Fourteen Points on Local Courts in the U.S.

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PATRICIA SOHN, DEC 27 2016

When the first edition of my book was published, Judicial Power and National Politics: Courts and Gender in the Religious-Secular Conflict in Israel, I gave a rather rousing commentary on the benefits of judicial power for protecting civil and human rights, and for navigating the proper relationship between state power and individual freedoms.

Some colleagues suggested that I was too 'sanguine' about the benefits of judicial power. They suggested that I take a look at the lower courts in the United States to find that there are, perhaps, significant down-sides to judicial power in practice (by contrast to formal rules).

I agreed that my account was rather positive. I had no idea how I might find a way to talk about the lower courts in the U.S., since I was trained in comparative law and society and not American courts, *per se*. This blog seemed the right forum.

As an historical institutionalist and political ethnographer of comparative courts (e.g., outside the U.S.), let me outline a few of my institutionalist-type observations about the lower courts in the U.S. today.

1. Local judges are under enormous pressure from local people to bend, twist, disembowel, circumnavigate, and otherwise run roughshod over the law as written. This local pressure comes in the form of individuals, social constituencies, interest groups, local lawyers, and professional associations or individuals from those associations who insist that they know better than the judges how to run things, particularly judicial decisions.

2. Local lawyers honestly believe that the United States Constitution does not apply to many – and for some lawyers, *all* – components of what happens in local courts.

3. Local judges are overworked. They work enormously hard and take their jobs very seriously, to an appropriate level.

4. Many local populations believe that courts should be like other political institutions; that they should be like majoritarian institutions and follow public will. They should not. As an institutional matter, the judiciary is the only non-majoritarian political institution. It is meant to be precisely a check on public will, which, too often, at the local level, strays toward tyranny of the majority.

5. Too many cases are allowed into the lower courts. Most cases should be thrown out without hearing from the first instance for lack of justiciability or jurisdiction on the question at hand, or for lack of admissible *prima facie* evidence supporting the claim at hand. My favorite international legal scholar on this question is former Israeli High Court President, Aharon Barak. The U.S. would save enormous amounts of money, nationally, locally, and individually, by implementing these already existing principles in our legal system.

6. Social pressure on the lower courts is such that it has come to be believed – and practiced – that the right to a hearing is a right of the accuser. It is not, or, at least, it is not in most constitutional systems. In most constitutional systems, the right to a hearing is only the right of the accused. If the right to a hearing becomes the right of the

accuser, the result is a pandemonium of cases. That is what is happening today in some lower courts in the U.S. (I believe it is part of what is bankrupting the country, from the individual level and up.)

7. Local lawyers love to complicate a question that is simple. Lawyers who engage in this practice should be disbarred. It is a waste of public resources, which translates to the public pocket book. It can also be understood as a form of fraud *vis à vis* the client.

8. Local judges are not protected from the influence, pressure, or other insertion of the public into their judicial decision making at either the individual or community levels. This phenomenon is in the extreme.

9. Judges need to be more empowered, not less, so that they can engage their training in impartial decision making based on law and principle rather than the whims, interests, or agendas of individuals, communities, professional groups, or other interest groups. All of this is necessary for the proper functioning of judicial impartiality, and judicial independence from both society and other branches of state. Readers might translate this principle on the individual level to mean: just because you, personally, don't like a judge's decision, it does not mean that he or she is wrong. Do your own work; let the judges do theirs. The are actually expert at what they do.

10. Significant and new governmental institutions should be put in place to check, punish, and, if necessary, take away the license and/or criminally prosecute lawyers who commit fraud against their clients, or who waste the public coffer with unnecessary litigation. The practices currently in place to handle this problem are vastly insufficient. This problem is ignored as if it is endemic to the system. As an institutional matter, it is not. There is an easy fix.

11. Judges should be appointed through a professional process alone. Countries in which this is done well usually use a committee of judges, legislators, executive office holders, and one or two members of the bar to make these appointment decisions. Promotion and firing decisions are also made by this committee and are based on criteria of professional merit, including audit/review of an individual judge's case load.

12. At the local, appellate, state, and Federal levels, case load should be audited/reviewed per individual judge at random on a quarterly basis to a level of at least 25% of the case load until the numbers coming out of the Criminology and American Public Law literatures no longer show the systematic and extreme racial and gender bias that they have, now, for at least thirty years. Based on my own observation, admittedly limited and simplified, it is my suspicion that these numbers come from public pressure against judges. As is done in some other countries around the world, this audit/review body should include the same categories of members as the judicial appointment body mentioned above.

13. The Constitution of the United States of America is still the best document on institutional configuration, and on rights and liberties, for the U.S. context. Local individuals, communities, interest groups, and/or professional associations that want to get around it – for whatever reason they deem so crucial – should be told, summarily, to take a flying leap.

14. Judges at all levels of the judicial system need body guards for themselves and their families, husbands, wives, children, parents, etc. When the country is this fractured and angry, and a significant part of the population does not respect any part of the political process to say nothing of the judicial process, our judges need to be protected. Think of it this way: Judges (even in civil cases) deal every day with *criminals*. Enough said. Keep them safe. They cannot make impartial decisions if they feel threatened for themselves or their families.

And, finally, give me research to do in a language that I do not speak, in a country where I have never been, and no running water any day of the year. I would far prefer that to having to do the work that our judges do every day.

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