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### Cultures of Legality

Judicialization and Political Activism in Latin America

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### Chapter

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

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## 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*. Bogotá: 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.

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).

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.

## 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).

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).

[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.

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).



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

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 pluricultural, 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

of judicialization to be complex, multi-determined, and beyond the scope of this introduction: we limit ourselves here to defining judicialization, and allow the chapters to explore the dynamics between legal cultures and judicialization in different settings. We cannot help but note, however, that the three differences outlined above suggest changes in the way people conceive of and practice law, and may also be a product of those changes.

## JUDICIAL POLITICS AND LEGAL CULTURES

Many Latin American countries are currently experiencing a change in the dynamics among law, courts, and politics. Correspondingly, a new field of studies examines the judicialization of politics in the region.<sup>7</sup> These studies, focused on the questions of where, when, why and how law matters to politics, generally draw their assumptions and methods from two schools of new institutionalism: rational-choice institutionalism (RI) and historical-institutionalism (HI). RI examines how actors strategically navigate institutional constraints in their quest to maximize their preferences. Thus, for example, Gretchen Helmke argues that Argentina's generally deferential Supreme Court will begin to vote against the government toward the end of an administration when reprisal is less likely to curry favor with the incoming regime (Helmke 2005). Judges are cast as strategic actors who will seize on available opportunities to advance their own power. Such studies have yielded important insights into judicial behaviour and law's political role, indicating, for example, what institutional configurations will yield more assertive courts. As often observed, however, rational actor studies concern themselves mainly with instrumental rationality – how actors choose the means of achieving their ends – and not with other aspects of reason, such as how actors adopt their goals in the first place. Thus, these studies fail to address the possible connections between the form judicialization takes and the way in which the actors involved in such processes actually conceive of or represent law, justice, and the proper role of courts. Absent are the cultural or representational aspects involved in these practices, such as the negotiations and re-negotiations concerning the boundaries between law and politics. Such changes tend to occur gradually and cumulatively and do not fit easily into models which emphasize actors' maximization of their own interests.

HI studies examine how the self-reproducing, historically defined features of institutions shape their political participation. Although HI studies of judicial politics do not define themselves as being about legal culture, they often implicitly address

<sup>7</sup> See note 2. Examples are Brinks (2008), Chavez (2004); Couso (2004); Gargarella, Domingo, and Roux (2006); Gloppen, Gargarella, and Skaar (2004); Helmke (2005); Hilbink (2007); Huneus (2010); Kapiszewski (2007); Prillaman (2000); Rios Figueroa and Taylor (2006); Scribner (2004); Sieder, Schholden, and Angell (2005); Taylor 2008; Ungar 2002.

how certain ideas, ideologies, or other ideational patterns funnel behavior along path-dependent lines. Lisa Hilbink, for example, has observed how a particular legacy of formal and informal legal practices and ideas inhibits the Chilean judiciary's defense of constitutional rights (Hilbink 2007). Strict hierarchical control, coupled with a conservative ideology within the Supreme Court, has kept the judiciary well out of the constitutional business. Comparing the Argentine and Brazilian high courts, Diana Kapiszewski argues that a court's "character" is the product of naming procedures and other institutional features that, over time, foster a particular manner of working together among judges and of inserting themselves into the political realm (Kapiszewski 2007).

We share with these HI studies a concern with how institutional norms and ideologies shape actors' perceptions and, ultimately, behavior. At the same time, the contributions here extend the HI turn in two ways. First, several chapters give ideas and discourse a more fundamental role in explaining judicial change than do most current HI studies. One of the shortcomings of HI as it has been formulated within judicial politics is that, like its fellow new institutionalisms, it posits a static equilibrium and so struggles to explain change. In HI, ideas and other ideational forms are viewed as passively inherited from the past and bequeathed unaltered to the future, to the point that we lose sight of agency. However, once we view actors as capable of rejecting and reformulating ideas, as well as simply imbibing them, institutions can become less "sticky" (Schmidt 2008). As noted earlier, institutional culture is heterogeneous, not a monolithic whole, and this very variation makes room for change: actors can choose between contesting lines of thought or recombine them in new ways (Campbell 2004). Furthermore, agents are able "to think, speak, and act outside their institutions even as they are inside them, to deliberate about institutional rules . . . and to persuade one another to change those institutions" (Schmidt 2008: 314). In pointing to the explanatory importance of ideas and discourse, this volume aligns with the vision of what some political scientists now refer to as a fourth branch of new institutionalism, called constructivist or discursive institutionalism (Schmidt 2008, Hay 2006). Under this view, institutions are still central to understanding political behavior, but actors are not just ruled by institutions; they play an active, conscious role in the reproduction but also re-creation of institutions through discourse and ideas. This move also puts political science into dialogue with other fields focused on ideas, such as anthropology, sociology, and even philosophy (Schmidt 2008).

Of course, not each chapter in this volume considers itself an exercise in discourse institutionalism, and in any case it is possible to argue that historical institutionalism properly understood anticipates the HI emphasis on ideas and discourse (Hay 2006). Yet this volume is, in part, a call to scholars of comparative law and courts to consider ideas and discourse, as well as inherited scripts and practices, as central to our understanding of judicial behavior and outcomes. Thus, even when the chapters

in this volume turn to the more traditional objects of political analysis, such as the work of lawyers and judges (for example, lawsuits and judicial decisions), they point to more cultural domains of that work. Writing about the Colombian Constitutional Court, Pablo Rueda analyzes one specific legal concept developed by the court (that of *mínimo vital*, or subsistence minimum). He reveals the way in which this legal concept generated an emerging theory of social rights in contemporary Colombia that took on a discursive life of its own, far beyond the institutional remit of the Court. In looking at the Mexican Supreme Court, Karina Ansolabehere focuses on judges' shifting and complex ideas about law, suggesting how these conceptions might shape their rulings. There is a second way in which we aim to move beyond existing institutionalist accounts of law and politics. Studies of judicialization in the region to date have tended to be court-centric. By contrast, we borrow from the Law and Society movement the insight that law is created and lived not just in the court and through litigation, but beyond, in the conversations of lawyers and their clients, in social movements, in academia, and in everyday life. Courts are important, of course, but they are only part of the law-and-politics picture. To better understand the causes, contours, and consequences of judicialization, we must look well beyond the judicial arena. It is through the concept of legal cultures that we begin to do so. By using the term *culture* we signal our focus on norm-generating spheres and social practices that tend to be overlooked by scholars of judicialization because they are traditionally – and we believe mistakenly – viewed as not significant to politics; because focus has traditionally been trained on judicial actors or institutions and because their workings and the influences they exert are diffuse or indirect and therefore difficult to capture within causal models.

Thus, Rachel Sieder turns her lens away from the formal institutions of the judiciary and looks at the ways in which a disenfranchised group of indigenous people structures oppositional forms of political and social action by consciously and unconsciously mimicking the state's legal forms. This judicialization of highly localized political protest is, in turn, linked to the spread of "rights talk" and the beliefs in indigenous peoples' collective entitlements, indicative of a wider shift in legal culture(s) outside the formal institutions of the judiciary. Catalina Smulovitz shows us how the life experiences and accumulated specialized knowledge of lawyers can shape court dockets: the rights litigation expertise that Argentine lawyers gained during the dictatorship, she argues, partly accounts for the greater use of courts to advance claims for social justice today in that country. Manuel Gomez reveals how the loyalty of corporate lawyers to their clients survives Chavez's Bolivarian revolution, but transforms these lawyers from well-heeled power brokers to struggling cause lawyers immersed in a high-risk battle against the executive. We should note that scholars in other disciplines have already moved in this direction (see, for example, Goodale 2008 and Snodgrass-Godoy 2006). It is one objective of this volume to put scholars of law and politics and scholars in other disciplines in dialogue with each other.

## WHAT LIES AHEAD

Following the introduction, the book is divided along the two dimensions of the concept of judicialization: the articles in Part II refer to the actions of the courts themselves, and those in Part III look beyond the courts to the growing use of law, legal discourse, and litigation by political actors, including politicians, social movements, and individual citizens. The organization of the chapters thus demonstrates how a focus on cultural processes reveals new dimensions of a traditional subject of study (courts), even as it allows us to explore less traditional subjects as sites of judicialization.

The chapters in Part II, “Courts and Judicialization through a Cultural Lens,” focus on the most traditional of public law subjects. However, they go beyond institutionalist scholarship by focusing on a little-explored aspect of courts – the legal concepts, frames, and role conceptions on which judges draw. Pablo Rueda focuses on the Colombian Constitutional Court, fixing his gaze on the legal concept of *mínimo vital*, or “subsistence minimum.” Rueda argues that in Colombia, this new legal concept developed for the benefit of the marginalized social groups was in fact co-opted into the service of the middle class – subsumed into the maintenance of power dynamics through litigation. Aspects of legal cultures, in this case language, can thus serve to reveal some of the ways in which judicialization may reinforce existing hierarchies of power at the same time as pointing to the transformations of legal consciousness involved in the increasing resort to the courts across Latin America.

Karina Ansolabehere analyzes the changing frameworks through which the Mexican Supreme Court understands and adjudicates rights claims. Looking at freedom of speech, participation, and indigenous rights, she argues that judges’ shifting relations with society, the government, and the judiciary itself has altered the way in which judges view rights since the transition to democracy. In her chapter, legal cultures or frameworks play the role of intervening variable: conceptions of rights are changed by the more democratic political and social environment; these change the way in which judges frame their relationship to society and politics have, in turn, fomented the greater protection of certain rights. Turning to the Brazilian Supreme Court, Diana Kapiszewski argues judicial culture must include not only judges’ attitudes, but also informal institutions and particular court attributes. She develops a new framework for the analysis of judicial “institutional culture,” and applies it to the Brazilian Supreme Court to explore how it contributes to judicialization. Her work is drawn from interviews with justices and observation of the court, allowing her to bring a rich level of detail to her three-pronged framework of analysis about the inner workings of the Brazilian high court.

Alexandra Huneus’ chapter moves our attention from legal institutions at the national to the regional level. Whereas courts have been considered important partners to regional legal integration in the European setting, Huneus points to

several political, institutional, and cultural factors that may mean Latin American courts are playing a different role in the process. At first glance, it might seem that judicialization and regional legal integration are mutually reinforcing phenomena, but through three case studies in which high courts reject rulings by the Inter-American Court, Huneeus suggests that the dynamics are more complex and varied. Factors such as judges' experience with international law, judicial role conceptions, regional politics, and the relationship to the executive can inhibit judges' motivation to comply with Inter-American human rights instruments.

The book's third part, "Judicialization Beyond the Courts," explores the phenomenon of judicialization as it unfolds outside the courts – in a new generation of academic writing and classes (Couso); in the political organizing of indigenous groups (Sieder, Skjævestad); in the metamorphosis of Venezuela's boutique-firm lawyers into ideal-driven cause lawyers; and in the way Argentine lawyers bring their life experience to bear on their practice (Smulovitz). Javier Couso's chapter explores the intellectual and sociological shifts taking place within Latin American law schools in the era of politically prominent courts. In an inversion of the U.S. academia, constitutional law scholars traditionally had not enjoyed a particularly high status among academics. However, with the spread of judicial review and a new emphasis on law's political role, constitutional law has come to be regarded as a central intellectual enterprise in many Latin American countries. This means not only that constitutional scholars are enjoying a higher status, but that scholars and lawyers alike are gaining a more sophisticated understanding of constitutional jurisprudence, and are more likely to turn to it as a source of legal argument, fostering, in turn, further judicialization.

Rachel Sieder's chapter tracks how the indigenous movement in Guatemala has turned to recreating juridical forms outside the context of the state courts in their battle to win recognition and greater autonomy from the state. In recent years, the claims of indigenous groups have become a central political issue and a site of active struggle throughout the region. In light of the tenuous or fraught relationship such groups have to the state, their use of legal and paralegal means seems a particularly rich site through which to study aspects of the relationship among legal concepts, judicialization, and the state. The chapter traces how indigenous communities in Guatemala organized consultation processes in opposition to proposed natural resource exploitation projects. These consultations had contested legal status, but the hope was that by mimicking legal processes of the state, they would have greater political resonance. The chapter thus provides a window on the relationship between the dominant legal culture and bottom-up social movement engagements with law within a highly plural legal environment. It also challenges us to reflect on and perhaps to stretch the definition of judicialization to include the turn not just to law and courts, but to law-like proceedings aspiring to greater impact through mimicry of law.

Turning to the south of Chile, Anne Skjævestad shows how the judiciary's conservatism impedes the defense and advance of Mapuche indigenous claims through the courts. She also argues, however, that the very process of mobilization and experience in the courts served, in turn, to "judicialize" the Mapuche's own "legal consciousness" and understanding of their political battle, giving their movement further momentum. As in Sieder's chapter on Guatemala, we see how legal mobilization alters the self-understanding and practices of a movement.

Manuel Gomez focuses his chapter on Venezuelan lawyers. As the Chavez government radically transforms state institutions and the relationship of old elites to the state, a small group of traditional Venezuelan corporate lawyers have taken on a new and unfamiliar role: cause lawyering. They have taken to defending their traditional clients, now stripped of their access to the government, in their struggle to retain their social position and capital. If the Chavez regime is as dismissive of legality and institutions as its opponents claim, the turn to cause lawyering might appear futile. And, yet, Gomez shows us how even in this setting of politicization of law, legal discourse is the tool of choice of Chavez's opponents, as of the Chavez government itself. The turn to rights language, in other words, seems to transcend particular legal cultures and particular national and subnational scenarios.

In her chapter on judicialization in Argentina, Catalina Smulovitz takes a contrarian view: citizens' ideas about the law, she argues, do not help us explain or understand the greater use of courts by citizens in recent years. Although opinion polls show that perceptions about performance of the judiciary and judges are negative in Argentina, the number of claims and topics that are being brought to the courts has continued to increase. Smulovitz argues that judicialization is not related to *ex ante* changes in how people evaluate the judiciary. Rather, changes in the opportunity structure for making claims – combined with the existence of a support structure of lawyers specializing in labor rights and a new structure of advocacy nongovernmental organizations (NGOs) – led to the increased resort to courts. Lawyers who had cut their teeth on labor claims found that they could turn their litigation experience to other kinds of demands. In Smulovitz's views, then, it is not the citizenry's ideas about law that matter, so much as the existing resources and, in particular, lawyer's cultural capital.

The final chapter, written by Pilar Domingo, provides a sweeping overview of the legal changes unfolding in Latin America. She shows how legal representations have become more frequently resorted to in instrumental ways by a wide range of actors who, in the past, either were not prominent in the political and social landscape (judges and litigating lawyers); or tended to use other strategies and languages that were not framed in terms of rights of rule of law to advance particular social and political causes (social movements and subaltern actors). She examines three sets of processes related to judicialization in the region. The first is trends in the normative language of rights, law, and legality, or "the power of ideas." The second cluster



involves identifying and disaggregating the multi-actor nature of who is driving the process of judicialization. Thirdly, she examines the institutional dimension, looking at the spaces in which the process of juridification is playing out. Domingo's chapter thus suggests a framework for understanding the changes discussed in the preceding chapters.

## CONCLUSION

Undoubtedly institutional factors, rational calculations of interests, and shifting opportunity structures explain much about current processes of judicialization. By broadening the study of judicialization to encompass legal cultures, the chapters in this volume reveal the important role that ideas, beliefs, and symbolic and informal practices regarding the law and its power also play. It is our hope that this volume will spur a new research agenda on the relationship between law and politics in Latin America that is sensitive to the importance of the cultural dimensions of processes of judicialization observable in the region. Further, this research agenda should be interdisciplinary. By emphasizing that judicialization is a cultural phenomenon, we signal that the study of judicialization should encompass the use of diverse methodologies, of extrajudicial sites, and of the epistemologies of the various social sciences.

Four areas for further research present themselves in particular. First, we are in need of more historical inquiries into the relation between law and politics in Latin America. To assert that there is a change afoot, and to properly characterize that change, requires knowledge of the past. As noted above, Latin American politics have been steeped in law since the colonial founding. Through historical studies we may well find that there have been prior moments of what we now label judicialization. Further, we may find that judicialization in the past has had different causes, features, and outcomes. Such findings would greatly enrich our understanding of current processes. Second, we are in need of studies that examine politics that have *not* become judicialized. The more politics is judicialized, the more important it becomes to understand the processes that suppress judicialization, be they inclusive political systems that allow citizens to bypass the courts and legal language, or, what is more likely, social exclusion. Who fails to voice their demands in legal language and why, and what does this tell us about judicialization? Third, we are in need of studies that go even further afield of the state judicial system than this volume has done. While Rachel Sieder's chapter ventures beyond the formal justice system entirely, most chapters hew more closely to the state. How does the turn to law play out in everyday life and in legal consciousness? How is law portrayed by the media in Latin America? It would be informative to venture into these neglected sites, and to explore how they connect back to the formal legal system. Eventually, and finally, we are in need of a theoretically and empirically informed account of

the politics of producing legal cultures.<sup>8</sup> Who are the key actors and what are the important processes involved in a cultural account of judicialization? Before we get there, however, we need more empirical studies to help us generate theories about the relation between judicialization and cultures. This volume is a first step.

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<sup>8</sup> We thank Daniel Brinks for this point.

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