Procedure Here, There, and Everywhere

Author : Pamela Bookman

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Alyssa King, *Global Civil Procedure*, __ Harv. Int'l. L. J. __ (forthcoming 2021), available at SSRN.

Remember when civil procedure was making headlines? Dozens of courts relied on familiar procedures to dismiss meritless lawsuits lacking proof or factual support. The Supreme Court dashed President Trump's hopes of a judicial reversal of fortune by relying on standing to reject Texas's attempt to have the Court exercise original jurisdiction over its suit against Pennsylvania and other states. While Trump and his affiliates complained that cases were being dismissed based on "technicalities," those dismayed by Trump's attempt to subvert the election rejoiced that civil procedure did its basic job of protecting justice.

These recent events—and more recent ones—provide a striking backdrop for Alyssa King's *Global Civil Procedure*. Surveying procedural developments in litigation and arbitration around the world, King reveals an overlapping consensus in how institutions handle civil dispute resolution. She demonstrates a growing consensus on what procedure governs civil dispute resolution around the world but cautions that this seeming harmony conceals fundamental disagreements over what procedure is for, and thus differences in what procedure can and should do in different political contexts.

King defines global civil procedure to "include[] the procedural rules, practices, and social understandings that govern international litigation and arbitration." Reading this definition, you might think that global civil procedure would be an eclectic combination of different procedures. But varied tribunals have adopted "global civil procedure norms," norms "adopted across courts or arbitration providers with the purpose of making that jurisdiction or provider more competitive in attracting transnational litigation or arbitration."

By identifying the international dispute resolution community's convergence on certain global civil procedure norms, the article makes (at least) three important contributions that are worthy of the attention of those interested in domestic or international litigation or arbitration (or both!). These insights are also revealing for students of democracy, judicial independence, and the interaction between courts and politics.

First, King provides a useful frame for understanding the current state of transnational dispute resolution and the receding importance of U.S. courts. She notes the convergence of certain procedural norms across both arbitration and litigation. She focuses on three cases studies, demonstrating similarities in norms about the importance of decisionmaker independence, discovery, and the ability to aggregate claims across transnational litigation and arbitration. Notably, this convergence happens across modes of adjudication and geographic boundaries. King identifies an emerging "common language" about procedural values such as efficiency and impartiality.

Second, King questions the theory that competition among dispute-resolution forums will lead to a race to the top and an agreement on best practices. According to that theory, parties with choices about where to duke out their disputes will choose the forums with the most efficient rules—especially if the parties must agree on that forum in advance through a contractual forum-selection clause. King doubts that rosy account, while recognizing that courts and arbitral tribunals often adapt their procedures with

that competition in mind.

The market hypothesis, King argues, relies on three assumptions: (a) parties actively choose a particular forum for its procedures, (b) that choice represents revealed preference, and (c) that preference chooses efficiency. But none of these assumptions holds true across the board. For example, because certain actors, (e.g., lawyers who practice transnationally) are often the vehicles for spreading procedural norms across different legal systems, these actors may choose some procedures for their familiarity, as much as, if not more than, for other qualities. For example, when English lawyers advise the Kazakh government about how to set up a new international commercial court in the Astana International Financial Centre, they may draw upon "international best practices," but they identify English common law practices as the best. The argument is circular, of course, since Kazakh officials hired these lawyers for their English common law expertise. But King is right to point out the blurriness between "best" practices and practices that may be "most familiar" to a certain elite set of lawyers. This is not to malign those elites' preferences, but to demonstrate that they are neither universal nor unbiased.

Global civil procedure thus provides a useful perspective for viewing other kinds of procedural reform. Drawing inspiration from Brooke Coleman's work on the *Efficiency Norm* and *One Percent Procedure*, King pays attention to who pushes for reforms and who stands to benefit. She identifies a wide range of actors—including international lawyers, clients, litigation funders, adjudicators, and institutions—as the drivers of global civil procedure and explains the convergence of these norms through the lens of their interests. With these insights, King adds to the growing literature on procedural convergence and harmonization around the world, casting doubt on and adding perspective to the law-market narrative used to explain procedural reform.

Third, and perhaps most interestingly, at least to a wider audience, King appreciates the limits of convergence. Procedural "[r]ules that seem to do similar things, [and] for which similar rationales are given," may "still ultimately reflect divergent and likely incompatible understandings of what adjudication is for." Political context matters, as seemingly similar procedural rules can sustain and support different kinds of states.

A prime example is judicial independence—a key feature of the legitimacy, authority, and fairness of the U.S. legal system and a topic of recent debate. U.S. courts adopt strong norms and rules to avoid conflicts of interest, so the judge does not have an inappropriate relationship with or bias towards one of the parties. Separation of powers, life tenure, and other constitutional structures are supposed to ensure the independence of federal judges.

It may surprise lawyers raised on this account of judicial independence to learn that this account plays an important role in the socialist legal tradition. When considering judicial independence, King therefore urges us to ask "independence from whom and to do what." In Communist East Germany, for example, independence sometimes meant "responsiveness to the 'right' external interventions," namely, supporting prevailing party policy; after all, socialism began with the idea that "law had to serve the interests of the proletariat," which were represented by the Party. Because politics changed quickly in East Germany, "for many judges, 'the safest way to go forward was to make no decision at all.'" (Note the similarities between using the "passive virtues" of judicial restraint in the U.S. system to avoid disrupting an election and using judicial restraint in the socialist system to avoid interfering with political party control.) Similarly, recent Chinese legal reforms promoting judicial independence tend to create institutional independence from local government and local Communist Party entities, but in a way that helps the centralized Communist Party retain its control.

We might think of global civil procedure as akin to standardization of the metric system or the

international postal system. It makes life easier for professionals working across borders and captures professional views of what “good” dispute resolution procedure looks like. This coordination has considerable benefits.

But convergence also has its limits. In stark contrast with American idealization of procedure as a protector of justice, King emphasizes that “global civil procedure is … not a vehicle for deeper harmonization on issues such as democracy, or even liberalism.”

When I originally drafted this jot, King’s insight made me worry about whether we are too quick to celebrate procedure as protecting American democracy against President Trump’s baseless allegations of election fraud. From one perspective the procedural protections of Rule 12(b)(6) and standing doctrine stopped legal assaults on the election. From another perspective, however, these doctrines simply allowed courts to avoid deciding.

Of course, recent events demonstrate that victory in the courts is not always the end of the story. King teaches that the commitments of judges who implement procedure and their ability to withstand political pressure can direct procedure’s power. But that takes us only so far. It is a lesson worth considering on the domestic and global levels—and in a broader political context.

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