



HAL
open science

Judicial Politics on the Ground

Jeanne Hersant, Cécile Vigour

► **To cite this version:**

Jeanne Hersant, Cécile Vigour. Judicial Politics on the Ground. *Law and Social Inquiry*, 2017, 42 (2), pp.292-297. 10.1111/lsi.12306 . halshs-01551765

HAL Id: halshs-01551765

<https://shs.hal.science/halshs-01551765v1>

Submitted on 4 Dec 2023

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

JUDICIAL POLITICS ON THE GROUND

Introduction to the special issue « Judicial Politics on the Ground » (6 articles, 240 p)

Law and Social Inquiry, 42(2), 2017, p. 292-297.

Jeanne Hersant & Cécile Vigour

Jeanne Hersant (Associate Research Professor, Facultad de Ciencias Sociales/Centro de Estudios Avanzados, Universidad de Playa Ancha, Chile); jeanne.hersant@upla.cl

Cécile Vigour (Associate Research Professor, French National Center for Scientific Research, Sciences Po Bordeaux, University of Bordeaux, France); c.vigour@sciencespobordeaux.fr

ABSTRACT

This symposium focuses on judicial politics at the micro level. Its aim is to shed light on justice in action, drawing on an ethnographic approach to explore the routine decision-making practices of judges and other legal actors, and to study their interactions with citizens and politicians. Each article is based on close observation of the interactions between legal professionals and administrative actors who are in the frontline in local and lower courts. By examining a variety of jurisdictions around the globe, the articles in this symposium offer fresh insight into “judicial politics on the ground.”

09/09/16

INTRODUCTION¹

This symposium focuses on judicial politics at the micro level. Its aim is to shed light on justice in action, drawing on an ethnographic approach to explore the routine decision-making practices of judges and other legal actors, and to study their interactions with citizens and politicians. Each article is based on close observation of the interactions between legal professionals and administrative actors who are in the frontline in local and lower courts. By examining a variety of jurisdictions around the globe, the articles in this symposium offer fresh insight into “judicial politics on the ground.”

WHAT IS NEW ABOUT JUDICIAL POLITICS “ON THE GROUND”?

Literature on the judicialization of politics – “the process by which courts and judges come to make or increasingly dominate the making of public policies that had been previously made [...] by other governmental agencies, especially legislatures and executives” (Moustafa 2007, 26-27) – mainly adopts a macro and top-down approach. It tends to concentrate on higher courts rulings (Baum 1997, 148; McGuire 2012) and constitutional review, often focusing on the values influencing the judges’ decisions (Fielding 2011, 97; Tata 2007, 427). The most common topics of inquiry are transformations to the status of law and redefinitions to the balance of power between the legislature, the executive, and the judiciary (Baum, 1997; Commaille and Dumoulin 2009). The processes driving the increased role of courts in making public policy tend to be theorized along four main lines: the globalization of judicial issues, reinforced by the establishment of supra-national regional entities; demand for judicial review of political disputes; public policy analysis; and collective initiatives to acquire new judicially

¹ This article was translated from the French by Adrian Morfee. The authors thank Christopher Schmidt for his insightful comments on the first draft of this introduction

09/09/16

enforceable rights. Most scholarship on judicial politics has focused on democracies, although recent scholarship has considered the role of judicial institutions for authoritarian regimes (Ginsburg and Moustafa 2008).

This symposium presents an alternative perspective to emphasize “how much [courts] are like other political actors” (Shapiro 1981, 1). Our bottom-up approach examines judicial politics from the perspective of the daily interactions between legal professionals (judges, barristers, and case managers), those appearing in the courts (defendants, plaintiffs, etc.), and administrative agents (who may or may not have legal training, depending upon the country in question). And so, the crux of these articles is to examine legal and administrative practices and dynamics between those working in the system, where these practices and dynamics provide the underpinning for the elaboration of judicial politics.

This perspective is based on in-depth ethnographic surveys showing how the justice system actually functions and how cases are adjudicated. This special issue thus sheds light on what Flemming, Nardulli, and Eisenstein (1992, 3) call “judgecraft,” i.e. “how [...] judges go about their tasks in the courtroom,” but without thereby being limited to this aspect (see also Moorhead and Cowan 2007; Mack and Anleu 2007; Hutton 2016). The articles thereby examine various dimensions of judicial politics on the ground – including the most proactive aspects as illustrated in reforms and their effects on the ground, and the militant positions and innovative judicial practices a judge may deem socially desirable, as well as less visible aspects relating to work routines, the embedded ethos, and the independence accorded to judges, or else to the autonomy and discretion characterizing professions (Freidson 2001) and street-level bureaucracies (Lipsky 2010).

09/09/16

These articles employ “on the ground” observation as their starting point for analyzing interactions within courts at the micro-political level, in conjunction with macro-political dynamics and conflicts (public policy and debates about justice, state reforms, and so on). And so, by focusing on the practices of legal professionals and ordinary people involved in the courts, this issue seeks to show how judicialization processes operate at the micro level. This approach differs markedly from those that have long dominated the field of judicial politics studies, based on behavioral theory of judicial decision-making and modeling (be it denominated legal, attitudinal, or rational choice; Spaeth 2008). This approach departs from the normative and prescriptive tones found in mainstream literature on judicialization (as noted by Hirschl 2004) by focusing on studying justice in action.

This symposium draws on the multifaceted tradition within the social sciences of micro-logical analysis of the state (Bernstein and Mertz 2011; Barrera 2009; Latour 2009; Lavanchy 2013; Baczko 2013; Aymes, Gourisse, and Massicard 2015) in order to examine the relationship between the judiciary and politics. Baczko (2013), for instance, shows how within the context of the civil war in Afghanistan since 2001, the Taliban’s claim to control the state – despite being “just one politico-military player among others” (104) – is related to the jurisdictional network they set up in various regions. The goal of this symposium is to bring out the heuristic aspects of combining these approaches.

Judicial politics on the ground use different scales of analysis, moving from the local to the national—and in some cases to the international. They combine qualitative, fine-grained local analysis of the concrete organizational settings in which the activities of legal and administrative professionals

09/09/16

and those appearing in court are played out. At the same time, they take into account the legal, professional, and cultural dynamics.

From the perspective of judicial politics on the ground, these articles analyze local actions on the individual level, with an eye to understanding individual behaviors conjointly with collective actions (see Figure 1). These interactions are influenced by the individual characteristics of local actors, such as their socio-demographic profile, their professional backgrounds, and their beliefs and values. The institutional and organizational set-up within courts can also have an impact on judicial practices and strategies, including such characteristics as their size and type, their specialization and style of leadership, the division of labor between and among professional groups, their workload and the degree of control they have over it, and their resources. Interactions within courts and the links to politics are also determined at the national and international levels by the dominant features of the judicial system, where these include the legal tradition; the varying levels of fragmentation and hierarchy; the influence of legal professional associations; the balance of power between professional groups, as well as between the polity and the judiciary; judicial and legal policies; epistemic debates and communities; administrative reforms to the state; and the general economic and social context.

[Figure 1 about here]

From a methodological point of view, focusing on judicial politics on the ground implies a qualitative research design grounded at least partly in observation and interview, and, for historical case studies, on discourse analysis rooted in close-reading of textual sources. This can be combined with the study of documents, videos, or quantitative data (systematic case analyses). But studying micro-politics in conjunction with the macro-dynamics of change does not imply the need to adopt any specific

09/09/16

theoretical perspective and, depending on the case under study, the authors draw on the sociology or social history of justice and law, the sociology of professions, and public policy analysis.

Findings

This analytical framework allows us to take into account diverse situations across countries and over time, and to consider variations that may arise between individuals within the same court setting. This makes it possible to appreciate the diverse forms that judicial politics can take. Each article places the observed practices within the perspective of larger dynamics of change. Castellano and Travers examine attempts to reduce crime and recidivism, Gonzalez Le Saux examines interactions between lawyers and society, and Hersant and Biland and Steinmetz examine administrative reform programs inspired at least in part by the principles behind New Public Management. Each systematically applies a comparative approach, comparing courts, comparing judicial systems at national or inter-state level, or comparing a single judicial system across time.

Ursula Castellano adopts an ethnographic approach to judicial behavior in the context of “uncommon justice,” in this instance mental health courts in the United States. Her article presents findings from sixteen months of ethnographic study, conducted in four American mental health courts between 2007 and 2011, focusing specifically on judicial responses to non-compliance with treatment. Her approach differs from most research into mental health courts, which focuses on whether these courts reduce recidivism. Instead, she examines the uses of and limitations on judicial discretion of these alternative courts.

09/09/16

Max Travers provides a case study of bail decision-making in a lower criminal court in Tasmania, Australia. By evaluating these courts as political organizations—as unique institutions facing challenges within a given local political and institutional context—he demonstrates the value of the concept of “micro-politics” to the study of criminal courts. Travers combines ideas and methods from two traditions that rarely come into contact: ethno-methodology and political science research that studies courts by using ethnographic and quantitative methods to focus on political activity and organizational change. The article illuminates political influences on the courts, recent organizational changes, and efforts to include pre-trial services within the judicial process.

Marianne Gonzalez Le Saux examines the Chilean Legal Aid Service between 1930 and 1960. Drawing on archival research, she argues that its structure reflected attempts by social workers and lawyers to modify their professional identities in the light of the expansion of the welfare state. Lawyers and social workers, by collaborating in this service, helped to shape the judicial politics of the period by stressing the need to improve access to justice for the poor. They established specific mechanisms to deliver this service, for instance, by promoting conciliation and compromise over contentious judicial actions. Gonzalez Le Saux shows how gender dynamics between legal professionals and social workers in their everyday interaction within legal aid offices affected poor people’s access to the justice system.

The article by Jeanne Hersant focuses on the effects of the Criminal Procedure Reform (CPR, 2000-2005) on the lower courts in Chile. Drawing on three months of observation in an inquisitorial court and in-depth interviews with court clerks and magistrates from before and after the reforms, she analyzes how the CPR transformed a criminal justice system that had widely been regarded as corrupt

09/09/16

and inefficient. In both the pre- and post-reform systems, actors extrinsic to the formal legal process—here the “actuarios” forming the judicial street-level bureaucracy—played an important role in justice-making. The article shows how macro-political dynamics—both democratization processes and the introduction of management standards shaping the work of administrative departments—translate at the micro-political level of interactions between actors in the lower courts.

Emilie Biland and H  l  ne Steinmetz employ a cross-national ethnography of family courts in France and Quebec to examine how street-level bureaucracy relates to the judiciary. They propose a “micro-international comparison” based on observations of hearings conducted over several months, interviews with professionals, and analysis of the judicial records. By focusing on actions at the micro-level – day-to-day routines and encounters with the parties – they show that the accuracy of the street-level bureaucracy framework depends upon professional and cultural patterns, particularly assumptions about the role of judges, which take on different form in the two countries.

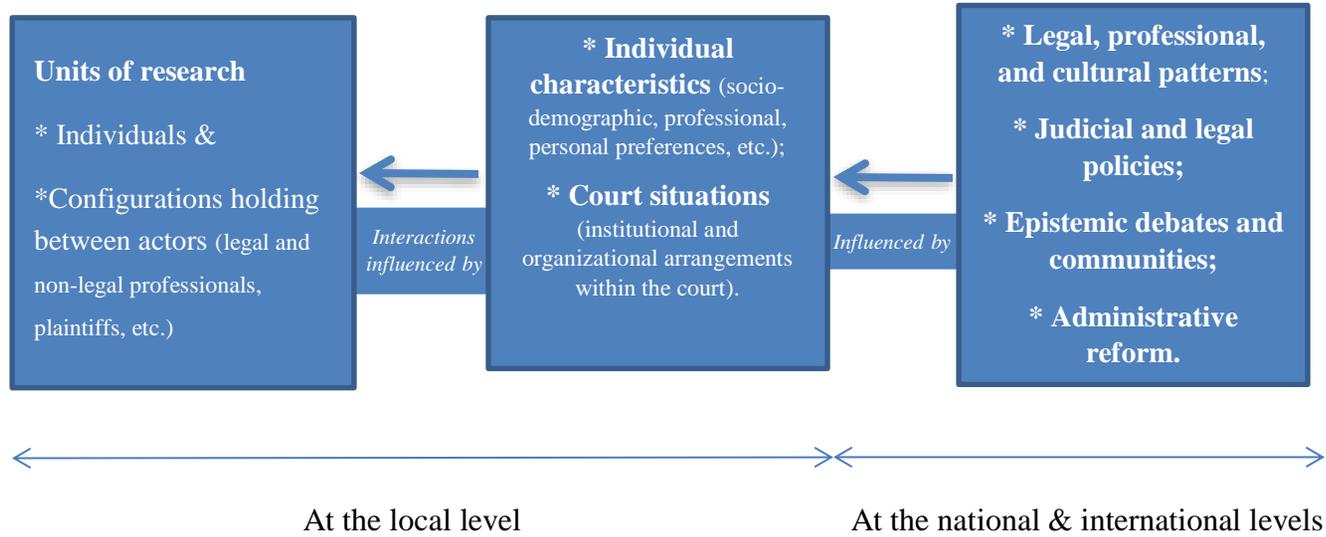
Martina Kolanoski analyzes a civil proceeding for compensation brought by victims of a 2009 German-led military airstrike in Afghanistan. The court treated military video material recorded during the “Kunduz airstrike” as crucial evidence. The key question: were the “infrared dots” to be interpreted as “possible Taliban” or “possible civilians”? This article makes a contribution to our understanding of the judicialization of politics by bringing out the political stakes involved, for the airstrike demolished the official narrative according to which the German operation in Afghanistan was not in fact a “combat” mission but one of “stabilization.” Kolanoski examines the court’s decision within its procedural context, using ethnographic field notes of the court hearing as well as legal documents to reconstruct how certain kinds of judicial categorization work were undertaken as the proceedings

09/09/16

unfolded. The trans-sequential perspective she takes on membership categorization analysis provides a way of thinking about how moral, political, and legal discourses are inter-connected.

Each of the articles in this symposium examines judicial politics on the ground by drawing on ethnographic approaches that are attentive to the social and political stakes of judicial practices. This approach makes it possible to shed new light on how the justice system in all its variety and complexity – hearings relating to marital conflict and divorce, judicial regulation of various forms of “insanity,” the consumption of illegal drugs, combating minor delinquency, and the routine conflict resolution of low-level disputes more generally, as well as military combat in a foreign country – is shaped by its interaction with the political sphere.

Figure 1 – The analytical framework



REFERENCES

- Aymes, Marc, Benjamin Gourisse, and Élise Massicard, eds. 2015. *Order and Compromise: Government Practices in Turkey from the Late Ottoman Empire to the Early 21st Century*. Leiden: Brill.
- Baczko, Adam. 2013. Judging in the Midst of Civil War. The Taliban Courts in Afghanistan (2001-2013). *Politix* 4 (104): 25-46.
- Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: Michigan University Press.
- Barrera, Leticia. 2009. Performing the Court: Forms and Practices of Legal Knowledge-Making in Argentina. Doctoral dissertation, Cornell University. <https://ecommons.cornell.edu/handle/1813/12828> (accessed November 9, 2015).
- Bernstein, Anya, and Elizabeth Mertz. 2011. Introduction. Bureaucracy: Ethnography of the State in Everyday Life. *Political and Legal Anthropology Review* 34 (1): 6-10.
- Commaille, Jacques, and Laurence Dumoulin. 2009. Heurs et malheurs de la légalité dans les sociétés contemporaines. Une Sociologie Politique de la “Judiciarisation”. *L’Année Sociologique* 59 (1): 63-107.
- Fielding, Nigel G. 2011. Judges and Their Work. *Social & Legal Studies* 20:97-115.
- Flemming, Roy B., Peter F. Nardulli, and James Eisenstein. 1992. *The Craft of Justice: Politics and Work in Criminal Court Communities*. Philadelphia: University of Pennsylvania Press.
- Freidson, Eliot. 2001. *Professionalism. The Third Logic*, Chicago: University of Chicago Press.
- Ginsburg, Tom, and Tamir Moustafa. 2008. *Rule by Law. The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press.

- Hirschl, Ran. 2004. *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.
- Hutton, Neil. 2016. Visible and Invisible Sentencing. In *Modernization of the Criminal Justice Chain and the Judicial System*, ed. Annie Hondeghem, Xavier Rousseaux, and Frédéric Schoenaers, 145-58. Baltimore: Springer.
- Latour, Bruno. 2009. *The Making of Law. An Ethnography of the Conseil d'Etat*. Cambridge: Polity Press.
- Lavanchy, Anne. 2013. Dissonant Alignments: The Ethics and Politics of Researching State Institutions. *Current Sociology* 61 (5-6): 677-92.
- Lipsky, Michael. 2010. *Street-Level Bureaucracy. Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation.
- Mack, Kathy, and Sharyn Roach Anleu. 2007. "Getting Through the List": Judgecraft and Legitimacy in the Lower Courts. *Social and Legal Studies* 16:341-61.
- McGuire, Kevin T., ed. 2012. *New Directions in Judicial Politics*. New York: Routledge.
- Moorhead, Richard, and Dave Cowan. 2007. Judgecraft: An Introduction. *Social & Legal Studies* 16:315-20.
- Moustafa, Tamir. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Reform in Egypt*. New York: Cambridge University Press.
- Shapiro, Martin. 1981. *Courts. A Comparative and Political Analysis*. Chicago: Chicago University Press.

- Spaeth, Harold J. 2008. Reflections About Judicial Politics. In *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington, 752-66. Oxford: Oxford University Press.
- Tata, Cyrus. 2007. Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process. *Social & Legal Studies* 16:425-47.