Courts: The Quagmire

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PATRICIA SOHN, NOV 30 2018

Most of the month of September 2018 was filled with the drama – of almost theatrical configuration – of the Brett Kavanaugh confirmation hearings in the U.S. The courts need to be reconfigured, in my view, back to something closer to positive law. Personnel is often the easiest and most efficient way to do that. So, people on opposing sides of the political spectrum are right to worry about who is on the Supreme Court, or in any court. In fact, if anything, we pay attention to courts too little. Personnel matters. However, other institutional factors matter as well.

Before my book, *Judicial Power and National Politics: Courts and Gender in the Religious-Secular Conflict in Israel* , was published by SUNY Press in its First Edition in 2008 (Second Edition 2017), several of the most important scholars of American public law and Comparative law and courts expressed concern to me that I was being too "sanguine" in my book about the expansion of judicial power.

Normatively speaking, the Israeli case was one with a long court-driven constitutional heritage in which the High Court both reservedly (using positive law) and strongly (in terms of asserting limits on other institutions of state) used increasing numbers of rights cases coming to itself carefully to navigate and define the line between individual freedoms and public (executive, legislative, or judicial) power within the boundaries of the state. Thus, I felt comfortable being positive about expanding judicial power in that context.

Since that time, nonetheless, the concerns of my highly respected senior colleagues regarding the dangers of (unlimited) expansions of judicial power have remained with me.

Indeed, courts appear to be one of the first lines of attack for authoritarian rulers seeking to entrench authoritarian rule. The Nazi regime is a paradigmatic example of this phenomenon. In other cases, courts have moved back and forth either supporting or attempting to restrict authoritarian trends in executive power.

My colleagues in the U.S. who work on American public law have typically told me that the problem with the application of law in the U.S. lies more with the lower courts than the upper courts, as the lower courts are under less daily scrutiny, in fact, by anyone (e.g., the press, or the government). And, in fact, people may feel cowed from those few options available to them at the lower court level in cases of misuse of power, contributing to a lack of accountability at that court level. Others have detailed the effects of "court communities" at the local level, which may be minor or may be significant; and those effects may be positive or negative, normatively speaking (assuming a shared normative goal of participatory rule).

In countries that do not include a regular, randomized audit of judicial decisions at all levels, courts at the sub-national level may be expected to display a tendency to be less accountable either to positive law or to the norms of the higher courts due to a lack of institutional accountability measures and little-to-no daily scrutiny by normal channels (e.g., the press, or government offices). Both precedent and statute may be used with extreme creativity – in the negative sense – without a court's limiting itself to positive law in the way that upper courts must accomplish due to daily normal scrutiny.

Court systems in such disparate cases as Israel, France, Japan and others obviate this problem with the lack of general scrutiny of the sub-national courts by having various forms of rather extensive professional audit of court

rulings to ensure that judicial rulings conform with contemporary legal standards in that country in terms of both positive law and precedent. Both promotion and retention may be, and often are, subject to such audits in these country cases.

Such a move raises the question of authority – who has authority over the courts, and should the people have authority over the courts? The courts lie in the strange realm of acting as check – within a democratic system – against majoritarian tyranny. It is important that they remain so. For, democracy itself requires substantive freedoms and the ability to participate in politics for both majority and minorities at any given time (e.g., who is majority and who is minority changes with time and place, so it is in everyone's interest to protect the interests of minority communities as well as majority communities). The executive and legislative branches are majoritarian, elected branches accountable directly to the public. The judiciary stands as the only of the three major governmental branches in place to check the power of the majoritarian branches. It must have the power to do so.

Courts stand as experts in the law, meant to safeguard the foundational legal principles upon which a country is established. Countries that use systematic, annual, and randomized audits of case decisions often use a committee of a few members each from the three major government branches and the national Bar. Others use only judicial experts (e.g., the highest-ranking judges and a wider judicial administration than the U.S. currently maintains). It should be said that *none* use people outside of the political or judicial system; the public does not have a role in regulating or directing the one existing institution intended to check the majority. Individuals from the public who feel they should have a say are not accountable to the people; people elected or appointed within the political system are so accountable.

Lawyers in our current system in the U.S. often do not give the public much reason to believe in legal expertise as principle-related or something in which the public should put its trust. Governmental, rather than only American Bar Association audit of *lawyer* activities, is also important to bringing back the public's trust in the legal system. While an excellent organization at the national level, at least at some local levels, the Bar Associations have substantively failed to regulate their own people, contributing to a decrease in public trust in the judicial system at large.

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