

LAW AND COURTS' IMPACT ON DEVELOPMENT AND DEMOCRATIZATION

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I. INTRODUCTION

WHAT is the power of law and courts? Can they influence the emergence or quality of democracy? Can they redress an unequal distribution of social burdens? Academic

II. FROM MACRO VARIABLES TO MICRO FOUNDATIONS

Does economic growth and development depend on the existence of law, or does development produce a demand for law and institutions? Can law have an impact in authoritarian contexts or is democracy a precondition of such impact?

Study of the relationships among law, development, and democracy is characterized by controversies about the nature and causal direction of their connections. Variations in the character of these relationships are associated with changes in the understanding of their causal linkage, with changes in the definition of development, and with changes in the value ascribed to democracy and development as social goals. While, in certain periods, law has been considered a necessary condition for the achievement of economic growth, development, and democracy, in others, law was understood to be an obstacle to development. When development was defined restrictively as economic growth and was preferred over democracy, concerns about law and its benefits had a secondary character since it was believed that rule of law would follow eventually. On the other hand, when democracy was considered a necessary condition for economic growth and development, worries centered on the conditions that could make the rule of law flourish, on the extent of law's impact, and on the types of changes law can bring about. In recent times, questions have also been raised about the ability of legal mobilization to democratize authoritarian environments (Moustafa, 2007; Barros, 2002; El-Ghobashy, 2008; Diamant et al., 2005); and, in third-wave democracies, there have been debates about the ability of laws to enhance the quality of these democracies. Recent discussions have particularly focused on the capacity of law to increase equality, to modify the distribution of rights and social burdens, and on the impact transitional-justice¹ procedures have on the human-rights indicators of emerging democratic regimes (Sikkink and Walling, 2007; Gargarella et al., 2006).

Debates focus on the conceptual underpinnings of causal relations, of normative arguments, and on the interpretation of ambiguous empirical results. Discussions about the relationship between economic growth and democracy involve two different issues: the degree of association between these two variables and the causal mechanism that explains that association (Przeworski et al., 2000; Boix and Stokes, 2003). In regard to the causal connection, some authors argue that for the rule of law to flourish, economic growth has to come first; while others contend that law

¹ Transitional justice refers to the legal and non-legal responses used in recently established democracies to address systematic abuses of human rights committed by former dictatorial regimes (Elster, 2004; Sikkink and Walling, 2007).

is a necessary condition for the expansion of economic growth and development. Two justifications are cited for the first position. First, in order for economic growth to occur, "modernizing" elites need to carry out some unpopular and unpopular measures that cannot be implemented if the rule of law limits the governing elite's use of power. Second, the extreme social and political inequalities associated with underdevelopment prevent the establishment of successful and sustainable legal restrictions capable of controlling powerful actors. Thus, unless "benevolent authoritarian" (sic) elites can carry out development programs in an unrestricted fashion, the expected social differentiation that modernization theory associates with economic growth will not take place, with the result that neither rule of law nor development will flourish.

This position is contested by authors who argue that underdevelopment is associated with "unrule" of law and that "unrule" of law reproduces underdevelopment. From this other perspective, lack of legal rules leads to underdevelopment because it prevents the existence of predictable and stable signals needed by economic agents in deciding whether to make investments. Thus, until those rules are established and consolidated, economic growth and development cannot take place. Stable legal systems are necessary for growth and development because they minimize transaction costs associated with arbitrary rule. Consequently, rule of law must come first and is a precondition for economic growth and for eventual changes in the distribution of social burdens.

Those who contend that the rule of law is not a precondition note that its absence did not prevent the economic modernization and development of China, the USSR, and the Southeastern Asian countries, or of Brazil before its democratic transition. On the other hand, those who contend that it is a precondition note that "per capita incomes grow faster in democracies," that "poor people are much more likely to be ruled by dictators," and that democracy does not reduce the rate of investment in poor countries (Przeworski et al., 2000).

Recent comparative empirical evidence shows that the linkage between rule of law and development is complex (Przeworski et al., 2000; Boix, 2003). Przeworski et al. argue, for example, that economic growth, development, and democracy are related to intervening variables, such as differentials in population growth between authoritarian and democratic regimes, rather than being explainable by a direct causal relationship between law and development. Boix, on the other hand, asserts that the connection between development and democracy is related to changes in tax structures and income distribution that result from development. Even though Przeworski et al. report that they "did not find a shred of evidence that democracy needs to be sacrificed on the altar of development," they also noted that "at least in regard to the growth of total economies, political regimes are not what matters." It is worthwhile asking then, whether rule of law, although not necessarily associated with economic growth, is related to improvement in human well-being (e.g., declining death rates and infant mortality, and increasing life expectancy and school enrollment)?

According to Macguire (1999) changes in well-being indicators are related to the distribution of the social and political actors' organizational capacities rather than to the nature of political regimes. He contends that since the ability to exert pressure is unequally distributed and depends on organizational capacities, only organized actors—trade unions, business associations or political parties—are able to enhance their material well-being. This means that regardless of the political regime, organized actors will do better than non-organized actors. However, it also follows that in democracies organized actors will do even better because democracies provide them with more favorable opportunities to demand and protect their rights.

These findings highlight that analysis of the impact of law and courts on democracy and development must consider the legal, political and social conditions that enable the production of effects. As classical legal sociologists were well aware, the impact of law cannot be understood independently of the social reality in which the law works. Although there is nothing radically new in this perspective, the renewed recognition of the social and political determinants reminds us that outcomes do not follow from the autonomous existence of laws but from conditioned social interactions. While actors' endowments (e.g., organization, money) condition their ability to use laws and courts as social tools, political, institutional and economic scenarios affect which actors have access to legal institutions, the way judiciaries decide as well as the implementation of those decisions.

These findings also show that to understand how laws and courts produce effects, research needs to move from macro relationships to the examination of micro or medium level factors. As I will discuss in section IV, contingent medium and micro level institutional and social conditions rather than macro causal relationships explain differences in the performance and outcomes of laws and courts. Thus, exactly what those conditions are, and why and how they produce effects is the central focus of the discussion that follows. This approach demystifies the ability of law to produce changes autonomously, but it also acknowledges its distinctiveness as a social institution characterized by mandatory, enforceable commands.

III. WHAT EFFECTS AND HOW TO MEASURE THEM?

What are the impacts of law and how can they be measured? Assessments of the effects of laws on democracy and development have usually focused on changes in specific social indicators such as poverty levels, distribution of rights, or of public goods such as health, education, or justice. In some studies, results did not show

significant improvements, leading certain authors to dismiss the relevance of litigation as an instrument for social reform. For example, Rosenberg (1991) shows that ten years after *Brown v. Board of Education*, the percentage of black school children attending mixed schools in the Deep South states had not significantly increased; he attributed the changes that eventually came starting in the mid-1960s to a combination of increased political support for ending school segregation, penalties for non-compliance imposed by statutes, and the creation of the necessary administrative capacities for enforcement. In other words, while a narrow interpretation of his findings leads to the conclusion that judicial action is irrelevant as a vehicle of change, a broader interpretation concludes that the impact of such action depends on its relationship with the political and institutional environment. Other analysts, such as Galanter (1983), have warned that evaluations of impacts should consider not only the narrow and direct effects of laws and court decisions but also their radiating consequences: that is, how their workings diffuse into other issues and arenas and how they alter the resources available for negotiating other conflicts. The implication is that the study of impact should include not only an assessment of direct gains but also of the changes in the opportunity structure for claim-making, in the ways in which results diffuse into other types of issues, and in the ideological orientation of judicial responses to claims.

Studies of impact have also distinguished between the direct and indirect effects of law. Direct effects include the number of cases decided in favor of plaintiffs, the gains accrued by them or the percentage of the population affected by a legal decision. Indirect effects comprise, among other things, the establishment of precedents that spur claim-making regarding other issues, public scrutiny mechanisms for rights enforcement, and what might be labeled educational outcomes such as judicial and public awareness of rights. However, it is not always clear how to distinguish between direct and indirect effects: how to evaluate, for example, situations in which direct plaintiffs lose but those losses spur political reactions that lead to winning in other policy arenas? Furthermore, how does one evaluate these impacts when studies also show that losing in the short run can become a powerful strategic tool to activate involvement of other actors, which might lead to the achievement of direct gains in other arenas. In Latin America, for example, losing in human rights trials in domestic courts allowed plaintiffs to take their cases onto international courts where the cases received a more sympathetic reception. Similar trajectories were observed in the Mexican and Colombian mortgage crises where initial losses in the courts led, first, to political turmoil and then to legislative changes (Grammont, 2001; Uprimny Yepes, 2007). An ongoing study evaluating the effects of health-rights litigation highlights another problem related to the evaluation of impact: the unintended distributive consequences of litigation success (Wilson, 2009). The country studies in this project show that in spite of the positive direct effects, litigation success has led to reallocation of resources in inequitable and inefficient ways and reoriented policy goals in ways that undermine collective priorities (i.e. forcing concentration

of health budgets on curative rather than preventive policies, on high-tech treatment rather than on basic assistance). These examples show that narrow evaluations of impact could result not only in incomplete but also in erroneous assessments of the outcomes achieved.

Discussions of law's effects become, then, a methodological debate about adequate indicators and places where law's workings can be observed. Given that laws can have immediate but also wider effects, indicators must be multiple and complex. Evaluation of immediate effects concentrates on tangible changes such as the modification of the ethnic composition of schools in a particular district, or in the number of individuals that receive a particular state-provided drug, or on the effects the provision of a drug has on the mortality rate of a certain population. Evaluation of the wider effects requires assessment of radiating consequences, such as changes in legislation, unintended changes in associated policies (COHRE, 2003) or modifications in the agenda. For example, when Colombian courts accepted that health demands could be understood as human rights claims, petitions requesting public funding for new drugs and treatments increased. The resulting expansion of health spending challenged the state's ability to fulfill other public obligations and a legislative reform regulating the provision of health services had to be approved (Yamin and Parra-Vera, 2009). Evaluations also need to consider that since outcomes of laws and court decisions take time to become evident or can be achieved "by losing," the adoption of a narrow perspective may result in inaccurate conclusions.

Another problem confronted in the evaluation of impact relates to the availability and reliability of judicial statistics. Galanter noted that until recently this was an important obstacle even in developed countries such as the United States where "what courts and litigants and lawyers were actually doing was only dimly known" (Galanter, 2006), and it continues to be so in underdeveloped countries. Lack of information has not only obvious consequences on the quality and specificity of judicial policy-making, it also prevents adequate evaluation of the consequences of laws and court decisions and conditions the type of research that can be done. Indeed, because in most Third World countries, comprehensive, disaggregated judicial statistics are generally unavailable, systematic empirical legal research about the impact of laws has mainly taken the form of case studies or has concentrated on major decisions by apex courts (COHRE 2003; Gargarella et al., 2006; Coomans, 2006; Langford, 2008). Lack of systematic, disaggregated, and reliable information about sentences, caseloads, and the implementation of judicial decisions, which has hindered quantitative research, has also limited the study of lower courts' behavior and comparisons within and across countries. In this regard, Linn Hamnergren (2002) has shown that in Latin America inadequate and unreliable statistical information has produced not only erroneous evaluations of performance but also misguided policy recommendations. Due to poor record keeping in the courtroom and poorly maintained judicial archives, statistical information about the courts is inadequate, creating serious problems for designing samples that might produce better

information. The information available has at best produced "partial snapshots" of national situations; it is inadequate for any type of more sophisticated or comparative studies. Data tend to be limited to a few years and a few jurisdictions, and do not cover the same indicators across countries or districts.

Such informational inadequacies have also impaired some recent attempts to measure impact using, for instance, the formula designed by Gauri and Brinks (2008: 327) to evaluate the effects of legalization. Their own description of the formula and of problems they faced in finding data raises doubts about the utility of the indicator. The weakness of the judicial statistics has led researchers interested in carrying out systematic empirical studies to laboriously build their own data bases (see Helmke, 2004; Gauri and Brinks, 2008; Uprimny Yepes, 2007). In spite of these commendable efforts, the nature of the data sets limits the ability to pursue comparative analysis across countries, issues, and times. However, as the next sections show, researchers building their own, specially designed data sets have produced some useful analyses of specific conditions that foster or hinder the impact of laws and courts. Although informational difficulties have limited the comparability and time frame of these studies, results have revealed the complex nature of the interactions that make laws and courts work.

IV. HOW IMPACT COMES ABOUT: INTERACTIONS AND CONTINGENT OUTCOMES

The impact of laws depends on political and social conditions and on the way laws are applied by the courts. But what are the contextual conditions that constitute the relevant intervening variables? How do they influence the emergence of claims, judicial decisions, enforcement, and in turn, the impact of law on development and democracy? This section examines the interaction of laws with three contextual variables: a) the structure and competitiveness of political systems, b) the structure and performance of the judiciary, and c) the organizational endowments of the social or political actors, such as social and labor movements, that use the law. This list could have included other contextual factors, such as colonial legacies or legal traditions. However, for reasons that I explain below, this Chapter does not analyze all of the possible factors. The goal of this section is multiple: to show how and why these selected conditions affect impact and to speculate, based on the findings of empirical research, about some additional developments that might follow from the relationships between law and these three variables.

A. Structure and competitiveness of political systems

The competitiveness and structure of political systems affect the ability to pursue legal actions, to adjust to legal changes, and to enforce judicial decisions. Studies have considered the impact of the following political factors: (i) the democratic or autocratic character of the political regime; (ii) the federal or centralized character of the political structure; (iii) the degree of political competitiveness; (iv) the state's administrative and fiscal capacities; and (v) the extent and type of constitutionalization of rights and international treaties.

(i) It is usually assumed that the impact of law is greater in democratic contexts than in autocratic ones. Democratic regimes limit authority's arbitrary actions, increase citizens' opportunities to organize and to pursue legal claims, create the conditions for independent judicial decisions, and give voters the opportunity to oversee enforcement of those decisions. However, studies have also shown that laws and courts can have an impact in authoritarian regimes. In authoritarian contexts, actors use the courts and the rhetoric of rights to expose the illegitimacy of authoritarian governments and decisions and use international courts to expand the scope of conflicts. Studies focused on Chile, Argentina, Egypt, and China have described the democratizing effects of these uses of laws and courts in authoritarian contexts (Barros, 2002; Ginsburg and Moustafa, 2008; El-Ghobashy, 2008; Acuña and Smulovitz, 1997; Groisman, 1983). Thus, although democracy is generally associated with the function of law as a protective or transformative tool, research has shown that such effects can also be found in autocratic systems.

(ii) The federal or unitary character of the political structure also produces ambiguous results. Research on federal countries indicates that the simultaneous existence of diverse and local judicial structures results in the uneven achievement and enforcement of legal outcomes. Since the production and enforcement of legal outcomes depend on the specific institutional, legal, and social endowments found in each district, legal outcomes end up being important in some districts but not in others. Federalism is associated with inconsistent results because the "translation" of federal laws into local norms varies but also because local, legal, and political conditions enable compliance in some districts and preclude them in others. Laws and courts can produce unequal effects in unitary political systems in so far as the distribution of state capacities, actors' resources and support structures also vary in this type of system. However, in federal countries variations tend to be more intense because the autonomy of provincial governments results in unequal "translations" of the normative contents of federal laws and in unequal mechanisms for their enforcement. Thus, differences among districts tend to be more significant than in unitary states because what can be claimed and what is enforced also differ. In a federal state such as Brazil, research has shown that the achievements of social-economic litigation and the interventions of the *Ministerio Público* vary between Northeastern and Southern States (Hoffmann and Bentes, 2003; Arantes Bastos, 2003). Similar results

are found in another federal country such as India, where public interest litigation (PIL) has led to different outcomes between Bihar and other states (Gauri, 2009). Thus, although the federal or centralized character of a polity does not necessarily determine the likelihood of achieving results, federal countries show greater variation in the distribution of rights due to differences in the definition of the protected rights and in the enforcement policies among districts (Epp, 1990; Riddell, 2004; Smith, 2005).

(iii) Degree of political competitiveness is another factor that influences people's ability to pursue legal actions, the judiciary's decision-making process, and the enforcement of legal decisions. Analyses of the effects of political competitiveness also show contested results. Some authors note that since high competitiveness diminishes powerful actors' ability to control results, it ends up fostering judicial independence. These outcomes build confidence in the judiciary and encourage legal mobilization to redress the distribution of rights. In competitive scenarios nobody is certain who will win, leading all parties to be interested in preserving the impartiality of the arbiter and in preventing future encroachments on their rights. Rebecca Bill Chavez's research (2003) showed that differences in political competitiveness in two Argentinean provinces determined variations in judicial autonomy and in the achievement of outcomes. While in one province lack of political competition allowed the governor to subordinate the judiciary and to dismantle sources of countervailing power, in a neighbouring province, competition among three parties bolstered checks on executive power and created incentives for all parties to support a system of checks and balances. Perez Liñan and Castagnola (2008) found similar results regarding the impact of competitiveness on judicial appointments. Their study shows that when inter-party competition is high, executives develop a meaningful system of checks and balances including an independent judiciary, and that when one party controls the government for prolonged periods of time, executives control judicial appointments and removals in a way intended to preserve their own power.

In contrast, other authors report that lack of political competition can have a surprising effect: it can promote legal mobilization. They contend that when winning in the political arena is precluded, legal claims become the only political tool available. McIntosh (1983) highlighted this paradoxical effect of lack of competitiveness. He argues that when traditional political participation and competition are restricted, legal mobilization becomes *the* alternative form of political participation and courts an additional arena. Studies about the use of legal mobilization in authoritarian contexts seem to confirm his finding (Groisman, 1987; Barros, 2002; El-Ghobashy, 2008; Giles and Lancaster, 1989). It follows, then, that competitiveness levels may have multiple and distinct effects. While high competition may increase judicial independence and the ability of the courts to produce results, low political competition may increase the use of law as a political tool. The first argument highlights the effects of competition on the outcomes of law, and the second

its impact on the propensity to use the law. Both results have consequences for democracy and development. High competition promotes the protection of rights and is likely to affect the distribution of social burdens, while low competition appears to expand legal mobilization by increasing the number of actors turning to the law.

(iv) The state's implementation capacities influence the impact of laws and courts on democracy and development because they determine whether and how legal decisions are enforced and thus affect the strategic use actors make of the law. State implementation capacities depend on the supply of bureaucratic resources such as the human capital of administrative agencies or the coercive capacities of police forces. State implementation capacities also depend on the availability of fiscal resources, on the number of agencies that intervene in enforcement, and on the centralized or decentralized character of state bureaucracies. Acknowledgment of the relevance of implementation capacities highlights the fact that impacts do not flow automatically from the content of laws or courts decisions. Without enforcement capacities, laws and judicial decisions can become irrelevant. Even if a judiciary considers claims and issues decisions about them, and even if the power configuration is favorable, enforcement will only follow if appropriate bureaucratic capacities and fiscal resources are available. Availability of administrative and fiscal resources can affect the likelihood of enforcement and influence the substantive content of the decisions. Knowledge about bureaucratic and fiscal capacities informs actors about the potential efficacy of their actions, and informs judges about the costs of making controversial decisions. When judges know their decisions will not be implemented because bureaucratic capacities are low, they also know that it is likely that the fiscal consequences of their decisions will be irrelevant. If that is the case, judges playing for popular support are prone to decide in favor of plaintiffs since they can anticipate that the cost of their decision will be immaterial. Similar developments can be expected, in hierarchically organized judiciaries, when judges know their decisions will be automatically appealed. In those situations lower court judges may feel free to advance controversial decisions because they can expect that appellate courts will block enforcement or because they may want to displace responsibility for unpopular decisions to higher courts.

The increasing number of proceedings seeking the enforcement of sentences achieved in public interest litigation (PIL) illustrates how weak state capacities and scarce fiscal resources can water down the impact of laws and court decisions. Weak state capacities have been critical in the Latin American case where, as Lynn Hammergren noted (2002; see also Gauri and Brinks, 2008), winning does little good because enforcement is problematic. Lack of fiscal resources has also effectively negated some well known and praised judicial decisions, and impaired the ability of law to affect the distribution of public goods. In 2000, for example, the South African Constitutional Court established that the government had not met its obligation to provide adequate housing for residents of the Grotboom informal

settlement and held that it had to implement a program to provide housing for those living in intolerable situations. Analyses of the Grootboom case indicate that difficulties in coordination among different bureaucratic agencies, lack of human resources, and insufficient fiscal resources to ensure implementation at the local level have led to a lack of compliance with the decision (Wickeri, 2004; Pillay, 2002). In other words, if bureaucratic capacities and fiscal resources are weak, court decisions become irrelevant and lack impact. Thus, evaluations of impact need to include an appraisal of their availability.

Gauri and Brinks (2008) have additionally noted that knowledge about the availability of fiscal resources also influences the types of claims actors advance. Their study of social rights litigation shows that when actors know fiscal resources are insufficient, claims tend to target private actors or to request the regulation of public services. In contrast, when actors estimate that fiscal resources are available, claims concentrate on the state and demand for the direct provision of goods and services. Thus, availability of fiscal resources determines not only the state ability to enforce decisions but also the target and type of claims that actors advance. In turn, both the orientation of claims and the degree of compliance with decisions determine the type of influence laws and courts may have on development and democracy.

(v) The extent and type of constitutionalization of rights and international treaties also influence the effects of law and courts on democracy and development. After 1945, some constitutions expanded the charter of protected rights, others modified the number and standing of the actors authorized to advance claims related to rights, and still others gave constitutional status to international human rights treaties. These changes created opportunities for litigation on new matters and led to the juridification of conflicts previously solved through political processes. They placed the justice system within the reach of public interest advocacy organizations and expanded the types of rights enforceable through the courts. In addition, constitutionalization of international treaties expanded the types of actors that could oversee and demand enforcement of rights and gave international courts authority over certain domestic legal disputes.

The crisis of the welfare state and the resulting shrinkage in the provision of services has made evident the impact of constitutionalization of rights. Studies have shown the increased use of these new tools to confront unfavorable scenarios (Fix Fierro, 2004; Sousa Santos, 1996). In India, for example, the Constitution allowed the central and state governments to make special provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. These constitutional reservations led to the creation of compensatory discrimination programs that included benefits, such as jobs and places in professional schools for members of these groups. Analysis of the Indian case demonstrated that, in spite of their shortcomings, constitutional reservations succeeded in getting members of the beneficiary groups

into government employment and in increasing their presence in the legislature (Galanter, 1984). Important impacts have also been noted in Costa Rica, where the expansion of constitutionally protected rights and of the actors authorized to advance rights claims significantly increased the number of cases considered by the Constitutional Court. More specifically, a claim of rights was used to compel public health authorities to make AIDS treatment publicly available, resulting in an 80% reduction of AIDS mortality (Gauri and Brinks, 2008; Wilson and Rodríguez Cordero, 2006). Similar increases in rights claims have been reported in Colombia, South Africa, Brazil, Bangladesh, and Argentina; in all of these countries constitutionalization of social rights has led to increased litigation over provision of health-related services and to changes in policy orientations (Gargarella et al., 2006).

Finally, it is worth mentioning two other consequences of the recent constitutionalization of rights. Some authors argue that the constitutionalization of rights communicates to judges changes in prevailing political orientations and signals the policy areas where decisions will confront fewer obstacles and find greater political support. When judges know where and when jurisprudential innovations will be less costly, changes in the ideological orientation of their decisions become more likely (Gauri and Brinks, 2008). Other studies have shown that constitutionalization of international human rights treaties provides actors with an additional legal vehicle for claiming rights and increases the prospects for compliance. For example, claims made before the Inter-American Human Rights Court have led to the reopening of human rights trials that had been terminated by local amnesties and to decisions demanding the implementation of housing, health or education rights (Langford, 2008). Thus, while there are still debates regarding the extent of the impact of the constitutionalization of new rights, its relevance is not disputed.

B. The structure and performance of the judiciary

Those who assume that the impact of laws depends on their content, application or interpretation concentrate their research on the effects that the structure and performance of the judiciary has in producing rights-enforcing legal decisions. Since this perspective assumes laws and legal decisions are themselves sufficient to produce impacts, the main topics of the research agendas of people who make this assumption are how decisions are made and what factors affect those decisions. While I do not accept the assumption that laws and court decisions alone are sufficient to explain impact, I recognize that without laws and legal decisions the question of impact becomes irrelevant. Thus, how the structure of the judiciary affects actual decision-making and the content of the decision is an important topic for inquiry. Research on the legal decision-making process considers variables such as case-selection procedures, the role of precedent, ideological orientation of judges, selection procedures (and tenure) for judicial personnel, and

judges' strategic calculations. Studies have also examined issues related to the accessibility of courts, such as the quantity and geographical distribution of court facilities and judges; the economic cost and timeliness of legal processes; the availability of free legal assistance for criminal, civil and commercial claims; the type of actors authorized to make legal claims or to demand constitutional review; and the existence of language requirements or legal representation requirements.

What have these studies shown? Let's consider some findings. Regarding precedents, studies have shown that when legal precedents are not binding, the outcomes of cases may be uncertain. Some judges will follow precedents, while others will disregard them. Since results will vary according to the judges' ideology, their strategic calculations or the plaintiffs' ability to engage in repeated litigation, impact of court decisions will be uneven. In some cases, uncertainty about the likely outcome of cases will be perceived as an opportunity while in others as an additional cost. It will be an opportunity if actors understand that lack of mandatory precedents does not close their prospects of getting more favorable decisions from another judge in a new claim. It will become an additional cost if actors hoping to get a more favorable decision do not have resources to engage in repeated litigation.

The absence of a norm of binding precedent has another consequence. When previous decisions do not determine future ones, actors have incentives to keep re-litigating the issue, which can lead to increased numbers of cases and judicial congestion. While court congestion is usually attributed to a lack of judicial resources, research has shown that it can also result from deliberate and coordinated action by social actors seeking to force the intervention of political authorities. Analyses of the "corralito case" in Argentina and of the "Barzon case" in Mexico demonstrate that actors deliberately used the weakness of precedents to "play the congestion card" in order to force the intervention of political authorities (Smulovitz, 2006; Grammont, 2001). Thus, although a system of binding precedent minimizes transaction costs and reduces uncertainty—two results usually associated with democracy and development—empirical research also shows that actors can take advantage of the lack of binding precedents to develop and sustain sophisticated strategies.

Studies about the consequences of judicial tenure and selection procedures on the content of judicial decisions have a long tradition. In recent years, Lisa Hilbink (2007), Gretchen Helmke (2004), and Santiago Basabe Serrano (2009) have analyzed the impact of these factors in several Latin American cases. Hilbink, for example, shows the relevance of such institutional factors to Chilean judges' decisions. She notes that procedures giving the Court almost complete control of the selection of its own membership enables the Court to discipline and ideologically control lower tribunals and their decisions. On the other hand, Helmke's analysis of the Argentinean Supreme Court illustrates that when judges' term in office is uncertain, strategic calculations affect the content of their decisions. She shows that in the absence of guaranteed tenure, and in order to avoid being ousted by a succeeding government, judges tend to be loyal to the current administration unless a change in power seems likely,

in which case they may rule against the incumbent administration. Judges' strategic calculations about the strength of the government in office and about their chances of being ousted affect the pro- or anti-government content of their rulings. In her view, judges' strategic calculations rather than institutional factors have a greater effect in the content of decisions. Basabe Serrano's study of judges' behavior in Ecuador shows a different and surprising connection between tenure and the content of court decisions. According to this study, in highly unstable contexts the best strategy for judges is to vote according to their previous ideological preferences. Since judges know that they may be ousted anyway, ideological sincerity appears as the best strategy to maintain or improve their reputation, which can benefit them when they return to their former activities. These studies show that both institutional and strategic considerations can affect the content of judicial decisions. However, the conditions determining when each of these variables influences the content of judicial decisions remain to be established. From the perspective of potential litigants this information is relevant both for timing claims in order to maximize the chance of success and for deciding when to pay attention to the appointment process.

A court's ability to control its docket can also influence the content of legal decisions and thus potential litigants' ability to obtain desired results through legal action. Under a system of discretionary jurisdiction, the courts determine which disputes merit legal responses and when. Beyond its administrative benefits, docket control gives courts a powerful political instrument. It allows them to decide and signal which public policy issues will get legal attention and gives them an instrument they can strategically use in their relationship with the executive and (other) potential litigants. In unstable political systems docket control can also be used to show compliance or to threaten hostile executives with unfavorable decisions. When relationships between the executive and judicial branch are friendly, courts can decide to concentrate on those cases that do not threaten executive policies and leave conflicting issues for future treatment. On the other hand, when relationships are tense, courts can decide to pursue cases executives would have preferred to delay. The history of the legal conflict about savings deposits that took place in Argentina from 2001 to 2006 illustrates how the courts' management of the docket was used as a political tool in a power conflict between the courts and the executive (Herrero, 2007).

The accessibility of courts is also critical when evaluating the effects of laws and courts on democracy and development. The various access factors mentioned determine not only who but also what type of topics get to the courts. For example, when public interest organizations are not entitled to initiate claims on behalf of other actors, it is less likely that topics such as human rights, environmental protection, or lack of access to public services due to poverty discrimination² will become subjects of legal

² For example, ACIJ, an Argentinean public interest advocacy organization, advanced several claims based on inequalities in the provision of public services (education, transportation, and garbage collection) as between high and low income neighborhoods. They accused the Argentinean State of discriminating in the provision of these public services against lower income populations. The

disputes. Accessibility factors also affect enforcement of judicial decisions. They influence, for instance, whether it is easy to initiate proceedings seeking the enforcement of judgments. Studies about the implementation of court decisions indicate that public bureaucracies only start to comply with those rulings after proceedings to enforce judgments are initiated (Smulovitz, 2005). Thus, it follows that when barriers to initiating these types of proceedings are high, reluctant public bureaucracies can compromise the enforcement of legal decisions and thus neutralize their impact.

Discussions about the impact of accessibility factors are not new and their relevance is usually not contested. In recent times, research has also drawn attention to some lesser-known micro-level institutions that affect access. For example, a comparative analysis of the outcomes of human rights trials across the world suggests the significance that the existence of the "private prosecutor in criminal cases" (*querellante adhesivo o asociado*)³ has in the prosecution of certain public criminal cases. The study shows that when this institution is in place, human rights trials are more common and last longer. Sikkink and Walling (2007) demonstrate that, when public prosecutors are reluctant to act, this micro-institution is particularly relevant. They show that when plaintiffs confront official resistance, this institution allows victims to initiate, sustain and oversee trials. We also know that the institution has another consequence: countries that held transitional justice trials for long periods of time, a development associated among other things with the existence of the "querellante adhesivo," had a higher improvement in their human rights conditions than countries that held them for shorter periods or that did not have them at all. These studies show, then, that in addition to the usual accessibility variables, research should also analyze the impact that these rarely observed micro-legal institutions have in the achievement of outcomes.

C. The socio-economic and organizational endowments of the actors

The social and organizational resources of the participating actors constitute a third set of variables affecting the ability to pursue legal claims, the content of the

courts favorably considered these claims and ordered the government to mend the identified asymmetries in future budget allocations.

³ There is no adequate English translation for the phrase "querellante adhesivo o asociado." Some authors translate it as "auxiliary prosecutor" and others as "private prosecutor in criminal cases." The institution allows the victim the right to recourse before the courts as a party in the criminal proceedings, or as a participant in judicial investigation preparatory to pursuing penal sanctions. It allows, for example, victims of human rights violations to present a case even if the public prosecutor is not willing to pursue the case. "Private prosecution" enhances access because it is assumed that victims' direct participation increases the effective protection of their rights and diminishes the likelihood of reluctance—due to conflict of interests—on the part of public prosecutors in cases involving State crimes.

decisions, and the enforcement of those decisions. To influence outcomes, actors need certain basic endowments such as minimum levels of economic and educational resources. While basic material resources provide the wherewithal actors need to exercise choice, organizational resources and educational attainments provide technical and informational opportunities. However, these endowments do not ensure that actors will organize or that they will have resources to transform wants into entitlements. In addition, actors need to coordinate their actions (organizational resources) and need access to support structures. Especially for weak actors, support structures provide sophisticated knowledge of the law and legal processes plus access to specialists that can assist them in their claims. In other words, they need organizations dedicated to litigating rights claims, willing and competent lawyers, and the financial resources needed to pursue claims in courts. Favorable political conditions and low institutional thresholds for legal claiming can be irrelevant if weak actors lack the support structures needed to work within the judicial system. Epp's work (1998) showed how differences in the density of support structures in the United States, UK, Canada, and India explained variations in the pursuit of results through the courts (Epp, 1998). The recent growth of public interest litigation (PIL) in India and in Latin America has been facilitated by the development of local support structures and by increases in economic support from donors (USAID, Ford Foundation, Open Society, National Endowment for Democracy, British Council) to organizations pursuing this type of strategy (see McClymont and Golub, 2000; Sikkink and Keck, 1998)

Although the relevance of support structures for the likelihood of law's impact is not disputed, studies indicate that their specific consequences vary. For example, the relevance of support structures diminishes when courts do not have docket control, since less effort is needed to ensure the sustainability of claims or to call the court's attention to a specific claim. Support structures are also less relevant in countries where the private bar is well developed and individual claiming is more frequent. The significance of support structures is also related to the presence of legislation authorizing collective claims (Gauri and Brinks, 2008). Underprivileged individuals need organizations acting on their behalf in order to pursue collective claims, and where such claims are possible, support structures are more important. While geographic variables affect the distribution of claims and outcomes, sources of funding affects the litigation agenda and strategy. In 1983, for example, the Ford Foundation announced that future grants in the South American region were to be assigned to research centers, universities, and bar associations that promoted research, and actions on topics related to administration of justice and non-politically motivated rights violations such as police violence, denial of access to public information and of due process, and gender discrimination. Given this change in the donor's priorities some existing human rights organizations shifted their strategies while newly created groups adopted these issues as part of their own agenda. The use of laws and courts to address non-politically motivated rights

violations became the prevalent activity of local advocacy organizations (Fruhling, 2000). Sources also note that the reorientation of financial support to associations promoting the use of public interest litigation was critical for the development of this legal strategy as a political tool (Sikkink and Keck, 1998). Thus, even though the relevance of support structures is not disputed, research shows that the scope and type of impact of their activities is, in turn, conditioned by the selection of their agenda and strategies.

The impact of law and courts on democracy and development is also conditioned by variables such as colonial legacies or legal traditions (civil or common law). Some have argued that colonial domination affects the type of development and degree of autonomy of courts, and that the independence of judiciaries and their ability to protect political freedom and property rights are related to the legal tradition inherited from a former colonial power (see La Porta et al., 1997). Research has shown, however, that the connection between these variables is complex. The impact of colonial rule varies because colonial legacy is not the same everywhere. It varies, for instance, according to the type of settlements colonizers established,⁴ the alliances set up between colonial rulers and local populations, and the ways in which colonial linkages were broken. Thus, although it is possible to trace the specific impact of colonial rule on the legal system of a particular country, understanding its impact depends on the specific arrangement of colonial rule found in each case rather than on having been under "colonial rule" (Acemoglu et al., 2001; Mahoney et al., 2006; Coatsworth, 2008). Recent empirical research has also questioned the distinctive impact of legal traditions (civil law and common law). A study comparing courts in twelve countries concludes that legal tradition is not a good predictor of the willingness and ability of superior courts to exercise accountability functions; and it also reconfirms previous observations about the blurring of the distinctions between the two traditions (Gargarella, 2010). While analyses of each of these traditions show that achievements in each of them exhibit important internal variations, comparisons between the two indicate that their workings appear to be converging. These findings thus raise questions about the relevance of the common law/civil law distinction for explaining variation in development and democracy.

⁴ Recent accounts of varying colonial experiences indicate that differences in local endowments at the time of colonization led to the establishment of different institutions that, in turn, had lingering effects in post-colonial times. Acemoglu et al. (2001) argue, for example, that when, due to population density or mortality risks, colonizers could not settle permanently, they set up extractive institutions. These institutions allowed them to manipulate local labor and resources from afar, but did not lead to the settlement of population in the colonies or to the creation of local institutions of government. The post-colonial results were unequal societies and less institutionalized political systems. On the other hand, when conditions allowed the creation of permanent settlements, colonizers shaped the local demographics and institutions. Settlers had an interest in establishing a system of rights to protect their lives and properties and this led to the establishment of production enhancing institutions that tended to persist in post-colonial times.

V. FINAL REMARKS

The main lesson of recent empirical research regarding the impact of laws and courts on economic and political development is that outcomes are contingent and depend on interactions with political and social conditions. Laws and court decisions are important catalysts for change but neither is a sufficient condition. Even though the general and mandatory character of law defines law's peculiar and unique features as a social institution, its impact depends on the conditions within which it operates. Analysis of the relationships between these conditions and the impact of law and courts shows that similar laws can have different impacts. These variations suggest that although the specific content of laws cannot be disregarded, impacts must be understood as contingent on historically and geographically contextualized variables. The inclusion of the sociological and political variables in the analysis reflects the reality that legal conflicts do not take place in the void. Moreover, understanding the workings of law and courts requires that we consider all stages of the legal process (initiating claims, adjudication of those claims, and enforcement of the decisions).

The definition and measurement of the impact of laws and courts continue to be the subject of disagreements and uncertainties. The main problem regarding the definition of impact relates to its reach. The distinction between direct and indirect impacts does not solve the problem since it does not provide clear lines of demarcation that differentiate among types of effects, and does not readily identify the set of possible indirect impacts that needs to be considered. These difficulties have led to ambiguous assessments about the actual scope of impacts. While studies using a narrow definition probably result in incomplete pictures of the effects, broader definitions make it difficult to establish whether impacts might have resulted from some other cause and thus raise questions about the relevance of laws and courts in the production of indirect impacts. Furthermore, if impacts radiate across institutions and policy areas, throughout time, and if they can be even achieved by losing, it is unclear how to establish when laws do *not* produce results.

In spite of these difficulties, research has shown that law and courts have had some positive results. The interaction of law with social, legal, and political conditions has modified the mortality rates of some populations (Gauri and Brinks, 2008), induced executive agencies to advance public policies that had been detected by the "judicial radar," altered the negotiating resources available to parties, and provided actors with additional legitimating arguments. Studies also indicate that countries that held human rights trials for longer periods show greater average improvement in their human rights indicators than those that held them for fewer years or that did not have them at all (Sikkink and Walling, 2007). Thus, the question for future studies is not whether laws and courts can have an impact but what combinations and interactions among variables lead to the production of results.

Another difficulty that hinders evaluation of impact is related to the availability of adequate and systematic judicial information. Some countries do not produce information to track the progress of legal processes, others only report highly aggregated results or do not produce specific information regarding lower court decisions and still others do not collect judicial statistics at all. Problems include not only the lack of systematic data regarding basic judicial indicators, but also confidentiality restrictions that prevent access to information. Informational deficits impose different types of restrictions. Lack of disaggregated databases has led to the concentration of studies on apex courts, has prevented the study of impact, and has made comparative studies difficult or impossible to execute. Although researchers have designed innovative strategies to cope with some of these difficulties, such solutions do not substitute for good state-produced statistics. At least in underdeveloped countries, advancing the research agenda on the impact of law and courts on economic and political development requires the improvement (if not the creation) of systems for compiling and disseminating judicial statistics. Without reliable and systematic information, basic facts such as the scope, nature, and types of cases, and hence the impacts of those cases, cannot be established, and comparative studies will continue to be limited. Given the increased use of legal instruments as political tools, accurate and informed knowledge about their effects has become even more necessary.

Research has also highlighted different impacts that laws and courts have on the governability of political systems. Some studies emphasize the non-democratic political effects that arise when judges have the power to nullify decisions reflecting the preferences of political majorities. Other studies stress the democratic implications of laws and courts since they increase the number of tools for democratic participation. And still other studies note that laws and courts allow actors to initiate collective claims without coordinating actions with others. Regarding the impact of law and courts on governability, two primary claims have been advanced. First, laws and courts have a virtuous effect because they imply the use of institutional, legal, and non-violent instruments to advance demands. Second, laws and courts have troubling consequences because they move to the unelected judiciary debates that should be taking place in legislative or executive arenas. The main concern raised by this latter claim is that the judicial framing of disputes transforms outcomes into "trumps," and undermines the legitimacy of the decisions made by democratically chosen representatives. These perils cannot be totally dismissed. Research shows that the impact of laws and courts on governability can lead either to social disorder and maintenance of the status quo, or to more equalitarian distribution of goods and rights. In the end, however, the relevance of laws and courts depend on the complex, often changing dynamics of the context in which they are used.

In addition to information needs, the preceding pages identified areas and questions where future research needs to concentrate. Some questions relate to the impact

of laws and courts on the distribution of social burdens. What results do laws and courts actually produce? Do they lead to a more fair distribution of benefits or do they just increase the privileged access of organized actors? Other questions relate to the impact of litigation and laws on public policy. Does successful litigation reorient public policy in ways that leave the public's interests and the problems of unorganized actors unaddressed? Does successful litigation serve to reorient budget allocations in ways that endanger the provision of other public goods? In underdeveloped contexts, characterized by significant budget restrictions, how can public authorities deal with legal decisions that do not take into account economic or policy by-products? Other areas of inquiry relate to the interactions between laws, courts, and the political structure. As was noted previously the effects of laws and courts show significant variations across and within countries. Are these variations the result of insufficient state capacities, differences in political competitiveness, the ideology of the judges, or what?

The research agenda is vast and the social and political consequences of the potential findings could be extremely important. However, both academic studies and policy recommendations confront a pragmatic limitation: inadequate comparable country-based information. Beyond the negative consequences of this deficit for academic research, poor empirical information has and will lead to faulty policy decisions. The wave of judicial reforms that recently took place in many underdeveloped countries shows some of the consequences of these deficits. Policy-makers, unable to evaluate the magnitude, relevance, and urgency of the problems they were confronting reached decisions in a fog. Lack of adequate information not only strengthened unsubstantiated public beliefs about the workings of laws but also led, in many cases, to faulty policies.

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