

## I

**Working in New Political Spaces***The Checkered History of Latin American  
Judicialization*

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## INTRODUCTION

This book brings together an interdisciplinary group of scholars to take stock of the role that law and courts have played and are playing today in Latin American politics. Beginning in the 1980s, Latin American courts, especially supreme and constitutional courts, left behind decades of subservience and irrelevance to become crucial political actors across the region. In the intervening decades, the law and legal institutions gained prominence as tools for social contestation and change. As never before, judges entered the political maelstrom, serving as arbiters between the branches of government in heated debates over policy and the reach of presidential or legislative prerogatives. Working with prosecutors, courts also investigated corruption – not only, as in the past, the misdeeds of prior administrations but also those of people still in power. In the process, politicians began to realize that laws and constitutions perhaps meant mostly as window dressing were becoming more costly, since courts might actually hold them to the standards they were creating. Motivated by these developments, individuals and social movements turned the courts into battlegrounds for the realization and expansion of civil, political, cultural, and socioeconomic rights.

Latin America was one of the earliest and most enthusiastic adopters of the judicialization of politics. The region saw a wave of changes beginning around 1980 that created what we call the “superstructure” of judicialization: institutional changes including but not limited to the move toward a social rights constitutionalism (see, e.g., Brinks, Gauri, and Shen 2015), and cultural changes that emphasized the transformative power of

constitutional law and the political mission of legal actors (see, e.g., Couso, Huneeus, and Sieder 2010). Despite some misgivings about the “government of judges,” academics, practitioners, and activists generally saw in the emergence of more powerful courts and more meaningful constitutions a beacon of hope: a new set of actors and institutions that promised to control and punish abuses of power, redress egregious wrongs, and challenge entrenched inequalities in a region in desperate need of progress on all these fronts. But to what extent have Latin American judicial institutions lived up to these expectations? What exactly did these new institutions promise and what did they actually deliver?

Forty years into this experiment, it is clear that expectations have not always been met. The contributions to this volume document the ways in which, despite many successes, the promise of judicialization falls short when the superstructure of judicialization<sup>1</sup> remains unmoored from deeper social and political roots, and when it produces heavy demands that cannot be met by weak states and institutions. As a pioneer in judicialization, Latin America can share lessons and experiences that travel readily to other parts of the world.

Admittedly, the volume focuses on the liabilities side of the balance sheet more than other studies have. But ours is not a critique of judicialization that either regurgitates the well-known counter-majoritarian objection to judicial power (Waldron 2006) or bluntly characterizes courts as “hollow hopes” (Rosenberg 1991). We accept that judicial branches in Latin America have been formally empowered through democratic processes to exercise control over policy decisions and indecisions, and thus promote the enjoyment of a wide range of rights. Expansive judicialization, however counter-majoritarian, now has a clear place in the constitutional order. It is also an unavoidable feature of the political landscape in nearly every democracy on the globe, and even in some countries with questionable democratic credentials.

Moreover, in deeply unequal societies, judicialization definitely plays a role in guaranteeing basic preconditions for the exercise of democratic citizenship (Roa Roa 2019). Indeed, multiple studies have shown that, under certain conditions, judiciaries help advance rights and act as checks on excessive power (see, e.g., Nunes 2010; Rodríguez Raga 2011; Botero 2017; Cano Blandón 2017; Sigal et al. 2017; Antía and Vairo 2019).

<sup>1</sup> See the later section on the judicialization “superstructure” and its limits for a discussion of what we mean by the term.

Latin America is not alone in empowering courts in this way. Some countries in Asia – most notably India – and Africa – most notably South Africa – have seen a similar expansion of the role of constitutional justice in their politics, with nontrivial consequences for the effective enjoyment of rights (see Baxi 1985; Dembowski 2001; Langford et al. 2011; White and Perelman 2011; Bonilla-Maldonado 2013; Kapiszewski, Silverstein, and Kagan 2013). The phenomenon is sufficiently widespread that it has prompted books with titles such as *Constitutionalism of the Global South* (Bonilla-Maldonado 2013) – a phrase that describes a true phenomenon even as it glosses over the wide variety of experiences that can be found in the Global South.

Taking stock, of course, requires a measuring stick. We should not simply cast about for a number of happy stories, and then declare victory. We must also reject unrealistic benchmarks for determining the success or failure of attempts at social progress through judicialization. Following Brinks, Levitsky, and Murillo (2019), who use the statutory goal to evaluate the strength or weakness of institutions, we believe we should measure success or failure with reference to what an institution was meant to achieve. Read naively, many of the new constitutions the courts were working with, and the rights people sought to enforce through the judicialization of politics, promised nothing less than a social, cultural, economic, and political revolution. If one interprets civil rights guarantees as promises of fully realized political agency and inclusion; socioeconomic rights as promises that the government will fulfill everyone's material needs; environmental rights as promises that the government will deliver a clean environment; equality rights as promises that the government will eliminate inequalities of race, ethnicity, and gender, among others; and indigenous rights as promises that indigenous peoples will realize their aspirations for territorial autonomy, full equality, and cultural respect, then anything short of utopia, several decades later, is a broken promise.

But surely this is not the right standard. The realization of a fully democratic society – through the struggle for accountability, the promise of social justice, the enforcement of fundamental rights, and all the other aspirations that can be found in Latin America's constitutions – is bound to be a perpetually unfinished project, one in which goalposts move as governments and societal demands change. It is also a fight that cannot simply be won in court; it requires the activation of multiple institutional levers, and ultimately the transformation of society itself. If a constitutional project is a journey without a fixed final destination, then the

benchmark by which we might measure its success is the quality and characteristics of that journey.

On this point, one of us has said elsewhere that “the driving motivation for designers of systems of constitutional justice is to craft political spaces that will reflect their interests, serve their purposes, and secure a role for their successors in governing in the future” (Brinks and Blass 2018: 3–4). Judicialization was driven in large part by the inclusion of social and economic rights, environmental rights, and indigenous rights, together with the creation of mechanisms for their enforcement. Generally, these were elements that the left had sought to include in Latin American constitutions since the 1980s (Brinks and Blass 2018; Brinks and Sandoval Rojas 2019). As a *constitutional* project that relies on rights and courts, one of the core goals was to include or strengthen minority voices in the decision-making around rights-related issues. If this is the objective, then the standard is less whether or to what extent the judicialization of politics has moved us closer to utopia and more whether it has created a new form of politics in which previously suppressed voices are being heard on these issues, and in which previously marginalized groups have a better chance of advancing their agendas.

There were other elements of the judicialization project, also addressed in this book, that were a project from the right (sometimes in cooperation with the left). In particular, this is true of initiatives to strengthen anti-corruption and prosecutorial institutions (Rodríguez-Garavito 2010). As to these innovations, the goal was to improve what has been described as “horizontal accountability” (O'Donnell 1999; Mainwaring and Welna 2003), sometimes in an effort to retrench and restrain the state as countries adopted neoliberal policies (Gathii 2019). The measure of institutional strength, or success, for these institutional innovations will be the degree to which those in power now have to answer for their actions, including those associated with illegal rent-seeking practices.

At the same time, we want to go beyond the extent to which the institutions that underpin the judicialization of politics achieved their own goals. We therefore also consider some of the unintended consequences of strengthening these institutions for counter-majoritarian participation and horizontal accountability, and explore the reasons why things might have gone awry, even as institutions were fulfilling their stated purpose. A few chapters discuss, for instance, the ways in which conservative forces, sometimes reflecting longstanding entrenched interests, have taken advantage of the same counter-majoritarian spaces that were designed to include marginalized groups. Although surely an

unexpected outcome from most designers' perspectives, this is, perhaps, a measure of the strength of these institutional spaces. Other chapters look not only at the ways in which prosecutorial institutions have been captured by partisan interests – a clear violation of their institutional purpose – but also at the times when their zeal and success – a measure of institutional strength – have been enormously disruptive of the political system, with clearly deleterious consequences for governance and democracy. Given this complex reality, our conclusions and critiques are necessarily nuanced, as befits the complex and multivalent nature of the institutional innovations we are evaluating, even after considering the fact that there have been many unalloyed successes along the way.

With all this in mind, the book examines the promises and pitfalls of judicialization without failing to recognize that courts have often improved the quality of democracy, effectively expanding the horizons of political possibility for both majorities and minorities. The aim is to call attention to processes and pathologies that the architects of judicialization's institutional superstructure overlooked or failed to anticipate, and that prevent the project from realizing its full potential. In other words, we choose to focus on what is not working properly as an opportunity to shed light on what can be adjusted going forward. Specifically, we demonstrate that deficits in state capacity, variation in the degree of social embeddedness of judicial policy mandates, and pervasive judicial corruption diminish courts' ability and willingness to fulfill their new constitutional role. Furthermore, the book explores instances in which the expectations of the architects of judicialization have been met all too well, especially in terms of strengthening mechanisms of horizontal accountability. At times, the aggressive pursuit of anti-corruption is exactly what was contemplated, and in that respect a measure of effective judicialization, but nevertheless does more harm than good due to the broader context in which it takes place.

The various chapters thus evaluate whether the progressive ideals embedded in various constitutional and legal frameworks actually came to fruition, and examine the openness of these systems to a new form of politics that might be more inclusive. In particular, the contributors show that the institutional and cultural changes that empowered courts and put them at the center of policy disputes often fell short of the promised social and political advances for two main reasons. First, courts too often failed to account for persistent state weakness, pushing policies ahead of the bureaucratic infrastructure needed to support them; and, second, courts'

and activists' inability to root change in robust structures of social support often led to political and societal backlash that jeopardized reform efforts.

The first shortcoming is neither surprising nor fatal to the project that animated the judicialization of politics – after all, weak states and failing bureaucracies are perennial problems in Latin America, and the failure to accomplish a policy objective may not be especially attributable to the fact that the demand came through legal mobilization rather than more traditional forms of doing politics. A legislative push to fix the public health system in Colombia may have been just as likely to fail as a judicial one; an executive-led attempt to clean up a waterway or address prison conditions may find as many real-world obstacles as a judge-led one. But some of the chapters do show that pushing ahead of what the context could bear and testing the limits of newly minted judicial prerogatives without first fixing other issues can have destructive consequences for the very goals the superstructure of judicialization was meant to advance. The lesson here is not only that courts face enormous challenges when it comes to effecting social and political change but also that courts themselves can pose significant challenges to the democratic regimes they are a part of if they are not sufficiently transparent or if they are excessively empowered relative to other state institutions. Moreover, without proper checks on their own power, courts and prosecutors themselves begin to stretch or even break the rules, contributing to the weakening of democracy.

The second shortcoming, on the other hand, is more aptly a critique of the judicialization model itself – conservative publics and power structures are not exactly new in Latin America, but perhaps the failure was to imagine that simply giving minorities the ability to voice their demands through the courts would be enough to overcome resistance to progressive change. In this regard, some of the chapters can be read to suggest that the creation of robust rights and redress mechanisms may have encouraged social movements to rely on legal strategies as shortcuts, pursuing narrow agendas defined around a particular right, with a limited number of NGO-based supporters and, often, support from abroad. The alternative might have been to embark on the more arduous journey of constructing a broader agenda and building a wider coalition in support of their goals. If this is so, then perhaps the main shortcoming of the judicialization of politics around rights-based claims is that in many cases it has severed – or, perhaps more fairly, not helped to develop – the connection between progressive movements and mass politics.

One group of essays directly explores the limits of institutional change. Studies of Mexico, Colombia, and Guatemala show that the prosecution of complex crimes perpetrated by public officials, including corruption, drug-trafficking, corporate crimes, and human rights violations, can be acutely compromised not only by a backlash orchestrated by powerful political and economic actors but also by deficits in basic investigative capacity. In the case of struggles over gender equality and abortion rights in Argentina, Brazil, Colombia, Mexico, and Peru, backlash and counter-movements by conservative forces have been an important limit to the rights-affirming promise of judicialization, especially when judicial interventions are not accompanied by mass-based activism and effective public outreach strategies. Clearly, simply adding a layer of new institutions was not enough to overcome a longstanding and mutually reinforcing topography of state weakness and entrenched social, political, and economic actors.

Another group of essays reveals a microcosm of the same story – institutions too weak to overcome societal resistance – taking place in the interior of the institutions themselves. These chapters look at the informal networks of nepotism and corruption that undermine judicial functioning in Mexico, Ecuador, and Peru. The networks survived processes of formal judicial empowerment, and continue to color the way the courts operate. It is tempting to resurrect the old chestnut about how the judicialization of politics will lead to the politicization of the judiciary, except that these chapters make it clear that the politicization of the judiciary long predated more recent attempts by new groups to pursue their goals through law.

What is new in the story of institutional weakness that runs through these two groups of essays is the nature of the aspirational institutions of the judicialization superstructure (Brinks, Levitsky, and Murillo 2019, 2020). One goal of this institutional change was to alter, in two senses, the way in which politics is done: it was meant to eliminate the old ways of doing law, in favor of more meritocratic, even technocratic approaches; and it was meant to give previously underrepresented groups such as women, gender-nonconforming groups, and other minorities a stronger voice in pursuing equality. To the extent that old ways of doing law endure, and old power structures continue to dominate judicial decision-making, this is a clear failure of the model. The mere presence of contested politics over questions of sexual and reproductive rights or transitional justice, on the other hand, cannot be seen as an institutional failure, since, as we argued earlier, the goal was not to impose a particular

solution but to create spaces for a more robust and inclusive politics of constitutional meaning (Brinks and Blass 2018). Backlash and resistance must be seen as merely part of the process by which any society works out the practical application of its constitutional commitments, even if we are not always pleased with the outcomes.

Finally, there is a series of essays on the wholesale criminalization of grand corruption, possibly the ultimate and most recent form of judicial intervention in Latin American politics. These chapters dissect the tension between, on the one hand, a strong form of judicialization that proceeds in line with reformers' aspirations and, on the other, the wider consequences of these prosecutions in a weak institutional context for the construction of the rule of law and good governance more generally. Specifically, studies of the *Lava Jato* operation in Brazil and Peru show clearly empowered prosecution services and courts training their eyes on systemic corruption. These investigations are unprecedented in many ways, and are, at times, exactly what many hoped for in that they address actual corruption and the abuse of power. At the same time, especially because they are targeting widespread practices that affect every corner of the political system, they risk undermining the values they claim to promote. Moreover, they also risk unleashing unproductive clashes with the establishment that compromise judicial integrity, fueling anti-political sentiments and backlash against fundamental rights. In these cases, the weak institutions, at least initially, are not the legal ones but all those that surround the legal complex, particularly the institutions of ordinary politics. Ultimately, however, that surrounding weakness returns to infect the legal complex as well.

#### WHY ASSESS THE CONSEQUENCES OF JUDICIALIZATION?

In interrogating the promise and ultimate impact of judicialization, we dialogue with three edited collections that defined the contours of the field of Latin American judicial politics: *The Judicialization of Politics in Latin America* (Sieder, Schjolden, and Angell 2005), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Couso, Huneeus, and Sieder 2010), and *Courts in Latin America* (Helmke and Ríos Figueroa 2011). These volumes traced the initial stages in the evolution of courts and law after the third wave of democratization, teaching us that, perhaps irreversibly, the judiciary has established itself as a preeminent site of political contestation.



Sieder, Schjolden, and Angell's book chronicled the journey of courts from dormant institutions into arenas of rights expansion, legal pluralism, and accountability. The editors highlighted the role of independence-enhancing reforms and the transnational diffusion of rights-centered legal discourses via social mobilization, as the factors pushing courts toward greater activism. In this book, we find that these transformative forces often suffer from a lack of domestic support, and that NGO-based legal mobilization can fail to build the necessary social and political base that makes progress sustainable. Their work also asked whether judicialization is indeed an effective tool for sociopolitical change. Written in the thick of this political "awakening," Sieder, Schjolden, and Angell's book offered more and less positive examples, but could not yet hazard an overall assessment. It did, however, call attention to the democratic deficit of policymaking through the courts and the risk of seeing the judicialization of politics morph into the politicization of the judiciary, both issues that are documented in this volume.

Five years later, Couso, Huneeus, and Sieder's (2010) collection sought to make sense of judicialization by looking at the cultural changes it embodied. The editors observed that more aspects of social and political life are now channeled using the language of the law, and that the institutional toolkit available to articulate claims in this way has expanded considerably. But rather than providing a general overview of the phenomenon, or assessing its causes, the book had a more specific goal: to identify the cultural underpinnings of the judicial revolution. As the editors put it, "law exists in the discursive realm and – perhaps more than other political practices – relies on symbolic practices for its legitimacy" (Couso, Huneeus, and Sieder 2010: 4). The book therefore zoomed in on the role of ideas, language, and informal practices in the judicialization of politics. Contributors documented how the shift away from legal formalism in both the courts and related fields (i.e., the academy, the bar) engendered more activist judicial role conceptions. They also explored ideological and organizational changes in civil society, which increased citizens' predisposition to transform political claims into legal battles. Like the previous volume, the focus was not on the consequences or effectiveness of judicialization. But far from being overly optimistic, it suggested that the coexistence of judicialization with weak states that struggle to implement public policies was reason for concern. We too pick up the theme of weak states, now with ten years of additional experience.

Helmke and Ríos-Figueroa's (2011) volume, the most recent of the three but already a decade old, also documented the new place of courts in Latin American politics. This last book went further, investigating the implications of judicialization. Do courts actually behave as arbiters of interbranch conflict? And do they actually protect and expand rights? These questions reflect the two functions of courts that the editors mapped out in their introduction: horizontal and vertical control. A collection of essays then provided evidence that Latin American courts are generally more predisposed to fulfill their horizontal control function than their vertical control function. Building on this observation, we note that excesses of horizontal control can wreak havoc in a weak political system; and show how the weaknesses of social, political, and infrastructural support can undermine the best efforts to impose vertical controls.

In line with the spirit of the times, the three volumes rightly recognized that something fundamental had changed in the character and thus the transformative potential of the region's judicial institutions. While not naively optimistic, all of them exude a newly found sense of possibility, with the law seemingly carving out productive paths to social and political change. They tell compelling stories of disadvantaged groups or aggrieved individuals successfully mounting court challenges against powerful actors, judges making it harder for presidents to govern in a delegative fashion, or courts otherwise shaping the politics of a country. These things simply did not happen, or were extremely rare, before this new era of judicialization.

The broader literature on Latin American judicial politics also offers plenty of examples in which judicialization shifted power inequalities, disrupted policymaking inertia, and moved politics in progressive directions (for reviews, see Kapiszewski and Taylor 2008; Gonzalez-Ocantos 2019). For instance, high courts in the region have handed down rulings that challenged the retrenchment of welfare benefits during periods of neoliberal adjustment (Rodríguez-Garavito 2011; Kapiszewski 2012; Brinks and Forbath 2014; Botero 2017; Brinks and Sandoval Rojas 2019), or recognized the rights of sexual minorities (Wilson 2009, 2011; Albarracín 2011; Díez 2015). Work on Argentina shows that the judiciary in general (Gonzalez-Ocantos 2016), and the Supreme Court in particular (Merlinsky 2009; Herrero 2011; Botero 2018), occasionally provide visibility and relief for citizens in disputes over human rights violations, housing, the environment, and social policy. Others have traced how democratization turned Mexico's Supreme Court into an effective referee in disputes between political parties (Magaloni 2003),