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978-0-521-87234-8 - The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law

Daniel M. Brinks

Excerpt

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## I

### Effectiveness and Inequality in the Legal System

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

Martin Luther King, Jr., Letter from the Birmingham Jail  
(April 16, 1963)

Ana lives in one of the vast poor suburbs of Buenos Aires. Her son was beaten to death after he allegedly punched a police officer. She says they were trying to teach him a lesson but things got out of hand. At least four policemen – and probably several more – locked him in a room and beat him with heavy sticks until they fractured his skull and he died. The policemen who killed him got promotions even after they were charged with the killing. At the trial, the prosecutor argued that they should be acquitted because they were just doing their job, subduing an unruly prisoner. The experts called by both the prosecution and the defense agreed.

As the law permits, Ana got some lawyers from an NGO to participate in the trial, as sort of private prosecutors. These lawyers work for free in cases like hers. They called their own witnesses and brought in experts, and argued that these policemen should not be set free after brutally beating an unarmed twenty-four year old and leaving him to die without medical attention. The NGO also organized demonstrations, bringing in many of Ana's neighbors to march in front of the courthouse throughout the trial. Afterwards, one of the judges privately confessed to Ana's lawyers that they had intended to acquit the defendants, but thought that if they did, the people might burn down the courthouse. So, instead, the judges imposed suspended sentences of no more than three years on each policeman. Ana says what really bothers her is that they won't spend a single day in prison.

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[More information](#)

After the trial, Ana joined the NGO and became an activist. She led marches, attended other trials, met with other parents who had lost children, and worked to call attention to all the young people who die at the hands of the police. On a Friday night some time later, Ana told me, her son-in-law was sitting in a neighborhood pub when the bartender said there was a phone call for him. The caller, who implied he was with the police, said, “You better start checking the morgues, because we bought your son a ticket to hell.” For nearly two days, Ana and her daughter and son-in-law, armed with a homemade, handwritten, habeas corpus petition, frantically searched for the young man, checking morgues and police stations. As it turned out, Ana’s grandson had gone out of town, knew nothing about any threat, and eventually returned home, to everyone’s nearly hysterical relief.

However, on the following day, a second phone call came in, on Ana’s brand new cell phone. The phone was so new that few of her friends knew that number. This time the message was clear, and it was for her: “Stop messing around with the police, or the next time your grandson won’t be coming home!” “No te metas con la cana. ¡Dejate de joder que la próxima vez va en serio!”

Ana asked me to protect her identity. Her daughter and son-in-law do not want anyone to go to the police or to the prosecutors to report the threat. They worry because it seems clear that the police know where their family members are at any given time, have access to their phone numbers, and could harm any one of them, but especially Ana’s grandson. They would like Ana to reduce her activities and become less visible. She’s determined to do what she can to make sure young people cannot be killed with impunity, but she’s worried about her family.<sup>1</sup>

The focus throughout this text is on courts and criminal prosecutions. But at its core this is a book about rights and the lack of rights. It is about those who in practice have rights and those who do not, regardless of what their constitution might say. It is about courts, judges, prosecutors, and investigative police – those who protect citizens from abuse and those who do not. It explores the social foundations for the effective assertion of rights, the political foundations for the effective judicial protection of rights, and the institutional mechanisms that impede or facilitate the process by which formal rights are made effective. The book has implications for our understanding of what produces higher quality democratic citizenship, a citizenship

<sup>1</sup> Author interview with Ana, Buenos Aires, Argentina, January 16, 2001. Ana is not her real name. Also based on interviews with Ana’s lawyers in November and December 2000 and on a review of documents relating to the case.

Cambridge University Press

978-0-521-87234-8 - The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law

Daniel M. Brinks

Excerpt

[More information](#)*Overcoming Resistance*

3

that comes closer to endowing all citizens with the full complement of rights guaranteed in constitutions and laws. The argument draws on and has implications for the literature on the relationship between law and politics, law and society, and law and democracy.

## A. OVERCOMING RESISTANCE

The starting point for much of the analysis is the simple idea that legal rights seek to re-shape the distribution of power in a society: they shift rights/freedoms and duties/constraints away from where the market or the distribution of coercive resources might otherwise deposit them.<sup>2</sup> New legal rights aspire to be, as Max Weber once said, “a source of power of which even the hitherto powerless might become possessed” (1978 [1921]: 666–67). As Weber’s own definition of power suggests, this implies assigning to those who are otherwise vulnerable to the unfettered will of another the capacity to carry out their own wishes *despite the resistance of the other*. When formal rights do indeed run in favor of the hitherto powerless, we should expect more resistance from the otherwise powerful. As these rights increasingly seek to change long-established patterns of domination and asymmetries of power, it will become increasingly difficult to up-end these relationships. This abstract idea becomes concrete in the details of many of the police killings I reviewed: the conflict often begins when the victim forcefully claims ownership of a (novel) right, and it ends with the ultimate negation of that right. Similarly, Ana’s demands that police be more accountable challenge the existing order of police-suspect relationships.

Even as it contemplates that lived law will continue to reflect social power, this approach presupposes a certain degree of autonomy for the written law. It assumes that legal rights might arise that do not reflect the distribution of economic or coercive resources or other sources of social power,<sup>3</sup> and thus that the law and the state that enforces it are more than simply a condensation of relations of power (see O’Donnell [2004] and before him, of course, Poulantzas [1978]). Democracy ostensibly has this goal: in theory it assigns (mediated) lawmaking power to everyone equally, regardless of

<sup>2</sup> Coase, for example, makes this redistributive nature of rights clear in his treatment of the problem of social cost (reprinted in Coase 1988), but it is not news to students of the law that a right in favor of one individual imposes correlative duties on others.

<sup>3</sup> For a comprehensive discussion of the sources of social power, see Mann (1993). For purposes of this discussion, suffice it to say that social power is importantly but not exclusively constituted by and reflected in the state and its law, and that some parts of the law may purport to assign power in a way that is negated by other parts of the law.

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Daniel M. Brinks

Excerpt

[More information](#)

wealth, social standing, the capacity to exercise lethal violence, or any other attribute beyond citizenship. A transition to democracy, therefore, can be expected to shift some measure of lawmaking power to new actors, producing new legal rights that clash with entrenched patterns of power.

Moreover, even when political influence perfectly reflects social power, new laws come about for a number of reasons unrelated to the “natural” distribution of power. Legislators as well as dictators very often enact laws that are meant to have more symbolic than literal effects. In many of the electoral democracies of the developing world, the commitment to universal citizenship rights is less than universally held. To put it broadly and imprecisely, especially but not only in the developing world, many laws and the institutions they conform have stronger ideational than material roots. These laws rest very lightly and uneasily on the surface of society.

The right examined in detail in this book, the right to be free from arbitrary police violence, is one of these “uneasy” rights. It seeks to upset long-standing relations of domination between the police, as representatives of the state, and ordinary citizens. It has its roots not necessarily in the distribution of economic or other resources but in the idea that, in a democracy, *everyone* is entitled to respectful treatment and due process of law, even those who have no social standing or choose to break the law and prey on their fellow citizens. It runs contrary to the normative expectations of many police forces, especially those that have long histories of violence and impunity like the police of Argentina and Brazil. Indeed, procedural limitations on police use of lethal violence even contradict the expectations of many of the people these limits are supposed to protect, as we will see. In this respect, this right is just one example among many: many core democratic rights, with their strong egalitarian bias, rest just as uneasily on the surface of deeply unequal societies.

To repeat, then, when law purports to change long-standing normative expectations or a deeply entrenched balance of power between the duty bearer and the rights holder (a balance sustained by many interconnected and mutually supporting resources) anyone purporting to exercise the right is likely to encounter strong resistance. But what form will that resistance take? If the original reasons for the law’s creation persist, it is unlikely that the formal structure will be abolished outright. It is much more likely that the right in question will suffer, as James Scott puts it, from everyday, prosaic forms of resistance – not, this time, on the part of the relatively powerless (Scott 1986: 29–30) but on the part of the relatively powerful and, therefore, twice as effective. We should expect such rights to die by “small arms fire”

Cambridge University Press

978-0-521-87234-8 - The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law

Daniel M. Brinks

Excerpt

[More information](#)*Overcoming Resistance*

5

(Scott 1986), in a thousand small ways, rather than by a frontal assault and institutional change.

An example should make this clear. The ordinary low-ranking police officer does not, in the overall scheme of Brazilian or Argentine society, wield a great deal of social power. The police institution as a whole wields much more power, but not enough, since the end of the authoritarian period, to formally suspend constitutional guarantees. Still, in any confrontation between an armed police officer and an ordinary shantytown resident or criminal suspect, it is clear where the “natural,” historical, pre-rights, pre-democracy (but state-supported) balance of power lies. It is in large measure the work of the legal system to change this balance of power, to moderate the behavior of those who exercise the state’s monopoly on the legitimate use of force. The legal system, then, becomes one arena in which the resistance of the new duty bearers is played out.<sup>4</sup> Since they cannot change the formal rules of the game, this resistance is likely to come in the form of many small acts of sabotage, aided and abetted by the police corporation, rather than in a grand gesture of legal reform to eliminate due process guarantees.

In Ana’s case, as we will see in later discussions of the Buenos Aires system, the initial trial of her son’s killers was frustrated by the police’s ability to sway judges and prosecutors in their direction, hide some information, and present expert witnesses to create an inaccurate picture of what took place. Ana was unable to completely overcome that resistance, despite the legal and political assistance of an NGO, and surely would have fared even worse without her lawyers. Her continuing claims were then suppressed by credible threats of violence against her family, threats backed by superior access to information about her and her loved ones’ whereabouts and the implicit ability to replicate the near impunity of the first trial. All of this takes place without a frontal challenge to the formal rights structure that has been in place since re-democratization.

This entails that formal rights in favor of the “hitherto powerless” must be backed by a constellation of other legal, economic, social, and political resources, sufficient to overcome that resistance. It should be clear by now that even purely negative rights require a substantial social investment in a

<sup>4</sup> Note that the legal system is not the only arena, as this book will make abundantly clear. The struggle also takes place in legislatures, within the police corporation itself, on the streets, in the media, and in many other places. The analysis here takes us to many of those places, although principally to show how they impinge on legal processes. In any event, although the legal system is only one arena, and a peculiar one at that, some of the lessons to be derived from analyzing it are relevant to the entire process of constituting effective rights.

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Daniel M. Brinks

Excerpt

[More information](#)

supportive framework of institutions (Holmes and Sunstein 1999). But the exercise of citizenship is not cost free for the individual even when such a framework exists. Rights bearers must have the resources to engage effectively with the best-laid supportive framework, including such expensive and scarce resources as transportation, knowledge of rights, access to lawyers and other professionals, free time, freedom from violent coercion, and, sometimes, social standing, a cultured accent, a Europeanized, non-indigenous appearance, and so on. Every legal system includes its own laundry list of the extra-judicial but very much “legal” resources that claimants must invest if they wish to effectively present a claim.<sup>5</sup> And once they get there, they must still overcome the resistance of those who oppose the claim. The more resistance the duty bearer exerts, the more resources the rights bearer will need.

Any society that seeks to extend universal effective citizenship, then, has a twofold task. Clearly, it is not enough to create a legal system that will equitably receive those claims of right that are brought to it and dispassionately decide them. It is necessary but not sufficient, then, to create efficient courts and to staff them with judges who understand the law and will enforce the rights inscribed in the legal system, along with all the other measures that legal reformers advocate. In addition, this society must endeavor to affirmatively endow rights bearers with the secondary, extra-judicial “legal” resources they need in order to engage the system and make an effective claim of right against the resistance of those who will oppose their claims. These resources range from education and income at the more general, agency-enhancing end of the spectrum to witness protection plans, free lawyers, and physically accessible courthouses at the more narrowly legal end. This second task requires, in short, sustained attention to what goes on outside the legal system itself, and in particular to the capabilities and resources of new rights bearers. As long as there is a severe imbalance between the legal resources of rights bearers and duty bearers, rights are likely to remain purely formal.

A society can ignore this imbalance altogether. It can simply pass universal rules and leave the rest up to private actions and resources, in effect pretending that the playing field is even. Anatole France’s irony reminds us that the perfect equality of a citizenship that ignores the material circumstances of particular citizens is a recipe for actual inequality: “Another source of pride,

<sup>5</sup> These are extra-legal resources in the sense that they are not usually legally prescribed as an element of the claim. They are in a very real sense “legal” resources, however, in that they are a prerequisite for effective engagement with the legal system.

Cambridge University Press

978-0-521-87234-8 - The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law

Daniel M. Brinks

Excerpt

[More information](#)*Overcoming Resistance*

7

to be a citizen! For the poor it consists in... laboring under the majestic equality of the laws, which prohibit the rich and the poor alike from sleeping under bridges, begging in the streets, and stealing bread" (France 1922 [1894]: 117–18 [my translation]). The impartial application of facially neutral laws, in a deeply unequal context, tends to produce severely unequal results.

Most legal systems today, however, include various mechanisms that seek to ameliorate stark formal equality and redress the imbalance. One way to do this is through the use of procedural devices: Brazil's *ação civil pública* or India's Public Interest Litigation empower various actors to bring claims that are in the public interest; private class actions accumulate many small claims into one large one to produce the economies of scale that the wealthy and the corporate enjoy almost as a matter of course; contingency fees alleviate the need to fund legal fees in advance of recovery. Many states also create organizations to provide institutional support for private actions to vindicate rights, such as state-funded lawyers and other support institutions. Alternatively, states may create the legal and political space for claimants to organize into interest-based organizations, such as rights NGOs, to support individual claims. All of these devices by and large leave the enforcement action in the hands of private individuals, with more or less assistance from the state.

Occasionally, however, a society will constitute the state as a directly interested party in any action to enforce the right in question. Regulatory instances are one example of this. Presumably, the U.S. Environmental Protection Agency exists to protect the collective right of American citizens to a clean environment, yet it is often the sole entity legally empowered to act in this respect. The most dramatic example of giving the state ownership of the enforcement action is when the state criminalizes the violation of a right. Brazil has criminalized racial discrimination, for example. In theory at least, this places the state's entire prosecutorial apparatus behind the right, relieving individuals of much of the burden of enforcement. At the same time, in many instances, this limits the original rights bearer's ability to participate in the assertion of the right, screening and reshaping the claims that can be brought pursuant to that right.

When state power is truly, in fact as well as in law, placed behind the right, vindication of that right depends less on private resources, and thus social and material inequalities are less likely to translate into legal outcome inequalities. When a society depends on private resources for rights enforcement, social inequality is significantly more likely to leave its imprint on the outcome of the struggle to make formal rights effective. This simple equation

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Daniel M. Brinks

Excerpt

[More information](#)

brings politics into the very center of the question of legal inequality. Politics (mostly) determines how the state will direct its resources – which claims are valued and which are not, who deserves state backing and who does not. As a result, politics and political inequalities (mostly) determine the extent to which socio-economic inequality will translate into legal inequality. Poverty matters, in part, because political decisions allow it to matter.

To test this general idea, I first reduce this abstract model of rights and their enforcement to a concrete instance, the prosecution of police officers who exceed limits on the use of lethal force. I show how legal outcomes in many systems follow predictable patterns based on the socio-economic and political resources the victims and their survivors can bring to bear. I then chronicle the everyday methods of resistance the police use in the struggle to avoid the duties imposed by these rights. I evaluate the imbalance of resources between claimants and the police, and the institutional and social mechanisms that might redress that imbalance in each of five South American cities. I show how the criminal justice system, in its ordinary configuration, has structural flaws that keep it from putting the full weight of the state behind claims of police misconduct and how, as a result, inequality springs from over-reliance on private resources. Finally, I demonstrate how politics, mediated by institutional mechanisms of appointment or promotion and discipline, affects the support given by state actors, including judges and prosecutors, to these rights.

More broadly, this book reveals how deeply embedded the legal system is in its social and political context, even when it is specifically designed to have considerable autonomy. That embeddedness is both vice and virtue. More embedding – that is, more numerous and more effective institutional ties between the legal system and society – makes the system aware of social needs, responsive to social reality, and open to information about the situations that come before it. It allows the legal order to evolve in harmony with its social, economic, and political order. At the same time, unless they are consciously designed otherwise, more often than not these social ties import social inequalities into the system and reinforce social hierarchies instead of promoting universal citizenship. On the one hand, then, the analysis in this book exposes the manifold mechanisms that cause legal outcomes to reflect deeper social structures more faithfully than they reflect the pattern of legal rights lightly etched onto the surface of society. On the other, it shows that establishing and nurturing the right institutional connections can facilitate the task of using legal rights to overcome social inequalities.

The prosecution of rights violations against the police is a good test of this model. Those whose rights are violated are typically, but not always,

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978-0-521-87234-8 - The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law

Daniel M. Brinks

Excerpt

[More information](#)*The Problem of Police Violence*

9

weak. In comparison, the police are typically strong, especially in relation to those left on the margins of the formal society and economy, and most especially when social concern for crime reaches a fever peak. The rights in question, while not newly minted, are ostensibly meant to change long-standing patterns of behavior that go as far back as the origins of the state in Latin America. The judicial response to police violence thus brings into sharp focus many of the issues that are common to other attempts to use law to change social relations of power.

If the model is correct, we should expect to see the successful prosecution of rights violations only in those places that have solved this power imbalance by enabling the victims of police violence to overcome that resistance. We should see little or no effectiveness where the imbalance affects the entire class of victims and there is little or no attempt to solve it: when the victims are poor, the police are strong, and there are neither institutional devices that allow claimants to effectively engage the legal system nor political incentives for state actors to pick up the challenge. We should see more inequality in the outcomes, and average results that are dependent on the average level of resources in the victim class, when the state attempts to solve the imbalance with solutions that remain inside the legal system, depending on claimants to engage state structures more or less on their own. This is true when judicial institutions are strong, but there is little political support for proactive state intervention. Finally, we should see the best results, with high effectiveness and low inequality, in those places where state actors are mobilized to affirmatively engage with these claims and claimants, placing the state fully behind rights enforcement as a matter of fact as well as of law. This last result should obtain when the political conditions strongly favor the prosecution of violent police misconduct.

## B. THE PROBLEM OF POLICE VIOLENCE

Legal protection from arbitrary killing by agents of the state is one of the most basic promises of the rule of law in a liberal democracy, and one of the promises of Latin America's transition back to democracy. The regimes that tortured and killed in the 1970s in countries like Argentina, Brazil, and Uruguay have been replaced with democratic regimes that hold elections and legally guarantee all the basic civil and human rights. Elected national leaders like Raul Alfonsín in Argentina and Fernando Henrique Cardoso in Brazil demonstrated a commitment to democracy and the protection of individual rights; others, such as Mário Covas in São Paulo, have done the same at the sub-national level. Argentina reformed its constitution in 1994 to grant

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Daniel M. Brinks

Excerpt

[More information](#)

constitutional status to international human rights treaties. Brazil drafted an entirely new constitution in 1988 that contains some of the most extensive protections of individual rights found in any constitution anywhere. And yet, in the darker corners of large cities and in remote rural areas, in the back rooms of police stations and in vacant lots, the promise that the law will protect individuals from state violence often rings hollow. With public safety as the justification, torture is the preferred method for extracting information, and criminal investigations sometimes begin and end with a bullet to the head.

In practice, then, many of the governments called into existence by the democratic transitions of two decades ago have a distinctively Hobbesian feel: in the name of protecting citizens from the depredations of fellow citizens, there are few if any restraints on the actions of the state, so that the hands of “that Man, or Assembly of men that hath the Sovereignty” remain “untied” (Hobbes 1964 [1651]: 122). Over the course of the 1990s, the police in the state of São Paulo, Brazil, killed more than seventy-five hundred people. In some years, the São Paulo police killed, on average, one person every six hours. Nor are São Paulo’s police the most violent. In Salvador da Bahia, in Northeastern Brazil, the per capita rate of police killings for a three-year period in the mid-nineties was three times higher than the rate in the worst years in São Paulo. Many other places show equally dismal results. In the second half of the decade, the police in Buenos Aires killed, on a population-adjusted basis, just as often as the police in São Paulo. There is information to suggest that in Venezuela, which is not a part of this study, the police killed twice as often as in Salvador.<sup>6</sup>

The phenomenon, however, is not universal; there are variations even within countries. In the Argentine province of Córdoba and in Uruguay rates of killing are very much lower. Uruguay has the lowest rates, reporting two or three deaths per year at the hands of the police, and Córdoba follows with about thirty killings per year. Adjusted for population levels, Uruguay’s rate is about 0.1 per hundred thousand, and Córdoba’s about 0.3, compared to more than 6 per hundred thousand for Salvador. Still, in many countries police violence is an everyday occurrence, and the phenomenon seems to be growing.

<sup>6</sup> The 2001 U.S. State Department Human Rights Report for Venezuela notes the government’s claim that 2,000 criminals had been shot by the police in the first eight months of that year. That figure suggests an annual per capita rate of killings of 12.75 per hundred thousand, twice as high as Salvador’s.