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Edited by Javier A. Couso, Alexandra Huneus and Rachel Sieder

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## PART I

### INTRODUCTION

1

Cultures of Legality: Judicialization and Political  
 Activism in Contemporary Latin America

Alexandra Huneeus, Javier Couso, and Rachel Sieder

INTRODUCTION

Legal practices and ideas about law are undergoing dramatic change in Latin America. Today, a turn-of-the-century crop of constitutions grants high courts greater powers; provides long lists of social, economic, and cultural rights; and assigns international treaties constitutional status – or better – within the hierarchy of laws. Judges, in turn, have embraced a new role. In the past, courts were not expected to defend – let alone expand – citizen rights, but to quietly preserve the status quo through formalist interpretation. As one scholar put it only two decades ago, “persistent cultural attitudes” have meant that Latin American judges lack “the values necessary for actively guarding the constitution against popularly elected leaders” (Rosenn 1987). But in recent years several high courts have begun to cast themselves as defenders of rights and to intervene in significant political controversies. And, correspondingly, political claims more often take legal forms. Activists throughout the region increasingly use courts as a stage for their struggles and as a portal through which to import favorable international norms. The growing importance of law, legal discourse and legal institutions in the political arena has led scholars to report that a “judicialization of politics” is underway in the region (Domingo 2004; Sieder, Schjolden, and Angell 2005).

Our volume explores this landscape of changing legal cultures. Starting with the assumption that formalism is no longer a useful concept for describing Latin American legal cultures – and was in any case always an oversimplification<sup>1</sup> – we

<sup>1</sup> For a nuanced discussion of the history of formalism in the region, see Lopez Medina, D. E. (2004). *Teoría Impura del Derecho: La transformación de la cultura jurídica latinoamericana*. Bogota: Legis.

We were fortunate to receive thoughtful and challenging comments on this essay from Daniel Brinks, Alan Angell, Pablo Rueda, and Diana Kapiszewski; we gratefully acknowledge their collegial contributions. Of course responsibility for what follows lies solely with us.

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explore the repertoires of legal ideas and practices that accompany, cause, and are a consequence of the judicialization of politics. This volume is the product of an international research effort sponsored by the Law and Society Association, a Ford-LASA Special Projects Grant, and the University of Wisconsin Law School. Over three years and through several meetings, the project gathered leading and emerging scholars of Latin American courts from across disciplines and across continents to debate, reflect on and write about the region's legal cultures and politics.

A focus on the concept of legal cultures offers three distinct contributions to current debates on politics, law, and society. First, it pushes scholars of courts to take seriously the role that ideas, language, and informal practices play in judicial politics. Over the last decade, a new field exploring judicial politics in Latin America has emerged.<sup>2</sup> These analyses, rooted in the methods and models of political science, have sought to answer the questions of where, when, and why law, legal institutions, and legal actors come to influence politics in the region. This nascent body of literature is our starting point, for we share its assertion that law occupies a central role in contemporary Latin American politics. However, these scholars have rarely explored the broader cultural domain. Even those studies that have adopted more historically informed approaches have rarely made explicit the question of the relation between legal cultures and judicialization (Smulovitz 2006; Wilson 2006, 2005; Chavez 2004). Yet law exists in the discursive realm and – perhaps more than other political practices – relies on symbolic practices for its legitimacy. It is therefore revealing to bring out social constructivist understandings of law that pay due attention to the ideas and informal practices of different actors within and without the judiciary. Just as Latin America's "neoliberal turn" during the 1980s cannot be accounted for without considering the role played by ideas about the proper role of markets and the state (Valdez and Goodwin 1995; Schild 2000; Dezalay and Garth 2002), so ideas about things legal held by judges, jurists, attorneys, and different sectors of the public are key to understanding judicialization in Latin America. With this volume, we aim to complement the scholarship rooted in North American political science with the social and cultural focus more characteristic of sociological and anthropological scholarship.

Second, our inquiry pushes the debate on judicialization in Latin America beyond the courts and, more profoundly, beyond the state. We wish to stress that it is not only within the formal state justice system that legal norms and understandings are generated and deployed; these are produced within a huge range of informal, subnational, and transnational spheres, and they shape social interactions that occur

<sup>2</sup> For a comprehensive review of this literature, see Kapiszewski and Taylor (2008).

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far afield of the formal legal system. Drawing on the insights of the Law and Society movement, several of the chapters in this volume look beyond national courts to focus on such sites as indigenous movements, the elite legal academy, and the bar. They reveal how these disparate extrajudicial sites contribute to the growing importance of law, legal institutions, and legal actors to politics: Judicialization is a phenomenon that also unfolds outside the formal legal system in ways that shape and influence politics.

Third, by exploring the specific forms judicialization processes take in Latin America, this project teaches us something new about law and politics. In other words, we do not simply take a concept developed in the Northern Hemisphere and see how the Southern Hemisphere conforms or does not conform to it, but rather ask how the unfolding of the relation of law and politics in Latin America forces us to rethink and theorize anew the concept of judicialization. “The judicialization of politics is proceeding apace everywhere,” (Comaroff and Comaroff 2006, 148) and it is important to pay attention to the convergence of north and south in this respect. But it is also the case that judicialization in the developing world unfolds in a context in important ways different from that of developed countries with longer histories of centralization of power. Strong legal pluralism, institutionally weak states, recurrent episodes of political instability, developing economies, and increasingly serious challenges to government by organized crime distinguish many Latin American polities from the North American and European settings where the phenomenon of judicialization was first noted, and wherein it has been most studied. Indeed, in some places in the region, a “fetishization of the law” (Comaroff and Comaroff 2006), or a growing use of legal language and forms in social and political life, and a belief in law’s potential to assist in the creation of a more just order, co-exists with “the (un)rule of law,” or lawless violence and a weak presence of the state, including state justice (Méndez, O’Donnell, and Pinherio 1999). This paradox suggests that Latin America can be a “crucial site for theory-construction” about judicialization (Comaroff and Comaroff 2006: 149), and the chapters that follow take up the challenge.

At its core, this collective volume advances the thesis that ideas and non-strategic action matter to political outcomes, and that judicialization can only be fully understood if legal cultures, too, are considered. However, the conceptual building blocks of this project – legal culture and judicialization – have indeterminate and, in fact, hotly disputed meanings. Before further exploring their relation through the different chapters, we take a step back to examine these disputes. In the following three sections of this introduction, we specify the meaning that we attribute to each concept for the purpose of this volume, and then place our definition in the context of the surrounding debates. The introduction concludes by mapping out the chapters of the volume and by suggesting new agendas for research on law, politics, and legal cultures.

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## LEGAL CULTURES

In this volume, we place center stage the provocative concept of legal culture or cultures. It is a concept that has elicited academic controversy, with many questioning its analytical value (Cotterell 1997). In part, this is because the concept of legal culture as used in the sociolegal literature and judicial politics literature has tended to imply a fixed set of attitudes, behaviors, aspirations, and beliefs. Such an approach has its roots in scholarly works on comparative legal traditions where the concept of *legal culture* is used loosely to signal the historical, institutional, or doctrinal specificities of non-Western nations' legal systems.<sup>3</sup> It also appears in the works of judicial politics scholars, who, when they do discuss culture in the comparative realm, can depict foreign courts as having a particular character or single value set (Haley 1998; Hilbink 2007; Kapiszewski 2007).

The understanding of legal cultures deployed here stands in contrast to the version of culture traditionally employed by comparative legal scholars (Haley 1998; Merryman 1969). Anthropologists have long criticized the notion of culture as fixed or bounded, pointing instead to the way in which cultural formations are hybrid, contested, and fluid. In a critique of how the term culture is essentialized by transnational human rights discourse, Sally Merry argues that cultures are best viewed as “repertoires of ideas and practices that are not homogenous but continually changing because of contradictions among them or because new ideas and institutions are adopted” (2004: 11). Following the anthropological tradition, we use the term legal cultures to refer to contested and ever-shifting repertoires of ideas and behaviours relating to law, legal justice, and legal systems. Note that the term “repertoires” is not meant to suggest that there is internal cohesion or stability; rather they are the product of accident and history. We understand legal cultures – as with culture more generally – as being porous and characterized by hybridity, as being perpetually produced and re-produced, and as influencing the shape of contests for power, just as it is partly shaped by them. As the contributions to this volume demonstrate, the ideational aspects of legal cultures include representations, ideologies, norms, conceptions, beliefs, values, and discourses about law. The behavioral aspects of the concept of legal cultures discussed in the chapters include language, informal institutions, and symbolic actions (such as mimicry). Further, these sets of ideas and practices can be held and deployed by both legal professionals and other groups and individuals in society.<sup>4</sup>

The related issue of legal pluralism is important here. In their volume on Latin American legal cultures and globalization, Lawrence Friedman and Rogelio

<sup>3</sup> See for example Chiba (1989) on Japan; Potter (2001) on China; or Patrick Glenn (2000) for a general comparative approach.

<sup>4</sup> Our notion encompasses, in other words, both what Lawrence Friedman has dubbed “internal legal culture,” or the sets of ideas held by lawyers, judges, and other official actors, and “external legal culture,” those held by non-legal actors (Friedman 1997).

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Perez-Perdomo speak of the “strictly national character” of legal culture (Friedman and Perez-Perdomo 2003: 2). A restrictive definition and focus on the production of norms by courts, lawyers, parliaments, and councils, however, support a reading of Latin America as a region with a highly unitary legal history. There is another, more socially and historically informed account of law in Latin America, one in which multiple legal orders have coexisted over time in different ways in different countries, and often in quite different ways within the same country. In this alternative account, it is quite difficult to speak of a unitary legal culture as such, except if by legal culture we mean the sum total of these complicated cases of what Boaventura de Santos calls interlegality, his framework of legal pluralism that suggests a radically different ontology of law (Santos 2002).<sup>5</sup> Thus, it is not only within the formal state justice system that legal norms and understandings are generated; these are produced within a huge range of nonformal, subnational, and transnational spheres, spheres that are invariably interconnected. With Santos, we adhere to the pluralist view that Latin America is a region of multiple legal orders that overlap and coexist. We use the plural form *legal cultures* – perhaps testing proper English grammar – as a way to resist sliding back to a more monolithic conception.

Importantly, by adopting this broad and fluid definition of legal cultures, we renounce the concept’s utility as an explanatory variable strictly construed. After long debate, we have accepted that legal cultures is not itself a concept that can be fruitfully cast as causing specific, traceable outcomes, or even as the product of specifiable variables in the drama of law and politics. It is too amorphous to occupy an explanatory role within testable hypotheses. That the broad umbrella concept “legal cultures” cannot itself act as an explanatory variable, however, does not mean we have to give up on cultural phenomena as useful to explanation. As Lawrence Friedmann argues, there are many concepts in the social sciences that are useful, indeed crucial, despite their lack of precision. The term legal cultures works here as an umbrella concept that encompasses a group of phenomena that has been neglected in the field of judicial politics, but which, when carefully delineated and conceptualized, *can* be fruitfully cast as explanatory variables. We keep the term *legal culture* at the centre of this project, despite the controversy surrounding its analytical utility, as a way of pointing to a realm of social phenomena that has been largely neglected by comparative law and politics scholars. With this move we signal that, as lawyers and social scientists, we are interested in exploring aspects of political–legal life that do not seem to be well captured by some of the more traditional studies in our fields – that is, the nonmaterial realm of discourse, norm, and belief, as well as informal practices. As George Steinmetz argues, “Culture seems best able to capture the epistemological, methodological, and substantive distance of these

<sup>5</sup> Santos’ conception of interlegality points to the superimposition, interpenetration, and intersection of different legal spaces and orders; interlegality is a highly dynamic process involving a constant interplay between legal structures and human agency (Santos 2002: 437).

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[cultural] approaches from the hard materialism and cultural homogenization of objectivistic social sciences” (Steinmetz 1999: 7).

The chapters in this volume, therefore, do not tackle the umbrella concept of legal cultures head-on. Rather, they point us to a diverse range of legal-cultural phenomena and explore their relation to judicialization. The aspects of culture explored in the volume range from “interpretive frameworks,” “legal doctrines,” “legal meanings,” to popularly held ideas about both the nature of law and the demands of judging. The chapters explore debates about legal and constitutional interpretation and the value of international law; about the role of the courts and the relation between law and politics; and about perceptions or beliefs about the intrinsic value of law and practices related to law within society. The authors find legal cultural phenomena in a wide variety of sites, ranging from the courts to social movements and NGOs, the legal academy, the bar and – of course – the general public. Further, these aspects of legal cultures are viewed as explaining changes to politics, just as they are explained to be the product of political and social change. Those chapters that work at a more descriptive level nonetheless suggest ways in which these phenomenon help explain the drama of law and politics in Latin America. Aspects of legal culture are essential to understanding legal processes because they are an “intervening variable in the process of producing legal stasis or change” (Friedman 1997: 34), but, or put differently, also because they are phenomenon that help us understand how social and political life are constructed.

### THE JUDICIALIZATION OF POLITICS

Our second conceptual building block, judicialization, has two distinct but related aspects. The first refers to the observation that many courts around the world have embraced a new, higher profile political role that depicts them as defenders of constitutional commitments, advocates of rights, and arbiters of social policy conflicts (Tate and Vallinder 1995). More courts have been granted or have begun exerting the power to review legislation under the constitution, and more courts have assumed a more significant role within important political and social debates that were traditionally left to the elected branches. Correspondingly, the second aspect of judicialization refers to the growing use of law, legal discourse, and litigation by a range of political actors, including politicians, social movements, and individual actors. Increasingly, scholars claim, legislators write laws with the courts’ language and opinions in mind (Tate and Vallinder 1995; Stone Sweet 2000); and social movements, individual citizens and the political opposition alike frame their political struggles in the language of rights, and turn to courts to advance them (Comaroff and Comaroff 2006; Sieder et al. 2005). This accelerated recourse to law’s language and institutions in political struggles is empirically tied to, but analytically separable from, the first aspect of judicialization: the first refers to the discourse and activity of courts, and the second to that of other political actors, including individual citizens.

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Turning to Latin America, we note that the salience of law and courts to the political arena is not only not new, as some have implied, but rather is a founding motif of Latin American politics. As Mark Goodale, quoting Malagón Barceló, reminds us, “America was born beneath the juridical sign” (Goodale 2009: 31). From the papal bulls that formally justified the conquest to the massive bureaucracy that was at the center of colonial government, “law and legal institutions served the Crown’s needs of conquest and colonization,” acting “as a mechanism of political and cultural hegemony” (Mirow 2004: 11). Steve Stern argues that indigenous “resistance within Spanish juridical frameworks locked the colonials into a social war which hammered away at specific privileges,” even as it consolidated the Crown’s power in Peru (Stern 1982: 115). Indian litigants challenged Spanish privileges throughout the colonial period in New Spain as well (Taylor 1972: 83).<sup>6</sup> Law’s centrality survived independence. Notably, Latin Americans had enacted more than two hundred constitutions prior to the latest wave of constitutionalism (Cordeiro 2008; Loveman 1993), which shows that political elites have always been willing to expend considerable resources on constitutional law as a means of imagining, constructing, and attempting to control the state. Even the use of rights language and of the courts by underprivileged groups to articulate political demands has a long tradition. Historians of the post-colonial eras have shown us how courts and legal discourse were central in postcolonial struggles over slavery (Scott 1985), land reform (Mallon 2000), labor conditions (French 2004; Schjolden 2009), and in the struggle of native peoples for recognition, autonomy, and restitution (Mallon 2000, Rappaport 1994). Well before the recent surge of transnational indigenous resistance, revolutionary leftists in Chile criticized Mapuche rural activists for “*pasarsela juiciando*” (or “living in court”) (Mallon 2000: 185).

Indeed, at times one suspects that part of what is “new” about judicialization is only that scholars are now more attuned to the role of courts and law in politics. But we suggest that there are three significant, tangible sets of differences that distinguish law and politics in Latin America today, and that these differences bespeak a process of judicialization: 1) expansion of the domain of social and political life that is articulated in legal language and through legal institutions; 2) the expansion of the number and kinds of legal instruments that have become available for use in political struggles; and 3) ever more frequent recourse to legal language and legal instruments as a strategy within types of political struggles that have traditionally turned to law and courts.

The first difference refers to the by now frequent observation that social and political struggles that in the past would have unfolded in the realm of the political

<sup>6</sup> At one point the Viceroy of New Spain, exasperated by Indian litigiousness, decreed, “I have found it advisable to order that no Indian town can send more than one or two representatives to engage in litigation” at a time (quoted in Taylor 1972: 83). Note that Castilians were also considered to be highly litigious (Mirow 2004).



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branches, or would have been otherwise funnelled through non-state channels, now present themselves as legal struggles. Perhaps most notable is the tendency to dress the claims of social justice in the language of social, economic and cultural rights, and to hitch them to legal texts subject to judicial review. In Latin America today there is litigation over access to HIV medicine, marijuana, and the morning after pill; access to education; access to state benefits such as pensions and healthcare; legal recognition of cultural groups (even non-indigenous groups), and access to water and a clean environment, to name a few. Indeed, it has become difficult to imagine a claim for redistribution that would not be stated in rights terms and linked to a legal instrument at some point. Another area of social life that has been judicialized only in recent years is the struggle over authoritarian legacies. In Argentina, Brazil, Chile, El Salvador, Peru, and Uruguay, among others, an important part of the current work of the criminal and civil judges involves adjudication of crimes committed by former members of repressive regimes, so that law's reach into the political domain not only is now wider in the present but stretches further back in time. It also reaches higher into the hierarchy of power. Efforts include trials against heads of state, perhaps culminating in the trials against Augusto Pinochet in Chile and Alberto Fujimori in Peru, wherein law has, for the first time, entangled and condemned former political leaders in the region.

The second difference refers to the ever-expanding toolkit of legal language, instruments, and institutions available for use in social and political struggles. Where constitutions and international treaties used to be seen as laws in a different realm, they have become vernacularized, and lend themselves to any individual or group that can claim a violated right. Democratization in the region has come hand in hand with a generation of new constitutions that tend to emphasize justiciable rights, and many of which create new high courts with stronger review powers. As a result, the Colombian and Costa Rican constitutional courts have become known as liberal beacons, defending the rights of gays, marijuana consumers, street vendors, and other underrepresented groups (Wilson 2007). At the supranational level, today's potential litigants have recourse not only to national legal instruments and institutions, but to a growing plethora of regional and international tools as well (Merry 2006, 2004; Goodale and Merry 2006, 2007; Szablowski 2007). Thus, the International Labor Organization's Convention 169 on the Rights of Indigenous and Tribal Peoples in Independent Countries has been repeatedly, at times successfully, referred to by indigenous groups in struggles against national governments; while in Chile even ex-officers of the Pinochet regime have turned to the Inter-American Commission to redeem their due process rights.

The growing menu of legal tools for political struggle includes new forms of collective litigation such as the Brazilian Constitution's Article 5, which gives legal standing to political parties, unions and organizations; as well as judicially created collective writs of protection in Argentina and Venezuela, and ombudspersons

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with legal standing throughout the region (Oquendo 2008). Ángel Oquendo argues that Latin America has “launched a true revolution on collective rights, moving beyond the paradigm of group entitlements . . . to that of comprehensive entitlements which generally pertain to society as a whole,” but can be claimed by a single litigant (Oquendo 2008). The Ecuadorian and Bolivian constitutions (2008 and 2009, respectively) enshrine a wide range of collective rights for those countries’ indigenous populations, reflecting the demands of indigenous movements. Although the previous constitutions (Ecuador 1998, Bolivia 1994) were in part the result of the mobilization of indigenous movements, recognizing as they did a range of collective rights and defining the state as multicultural and pluriethnic, the recent constitutions go much further. In effect, they define their respective nations as “intercultural” and “pluri-national,” and recognize the jurisdictional autonomy of indigenous law and its parity with national law.

The third difference is an acceleration in the use of legal language, instruments, and institutions in politics. Within areas of struggle that have traditionally relied on legal forms, such as land redistribution and fundamental rights claims, we believe the turn to law has become more frequent. A darker side of judicialization, for example, is an intensification in use and expansion of the domains of criminal law in governance (Simon 2007). “Criminal violence has become a hieroglyph for thinking about the nightmares that threaten the nation. And everywhere the discourse of disorder displaces attention away from the material and social effects of neoliberalism, blaming its darker undersides on the evils of the underworld” (Comaroff and Comaroff 148). Of course, to claim there is an acceleration in the turn to law is to claim substantial knowledge about the role of law in politics in the past. One conclusion of our project is that more historical work needs to be done on the political role of law and courts in political struggles in Latin American history, as well as the legal history of particular struggles, as will be discussed. Nonetheless, we believe there is ample evidence to sustain these three claims of difference, and that the differences constitute a process of judicialization.

In highlighting that which distinguishes the relationship between law and politics in Latin America today we are not analyzing its causes. Several studies have attempted to encapsulate the reasons underlying judicialization, both in the developing and developed worlds; indeed, the literature on this question is burgeoning. Scholars have pointed to democratization; entrenchment of the rule of law; neo-liberal reform; multiculturalism; globalization and an ensuing diffusion of norms; judicial reform; weak, de-centralized states; heightened expectations about what states owe citizens; erosion of sovereignty; political failure; political competition; recent experiences of authoritarian rule; and the spread of non-governmental organizations, among others (see, for example, Santos 2002; Helmke 2004; Navia and Rios-Figueroa 2005; Sieder, Schjolden, and Angell 2005; Wilson 2006; Comaroff and Comaroff 2008; Benda-Beckmann, Benda-Beckmann, and Griffiths 2009). We understand the causes