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DEMOCRACY AND JUDICIARY: A COMMENT
ON AULIS AARNIO, "THE COURT SYSTEM
AND DEMOCRACY"

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Professor Aarnio has chosen an important and difficult topic to address—the relation between democracy, with its ideology of majority rule, and the court system, with its commitment to the rule of law. This is a topic central to my recent book *Law, Pragmatism, and Democracy*,[†] and I am therefore grateful for this opportunity to comment on his very interesting paper.

Professor Aarnio emphasizes the distinction between the form and content (or one might say the procedures and the spirit) of democracy and seeks also, I think, to subsume the courts under a concept of democracy sufficiently capacious to allow the courts to be seen as democratic institutions. His view emphasizes the importance of principle in both domains, and can perhaps be capsulized as "deliberative liberalism." My own approach, which is in the tradition of American legal pragmatism and so perhaps not fully applicable to the Finnish politico-legal system, is different. I conceive of democracy in strictly procedural terms, of courts as pragmatic policymaking organs, and of the politico-legal system as a whole not as "democratic" but as "liberal" or, better because it is a less charged term, as "mixed." The system mixes democratic with oligarchic and even autocratic elements. The mixture is more perspicuous in a presidential system, such as that of the United States, than in a parliamentary one. In a presidential system the president is the autocratic element (though of course there is an important democratic element as well, the President being an elected official serving a limited term), the judiciary is the oligarchic element, and the lower house of the

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legislature (the House of Representatives, in the U.S. federal system) is the democratic element; the U.S. Senate, the upper house of Congress, formerly oligarchic, is now democratic with perhaps a trace of the oligarchic. The population inequality among the states (each state has two senators, regardless of the state's population), the long terms (six years) of senators, and the filibuster and other procedural devices that require supermajorities for the enactment of controversial legislation, are among the features of the Senate that are questionable from the standpoint of pure representative democracy.

Federal judges in the United States are appointed by the President, with confirmation by the Senate, for life; and are virtually impossible to remove except for criminal activity. There is no way in which the federal judiciary could be described as a democratic institution. It is not wholly insensitive to public opinion, but neither for that matter are most dictatorships. Because I regard the U.S. political system as mixed rather than as democratic, I am not troubled by the fact that the judiciary is oligarchic rather than democratic.

My conception of democracy is in the tradition of Joseph Schumpeter, whose theory of democracy is usually referred to as "elite," "procedural," or "competitive" democracy—all apt terms. For Schumpeter the population is divided into two classes: a governing class consisting of politicians and other officials, and a general public that exercises a limited and intermittent control over the governing class through the institution of popular elections. The people do not govern; "self-rule" is a pious fraud; but because the key officials are elected to limited terms of office the people do have an opportunity to select, and more important to fire (to "deselect" by refusing to reelect), officials who do not perform their public duty adequately as the public perceives it. The fact that most ordinary citizens do not take a continuous interest in politics and are not deeply informed about candidates and about most issues of public policy is no more troubling than the fact that consumers do not know a great deal about the products they buy. Indeed,

the market analogy to democracy is close and illuminating, with politicians corresponding to sellers in a market and voters to consumers. In both cases there is a division of labor and an asymmetry of information, but also in both cases the less informed body of individuals, the voters and the consumers respectively, have an important checking power that constrains the knowledgeable “producers,” the politicians and the sellers, respectively, to more or less serve the interests of the weaker class.

For democracy to work adequately, there is need for substantial institutional foundations, of which, as I’ll argue, a nation’s judicial system is an important part. But I do not think that the psychological or even educational requirements of democracy are particularly strenuous. If I am right that voters can be analogized to consumers and like consumers need not be deeply informed about the “product” (governance, in the voting case) they are buying, then we need not insist on a high degree of public-spiritedness, or a deep interest in politics and policy, on the part of ordinary citizens. We need not even worry if many people do not bother to vote (in the U.S., even presidential elections do not attract more than half the eligible voters), since the decision not to vote is a rational judgment that the difference between candidates and policies is not important to the particular (non)voter. We must, it is true, anticipate even more ignorance in the electoral “market” than in the normal economic market, because people have a greater individual stake in and greater knowledge concerning their purchasing decisions than their voting decisions, but remember that people are not voting on policies or being asked to govern in the sense of administering or legislating. They are making gross choices between candidates and between general policy orientations, and it may be that these choices can be made rationally without a great deal of knowledge. People can also rationally use political parties to guide their votes, with the party “label” corresponding to a trademark in an ordinary market. One of the advantages of democracy, indeed, is that it allows ordinary citizens to devote most of their time to nonpolitical pursuits while still leaving them

with a residuum of political influence that assures a reasonable if rough correspondence between government and public opinion.

But the democratic system will not work without a certain kind of institutional foundation, and the cornerstone of that foundation is an independent judiciary. The relevant independence is twofold: it is from the officials who rule, but also from the fluctuations of public opinion. If the judges are subservient to the governing officials, democracy will degenerate into tyranny as elections are rigged and criticism of officials suppressed, abuses that it is a central function of the judiciary to prevent. But if the judges are subservient to the people, as in a system in which judges enjoy no secure tenure, the danger is acute that they will not protect the property and personal rights of unpopular individuals or groups, with potentially disastrous effects on incentives to invest.

The protection of rights irrespective of the popularity of the rights holders is the essence of the “rule of law,” a doctrine that comes down to us from Aristotle, who in the *Nicomachean Ethics* set forth the theory of law that he called “corrective justice.” If someone through wrongful behavior disturbs the preexisting balance between himself and another person, to the injury of the latter, that other person is entitled to some form of redress that will to the extent feasible restore that preexisting balance—that will correct, in other words, the departure from equilibrium brought about by the wrongful act.

Aristotle’s concept of corrective justice is highly abstract. What shall count as wrongful behavior is not specified; nor the forms of redress that shall be deemed appropriate. Its principal significance may lie in a corollary that Aristotle derived from it. The corollary is that corrective justice abstracts from the personal qualities, the merit or desert, of the wrongdoer and his victim. The victim may be a bad man and the wrongdoer a good one, if we have regard for the character of a person and the entire course of his career—the summation of all his good and bad deeds and not just the particular episode that resulted in the injury to

the victim. Nevertheless the latter is entitled to redress. The reason that this is a corollary of corrective justice rather than a separate principle of justice is that corrective justice seeks to redress a preexisting equilibrium rather than to change it. The court doesn't use the occasion to enrich or impoverish wrongdoer or victim on the basis of a judgment about their merits or deserts apart from the circumstances of the injury itself. For that would not restore the parties to the preexisting equilibrium; it would create a new equilibrium.

This concept of justice "without regard to persons," the concept symbolized by the statue of justice as a blindfolded goddess, remains a cornerstone of law in all civilized societies. Indeed, it is one of the institutions that is criterial of whether a society is civilized. The reason is practical (Aristotle was a practical thinker). If obtaining redress for injuries depended on a person's reputation, people would invest inordinate resources in becoming well liked, well regarded. To the extent that such investments took the form of doing genuinely good things, they would enhance social welfare. But often it would be easier to obtain a good reputation by cultivating the friendship of the powerful, allying with the powerful through marriage, avoiding unpopular stands, and taking other steps unrelated, indeed often detrimental, to the good of society. And even when a person obtained a good reputation by proper means, once he had that reputation and could use it to inflict wrongful injuries with impunity on persons who did not have a good reputation, incentives to wrongful behavior would be created. The friendless would be an outlaw class on whom any of the "good" could prey with impunity. Energies would be deflected from socially constructive activities into rent seeking and clientelism.

So we want law to be "impersonal" in rather a literal sense. We want judges to abstract from the personal characteristics of the parties to the litigation before them and treat them as representatives of classes of activity, such as drivers and pedestrians. This aspiration for legal justice received canonical expression (in the European tradition) in

Max Weber's concept of formal rationality. Law, in Weber's analysis, participates in the modernizing process by shucking off its supernatural, charismatic, and discretionary elements and becoming increasingly cut-and-dried, rational, and bureaucratic—increasingly a system in which disinterested civil servants, constituting a professionalized judiciary, resolve disputes by applying clearly stated rules designed to promote rational economic planning by private and public actors to facts that these civil servants also ascertain rationally. The rules do not prescribe any private actions; they do not tell people what contracts to make, what risks to take, what callings to follow. Instead they create the framework within which people can go about their business—acquiring and exploiting property, making contracts, investing and lending, engaging in risky activities, and so forth, confident that known, clear, substantively neutral rules provide the exclusive statement of their public rights and duties. To the extent that the legal system conforms to these criteria, it attains formal rationality—the optimal environment for capitalism.

With Weber we are already far beyond Aristotle. This is particularly clear when we consider Weber's argument that the efficacy of the law as a handmaiden of a capitalist economy depends on law's maintaining its professional autonomy. (Aristotle had written at a time when there were no professional judges.) Judges are not to be the cheerleaders for capitalism. They are to enforce the abstract norms of the law without regard to the consequences for the persons and activities encountered in the cases that they are called upon to decide. This neutrality, neutrality not only as to personal worth as in Aristotle but as to ideology as well, is important not only for enhancing the predictability of law—and it is predictability, above all, that Weber thought capitalists require of the legal framework—but also for reassuring the potentially restive classes in society that the law is not infected by class bias. But this means that even modern law has an ideological, one might even say a prerational, role—to conceal the lineaments of power in a capital-

ist society. Legal rationality is—rational. But it is also, and by that very fact, an agent of mystification.

I want to emphasize the difference in this regard between Aristotle and Weber. It is at least formally possible to do justice “without regard to persons” yet to do so on the basis of loose, discretionary, “equitable” standards rather than the kind of strict rules envisaged by Weber. The important thing from Aristotle’s standpoint is that the judge (or jury) not have regard for the individual characteristics (wealth, family, deservedness, etc.) of the parties to the lawsuit, that he treat them as representatives of activities rather than as unique individuals. But this leaves undetermined the degree to which the judges will base decision on abstract principles rather than on the particulars of the individual case, not the personal characteristics of the litigants but the particular character of the activity in which each was engaged. It is the difference between punishing a driver for driving over the speed limit and punishing him for driving too fast for driving conditions at the particular time and place. But of course the looser the standard applied, the greater the danger that the judges will be influenced by the personal characteristics of the litigants or, alternatively, will be harder to detect should they allow themselves to be influenced by those characteristics, because the correct application of a standard is usually more difficult to judge from the outside than the correct application of a rule. Weber’s concept of formal rationality places great weight on the desirability of rules that leave little scope for judicial discretion and so provide the clearest possible guide and framework for the imposition of legal duties.

Aristotle laid the cornerstone of the rule of law, but Weber completed the edifice. That judges shall judge without regard to persons is a central element of what we consider the “rule of law,” or in German the *Rechtsstaat* (what Professor Aarnio calls “the constitutional state”) but it is not the only element. Others are that rules of law shall be general, shall be clear, and shall be announced in advance so that people can conform their behavior to them without risk of punishment. These are values emphasized by Weber. An-

other important element of the rule of law is the separation of the legislative and judicial functions.

The danger of judicial discretion run wild is a real one. But it is timely primarily I think for Europe rather than America. Europe is at the crossroads, where one path leads to discretionary adjudication on the Anglo-American model while the other is the continuation of the tradition of judicial modesty that (to an American) is the most striking feature of the European judiciary. But the second path is not open to judges in America. The lack of control of American legislatures by political parties, the tricameral character of the Congress and the state legislatures (the veto power makes the President in the case of federal legislation and state governors in the case of state legislation in essence a third branch of government), the heterogeneity of the society, including its legal culture, the nature of judicial selection (the absence of a career judiciary), and the sheer complexity of American law (the Constitution layered on federal statutes and the whole of federal law overlain on the laws of the fifty states) make the exercise of broad discretionary authority by American judges unavoidable. Professor Aarnio associates this type of discretionary judicial decision making with the ideology of the welfare state, yet the welfare state is weaker in the United States than in Europe, while European judicial decision making is more legalistic than American. However, as Professor Aarnio notes, times have changed and even in Europe the role of the “syllogistic model of deduction” in judicial reasoning is in decline. Aarnio is right to warn, however, that too expansive a concept of positive liberties (in Isaiah Berlin’s sense) could render the law hopelessly arbitrary and unpredictable.

I contend that while an independent judiciary plays an essential foundational role in a democratic system, the precise balance in the judicial process between rules and standards (or principles) is a variable rather than a fixed requirement. A court can be impersonal in Aristotle’s sense, and independent both from the ruling officials and the masses of the people, and if it is these things the preconditions of democracy will be secure. It need not also have the

degree of formality prescribed by Weber. Whether it will have that or not will depend on circumstances that vary across democracies.