BEYOND JUDICIAL REFORM

Courts as Political Actors in Latin America

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THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA. By Rebecca Bill Chavez. (Stanford: Stanford University Press, 2004. Pp. 255. $55.00 cloth.)

DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE. By John D. French. (Chapel Hill: University of North Carolina Press, 2004. Pp. 233. $59.95 cloth, $24.95 paper.)

DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES. Edited by Siri Gloppen, Robert Gargarella, and Elin Skaar. (London: Frank Cass Publishers, 2003. Pp. 210. $115.00 cloth, $34.95 paper.)

COURTS UNDER CONSTRAINTS: JUDGES, GENERALS AND PRESIDENTS IN ARGENTINA. By Gretchen Helmke. (Cambridge: Cambridge University Press, 2005. Pp. 240. $60.00 cloth.)

DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA. Edited by Scott Mainwaring and Christopher Welna. (Oxford: Oxford University Press, 2003. Pp. 352. $125.00 cloth, $47.44 paper.)

LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA. By Matthew C. Mirow. (Austin: University of Texas Press, 2004. Pp. 360. $45.00 cloth.)

Legal institutions have always factored into Latin America's political fortunes. Law is an essential ingredient in determining who gets what, when, and how. Yet until recently, law and its attendant institutions—courts, legal codes, and the legal profession—were not an important component of social science research on Latin America. The quantity of research on the judiciary does not compare even remotely to the vast literature on presidents and assemblies, under either authoritarianism or democracy.

As these new books illustrate, on the heels of an energetic burst of research on judicial reform, scholars are once again turning their focus to the political, economic, and social implications of law and legal systems

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in the region's evolution. Implicit in all these works is the notion that courts have an important effect on governance. Even in the breach, when they are subservient to the executive branch or responsive primarily to elites, courts set rules, reflect values, and allocate societal goods. This gives courts a degree of influence that may be as significant as that of the elected branches of government, even if it is less recognized and not always conducive to basic egalitarian ideals of democracy.

This renewed interest in courts as political actors follows a long hiatus. The collapse of the law and development movement in the early 1970s was engendered in part by recognition that many of the reforms it advocated might well have effects contrary to those sought by legal reformers. Courts were revealed to be far from their democratic ideal: they were not independent and neutral political institutions, but rather, had an influential regime-supporting role, especially inasmuch as "the formal neutrality of the legal system is not incompatible with the use of law as a tool to further domination by elite groups" (Trubek and Galanter 1974, 1083). This would seem in retrospect a reason for more study, rather than less. But the combination of the policy community's cooling interest and the escalating wave of authoritarianism across the region dampened all but the most legalistic study of Latin American courts.

With the resurgence of minimally democratic regimes in the hemisphere, scholarly focus has returned to the courts' role in new democracies, with study of the courts' role evolving in three general directions. A first group has approached courts as dispute resolution mechanisms that can be improved through procedural reforms, with a focus on efficient problem solving aimed at economic development (e.g., Buscaglia et al. 1997; Castelar Pinheiro 2000). A second set of scholars has focused on the larger sociological context within which courts operate, and emphasized gaps in the application of the law as a reflection of patterns in overall society (e.g., Méndez et al. 1999). The implications for evolving democratic practices are paramount, if broadly spelled out, and courts are seen as guarantors of "horizontal accountability" (O'Donnell 1994), even though the prospects for a robust and democratic rule of law are depicted as daunting at best. A third group has focused on post-military judicial reforms, and especially on the politics and unintended consequences of the reform process itself. These scholars put great weight on understanding the weaknesses of the reform process during the late 1980s and 1990s, and especially the difficulty of addressing problems of independence, access, efficiency, and accountability in court systems (e.g., Hammergren 1998; Prillaman 2000).

From these broad approaches have emerged many of the questions addressed in the current wave of postauthoritarian judicial literature. The works reviewed here go beyond the quotidian practicality of the judicial reform literature to examine the broader political and social

implications of the institutionalization and evolution of judicial systems. At their root lies the recognition that the political role of the courts is one of the thorniest questions facing new democracies and scholars alike: despite the relative inattention to their role, courts are institutions whose construction, structure and culture have concrete effects on the pace of economic, social, and political change. Understanding how courts structure, wield, and expand their power is the common thread in the diverse body of work reviewed here.

Yet aside from sporadic and often timid policy interventions in Brazil, Costa Rica, Colombia, and occasionally Mexico and Chile, courts in Latin America don't always seem to have much overt political power. Is it premature, therefore, to focus on the political role of the region's courts, especially when many issues surrounding their day-to-day performance remain unresolved, and most Latin American democracies remain weakly rooted?

The books reviewed here suggest not. Understanding the political role of judicial systems may be fundamental to understanding "the enormous gap separating the ideal of a democratically institutionalized judicial system and the reality of judicial practice in Latin America" (Dodson 2002, 201). Prior to democratization, authoritarian regimes often maintained a constrained role for the courts, providing a stilted form of law under authoritarianism. Even when operating under such constraints, the courts played an essential political role in upholding and sanctioning government behavior, and providing a framework of legality that was especially important to the legitimation of bureaucratic authoritarian regimes. There are few signs that as democracies mature, the role of courts will become any less political, given the judiciary's role as a key delineator of the rules, and hence, of the incentives and constraints that constrain other key government institutions.

The books reviewed here fall into three broad categories which structure the remainder of this essay. Mirow and French address the history of law and legal systems, giving credence to the notion that law has long had significant political impacts across both authoritarian and democratic regimes through its influence on, and reflection of, the structure and organization of society. The edited volumes by Gloppen et al. and by Mainwaring and Welna focus on the role of the region's courts as a check on other branches of government and as providers of the ephemeral good of accountability. Finally, two studies of Argentina, using very different methodologies, analyze the manner by which judicial power is created and expanded.

LAW AND THE CONSTRUCTION OF POWER

Mirow's *Latin American Law* is a useful starting point, given its convenient compilation of sources and comprehensive overview of the role

of law in the region. In seeking to bring private law into Spanish America's history, Mirow divides his work into three roughly parallel sections on the colonial period, the nineteenth century independence era, and the twentieth century. This account supports the notion that private law has structured human relations and the strength of factions in society throughout Latin America history—under Aztec, Spanish, and postindependence rulers, all of whom used the law as an essential tool of social control. Although they were strongly disliked, lawyers were central to this task, and Mirow notes that one of Columbus's first requests was for an *abogado* to be sent from Castile (39).

Throughout, Mirow reflects the continuing influence of Karst and Rosenn's 1975 portrayal of the "idealism, paternalism, legalism, formalism, and lack of penetration" of Latin American law. Mirow finds a "wide gap between the law as written and the law as practiced," and notes that over time the rules intended to instill impartiality have been subverted from all directions, including through corruption. Likewise, the broader effects of colonial law foretell many modern accounts: the description of the illegal building of "large estates through the seizure of unused, unclaimed, or Indian land"(63) echoes contemporary accounts of the steady deforestation of the Amazon; patrimonialist law that "disabled those it sought to protect" (60) continues to be evident in much Latin American legislation; and unrealistic restrictions on trade or social behavior continue to contribute to weak adherence to the law, with the telling detail that in the seventeenth and eighteenth centuries even religious houses served as "distributing centers for contraband goods" (71). The crown was routinely forced to adjust the law to reality as its normative foundation was subverted from below. But even when imposed arbitrarily from above, changes in the law had direct repercussions in colonial society, as when tragic new laws on slave ships shifted from "measurement based on *piezas* to tonnage" (79), increasing the brutality of the trade.

Not surprisingly, given its sweep of more than five centuries, this work suffers from some over-generalizations, a problem that is particularly apparent in the section on modern Latin America, where the growing political and economic differences within the region blur the overall conclusions. Nonetheless, Mirow provides historical grounding for two arguments present throughout the works reviewed here.

The first is that the typical Latin American judiciary has long been politically subordinate to the executive, requiring it to adopt special strategies that limit the "scope of judicial action" and enable it to be "perceived as a 'good technician'" (193). But even when the judiciary has been institutionally weak or subservient, it has played a major role in the construction and legitimation of social and political power. In part this is because the private law has proved more advanced, more

structured, and more respected than public law: despite political turmoil, "the sectors dependent on private law—property owners, commercial enterprises, miners, growers, and traders—have been able to function with little disturbance"(240).

A related argument is that the gap between "el derecho y el hecho" partly results from reforms that "were a poor match to the societal, religious, economic, and commercial needs of the country."(142) Considerable idealism in the drafting of social laws has been unreflected, and thus undermined, by societal norms and structure. Business law, however, has often been more realistic, perhaps because it is founded in genuine business mobilization for reform: after independence, it was "not by accident" that the process of codification began with "the provisions dealing with the inheritance and succession of property," (98) and business always seemed one step ahead, with commercial codes often being written before civil codes (100). Even in the twentieth century, Mirow notes that "[s]ome critics warn that the general trend in judicial reform is commercialization rather than democratization" (175).

French's *Drowning in Laws* contrasts greatly with Mirow's history, both because of his extensive field research, and more importantly, because of French's bottom-up focus on the manner by which social power structures the Brazilian labor law and the labor law system in turn has influenced labor consciousness. French argues cogently that "law is a particularly powerful locus for discourse that comes to be shared across and between lines of socioeconomic and role differentiation"(xi).

But law means different things to different people. Tracing the history of the *Consolidação das Leis do Trabalho* (CLT), the elaborately regulated labor code systematized under Vargas's Estado Novo dictatorship in 1943, French explores the considerable controversy engendered by its origins in the opportunistic paternalism of Vargas's dictatorship. He highlights the conflict between the sincere "adherence [of the lawyers that created the CLT] to the juridical concept of legal *tutela* (tutelage or protection)" (22), and the false promises it contained for workers—"a generosity akin to fraud" (41). Through a lengthy analysis of the scholarly controversy generated by Vargas-era mythologizing of the labor law, French argues that rather than a grant by a benevolent state, the labor law initiatives were a conscious effort by a weak state to structure and organize "the urban working class to vanquish the government's powerful and by no means resigned or defeated enemies" (38).

Throughout, French is clearly sympathetic to workers, and provides evidence of the open contempt of industrialists for labor law, the weakness of unions, and the undermining of labor rules by corruption and labor court bias, which together produced "what can only be called justice at a discount" (45). His focus turns, as a result, to the manner by which workers and trade unionists worked to make the imaginary ideal

of the law into reality, and ends with great hope in the election of former union leader Luis Inácio "Lula" da Silva as president. But this optimism seems oddly misplaced in light of French's depiction of the weak historical links between the law and informal norms in courts, business and society, which when combined with the traditional strength of business groups, have permitted considerable slippage from the realization of the legal ideal.

HORIZONTAL EXCHANGE AND THE JUDICIARY

Despite hopeful notes, these two histories of Latin American law provide a discouraging picture of the partiality of law and its perpetuation of the power of some societal groups over decades (French) or centuries (Mirow). Can powerful political and social forces, and their reflections in the state, be contained? How should accountability be structured in nascent democracies so as to ensure checks on power and promote more deep-seated, even egalitarian, democracy? This—broadly speaking—is the subject of the two edited collections by Gloppen et al. and Mainwaring and Welna.

The most important conceptual thread linking both volumes emerges from Beatriz Magaloni's lucid argument (in Mainwaring and Welna) distinguishing between two dilemmas that are frequently conflated in the ubiquitous use of the term 'rule of law': "Madisonian-like dilemmas or the establishment of limits to the state's ability to predate upon citizens' rights, and Hobbesian-like dilemmas or protection of individuals' rights against encroachments by other private agents" (269). The bulk of the two collections emphasize the Madisonian dilemma. While this leaves aside the vexingly complex issue of personal security and focuses more on the role of courts in constructing and applying their power, it suggests that a useful distinction can be made between the region's democracies on the Madisonian dimension alone, between countries that have *relatively* well-developed government institutions and *relatively* strong judicial branches—such as Brazil, Chile, and Colombia—and those that are unable to challenge the government effectively, as in much of Central America or the Andean region. Perhaps more importantly, several of the authors hold out hope that construction of Madisonian guarantees may deepen respect for the broader rule of law, including its Hobbesian dimension.

Gloppen et al. note that accountability holding by well-functioning independent courts requires that they ensure "transparency," which makes power-holders accountable; "answerability," which forces officials to exercise power within the limits of their mandate; and "controllability," the imposition of checks on officials who overstep their power. The central question uniting the essays in this collection, which draw

from both Latin American and African experience, is how to ensure that the courts develop this "accountability function."

The majority of the essays focus on judicial review as a form of ensuring accountability. In a typically insightful essay that sets the tone for the volume, Shapiro cautions against excessive optimism about judicial review's potential contributions to democratic consolidation: not only have high courts in developed democracies not always succeeded in influencing policy, but they have often been forced to make choices between fights they can win and those they cannot, so as to live to fight another day. The U.S. Supreme Court clearly has chosen its battles carefully: in federalism cases, the Court has "placed itself on the side of the winners," while in separation of powers cases where political controversy is greater, it has "been almost entirely a spectator" (7–8). In a third area, individual rights, Shapiro notes that it took the Court more than 130 years before it had built up sufficient support to confer rights in the mid-twentieth century and even then it had to make tradeoffs: "ultimately, it actually gave up protecting reds at the cost of protecting blacks" (12).

Walking this tightrope between expanding rights and preserving judicial power is the key challenge facing courts in new democracies. Roux's essay on South Africa is particularly innovative, illustrating how the high court has exploited the "discretionary gaps" in legal rules to expand its institutional strength. The absence of a political question doctrine on the American model—also largely missing in Latin American courts—forces the court both to "*avoid* deciding issues that might bring it into conflict with the political branches, and to *take on* politically useful issues that might not present themselves for decision again" (95). Several essays argue, however, that the courts may be able to build their power more effectively through small-scale judicial action than through conflictual constitutional review. Uprimny, for example, notes the difference between the 'dramatic justice' of the Colombia constitutional court's intervention in policy and the greater importance citizens attach to resolving the problems of everyday 'routine justice' (66).

There are some regrettable factual errors in the collection: the direct action of unconstitutionality in Brazil cannot be presented in *any* court (173), but is restricted to specific actors pleading before the Supreme Federal Tribunal; reform in Brazil since the writing of the Constitution has largely been opposed by lower court judges rather than high court judges (176), who in fact largely supported the most recent reform; and concrete review should not be conflated with a posteriori review (73), as they are distinct concepts.

But these are minor errors, especially in light of the volume's overall contribution in setting a realistic tone about the prospects of establishing courts as accountability holders. Widner's delightful history of U.S.

courts highlights the notion that reform is likely to be an arduous and long-term proposition, measured in decades rather than years. It is unrealistic, furthermore, to expect courts to break out of the gates in the post-transition period furiously seeking to enforce accountability on the other branches of government. Gargarella's essay on Argentina makes the disconcerting argument that "judges have no good incentives to do things like defend democracy or protect disadvantaged minorities" (194); such checks are costly, and run up against the more cautious and rational pursuit of judicial power. As a result, "a certain degree of political independence and the possession of bureaucratic facilities are necessary but not sufficient conditions for ensuring democratic justice" (195).

Mainwaring and Welna's volume broadens the conceptual focus, addressing courts as only one of a group of political and societal actors which jointly provide accountability. Mainwaring's introduction places the concept of accountability—"about as muddled as concepts get" (5)—in the broader framework of the interaction between various political institutions to ensure the public good of accountability, including both oversight and sanctioning functions.

Contributions by Guillermo O'Donnell, Charles Kenney and Erika Moreno et al. emphasize the interaction between accountability institutions in a relationship of "mutual control" in which "de facto or de jure [agencies] take into account the jurisdiction, the decisions, and the preferences of other agencies" (35). Despite this consensus, and even as the essays clearly speak to each other, the authors vie over the meanings and implications of various forms of accountability: although they agree "that horizontal accountability is about controlling the actions of state agents . . . [t]he subjects, means, and scope of horizontal accountability are . . . disputed" (Kenney, 57). But the debates raised here, and the insight that the ongoing interaction between various institutions (including the courts) is essential to constructing accountability, will surely become a mainstay of the growing literature on accountability in Latin America.

The remainder of the book extends various notions of accountability to institutions that go far beyond the courts, even as the judiciary remains at center stage. Sadek and Cavalcanti note how the prosecutors in the highly independent Brazilian Ministério Público are essential to activating the courts, but that the judiciary has also "acted to curb potential excesses" by activist prosecutors (220). In an insightful essay, Morgenstern and Manzetti seek to understand the puzzle of weak Argentine legislative oversight through comparison with the U.S. historical experience, and find that "the [Argentine] Supreme Court's inability or unwillingness to address executive abuse is a final factor contributing to the weakness of legislative oversight"(161). The overall logic as

it applies to the judiciary is that courts cannot and do not operate in a vacuum: without strengthening other institutions, it is panglossian to expect the courts to develop independently as democratic accountability holders; likewise, well-functioning courts will contribute to the democratic evolution of other institutions and society.

In sum, the good of democratic accountability requires much more than just courts. But public support for courts and the construction of judicial authority—in tandem with the development of a broader network of institutions including society, prosecutors, auditors, and elected officials—is an essential foundation for the construction of "democratic accountability." How courts build such authority is the focus of Helmke and Chavez's studies of Argentina, both of which convincingly claim to be using comparative political science methodologies, although they could hardly be more different in method or conclusion.

THE CONSTRUCTION OF JUDICIAL POWER IN ARGENTINA

How do courts gain independent power? Chavez's inquiry into the Argentine courts looks at what factors external to the courts permit judicial idependence to emerge, and thus, enable courts to check other branches of government. Although Chavez over-ambitiously terms these checks the "rule of law"—neglecting the Hobbesian elements of "personal security against decentralized encroachments" mentioned by Magaloni, or personal adherence by citizens to the law—her exploration of the interaction between the separation of powers and the role of courts over nearly a century and a half is elegant.

Chavez's detailed overview of the development of the "rule of law" emphasizes the importance of the dispersal of economic assets and the intensity of political contestation in the construction of an independent judiciary. While this is not a particularly new argument, its application not only at the federal level, but also within Argentina's individual provinces, is particularly revealing. Too little comparative research, especially in Latin America, focuses on lower courts. Chavez's in-depth qualitative approach, drawing on more than 200 interviews, illustrates the reality that provincial patterns of rule of law may be quite different from the federal, and may therefore contribute to different sub-national forms of democracy. This study—and especially the enticing concluding comparison of Huey Long's Louisiana and Rodríguez Sáa's San Luis—suggests that further work on the differences among sub-national judicial power within countries may be as revealing as the predominant focus of scholars on comparing national high courts across countries.

This book's origins in a political science dissertation occasionally lend it a dogmatic tone, but on the whole it is a very thought-provoking work. Chavez's useful measures of judicial subordination and strong

narrative generate an ambitious future research agenda. Among the questions raised, one wonders how lasting, and how immutable, is the influence of courts once court power has been constructed? How would transitions in the opposite direction, from independent to subservient courts, unfold in countries or provinces whose courts may already have achieved some degree of independence? A second question is raised by Chavez herself, who notes La Pampa and Cordoba's experiences as exceptions to her argument, suggesting that many other factors may be at work in the evolution of judicial power. Finally, drawing on Smulovitz and Peruzzotti's analysis (in the Mainwaring and Welna volume) of popular reactions to criminal events, one wonders how shorter-term social upheaval may enhance or weaken court power in even the most entrenched one-party governments.

Helmke turns many of the separation of power assumptions on their head, arguing that it is the Argentine Supreme Court's very *lack* of independence that leads justices to check the government, with a special tendency to act independently at the end of presidential terms. Precisely because they lack independence, she argues, judges seek to curry favor with future administrations, and therefore turn against incumbent governments toward the end of their terms, even though this frequently means they may be biting the hand that nominated them. Helmke's description and test of this "strategic defection" hypothesis is gracefully constructed on a foundation of statistical methods, game theory, and analytical narrative spanning court decisions during the military, Alfonsín, and Menem presidencies between 1976 and 2000.

The notion that judges may behave strategically is well-argued and the method is innovative, but the broader implications are less clear. Chavez (25, fn. 60) criticizes Helmke's quantitative measures of judicial independence for what they exclude and oversimplify, and the issue of corruption also lurks mightily in the shadows, but two other doubts arise. The first is that it is not clear by what rationality judges discount a nebulous future threat against them as being equally as dangerous as the very real potential threats from an incumbent government, however weak. And while the threat of impeachment by the government that appointed them may be low, there is no guarantee that future governments will be aware of, and grateful for, a judge's late-term signals. Nor is there much of an explanation for why incumbent politicians do not see through their judges' double-dealing and act equally rationally to counter it.

Second, it is not clear how widely the notion of "strategic defection" can be applied, either beyond Argentina's borders or over a broader sweep of Argentine history. The periods of strategic defection analyzed here are notable moments of change resulting from the transition to democracy and a hyperinflationary crisis, both of which weakened the

executive's hand. Furthermore, defection seems to require an unstable democracy, but not too unstable a democracy, as illustrated by the rapid turnover in both executives and justices since Menem left office. These doubts aside, however, Helmke's work is a useful reminder that the construction of court power may be undermined by current events as well as the career strategies of individual judges, and that some judicial contributions to democratization—such as the checking of powerful governments—may come about for reasons that have little to do with judges' normative commitment to democracy.

CONCLUSIONS

There is still considerable work to be done in the area of judicial reform, including greater evaluation of the impact of past reforms (as Sieder forcefully notes in the Gloppen et al. volume). But the works reviewed here suggest that considerable gains for the study of democratization may also come from explicating the broader role of the judiciary as a political institution seeking to preserve and on occasion expand its power. As in the reform literature, there are complications in lumping the region's courts together: some countries are still dealing with the significant fallout from peace accords; corruption varies across countries and among different levels of court systems; and there are significant differences between the depth and degree of the Hobbesian and Madisonian challenges facing different courts across both national and sub-national boundaries.

Nonetheless, the works reviewed here illustrate the significant role courts play in Latin American development through their direct influence in the political system, their effect on the relative strength and strategic positioning of political and economic actors, and their interaction with other institutions in the provision of accountability. In contrast to legalistic accounts that depict apolitical judges and judicial neutrality, it is clear from these books that the distribution of power in Latin American societies is shaped in significant ways by law, legal institutions, and the strategic considerations of the judges, lawyers, prosecutors, governments, and citizens that use the courts.

These works point to the many different factors which contribute to building court power. These may include factors entirely external to the courts, such as the degree of business mobilization for legal change, executive branch strategies for disarming entrenched elites, the preexisting degree of concentration of economic and political power, or societal mobilization, among others. But they may also arise from decisions internal to the judiciary, including purposeful tactics aimed at increasing court power, be it by various forms of constitutional review (Shapiro, Roux), through longer patterns of quotidian administrative

decisions (Uprimny), or via more elaborate strategies such as strategic defection (Helmke).

The challenge scholars will face in future research will be to integrate these nuanced views of the courts' effects with practical measures that might reconcile courts' origins in unequal societies, and their unelected roots, with their role in providing the highly complex good of a "democratic rule of law." The works reviewed here raise the bar by framing a new research agenda focused on the construction of judicial legitimacy and the expansion of the judiciary's role as an accountability holder, while nonetheless recognizing the courts' potential as significant and partial political actors in their own right.

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