Courts and the marginalized: Comparative perspectives

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Those landmark cases where courts have assertively defended the rights of poor, vulnerable, or insular groups—such as homosexuals, refugees, or indigenous peoples—even in the face of social hostility and indifference have generated considerable interest in the role of courts as protectors of the marginalized. What role can and do courts play in protecting the interests and rights of vulnerable groups? Why do some marginalized groups succeed in having their rights recognized by the courts, while others fail? What makes some judiciaries more activist and receptive to their concerns and others less so?

The four articles presented in this symposium originated in an interdisciplinary workshop held in Santiago, Chile, in December 2005, which attempted to answer these questions. The focus of the workshop was on new democracies in Africa and Latin America, but participants also drew on the experiences of more developed and stable legal systems in Europe.¹

Most of the time, courts restrict themselves to applying the law, seldom engaging in the judicial reshaping of existing legal norms and often, as a result, reinforcing existing patterns of social exclusion. But, on occasion, courts—particularly constitutional courts—have sought actively to improve the conditions of marginalized groups that have, in one way or another, been left behind by the political system. Judicial activism on behalf of “permanent, insular minorities”² first appeared in the United States and other consolidated

¹ The workshop, entitled “Courts and the Marginalized: Comparative Experiences,” formed part of a workshop series and research network on “Courts in Transition,” funded by the Norwegian Research Council and based at the Chr. Michelsen Institute, Bergen, Norway. It was organized in collaboration with Universidad Diego Portales, Chile; Institute for the Study of the Americas, University of London; and Centre for Applied Legal Studies, University of the Witwatersrand, Johannesburg, South Africa. Country cases examined in the workshop included Argentina, Brazil, Costa Rica, Chile, Colombia, Guatemala, Kenya, Malawi, South Africa, Tanzania, Uganda, and the United States.

² US Supreme Court Justice Harlan Fiske Stone introduced the expression “discrete and insular minorities” in the now legendary footnote 4 of Carolene Products Co. v. United States, 323 U.S. 144, 152 n. 4 (1938). (In that case, according to the footnote, it was not necessary to “inquire whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”) See Peter Linzer, The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 CONST. COMMENT. 227 (1995).
common law liberal democracies. In recent decades, such efforts have been observable not just in other developed countries but also in new and fragile democracies, such as South Africa, Taiwan, and Colombia. These papers, and the workshop in which they were first presented, aim to shed light on this phenomenon, analyzing the origins and preconditions of the steps taken by these courts as well as the potential limitations on their actions to improve the position of marginalized groups. In one of the examples scrutinized here, that of Costa Rica, landmark decisions have been made directly improving the position of marginalized groups.\(^3\) In the other cases examined, courts have not taken an active role in promoting the interests of marginalized groups, or, indeed, have opposed them. The participants in the Santiago workshop sought to understand the milieux that, as a whole, determine whether the rights of politically marginalized groups will be protected by the judiciary.

The papers analyze the institutions and rules regulating how the relevant rights become justiciable. They also reflect on the differences between civil and common law traditions and among different constitutional regimes in light of the broader legal context. The papers not only consider the courts but also the political and socioeconomic climate within which court action occurs, asking when, how, and why particular issues become salient.

Lastly, the case studies investigate the capabilities of marginalized groups themselves to engage in legal mobilization. And other questions arise: Is there a difference between moral and economic marginalization? Between groups that are vulnerable in society and not treated as full citizens and those that are politically weak or who are stigmatized? And what is the significance of support structures and availability of resources for litigation and advocacy? Is it the marginalized groups themselves that bring the cases, or professional domestic or international litigators? And are plaintiffs’ interests truly represented in these cases?

The workshop also considered the social and political effects of landmark rulings. Success is not easily measured. What are the effects of test cases or legal victories—or, indeed, test cases that are defeated (since these, too, can be politically transformative)? Similarly, cases that are not implemented on the ground nonetheless may build up jurisprudence that is increasingly important across borders. However, if the courts rule in favor of marginalized groups yet their decisions are not upheld in practice, this means something different from decisions in a system where the law is enforced more rigorously; the latter situation will likely have a more significant impact on the behavior of social actors. Within each national context, the essays consider whether courts are salient players in the political process; whether test cases represent the judicialization of politics; and in what sense successful implementation of test cases ultimately depends on receptivity on the part of the political branches of government.

\(^3\) Other cases examined in the workshop, where courts have operated to the benefit of marginalized groups, included South Africa and Colombia.
The focus is on the potentially transformative impact of court action on new and fragile democracies and on transitional contexts within nonhegemonic countries and in situations of legal pluralism.

Carlo Guarnieri analyzes how Continental judiciaries relate to marginalized groups, and how this has changed over time. He finds that, in recent decades, groups have emerged inside the judicial corps—especially in France, Italy, and Spain—that openly advocate some sort of progressive or radical jurisprudence, and that some European judiciaries have developed policies more or less devoted to defending minorities or marginalized groups. Today, if we look to Continental judicial systems, we see a puzzling landscape, including instances in which a judiciary traditionally considered conservative, if not reactionary, has generated progressive policies. Guarnieri concludes that the more politically and socially autonomous is the judiciary, vis-à-vis other centers of political and social power, so the less powerful is the influence of the political system, and, therefore, the greater are the chances of minorities achieving a positive judicial response to their demands.

In Latin America, indigenous peoples constitute an acutely marginalized group that increasingly uses the courts, particularly the higher courts, as one arena or means by which to pursue and defend their rights. Rachel Sieder’s article considers this region-wide trend. By focusing on Guatemala, where the Constitutional Court and Supreme Court have largely failed to defend the collective rights of indigenous peoples, she analyzes how we might account for the defense, or lack of defense, of such rights. The essay argues that, in Guatemala, weak normative protections for indigenous rights—combined with a conservative judiciary that has historically defended elite interests—and the absence of a concerted strategy of judicialization of collective rights claims on the part of civil society organizations account for the courts’ failure to defend rights of indigenous peoples.

Brief comparisons are drawn with Colombia, where a strong normative framework and a proactive judicial branch have contributed to the development of a more progressive jurisprudence. Four factors are said to explain the differences between the countries: (1) the political context within which rights become judiciable norms; (2) institutional considerations, particularly the presence or absence of mechanisms available for the legal defense of rights; (3) judicial culture and the relationship of the judiciary to the executive and legislature; and (4) the nature and strategy of social movements.

Bruce Wilson focuses on one of Latin America’s—and the world’s—most activist judiciaries: the constitutional chamber of the Costa Rican Supreme

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Wilson asks whether the court’s activity has resulted in a genuine enhancement of individual rights. Is the court an ally of marginalized groups, and if so, have those rulings had an actual impact, or have lower level courts and government agencies thwarted their implementation? He finds that the constitutional chamber has taken its role as protector of individual rights seriously and has acted decisively in cases of individual rights claims, often ruling in favor of even the weakest, most marginalized groups in society. His analysis demonstrates the impact of those rulings, which the popular branches and government agencies have, in general, accepted, implemented, and treated as precedents. Special attention is paid to how this apparent rights revolution has impacted on the condition of gay people, who live on the social, political, and policy-making margins of Costa Rican society and have historically endured significant levels of discrimination and lack of respect for their rights by governments and their agents.

Marginalized groups in Africa have also turned to the legal system for advancing their social rights. In the southern African country of Malawi, poverty is widespread, deep, and severe. Two-thirds of the population lives below the poverty line and a third in conditions of severe poverty. Since 1994, Malawi has undergone radical changes in its constitutional and legal order, changes that have strengthened the courts vis-à-vis the other political branches and which, at least at face value, create a legal framework more favorable to the concerns of the poor. But what has been the effect in actual fact? Fidelis Kanyongolo and Siri Gloppen find that pro-poor changes in the formal legal framework do not appear to have strengthened the legal voice of the poor. Few cases concerning the constitutional rights of poor and marginalized people have come before the courts, and when such claims have been voiced the judiciary has not responded favorably. The essay compares Malawi with South Africa—where similar constitutional changes have resulted in landmark decisions—and investigates both the structural barriers that limit access to the courts by the poor in Malawi as well as the inherent biases of the dominant legal ideology, which prevent the poor from benefiting from the law.
