
From Unresponsive to Responsive Judiciaries

The dictatorships and armed conflicts that ravaged Latin America in the second half of the twentieth century led to the torture, exile, murder, and forced disappearance of thousands of individuals. Victims' relatives, in many cases unaware of the fate of their loved ones, knocked on the doors of military barracks, filed habeas corpus petitions, risked their lives denouncing these crimes in the press, and endlessly navigated the complex world of courts in order to seek punishment for those responsible. The quest for truth and justice evolved into a tortuous and protracted battle, but these efforts sometimes paid off.

In July 1992, military officers raided a university outside Peru's capital city in one of their many attempts to disband illegal armed organizations. Gisela Ortíz never again saw her brother, who thus became one of the seventy thousand victims of the internal armed conflict. The authorities turned a blind eye to her requests for information, to the point that they even denied her brother's existence. Luis Enrique had not only disappeared; for the Peruvian state he had never been born. In April 2009, seventeen years later, the Peruvian Supreme Court found former President Fujimori responsible for mounting a repressive apparatus that carried out this and other crimes. Similarly, after Peru's democratic transition in 2000 dozens of other high-ranking military and police commanders were prosecuted and punished in a wave of trials that is still ongoing. According to Gisela, courts "made official a series of facts that everyone denied. Before that day I felt like a mad lady with a story that no one believed in. The judiciary finally validated our story... Today we can declare mission accomplished."¹

In April 2011, former police officer Luis Patti was found guilty of planning and executing the kidnapping and forced disappearance of several activists during Argentina's last military dictatorship. Until his arrest, Patti benefited from the amnesty laws passed in the late 1980s, and, as a

¹ Interview, Lima, 27 April 2010.

member of parliament, used his congressional immunity to escape prosecution. After the judges announced their decision, Manuel Gonçalves, the son of a victim, appeared outside the courtroom and declared: “This is the product of many efforts and struggles. . . . Our objective was to get to the day in which a court handed down this ruling. Patti . . . used our country’s institutions to preserve his impunity.”² This ruling is just one of more than four hundred prison sentences that have been handed down since the mid-2000s in what constitutes an unprecedented wave of prosecutions and trials.

The situation in Mexico is very different. Tita Radilla still sheds tears as she recalls the 1974 morning when army officers abducted her father, an activist from the state of Guerrero. She never heard from him again. For almost three decades Tita has been part of an organization that represents hundreds of victims of the dirty war, assisting them in their efforts to give testimony of the forced disappearances, torture, and sexual assaults perpetrated by the armed forces during the 1970s. In 2005, a special prosecutor appointed by President Fox filed her father’s case in the federal courts. The case moved back and forth between civilian and military jurisdictions, but like all the other cases investigated by the special prosecutor it was eventually shut down. As she put it, “We have no faith in state institutions. There is a total lack of will to investigate what happened to our victims.”³ After forty years, Tita and many others are still waiting for justice.

Despite the enduring suffering of people like Tita, over the last decade and a half, judges and prosecutors across Latin America have become central actors in efforts at strengthening democracy by punishing the brutality of past regimes (Olsen et al.; Sikkink 2011). Figure 1.1 shows the explosion of antiimpunity rulings handed down by Supreme and Constitutional Courts after the year 2000, which paved the way for justice by overturning amnesty laws and pardons, declaring the nonapplicability of statutory limitations, recognizing victims’ right to truth, or limiting the scope of military jurisdiction. As a result of these decisions, which relied heavily on international human rights law, courts throughout the region began to investigate – and in some notable cases, prosecute and punish – state agents responsible for human rights violations, thus putting an end to decades of judicial acquiescence. The magnitude of this shift in jurisprudential trends is remarkable not only because it took place years after the onset of the so-called third wave of democratization, but also because

² *Página 12*, 15 April 2011.

³ Tita Radilla, Interview, Mexico City, 23 July 2010.

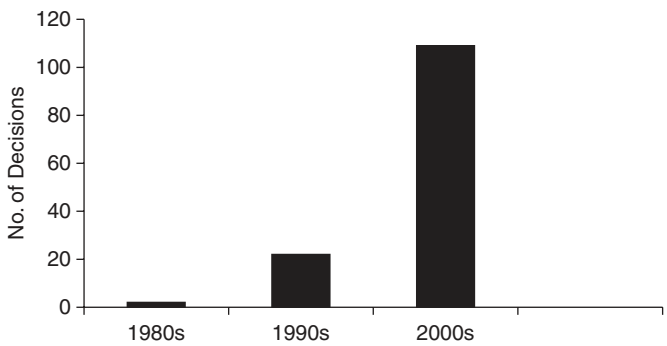


Figure 1.1. Number of Antiimpunity Rulings Handed Down by Latin American High Courts (1980–2010).

Source: DPLF (2010) and author’s data set. The figure includes rulings on cases of human rights violations by Supreme and Constitutional Courts. The rulings use international human rights law and humanitarian law to limit the application of amnesty laws or declare their unconstitutionality; modify procedural and substantive aspects of criminal legislation to meet international standards; recognize victims’ right to truth; and limit the jurisdiction of military courts. The data set was constructed using online public information systems, consulting with country experts, and reading the relevant legal literature. I am grateful to Ximena Medellín for facilitating some of the rulings.

prior to this explosion of judicial activism Latin American democracies put in place seemingly impenetrable impunity regimes.

During the 1980s democratic transition, Argentina took the first step in the direction of transitional justice by creating a truth commission and filing criminal charges against the leaders of the military juntas (Nino 1996). As a result of the civil-military tensions engendered by these initiatives, in the late 1980s and early 1990s there were important backlashes against transitional justice in the form of amnesty laws, presidential pardons, and the termination of all criminal procedures against perpetrators (Pion Berlin 1994, 1995, 1997; Acuña and Smulovitz 1997). Following the Argentine example, sixteen Latin American countries adopted amnesty laws to prevent criminal investigations that could potentially destabilize the political system (Sikkink and Walling 2007).⁴ Moreover, as the years

⁴ Some, like the one passed by the Peruvian congress in 1995, were blanket amnesties. Others contemplated exceptions. In Argentina the crimes of illegal abduction and trafficking of babies born in detention centers were excluded. In Guatemala, crimes against humanity were also excluded (Cassel 1996; Lessa and Payne 2012). For an analysis of amnesties around the world see Mallinder (2009).

passed, statutes of limitations began to run out for most of the crimes in question, barring criminal prosecutions. Consequently, even though the policies of transitional justice that had taken effect immediately after the waning of authoritarian regimes showed some degree of cross-country variation, by the mid-1990s there was a regionwide convergence toward impunity (Sikkink 2005).

As victims and their lawyers insisted on seeking redress for the violations in domestic and international courts, the institutionalization and legalization of impunity gave rise to heated legal debates (Teitel 1997; Lessa and Payne 2012). On one side were those who argued that international customary law, treaties signed and ratified by Latin American states before and after these violent episodes, and the jurisprudence of the Inter-American Court of Human Rights demanded that states treat human rights violations as serious international crimes subject to special judicial rules and procedures. According to this camp, when domestic actors invoke statutes of limitations or apply amnesties, they incur a violation of states' international duty to investigate and punish crimes against humanity. On the other side were those influenced by formalistic legal philosophies who argued that the passage of amnesty laws or pardons was a sovereign prerogative of presidents and congresses, and therefore courts had no place in questioning them. Moreover, invoking unwritten principles of customary international law or treaties signed after the perpetration of the crimes in order to apply special legal standards to these cases or define the crimes using extemporaneous criminal definitions would amount to a grave violation of due process.

The formalistic position was for decades the dominant one in Latin American judicial branches, generally leading courts to behave more as arbiters of procedure than as architects of fundamental rights (López Medina 2004; Couso 2010; Guzmán Dálbora 2010; Pásara 2010). Today the situation is very different, as judicial actors are more predisposed to make creative readings of the legal framework that afford citizens greater protections vis-à-vis the state (Nunes 2010; Rodríguez Garavito 2009). This is clearly seen in cases of organized state repression, in which customary and positive international law are recurrently invoked to define the crimes in ways that capture their historical significance, declare the unconstitutionality of amnesties and pardons, and limit the application of statutes of limitations, thus expanding the sphere of victims' rights. Moreover, innovative theories of criminal liability and investigative protocols first developed to address international crimes have been applied domestically to ascribe criminal responsibility to direct and indirect perpetrators (Roht-Arriaza

2015). Beginning in the late 1990s and especially in the 2000s, some Latin American judiciaries thus became a beacon of progress in the area of transitional justice.

Why did some judicial corporations evolve from unresponsive bureaucracies into suitable arenas for the advancement of rights claims, while others did not? In this book I compare the surge in prosecutions and prison sentences in Argentina and Peru with the failure of investigations and judicial proceedings in Mexico. I study the process that led judges and prosecutors in some countries to leave behind a formalistic legal orthodoxy strongly influenced by positivism, and embrace a new legal worldview grounded in the values of international human rights law. I show that this shift in the judicial imagination away from formalistic instincts and a narrow focus on domestic law constituted a necessary condition for the explosion of trials and convictions in the 2000s. In particular, my argument indicates that these bold and unprecedented jurisprudential steps became possible after litigants activated informal mechanisms of legal-ideational change inside judiciaries, and enhanced the technical capabilities of judges and prosecutors. These transformations in the norms, knowledge, and routines that underpin judicial decision making triggered effective judicial action in cases that were complex and idiosyncratic. By manufacturing a new logic of appropriate legal interpretation, litigants invested judges and prosecutors in investigations that required highly specialized knowledge and involved an unusual degree of juridical experimentation and numerous professional risks. Changes in legal preferences were also instrumental in motivating resistance against the pressures exerted by powerful presidents and soldiers adamantly opposed to the trials. In the absence of these shifts in legal visions, the impact of projustice pressures by local politicians, international institutions, and foreign governments was limited.

By exploring the microdynamics of norm and capabilities diffusion during the interactions among judges, prosecutors, and human rights lawyers, this book engages a series of theoretical questions about the nature of judicial power. In particular, I analyze the role that ideas about the law and received standards of legal praxis have in constraining or empowering judicial actors to become involved in thorny political territory. I emphasize that in order to understand changes in patterns of judicial decision making it is important to look beyond the degrees of freedom for action afforded by the surrounding political environment. We ought to recognize the role of internal norms of conduct and legal preferences, which can act as catalysts of bold and assertive judicial action in defiance of external political constraints. In so doing, the following pages explore the conditions under

which judicial branches acquire the technical capabilities and the political will to become powerful and effective players in salient political struggles.

The Argument in Brief

Understanding how judicial actors think about their professional duties and how they perceive the solutions available for the cases they receive is crucial to explain the wave of trials and prison sentences observed in some Latin American countries. To this end, this book uses insights derived from sociological institutionalism to develop a theory that emphasizes the bureaucratically embedded nature of judicial decision making (Hall and Taylor 1996). I argue that judicial behavior is processed within a complex organizational environment that instills among its members profession-specific norms and identities. These in turn lead to jurisprudential outcomes that reflect the institutionalization of “sticky” ideas about the law in courts’ routine practices (Smith 2008; Clayton and Gillman 1999; Hilbink 2007a; Couso 2010). These ideas or legal preferences bias judicial actors’ knowledge of the legal corpus at their disposal, trace the landscape of values underpinning their decisions, and define their understanding of their role in the political system, motivating them to take a more or less critical approach to decisions made by politicians. Qua norms governing professional praxis, legal preferences are accompanied by expectations about acceptable courses of action within the organization, and stable behavioral patterns (e.g., recurrent use of certain precedents, doctrines, evidentiary standards). Responses to external requests, threats, and incentives are filtered through this thick cultural lens, leading behavior to result less from individual judges’ opportunistic calculations regarding specific cases than from a shared understanding of what is the appropriate thing to do as members of the bench (March and Olsen 1984).

When confronted with the question of whether or not to investigate and prosecute human rights violations perpetrated in the distant past, most Latin American judges and prosecutors had to grapple with legal arguments that were out of sync with established legal preferences. For example, instead of dismissing these cases because of the expiration of statutes of limitations or the presence of laws barring prosecutions, as they would have normally done, judicial actors were asked to challenge the legal status quo by invoking international norms. Most of them were unfamiliar with these norms, as they had never featured prominently in judges and prosecutors’ decision making routines. To complicate matters further, once the cases were opened, judicial actors were put in charge of unprecedented

investigations. Although the bureaucratic instinct was to proceed as in regular criminal cases, many soon discovered the inadequacies of standard techniques to gather and evaluate the evidence. In the absence of knowledge about the whereabouts of victims or lacking access to documentation certifying the existence of clandestine repressive structures, judicial actors had to find the motivation to look for innovative ways to obtain information, weaving circumstantial evidence into convincing stories of individual criminal responsibility.

Overcoming these challenges required breaking with deeply ingrained institutional inertias. This was no small feat. Gaps in legal knowledge had to be filled and templates of juridical reasoning modified. In addition, judicial actors had to become invested in these cases in order to be willing to experiment with unorthodox legal arguments, go an extra mile when gathering evidence against soldiers and politicians, and risk their personal and professional integrity when handing down condemnatory rulings. In other words, the professional lens through which they perceived both the legal possibilities afforded by these cases and their institutional responsibility in transitional justice had to change. To the extent that this happened, judges and prosecutors became more willing and able to see viable legal pathways for truth and justice. This process involved the deinstitutionalization of historically dominant positivist/formalistic legal cultures, jealous of legal sovereignty and protective of conservative interests, and the entrenchment of a progressive juridical vision committed to the values of international human rights law. In addition to reshaping judicial actors' cognitive maps and awareness of certain enabling legal doctrines and instruments, this transformation modified their understanding of their professional mission as it relates to the ways they ought to conduct their duties and interpret the law in human rights cases.

Why did judges and prosecutors in some countries become committed to the cause of truth and justice? I argue that where human rights activists acknowledged the importance of traditional legal preferences as a clear blockage on the road to justice, and sought to tame the judiciary by turning themselves into agents of ideational change and capabilities diffusion, they managed to put criminals in jail. By taking seriously how judges and prosecutors think about these cases qua professionals of the law, litigants were able to design effective tactics of legal contention. Denouncing impunity in international forums, litigating abroad, or marching on the streets to put pressure on politicians would not suffice. They understood the importance of putting together professionalized teams of lawyers capable of introducing domestic judicial actors to new paradigms of rights-based

jurisprudence, and teaching them how to pursue the goals of truth and justice legitimately within the conventions and parameters of the legal field.

Savvy litigants realized they faced three types of judicial actors – committed, indifferent, and recalcitrant – leading them to deploy two main strategies in order to bring about this necessary ideational transformation, and galvanize a critical mass of judicial actors in favor of their cause. First, committed and indifferent judges and prosecutors were targeted with pedagogical interventions. These included the organization of seminars for judicial personnel, establishment of informal contacts before and during critical stages of the litigation process, and the circulation of academic documents in court. Litigants thus taught members of the judicial community complex and often unknown international juridical doctrines and protocols. In the process, NGOs disrupted bureaucratic inertia and manufactured a plausible legal framework for judicial actors to justify the appropriateness of their actions. The ideas circulated in these venues had a technical component; i.e., they served as roadmaps for action. But they also had a normative one, because they legitimized unusual courses of action. Second, activists sought the replacement of recalcitrant judicial actors who staunchly resisted changes in patterns of legal interpretation, as a result of their unwavering commitment to positivism or their complicity with the previous regime. By deploying naming and shaming tactics in order to force resignations, and by promoting impeachments, human rights litigants deepened the shift in the legal and political allegiances of the judiciary.

Domestic judicial strategies operated primarily as a permissive cause. Litigants fundamentally altered the scope of conceivable outcomes, making possible certain legal solutions that in the absence of these interventions were literally “unthinkable.” If doctrinal positions, technical skills, and professional commitments had remained unchanged, judicial actors would not have been able or willing to read constitutions or criminal codes in light of the greater protections afforded to victims by the international legal corpus. Moreover, these strategies marshalled a new logic of behavioral appropriateness within the legal field that catalyzed judicial collective action when the political and military establishments attacked pro-transitional justice outcomes. When litigants succeeded in institutionalizing a new set of standard practices, rekindling a shared vision of the role of the judiciary in processing rights claims, judicial actors incorporated a new professional mandate and set of values that they were willing to defend as a corporation. For example, presidents or soldiers who threatened judges or tried to contain transitional justice by invoking certain due

process norms encountered resistance when judicial actors found it professionally unacceptable to ignore the demands of international law.

Given what is generally at stake in judicial dockets, the reproduction or transformation of legal preferences is an eminently political process that involves a variety of social forces that struggle to entrench within judicial bureaucracies legal ideas compatible with their normative commitments (DiMaggio and Powell 1991; Gillman 1993, 2002, 2008). The judicial battles at the core of transitional justice processes in Latin America, which pitted human rights NGOs against the military and its allies, exemplify these attempts to preserve and transform dominant legal visions in order to promote political causes. The ideas and legal arguments espoused by both groups either constrained or expanded the avenues to justice. Precisely because judiciaries were the epicenter of colonization strategies by both camps, the theory I propose indicates that litigants' chances of success increased when (a) they deployed strategies of institutional change before their rivals; (b) pedagogical interventions were framed in such a way that they were perceived by judicial actors as authoritative and elicited feelings of cognitive discomfort; (c) litigants' efforts were systematic, across both jurisdictions and legal issue areas; and (d) litigants were able to combine persuasion and replacement strategies to engineer widespread and enduring value changes in the judiciary.

In sum, ambitious programs of criminal prosecutions require deep institutional transformations within judicial branches, which involve both legal learning and changes in professional values. In turn, these changes depend on external inputs that actively expand the cognitive maps of judges and prosecutors, shake up their problem-solving predispositions, and contest control over their normative commitments. Human rights activists and their lawyers can manufacture this exogenous shock, crafting a new judicial culture through pedagogical and replacement strategies.

Deepening Our Understanding of Human Rights Prosecutions in Latin America

This book tells the story of how human rights litigants removed important blockages inside the judiciary to achieve their goals. The argument zooms in on how legal preferences and their remodeling by activists shape judicial responses to state repression, and in so doing deepens our understanding of transitional justice processes in three ways.

First, the following pages shed light on the relationship between the success of litigation battles and the strength of political/military veto

players. It is often argued that these elites have the upper hand in deciding the fate of human rights prosecutions (Karl and Schmitter 1991; Zalaquett 1992; Pion-Berlin 1995, 1997). For example, according to Huntington (1991), the balance of power between the prodemocracy coalition and the authoritarian coalition at the time of transition determines whether or not there will be trials. In fact, the notion that “the victor tells the tale” squares well with several important cases of transitional justice across the globe (Nobles 2010).⁵ Even when the phenomenon proves much more dynamic, and trials are not forever conditioned by the power of former dictators during transitions (Olsen et al. 2010; Kim 2012; Lessa 2013),⁶ the general intuition about the role played by the stakeholders of power is still an important one (Lessa et al. 2014). Uninterested or ideologically opposed politicians can stall human rights prosecutions at any given point. By the same token, the rise to power of supportive presidents may revive the impetus for justice. In line with this view, some observers have attributed the recent wave of transitional justice in Latin America to the emergence of left-wing governments (Evans 2007; Karl 2007; Roehrig 2009).

However, by adding the legal preferences of judicial actors to the equation, it is possible to see that the goals and tactics of political and military actors need not overdetermine the outcome of these processes. In the same way as support from politicians or a weak military does not automatically translate into judicial victories, the presence of resourceful veto players does not necessarily lead to impunity. Judges and prosecutors can play an important role in blocking trials in otherwise favorable environments (due to technical incompetence, legal formalism, or recalcitrance). For

⁵ The trials in Tokyo and Nuremberg are obvious examples. Similarly, when the Greek junta left power after a military defeat in 1974, human rights abusers were quickly taken to court and most cases were resolved within two years (Alivizatos and Diamandouros 1997). By contrast, after the negotiated Spanish transition (1975–1977), no attempts were made to prosecute those involved in the crimes of Franco’s regime.

⁶ For example, in Chile and Uruguay amnesties passed before or during the transition have not been an obstacle to protracted struggles for justice. In Chile a few years after Pinochet left power some courts issued condemnatory rulings (Collins 2010). Initially, the Supreme Court overturned the rulings, but since 1997 it has granted many exceptions to the amnesty (Hilbink 2007a). In Uruguay, there were popular referenda on the question of whether or not to uphold the amnesty law, and in all instances the pro-transition justice camp lost. In the late 2000s, however, demands for justice were reactivated (Sikkink 2005; Lessa 2013). Important victories include a Supreme Court ruling in 2009 declaring the amnesty law unconstitutional, and a guilty verdict against former dictator Bordaberry in 2010. Finally, even in Brazil, where the issue of criminal accountability was absent from the political agenda in the aftermath of the 1985 transition, in the late 2000s prosecutors began to launch criminal investigations (see Chapter 6).