

2012

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Repository Citation

Kavar, Leila and Massoud, Mark Fathi, "New Directions in Comparative Public Law" (2012). *Political Science Faculty Publications*. 17.

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New Directions in Comparative Public Law¹

Leila Kavar² and Mark Fathi Massoud³

Conducting fieldwork in South Sudan in the aftermath of what was Africa's longest civil war, one author of this article arrived at the office of a newly appointed Supreme Court justice. The desk was sparse. A new computer was switched off. And the court's docket was empty, with no case making its way through the state's nascent system following decades of political violence. If courts are effectively silent (and a new legislature only beginning to draft bills) where is state law in these places, at these moments?

Cognizant of the controversial politics of judicial review of immigration policies in the U.S., the other author went to France to study immigration in a civil-law system. While French appellate judges reviewed immigration-agency discretion, they hardly concerned themselves with the role of courts in an administrative state. Rather, judges sought to settle the legal meaning of foreigners' substantive rights, a subject left relatively untouched by their U.S. counterparts. If immigration law has taken such distinct trajectories in the U.S. and France, what are the broader implications for studying the judicialization of politics?

Important questions emerge, then, for scholars of public law about how culturally significant norms, routines, and institutional relations inform legal practices. A research strategy that fully attends to the distinct settings in which the politics of law is enacted would require significant research time abroad and typically substantial foreign-language skills. But the investment comes with appreciable rewards: Tackling comparative legal politics in a sophisticated and richly contextualized manner has the potential to extend public law scholarship in original and exciting directions.

Despite the pioneering work of Shapiro (1981), only during the past decade has consideration of law and courts outside of the United States developed into a significant current within public law. Based on the important insight that courts and constitutional rights have come to play a meaningful and growing role in politics, studies of non-U.S. legal contexts have emphasized the broadly shared features of this global "judicialization" of politics. With an eye towards developing generalizable models of how judicialization takes place, public law scholars have examined judicial empowerment in Europe (Cichowski 2007), Latin America (Helmke and Rios-Figueuroa 2011), and East Asia (Ginsburg 2003). Innovative new work on authoritarian regimes has similarly brought attention to courts and the sources of judicial empowerment in these complex settings (Ghias 2010; Ginsburg and Moustafa 2008; Moustafa 2007).

These studies of the politics of courts are important in shedding light on institutional relationships within national government and the relative power of judiciaries. But judicialization is just the tip of the iceberg. Now is the time to deepen the comparative public law agenda to address broader questions about the inter-relationship of legal processes with the diverse ideas and practices that constitute social life. For those considering embarking on

¹ We owe special thanks to Michael McCann for a thoughtful review of an earlier version of this article.

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a comparative public law research project and who may be looking for ideas and encouragement, we suggest three directions for fruitful research in largely uncharted waters.

First, consider diversifying the focus from the *politics of courts* to the *politics of law*. In many parts of the global South, many people have little ability or need to take their grievances to state courts. Studying judicial empowerment in these places may disconnect scholars from the daily realities faced by those with real disputes. That is, there are varieties of sites where the politics of law is generated and its impact is mediated, including non-governmental organizations, refugee camps, and the home. And even in robust industrialized democracies with well-functioning legal systems, the politics of rights may be largely enacted outside the judicial realm. Yet the fact that politics occurs through other mechanisms than formal adjudication does not mean that the politics of law is absent. As studies of rights-based politics in the U.S. have shown, the symbolic power of rights may catalyze political struggles “even where the shadows of official legal institutions are dim or largely disregarded” (McCann 1994). Inductive and empirical studies that acknowledge individual and collective experiences of law will ultimately shape how scholars theorize its practice. It may also expose law’s multiple faces—promoting but also retarding the goals of the actors who use it for their benefit (Massoud 2011).

Second, pay attention to the *discursive and symbolic dimensions* of law. As studies of disputing in the U.S. have shown, culturally embedded norms, routines, and institutional relations inform the range of issues and legal arguments that are understood as suitable for litigation (Harrington and Merry 1988; Mather and Yngvesson 1980). And engagement with a particular juridical community’s shared discursive repertoire lies at the heart of the adjudication process (Feeley and Rubin 1998; Gillman 2006). What are the specific cultural forms, then, that configure law and rights in non-U.S. contexts? Applying legal anthropology may be helpful in this regard—to illuminate, for instance, how international ideas of rights translate into local practice or take local meaning (Merry 2006).

Third, be mindful of the *dynamic, multidimensional, and uneven* nature of worldwide engagement with rights. Comparative public law scholarship has generally framed the “judicialization” of politics as uni-directional and uni-dimensional: At some cognizable point, courts enter the game of politics and change the rules by which it is played. Recent work has offered a sophisticated picture of the combination of ideas and institutions that lie behind this judicial engagement with rights (Woods and Hilbink 2009). Pushing further ahead, what would happen if we reframed the “rights revolution” not as an accomplishment but rather as an ongoing process in which legal change is frequently neither linear nor continuous? Are there systematic differences in the register and temporality of judicial engagements with rights across national contexts? “Constitutional ethnography” makes an important contribution in this direction—bringing an ethnographic sensibility to comparative public law by privileging the “lived detail of the politico-legal landscape” (Scheppelle 2004).

These three directions for research are, we hope, promising starting points for extending the frontier of comparative law-and-courts scholarship. Scholars in this section have demystified the process of litigation and how it transforms “facts” about the social world into new, culturally embedded formations of legal knowledge. But law is also a practice of politics, as the process of adjudication exerts a powerful influence over the orientations and actions of litigants. Lawyers and judges must adjust their strategies to the culturally meaningful register

of the particular legal field in which they operate. In the U.S., the prominence of public interest law has been understood as a product of this dynamic, as legal professionals seek out symbolic judicial validation for their claims (McCann 1986; Trubek et al. 1994). Different strategies might be available to legal professionals who engage in reform-oriented litigation in different cultural settings (Kawar 2011). How are the contours of judicial engagements with rights shaped by these differential registers of adjudication?

Adopting a political and cultural approach to law also allows comparative scholars to understand both the power of rights and its consequences (see Couso, Huneeus, and Sieder 2010). On the one hand, framing politics in terms of rights reproduces the coercive power of the state. Rights have the discursive power to constitute the identities and grievances of political actors (Brigham 1996). On the other hand, rights are embedded in cultural meanings lending them symbolic power, which in specific contexts may catalyze fundamental rearrangements of politics. By illuminating what happens to rights and what happens to people who use notions of rights in a variety of settings, we can assess how law's discursive power is enacted in diverse forms within national or subnational systems of cultural meaning.

Political scientists who care about law and courts are well suited to conducting this kind of examination into the politics of law. Many of us see law as embedded in—shaping and shaped by—political processes. We do not take legal rules on their face value, and we find rules existing in multiple sites. For example, in post-conflict areas where courts or regulatory frameworks are weak, a political science graduate student or scholar hoping to study law may be more suited to examining the legalistic operations within United Nations agencies than speaking with a group of freshly appointed Supreme Court justices who have yet to hear a case.

Examining the inter-relationship between cultural meaning and legal practice, both inside and outside the formal justice system, does require going beyond the conceptual categories of American law. This research agenda, then, would require an openness to rethinking what the fundamental questions may be in comparative public law. In studies that focus on adjudication outside the U.S. context, the global rights revolution cannot be fully appreciated if it is measured according to a rubric generated purely in the U.S. legal system and then exported to other national contexts. A more sensitive approach is required, in which the analytical framework encompasses the full range of juridical practices and actors that are present in another country's diverse legal cultures.

Our purpose here has been to put forward promising research trajectories that would build upon and enrich public law scholarship with insights drawn from local legal contexts outside the U.S. Our community of scholars has examined the wider politics produced by the deployment of juridical categories in much greater depth in the U.S. than anywhere else in the world. Studies in comparative public law of judicialization and constitutional rights have now called our attention to the global scope of legal politics. But we have only begun to scratch the surface of the full range of cultural meanings associated with the experience and practice of law.

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