Introduction

Judges and Journalists and the Spaces In Between

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Much has been written about the need for an independent judiciary to act as a check against the arbitrary use of government power and as the great insurer of individual and human rights. Indeed, an independent judiciary is the linchpin of democracy; without it the power of the executive cannot be limited or made accountable. But judges need journalists to make their voices heard. Without the press, judgments would not be publicized, inaccuracies and misinformation might not be corrected, and the public would be unaware of the laws under which it is governed. More to the point, judges also need favorable press coverage. Without positive coverage, judges run the risk of having their judgments mocked and delegitimized and the trust on which their authority rests eroded. In the end, journalists have the last word deciding which judgments make news and which judgments remain in the shadows. While judges are often reluctant participants in the media game, the failure to play it well can be devastating.

There is also an impressive literature extolling the need for a vigorous press to act as a bulwark against corruption, secrecy, and the misuses of power. As the legendary journalist Walter Lippmann famously wrote about the power of the press, "it is like the beam of a searchlight that moves restlessly about, bringing one episode and the other out of darkness and into vision."[1] Without a free and vigilant press, citizens would be deprived of much of the information that they need to make decisions about their lives. Yet little has been written about the relationships between judges and journalists and the need for high courts in particular to undergo the same level of scrutiny and criticism that political leaders, corporations, and civic organizations endure. Without that scrutiny, arbitrariness, corruption, and errors would go unreported. Until recently, high courts have been shielded from media exposure by the high walls of tradition and authority. Yet over the period of the last 20 years, many of these walls have come crashing down. Journalists have gained increasing

access to high courts, and high courts have developed complex strategies for navigating through media waters and negotiating their relationship with journalists. Websites, Twitter feeds, cameras in courtrooms, Facebook posts, briefings and lockups, and the ready availability of judgments and video streaming are part of the public relations and outreach campaigns now waged by high courts around the world.

Yet the relationship between judges and journalists, so critical to the health of democracy, varies widely from country to country and from experience to experience. At its heart it is a contested ground, as judges wish to control the message as much as possible and journalists wish to impose their own meanings and narratives on court decisions.

This volume is the first attempt to present the media strategies and practices of High Court judges and the journalists that cover them in global and comparative perspective. While previous studies have focused on the evolution of judicial communication systems in individual countries, no previous publication has attempted to view and chronicle the wider global picture that is now emerging. The inspiration for this collection came from Richard Davis who led the way in organizing a workshop on this subject held in Banff, Canada, in May 2015. Richard later brought me on board as a co-organizer and co-editor. The idea was to bring together leading experts from close to a dozen countries to exchange and compare information on High Court–media relations. To fill in gaps, Richard and I as the editors of this volume also solicited contributions from scholars that had not attended the Banff Workshop. Given that very few national studies on the relationship of judges and journalists have been published, each of the chapters makes a distinctive contribution to the literature by either adding decisively to what has been previously published or has broken new ground where no previous cultivation had taken place. In short, this collection attempts to create an overall map of the global terrain as well as adding knowledge about the existing topography in individual countries. In doing so, we hope to illuminate common patterns and developments as well as the differences that are emerging.

While it is impossible to cover the full kaleidoscope of national experiences given the more than 200 countries that make up the family of nations, we believe that the countries whose High Court–media systems are examined in this volume exemplify and capture the main trends that are occurring globally. Our criteria for inclusion revolved around autonomy, historical background, and geography. The first cut omitted those nations where courts lack some degree of autonomy due to an authoritarian system that disallows an independent judiciary. Secondly, we sought to include an array of established and newly democratic systems. While the United States, Canada, and Norway are

examples of the former, Korea and Indonesia are examples of the latter. Some nations, such as Brazil and Argentina, have experienced military regimes in the past half-century that have challenged the role of the judiciary. Thirdly, we sought to offer geographic breadth by including representative nations in the Americas, Asia, Europe, and Africa.

Of course, as in any scholarly work, much depends on the legitimacy of the sample that is being investigated. With contributions on the United States, Canada, and Mexico, the book is perhaps strongest in covering developments in North America. However, if we define Mexico as being part of Latin America, then the combination of Mexico, Argentina, and Brazil reveals a great deal about the forces at play among judges and journalists in the Hispanic world. Our choices in Europe – Germany, Norway, and the United Kingdom – admittedly reflect developments in western and northern Europe. Clearly, Germany is pivotal in any discussion, because like the proverbial elephant in the room, its economic muscle ensures that its laws are felt everywhere in Europe. The German case is also compelling because, as Christina Holtz-Bacha points out, the Federal Constitutional Court is among the most active in the world having overturned hundreds of legislative initiatives. In addition, the degree to which the German judicial system is incorporating and coming to terms with the expanding influence of the European Court of Justice, mirrors experiences that are taking place across Europe.

It's difficult to imagine a collection on this topic that didn't include the British experience. While Germany may be the example par excellence of the effects that a written constitution, in this case the Basic Law, can have on the shaping of political culture, the United Kingdom, which does not have a formal written constitution, is at the other end of the spectrum. While British laws have been shaped by a common law tradition that has evolved over hundreds of years, Parliament famously has the last word. Another reason to include Britain is that the UK Supreme Court was only established in 2005, having taken over from and been a continuation of the Appellate Committee of the House of Lords. Until 2005 the Court was effectively part of the legislative branch.

Norway is an example of a court that practices a low-profile media strategy. While information officers keep in close contact with and brief the press, justices avoid coverage as much as possible. The court won't react to negative coverage, justices are discouraged from dealing with the press, and journalists feel intimidated by the rarified world that the judges occupy. Yet, despite what our authors, Gunnar Grendstad, William Shaffer, and Eric Waltenburg, have described as "managed openness," the Norwegian Supreme Court is among the most trusted in the world. Or to put it differently, what the Norwegian case

demonstrates is that high courts can maintain a high standing with the public even if they keep the media at a distance.

The book covers three very different countries in Asia: Indonesia, Israel, and South Korea. The Indonesian and South Korean judiciaries have both struggled to find independent voices after decades of military rule and authoritarian repression. Judiciaries in both countries have had to reestablish their reputations and the public trust that was all but broken when judges served as willing servants to generals and autocrats. The two countries can be seen as stand-ins for many other countries where the courts have had to navigate through treacherous political storms and have used the media in an attempt to reclaim their legitimacy. By contrast, Israel's High Court is among the most fearless in the world. The court routinely challenges and overturns government laws and has ensured that presidents, prime ministers, and powerful party leaders are not only not above the law but can end up in jail. The court often finds for Palestinian claimants against the Israeli government. Contributors Bryna Bogoch and Anat Peleg also point out that the Israeli press is notorious for being among the most aggressive in the world.

The book also includes chapters on Ghana and Australia. Ghana is a particularly interesting choice because it is often seen as the most advanced democracy in Africa, the great hope for an emerging continent. The Ghanaian court has played a decisive role in cementing the rule of law and in codifying and defending human rights, but as is the case in other developing countries, the court has had difficulty ensuring that its decisions are implemented by governments. In Australia, as in other jurisdictions, the High Court has had to grapple with the hold of tradition and the desire of judges to speak only through their judgments on one hand and the onslaught of new web-based media on the other. While the Federal High Court in Canberra maintains a relatively restrained relationship with journalists, preferring to speak through its judgments, supreme courts in states such as Queensland and South Australia use Twitter and other web-based media to communicate with their publics and allow tweeting and texting by journalists and the public in court rooms. But judges and members of juries cannot using mobile devices or post comments. As described vividly by Rachel Spencer, these new technologies represent a new frontier where the rules are not quite set.

THE CHANGING ENVIRONMENT OF JUDGES AND JOURNALISTS

In a recent book, the American Supreme court Justice Stephen Breyer has argued that judges need to be viewed as members of a global community.[2] In Breyer's words the days of being "home alone" are long past.[3] First, judges have

to contend with a host of international trade, foreign investment, extradition, intellectual property, and treaty laws that impinge on national sovereignty and are reflected in how laws need to be understood and administered. Second, judges also participate in what is in effect a new diplomatic system. They attend international conferences, speak at universities and to audiences across the globe, interact with and form relationships with judges in other countries, and exchange judgments on list servers. Within this new judicial community, there are star and celebrity judges whose influence and judgments resonate across borders. It's no surprise, then, that the instances in which High Court judges cite cases and decisions from other jurisdictions has increased dramatically. Judges now breathe much of the same intellectual oxygen regardless of where they are in the world. According to Breyer, what has emerged is an international judicial culture based on a sustained struggle against the arbitrary use of power.[4]

It's tempting to argue then that global influences have also shaped the relationship between judges and journalists. The increased openness of high courts, the use of communications professionals and offices to deal with journalists, and the adoption of new web-based technologies can be seen as part of a global trend that seems to be permeating everywhere. It's certainly true that despite operating in much different media climates, there are remarkable similarities in the methods and strategies used by high courts to communicate with journalists and the public.

If there is a major global trend, however, it is in the flowering of democracy that took place in so many countries in the 1980s and 1990s and the refusal of citizens to live with the closed authoritarian practices of the past. Dictatorial regimes in Asia, Latin America, and Eastern Europe crumbled one after another, leaving high courts at the vortex of change. The choices facing courts were stark. Either they adapted to and embraced the new spirit of change or they could languish as vestiges of a bitter past, despised and distrusted by their citizens.

As enticing as the globalization thesis might be, our contributors focus almost exclusively on the changes that have taken place in their own countries. If there is a common denominator, it's that courts have had to respond to crises of legitimacy where their power and credibility came under concerted attack and where trust has been eroded. Arguably the oppression brought by brutal authoritarian regimes in Germany, Brazil, Indonesia, South Korea, Argentina, and Ghana and the battles for democracy in those countries were the main reason why courts changed how they communicated with the public. In Germany the entire constitutional system was engineered to prevent the emergence of another totalitarian government including the powers given to

the Federal Constitutional Court and the placing of broadcasting under the jurisdiction of the Länder rather than the federal government. In the cases of Indonesia and Argentina, our authors describe a continuing war waged by governments against the high courts. In these instances, high courts attempted to reach over the heads of government by launching their own media campaigns to reach the public directly as well as mobilize allies. In Mexico, the integrity of the court system is under assault because of the government's battle with the drug cartels, a battle that has claimed more than 120 000 lives. In this maelstrom it's often difficult to know which side the police are on, and journalists who cover the courts face threats and intimidation, many justifiably fearing for their lives. Francisca Pou Giménez describes the tortured route that the Mexican High Court often takes in delivering its judgments, a route that sometimes makes reporting difficult.

A similar crisis of legitimacy occurred in Canada. After a series of destructive constitutional battles that took place in the late 1980s and early 1990s and a vote on Quebec's succession from Canada in 1995, which was won by only a hair's breath by the federalist side, the Supreme Court realized that it was in effect sitting on a powder keg. Always alert to how it has been viewed by the public, the Supreme Court of Canada has been at the forefront globally in reaching out to journalists and ensuring that its judgments as transparent and understandable to the public as possible. In the United Kingdom a new Supreme Court, created only in 2005, had to create a public face where none had existed before. While one can argue that the new Supreme Court benefited from the centuries of majesty and deference accorded to the Law Lords of the House of Lords, the court acted quickly to create its own media echo system, including the broadcasting of decisions by the judges themselves.

In Ghana as Wisdom Tettey points out the crisis of legitimacy came with a petition to overturn the results of the 2012 election. The Ghanian Supreme Court responded by allowing cameras and live broadcasts from the courtroom. Although precedent was established the court has been largely closed to off to the public since it rendered its decision.

Interestingly the US Supreme Court exists outside of this experience. While the judgments of the court are often strongly contested, the court remains trusted by the vast majority of Americans. This does not take away from the politics that has surrounded court rulings on issues such as civil rights, abortion, gun purchases, Obama's health care plans, or election financing, where criticism and resistance have been vehement. The court's authority and prestige might explain why it remains among the least open to journalists and the public among the high courts examined in this volume. It can simply move at its own pace because it does not face the crisis of legitimacy experienced by almost all of the other courts examined in this volume. Moreover,

an "Americanization thesis" holds little water. While some scholars see political systems across the world as being deeply influenced by US methods and political trends, when it comes to court–media relations, American influence seems to stop at the courthouse door. Significantly, not one of our authors refers to the example of the US Supreme Court in explaining the emergence of court–media relations in their own countries.

As much as there are commonalities between the countries that we are examining, there are also stark differences. Each of our chapters explores a different constitutional culture. The power of high courts varies from country to country, the role played by the press varies, and so does the degree of citizen trust in and awareness of institutions. Legal scholar David Schneiderman argues that "citizens as much as politicians and courts, generate the content of constitutional culture."[5] But other scholars argue that power relationships are created by constitutions and that, in the end, constitutions create the culture. One of the most fundamental aspects of constitutional culture is the degree to which decisions by high courts are accepted by other actors in the political system. Although it is worth noting that even in the United States, compliance with Supreme Court decisions on voting rights and desegregation were strongly resisted by southern states until the federal government sent troops to the South to enforce these decisions, in established democracies, compliance with top court decisions tends to be automatic. Legislatures of course can respond with legislation that overturns or amends what the high courts have ruled, creating what is in effect a chain reaction of responses. In many emerging democracies, however, the issue is the degree to which judgments are simply ignored by those in power. In Indonesia and Argentina, for instance, judges have had to wage intensive media campaigns to get governments to adhere to court decisions.

It's also the case that the top courts in the countries that we are examining don't have the same structures or responsibilities. While we are, to use a popular metaphor, comparing apples with apples, these apples come in a variety of shapes and sizes. South Korea has both a Supreme Court and a Constitutional Court. They are separate institutions, with different powers and different methods of appointment. In Israel, the Supreme Court acts as an appellate court for cases that come to it from lower courts but becomes the High Court of Justice when hearing cases directly from citizens and individuals who believe that their rights have been violated by public authorities. In Norway, the Supreme Court is a court of many faces with 20 justices divided into two rotating 5-justice panels for most cases, an 11-member Grand Chamber and en-banc for others, as well as an Appeals Selection Committee, with 3 justices, whose composition continually changes. In Argentina, the size of the Federal Supreme Court seems to inflate and deflate much like an accordion. In recent years it has gone from seven to nine to five judges.

Even the appointments process takes different forms in different countries. In the United States, the naming of Supreme Court justices and the gauntlet of hearings that they must go thorough to be confirmed, are ceremonies of power and legitimacy where the media can play a role in either anointing nominees or in taking them out of the game. Justices are appointed for life and can leave indelible marks on public policy for decades into the future. In Canada, where justices sit until age 75, there is no equivalent public spectacle. The selection of justices is at the discretion of the prime minister. Candidates are vetted by a non-partisan advisory board and the prime minister and cabinet ministers consult with members of the legal community and with other political leaders. Judges who have been nominated undergo a brief question and answer session in front of a parliamentary committee. In Indonesia, as Stefanus Hendrianto argues, term lengths are seen as a barrier to judicial independence. Justices serve for a five-year term – although they can be renewed for an additional five years. The appointment of six of the nine judges is controlled by the president and the People's Representative Council. This gives the president and the legislature the power to replace the justices that they don't like with relative frequency. Chief justices are elected by their fellow judges for brief two and a half year terms – hardly enough time to make their presence felt.

In Norway, appointments go virtually unnoticed. In fact, in one recent round, there were no applicants for positions on the court. The situation in Argentina, however, is anything but unnoticed. In Argentina, judges can be impeached by the lower house of the legislature in what is termed a "juicio politico" or "political trial." As Druscilla Scribner describes in her chapter, in 2014, President Christina Kirchner passed bills requiring members of the Judicial Council, the body that appoints and dismisses judges, to be members of political parties and stand for election to the council. The color of a judge's political stripes rather than the quality of her or his judicial experience and temperament became the main criteria for selection to the court. Presumably the new president, Maurico Macri, will follow through on his pledge to reestablish judicial independence.

JUDGES AND JOURNALISTS IN THE NEW MEDIA WORLD

So while the judicial landscape differs from country to country, so do judicial communications. When it comes to the nature and values of the media, however, the landscape is pretty much the same. This is because we now live in an era that I have previously described as one of "media shock."[6] Communication is now instant, global, interactive, and based on networks that link citizens in new communities of interest. The traditional media – newspapers, television networks, magazines, movie theaters, music labels – are under con-

certed attack almost everywhere from digital competitors. When it comes to top courts, the old lions of the traditional media, such as the *Frankfurter Allgemeine Zeitung* in Germany, the *Financial Times* in the United Kingdom, *Koran Tempo* and *Kompas* in Indonesia, the *New York Times*, *Estado de Sao Paulo* in Brazil, *El Universal* in Mexico, the *Globe and Mail* in Canada, the *Australian*, and *Pagina/12* in Argentina, continue to roar in terms of producing what scholars refer to as "accountability" news: news that shines a light on public life and institutions. But almost universally, these great institutions attract fewer readers and advertisers, generate less revenue, have fewer journalists, do shorter stories, and do less investigative work that they did in the past. While public service broadcasters, such as the BBC, the KBS in Korea, or the ARD and ZDF in Germany, still attract large audiences, it is more and more difficult for these broadcasters to maintain their standing in a world where piracy, cord-cutting, over-the-top viewing, and daily viral explosions on YouTube, WhatsApp, and Twitter, among a host of other platforms, eat into their viewing numbers. Simply put, journalism is in a state of crisis in almost all of the countries that are examined in this collection. Nonetheless, the amount of scrutiny that high courts are under in countries such as Argentina, Germany, Israel, and the United States is relatively constant and extremely intense. The spotlight never really fades. In other countries, such as Australia, Norway, Canada, the United Kingdom, and Ghana, the spotlight is mostly dim. Reporting is at best intermittent – blowing hot or cold (but mostly cold) depending on whether cases have sensational or controversial elements.

The fall of the traditional media is perhaps most apparent in South Korea. As authors Ahran Park and Kyu Ho Youn point out, South Korea has long been a global leader in the use of digital media. While the "Big Three" newspapers still retain a combined 50 percent share of newspaper readers, that readership has dropped to dangerously low levels. Most Koreans now receive their news on digital devices, and there is no shortage of digital news providers filling the void created by what appears to be a mass evacuation from the traditional media.

Amid the chaos and destruction that's taking place in the traditional news organizations, new types of media have emerged. Highly customized judicial blogs, such as *Borde Juridico* and *Derecho en Accion* in Mexico, *Scotus* in the United States, *Lawyer's Weekly* or *Blacklock's Reporter* in Canada, *All about the Court* and *Know the Law* in Argentina, the *Guardian Law* blog in the United Kingdom, and *Verfassungsblog* in Germany, follow judgments, generate discussion and debate, and are a meeting place for High Court watchers. Almost everywhere, narrow but highly attentive audiences are congregating around new web-based watering holes.

Although it's difficult to generalize, High Court judges in most countries seem to share many of the same fears in dealing with journalists. They worry that

their judgments, which are often the product of weeks and sometimes months of writing and rewriting and are based on a complex series of precedents and highly refined legal arguments, will be misunderstood and/or sensationalized by reporters who have little or no legal training. They look on aghast as journalists sometimes get the facts wrong, pick winners and losers without understanding the judgment, and criticize judges who are unable and/or unwilling to respond to attacks. Of particular concern is when the reasons for their judgments are not included in stories, thus leaving the impression that decisions are not based on legal reasoning but on political prejudices or personal biases. As stories get shorter and shorter due to cutbacks in major news organizations, and the fact that many young readers and viewers in particular devour media "snacks" rather than "meals," the reasons behind decisions fall increasingly by the wayside.

Judges also worry when what they consider to be landmark decisions from a legal perspective are ignored or downplayed, while reporters are consumed by cases that while ordinary or relatively trivial in terms of their wider legal significance become "hot" because they fit the requirements most desired by journalists: they can be easily explained, have dramatic or sensational elements, or feature "celebrity villains." In short, they are worried about losing control of the message and having those messages twisted out of context by journalists for their own purposes.

In a study that he conducted of media coverage of the UK Supreme Court, contributor Leslie Moran found truth in some but not all of these concerns. His snapshot study showed that a sizable majority of judgments were in fact reported in the newspapers that were sampled. But news stories tended to focus on constitutional issues and cases involving human rights and public law, while decisions that dealt with other aspects of the law received less attention. He also found that news stories declared "winners" and "losers" and focused on the human elements in a case. The reasons behind judgments and their legal importance were rarely discussed.

The Canadian Supreme Court has often been seen as the "gold standard" in court–media relations. Yet, as Susan Harada describes in her chapter, the court maintains what can best be described as a guarded openness. Oral arguments are broadcast on a national cable network, memorandums of argument on applications of leave for appeal that have been granted are available online, as, of course, are judgments, the court releases only a very few judgments at one time and releases them at a set time and day of the week, journalists are briefed by the Executive Legal Officer before each session and before judgments are handed down, journalists can ask for a lockup that allows them to read judgments and have them explained before they are released, and once a year judges meet journalists for a working meeting and dinner. Judges