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Judicial Reform in New Democracies

The twin processes of democratization and economic liberalization have raised the global profile of courts. Judicial strength and the rule of law are increasingly understood as vital to political and economic development. In the political arena, effective courts provide crucial mechanisms of accountability, maintaining checks and balances and guarding against corruption (Schedler et al. 1999; Gloppen et al. 2004; Power and Taylor 2011). Echoing Marshall's (1965) trichotomy of rights, the United Nations Development Program (UNDP 2004) identified political, social, and civil dimensions of democratic citizenship, noting that courts and other components of the "legal complex" (Halliday et al. 2007), when working well, enhance the civil dimension of democratic citizenship – that valence of citizenship based on the day-to-day effectiveness of a bundle of legal rights and liberties that constitutes real agency and participation in modern democracies (Marshall 1965; Sen 2000; O'Donnell 1993; 2004). In the economic arena, effective courts enable the efficient enforcement of contract and property rights, leading to transparency and predictability in business and commercial transactions, promising greater investment, growth, and prosperity (Kaufman et al. 1999; Cross 2002; Hirschl 2004: 46–47). The sound development of both democracy and markets, in short, hinges in part on the strength of courts.[1] However, despite the evidence of political and economic benefits from strong judicial institutions, courts are not always empowered. Thus, in the burgeoning literature on the "global expansion of judicial power," "judicialization" (Tate and Vallinder 1995), and "juristocracy" (Hirschl 2004), a central question focuses on explaining variation in

[1] Like the constitutive relationship between politics and economics captured by "political economy," the constitutive relationship between legal institutions, politics, and economics generates the terms that define the field, e.g., "political jurisprudence" (Shapiro 1964), "constitutional political economy" (Buchanan 1990), or the more common "public law" and "judicial politics." We might even speak of "judicial economy" or "judicial political economy."

judicial reform and empowerment (or counterreform and disempowerment) (Shapiro 1980; Stone Sweet 2000; Shapiro and Stone Sweet 2002; Ginsburg 2003), and Latin America has figured prominently in these studies of *crafting courts*.[2]

Yet, even in the context of expanding scholarship on judiciaries, local courts remain neglected subjects of inquiry. Existing research focuses on national high courts – apex or peak courts such as constitutional tribunals, supreme courts, and other judicial fora of last resort – overlooking subnational judiciaries with only a few notable exceptions (e.g., Chavez 2004; Beer 2006; Ingram 2012a, 2013a, 2013b). The neglect of subnational courts is remarkable for several reasons. First, the vast majority of litigation originates locally. For example, more than 80 percent of judicial activity in Mexico takes place in state courts (e.g., INEGI 2005; Poiré 2012), and similar figures hold for Brazil (CNJ 2004) and other federal systems, including the United States. Second, local institutions are the locus of ordinary, routine, day-to-day forms of justice that most directly affect citizens' daily lives. Third, to a much greater extent than the federal or national judiciary, or even local executive or legislative offices, local courts have an extensive geographic presence well beyond capitals or large cities, and local judges have direct, regular, and sustained contact with individuals. Thus, due to volume, case types, and geographic extension, local courts arguably have the greatest potential to shape citizen views and direct experience of democracy. Given the preoccupying trend of persistently low or decreasing public confidence in justice institutions throughout the region (Seligson and Smith 2010), and the association between low public confidence in these institutions and support for nondemocratic forms of government (e.g., Donoso 2008), there is a strong case to be made for understanding how to empower institutions such as local courts that are uniquely situated to influence state-society relations. By neglecting subnational courts in federal and other decentralized countries, scholars fail to understand both the form and function of local judiciaries, and overlook most of the volume and key outcomes of courts, including accessibility, efficiency, independence, and the quality of decisions. Further, as we seek to understand local institutional change, we remain unaware whether theories derived from studying apex courts – national supreme courts and constitutional tribunals – translate well to subnational courts.

[2] A sample of book-length works and edited volumes includes: Méndez, O'Donnell, and Pinheiro (1999); Prillaman (2000); Domingo and Sieder (2001); Chavez (2004); Sieder, Schjolden, and Angell (2005); Helmke (2005); Brinks (2007); Hilbink (2007a); Finkel (2008); Taylor (2008); Couso, Huneeus, and Sieder (2010); Staton (2010); Helmke and Rios-Figueroa (2011); and Kapiszewski (2012).

This book documents and explains variation in subnational judicial capacity across the twenty-seven Brazilian and thirty-two Mexican states from 1985 to 2010. The core outcome of interest is institutional change – positive reform (empowerment) or regressive counterreform (disempowerment). The multimethod research design combines quantitative and qualitative techniques, sequencing regression analyses and 6 state-level case studies, and drawing on 117 personal interviews with judges and other legal elites, as well as archival analysis and direct observation conducted over 22 months of fieldwork funded by the National Science Foundation, Social Science Research Council, and Fulbright Program. The project first describes key judicial outcomes and then explains temporal and spatial variation in these outcomes across states within the same country and then across the two countries. Alternate measures capture institutional change at different stages of analysis. In the quantitative analysis, the dependent variable is judicial budgets per capita; in a region historically marked by chronic political dependence and institutional dysfunction linked to weak court budgets, this variable is a fundamental measure of reform and has the methodological strength of being comparable over time and across states in both countries (see Part II; Ingram 2013a). In the qualitative analysis, the dependent variable includes judicial budgets but extends to other measures, including institutional design, judicial selection, career structure, and overall administrative capacity (see Chapters 6–7; Ingram 2012a; 2013b). This triangulation among complementary streams of evidence and methods enhances the validity of conclusions, and the subnational analysis in more than one country enhances generalizability. The findings contribute to literatures on subnational politics, rule of law, and the challenge of building institutional capacity in new democracies.

ARGUMENT

The argument highlights the causal role of ideas in explaining subnational judicial reform. Ideas – understood as nonmaterial, principled, programmatic commitments about the proper role of courts in democratic societies – illuminate both the *timing and content* of reform, as well as the puzzle of why political and legal elites would engage in *costly behavior* in pursuit of reform. Each of these phenomena – timing, content, and costly behavior – is puzzling for rational-strategic accounts of judicial reform and political action more broadly, which assume that material incentives motivate behavior.

Crafting Courts, in contrast, emphasizes that ideas are consequential, calling for revitalized attention to the causal role of ideas. A growing literature documents divisions in legal cultures within countries, divisions that roughly

coincide with political-ideological orientations (Woods 2008; Woods and Hilbink 2009; Couso 2010; Rodriguez-Garavito 2011; Hilbink 2012). I argue that the programmatic commitments of these legal-cultural profiles motivate actors to prefer certain institutional designs over others, and therefore to shape reform outcomes, resolving otherwise puzzling phenomena. On timing, the programmatic commitments of relevant actors help explain why some actors may promote reform despite the absence of material incentives while others do not promote reform despite the presence of these incentives. On content, highlighting ideas elucidates why the substance of reform projects varies so widely across space and time despite similar material conditions. Centrally, while a dominant current in the literature anticipates that actors follow material incentives like those derived from electoral competition, ideas illuminate why actors promote reform despite material costs, obstacles, and constraints, even expending great effort over long periods of time to overcome barriers, and even pursuing reform efforts despite substantial personal risks, including risks to life and safety. That is, legal-cultural ideas help us understand what motivates forms of "high-risk activism" (McAdam 1986), "courageous challenges," "reckless exemplary acts," "ethical witnessing" (Eley 2002; quoted in Grandin 2004: 16), and other forms of risky or costly behavior.[3] Further, while I discuss politicians and other actors external to judicial institutions, the main analytic focus of the research is on judges and other legal professionals internal to courts, and on the ideas held by these institutional insiders. Judges and ideas play key analytic roles throughout, complementing recent work on judicial leadership in the United States (Crowe 2007; 2012) and abroad (Hilbink 2007b; 2012). In some cases, judges' advocacy reinforces leadership provided by elected officials; in other cases, judges' lobbying changes the preferences and goals of elected officials, producing reforms in states where other factors such as competition and the a priori ideology of elected officials would not have been favorable to reform.[4] Thus, I argue that judicial reform is not a mechanical, almost unintentional side-effect of increasing electoral competition. Rather, reform is the product of purposeful action – in large part by judges seeking to shape their home institution – and that the motivations underlying

[3] See also Sabet (2012: 5), discussing police reform in Mexico and the role of "highly committed individuals [who] risk their lives and some [who] lose them for the security for their city and the integrity of their beliefs."

[4] See Béland (2007: 23–24), noting how ideas help understand not only the direction or content of policies but also how actors come to perceive their own interests. That is, we cannot understand the perceived material value actors attach to different behaviors or policies unless we understand the relevant ideas.

that purposefulness consist of principled, programmatic commitments. Ideas matter, and judges are key agents motivated by these ideas, even transferring them to politicians.

Offering the first book-length explanation of subnational court empowerment in more than one country, the research design draws on a mixed-methods approach, sequencing large-N and small-N analyses at the subnational level in each country. The theoretical emphasis on nonmaterial, ideational factors complements and challenges contributions of rational-strategic accounts, and also builds on and contributes to recent developments in cultural-ideational accounts of legal and institutional change.

BROADER OVERVIEW

The subnational variation in judicial strength within Brazil and Mexico poses two kinds of challenges for scholars of public law, the quality of democracy, and development. These two challenges come in the form of (1) empirical problems and (2) theoretical puzzles.

Empirical Problems

Variation in subnational court strength presents an important empirical problem. Figures 1.1 and 1.2 illustrate this intranational variation in court strength, using court budgets as a proxy for the broader concept of judicial strength discussed earlier (additional dimensions of court strength are discussed later in this chapter and in Part II). These figures map data on judicial spending per capita across the Mexican and Brazilian states, respectively. Figure 1.1 shows the average amount of judicial spending per capita in Mexico in constant, 2000 pesos, from 1993 to 2009. Figure 1.2 shows the average amount of judicial spending per capita in Brazil in constant, 2000 reais, from 1985 to 2006. In both figures, light shading indicates low court budgets and dark shading indicates high court budgets.[5]

The financial strength of courts varies substantially across territorial units within both Mexico and Brazil, granting vastly different financial resources to local judiciaries within these single countries. As one Brazilian judge noted, echoing repeated comments from judges in both countries, "the budget is the lifeblood of the judiciary" (Interview 136). Without resources, no reform

[5] Both maps generated with ArcGIS 9.3, using spending data from large-N analyses in Chapters 4 and 5.

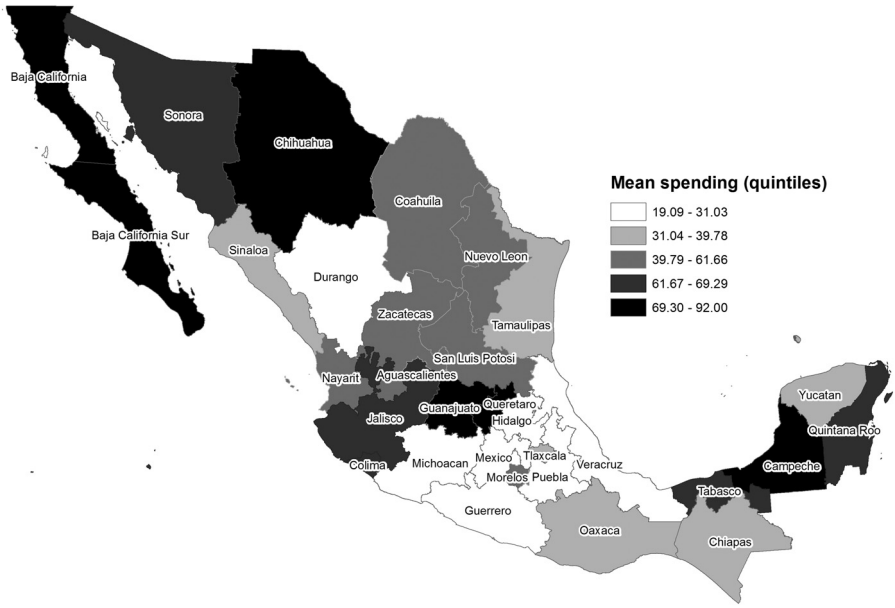

FIGURE 1.1. Average judicial spending per capita in Mexican states, 1993–2009 (constant 2000 pesos).

or improvements can be made, including staffing, materials, and physical investments.[6] Thus, the variation in Figures 1.1 and 1.2 signals vastly different institutional capacities for the judiciary across territorial units within each country.

Variation in the strength of state courts extends beyond the size of judicial budgets. The following vignettes outline the general contours of institutional changes in Mexico and Brazil, along with some of the central political dynamics associated with these reforms.

On May 23, 2006, a constitutional reform in the Mexican state of Michoacán altered the financial autonomy, institutional design, and the career structure of judges in the local judiciary, yielding one of the strongest administrative designs across the thirty-two Mexican states. The reform process was highly contested, capping more than three years of local political struggles in which left-of-center politicians belonging to the Party of the Democratic Revolution (PRD, by its Spanish initials) promoted the reform initiative of which

[6] In Chapters 4 and 5, I conduct econometric analyses of judicial spending across all states in each country to identify the determinants of this variation. Chapters 6 and 7 examine additional dimensions of court strength.

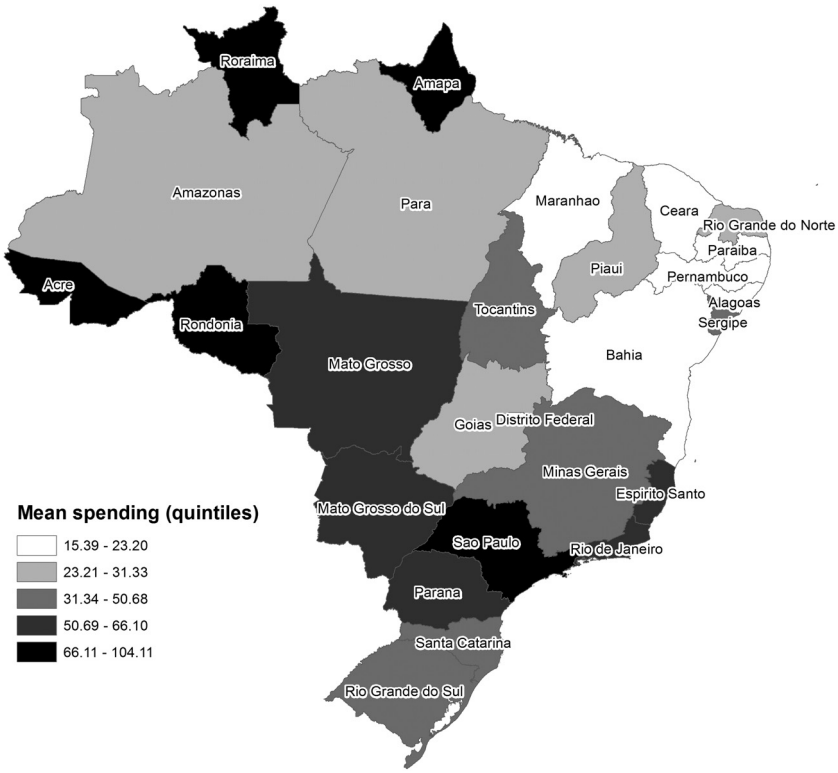

FIGURE 1.2. Average judicial spending per capita in Brazilian states, 1985–2006 (constant 2000 reais).

ideologically sympathetic, progressive judges were chief architects. The reform project was opposed by politicians and judges affiliated with the previously hegemonic Institutional Revolutionary Party (PRI). In the central state of Aguascalientes more than a decade earlier, in 1994, a neoliberal[7] PRI governor, closer ideologically to the right-wing National Action Party (PAN), also pursued a judicial reform. Even though this earlier reform was milder than the one in Michoacán, it nonetheless encountered strong opposition, especially from traditional, local judicial elites, some of whom resigned rather

[7] I use "neoliberal" to refer to a set of policies oriented toward freeing markets, or "liberalizing" the economy. Although the term is itself contested, it nonetheless is useful shorthand in Latin America (and beyond) to identify a bundle of policies that, since the 1970s, has emphasized, among other issues, fiscal discipline, deregulation, and privatization, and has generally been supported by the political right and opposed by the political left. Alternate terms include "neoclassical" economics, "structural adjustment," or "market reforms" (see, e.g., Williamson 2000; Naím 2000; Weyland 2004; Roberts 2008).

than submit to the institutional alterations. Once the neoliberal PRI governor left office, the gains from his project were reversed by the combination of traditional judges and a more traditional, clientelist PAN administration. And in the state of Hidalgo, which continues to be a bastion of the once dominant (and recently resurgent) PRI, reform arrived late in 2006 and in weak, superficial form, essentially leaving existing political and judicial elites undisturbed.

In Brazil, in the southern state of Rio Grande do Sul, a center-left governor belonging to the Democratic Labor Party (PDT) was the first to delegate financial and administrative autonomy to the local judiciary in 1991–1992. In doing so, the governor was limiting his own power, effectively constraining himself. Crucially, he was responding to reformist initiatives from the judicial leadership and to the recent pressure of striking judges. A close friendship between the governor and the president of the state court facilitated communication about reform. Several years later, in 1999–2000, a leftist governor belonging to the Workers' Party (PT) sought to reduce the court's budget, generating constitutional litigation in which the judiciary sued the governor. Meanwhile, in the state of Acre, a governor from the same leftist party (PT) combined with progressive, ideologically sympathetic judicial leaders to strengthen the financial resources and staffing of the court. In contrast, in the northern state of Maranhão, where traditional, conservative elites sympathetic to the military dictatorship of 1964–1985 still dominated local politics, courts were by all accounts extremely weak institutions, financially and administratively. The judiciary remained a source of patronage for local elites, and there was increasing tension between progressive, reformist lower-level judges and conservative, anti-reform judicial elders.

Overall, court strength varies substantially over time and across space within both Mexico and Brazil. Judicial budgets vary widely. Further, institutional design and career structure in Mexico vary from state to state. In some of the strongest cases of reform, the selection of judges follows a fairly transparent civil service process, and selection to the state's highest court is no longer dominated by the executive branch, having been delegated to administrative organs that are often composed of judges, legislators, and other politicians. The administrative organs generate a list of candidates, which is then turned to the legislature for a vote. Indeed, these administrative organs – judicial councils – can offer meaningful benefits depending on their structure, composition, and powers. Michoacán offers a strong council on all three counts, and is an example of positive court strengthening in Mexico. Conversely, in other states the judiciary remains fairly impoverished and council reforms are superficial, perpetuating institutional weaknesses. Selection to the state's supreme court

is still dominated by the governor, raising questions about independence, competence, and corruption. Hidalgo is an example if this kind of state.[8]

In Brazil, institutional designs and career structure are fairly centralized nationally, yielding minimal variation along these two dimensions compared with Mexico. Variation in Brazil emerges in terms of administrative capacity – adequate staffing, materials, and physical infrastructure. Indeed, variation in these areas led one prominent observer of Brazilian courts to comment, contrary to the conventional perception that courts are uniform across states, that the administrative unevenness across Brazil's state courts yields "multiple judiciaries" (Falcão 2006). In some states, courts are well staffed and well equipped, and therefore function reasonably well. This is the case in Rio Grande do Sul. It is also increasingly the case in Acre, where judges who complained of once having to cover two or three different geographic jurisdictions for lack of judges, or bring their own paper on which to write decisions, are now relatively satisfied with staffing levels and working conditions. Other states offer striking examples of poor staffing and infrastructure, as well as misuse or abuse of materials, resources, and power. Maranhão is an example of this kind of state, where judges on the state supreme court have historically appropriated most of the institution's resources for themselves, paying little attention to first-instance courts or the daily operation and administration of justice.[9]

Summing up thus far, judicial strength varies dramatically across states within Mexico and Brazil. This "problem of unevenness" is particularly pressing because of scholarly neglect of local courts. The understudied aspect of subnational courts is remarkable in light of the fact that, as noted earlier, in large federal systems like Brazil and Mexico, the vast majority of litigation occurs at the subnational level. In addition to carrying a large volume of judicial work, local courts tend to process the kinds of legal claims that touch individuals' daily lives, including criminal proceedings but also extending to most routine civil claims involving family law, property, contracts, torts, and small claims. Apex courts may attract singular, high-profile, and difficult cases,

[8] Both Michoacán and Hidalgo, along with Aguascalientes, are examined in Chapter 6.

[9] In Maranhão, for example, first-instance judges have had to invest their own money to pay for plumbing and basic building maintenance (AMMA Noticias 2008d), or courthouse evidence rooms have been burglarized for lack of security (AMMA Noticias 2008a; 2008b; 2008c). Meanwhile, state supreme court judges (*desembargadores*) have historically hired hundreds of discretionary employees; hired "ghost employees" (*servidores fantasma*) – individuals who receive a paycheck but do not actually work at the court); frequently violated nepotism norms and laws; arbitrarily increased their own salaries and benefits; and, despite the concerns just mentioned regarding the security of courthouses, used more than 100 officers of the military police to guard their own private homes. Chapter 7 examines judicial change in the three Brazilian states mentioned here.

but local courts adjudicate these types of daily justice. Local courts, then, for reasons of both volume and the everyday nature of their work, call out for attention.

Beyond the underexamined character and daily relevance of subnational courts, the persistent and ongoing unevenness of local judiciaries within single countries represents a substantive problem with the quality of democracy in both countries, namely that there are better institutions in some territorial units than in others. To be clear, to draw attention to problems of unevenness in the judiciary is not a call for uniformity. There will always be some variation, and courts need not be identical across subnational units, whether in centralized or decentralized contexts. However, dramatic unevenness demands an explanation because of the multiple ways highly irregular state capacity affects the everyday lives of ordinary citizens. Ultimately, large differences in court strength across territorial units within a single country mean citizens' experience of justice depends largely on their domicile, a phenomenon others have called "justice by geography" (Feld 1991). Further, the variation in court strength across the Mexican and Brazilian states is part of the broader problem of uneven democratic institutions more generally (O'Donnell 1993; Cornelius 1999; Snyder 2001a; 2001b; Gibson 2005; Gervasoni 2010). Regional institutional weakness within individual countries resonates with O'Donnell's criticism of the coexistence of regions with strong public institutions alongside "brown areas" in new democracies – territorial spaces where functional public institutions fail to develop. These institutional lacunae undermine the ability of citizens to seek redress and vindicate individual rights and liberties, eroding the real effectiveness of these rights and liberties. Under these conditions, the core of the legal or civil dimension of citizenship is diminished, eroding the capabilities for individual development (Sen 2000), and truncating or inhibiting full democratic citizenship (Marshall 1965; O'Donnell 1993; Collier and Levitsky 1997; UNDP 2004). Weak judiciaries also translate into poor restraints on other branches of government, undermining accountability (Schedler et al. 1999; Maravall and Przeworski 2003; Gloppen et al. 2004) and increasing the risk of arbitrary, abusive, or unchecked power. The problem of uneven courts, then, is also of concern to scholars of subnational pockets or enclaves of authoritarianism (Gibson 2005; 2013) and "subnational undemocratic regimes" (Giraudy 2015).

Variation in court strength within a single country is a meaningful empirical problem, posing the kind of "big, substantive question" or "real-world puzzle" that Pierson and Skocpol (2002: 695–696) emphasize as being "inherently of interest to broad publics as well as to fellow scholars," and therefore as important for political research as are more formal theoretical puzzles (see