

## Introduction

### Private Prosecution, Access to Justice, and Rule of Law

Tamir Rice, a twelve-year-old African-American boy, was playing in a park with a toy pistol in Cleveland, Ohio, when a police officer, responding to a 911 call, fatally shot him. For months, the family and grassroots organizations requested the public prosecutor press charges against officers Timothy Loehmann and Frank Garmback for homicide. On June 8, 2015, a group of community leaders in Cleveland, Ohio, decided to resort to a rarely used law that allows private citizens to request a judge to determine if a prosecutor should issue an arrest warrant. In six affidavits filed on June 9 on behalf of the victim's family, these activists requested the arrest of officers Loehmann and Garmback based on criminal charges related to the fatal shooting of Rice (Ohlheiser, 2014). A couple of days later, a Cleveland Municipal Court judge released an opinion saying that he found probable cause to charge the officers for various charges (Perez-Pena & Smith, 2015). However, he also added that he did not have the power to order an arrest without a criminal complaint being filed by the prosecutors. The Rice family was left without legal resources to appeal the decision of the District Attorney not to prosecute the case.

The Rice case, unfortunately, is not rare. Despite all the media and social mobilization in the United States surrounding cases of police abuse or use of excessive force, the likelihood of these ever reaching a criminal prosecution is quite low. One key factor behind such impunity is the lack of legal tools available to victims and civil organizations in the United States to challenge prosecutorial decisions.

The availability of legal tools to challenge a decision not to prosecute can significantly impact the ability of victims, particularly those from marginalized backgrounds, to access justice. Consider the examples of Juana Méndez and Orquídea J. Palencia. Ms Méndez was raped in 2005 while in preventive

custody in the local jail of the town of Nebaj, Guatemala. She had all the attributes of the perfect victim of impunity: illiterate, poor, and indigenous. Furthermore, she had been accused of a crime in a country that is not only one of the most violent in Central America, but that also has one of the region's weakest judicial institutions.<sup>1</sup> Méndez faced charges of complicity for not informing the authorities that cultivation of marijuana was taking place next to her land. She had no money to pay bail or hire a private defense attorney. The abuse happened the night before Méndez was scheduled to provide her first testimony in court, when two drunken police officers stepped into her jail cell and sexually assaulted her. She reported the rape to the court the following day, but the judge did not believe her allegations. No administrative or criminal investigation was initiated against the guards.

In sharp contrast to the Tamir Rice case in the United States, however, Ms. Méndez eventually saw her perpetrators face trial. Serendipitously, a nongovernmental organization (NGO) heard about her case and decided, as a private prosecutor, to present a criminal complaint against the police officers, which, in turn, resulted in an investigation. The litigation efforts of this NGO made it possible that for the first time in Guatemalan legal history a serving agent of the civil national police, the *Policía Nacional Civil*, was convicted of rape.

Similar to the case of Ms. Méndez, the murder of Orquídea J. Palencia at first appeared to be doomed to impunity due to prosecutorial negligence. On an afternoon in October 2004, a man forced himself into her modest home in rural Guatemala and shot her in the head. At the crime scene only a judge, an ambulance, and the funerary services appeared. Neither the police nor the *Ministerio Público*, the state's organ in charge of investigating and prosecuting crimes, showed up. No witnesses were interrogated. Not even an investigation case file was opened (Mansilla, 2008). Weeks later, Palencia's husband and their two children fled their community and went to Guatemala City, where they sought the support of an NGO. They had received death threats from the man they suspected had killed Palencia, and they feared to report these threats to the authorities. The NGO filed a criminal complaint and helped buttress the criminal prosecution that eventually took the suspect to trial. How was this possible? What explains how a civil organization can litigate for marginalized victims in an underdeveloped country that is famous for its weak rule of law?

<sup>1</sup> According to the World Justice Project, Guatemala has a weak rule of law, ranking 15th out of nineteen countries in the region. Uruguay ranks first in the region. This database is created with survey data and ranks 102 countries based on perceptions of strength among various indicators of the rule of law. See: <http://worldjusticeproject.org/rule-of-law-index>.

Stories such as these provide both the motivation for and focus of this book. In these stories, the state fails, either by commission or by omission, to investigate and prosecute a crime, but victims' relatives and civil society still somehow find a way to prevent the case from falling into impunity and oblivion. Impunity is ultimately the result of state failure. When a state fails systematically in its duty to investigate and prosecute crime, the human right to a judicial remedy is violated. Impunity of this sort both reflects a preexisting weak rule of law and further erodes that rule of law. For decades, scholars have warned about the vicious cycle that insecurity and impunity generate in Latin America, weakening democratic institutions, increasing violence, and eroding the rule of law (Bergman, 2009; Brinks, Leiras, & Mainwaring, 2014; Malone, 2012; Méndez, O'Donnell, & Pinheiro, 1999; O'Donnell, 1993). Historical, social, and economic inequalities continue to be widespread and are reproduced in the criminal justice systems of these countries (Brinks, 2008; Galanter, 1974).

Thus, this book offers a slightly more optimistic view of a region that has long been criticized for failing to consolidate strong rule of law institutions, looking at instances where, against all odds, impunity is overcome. Though the stories of Juana or Orquídea are not unique, we tend to be more familiar with the region's struggles against past abuses of dictatorships, such as the groundbreaking 2016 conviction in Argentina of seventeen former military officers for their participation in Operation Condor, a plan implemented between the dictatorial regimes of Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay, to eliminate political dissidents; or the attempts in Chile to bring former dictator Augusto Pinochet to trial in domestic courts. In this book, however, I focus on a larger set of cases, examining instances where a victim's right to a judicial remedy is violated by impunity. Interestingly, when victims of crime or victims of state abuse face impunity, a similar storyline emerges: an unresponsive state triggers a grassroots demand for justice. Thus, this book is about how victims get their day in court when facing either an unresponsive or incapable state.<sup>2</sup>

Much has been written about how grassroots efforts can provoke social change in courts. Thus, it is quite puzzling that no research has inquired about the legal mechanisms that allow common citizens to exert such influence in criminal cases. This is even more puzzling when considering that

<sup>2</sup> Because Latin American criminal procedures frequently consider a victim's relatives to be indirect victims of a crime, throughout this book the word "victim" is used to refer not only to those directly affected by a crime, but also to their relatives. This will be further explained in Chapter 2.

criminal law and criminal prosecution are considered the monopoly of the sovereign modern state. Most scholarship assumes that the judicialization of human rights activism (Sieder, Angell, & Schjolden, 2005) depends mostly on how independent the overall judicial system is (Apodaca, 2004; Camp Keith, Tate, & Poe, 2009; Skaar, 2001, 2011). In addition, some scholars have emphasized the way that a repressive past triggers a grassroots demand for justice (Burt, 2013; Collins, 2010; Dancy & Michel, 2015; Lessa et al., 2014), and other scholars have pointed to the ability of international and foreign courts and a transnational network of activists to build pressure from both within and abroad (Davis, 2014; Keck & Sikkink, 1998; Sikkink, 1993, 2005). Although I do not dispute that these factors play a key role in allowing citizens to bring claims to courts, in this book I demonstrate that domestic litigation efforts were (and still are) *only* possible because a domestic legal opportunity structure, i.e., the right to private prosecution, offers victims the necessary tools to engage in litigation in the first place.

#### LEGAL OPPORTUNITY STRUCTURE AND PROSECUTORIAL ACCOUNTABILITY

In this book I argue that the legal stock available to citizens explains how societal actors can bring claims to criminal courts and fight impunity. The legal opportunity structure of a country has long been recognized to be important for legal mobilization (Hilson, 2002; Sikkink, 2005), but there are three contributions that make this book unique. First, I focus on a quite unknown procedural right. In particular, I focus on the right to private prosecution, a victim's right granted by criminal procedure law. The second contribution is empirical. This is the first study that compares the impact of private prosecution in murder cases where the state had failed, either by omission or by commission, to investigate the crime. Thus, examining victims' access to justice can help us better understand how and when citizens use procedural rights to push states to hold perpetrators accountable. As is further explained in Chapter 1, private prosecution rights are a possible societal check on a state's duty to investigate and prosecute crime. But do they actually work? How can this right overcome impunity and prosecutorial failures? What about when the crime is committed by a state agent? To assess if private prosecution is used as an accountability tool when a right to a judicial remedy is violated, I compare how victims access the courts in murder cases. I look at both "ordinary" cases, i.e., when the crime was committed by an ordinary citizen, and "human rights" cases, i.e., when the crime was committed by a state agent. This comparison allows

me to study how private prosecution works in different contexts of impunity. In particular, I reveal how society responds similarly to the threat of impunity due to state negligence or omission (in the case of a weak or poor state) and to the threat of impunity due to political commission (when the defendant is a state agent and the state is unwilling to prosecute).

Finally, this book makes an important theoretical contribution to our understanding of how legal struggles can build the rule of law from below. I argue that the everyday legal struggles against impunity are evidence of a slow, sometimes imperceptible, process of change, and that the key mechanism allowing such process is the procedural right of private prosecution. When we study how and when citizens claim procedural rights, as well as the impact that such legal mobilization has on access to justice, we shift our attention toward a more bottom-up conceptualization of the rule of law (Fleming, 2011; Laplante, 2010) that understands justice more as a process than an outcome (Davis, 2014). In this book I show that it is through the interaction of private prosecutors with the legal system and other key actors (prosecutors and judges) that meaningful change in rights adjudication is possible. Thus, through a comparative study of ordinary and human rights murder cases in Chile, Guatemala, and Mexico, I explain how private prosecution matters in Latin America, and I show how grassroots litigation efforts increase access to justice and strengthen the rule of law.

#### PRIVATE PROSECUTION IN A NUTSHELL

Procedural law prescribes the formal steps that each actor must take to enforce her rights throughout each stage of a legal proceeding. In so doing, procedural law also establishes who is considered an actor and what are her rights in the proceedings. Traditional notions of a sovereign state conceptualize it as holding the monopoly of the legitimate use of physical force (Weber, 1965), which is also manifested in the centralization of criminal prosecution and punishment (Sarat & Clarke, 2008). However, the right to private prosecution poses an interesting paradox to such traditional notions of sovereign state power. As private prosecutor, the victim's lawyer has standing to intervene during the hearings and trial, and can even contradict the public prosecutor. The private prosecutor even has influence over the state in terms of how to investigate the crime (e.g., by requesting a judge to force the public prosecutor to follow a certain line of investigation) and when to end a prosecution (e.g., by requesting a judge to keep the criminal investigation open or to take the case to trial).

The right to private prosecution, then, goes well beyond the victim's right to speak granted in the United States,<sup>3</sup> because the right to private prosecution is a right of the victim or their relatives to have a lawyer that represents their interests and to participate in the criminal proceedings.<sup>4</sup> Whereas the public prosecutor represents the interests of the state, the private prosecutor represents the interests of the victim. Private prosecution, however, is not accessible to all victims of crime because the law places on the victim very strong requirements. For instance, they usually must be represented by a lawyer. Also, the victim or their family is required to file a criminal complaint to “constitute as a private prosecutor” during the criminal proceedings, but they only have a limited time to do so, usually before the indictment, i.e., before any criminal charges are made. Although in most Latin American criminal procedure codes (CPCs) this right can only be claimed by the victim or the victim's family, some countries also allow other state agencies and even NGOs to litigate as private prosecutors in favor of an individual victim or the collective interest (see Annex 3 for a summary of private prosecution rights in the region).

Contemporary Latin American criminal law allows for a range of different forms of prosecution. On one end of the spectrum there is “public prosecution” (*acusación pública*), when criminal action is exercised exclusively by the state, while on the other end of the spectrum some countries also allow “exclusive private prosecution” (*acusación privada*).<sup>5</sup> Between these extremes there is a third kind of prosecution: public prosecution supported by an “auxiliary private prosecution” (*acusación adhesiva*) or by an “autonomous private prosecution” (*acusación particular o autónoma*) (Binder, 2000a; Brienens & Hoegen, 2000).<sup>6</sup> An auxiliary private prosecutor is only allowed to support the prosecution of the state and collaborate with the state throughout the investigation. Countries that allow this type of private prosecution include: Brazil,

<sup>3</sup> Refer to the Kyl/Feinstein Crime Victims' Rights Constitutional Amendment approved in 2003, which grants victims the right to be notified, present, and heard at critical stages throughout their case in criminal proceedings.

<sup>4</sup> Throughout this book I will purposely refer to victims as male, to avoid the stereotype of women as victims, unless I am referring to a specific victim that happened to be female.

<sup>5</sup> In an exclusive private prosecution victims bring a criminal complaint or *querrela*, and the burden (and costs) of the prosecution falls exclusively on them. The PPO does not participate in this type of prosecution. Contrary to the other two types of private prosecution rights, individuals can resort to this right only when they become victims of misdemeanors such as fraud and crimes against the honor or reputation of the individual, where the public interest is low. Argentina, Bolivia, Costa Rica, El Salvador, Guatemala, Nicaragua, Paraguay, and Peru allow for an exclusive private prosecutor for certain crimes. In Mexico, the Estado de Mexico introduced this right in 2008.

<sup>6</sup> Similarly, a criminal complaint brought through *actio popularis* or popular action would fall in the middle of this spectrum.

Germany, Mexico, Russia, and Sweden. By contrast, an autonomous private prosecutor not only has the right to collaborate throughout the criminal investigation, but also has the right to present her own indictment; this allows the victim to press for charges that are different from those introduced by the public prosecutor. This type of private prosecution can be found in countries like Chile and Guatemala, as well as in Austria, Bulgaria, Portugal, and Poland. Both the autonomous private prosecutor and the auxiliary private prosecutor are allowed to prosecute every type of felony. In this book, I generically refer to both types as “private prosecution.” Also, it must be noted that the powers of private prosecution are bounded, as this is a right that operates within the realm of the modern state. Thus, private prosecution is always “judicially mediated,” given that every request and motion filed by the private prosecutor, just like that of the public prosecutor or the defense, must be subject to judicial review and approval.

As puzzling as this right may sound to American ears, and despite the lack of empirical scholarship referring to this right, private prosecution is quite widespread in the CPCs of many countries (Binder, 2000b; Brienens & Hoegen, 2000; Doak, 2008; Kirchengast, 2008; Zaffaroni, 2000), and recently it has been incorporated to the criminal procedure of international tribunals like the International Criminal Court (Funk 2010). Since the 1980s, most states in Latin America have reformed their CPCs to transform their systems toward an accusatorial or adversarial model of criminal justice. This is part of a wider judicial reform effort to improve efficiency, judicial independence, and access to justice. Though some scholars have depicted these reforms as mere Americanization (Hafetz, 2002), the right to private prosecution is a non-American legal figure that offers procedural mechanisms for victims of criminal offenses to actively participate in the penal process. Despite cross-national variation in the timing of these reforms, the introduction or strengthening of the right to private prosecution is a similarity across countries. Fourteen out of seventeen countries in Latin America today offer this right to victims.<sup>7</sup>

According to legal scholars, private prosecution rights were designed as an accountability mechanism over the duty of the state to investigate and prosecute crime (Binder, 2000). This book, therefore, aims to answer a very basic question that has remained virtually unexplored: Does private prosecution actually function as a control mechanism? Through a comparative analysis of murder cases in Chile, Guatemala, and Mexico, this book examines if this

<sup>7</sup> In this book I use the term “Latin America” to refer only to those Spanish and Portuguese speaking countries of Central and South America that are based on a civil law tradition, excluding all Caribbean and common law countries.

procedural right matters, and answers when, how, and why private prosecution makes a difference in the investigation and prosecution of murder.

#### OVERVIEW OF THE ARGUMENT

In this book, I show that judicial responsiveness (or how a system responds to a murder case) depends not only on the autonomy enjoyed by the state's prosecutorial organ (Brinks, 2008; Ríos-Figueroa, 2006, 2012) or the independence of the judiciary (Ferejohn, 1999; Helmke & Ríos Figuera, 2011; Hilbink, 2007; Sadek & Cavalcanti, 2003; Skaar, 2011), but also on the checks that procedural law introduces over the public prosecutor, such as private prosecution rights. For cases to reach the courts in the first place, the Public Prosecutor's Office (PPO) must bring a criminal investigation into the courts, which makes the prosecutorial organ the main gatekeeper to the justice system. Therefore, it is at this stage, *the investigation stage*, that private prosecution plays a key role as a societal check.

I argue that when private prosecution constitutes part of the legal stock available to citizens, this right offers victims a powerful tool to trigger a review of prosecutorial decisions, inducing the state to be more responsive and effective. When the public prosecutor, either by commission or by omission, fails in its duty to investigate crime, the private prosecutor has important legal tools to push an investigation forward and protect the victim's right to a judicial remedy. Private prosecution can thus help hold an unwilling or incapable prosecutor accountable.

However, the degree of rights awareness and the degree of repression and violence in a state also affect the ability of private prosecution rights to work as an accountability tool. An important factor that impacts the legal mobilization of social claims using private prosecution is the context in which such claims emerge. Time and place matter as a context that either opens or closes the opportunity for legal mobilization. Only rights that are known can be claimed; therefore, the history of this right in a given country impacts the degree to which the right might be used today. Along with rights awareness, claimants must also enjoy a certain degree of security to channel their grievances through the courts. Repression will obviously deter the use of courts. Thus, time and context matter, and sometimes grassroots efforts are forced to wait for the *political opportunity* to channel their grievances through the courts.

Furthermore, victims must find ways to overcome the costs of litigation. The use of private prosecution rights depends not only on rights awareness and the security to press claims, but also on how victims overcome the costs associated with accessing the courts. Across countries and across types of murder

cases, when victims have the necessary resources and security to press a legal claim they are more likely to use the right. In this book I thus argue that the use of private prosecution as an accountability tool requires a *support structure* that helps overcome the costs associated with accessing the courts and, when necessary, also provides the necessary shelter and protection for victims to be willing to fight against impunity. The development of such a support structure requires time and resources, and, therefore, the use of private prosecution is dynamic and expected to shift across time.

I further argue that private prosecution can be a powerful accountability tool, but that its powers are bounded by the subsidiary role it plays in a criminal prosecution and by the same state structure it is contesting. Private prosecution does not guarantee a trial or a conviction, nor does it replace the state's prosecutorial organ. But I show that private prosecution matters most to high-light prosecutorial failures at the investigation stage. In other words, when a state is unwilling or incapable to investigate crime, private prosecution does work as a "control mechanism" on the state's duty to investigate crime, with the caveat that access to this right is limited given the costs involved in litigation.

When private prosecution is used in contexts of high impunity, it has its most meaningful impact at the investigation stage by keeping the case files open, avoiding state neglect and oblivion, and sometimes even pushing cases go to trial. This is best exemplified in human rights cases in Guatemala and Chile and in some ordinary murder cases in Chihuahua and Guatemala. In addition, when state resistance to justice is too strong or threats to victims' activists are too high, private prosecutors may use international human rights courts as a complementary tool to their litigation efforts in domestic courts. International or foreign courts can be used to apply pressure from abroad on an unwilling or incapable state (Brysk, 1993; Davis, 2014; Keck & Sikkink, 1998; Langer, 2011; Sikkink, 1993), and in this way international courts have helped some private prosecution cases be more effective. However, private prosecution cases do not always need pressure from abroad to succeed. Many private prosecutors have been able to press for prosecutorial accountability without resorting to international courts. Private prosecutors turn to these courts when judicial proceedings stall or when remedies have been exhausted. In this book I also show that private prosecutors have benefited from international law by incorporating in their domestic litigation jurisprudence that has emanated from international human rights case law, like the "right to truth" as well as the "right to effective legal remedies."

This book also has two unexpected findings. One, when private prosecution is used in contexts where the prosecutorial organ is working, private prosecution still improves a criminal investigation by helping cases reach a court.

Two, perhaps even more importantly, private prosecution improves the overall perception of access to justice by providing a sense of better “quality of service.”

Finally, I also argue that when societal actors embrace private prosecution as a social accountability tool, their cumulative efforts help build the rule of law from below. When societal actors respond to impunity by resorting to the courts, rather than other forms of social protest, they are placing a bet on the judicial system. Thus, I argue here that private prosecution is the key to understanding how grassroots litigation efforts, in their interaction with the legal system and other state actors, can foster social change and improve human rights adjudication over time. In this book I build upon previous research (Dancy & Michel, 2015; Michel & Sikkink, 2013) that has identified three important mechanisms through which these private prosecution efforts can foster change: (1) through the demonstration effect that a single case can have, (2) through the different ways in which grassroots litigation can push or inspire other state actors to also work toward justice, and (3) through the introduction of innovative legal argumentation.

#### DATA AND METHODOLOGY

The book is based on a qualitative longitudinal comparative analysis of data gathered in three countries (Chile, Guatemala, and Mexico) and covers the analysis of 520 ordinary homicide cases; 383 human rights cases; 98 interviews with relevant actors; and multiple case studies that illustrate how, when, and why private prosecution works as an accountability mechanism in a criminal prosecution. Private prosecution is defined in this book as the right of a victim of crime or their surviving relatives to participate in the criminal proceedings through representation by a lawyer. These rights are clearly defined in the CPC of the selected states (in the countries of Guatemala and Chile, and the Mexican state of Chihuahua) (see Annex 3).

The three countries in this book were selected following a diverse case selection strategy (Seawright & Gerring, 2008), which is useful when there is little research on a phenomenon. This strategy aims for maximum variance along relevant dimensions for theory development. Thus, this study required a case selection that allowed variation on factors that are known to impact access to justice and judicial responsiveness, such as economic development, income inequality, strength of rule of law and overall judicial independence, corruption, history of past abuses, and violence and insecurity.

Chile, Guatemala, and Mexico provide useful variations on these theoretically relevant variables, allowing me to assess which factors, across time and across types of murder cases, explain how the right to private prosecution works in different contexts. These countries share a civil law legal tradition