Ezequiel González Ocantos

The Ideational Foundations of Judicial Power: Legal Cultures, Strategic Litigation and Judicial Behavior in Cases of Gross Human Rights Violations in Peru

This case study of the judicialization of human rights violations in Peru illuminates questions relative to the determinants of judicial behavior and the factors that lead to the expansion of judicial power. Relying on an understanding of political action as culturally embedded in organizational spheres, this paper shows that the sea changes in jurisprudential patterns leading to the incarceration of human rights criminals throughout Latin America in the 2000s result from ideational revolutions within judiciaries. The process involves the deinstitutionalization of formalist/positivist legal cultures (historically protective of conservative interests in the region and the source of judicial deference to written laws and the branches entitled to enact them), and the entrenchment of a juridical vision committed to the principles of international human rights law. Victims and their lawyers succeed in sending criminals to jail when they transform the legal thinking, technical capabilities and political will of judicial corporations. I document how the Peruvian human rights movement deployed a massive pedagogical intervention, training judges and prosecutors in a new juridical discourse, opening up a world of unknown legal solutions for human rights criminal cases. This strategic alliance generated a number of ideological, technical and political resources that facilitated resistance on the side of judges and prosecutors against powerful military and political actors opposed to the trials.
“[L]aw is conservative in the same way in which language is conservative […] It seeks to assimilate everything that happens to that which has already happened […] Thus, the lawyer’s virtually instinctive intellectual response when he is confronted with a situation is to look for the respects in which that situation is like something that is familiar and that has a place within the realm of [the] understood.” Richard Wasserstrom quoted in Osiel (2000:121-122)

**Introduction**

With the spread of constitutional review procedures during the last decades of the 20th century, countries worldwide have experienced the growing ascendancy of courts in struggles over public policy and individual rights, a phenomenon often referred to as the “judicialization of politics”. An instance of this revolution in judicial behavior is the explosion of rulings handed down by Latin American courts after the year 2000 overturning amnesty laws and presidential pardons; declaring the non-applicability of statutory limitations; and modifying the standards of criminal evidence in order to punish state agents responsible for human rights violations during the dictatorships and armed conflicts of the 1970s, 80s and 90s (Figure 1).

![Figure 1. Anti Impunity Rulings by High Courts in Latin America](image)

*Source:* This original dataset includes rulings on cases of systematic human rights violations by state actors handed down until 2010 by Supreme Courts and Constitutional Courts that use principles, doctrines and instruments of international human rights law and humanitarian law to: a) limit the application of amnesty laws or declare their unconstitutionality, and modify other procedural and substantive aspects of criminal legislation to

---

meet international standards; b) declare the inapplicability of statutory limitations for serious international crimes; c) establish individual criminal responsibility for human rights violations; d) recognize the victims’ right to know the truth about the crimes; and e) limit the jurisdiction of military courts over human rights crimes perpetrated by security forces. The dataset was constructed using online public information systems; consulting with country experts; and reading the relevant legal literature. I am grateful to Ximena Medellin for facilitating some of the rulings.

Throughout the region, judges and prosecutors have become central actors in the efforts at eradicating impunity, conclusively putting an end to an era of judicial acquiescence. The central question addressed by this paper is why some judicial branches in Latin America evolved from unresponsive bureaucracies into suitable arenas for the advancement of the human rights cause. More generally, the issue at stake is how judiciaries acquire the political will and the technical capabilities to become powerful actors in politically salient struggles.

Two types of explanation have been put forward to account for this phenomenon. Some scholars suggest that the outcome of transitional justice processes is dictated by the preferences of elected politicians and the balance of power between them and the armed forces. Other authors emphasize bottom-up dynamics, describing the efforts of transnational networks of human rights activists to diffuse among national executives a behavioral norm in favor of criminal prosecutions. Both explanations completely sideline the judiciary, unwarrantedly assuming that judicial actors respond perfectly to outside political pressures.

3 Despite the early success of truth seeking initiatives throughout the region, amnesty laws, the running out of statutes of limitations as the years passed, the difficulties in investigating clandestine repressive apparatuses, and the daunting task of proving individual criminal responsibility in these crimes, led to the rise of seemingly impenetrable impunity regimes that blocked the victims’ quest for justice in domestic courts. For example, during the 1980s and 1990s 16 Latin American countries passed amnesty laws to close criminal investigations. See Kathryn Sikkink and Carrie Walling, “The Impact of Human Rights Trials in Latin America,” Journal of Peace Research (June 2007), 427-445.


handing down prison sentences or acquittals accordingly. As a result, these approaches fail to theorize and investigate a crucial step in the causal process that unfolds between the denunciation of the crimes and the outcomes of criminal trials. After all, judiciaries are the ones that must decide whether to uphold amnesties or apply statutory limitations. Understanding how transitional justice happens requires explaining how judges arrive at a certain type of decision, processing both outside pressures and complex legal controversies.

By contrast, I argue that the aforementioned sea changes in jurisprudential patterns are not the necessary outcome of changes in the political environment, but instead result from ideational revolutions within judicial branches. The ignition of the prosecutorial wave demanded the activation of a legal space for judicial action. This process involved the deinstitutionalization of formalist and positivist legal cultures, historically protective of conservative interests in Latin America, and the entrenchment of a new juridical vision committed to the defense of human rights. Activists and their lawyers succeed in sending criminals to jail when they acknowledge the importance of these cultural factors in judicial decision making processes, and deploy tactics to disrupt the reproduction of formalist behavioral norms within judiciaries. By mounting pedagogical interventions, which include a myriad of informal lobbying tactics, litigants foster the diffusion and positive reception of international human rights law and humanitarian law, familiarizing judicial actors with the complex and often unknown juridical doctrines that make it legally possible to overturn amnesties or ignore the exhaustion of statutes of limitations. These interventions enhance judiciaries’ technical capabilities by eliminating the cognitive obstacles posed by the formalist and positivist tradition. Litigants also rekindle judges’ and prosecutors’ political

---

will to eradicate impunity, reshaping their understanding of their institutional mission and providing them with cultural resources that facilitate coordinated resistance against soldiers or politicians seeking to put an end to the investigations and trials. At the core of this account is the notion that effective litigation strategies inside and outside the courtroom can insulate the judicial process from outside pressures by modifying judges’ perceptions about the legal possibilities for assertive judicial behavior and about the standards of correct professional praxis.

This paper makes two central theoretical contributions to our understanding of judicial behavior. First, I explore the role of internal cultural and informal factors in rendering courts more or less influential in policy disputes. I argue that displays of judicial power are influenced by the institutionalization of “sticky” ideas about the law within the judicial branch. The latter include routine practices, standards of adjudication and norms that generate expectations about appropriate forms of behavior within the organization, ultimately shaping judicial actors’ political will and technical capabilities to venture into sensitive disputes over policy. Second, I explicitly investigate the formation of legal preferences as a key step in the judicial decision-making process. I suggest that judicial branches constitute an arena of political struggle in which alliances forged between their own members and outside groups seek to socialize judges and prosecutors into embracing certain legal worldviews compatible with their political goals and visions.

I put these insights to work using a case study of the Peruvian experience in dealing with the crimes committed by state actors during the insurgency against the Shining Path in the 1980s and 1990s. The Peruvian case is interesting because its judiciary has been

---

recurrently characterized as submissive, politically irrelevant and poorly trained. After the 2000 transition to democracy, however, judges and prosecutors successfully launched an ambitious program of criminal prosecutions in defiance of powerful military and political establishments seeking to put an end to the investigations. Peru constitutes by all accounts a case of transitional justice in unfriendly territory. In order to explain an outcome that contradicts the predictions of extant theories (i.e. supportive executives and weak militaries are necessary to observe transitional justice), I draw on a survey of prosecutors and numerous in-depth interviews with judges, prosecutors and judicial clerks at all levels of the judicial hierarchy conducted during my fieldwork in Lima and Ayacucho between February and May of 2010. I also use the testimonies of key political actors, human rights activists and litigants, and former government lawyers to complement the analysis of the impact of formal and informal litigation strategies on judicial behavior. Finally, I rely on information collected in newspaper and NGO archives, as well as in various courts, where I read classified case files and transcripts of oral trials, collected rulings and observed the work of judicial clerks.

The paper is structured as follows. I first review the extant literature on transitional justice. I then explain the theoretical assumptions of my alternative model of ideational transformation, and specify the clashing legal ideas at the core of transitional justice processes, the actors that carry them, the mechanisms of norm diffusion and the ways they impact judicial outcomes. The final sections of the paper are devoted to analyzing the empirical evidence, showing the superiority of my theory over competing explanations that assume the permeability to judiciaries to the preferences of elected officials.

---

Judicial Power and Transitional Justice

Two main approaches have been developed to understand transitional justice in Latin America. First, following Huntington’s seminal contribution\(^9\), one group of scholars suggests that the outcome of transitional justice processes is dictated by the balance of power between elected officials and the armed forces\(^10\). Even if trials are not forever conditioned by the power of outgoing dictators during transitions, their fate depends on the preferences of electoral coalitions at any point after democratization. In the Latin American context, some scholars have argued that the rise to power of leaders of the formerly repressed left explains the revival of transitional justice during the last decade\(^11\).

By contrast, the “Justice Cascade” paradigm emphasizes the efforts of transnational networks of human rights activists\(^12\). Armed with the legitimacy of international human rights law, these groups produce “norm affirming” events at the international level to undermine impunity regimes at home. Sikkink, for example, documents the diplomatic pressures exerted on Argentina’s president Carlos Menem by Scandinavian and French officials when he visited Europe in the late 1990s trying to seduce investors. Argentine activists had used the principle of “universal jurisdiction” to file criminal lawsuits against former military officers in both countries\(^13\). Another norm affirming event often cited to

---

\(^9\) Huntington
explain the revival of transitional justice in Latin America is the 1998 Pinochet saga. In sum, building international pressure on political leaders ignites a shift in the behavioral norms and patterns relative to human rights prosecutions at the domestic level.

Both explanations operate under the implicit assumption that judicial actors respond perfectly to outside political pressures. Even the Justice Cascade model, which emphasizes the importance of international litigation, explains domestic judicial victories by focusing on human rights activists’ strategies to transform executives’ foreign policy incentives. Overlooking the role of judges is a serious theoretical shortcoming. After all, judicial bureaucracies are the ones that must decide whether to nullify amnesty laws or apply statutes of limitations. It cannot be assumed that judicial actors simply abide by the dictates of politicians, facing no constraints in their ability to legally formulate the requested jurisprudential solutions, or lacking the resources to put up a fight. Moreover, in order to fully understand the domestic diffusion of pro-human rights behavioral norms, a process central to the justice cascade argument, we must focus on the way judicial actors embrace the jurisprudential innovations initiated in the international arena. There is a legal learning process relevant to explaining judicial behavior, which is ignored if the analysis remains fixated with presidents’ foreign policy preferences. In other words, the “justice cascade” affects different sets of domestic actors via different diffusion mechanisms.

This understanding of judicial behavior is compatible with rational choice institutionalism, which portrays judges as politicians in robes who behave strategically in order to preserve their tenure. Courts are aware of the fact that their failure to adjust their preferences to those of other actors in the system can result in negative consequences like

---

14 Roth-Arriaza
removal from office or non-implementation of their rulings. The rational choice model thus sees judicial power as externally constituted. Courts’ lack of both a sword and a purse leaves their ability to wield power at the mercy of the credibility of the threats launched by veto players in the political system. As a result, rationalists tend to imagine two worlds of peaceful inter-branch relations: one in which power is fragmented so that executives and legislators lack the ability to punish dissident courts; and another in which courts’ calculations lead them to avoid confrontation in the midst of political adversity.

This world of court acquiescence, few inter-branch conflicts and underestimated judicial ability to prevail in those struggles, does not square with the much more convoluted relationship between politicians and judges in many parts of the world. With regards to the specific area of litigation studied in this paper, not all prosecutions are doomed when the preferences of political actors remain adverse to transitional justice. Moreover, in the presence of favorable political conditions we cannot assume that judges will automatically follow suit with condemnatory rulings. Intervening in shaping judges’ and prosecutors’ ability and willingness to topple amnesties or statutes of limitations, sometimes in defiance of powerful political actors, is the institutional setting within which they operate.

In contrast to the external theory of judicial power characteristic of strategic approaches, this paper presents an “internal” perspective on power based on an understanding of political action as culturally embedded in organizational spheres. We may think of power as cognitive structures that are constitutive of the goals actors seek and that shape actors’ determination to seek them. Pierre Bourdieu’s notion of *habitus* nicely condenses some of the

---

central features of this approach\textsuperscript{17}. Actors situated in any particular organizational or social field may act strategically to augment various forms of capital and improve their status \textit{vis-à-vis} others, but always do so guided by internalized dispositions, ways of judging, communicating or interpreting, that stem from those individuals’ socialization trajectories (education, class position, etc). As the propeller of individual or group behavior, the \textit{habitus} thus minimizes radically subversive behavior and reproduces patterned interactions. These cognitive schemas reflect conceptions about appropriate forms of action; naturalize certain rituals and routines critical for describing human interactions within bureaucratic and political domains; and provide meaning-ascribing tools to interpret the behavior of others and the constraints and possibilities presented by the social environment\textsuperscript{18}.

In the case of judiciaries, I argue that institutionalized ideas about legal praxis are central to understanding judicial power. There are two reasons for this. First, they define the universe of legal solutions that judges can imagine for the cases they receive. The way judicial actors think about their personal interests, formal prerogatives and possibilities for action is shaped by socialization processes operative across the bureaucracy they staff\textsuperscript{19}. Institutionalized norms of behavior promote certain ways of legally framing and addressing political and social problems at the expense of others\textsuperscript{20}. In this sense, traditions of legal interpretation function as a structuring lens that biases judicial actors towards privileging known and institutionally legitimized jurisprudential solutions\textsuperscript{21}. This bias constrains judicial


\textsuperscript{18}Paul Di Maggio and Walter Powell, \textit{The New Institutionalism in Organizational Analysis} (Chicago, IL: The University of Chicago Press, 1991)

\textsuperscript{19}James March and Johan Olsen, "The New Institutionalism: Organizational Factors in Political Life," \textit{American Political Science Review} (78, 1984), 734-749

\textsuperscript{20}Kathlyn Thelen, “Historical Institutionalism in Comparative Politics,” \textit{Annual Review of Political Science} (2, 1999), 369-404.

\textsuperscript{21}Diego López Medina, \textit{Teoria impura del derecho} (Bogota: Legis, 2004); Couso.
actors’ cognitive ability to imagine radical departures from precedent, i.e. their technical capabilities.

In order to be able to occupy a prominent role in policy debates, judicial actors must be able to legally justify their intervention in ways that conform to certain professional and bureaucratic standards. By virtue of their membership to a highly structured organizational environment, judicial actors share values and ideas associated to the practice of the law that limit the number of ways in which personal or ideological positions can be expressed in rulings. The satisfaction of expectations associated with their organizational roles leads judicial actors to behave as satisficers. Shared standards and norms make certain patterns of behavior unthinkable and certain legal solutions unknown. Judicial corporations need to be infused with new values or ideas about the law, signaling the formation of an alternative consensus about legal praxis, for there to be radical deviations from precedent or structural changes in the way judges understand their prerogatives.

Second, these behavioral norms can forge strong corporate identities, which can turn judiciaries into resourceful and hostile opponents of elected officials and military actors. Standard practices, routines or shared adjudication criteria constitute a key asset to anchor authority and cement political resolve when negotiating with other political actors about the proper stance or behavior of the judiciary. The entrenchment of these norms and values may fundamentally alter the cost-benefit analysis that determines whether or not to confront political actors favoring opposite outcomes. In the face of political pressures to issue rulings that run against what judges perceive as the foundation of their institutional mission or

---

professional standards of legal interpretation, judicial actors may find in these shared values catalysts or facilitators of defensive, corporativist collective action initiatives. For example, the widespread belief in the need to enforce states’ international duty to sanction human rights criminals, may lead judiciaries to ignore pressures to perpetuate impunity. The formation of professional associations of judges or prosecutors driven by similar corporate identities can amplify their voices and enhance their individual sense of security.

The reproduction of ideas about the law is not politically neutral. As Di Maggio and Powell put it,

Institutional reproduction has been associated with the demands of powerful central actors, such as the state, the professions, or the dominant agents within organizational fields. This emphasis has highlighted the constraints imposed by institutions and stressed the ubiquity of rules that guide behavior.

Moreover, they remind us that “rules are typically constructed by a process of conflict and contestation.” In order to understand the levels of involvement and impact of judiciaries in political struggles it is important to study the coalitional dynamics that generate and reproduce institutionalized values and ideas that define what the law is, how it should be interpreted, and what constitutes appropriate judicial behavior. Constellations of social and political forces fight to promote continuity or change in these standard practices, and thus solidify the ideational support for their interests within judicial corporations.

Central to the construction of legitimizing legal discourses for innovative and transformative judicial involvement in political struggles is what some authors have defined

25 Di Maggio and Powell, p.28
26 Ibid, p.28
as the “legal complex”. The web of relations established among the legally trained occupations (judges, prosecutors, private lawyers, public interest litigation groups, lawyers’ professional associations and academics) in pursuit of certain social and political causes, constitutes the basis for effective policy change in the judicial field. These associations not only build on the discursive plane the legal fundamentals for jurisprudential changes, but also give public visibility and mobilizational strength to these initiatives. The concerted actions of the legal complex can undermine the reproduction of practices and standards within judicial corporations, freshen up these institutions, redefine their mission and open up a new world of legal solutions for social and political demands.

Struggles for control over the normative commitments of judicial corporations and for imposing the acceptance of the legal discourses used to support those commitments, are at the forefront of transitional justice processes in Latin America. The quest for transitional justice brought before courts a set of legal arguments that departed radically from standard legal practice in the region. These criminal prosecutions demanded from victims and their lawyers strenuous efforts at imposing a new legal orthodoxy among judges and prosecutors, making them comfortable with jurisprudential innovations that were not just intellectually challenging, but also politically risky. Litigants had to put these new ideas on the map defying institutional inertias and convincing judicial actors that invoking them in their rulings amounted to a viable exercise of judicial power. Litigants’ success depended on igniting a process of ideational change to transform formerly unreceptive and passive judiciaries into allied corporations in the struggle against impunity. In the next section I describe these opposing legal visions, the actors promoting them and the hypothesized mechanisms of contention and ideational change within judiciaries.

Specifying the Ideas, the Actors and the Mechanisms

Human rights litigants in Latin America invoke the principle of *jus cogens* to argue that the wrongs committed by state officials during past dictatorships and armed conflicts constitute crimes against humanity. They explain that according to customary international law these crimes are unforgivable offenses against the community of civilized nations, and must therefore be punished irrespective of when or where they were perpetrated. This leads to a reinterpretation of victims’ rights to justice and truth, *vis-à-vis* the validity of statutory limitations, presidential pardons and amnesties. Judges should fulfill states’ international obligations, invoking international treaties, jurisprudence and legal doctrine to dismantle the legal structure that favors impunity. In addition, they should apply special standards of proof when determining individual criminal responsibility due to the difficulties inherent in finding direct evidence about crimes perpetrated by state-sponsored organizations in the distant past.

Critics contend that victims construe their demands on the basis of subjective interpretations of unwritten norms supposedly binding when the crimes were committed, and ask judicial actors to retroactively impute individual criminal responsibility on the basis of penal types codified in international legal instruments after the date when the crimes were perpetrated. Activists are also accused of demanding *sui generis* exceptions to rules of

---


31 In the case of military leaders or presidents, establishing individual criminal responsibility also requires the use of innovative theories of criminal liability. See Christina Prusak, “The Trial of Alberto Fujimori,” *NYU Law Review* (85, 2010), 867-904.
criminal procedures (e.g. statutory limitations) that were present in penal codes at the time of the crimes\textsuperscript{32}. For example, in a critique of the jurisprudence of the Inter American Court of Human Rights, from which domestic litigants draw to substantiate their claims, Ezequiel Malarino accuses the court of expounding a punitivist conception of human rights: “Hand in hand with victims’ super-right [sic] to justice, the Inter American Court is creating a true ‘statute of the victim’ opposed to the ‘statute of the defendant’, consecrated in the [American] Convention; that is, a non-written Bill of Rights of the victim that neutralizes the written Bill of Rights of the defendant”\textsuperscript{33}. The main problem with the “neo-punitivist” position, so the argument goes, is that human rights litigants expect judges and prosecutors to limit the application of the legality principle\textsuperscript{34}. “Nullum crimen sine lege, nulla poena sine lege paevia, scripta, stricta, et certa,” is a fundamental axiom of modern criminal law that forbids the retroactive application of the law and censures convictions for crimes not unequivocally defined in written statutes at the time when they are committed.

This critique of the case put forward by the victims is compatible with standard legal practice in Latin America. In order to relax the legality principle and grant the prosecution of human rights criminals, judicial actors must endorse legal arguments that defy the cultural understandings that underpin the functioning of the bureaucracies they staff. Prioritizing

\textsuperscript{32} Ezequiel Malarino, “Activismo judicial, punitivización y nacionalización: Tendencias antidemocráticas y antiliberales de la Corte Interamericana de Derechos Humanos,” in Kai Ambos ed. Sistema interamericano de protección de los derechos humanos y derecho penal internacional (Montevideo: Fundación Konrad Adenauer, 2010)

\textsuperscript{33} Ibid. p. 46. According to these critics, the lax interpretation of the legality principle defended by human rights litigants at the domestic level is also controversial because numerous human rights treaties explicitly outline the rights of individuals facing criminal charges. The limitations imposed upon the arbitrary exercise of state power as it pertains to criminal prosecutions that compromise the liberty and personal integrity of individuals has been one of the motivations driving the development of international criminal law, human rights law and humanitarian law. For example, the international recognition of due process guarantees for defendants is enshrined in articles 8 through 12 of the Universal Declaration of Human Rights and in articles 8 and 9 of the American Convention on Human Rights.

\textsuperscript{34} José Guzmán Dálbora, “El principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos,” in Kai Ambos ed. Sistema interamericano de protección de los derechos humanos y derecho penal internacional (Montevideo: Fundación Konrad Adenauer, 2010)
rights that are not the subject of written domestic legislation such as the right to truth, over
the rights of the accused involves a non-formalistic reading of the normative system that
governs criminal prosecutions. Contrary to this, legal cultures within Latin America’s civil
law tradition affirm the supremacy of domestic written law and the legality principle,
promoting a vision of the law as a series of rules to be applied and not as a set of principles to
be interpreted, reconciled or ranked. The dominant legal consciousness in the region,
formalist and positivist in nature, promotes the subordination of judges’ interpretative
discretion to the dictates of the legislator, privileging procedural aspects over substantive
ones. Judges are socialized to see the bench as an instance in which only the formal legality
of norms, and of private actions as literally described by those norms, is checked. The notion
that laws are clear and that their application requires no interpretation, is widespread. After
reviewing the legal literature produced in Latin America during most part of the 20th century,
Javier Couso concludes that the “the dominance of legal positivism and a deferential
understanding of the role of the courts vis-a-vis the political system was absolute”.

The hegemony of the formalist legal orthodoxy is a barrier for transitional justice. At
the most basic level, the legal arguments in favor of the human rights cause must be learnt
anew by judicial actors. Only recently has international law become part of universities’
curricula in Latin America. Because the jurisprudential innovations sought by human rights
litigants entail a high degree of experimentation, the arguments they expound take judges
outside their comfort zone, disrupting their routines and standard practices. Making available

35 Kenneth Karst and Keith S. Rosenn, Law and Development in Latin America (Berkeley: University of
California Press,1975; Couso
36 Andrés Cuneo, “La corte suprema de Chile, sus percepciones acerca del derecho, su rol en el sistema
legal, y la relación de éste con el sistema político,” in Universidad de Costa Rica, La administración de
justicia en América Latina (San José: Universidad de Costa Rica,1980)
37 Couso, p.152
38 López Medina; Pásara
a legal alternative to the *status quo* is the first step to legitimizing that alternative and making it politically viable. Judges and prosecutors need reassurance that they can legally justify their interventionism in a language that conforms to certain professional and bureaucratic standards.

These cognitive and informal behavioral obstacles are particularly consequential in the presence of powerful political actors opposed to the prosecutions. In the absence of an alternative legal vision, the positivist/formalist orthodoxy provides a legitimizing discourse for the decision to avoid entering into collision course with elected officials or the military. In order to alter the *status quo* in a politically adverse scenario, judges need to marshal the symbolic effectiveness of a new orthodoxy, appealing to potential allies in the socio-political world. Furthermore, the new orthodoxy must penetrate deeply into the identities of judicial actors and their institutional values in order to trigger risky, independent behavior. Only when these new professional standards become ingrained in the functioning of judicial bureaucracies it becomes more difficult for judges to accept political directives to ignore those new standards.

In the Latin American context, attempts at promoting transitional justice via criminal prosecutions therefore demanded the infusion of a counter hegemonic legal discourse within judicial corporations. In other words, the construction of a “willing and able judiciary”39, with the appropriate legal knowledge and the commitment to defend certain legal norms and practices, is a necessary condition for observing transitional justice. I contend that human rights activists play a central role in this process by exerting a disruptive exogenous force on the production and reproduction of norms of behavior within judicial corporations. Effective organized litigation efforts both inside and outside the courtroom empower judicial actors

---

vis-à-vis soldiers and politicians by deinstitutionalizing certain constraining ideas about legal praxis and providing judicial actors with an alternative mandate. Qua agents of norm diffusion litigants transform judiciaries in order to secure consistent and uniform macro-level jurisprudential shifts.

The causal process at play involves the re-socialization of members of the judiciary into traditions of legal interpretation that do not focus narrowly on national law as an empirical fact, but adopt more expansive criteria to identify alternative sources of law and to read rights and duties into constitutions, thus transforming both their technical capabilities and political will to end impunity. My argument goes beyond traditional analysis of public interest litigation by focusing both on the formal and informal strategies deployed by litigants. Instead of simply emphasizing litigants’ formal moves in particular lawsuits, I explore their informal, often surreptitious efforts to transform judiciaries as institutions. These re-socialization mechanisms include informal networking, organizing pedagogical activities for judges, circulating academic documents in court and exposing judges to the opinions of international experts and colleagues from other countries who managed to solve the same juridical problems. Human rights groups politicize legal hermeneutics forming strategic alliances with particular judges and prosecutors and gradually galvanize a critical mass of judicial actors to ensure the sustainability of litigation efforts. Successfully cementing these alliances in strong normative commitments is crucial because defendants

---


41 For another work emphasizing this type of informal mechanism see Patricia Woods, Judicial Power and National Politics (Albany: State University of New York Press, 2008)
and their political partners also engage in lobbying tactics, and they usually count with more resources to subject judicial actors to intense pressures.

The re-socialization process has empowering effects among judicial actors. It provides them with a menu of previously unknown or unconsidered legal options that render it possible to move forward with the prosecutions and trials. At the level of the judiciary \textit{qua} institution, effective re-socialization efforts also have the potential of recreating the professional identity of its members. By galvanizing a critical mass of judges and prosecutors who now believe it is mandatory to abide by international jurisprudence and doctrines that underscore states’ responsibility to investigate and punish crimes against humanity, human rights groups redefine what is right and what is wrong in legal praxis. If, for example, a consensus is reached around the idea that statutes of limitations cannot be applied to crimes against humanity, judges with a rekindled human rights perspective will find it professionally unacceptable to be forced to ignore that basic legal standard by closing down investigations.

The new collective identity of an institution that sees the prosecution of these crimes as its mission can catalyze collective reactions to outside impositions.

In what follows I explore the Peruvian experience with transitional justice in order to show the superiority of the litigation-induced legal empowerment thesis over alternative explanations that focus on judges’ responses to the surrounding political environment.

\textbf{The Peruvian Experience with Transitional Justice}

In this section I explain the success of transitional justice in Peru by showing how litigant groups transformed the legal and normative platforms that underpin judicial decision-making. In particular, I trace how human rights groups mounted a pedagogical intervention targeted at judges and prosecutors that included the informal diffusion of international legal
instruments and jurisprudence. In so doing they empowered judicial actors by changing their perceptions of what amounted to proper legal interpretation in the cases at hand and by providing them with previously unknown or unaccepted legal tools to justify the toppling of impunity dispositions in defiance of hostile and powerful political actors. Human rights activists thus transformed a judiciary that was once unable to transcend legal formalisms in order to protect individual rights.

I use the technique of process tracing analysis to adjudicate between competing explanations of transitional justice. In order to establish the impact of a) the levels of tolerance of political elites, and b) of litigants’ pedagogical interventions on judicial behavior, I rely on the testimonies of key political, civil society and judicial actors; elite surveys; public opinion data; and archival data. In addition to using information obtained during interviews with victims, human rights lawyers, law professors and politicians, I draw on the testimonies of numerous judges and prosecutors. Since only certain courts within the Peruvian judiciary have jurisdiction over human rights cases I was able to interview a high percentage of the judicial actors involved in the process. Table 1 shows the number of interviews with judges and prosecutors conducted at each of the relevant levels of the judiciary. I complement this qualitative evidence with the results from an anonymous survey of prosecutors. The survey was administered online and respondents were invited to participate by the chief human rights prosecutor. The response rate was 43.5%. Finally, the analysis also benefits from archival research conducted in various newspapers and NGOs, as well as from reading classified judicial dockets and observing various trials.

42 See the section “Transitional Justice in Peru: The Dependent Variable” below for a description of the Peruvian judiciary and the sub-system created to process human rights cases.
Table 1: Interviews with Judicial Actors

<table>
<thead>
<tr>
<th>Interviews</th>
<th>Judges</th>
<th>Prosecutors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Court</td>
<td>3 out of 7 (including two presidents)</td>
<td></td>
</tr>
<tr>
<td>Supreme Court (2 judge panel assigned to Fujimori's case)</td>
<td>2 out of 3</td>
<td>Supreme Prosecutor</td>
</tr>
<tr>
<td>National Criminal Court</td>
<td>5 out of 11 (including two presidents)</td>
<td>Superior Prosecutors</td>
</tr>
<tr>
<td>Anti-Corruption Courts (Chambers 1 and 3)</td>
<td>1st Chamber: 2 out of 3; 3rd Chamber: 0</td>
<td>Supra-provincial prosecutors</td>
</tr>
<tr>
<td>Provincial Judges</td>
<td>3 out of 7</td>
<td>Provincial Prosecutors</td>
</tr>
</tbody>
</table>

Background

During the 1980s and 1990s, Peru underwent a bloody internal conflict in which the armed forces and the national police confronted the terror tactics of a ruthless Maoist guerilla known as The Shining Path. The military campaign left an estimated toll of 69,280 deaths. 20,458 of these deaths are attributed to national security forces\(^{43}\). The crimes include sexual violence, torture, extrajudicial killings, massacres and forced disappearances. The conflict spanned across three different democratically elected administrations: Fernando Belaunde 1980-1985, Alan Garcia 1985-1990 and Alberto Fujimori 1990-2000. Fujimori’s strategy \textit{vis-à-vis} the terrorist threat was particularly ruthless\(^{44}\). After staging a self-coup in 1992, in 1995 he promoted an amnesty in order to exonerate military and police officers from their


\(^{44}\) APRODEH, \textit{Podrán matar las Flores, pero nunca las cantutas. Los familiares del caso La Cantuta} (Lima: APRODEH, 2008); Burt.
responsibility in human rights violations. In addition, the 1990s were characterized by a complicit response of the judiciary. Military courts usurped jurisdiction over all cases involving state agents in order to either close the investigations or hand down acquittals. No serious investigations were conducted in order to establish the truth about the whereabouts of the victims or to punish those responsible. According to the final report of the Truth and Reconciliation Commission, “the judiciary lacked a real capacity to act, or what is even worse, did not have the will to act in defense of the constitutional order”.

In this context, human rights organizations became crucial actors. They documented rights violations and engaged in strategic litigation, first in the Inter-American system of human rights, and after the 2000 transition to democracy, in domestic courts. In 1985 more that 40 regional and national NGOs joined efforts to create an umbrella organization known as the Coordinadora Nacional de Derechos Humanos (CNDH). During its first five years of existence, the CNDH intensely denounced and documented human rights violations. During the 1990s, it began to forge alliances with international organizations such as Human Rights Watch and the International Center for Justice and International Law. This strategy facilitated contacts with the Inter-American Commission of Human Rights, which intensified its concern with the Peruvian situation by giving it a prominent treatment in its annual reports.

---

45 Ombudsman’s Office, Aministías vs. derechos humanos (Lima: Defensoría del Pueblo, 2001)
47 During the 1980s Congress initiated investigations to no avail. See Villarán.
48 Truth and Reconciliation Commission, Volume III, Chapter VI, 249-250, my translation
49 Martín Tanaka, Democracia sin partidos (Lima: Instituto de Estudios Peruanos, 2005)
50 For a comprehensive history of the CNDH see Coletta Youngers, Violencia política y sociedad civil en el Perú (Lima: Instituto de Estudios Peruanos, 2003).
and by increasing its official visits to the country. The commission also took several cases to the Inter-American Court. 51

After 2000 human rights NGOs actively participated in the broad coalition that backed President Valentin Paniagua’s transitional government. Activists and their allies staffed crucial cabinet positions in the ministries of foreign relations, justice and women’s affairs, and in state agencies such as the Ombudsman’s Office and the Attorney General’s Office. This instantly improved Peru’s relations with the Inter-American system52, and shaped the political conditions suitable for the creation of a Truth and Reconciliation Commission. The final report of the Truth and Reconciliation Commission released in 2003 extensively documented the atrocities, and expanded its initial mandate to file 47 emblematic cases in the domestic judiciary.

The first post-transitional government ended in 2006 when Alejandro Toledo transferred the presidency to Alan García. The climate favorable to the NGO agenda ended abruptly. García was a former president formally accused of being responsible for hundreds of human rights violations in the late 1980s. Not surprisingly his government was extremely hostile to transitional justice efforts. His presidency also coincided with the regaining of electoral strength by Fujimori’s party. As this case study will document, the vast majority of Peru’s transitional justice achievements, measured in judicial rulings handed down by domestic courts rejecting formalist arguments invoking statutes of limitations and amnesties, and in the number of prison sentences against a former president and military and police officers, took place in this hostile political environment.

51 Landmark rulings include I/A Court HR, Case of Castillo Paez v. Peru, ruling of November 3rd 1997 on forced disappearances; and I/A Court HR, Case of Barrios Altos v. Peru, ruling of March 14th 2001 on amnesty laws. See also Villarán.

52 In 1999 Fujimori removed Peru from the contentious jurisdiction of the Inter-American Court of Human Rights.
Transitional Justice in Peru: The Dependent Variable

The Truth and Reconciliation Commission filed 47 cases and the Ombudsman’s Office another 14. 159 additional cases were also put under investigation after a friendly accord was signed between Peru and the Inter-American Commission of Human Rights.\(^53\) The process involves thousands of victims and affects over 750 military and civilian officers\(^54\). The route followed by these cases in the sub-system created within the judiciary to deal with human rights violations, is a convoluted one. Provincial prosecutors are in charge of the preliminary investigations. Once they formalize the accusations, a provincial judge also gathers evidence and decides whether there is probable cause to advance to an oral trial. At the trial stage, a higher-level prosecutor investigates anew. After the National Criminal Court issues a ruling, parties can appeal to the Supreme Court. The cases that involve the paramilitary group created by Fujimori, known as Grupo Colina, follow a similar path but in the special anti-corruption sub-system dependent of courts in the Lima circuit. Cases that involve former president Fujimori also follow a different track. A panel of three Supreme Court justices conducts the oral trial after an investigation by a supreme prosecutor. Another panel of Supreme Court justices acts as an appellate court.

*Figure 2* shows the progress of the cases filed by the commission and the Ombudsman’s office.\(^55\) The National Criminal Court has held 18 oral trials in which 19 military and police officers were sentenced, on average, to between 10 and 14 years in prison, and 60 were acquitted. Most of the cases involve forced disappearances and massacres committed during the 1990’s. All of the rulings shown in Table 2 were appealed and when

---

\(^53\) See Report No. 139, Ombudsman’s Office, available online at www.defensoria.gov.pe

\(^54\) Of the military officers being investigated, 160 are still in active duty. See *El Comercio*, June 6\(^{th}\) 2010.

\(^55\) The Ombudsman’s office is the only agency that has access to the status of the cases. With respect to the cases that were part of the agreement with the Inter-American Commission, in 2008 101 cases were under preliminary investigation with prosecutors, 34 had open criminal prosecutions in the judiciary, and 10 had been decided in oral trials.
considering those appeals, the Supreme Court invalidated 8 trials, which were held anew.

The rulings annulled by the Supreme Court include both acquittals and prison sentences.

**Figure 2. Situation of Cases Filed by the Truth Commission and the Ombudsman’s Office**

![Chart showing cases filed by the Truth Commission and the Ombudsman's Office]

*Source: Ombudsman’s Office on the basis of confidential information gathered in prosecutors’ offices and in different courts.*

**Table 2: Rulings in oral trials held by the National Criminal Court**

<table>
<thead>
<tr>
<th>Case</th>
<th>Decade of perpetration</th>
<th>Date of ruling</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Ruling confirmed by SC (a)</th>
<th>President at the time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Castillo Paez</td>
<td>1990’s</td>
<td>March 2006</td>
<td>4</td>
<td>12</td>
<td>YES</td>
<td>Toledo</td>
</tr>
<tr>
<td>Cespedes Montalvo</td>
<td>1990’s</td>
<td>November 2006</td>
<td>1</td>
<td>NO*</td>
<td>Garcia</td>
<td></td>
</tr>
<tr>
<td>Chuschi</td>
<td>1990’s</td>
<td>February 2007</td>
<td>2</td>
<td>4</td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Cespedes Montalvo</td>
<td>1990’s</td>
<td>February 2007</td>
<td>1</td>
<td>NO*</td>
<td>Garcia</td>
<td></td>
</tr>
<tr>
<td>Barrantes</td>
<td>1990’s</td>
<td>February 2007</td>
<td>5</td>
<td>NO*</td>
<td>Garcia</td>
<td></td>
</tr>
<tr>
<td>Bustios</td>
<td>1990’s</td>
<td>October 2007</td>
<td>2</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Mancilla</td>
<td>1990’s</td>
<td>October 2007</td>
<td>3</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Aponte Ortiz</td>
<td>1990’s</td>
<td>November 2007</td>
<td>2</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Santa Barbara</td>
<td>1990’s</td>
<td>March 2008</td>
<td>1</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Haro/Mautino</td>
<td>1980’s</td>
<td>July 2008</td>
<td>5</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Matero</td>
<td>1990’s</td>
<td>August 2008</td>
<td>5</td>
<td></td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Osorio Rivera</td>
<td>1980’s</td>
<td>December 2008</td>
<td>1</td>
<td></td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Pomatanta</td>
<td>1990’s</td>
<td>January 2009</td>
<td>1</td>
<td></td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Los Cabitos</td>
<td>1980’s</td>
<td>October 2009</td>
<td>4</td>
<td></td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Laureles</td>
<td>1980’s</td>
<td>October 2009</td>
<td>7</td>
<td></td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Barrantes</td>
<td>1990’s</td>
<td>March 2010</td>
<td>1</td>
<td></td>
<td>NOT YET</td>
<td>Garcia</td>
</tr>
<tr>
<td>Pucara</td>
<td>1980’s</td>
<td>June 2010</td>
<td>2</td>
<td></td>
<td>NOT YET</td>
<td>Garcia</td>
</tr>
<tr>
<td>Universidad del</td>
<td>1980’s</td>
<td>June 2010**</td>
<td>2</td>
<td></td>
<td>NOT YET</td>
<td>Garcia</td>
</tr>
</tbody>
</table>
Outside the specialized sub-system for human rights cases, the First Criminal Chamber of the anti-corruption sub-system handed down a series of exemplary rulings against the members of the paramilitary group created during the Fujimori administration. In 2008, the panel of three judges ruled against 4 members of the Grupo Colina and acquitted 5 others for the forced disappearance of students at La Cantuta University in 1992. Later that year, when the police captured two other members of the group, the court also sentenced them to prison. In November 2005, the judges had already sentenced two other paramilitaries after they confessed the crimes. In La Cantuta case, the Supreme Court confirmed the 5 acquittals and 7 of the prison sentences, but requested a new trial for one of the officers who was found guilty. In 2010, the same anti-corruption court sentenced 19 members of the paramilitary group to between 4 and 25 years in prison for perpetrating crimes against humanity in the Barrios Altos, El Santa, and Yauri cases. Among them was the former chief of the intelligence services and symbol of Fujimori’s repressive apparatus, Vladimiro Montesinos. 11 officials were acquitted and the ruling is pending confirmation by the Supreme Court.

Barrios Altos and La Cantuta are the most emblematic cases of state terrorism during the 1990’s. These crimes constituted the basis of the accusation against former president Fujimori in the trial he faced between 2008 and 2009, and after which he was sentenced to 25
years in prison for the crimes of aggravated homicide, assault and kidnapping\textsuperscript{56}. The panel of Supreme Court judges concluded that the status of Fujimori as a former head of state justified the maximum punishment allowed by Peruvian Law. The Fujimori trial constitutes an exceptional achievement in the Peruvian transitional justice process because it is the first time that a democratically elected head of state is sentenced by courts in his own country for human rights violations. The trial received international acclaim for its fairness and impartiality\textsuperscript{57} and attracted the daily attention of the Peruvian public who held the judges in very high esteem\textsuperscript{58}.

Judges in most of these trials used international law and jurisprudence to characterize the crimes in question as “crimes against humanity”, thus being able to disregard statutes of limitations and the amnesty law. Moreover, in the cases Castillo Paez, Fujimori, La Cantuta and Barrios Altos, judges explicitly applied a non-formalistic human rights vision and recognized that given the nature of the crimes, it is unfair to demand prosecutors and human rights litigants to present direct evidence, such as official documents ordering the disappearance of a prisoner, in order to establish individual criminal responsibility. For example, in Fujimori, the Supreme Court stated that “it is precisely the clandestine nature and the illicit practices of an organization what leads to rule out, for obvious reasons, the


\textsuperscript{58} In a survey conducted in January 2009, individuals were asked whether they “approved or disapproved of the performance in the trial of Cesar San Martin”, the judge presiding over the hearings. He received a 37% job approval. 34% offered no answer. Three years earlier, in January 2006, only 26% believed that if Fujimori had to face a trial he would be treated impartially, and 41% thought that courts would be biased against him. Source: APOYO. All survey results on file with the author. This contrasts with the chronically low ratings of the judiciary in public opinion polls. The average approval rating of the judiciary between 1991 and 2009 is 26.8\%.. Source: APOYO. All survey results on file with the author.
possibility of proving its existence and the acts it perpetrated using [written] normative instruments.”

Given the number of acquittals, some human rights organizations have been critical of the process. In particular, they argue that the above criteria are not consistently applied.

For example, in the cases *Matero*, *Pomatanta* and *Los Laureles* the National Criminal Court ruled to acquit some or all of the accused due to the absence of direct incriminating evidence. Human rights organizations complain that judges do not contemplate the fact that, to this day, the Ministry of Defense and the armed forces have refused to open up their archives. In interviews several judges acknowledged this problem. In fact, some judges have filed official complaints and opened parallel investigations against state officials under the charge of obstructing justice. With respect to inconsistencies in evidentiary standards, one of the judges stated that

> We do not demand direct proof in all cases. We understand that due to the passage of time and the patterns of behavior that one observes in these crimes, it is necessary to work with indirect evidence. But that evidence needs to be based on factual certainties. […] We often encounter contradictions in the testimonies of the victims or their relatives. Sometimes what they said in previous iterations of the investigations does not coincide with what they say in the oral hearings. It is really hard to reconstruct what happened.

Although not without controversy, judges have issued punishments and acquittals regularly since the judicialization process began. The above rulings show that in most cases judges have adapted the standards of normal criminal prosecutions to the nature of the cases in question by applying human rights criteria. More importantly, in all cases acquittals have been decided on the basis of the interpretation of available evidence, and not by invoking legal formalisms like amnesties or statutes of limitations to stop criminal prosecutions.

---

60 Carlos Rivera, *El estado del proceso de judicialización de graves violaciones a los derechos humanos en el Perú* (Mimeo, 2010) [On file with the author]
61 Interview, Lima, May 17th 2010.
During the course of investigations and trials, judges had to decide on numerous interlocutory appeals filed by the defendants invoking these formalisms. Between 2004 and 2008, 8 appeals were filed invoking the validity of amnesties, 13 invoking statutes of limitations, 35 challenging the definition of crimes using criminal types not regulated at the time of the events, and 17 claiming that the trials could not proceed because they concerned matters already adjudicated. In total, 24 of these appeals were granted, while the remaining 49 were rejected. Of the 24 interlocutory appeals accepted by courts, 19 correspond to objections raised against the definition of the crimes. Unlike the running out of statutes of limitations or the application of amnesties, accepting this type of request does not stop criminal prosecutions but demands prosecutors to reframe their accusations. These figures show that courts overwhelmingly dismissed arguments grounded in a formalistic and positivist understanding of the law signaling the development of a culture of legal interpretation that transcends plain meaning interpretation and delves into questions about fundamental rights and state responsibilities, which may or may not be part of positive law.

It is important to highlight the impact of a series of rulings handed down by the Constitutional Court, which consolidated this jurisprudential change. These rulings develop a series of criteria to interpret the obligations of the Peruvian state to investigate and punish gross human rights violations such as extrajudicial executions, forced disappearances and torture. The Constitutional Court has read the 1993 constitution in light of international

---

62 Some of the cases in question were investigated and closed by military courts in the 1980s and 1990s.
63 See Report No. 139, *Ombudsman’s Office*.
64 For example, crimes against humanity are not codified in Peruvian Law.
treaties and the rulings of the Inter-American Court in order to recognize the existence of a
ing the existence of a right to truth and the commitment of the state to fight against impunity in cases that involve
and the commitment of the state to fight against impunity in cases that involve	offenses against humanity. The Court has defined the right to truth as an implicit right
recognized by the constitution, since “the Nation has the right to know the truth about unjust
and painful facts or events produced by multiple forms of state and non-state violence […] In
and painful facts or events produced by multiple forms of state and non-state violence […] In
this sense the right to truth is an inalienable collective juridical good.”66 The magnitude of
this sense the right to truth is an inalienable collective juridical good.”66 The magnitude of
these atrocities, which the court has repeatedly defined as “crimes against humanity”
demands that the state cannot put limits to its punitive prerogative to conduct a criminal
investigation, prosecute and punish those responsible, even if “a long time has passed since
the date when the illicit act was committed.”67 This expansive reading of rights embedded in
the date when the illicit act was committed.”67 This expansive reading of rights embedded in
the constitution, and of the international obligations of the Peruvian state, has cemented the
criteria developed by lower courts in order to reject the interlocutory appeals filed by defense
critia developed by lower courts in order to reject the interlocutory appeals filed by defense
courts. Various courts have thus established that there cannot be positive or formal legal
courts. Various courts have thus established that there cannot be positive or formal legal
barriers to redress the wrongs in question.

The Constitutional Court has also been a central actor in putting limits to the
jurisdiction of military courts68. Disputes between civilian and military courts over which
jurisdiction of military courts68. Disputes between civilian and military courts over which
system had the right to intervene in the judicialization process threatened to jeopardize
system had the right to intervene in the judicialization process threatened to jeopardize
transition justice in Peru. Defense lawyers claimed that their clients should be put under the
transition justice in Peru. Defense lawyers claimed that their clients should be put under the
orbit of military justice because the crimes they were being accused of were committed while

---

67 Ibid.
68 Landmark rulings include STC 0017-2003-AI/TC (Marc 16th 2004), STC 0023-2003-AI/TC (June 9th
June 9th 2004), STC 0004-2006-AI/TC (April 17th 2006), STC 0006-2006-PI/TC (June 13th 2006), STC 0012-2006-
05567-2007-PHC/TC (February 3rd 2009), and 00002-2008-PI/TC (September 9th 2009). I cite the rulings
using the nomenclature employed by the Constitutional Court, which will facilitate readers’ search for these
documents on the court’s website: www.tc.gob.pe.
serving as military officers. Human rights lawyers anticipated the lack of impartiality of military judges when investigating their peers, since the institution still considers the crimes in question as normal “excesses” in what constituted a just and necessary war against terrorism. The Constitutional Court has consistently ruled in favor of excluding gross human rights violations from the jurisdiction of military courts by rejecting the formalist definition of the latter as “crimes committed in service”\(^{69}\) thereby considering them as regular crimes subject to civilian jurisdiction. Moreover, the court has ruled that military judges are not exempt from applying normal due process clauses and the human rights criteria established by the American Convention when deciding on cases.

The above characterization of transitional justice in Peru suggests that the judicialization process has been far reaching, leading to the incarceration of perpetrators of all ranks for crimes committed during different political regimes. What explains this intense judicial activity? Those found guilty include members of the still very powerful Peruvian armed forces and also the leaders of a political group that governed the country for a decade and is still a relevant actor in the political system. In the next section I diachronically analyze the pattern of rulings with respect to changes in the political resources available to these actors, and argue that the political variables emphasized by the extant literature cannot explain the observed outcome.

Transitional Justice in Unfriendly Territory: How Politicians’ Tolerance Levels Affected the Judicialization Process

Due to the rise to power of APRA’s Alan Garcia in 2006 and the parallel electoral recovery of Fujimori’s party, the political space for action in the area of transitional justice

\(^{69}\) The Spanish term is “delitos en función.”
narrowed. In the words of an activist lawyer, “our enemies have become more powerful; the armed forces have regained their political influence and the government has forged an alliance with them in order to anchor its power”\textsuperscript{70}. Between 1985 and 1990 Alan García presided over some of the bloodiest years of the armed conflict.\textsuperscript{71} As a result of his status as commander in chief of the police and the armed forces during those years, he is accused of being responsible for several massacres. The vice-president, a former army general also accused of human rights violations, and the minister of defense became extremely vocal in their support for the army officers affected by the investigations. The president himself repeatedly demanded the end of what he saw as a political persecution against those who “defended the interests of the fatherland.”\textsuperscript{72}

Results form an original survey designed and administered by the author in 2010 targeting all of the prosecutors involved in human rights cases, support the idea that the levels of political cooperation with the investigations are low (Table 3). 100\% of respondents strongly agreed with the statement that the Defense Ministry and the armed forces put obstacles for the progress of the investigations. The lack of cooperation from these actors is perceived as more problematic for the success of the judicialization process than the large amount of cases they work on simultaneously and the lack of adequate material resources to carry out their duties.

\textsuperscript{70} Interview, Lima, April 21\textsuperscript{st} 2010. Since 1997, when they received the lowest approval rating of the last 2 decades, the armed forces have recovered their prestige to levels akin to those they enjoyed after the defeat of the Shinning Path in 1992 (data on file with the author).

\textsuperscript{71} Although the greatest number of deaths in any given year took place in 1984 (approximately 4000), during García’s presidency the violence reached the second highest peak of deaths in 1989 (over 2500 approximately). See Truth and Reconciliation Commission, Volume I, Chapter III, 117.

\textsuperscript{72} El Comercio, June 6\textsuperscript{th} 2010
Table 3: Perceived obstacles for the progress of the investigations

<table>
<thead>
<tr>
<th>Question</th>
<th>Average Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Please indicate how much you agree with the following statements…</td>
<td></td>
</tr>
<tr>
<td>Strongly agree =4; Somewhat agree =3; Somewhat disagree =2; Strongly disagree =1</td>
<td></td>
</tr>
<tr>
<td>The Ministry of Defense puts obstacles that make the progress of the investigations for human rights violations slow</td>
<td>4</td>
</tr>
<tr>
<td>Large dockets make the progress of human rights investigations slow</td>
<td>2.6</td>
</tr>
<tr>
<td>The lack of economic resources makes the progress of human rights investigations slow</td>
<td>3.3</td>
</tr>
</tbody>
</table>

Source: Author’s Survey. Targeted universe: All prosecutors involved in human rights cases. Anonymous survey administered online: Link to survey sent via email by Chief Prosecutor. Response Rate: 43.5%

Given the questions asked, the above data cannot adequately gauge the extent to which García’s support for the armed forces increased their leverage vis-à-vis human rights investigations. In order to document temporal variation in the tolerance of elites I rely on qualitative evidence gathered during interviews. In all of my interviews with judges and prosecutors the lack of collaboration of the armed forces and the Defense Ministry was the first thing mentioned when asked about the main obstacles they face when gathering evidence. My sources unanimously pointed out that the reticence to release documentation about the activities of the military and the police during the armed conflict worsened since 2006. For example, the head of the anti-corruption team in the Attorney General’s office who presented charges against Fujimori and his allies for human rights violations indicated that

At first, gathering information was difficult because the military was still under the control of Montesinos’s allies. […] Paniagua [the transition president between 2000 and 2001] then removed many of these high commanders, and made our job much easier. In contrast to the current situation, during those years we did not face problems when asking the Defense Ministry to send us information. In fact, with the aid of a very courageous judge, we even broke into military intelligence headquarters and found documents, human remains and the ovens in which they were cremated.73

73 Interview, Lima, March 19th 2010.
In the words of a prosecutor working in Ayacucho,

The lack of collaboration by the Defense Ministry is the biggest problem we face. The lack of information is key to explain the slow progress with many cases. If we cannot identify the military personnel active in this area in the 1980s and 1990s, we cannot individualize those responsible for the crimes we investigate and therefore cannot present formal accusations. The military has those records. All that we have are the aliases that the victims remember they heard while in prison or when their relatives were kidnapped. It was very common for military officers to use aliases during clandestine operations.74

A judge offered her own perspective on this issue:

During Toledo’s presidency [2001-2006], while I was an anti-corruption judge I took part in the investigations against the Grupo Colina […] In those years there was a lot of room for us to act, and we achieved many things. In fact we captured a lot of military and police officers who were on the run. Nowadays the situation is different. […] On many occasions the armed forces and the Defense Ministry refuse to submit the documentation we ask for. I now feel that they are in a more powerful position to overlook our requests.75

As part of its alliance with the military, the García administration strived to create resource imbalances between the parties involved in the trials. For example, in an attempt to weaken human rights organizations and strengthen the position of military officers facing indictments, the García administration tightened regulations on the reception of international aid thus jeopardizing NGOs main source of funding. The defense ministry was also active in ensuring that those accused of human rights violations had access to private attorneys, a service not offered to the victims, many of whom do not have adequate legal defense76.

The government and the military also sought to paralyze judicial action by undermining the protective character of the constitutional parchment barriers thought to guarantee judicial independence. As Figure 3 shows, the number of untenured judges declined sharply since 2000, reestablishing the formal insulation from political pressures that

74 Interview, Ayacucho, May 1st 2010.
75 Interview, May 6th 2010.
76 Only 39.1% of the victims involved in the judicialization process have access to lawyers. See Report No. 139, Obusdman’s Office.
the judiciary had lost during Fujimori’s authoritarian interregnum. However, despite these improved safeguards, during García’s term in office judges and prosecutors were regularly the victims of informal intimidation tactics. For example, a judge stated in an interview that

I constantly receive threats, especially during oral hearings. Once a military officer tried to intimidate us saying that he knew where my colleague and I spent time when we weren’t at work. It was clear that he knew exactly at what time we left the office. My colleague’s son was shot.

![Figure 3. Untenured judges in the Peruvian judiciary (%)](image)

Source: Justicia Viva

Disciplinary sanctions were also enforced in order to set standards of acceptable behavior, especially among those judges and prosecutors with progressive career ambitions. For example, Provincial prosecutor Cristina Olazábal investigated the Cayara and Accomarca massacres perpetrated during García’s first term in the 1980s, and decided to press charges against him and a number of former military officers accusing them of perpetrating the crime of genocide. After García was sworn in, the nation’s chief prosecutor initiated an internal investigation against Olazábal for “malicious prosecution”. She was

---

77 See Finkel. These institutional conditions are often highlighted in the judicial politics literature as guarantors of judicial independence. See Julio Ríos and Matthew Taylor, “Institutional Determinants of the Judicialization of Policy in Brazil and Mexico,” in Journal of Latin American Studies (38, 2006), 739-766

78 Judges and prosecutors are evaluated every 7 years.
subsequently untenured. Prosecutors and judges see the Olazábal case as a reminder that their professional futures do not necessarily depend on their merits as public servants. As one of them admitted,

What happened to Cristina Olazabal is frightening. We need to be very careful when confronting these individuals. After that unfortunate episode many prosecutors have seriously considered whether to move on with the investigations or to put them on hold.  

A superior prosecutor who litigates before the Supreme Court also described how this episode affected his subordinates:

The accusation presented against Olazabal is something that I think should not have happened. It has spread a lot of fear among prosecutors. I can make a mistake, but it’s my opinion and cannot lead to a formal investigation for malicious prosecution! Instead of backing prosecutors and giving them the tools they need to face extremely complicated and dangerous investigations, the chief prosecutor attacks them. These shenanigans are aimed at discouraging prosecutors, at dilapidating their commitment to truth and justice.

Finally, a provincial judge also acknowledged that judges are not exempt from these fears. He explained that since then many of his colleagues “are afraid to launch bold accusations using innovative juridical language that precisely characterizes the crimes, like Cristina did, because they do not want to suffer the consequences.”

Formal judicial independence is also jeopardized by well-known patterns of judicial clientelism. Being out of sync with powerful political actors, or not having the right political relations can lead to a stagnant judicial career or to an abrupt termination of it. García’s political party, APRA, was mentioned in many of my interviews with judges and prosecutors as having expanded its influence over the judiciary between 2006 and 2010. The party’s past record in office enhances the credibility of my sources: APRA’s colonization of the bench in the late 1980s was one of the central arguments used by Fujimori when he launched the

---

80 Interview, Ayacucho, May 1st 2010.
81 Interview, Lima, May 26th 2010.
82 Interview, Ayacucho, May 3rd 2010.
restructuring of an institution seen as corrupt and inefficient\textsuperscript{83}. One of the judges I interviewed crystallized this consensus when stating that:

> The judiciary is full of staunch APRA supporters, especially here in Lima. I was part of the anti-corruption subsystem and could have been promoted to a criminal chamber. Instead I was sent back to a regular criminal court. My problem was that in the 1980s I was a high-ranking clerk in a special Supreme Court panel that tried four of Garcia’s ministers. As a result, for APRA I am a persona non grata. These are the informal mechanisms that do not kick you out of the game, but make your life really difficult. They are the ones who decide on your professional future. When I was about to begin investigating the \textit{El Fronton} case, they sent me to another court. They obviously know about my position with regards to, for example, statutes of limitations, so they got rid of me\textsuperscript{84}.

These subtle tactics deployed by the political and military establishments to minimize the impact of the investigations and trials have been accompanied by blunter policy initiatives aimed at striking a fatal blow to the entire judicialization process. The clearest example of the low tolerance shown by both congress and the executive\textsuperscript{85} towards transitional justice is the issuing of presidential decree No. 1097 in September 2010, characterized by human rights activists as an amnesty in disguise.

In August 2010 Congress interpreted a recent ruling handed down by the Constitutional Court\textsuperscript{86} as demanding a series of modifications in the Criminal Code of Military Justice. In order to comply with the ruling, Congress passed a law granting the Executive the powers to introduce those modifications by decree. In September the changes were announced and included a series of instructions in relation to the treatment of human

---

\textsuperscript{83} David Lovatón, “Cambios en el sistema de justicia y sociedad civil en Perú (1990-2002), Informe de Perú,” in Luis Pásara et al. eds., \textit{Justicia y sociedad civil. El papel de la sociedad civil en la reforma judicial} (Buenos Aires: CEJA, 2003); Finkel

\textsuperscript{84} Interview, Lima, 26\textsuperscript{th} March, 2010. \textit{El Fronton} case is about a massacre perpetrated in a prison where terrorist suspects were held in custody. Since it occurred during Garcia’s first term he is one of the officials accused in the case.

\textsuperscript{85} Congress is also a hostile ground for human rights activists. After the 2006 elections, Fujimori’s followers consolidated a cohesive legislative caucus, which after other more numerous blocs disintegrated, became the second largest in parliament.

\textsuperscript{86} Ruling STC 00001-2009-PI/TC of December 4\textsuperscript{th} 2009.
rights cases by civilian courts. One of them mandated the immediate closing of all criminal prosecutions that had been open for more than 14 months without a final resolution. In order to justify this, the decree anticipated the enactment of the new Code on Criminal Procedures only for cases involving human rights violations. The new code contains the 14 months rule. Another instruction forced upon courts an interpretation of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The decree stated that since Peru ratified the convention in 2003, the criteria used by courts to ignore statutes of limitations in cases involving human rights violations could not be applied retroactively in the cases still under investigation.

The decree triggered the immediate reaction of human rights organizations. They took center stage in the media and denounced the government for trying to stop the judicialization process. Constitutional law professors allied to the human rights movement explained in the media the arguments judges should use in order to apply judicial review to bring down the decree. They suggested that if judges implemented the decree they would be violating the state’s international responsibility to investigate and punish gross human rights violations.

When several days later one of the accused in the Barrios Altos case asked the First Criminal Chamber of the anti-corruption subsystem to terminate the trial and close the case, judges handed down a unanimous ruling declaring the decree unconstitutional. Similarly, the prosecutors who are part of the judicial sub-system dealing with human rights violations.

---

87 It was later revealed that the minister of defense received advise from Fujimori’s lawyers when drafting the decree. See IDL-Reporteros, September 24th 2010.
88 La República, September 2nd 2010 and September 8th 2010, and Caretas, September 9th 2010.
89 La República, September 3rd 2010.
90 La República, September 6th 2010.
91 Ruling Exp. 28-2001 of September 15th 2010.
issued a document carefully explaining why they refused to apply the decree. In what amounted to a manifesto of what they perceived to be their institutional mission, they emphasized that if the new regulations were accepted, and cases were closed either because statutes of limitations were invoked or due to the delay in the investigations, the country would be sanctioning impunity, thus aggravating the victims’ destitution.92

As a result of the strong opposition to the decree both in civil society and in the judiciary, the government was exposed to a political crisis. The president derogated the norm and completely restructured his cabinet.93 This episode clearly reveals two things about the Peruvian judicialization process. First, the tolerance of political actors for the investigations and trials is extremely low. Second, human rights organizations count with a series of crucial allies in the judiciary who in spite of adverse political conditions are committed to the cause. In this sense, it is important to bear in mind that all but one of the condemnatory rulings documented in the previous section were handed down during the García administration.

According to extant approaches to the study of transitional justice, it is the will of political actors what guarantees success. The judiciary is seen as an appendix of politicians, and its actions as reflexes conditioned by the balance of power. One could argue that the progress of the cases after 2006 is explained by the inertias generated by a previous political environment supportive of the human rights cause. Notwithstanding, the existence of extremely bold condemnatory rulings after 2006 and the reaction of judges and prosecutors to initiatives like Decree 1097, show there is something more going on than simply a bureaucratic inertia. In the next section I will show that Peruvian human rights litigants and activists were extremely successful in crafting a constituency of friendly judges and

92 La República, September 9th 2010.
93 The changes included the chief of staff and the ministers of defense, justice and the economy.
prosecutors, for whom anticipating the end of the judicialization process contravened a series of norms and legal understandings that they internalized as guiding premises of their professional undertakings. This cultural transformation was the product of skilful interventions by human rights activists to empower judges with the legal tools necessary to defeat impunity, arguments with which they feel safe in defying powerful political players.

**Legal Judicial Empowerment From Below**

Peruvian human rights activists were aware of the need to approach judges and build alliances with them in order to guarantee the success of transitional justice efforts. Even when politicians’ tolerance levels were high, the absence of those alliances could enhance the difficulties inherent in trying to overcome the legal hurdles that stand in the way of justice (amnesties, statutes of limitations, the legality principle, etc). If tolerance levels decreased, judges devoid of social support and of articulate pro-transitional justice legal arguments would be more likely to capitulate in the face of fierce political pressures.

The diffusion of the legal and jurisprudential tools necessary for prosecutors to formalize accusations and for judges to circumvent the legal formalisms invoked by the defendants was seen as central to the alliance-building effort. The human rights movement staffed the legal team of the Truth and Reconciliation Commission with this goal in mind. The lawyer in charge of that team stated in an interview that

> We knew that apart from gathering evidence about the violations documented in the Final Report of the commission, we had to expand the commission’s original mandate to provide a clear, almost pedagogical interpretation of the Peruvian legal framework in light of international law. We had to make it clear that it was illegal to use legal formalisms and a parochial reading of the law to stop the judicialization process.\(^\text{94}\)

---

\(^{94}\) Interview, Lima, March 10\(^{\text{th}}\) 2010. See Truth and Reconciliation Commission, Volume I, Chapter IV
In addition to a legal chapter, the Final Report also included a series of recommendations for the government. The creation of a special court system under the orbit of the National Criminal Court to deal with transitional justice cases was a high priority for NGOs. Building a relationship with an identifiable group of judges and prosecutors was paramount in order to facilitate the diffusion of the aforementioned doctrines and legal ideas.

It was an unprecedented opportunity to make sure that they shared our same legal criteria when assessing the difficulties presented by these cases. We had a demarcated group that we could approach by inviting them to seminars and discussions and by circulating academic materials among them.95

Another litigant explained the need for these pedagogical initiatives:

We had to cover what we anticipated would be the main legal hurdles in the judicialization process. The inapplicability of amnesties, the inapplicability of statutory limitations, or the definition of forced disappearances as continuous crimes, were juridical issues that had never been confronted by courts before. We knew these would be the main arenas of confrontation during trials, and it was crucial to ensure a minimum level of expertise in these matters among judges and prosecutors.96

Litigants did not want judges to excuse themselves from applying these innovative legal criteria due to lack of knowledge. Indeed, even those judicial actors willing to expose themselves to political pressures had difficulties in understanding the legal options available before them to move these cases forward. A prominent human rights lawyer admitted that

Prosecutors would tell us: “I have no idea how to legally back-up the indictments.” This was a warning sign about the obstacles we could face if we did not act within the judiciary, as opposed to simply being vocal in the media or staffing government agencies. At first we began by distributing documents and briefs, but then we decided to invite them to seminars and lectures given by experts in the field.97

95 Interview, Lima, April 14th 2010.
96 Interview, Lima, April 10th 2010.
97 Interview, Lima, April 21st 2010.
In this sense, human rights litigants had to struggle against a jurisprudential inertia reproduced by the educational system and enhanced by the taboo built around the human rights discourse often accused of being functional to the interests of terrorist organizations:

In our universities these topics are not part of law programs. I never took a human rights course. In addition, especially here in Ayacucho, human rights are considered subversive. The situation was even worse in the 1980s, when most of the judges active today studied law. As a result, judicial operators have a narrow focus on internal law and are not used to invoking international norms. Without expanding their legal knowledge and without encouraging them to transform their legal praxis, it would have been impossible to punish violators.98

In the section describing the dependent variable I suggested that judicial actors in Peru fully embraced the new legal orthodoxy in their rulings on transitional justice. Can we attribute this to the aforementioned diffusion strategies designed by the human rights community? In the survey of prosecutors mentioned above, respondents confirmed their attendance to on average 3.5 courses (Table 3). Only 3 respondents said they had studied international human rights law in law school. When asked about their agreement with the statement that after attending the seminars organized by NGOs they were more likely to apply international legal instruments in their decisions, the average response was 3.8 out of a maximum of 4 on the agreement scale. Similarly, the prosecutors who participated in the survey showed high levels of agreement with the statement that in the seminars they became familiar with legal instruments they previously did not know about. The fact that the average prosecutor somewhat disagreed with the idea that the lack of training makes the progress of the judicialization process difficult, provides further evidence of the positive effect of these pedagogical interventions on the technical capabilities of judicial actors (Table 4). Finally, in addition to diffusing knowledge of international human rights law, the seminars were also intended to persuade judicial actors to relax the standards to evaluate the evidence when

98 Interview, Ayacucho, May 5th 2010.
seeking to determine individual criminal responsibility. In particular, given the difficulties in gathering direct evidence on crimes perpetrated in the distant past, litigants expected judges and prosecutors to be open to assign special value to indirect evidence. As we saw in a previous section, this remains a contentious issue, especially when judges hand down acquittals due to insufficient evidence and victims and their lawyers accuse them of failing to adapt their criteria to the nature of human rights cases. The results from the survey also help explain this. Human rights NGOs were less effective at persuading judicial actors in this area: prosecutors’ level of agreement with the statement that after attending the seminars they were more likely to accept indirect evidence are significantly lower when compared to responses to the other questions.

Table 4: Effects of Pedagogical Intervention

<table>
<thead>
<tr>
<th>Question</th>
<th>Average Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Please indicate the number of seminars on human rights organized by civil society that you attended since 2004</td>
<td>3.5</td>
</tr>
<tr>
<td>Did you take International Human Rights Law Courses in law school?</td>
<td>YES = 15% (3 respondents)</td>
</tr>
<tr>
<td>The lack of training makes the investigation of human rights crimes more difficult</td>
<td>2.1</td>
</tr>
<tr>
<td>After attending these seminars I am more likely to use international legal instruments in my decisions</td>
<td>3.8</td>
</tr>
<tr>
<td>In the seminars I became familiar with legal instruments I previously did not know about</td>
<td>3.5</td>
</tr>
<tr>
<td>After attending these seminars I am more likely to accept indirect evidence to ascribe individual criminal responsibility</td>
<td>2.6</td>
</tr>
</tbody>
</table>

Source: Author’s Survey. Targeted universe: All prosecutors involved in human rights cases. Anonymous survey administered online: Link to survey sent via email by Chief Prosecutor. Response Rate: 43.5%
In order to complement the results from the survey in what follows I analyze the testimonies obtained during interviews with judicial actors. The judges and prosecutors I interviewed were surprisingly candid in accepting their prior ignorance of these legal tools and the positive impact of activists’ strategies in their ability to prosecute and punish human rights criminals. All of the judicial actors I talked to had at one point or another attended the pedagogical events organized by NGOs or received informal training by activists.

In the words of a provincial prosecutor “the lack of training in these legal questions was a big problem, especially at the beginning of the judicialization process. All of these topics were new! When I went to school I took one human rights class that did not cover the debates with the depth required by these cases.”\(^{99}\) An anti-corruption judge also explained that “the biggest contribution of these seminars organized by human rights NGOs is that they connect us with debates and questions that have already been answered in other countries. This makes our job much easier and enriches our decisions. […] Without the diffusion of this information we would have encountered insurmountable obstacles to bring down amnesty laws or to properly characterize the nature of crimes that were committed decades ago.”\(^{100}\) A provincial prosecutor was even more conclusive:

Due to the training we received in law school, we did not see these cases as special cases that involved gross human rights violations, and instead approached them as normal cases applying the conventional standards of criminal law. This whole process has involved first and foremost an intellectual journey. We had to attend seminars both here and abroad in order to understand new legal paradigms, the use of international instruments and above all, understand that we had to invoke customary law as a source of law already in place at the time when the crimes were committed. We had to fight against the legality principle and we had to know how to do that correctly in order to respect due process clauses. […] Without the training offered by NGOs and by some universities it would have been impossible to achieve these results. We were blinded by the rules of conventional criminal law. If you had conducted this interview 10 years ago I would be talking about statutes of limitations! Now

\(^{99}\) Interview, Ayacucho, May 1\(^{st}\) 2010.

\(^{100}\) Interview, Lima, March 23\(^{rd}\) 2010.
we can talk about crimes against humanity, we can see the importance of the Inter-American Court, etc.\textsuperscript{101}

These testimonies are examples of the broad consensus I found among judges and prosecutors with respect to the doctrinal shifts that constituted a necessary condition for transitional justice. Broadening the normative and jurisprudential foundations of judicial decision-making was crucial in order for judicial actors to overcome the legal prejudices that stood in the way of criminal prosecutions and punishments. Forging a new consensus about the validity of certain arguments and legal instruments, and providing judges and prosecutors with the tools needed to articulate sophisticated constitutional arguments, made justice possible in the Peruvian case.

The fact that the old formalist legal orthodoxy exerted such a constraining force on judicial decision-making in cases of transitional justice suggests that litigants could not rely on judicial actors’ good will or prior ideological predispositions. There are two reasons for this. First, before NGOs reached out to judges and prosecutors, those that were ideologically predisposed to support the victims felt ill equipped when they sought to translate personal or ideological commitments into legal language. For example, the following testimony of a judge who investigated a case of forced disappearances in the 1990s shows that judicial actors were indeed constrained by their technical capabilities. He recalled the “decisive impact that my contacts with human rights NGOs had when I was investigating that crime. Had I not attended the seminars they organized at the time, I would have never been able to hand down an arrest warrant. They opened the jurisprudential doors I needed by making me familiar with questions of constitutional law and human rights law, and with international

\textsuperscript{101} Interview, Ayacucho, May 3\textsuperscript{rd} 2010.
legal instruments and their applicability in a domestic setting. I have attended many of these courses, first as a student and now as a lecturer.\textsuperscript{102}

Second, the typical judicial actor was not ideologically predisposed to rule in favor of the victims. The above judge, who personally declared himself a long time supporter of the human rights cause, constitutes an exception. The prosecutors who responded to my survey revealed fairly centrist tendencies: the mean score for ideological self-placement in a 1 to 10 scale was 4.3. Moreover, the way judicial actors presented their views about the internal armed conflict and their opinions of NGOs made it clear that their pro-transitional justice behavior was not simply driven by an ideological commitment that led them to look for sources of law that would rationalize a pre-existing position. In interviews judges and prosecutors often accused human rights NGOs of being too leftist and many even referred to members of the military with pity and admiration as “brave” and “inexperienced” “young soldiers” (“soldaditos”) who selflessly combated the terrorist threat. The typical judge or prosecutor was therefore compelled to support the victims after NGOs successfully entrenched new professional standards and legal ideas associated to the principles and values of international human rights law. In interviews judges and prosecutors referred to the diffusion of these new legal standards as revolutionary, eye opening and intellectually challenging. The exposure to these new legal doctrines was something they did not look for but was offered to them by human rights NGOs. In fact, in a number of interviews, respondents told me that attending these courses had sparked an academic interest in these matters.

The evidence presented so far therefore supports the idea that legal cultures and legal knowledge exert a constraining force on judicial decision-making. But my argument also

\textsuperscript{102} Interview, Lima, March 19\textsuperscript{th} 2010.
suggests that by forging a consensus around the legitimacy of certain legal standards and values, NGOs can transform judiciaries’ corporate identity and institutional mission providing them with the motivation and the means to defy powerful political players. I suggested earlier that the resistance to the Presidential Decree that sought to put an end to the judicialization process is an example of this new identity at work. What exactly compels judicial actors to engage in these bold and risky acts of defiance? Are NGOs pedagogical interventions responsible for this sense of empowerment in the face of political adversity?

The testimony of a judge who in the midst of Fujimori’s dictatorship declared an amnesty law passed by congress inapplicable for those responsible of the Barrios Altos massacre, is instructive. Her action contravened all standards of professional behavior as judges understood them at the time:

At that time the idea that laws had to be in harmony with the principles established in international treaties was not something internalized among us. Moreover, it was a law passed by congress. Although judges are allowed to apply decentralized judicial review, in 1995 I only knew of one example in Peru and it wasn’t even by a criminal court. My colleagues told me that I was mad, how could I declare a law unconstitutional! It was a valid piece of legislation. We weren’t supposed to meddle in political affairs. […] I didn’t know how to back my decision to declare the inapplicability of the amnesty, it was something radically new! […] My contacts with a well-known human rights lawyer proved crucial. He gave me the legal instruments I needed to show that I was acting correctly, as mandated by the law, and that I wasn’t circumventing the amnesty because I was against the military or because it was a crazy idea of mine. I felt extremely constrained by the information I had before I visited this lawyer. In fact when I entered his office I was shocked by the size of his book collection on human rights law. 103

Once again we see the crucial intervention of human rights litigants in providing the judge with the legal tools she lacked and without which she could not have acted as she did104.

More importantly, though, in the interview she also recognized the empowering aspect of this intervention given the political context in which she handed down that decision: “knowing

---

103 Interview, Lima, March 26th 2010
104 Congress then passed a second amnesty and declared that it could not be subject to judicial review. This amnesty was never challenged in court during Fujimori’s regime.
about these issues gives us power, power to decide. It allows us to act following our convictions, despite political pressures to the contrary. I cannot let them intimidate me because I have the legal tools with which to justify the correctness of my actions.\textsuperscript{105}

The idea that expanding the sources of law that are seen as legitimate is empowering, was a recurrent theme in my interviews with judges and prosecutors. A superior prosecutor who participated in oral trials at the National Criminal Chamber stated that “these doctrinal and jurisprudential sources empower prosecutors, especially when we have to present politically sensitive accusations. International law and the legal human rights discourse become our best allies, our biggest sources of legitimacy and personal security.”\textsuperscript{106} Another prosecutor referred to knowledge as an insurance policy against charges for malicious prosecution. She argued that “getting to know other judicialization experiences and their respective jurisprudential developments reduces our uncertainty when we decide on a case. If others used this or that interpretation or instrument, then we know that we can also do it without running the risk of being accused of malicious prosecution. Better understanding these new and complex issues protects us and empowers us.”\textsuperscript{107} Another provincial prosecutor was frustrated by the fact that the amount and variety of courses being offered has diminished in recent years.\textsuperscript{108} She suggested that

We need more and better training. Defendants are all the time presenting new arguments to stop these prosecutions, to invalidate pieces of evidence, etc. What do I do, for example, if after 3 decades the medical and psychological reports do not find evidence of torture? What other kind of evidence can I look for? How do I use it and what importance can I give to it? We need help! These are really tough questions and we are not trained to answer them. We always have to grapple with these issues and hand down decisions in a context of fear. We need better training to back the choices we make, often against powerful people. Moreover,

\textsuperscript{105} Interview, Lima, March 26\textsuperscript{th} 2010.
\textsuperscript{106} Interview, Lima, April 22\textsuperscript{nd} 2010.
\textsuperscript{107} Interview, Ayacucho, May 2\textsuperscript{nd} 2010.
\textsuperscript{108} My sources in the human rights community agreed with this and explained that their budgets have become progressively tighter.
we need better training in order to know exactly the criteria being used by our superiors. We are afraid that we may end up being accused of prevarication like Cristina Olazabal.\textsuperscript{109}

As a judge suggested in an interview, judicial actors feel that entering the human rights legal world amounts to throwing themselves “into a void”.\textsuperscript{110} When they enter politically inhospitable territories or when they seek to pursue their moral commitments, it is important for judicial actors to know how to legitimize their actions in the language of the law. The above testimonies show that when the law to be applied is unknown or contravenes established standards of judicial praxis, this process is not straightforward. Litigation groups can expand the possibilities for assertive judicial behavior by transforming the ways judges perceive the reach of their formal prerogatives. The law and cultures of legal interpretation put limits on what judges and prosecutors think is acceptable behavior, even when those limits severely constrain their policy preferences. The consequences of their actions in transitional justice processes are so far reaching, both politically and legally, that the epistemic and social support offered by human rights activists is crucial.

The empowering effect of the pedagogical intervention executed by human rights litigants is recognized by judges and prosecutors and also, albeit indirectly, by the military. In 2010 the armed forced decided to approach prosecutors following the “academic” model implemented by NGOs. With the help of the nation’s chief prosecutor they organized a seminar which included lectures by two officials formally accused of perpetrating human rights violations. The goal of the seminar was to explain their vision of military command structures during the armed conflict, arguing that high commanders had no control over the actions of their subordinates. If prosecutors accepted this understanding of military

\textsuperscript{109} Interview, Ayacucho, May 4\textsuperscript{th} 2010.
\textsuperscript{110} Interview, Lima, May 6\textsuperscript{th} 2010.
operations they would circumscribe their accusations to those materially or directly responsible for the crimes, and abstain from presenting charges against those suspected of designing the anti-terrorist insurgency and of giving orders to the rank and file. In cases involving hundreds of victims and with little access to military records about who was deployed in each combat area, it is almost impossible to identify the direct perpetrators. That is why, since the beginning of the judicialization process, accusations mainly focused on the indirect perpetrators in command of the military apparatus. If prosecutors’ endorsed the military’s vision the investigations and trials would almost certainly end soon.

In the words of one of the prosecutors who attended the event, “we won’t cease in our efforts to achieve justice. The arguments they tried to convey to us clearly do not persuade us and we won’t use them.”

Another participant said she told the military officers that “we have lived through decades of a bloody conflict. You talk about pacification and reconciliation, but that cannot happen without justice because the nation’s scars are still bleeding.” It is clear that litigant’s efforts to craft a constituency of friendly judicial actors, sensitive to their cause and their novel legal arguments were effective. In fact, when the military was accused of organizing this seminar in order to intimidate prosecutors, they defended themselves by saying that human rights NGOs resorted to the same paralegal strategies. The controversy led the National Criminal Court to suspend all future contacts between judges and prosecutors with the parties involved in the trials outside the courtroom.

---

111 Interview, Ayacucho, May 4th, 2010.
112 Interview, Lima, April 22nd 2010.
Conclusion

The outcome of the Peruvian transitional justice process cannot be explained by a favorable political context or the presence of a disgruntled military. In this paper I showed that deinstitutionalizing positivist/formalist legal cultures, dominant in Latin American judicial corporations, and locking in an alternative legal vision was necessary in order to unleash the potential of the Peruvian judiciary as a viable site for the defense of victims’ rights.

The claim that judicial behavior is decisively affected by a cultural layer that fixes the world of known legal solutions and defines the judiciary’s understanding of its institutional mission, has important policy and theoretical implications. First, international institutions and domestic governments have spent over the past decades millions of dollars to strengthen the independence of Latin American judiciaries via formal institutional changes. This paper indicates that formal changes are not enough. The reproduction of behavioral norms within judicial corporations can severely constrain the capacity of judiciaries to develop a constitutional culture that socializes political and military actors into respecting the legal boundaries of their institutional prerogatives. The Peruvian case study shows how civil society groups can become effective stakeholders in the process of improving judges’ ability to enforce checks and balances by informally undermining limiting legal cultures.

Second, given the ideational inertias that characterize judicial behavior, in order to understand the regional and international diffusion of legal standards it is imperative to conceptualize diffusion as a differentiated process. States are not unitary actors. Executives may be induced to internalize human rights standards by manipulating their foreign policy incentives. The success of diffusion initiatives among judicial actors requires different
strategies. This paper contributes to the literature on norm diffusion by identifying specific mechanisms whereby international human rights norms have an impact on judicial personnel. It underscores the importance of re-socialization efforts attuned to judges’ and prosecutors’ concern with the legal legitimacy of their decisions.

Finally, this paper highlights the importance of exploring the formation of legal preferences in order to adequately explain changes in patterns of judicial behavior. Courts’ growing focus on fundamental rights instead of the procedural aspects of adjudication constitutes a true revolution in Latin America’s legal culture. As scholars begin to explore the spread of the so-called “neo-constitutionalist” paradigm\textsuperscript{113}, which includes pro-transitional justice arguments, it is important that they identify the political struggles involved in the consolidation of the new orthodoxy. The influx of new ideas is not a linear process devoid of conflict. Understanding how the cultural underpinnings of judicial decision-making are reproduced or disrupted requires identifying the socio-political coalitions that back different legal worldviews. This paper has shown that judiciaries are arenas of political struggle in which members of the corporation and external groups seek to secure their interests by entrenching legal worldviews biased in favor of their political visions and interests.

\textsuperscript{113} See Couso and references therein.