of the term "judiciarisation" - constitute phenomena already observed in history.

Once again, the dynamic specific to justice is associated with an increase of the demand for justice on the part of citizens and in a context of the internationalisation of the judiciarisation of politics (where Italy constitutes an excellent example).

We are in a context in which the judges confront the politicians and the public applauds. In the end, however, the question is whether recent political events and especially the current reforms of the justice system indicate a new reversal in the process of judiciarisation, a reversal in which the heroes of yesterday (the judges taking on the politicians) risk becoming the villains of today and in which the judiciary risks reverting to its traditional position as a subordinate of the executive.

The process of the judiciarisation of politics is a long one that falls into differentiated phases. The question then is whether the state institutions have the capacity to renew themselves so as to recreate a social link that the judiciary, the guarantor of the values inherited from the past, is not intended to maintain.

Between the judiciary and the executive there exist fundamental issues concerning the shaping of practices and ideas which have made our democracy what it is today.

Towards a judicial democracy?

Nowadays, with the dogma of the rule of law, the political issues tend to be reformulated in legal terms. The problems are addressed in the language of the law and tackled through the categories of legal understanding. In this way, eminently political questions are drawn into a debate of a constitutional nature.

Over the years, the law has become a resource that the political actors can no longer do without and a favoured weapon of political combat. It strengthens the legitimacy of the arguments exchanged. We can see here a notable development in the tensions between the executive and the judiciary, in which the latter is no longer the lapdog of the former and in which justice is no longer constrained by political power.

The political actors help to strengthen the belief in the force of law and present a political life entirely governed by law. Thus, politics can appear to be on trial.

The process of judiciarisation to some extent calls into question the legitimacy of the elected representatives in the name of a more demanding conception of democracy which can no longer be reduced simply to the election process but has to respect pluralism, and to guarantee citizens direct participation in rights and liberties. Citizens must "*be able to see themselves at all times as actors of the law to which they are subject as end-users*". This takes place necessarily through the processes of discussion and deliberation codified by law. Another typical feature of this contemporary phase of judiciarisation, namely the development of the desire for the above-mentioned law, appears essential in relation to an evolution in the course of which individuals have set themselves further and further apart from the social structures which had been their framework for centuries.

Challenged and weakened over time, the institutions (state, family, political party, trade union, school) have gradually given way to an individualism inherent in liberalism and, as we have indicated, to the rise of the right of the individual: there would appear, therefore, to be a certain linkage between judiciarisation and autonomisation of individuals in relation to the institutions, a linkage leading ultimately to a reversal of the old priorities of French law, the rights of individuals now taking precedence over those of the institutions.

Finally, a last question and a last paradox of the judiciarisation movement: Isn't there a risk that the clarity and transparency of the law will be damaged by the proliferation of legal texts?

Thus, democracy is becoming judiciarised at the end of a centuries-old development that has enabled us to see through the ambivalent and shifting structure of the balance of power between justice and politics that this process of co-construction in the work of these two main actors cannot escape a few hiccups and makes an underlying contribution to the production of social change.

Here, justice tends to appear as the *"the new stage of democracy"*, a neutral public space in which each citizen can assert his rights and challenge the rulers. *"The new humility of politics"* is characterised by the development of the role of the judges, the recourse to experts, the appeal to wise men, the establishment of independent regulatory bodies. Thus, the judiciarisation of politics does not mean simply the creation of constraining norms but is also a means of putting politics in perspective, placed within a system of new actors.

In any event, it is necessary to avoid being simplistic and presenting the relations between justice and democracy as an opposition of justice-democracy. The current crisis is as much as crisis of the State as a discourse on the State which does not always succeed in finding its signposts.

We think of justice by contrasting it with politics. We refer to a government of judges blithely ignoring the resulting confusion of the ordinary judge applying the law with the judge of the law, i.e. the *Conseil constitutionnel*.

The State continues to supply the resources of every kind. Thus, it constitutes an important political resource for the actors in the social game. Hence, the configuration of the regulator state becomes a central issue in the political debate. Sometimes, one has the feeling that these European states are at a loss. Narrow is the way, for law and justice are the key pieces in the liberal model which is its antithesis. However, even if the State has to fill a certain gap in its legal apparatus, it must not fall into the illusion of legal ideology, which consists in the belief that law and justice can or could be substituted for politics.

For that reason, even if the context is particularly delicate and the democracy of opinion poses unusual problems in an interaction constantly negotiated between our values and our tools, it is necessary to appreciate the way in which the judiciary and the executive fit

together and work mutually in the promotion of new conceptions and practices of democracy. It is a point of view which leads us more generally to consider "the ability of the judicial [...] to plough the political field in depth, whether to open, contain or close it".

A role of mediator to play?

Thus, faced with this phenomenon, it is easy to see that your professions engage and accompany both the user and the citizen who is nowadays increasingly involved with the law and justice, whether as victim, witness or accused. Conflicts and disputes of all kinds are encroaching on "ordinary" life and conflict resolution finds a way out in the legal field. It is also easy to see that legal protection is becoming a major issue for the insurance companies which play the role of mediator here. As a speaker said at a recent congress, the legal expenses protection insurer has a social role and a role of mediator. I leave you then to continue with your work and thank you for your attention.

MARTINE KALUSZYNSKI
CNRS-PACTE-IEP GRENOBLE