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# The Cause Lawyer's Cause

*Frank Munger\**

*The promise of human rights in South Africa may depend significantly on the course chosen by a professional and relatively independent South African judiciary. But what about the promise of human rights in other developing states which lack a judiciary with similar potential? Cause lawyers, increasingly visible in many of these new states, are presumed carriers of liberal legalism and democracy and celebrated for their courageous defence of human rights even in the absence of an independent court system. This comment argues that celebration of cause lawyers may reflect presumptions about their causes that are questionable even in the Global North, but decidedly premature in the Global South. In actuality cause lawyers represent both liberal causes and causes that are decidedly illiberal. Yet their work may still contribute to the defence of human rights. The value of cause lawyers lies not in their embrace of liberal legalism, as it is understood in the Global North, but rather in the variety of causes that they strive to make viable. Where space for a broad range of causes has been opened, the cause of human rights may also remain viable. But this is not a secure expectation, for cause lawyers, and the fate of their causes, derive meaning, support, and opportunities to move forward from social conditions not under their control. A necessary conclusion is that the contributions of cause lawyers to the progress of human rights and the rule of law must be evaluated with care.*

## Imagination

Anthropologist Clifford Geertz (1983) describes law as a work of imagination. Imagination 'narrows' and 'schematizes' the details of life observed and experienced so that rules can apply (1983: 170). A rule of law requires rules but also an image of the world in which law serves a purpose.

The imagination of a judiciary may be strongly influenced by a shared understanding of political institutions unifying a governing elite. Decisions by South African judges under apartheid supported the government in part because they were compelled to follow the statutory law of a constitutionally supreme parliament. But, as Professor Stephen Ellmann's comment on the courts concludes, this explanation falls far short of explaining the racism of South Africa's Supreme Court. Decisions by South African judges under apartheid also supported the government because members of the judiciary accepted the race-divided world imagined by apartheid's authors. The judges may have embraced the vision or declined to resist that vision for other reasons, but seldom questioned the legitimacy of

South African apartheid law. Court decisions aided the struggle against apartheid, but these occasions were exceptional and could not undermine the dominance of that vision without a political sea-change (Abel, 1998a).

## Professor Ellmann's Purposive Formalism

Martin Chanock, whom we honour in this conference, worried about whether the South African legal system could overcome not only its legacy of decisions supporting key institutions of apartheid but also its legacy of racial imagination. Professor Stephen Ellmann's comment (2012) suggests a path toward restoration of law's legitimacy through judicial decisions based on a purposive formalism, that is, through decisions based on principled interpretation of the law while encouraging articulation of a broad range of claims for popular justice unheard under the previous regime.

Professor Ellmann's comment singles out the promise of the South African judiciary. Under apartheid, courts retained a measure of independence and formalism in much of their ordinary jurisprudence and their reputation for professionalism has survived. Ellmann argues that the courts might craft a jurisprudence that avoids two possible extremes: apolitical formalism, which ignores the need for corrective justice; and subordination to the post-apartheid demand for popular justice in all its potentially extreme forms. Building on their strong reputation for professionalism in non-racial jurisprudence, the judiciary might craft decisions that balance principles and a sense of justice.

Many other societies of the Global South lack a legacy of judicial capacity for building a liberal rule of law. Some new states have adapted a judiciary modelled on the civil law systems of Prussian or French administrative states which limit the power of ordinary courts and emphasise judicial interpretation serving the purposes of the state. Others lack an independent judiciary because law, of any kind, was subordinated to the state's political interests (see Dezalay and Garth, 2010). A further distinction which may limit hope for judicial leadership elsewhere is that the legal systems of many new states, though adapted from European or American models, lack anything similar to the influence of natural law, the ethical system which has informed law's purposes in many Western systems of jurisprudence.

## Cause Lawyers

If many of the states of the Global South have judicial institutions that are far less promising than South Africa's, they have grass-roots movements for justice, and they have lawyers, if not courts, who readily support them. Cause lawyers have been defined by American scholars Austin Sarat and

Stuart Scheingold as lawyers who practice with a 'vision of the good life' (1998: 1). Their understanding of the cause lawyer's vision is that it is fundamentally based on a liberal rule of law in a democratic society, institutions taken for granted in economically developed and politically stable democracies, especially in the United States. According to this influential view, cause lawyers are agents of social change, favouring liberal legality and democracy.

Lawyers committed to a liberal vision of the rule of law are an important element in the global discourse of democratisation, human rights, and rule of law, both in South Africa and internationally. 'Cause lawyers' seem to offer hope of the kind Professor Ellmann seeks. His inquiry is responsive to Martin Chanock's ill-ease about the future of South African law, but it is even more compelling because his hopes reflect human rights values associated with the globalisation of law, hopes for law in new states of the Global South, and, as Professor Ellmann has expressed elsewhere (1998), a meaningful role for cause lawyers.

Cause lawyers are closely associated with imagining the implementation of human rights, and the global emergence of 'cause lawyers' has been celebrated as evidence that law's compelling ideals are taking hold in the Global South. South Africa is one such case, where a handful of lawyers fought for the rule of law before apartheid ended (Abel, 1998a) and where social movements together with South Africa's evolving constitutional jurisprudence have become important illustrations of the potential of cause lawyers to the globalisation of law.

## The Trouble with Cause Lawyers

Before placing our faith in cause lawyers, we should have some concerns about Sarat and Scheingold's conceptualisation of their role and the optimism that seems to be the starting point for a great deal of scholarship and commentary. How independent can cause lawyers be from the culture and politics of the society that they are seeking to transform and that shapes their self-perceptions and actions? The presumption that cause lawyers are likely to be carriers of liberal legalism and globalisation of international human rights reflects mostly experience in the Global North and, more specifically, the United States. The role and success of cause lawyers in the United States is embedded in a specific form of federalism and common law jurisprudence which encouraged lawyers and courts to collaborate as power brokers at every level of government (Abel, 1998b). In other societies, especially those which lack both the influence of the common law and equally favourable political institutions, the place of cause lawyers is far less certain.

Even if such goals were meaningful in political contexts where law has never played such a role, how do we know that is what cause lawyers actually want?

By definition, cause lawyers pursue social change and law may be no more than a means. The social cause may include strengthening democracy or the rule of law, but is more likely to emphasise transformation of the social order, redistribution of power, or changes in existing law. Cause law in the United States has not been limited to the defenceless, weak and politically marginal or to those who seek greater democracy. The relationship between the cause lawyer's cause and the cause of liberal legalism is by no means so clear, unless we understand the cause lawyer's place in the institutional structure which connects law to politics.

In March 2007, young lawyers in Pakistan inspired rule of law advocates everywhere by taking to the streets to protest the arbitrary removal of Pakistan's Chief Justice by a dictatorial Prime Minister. Unprecedented sympathy rallies by lawyers in the United States and elsewhere embraced the cause of the Young Lawyers Movement, admiring their courage and celebrating the power of rule of law ideals. The YLM was accepted as an illustration of the benefits of investing in law. Taken for granted was an identity of commitment by the cause lawyers and their colleagues in New York, London and elsewhere to a similar kind of society under the rule of law.

But rule of law movements may take unpredictable turns. In 2011, the same members of the Young Lawyers Movement showered rose petals over the assassin of an outspoken critic of Pakistan's strict Islamic blasphemy laws. This time the young lawyers denounced the liberal values of the West while upholding the superiority of Shari'a law (Gall, 2011; see Gahias, 2010). In the Global South, rule of law, like democracy, may be a discourse of resistance to existing institutions rather than a blueprint for new ones.

We should be cautious about celebrating a cause lawyer simply for pursuing a vision opposed to established authority.<sup>1</sup> Of course, we might choose to celebrate only those cause lawyers whose vision is precisely the same as our own, but in doing so we deny validity to any view of the benefits of law but our own and we ignore the complex process of social construction required to establish the authority of law or human rights in a society different from our own. And if we believe that cause lawyers should sometimes be celebrated even if their vision of the good life is different from our own, which ones should we support? Which do we think will ultimately prove beneficial in the way that Professor Ellmann hopes?

Reflecting a lifetime of studying the development of legal institutions in Indonesia and Malaysia, Lev (2000) cautions that in new states:

[P]ressures toward constitutionalism and more effective legal process have advantages and suffer constraints quite different from those of old Europe

... [I]deas, in Asia as in Europe or anywhere else, take hold only when they make sense domestically and are adapted to domestic purposes. (5)

The Young Lawyers Movement is very much a local adaptation, reflecting the strong foundations for law and the promise that law offers the politically ambitious. At the same time the YLM also illustrates the great uncertainty about the law's liberalising influence. The YLM reflects the Muslim identities in Pakistan that may completely undermine liberal rule of law. Cause lawyers representing visions of an illiberal state, where the power and even the form of the state are very much in play, may have quite the opposite effect from that expected by those who have celebrated the emergence of cause lawyers.

## Cause Lawyers and Elite Politics

A further concern about cause lawyers has been raised by Dezalay and Garth's important comparative studies of legal evolution in Latin America and Asia, which elaborate the truism that the political institutions of a society determine the role that law can play. Although the globalisation of rights has become an important goal of governments and international agencies of the Global North, legal evolution in the Global South has been full of puzzles and disappointments. Dezalay and Garth's research follows 'carriers' who have been influenced by law from the Global North, observing when and why transfers of law succeed or fail in new states. They conclude that law succeeds as a resource independent of state domination when colonial, international, and local elites have a stake in legal institutions and the legal profession has sufficient social, economic, and other forms of 'capital' to resist domination. In the United States, cause lawyers benefit from the independence that has been achieved by power-brokering elite lawyers who have established themselves 'in the field of state power'. Where colonial era investments are sufficient, Dezalay and Garth conclude, law retains some independence. But the legal systems of most new states lack founders with political independence and their legal systems will continue to lack independence until domestic elites remake them.

Dezalay and Garth describe many examples of the success or failure of elite projects of legal construction supporting their general conclusion that elite politics determine the independence of law. If valid, their conclusion has profound significance for the emergence of cause lawyers, because the relationship between elite politics and legal institutions seems to be far more important for realising liberal legality than the training or ideals of cause lawyers.

## New Places to Look for Cause Lawyering

Where does this leave cause lawyers or a 'cause' judiciary? The answer is that there are many examples of cause lawyers' contributions to progress toward greater respect for human rights, state accountability, and access to justice in transitional societies, although their influence on longer term institutional change is not at all certain. We can say first that Dezalay and Garth present a picture of legal evolution that appears far too monolithic and centralised to reflect how change actually occurs. Because law is indisputably the 'skeleton of the modern state' (Lev, 2000), even in authoritarian or transitional states lawyers are experts on the state's anatomy, so to speak. Even where courts provide little access, cause lawyers can help support and consolidate incremental social change in the spaces that politics create for at least three distinct reasons.

First, grassroots advocates are simply more important than Dezalay and Garth seem to suggest. Rejecting the elite-centred theory of legal change, Santos and Rodriguez-Garavito (2005) argue that Dezalay and Garth overlook the importance of grassroots activism:

Missing from this top-down picture are the myriad local, non-English-speaking actors – from grassroots organizations to community leaders – who albeit oftentimes working in alliance with transnational NGOs and progressive elites, mobilize popular resistance to neoliberal legality while remaining as local as ever ... The analysis [also] misses differences among sectors of the elites that are as real as the links among them. (11)

Santos and Rodriguez-Garavito suggest not only that Dezalay and Garth's mapping of actors is incomplete, but that their conceptualisation of global influence conflates networks of influence with 'deterministic' control. Global funders and legitimators may facilitate or limit certain forms of resistance to authority, but they do not control the commitments or strategies of their beneficiaries or the spread of values and beliefs, which may have important long term consequences for social movements and contention for power.

Santos and Rodriguez-Garavito also argue that the independence of law can be supported in local, as opposed to national, fields of power and by transnational counter-hegemonic ideology. A full understanding of the role of the long history of investment in the legal evolution of societies in the Global South would also require a broader and deeper study of indigenous law and culture with special attention to the role of the lower levels of administration and local governance that may be sites of law's construction as important as the palace wars of the capital.

Examples of successful cause lawyering (and very likely cause judicial action) are much more likely to occur locally than in the national spotlight where they pose a greater threat to political stability. Openings for interpretation and choice among alternatives are a necessary feature of

any system of rules, especially at the front line of administration, and a new, more democratic or liberal understanding at this level may take hold where advocates bring persuasive evidence of changes in society to the attention of local decision makers.

Local courts and other systems of administrative accountability have important functions other than coercing compliance with rules of conduct, functions that have less obvious political significance and still may support change. These include the power to decide who will decide an issue, the power to bring opposing parties together, and the power to legitimate the right to seek redress and to have rights, regardless of outcome.

Second, local cause lawyering that may have limited effectiveness on its own may work together with external pressures on other levels of government to make international human rights regimes enforceable, as Risse, Ropp and Sikkink have suggested (1999). International accords on human trafficking, the environment, or women's rights may have a better chance at the national level where a domestic constituency or social movement also demands such rights and generates situations in which international commitments can be tested.

Third, the terrain of cause lawyering may be much larger than the courts. In the course of my research on cause lawyers in Southeast Asia, interviews repeatedly referred not to their role in recruiting the support of the courts but to networks that permeated the formal boundaries of the administrative state. Because courts were seldom involved in bringing about changes in government action, networks which incorporated members of the bureaucracy served this role. Some social cause advocates mobilised the authority of the state by invoking the power of higher level bureaucrats, or through relationships with lower level officials based on long-standing mutual support or the authority of their expertise. Others employ different strategies. Their roles as advisers, collaborators, and as advocates for new norms are used to persuade or even to 'discipline' lower level officials resistant to accommodating the needs of those over whom they had authority (Munger, Kottakis and Rivas, 2010). Often, the point of contention between NGO staff members and front line government officials, such as police, immigration inspectors, labour department investigators, or health officials, has been competing visions of the public interest, between bureaucratic traditions serving 'insiders' and a more expansive view of public responsibility and, in some cases, rights.<sup>2</sup>

The implications of such strategies for longer term construction of state power may be subtle but important. Although cooptation of key front line officials in a ministry may not survive the particular players in the network, over time strategic advocacy may lead to more stable social construction of authority based on investment by the mutually interacting players, often anticipated by longer standing but unenforced formal rules, and which either reduces conflict with or wins the support of influential

outsiders. This may be especially the case, but by no means a prerequisite for change, if the NGO's approach is reinforced internally, for example, by a few front line officials with a sympathetic understanding of the NGO's cause, or externally, for example, by the discourses and pressures from Global North agencies, governments, scholars, media, philanthropies, and other social advocacy groups. NGO activity which brings about short-term investments by officials at different levels of government may reduce agency costs over time as workloads and work routines are adjusted to the mutually agreed norms. Therefore, such investments may persist. Further, social cause advocacy can help importing governments with one of the most vexing problems of globalisation, by delegating management of conflicts between domestic political expectations and the rule of law expectations of Western governments and agencies to the NGO staff members.

Over time, ruling elites in the Global South, like their European counterparts, have encountered an expanding circle of internal and global constituencies which they must coerce or persuade of their legitimacy. Education and economic globalisation have greatly expanded the demands of internal constituencies for governance. The growing importance of commercial and capitalist classes creates a demand for more technically competent bureaucratic administration. In recent decades, allegations of corruption, growing regulatory complexity, and fiscal crisis, as well as pressure from competing transnational business interests, may have created greater demand for rationalisation and third party monitoring of the performance of government officials. These factors may explain a notable rise in the importance of administrative courts in new states throughout Asia (Ginsburg, 2009). Elites have played a part in each of these changes, but they have not acted alone.

Finally, legal change need not be a project that is limited to lawyers or courts at all. Indeed, cause lawyers depend on a willing client, and potential clients have alternatives beyond those offered by lawyers or the law (Munger, 2010; Engel and Munger, 2003). Gillespie's studies of uses of law by businesses in Vietnam reveal that a variety of legal discourses are deployed in encounters between bureaucrats, local officials and entrepreneurs without the mediation of courts and often without lawyers (2011). Merry's research on the influence of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) suggests that much of the work of integrating 'universal' and 'local' interpretations of the relationship between women's status and rights under the Convention is done locally by informal interpreters or the rights bearers themselves (2006).

The emergence of alternative visions of state power through these local adaptations may or may not be the first signs of broader change but

will, at the very least encourage others to seek a wider space for claims and action.

## The Uncertain Importance of Cause Lawyers: A Structural Understanding

What enables these local sources of legal change to contribute to more open and equal access to rights and to power, in spite of the diverse and unpredictable goals of cause lawyers and the uncertainties of their efforts?

All of this seems to suggest that we should not celebrate the cause lawyer's cause, but rather the very presence of cause lawyers whatever the cause, for the conditions that enable cause lawyers to pursue their causes, whatever the cause, are the change desired by advocates for the rule of law.

To have value as a symbolic resource in opposing arbitrary use of power, law must be supported by other power holders, that is, law must be legitimate. In some stable democracies, this condition is met by an independent (which is not to say apolitical) judiciary and strong legal profession (backed by strong clients). Support is more problematic where such institutional independence has never existed.

Many Global South societies confront this problem, and one proposed remedy is to create independent, often constitutionally independent, bodies to monitor the state. This solution is particularly favoured by international business interests as well as some pro-democracy advocates, and has led to the establishment of constitutional courts, administrative courts, and specialised independent bodies to oversee state regulation of elections, the media, protection of intellectual property, corruption and other key areas of administration. The new institutions, not coincidentally, often reflect global, that is to say 'Washington Consensus', priorities, including protection of investments and property but also strengthening human rights associated with democratic and limited government.

This 'judicialization' of government in new states has been the subject of trenchant criticism as well as favourable comment (Ginsburg, 2009). An important concern is that creation of independent agencies to offset authoritarian politics removes decision making from fledgling, if often imperfect, democratic decision making. Where there has been a tradition of elite rule, members of the elite are likely to staff the new institutions, further entrenching their political power.

But strengthening rights need not involve a grand political strategy of institutional reform. Incremental gains are made by persuading local decision makers with power to view alternatives in a different way, perhaps only a slightly different way. In such a case, the gain is not so evidently a gain in power but a gain in access to the decision maker. Change which

has occurred locally is not self-evidently political, but a change in the expectations of an official or a court willing to hear new perspectives and take a wider range of outcomes into account. If administrators (or judges) believe they must consider all members of a disfavoured minority inferior or beyond the protection of certain rights, little other than race matters. Such dual legality forecloses examination of vital governance issues through further logical and factual inquiry. When minority status is no longer a barrier to further inquiry, or when minority status itself is admitted to be a complex and puzzling fact, the nature of decision making changes and may be held to a different standard (for insightful case studies, see Stinchcombe, 2001 and Herzfeld, 1993).

It is no surprise that law, government and civil society are mutually interdependent. While law may be 'politics by other means', law is also a symbolic resource which, under the right circumstances, strengthens opposition to authority. Cause lawyers encourage the co-evolution of law and society by creating political space for a wider range of imagination and action. Equal access to decision makers is more important than cause, and in turn, strengthens the independence of the decision makers by reinforcing their legitimacy. The rule of law is strong in the United States precisely because the courts have made themselves invaluable as enforcers, power allocators, brokers, and legitimators for (and against) so many causes. Cause lawyers must be free to advocate for and against traditional and non-egalitarian elements of the existing social system, keeping alive alternatives and a debate about access to them.

Granting access to advocates for a wide range of causes and social visions under a broad principle of equality and individual choice also holds risks. An Islamic woman claiming equal rights under CEDAW may create a dilemma with important institutional implications. A liberal, egalitarian rule of law requires that the woman have equal access to the courts to make her case for a particular balance of rights and tradition. Granting her access also undermines the authority of a traditional community that may be valued by the woman herself. Yet, to deny her access out of respect for the authority of the Islamic community is to institutionalise a dual legality, compatible with ideals of the YLM. This dilemma is only one of many which will be encountered globally as the rule of law is fully adapted to societies which may want to protect some communities whose values conflict with the prescription for universality of rights.

Cause lawyers can play an important role in building institutions that protect rights and individual choice. I have argued that cause lawyers' access to decision makers, independent of the cause, encourages a multi-sided discourse about alternative goals and means within society. In the end, this hope may be fragile indeed, for actually strengthening equal and just rights also depends on co-evolution of society willing to demand

rights, independent institutions with legitimacy, and political support for law that courts and cause lawyers alone have little power to determine.

## Notes

- \* This essay grows from work on a larger project studying cause lawyers in Southeast Asia, but the specific question I address here is more general and predates my current research. I would like to thank Rick Abel, Steve Ellmann, David Engel, Bryant Garth, John Gillespie and Austin Sarat for helpful conversations and advice. I owe special thanks to Susan Silbey for an especially provocative conversation which has had more influence on my thinking about cause lawyers than either of us could have anticipated at the time. Research referred to in the text has been supported by the Law School Admissions Council and a New York Law School faculty research grant.
- 1 I note also the recent mass demonstration by Muslims in Cairo demanding a central role for Islam in the Egyptian state, presumably in anticipation of drafting a new constitution. (Shadid, 2011).
  - 2 Western constructions of 'crony capitalism' and 'corruption' sometimes turn on just such disagreements with bureaucrats in systems of authority adapted to long-standing limitations of the polity and few rewards for serving a mass public while resisting cooperation with powerful patrons or clients (Connors, 2003: 96).

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## Legislation

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