Panel: The Justice Cascade in Latin America

*Beth Van Schaack, Moderator**

This panel considers the phenomenon of the Justice Cascade, a term that refers to the idea that extraterritorial legal processes—such as criminal or civil proceedings pursuant to universal jurisdiction or the exercise of international jurisdiction—can trigger domestic legal processes within a country where such processes had theretofore been impeded. Accountability may not easily be forthcoming in countries that have experienced massive human rights violations or systemic violence. Impediments include legal limitations, such as amnesty laws, or political obstacles, such as prosecutors unwilling to indict perpetrators or judges who are rejecting cases on pretextual procedural grounds. The Justice Cascade thesis posits that even though legal processes commenced abroad may not be as effective as domestic processes, such extraterritorial legal action can actually jump start domestic processes in the target country.

*Naomi Roht-Arriaza, Panelist**

My job is to set the scene, talk about overall trends and hazards related to justice in Latin America. Latin America was the scene of massive human rights violations in the 1970's and 1980's. The numbers vary from country to country, several hundred in some places, three to four thousand in Chile, at least ten to fifteen thousand in Argentina, seventy thousand in Peru, and up to two hundred thousand in Guatemala. The human rights violations encompassed massive disappearances, massacres, torture, and forced exile. Eventually these military or

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military-controlled governments ceased and there was a return to civilian government. The region has been a pioneer in a wide range of post conflict actions. The first major truth commission was in Argentina followed by truth commissions in a number of other Latin American countries. Argentina also held the first national prosecutions of high-ranking military officers in 1985.

Although there were subsequent truth commissions in a number of other countries, there was also a backlash, mainly in the form of national amnesty laws.[1] As a result of the amnesty laws in the late 1980s through mid-1990's in Argentina, Peru, Uruguay, Central America, and the refusal to annul the amnesty the military had given itself in Chile, the situation of justice for human rights violations was discouraging. Ten years later, however, the situation looks really different. Even though Pinochet is dead without ever facing trial, the local courts were within a month of actually beginning formal trial proceedings against him on human rights and corruption-related charges. Over a hundred of his subordinates have been convicted. Also, thirty-five generals are now facing trial and are under investigation. The amnesty law has now been severely limited. Several courts have held that the amnesty law, first, never applied to cases involving forced disappearance, and, second, has to be applied only at the end of all trial proceedings. Only once it is established that the person is guilty can you think about amnesty. Moreover, a number of judges have held that it does not apply at all because it violates international law.

In Argentina, the "due obedience" amnesty law was declared unconstitutional in 2005 by the Argentinean Supreme Court. Pardons granted by then President Menem in 1989 and 1990 were also annulled by the Supreme Court this year. The legislature also passed a law annulling all of the amnesty laws. Several low-level operatives have been convicted, and trials are under way against the surviving top brass, including both the military and police.

In Peru, where the Peruvian Truth and Reconciliation Commission presented its report a couple of years ago, the Truth and Reconciliation Commission also presented a dossier of forty-three cases to the Prosecutors Office. The Prosecutor, although reticent at first, has now moved forward on a significant number of cases. In some cases, people are under investigation for trial and there have actually been trial convictions in some of the emblematic cases. The amnesty law was also annulled in Peru. Fujimori, who found his way back from Japan to Peru via Chile, was arrested in Chile on a Peruvian arrest warrant and he is now under extradition

1. *See* Douglass Casssel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS 197, 200–01 (Autumn 1996).

proceedings from Chile to Peru.

Uruguay was one of the last holdouts. The Uruguayans passed an amnesty law right after the return to civilian government. There was a plebiscite in Uruguay to decide whether the amnesty law was valid. The military appeared on television, threatening new violence if the amnesty laws were found invalid. The plebiscite came out approving the amnesty. That held until about two years ago, but there are now cases opening in Uruguay against a number of high ranking military, and also against the ex-President and the ex-Foreign Minister.

In Mexico, a Special Prosecutors Office was created in the last five years, which indicted ex-President Echeverría and the former Chief of the Federal Police on genocide charges. The case has gone back and forth around the question of whether the statute of limitations can be tolled on grounds that for the period of time that Echeverria was Head of State, he had immunity and could not be prosecuted.

In Bolivia, General García Meza, one of the first prosecutions in 1993, was convicted and sentenced to thirty years in jail. García Meza fled to Brazil for a number of years, but eventually was caught and extradited back to Bolivia where he is now serving his sentence. Another president, Sánchez de Lozada, is being investigated for incidents in which troops opened fired on demonstrators a couple of years ago.

Numerous ex-heads of state have been investigated or convicted on human rights charges. And if you look more broadly, not just at human rights, but if you look also at corruption charges, you can add another dozen or so who have either been investigated or jailed. There is a surge as it were, and the question is why? The Justice Cascade idea is correct, but it has to be seen in the context of domestic changes as well. It is the confluence of the domestic and the international that is creating this phenomenon.

Domestically, there is the persistence of human rights movements inside the country. There are people who have not given up in fifteen or twenty years. These people documented the abuses from the beginning and kept the files so they could be used later. They also filed habeas petitions even when it was absolutely clear that the petitions were not going anywhere. They looked for loopholes in amnesty laws and for ways around statutes of limitations.

Now some of the doctrines that have been created internally have diffused from one country to another. One of the interesting aspects of the Justice Cascade idea is that it is not just a phenomenon coming from the outside into Latin America, but is also an infusion from one national court to another, from one Prosecutors Office

to another. For instance, the theory of overcoming the statute of limitations and amnesty issues in disappearance cases has traveled around the continent: from Chile to Argentina, Mexico, Peru, and Central America. The theory is that since it is unclear when the person is actually killed, we do not know when the amnesty law is supposed to take affect, and since we can't tell when the amnesty law is supposed to come into effect, it never does. There are a number of these kinds of domestic legal theories.

There are also legal theories and influences that have come from international law. For example, crimes against humanity are not subject to a statute of limitations. The source of this rule is international treaties and jurisprudence as it goes from state to state. The Inter-American system has been key both as a diffuser and also as a norm setter. The Inter-American Commission's early opposition to amnesty laws, its insistence on truth, prosecutions, reparations, and the Court's decisions detailing the inaction of the domestic legal systems, have all positively affected the domestic systems. The threat of substantial monetary judgments of the Inter-American system creates pressure on the governments to domestically prosecute these cases. For example, in the *Plan de Sánchez* massacre case against Guatemala the award was 7.2 million dollars in reparations for one massacre.[2]

With regard to events in a number of Latin American countries there are transnational prosecutions either based on passive personality jurisdiction –that is, victims who have the nationality of the state that is prosecuting—, or based on universal jurisdiction. The effect of these cases was to start changing the political context by re-imagining what could be done, making the government and the judges have to support justice at home as an alternative to trials abroad, and making even the military prefer domestic to foreign venues for trials.[3]

However, there are limits. As you move from the investigation stage to the actual trial stage, the number of cases significantly decreases, and the number of convictions is still fewer. Even where defendants actually are arrested, because so many of them are of advanced age, have lots of money and political connections, or they burn their fingerprints off, it is very challenging to get them to stay in jail. They either are out under house arrest, make bail, or they flee the country. In a number of cases, there are special cushy Class A prisons, specially constructed for

2. Case of the Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004).
3. For a full discussion, *see* NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

these high level defendants. Also, because it has taken so long for this phenomenon to take place, a lot of the defendants, witnesses, victims, and evidence are gone. Even though the political will to try them is now there, the cases are not triable because of these practical limitations.

Finally, the judicial decisions are not uniform. In parts of Latin America precedent does not apply in the same way it does in the US. Therefore, there are cases where the supreme court says one thing and six months later the same supreme court will say something different in a different case. This also makes it difficult to know if the current crop of positive decisions will persist over time. But for now at least it is clearly the reality of the region.

*Almudena Bernabeu, Panelist**

My goal is to try to find a balance between optimism and pessimism in the field of human rights litigation by discussing specific human rights cases that we are now trying from CJA. I would like to show how human rights litigation could have a double effect: provides justice for the victims and could contribute to important and necessary reforms in the countries where the violations took place. Generally, I believe Latin America countries are well suited for seeking justice through courts. However, the current successes have not been very uniform. I will briefly talk about a positive example taking place right now in Guatemala while in El Salvador, as a counterpart, absolutely nothing has happened internally as a consequence of important cases tried internationally.

In 1999 a suit was filed against Guatemalan members of the High Command under the universal jurisdiction provisions in Spain.[4] From the moment it was filed, Spanish prosecutors filed motions to dismiss on two grounds: (1) exhaustion of remedies and (2) venue or jurisdiction of the Spanish Courts to hear the case.

The case on appeal made it all the way to the Constitutional Court, which is the court of last resort. The Constitutional Court decision was pivotal in the role of litigation of international crimes in national courts. Previously, the Spanish Supreme Court had ruled in the sense of restricting the jurisdiction of Spanish Courts under universal jurisdiction to cases that showed a "national interest". Accordingly –stated the justices- only victims of Spanish nationality were able to sue under such provisions. This was really a passive jurisdiction approach that

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4. Organic Law 6/1985, art. 23.4 (1985, amend. 1999)(Spain).

destroyed the essence of the universal jurisdiction principles and violated to rights of the victims. The Constitutional Court ruled later that such consideration violated the *universal* part of universal jurisdiction. Thus, jurisdiction could not be limited to the nationality of the victims.

With the case active and reinstated in Spain, a letter rogatory pending since 2004, needed to be executed in Guatemala. This immediately transferred the proceedings to Guatemala. I should add here that all the defendants except for Donaldo Alvarez Ruiz, (a total of eight members of the Guatemalan Government and High Command, including former presidents Efrain Rios Montt and Romeo Lucas Garcia) were at the time residing in Guatemala. The immediacy and real threat of the rogatory going forward forced the defendants to seek for counsel and challenged the ability of the Spanish Judge to exercise his jurisdiction in Guatemala. They filed a Constitutional appeal that carried the suspension of all proceedings. The situation was very tense. You had an important judge from Spain sitting at a hotel waiting for the government and a bunch of judges in Guatemala to make a decision on whether to recognize the exercise of Spanish jurisdiction on Guatemalan soil or not. What it was behind this was a group of defendants who for the first time realized that a team of lawyers had been working on the case and some action was finally taking place. After the Spanish Constitutional Court decision endorsed the genocide claim, we had filed an amended complaint to really address it and there was in their land a judge with the intention of really doing something about it.

Another factor to take into consideration is that Guatemala was applying to be a permanent member of the Security Council of the United Nations. At the time, and with a foreign judge appealing to international cooperation and reciprocity, we realized that Guatemala has never signed a bilateral agreement with any country on international criminal cooperation. This is only the beginning of a much larger discussion on how little Guatemala has done to pass, ratify, or implement international treaties or international laws. A strictly criminal procedural step was suddenly knocking at the doors of the Guatemalan government. The situation became almost a diplomatic issue when the defendants' counsel -and some judges echoed- the question of the competence of a foreign judge to proceed in Guatemalan soil.

Judge Pedraz was unable to depose the defendants and take the testimony of the proposed witnesses. He left Guatemala when he realized that the appeal could take up to a year to be resolved. Upon his arrival in Madrid, Spain, with our support as private prosecutors, he issued international arrest warrants and orders to freeze the

assets against the defendants.

Guatemala asserted that, because they do not have any cooperation or bilateral agreements on these issues, the only documents they would attend to would be those filed through the diplomatic channels which is basically a seventeenth century system, with seven different government agencies getting involved, in my opinion, another way of stalling the proceedings.

Instead of fighting a lost battle, we found out how to precede facilitating the Judge and sending the documents respecting these diplomatic channels. Between September and October 2006, Guatemalan authorities received the arrest warrants properly filed. Surprisingly, they gave it to the competent court that open extradition proceedings. The court ordered the arrest and eventually the extradition to Spain of their own national military leaders, which was by all standards, unthinkable.

You have in Guatemala a succession of decisive events not only political but judicial and sociological. All that was needed was a push and this case I believe, provided it. Now our case that started in the Spanish courts, international by definition, is suddenly back in Guatemala. We have been heavily criticized for being invasive and maybe accelerating the process of reality and history. Nevertheless, a case initially across the Atlantic and questioned for not being representative, is now back in Guatemala shaking things up internally. This is perhaps the most important aspect of this work and chain of events, the most important lesson for all of us People are talking within Guatemala about reforms not only of laws but structural reforms that could potentially affect the judiciary.

We do not know whether this will happen or not. The defendants have filed several more appeals. However, Guatemala is incorporating international human rights litigation and its contribution to the national fight against impunity. There is a national debate and movement towards advancing the rule of law. People are now working together and with better results. It is wonderful to witness.

A second example is El Salvador. I want to acknowledge the Human Rights Institute of the University of Central America. This institute was founded by one of the Jesuits assassinated in 1989 and was originally created to assist the refugees of the Civil War. It has developed an expertise in filing cases before the Inter-American Commission and Court. These cases have generated important decisions. One of those, the Serrano Sisters case, pointed out the lack of effectiveness of Salvadoran Courts and urges the government to take the necessary steps to reopen national investigations to secure that these cases were not left unresolved. According to legal professionals in El Salvador and human rights

attorneys, nothing has been done yet. The Center for Justice and Accountability, in the civil context has filed three important cases regarding human rights abuses in El Salvador. Although our cases are only civil where you can only sue for damages, they have been very important and carried important impact for the Salvadoran society.

Terry Karl worked on all of them as an expert witness. Well, the second of our cases regarding the assassination of Archbishop Romero[5] induced the Catholic Church of El Salvador to make statements pointing out the importance of these investigations and efforts against impunity. Civil society has been trying to get the Catholic Church to help and has put pressure on the Church to be more active.

A third case[6] file by CJA on December 2003 was the first to propose that Salvadoran Congress to repeal the amnesty law. The blanket amnesty law was in part passed in opposition of the Jesuit's case. The Jesuit's case was tried nationally in 1990. Later in 2001 a second case was filed that made it all the way to the Supreme Court. This case represented an attempt to repeal the amnesty law that did not succeed. The Supreme Court became diplomatic and decided that the amnesty law would never apply to a human rights violation. Rather it will only apply to political crimes, as yet to be determined. They left the prosecutors to decide on a case by case basis whether a crime can be considered a political crime or not. Unfortunately, no prosecutor has declared these crimes as human rights violations, including the case of Monsignor Romero and they remained covered under the amnesty.

Regardless of how important our work could be in Spain or in the United States, these cases belong to the affected countries. All we can do and I believe we should do is to keep doing a serious job to bring these cases. We believe these are valid instruments for these countries to find justice. After the conflict and situations lived, these countries are at a delicate stage while rebuilding their democracies and getting stronger. I believe our work can play an important role for the victims to obtain justice and empower them to keep seeking justice, which directly contributes to the strengthening of their democratic institutions and their society.

*Alex Huneeus, Panelist**

5. Doe v. Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).
6. Chavez v. Carranza, 413 F. Supp. 2d 891 (W.D. Tenn. 2005).

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I am going to look not just at the domestic situation of Chile but also at what is happening in the Chilean judiciary. We will be taking a very close look at that institution to try to figure out whether, and how, the Justice Cascade has changed this institution.

It is true that, by his death in December 2006, Pinochet bilked the criminal justice system in Chile. 60,000 of his supporters —who waited roughly seven hours in the hot sun so that they could file by his coffin — brought the point home when they victoriously chanted that now only God is going to be Pinochet's judge. Scholars said that one of the preeminent human rights judges in Chile publicly chastised the courts for having taken so long in reaching a judgment in the Pinochet era cases. If these courts are to be faulted in dragging their feet in the cases, they have to account for their change in attitude toward Pinochet era cases generally.

One day after Pinochet's funeral the Penal Chamber of the Supreme Court issued a ruling that, for the first time, rested solely on international law to strike down the amnesty law passed in 1978 by the Pinochet regime to block prosecution of its own crimes.[7] While this ruling broke new grounds, it was not an anomaly; it only further unfolded what was already taking place in Chile. Starting in 1998, nine months before Pinochet's arrest in London, Chile's judges began to actively prosecute violations of human rights that were committed during the military dictatorship. Judges reopened over 700 such cases that had been closed, stalled, or filed as temporarily stayed. Some cases had not even been brought to the courts yet. By 2006, over 100 sentences had been handed down to former members of the regime. What is interesting about this activity is that, from the judicial point of view, it has often outstripped and contradicted executive policies in the human rights realm. For example, in 2005, President Lagos took steps to hinder courts from taking on cases about torture from the Pinochet regime. Nonetheless, the courts moved forward on these cases. Last October, Pinochet was arrested for torture. My research, conducted between 2003 and 2005, sought to explain and understand this turn towards prosecution by Chilean judges.

The turn is curious in light of what we already know about Chile's judges. We know that the judiciary was the only branch of government that was left intact by the military regime but yet, as one study shows, they cooperated fully with the authoritarian regime in human rights violations. Even after the return to democracy, the judiciary failed to pursue Pinochet-era cases of human rights

7. EXECUTIVE DECREE NO. 2191, April 18, 1978 (Amnesty Act).

abuses. Again, the same judges stayed on in the judiciary. During this time a few high profile cases that were not covered by amnesty decree managed to inch forward. But the bulk of Pinochet claims remained in legal limbo. The post-1990 judiciary has been slow to protect cases that do not have to do with Pinochet's regime. As one scholar put it, Chile's "courts have never expanded, let alone contributed to, a constitutional right."[8] My study sought to explain why, starting in 1998, this rights-averse judiciary placed itself in the thick of the country's most contentious political issue.

The recent prosecution of the Pinochet cases provides an example of the judiciary acting in a way that many perceive as more befitting for a liberal institution in a democracy. The cases reveal a potential for this judiciary. On a more general level, the inquiry's importance lies in the theme of how a new attitude toward human rights gradually permeates through an institution that has its roots in an illiberal era.

I interviewed over 40 judges and analyzed judicial opinions. I found a struggle within the judiciary over its own role in the past. I argue that the contest within the judiciary, this exchange of ideas and institutional debate about its own role in the current democracy as well as in the past democracy, has shaped its response to the Pinochet-era cases. The interviews reveal three conflicting role conceptions that are floating around within the judiciary. They rest implicitly on ideas about what the law is but also on their political role and they involve the law's role within a political system. I labeled these conceptions the Formalist view, the Deference view, and the Responsive view.

The first view is the Formalist view. Judges must strictly follow the letter of the law and the law is separate from politics. It does not have an internal reference to morality. Formalism and legalism have long been the adjectives that are used to describe the Chilean judiciary and, in fact, judges describe themselves this way with pride. My finding is that it is a role conception with waning popularity. Judges' responses were rarely legalist and the conception came up in interviews more as something to be criticized then as something the judges were actually avowing as a way of being a judge. Rather, legalism cannot be considered the strongest role conception within the Chilean judiciary.

Like the positive legal philosophy in post-World War Germany, formalism in Chile has come to be identified with the judiciary's failure to protect rights during

8. Javier Couso, *The Judicialization of Chilean Politics: The Rights Revolution That Never Was, in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (R. Sieder, L. Schjolden, and A. Angell eds., 2005).

the military dictatorship. The Truth in Reconciliation Commission ("TRC") itself charged the judiciary with many problems, but one of them was an exaggerated formalism in interpreting the law. Now it seems these critiques have had their effects; they have seeped into the judiciary and only two judges I interviewed could be considered self-consciously legalists. This idea of formalism has fallen so much that another justice complained to me bitterly that the press had actually called them legalists and said that they were just appliers of the law.

The second view is the Deference view. The transcripts of my interviews contained a lot of discussion about judging that did not fit into the continuum of formalism and anti-formalism, which is how we usually debate about this. Here it was common for judges to say judging was an act of deference and they justify their actions by what their superiors wanted them to do. The judiciary's internal norms outweighed the legal text or a personal policy preference or moral concerns in decision-making. One judge, when I asked why she was investigating a case of Pinochet era violations, said there is a political sanction. Today, it is Judges who do not investigate who feel they will suffer repercussions in their career. I should say as an aside that Chile's judiciary, unlike the U.S., is a bureaucratic judiciary. Judges enter young and slowly work their way up. Their superiors decide on their promotions and so does the executive; it is a joint decision. They are always looking to their superiors and to the executive for signals as to how they should make decisions. It shows somehow that it is culturally accepted within the judiciary to think of the role in this way.

The third view that I found is the Responsive view. Here the judges invoked the cycle of wronged penitence and redemption in explaining why they were looking into Pinochet-era cases. I will give you one quote from an appellate judge, "the judiciary acknowledges that during the dictatorship it did not fulfill its role. It knows it has a pending debt and it has permitted an omission. It knows the only way to solve the problem is to confront the issue, even belatedly." As another judge put it, the only option available to the judiciary is for it to act as it should. The importance of reopening a case lies in redressing not only the past wrong committed by the perpetrator, but the past wrong committed by the judiciary in not investigating the case at the time.

The motive of redemption harbors within it in an understanding of the judicial role as responsive to public concerns and morality and not just the commands of the superior. The responsive judging "strives for moral and political legitimacy," as one judge said. Nineteen of the respondents of my interviews could be characterized as most often describing their work in this way.

Therefore, we found that there are different ideas within the judiciary. This may seem commonplace, but in truth, most scholars based in the U.S., when looking at judiciaries outside the U.S., ascribe to them a single monolithic view on the law. It is interesting to note, even in a small, very conservative judiciary there are varying views on their roles. Specifically, we found that there has been a shift in formalism as an ideal, and there is a rise in the responsive conception of the role, at least in Pinochet-era cases.

On the basis of these findings I would like to theorize about the Justice Cascade, as well as the Chilean judiciary and its prognosis. The Justice Cascade will force the judiciary in Chile to change via two distinct mechanisms. One main mechanism for the judicial turnaround is the executive's actions. Judges, by their own description, were deferring to the executive and their superiors when they decided to investigate these cases. Once Pinochet was detained, President Lagos pushed for the judiciary to help find the disappeared people through a series of policy changes and statements. This signaled to the judges what they should do.

There was also another mechanism, that of institutional shame. Judges were ashamed and sought redemption. These judges experienced a genuine change of heart vis-à-vis human rights in the past. Some experienced a change of heart and some were newcomers to the judiciary.

The next question is what does all this mean for the Chilean judiciary? Many people ask, when will this judiciary, existing amidst such a flourishing democracy, finally step up to the plate and be more effective in defending human rights and constitutional rights in general? My data confirms that many in the Chilean judiciary have a cultural tendency toward a deferential position to the executive. However, I also found dissent within the institution and discovered moments in which judges are moved to impose a more responsive orientation to their role.

The reason why responsive judges were able to advance the Pinochet-era cases further than the government wanted was due to public interest in, and the close press coverage of, the cases which presented a window of opportunity for the judges. Neither the government nor the hierarchical superiors could push back without risking that the public would find out, especially given all of the press coverage and the public interest that the cases invoked. An example of this was a judge who actually announced that he was receiving phone calls from members of the government while he was investigating the Pinochet case. This provided a window of opportunity for someone like Guzmán[9] to push back and impose or

9. Juan Salvador Guzmán Tapia is a retired Chilean judge who was the first judge to bring charges for human rights abuses against former Chilean dictator Augusto Pinochet

perform a different view of judging.

Nonetheless I do not think these cases argue that a progressive move towards a more responsive judging is at large in the Chilean judiciary. The cases are unique because of the intense debates surrounding them. My data points instead to an entrenchment of this deference mode, and how the relationship to authority and hierarchy in the Chilean judiciary undermines the debate between formalism and anti-formalism philosophies of judging.

Chile's democratization has taken place without a vibrant autonomous judiciary, and it will continue to do so. The story of the prosecution reveals, rather, how an insular state institution struggles to regain, and above all, protect its place, even as the political world is altered.

*Terry Lynn Karl, Panelist**

The very first thing that we discuss when we talk about contemporary Latin America is its wave of democracy. One of the things that you note with this wave of democracy is a significant change in political and civil rights. You can measure and see it; I call this human rights change the "Transition Effect." When there is a transformation from military to a civilian rule, there is a transition effect, and it is very notable in all of these countries.

Does it make any difference for human rights that these countries are becoming democratic? We have a half full, half empty story because, on the one hand, it makes a really big difference in countries to the extent we can measure these differences. On the other hand, we also know that when we look at Latin America there are very imperfect democracies in place and different ways that political scientists classify these government; we only call some democracies. We call some liberal democracies, semi-democracies, partial democracies, soft democracies, hard democracies, soft authoritarianism, hard authoritarianism, and so on; there is a wide variety of language and labeling. What this basically means is that we do not have any open authoritarian regimes anymore. But there is a

following his return to Chile from London where Pinochet was under house arrest. "Juan Guzman has spent years building a case against Augusto Pinochet, gradually transforming himself from a fairly anonymous member of the Court of Appeal into Chile's most famous judge." *Chile's Most Famous Judge*, BBC NEWS, Dec. 10, 2004, http://news.bbc.co.uk /1/ hi/world/americas/672026.stm.

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difference between these groups of "democratic" countries, whether they have elections or not, o how meaningful those elections are, and how much an electoral system seems to affect the civil and political rights.

The transitional surge, the one with transitions to democracy from authoritarian rule, really began in the mid-80's. Now there is a second spike going on that starts around 2000 when governments of the left take power. What is interesting is that Latin America is changing very fast, from a political point of view. For example, if you look at Eva Morales or Chavez, or the left/ victories in Chile in 2000 and 2006, or at Brazil 2002 and 2006, or Argentina in 2003, Uruguay in 2005, Bolivia in 2006, Nicaragua in 2006, and so on, depending on how you classify different presidents. Basically there is a left of center shift happening in Latin America. What difference does that make? There is something else happening now – a different kind of rights effect.

I want to describe the region first of all just in terms of rights, as there is really an extraordinary variation in the region, and ask how are the differences explained. When I say there is an extraordinary variation in the region of Latin America as a whole, this is where the glass is half full. We should be pleased about "justice cascades" no matter what issues we may have about a range of other things. There has been slow and steady improvement since the initial democratic transitions on a range of indicators in Latin America. Some countries have seen some setbacks in the '90s, particularly around Fujimori in Peru, Haiti, and parts of Central America, but by and large in the region, there was definitely a transition effect and it continued a very gradual, by and large steady regional improvement. Now, when you look at that improvement there is a variation by the types of freedoms and rights you measure, and also by the countries themselves. All countries do really well on freedom of religion and freedom of movement in Latin America. The real problems are with political freedoms: freedom of assembly, freedom of expression and, most importantly, the independence of courts. If I had to make a hierarchy of rights problems, the big problem areas would be assembly, expression, independence of courts, personal integrity and safety of people. We have this kind of variation by type of rights.

Then there is also this extraordinary variation when you look inside the region. The best performers are Chile, Uruguay, and Argentina. The countries that once were the nightmares of rights violations with military regimes have not only shown a transition effect, but they show another surge of progress as democracy deepens and as parties of the left become more dominant. The intermediary countries that follow in the middle are generally the Andes countries, Colombia aside. Colombia

is obviously the highest violator of rights currently on the continent. With the exception of a backward move in Peru under Fujimori, and a decline in rights progress in Venezuela beginning prior to the Chavez regime, there is a kind of an intermediary category with the Andes. The countries that are really all over the map are in Central America. They show the greatest fluctuations, with the exception of Costa Rica, which is very stable.

Let me try to give you a series of possible explanations for these variations and then tell you where I think I am starting to come down in a current study in progress. What are the arguments to explain these variations? One could be international catalyst. For example, Pinochet gets arrested in Spain and this causes the change in Chile. This may be plausible, but it can only work for Chile; it is really not going to work for anybody else. There is no comparable story anywhere that has the same application of international power. And both Alex Hunneus' work and our data shows that this is not even an adequate story for Chile. To the extent that we try to measure the impact of those cases, it does not appear that there is a large international catalyst to improve rights. There is also an argument in the democratization literature about the transition effect from a military regime to a civilian regime. Because you get all the trappings and procedures of democratization, this forces certain kinds of human rights issues. As we have seen, this is significant. But the question remains as to what would happen if you did not have a transition effect. In other words, where is a country that has no transition effect, or if there is a transition, it is from one type of civilian to another form of civilian rule rather than outright authoritarian rule to some form of democratic rule? The interesting case is Venezuela. This country is a case of a democratic electoral party system collapsing and being replaced by a military officer who runs in the political system as a political candidate. It is not a military to civilian transition. And here, we see no positive transition effect. Instead, there is no demonstrable transition effect and, in many respects, continuity. In the Venezuelan case, the violation of rights precedes Chavez, which is very important. The violations rose quite significantly in the five years before Chavez, and they continue the same trend. Instead of having a dramatic change, we have a tendency to incrementally climb, which we have in all kinds of other countries where there is no dramatic regime change from military to civilian rule.

There are other possible arguments about why these kinds of particularly regional variations in democracy happen. The most powerful predictor of whether a country becomes democratic is actually whether its neighbors become democratic. The contagion is really important in democratization. If Uruguay is

becoming democratic, you are going to be pretty sure the neighbors are going to be infected in some way. There is also a very strong regional contagion effect in some of these regions because, just like there is more cooperation between Uruguay, Argentina, and Chilean military and political figures, there also is more cooperation between lawyers. People find out what other people are doing in the same region, and they learn that way, thus there is interregional contagion.

What I really think is going on here (and, because I am a political scientist I have to look for a political explanation) has to do with the empowerment of the left. I want to talk about why I think this is so important and why countries where there is no change in power are unlikely to change their rights patterns, whereas countries that have actually significant shifts in who is in power will change their rights patterns. It is important to look at the party structures of countries, not just the political party structures but the relationship between parties and militaries, as well as the relationships between parties and the church. Those political relationships will tell you a great deal about what is going to happen in the rights story. Let me give you some examples: One illustration is a type of "deference effect" in the judicial system. We see this both when the party in power is from the right; there is deference to the right. When the party in power becomes the left, then there is a type of judicial deference to the left. When this happens, all kinds of rights issues that were not on the agenda before now are on the agenda. Party arty change affects who you defer to and how the judicial system co-exists with the executive branch. It is an odd argument because it is almost like a climate argument, which is to say that the way judges make decisions and who they are aiming to please responds to changes in the political sphere. The argument involves a trickle down theory, where the top changes, and therefore the judges begin to think of rights in a different way.

But that is only one piece of the story; I think the other piece of the story is in the countries where I see the post-2000 surge going on, which is coming up from below. Those involved in this surge are the people who were justice seekers under authoritarian rule and have remained justice seekers, whoever they are. No matter whether they were victimized themselves influenced because they defended other victims, when you look at the Argentine, Chilean or Uruguayan political systems, for example, you realize you are dealing with people who are actually deeply involved in human rights issues and suddenly may even become president.

Those justice seekers have the following relationships. The most important one is a link to a party in power, which means that the way justice is normally negotiated in the political system is through compromise. In the past, the fear has

been that the pressure from the justice seekers can push parties and leaders further than they want to go, endangering democracy. But over time, as the fear of authoritarian reversion diminishes, this politics of compromise give way to a kind of normative politics – a politics which says that justice must be sought, that this is owed to the dead. I am beginning to see a pattern in that the groups that were the most repressed in different places are the groups that are the greatest justice seekers. For example, the Communist Party in Chile took a large role in the initiation of lawsuits because it also took the brunt of a repression. Groups that move the justice agenda forward have certain qualities that are the same. That is what I call the "repressed left effect;" they are justice seekers. They tend to be educated and have greater resources so there is a very strong national element in this story.

This aspect is ironic in the way that it usually plays itself out. For example, given their human rights records, you would expect El Salvador to do worse in improvements and Guatemala to do better; yet, it is the other way around. The switch is because of the kinds of international links we are talking about are just so much more difficult when you are dealing, not in just Spanish, but with eleven indigenous languages, or you are dealing with people who never traveled. They are the kinds of people who would not go into a court in their country in a million years, who just have a whole different culture.

Let me just end by showing you a drawing that illustrates the very dramatic difference between Chile and El Salvador. The reason I want to show you this is it shows you the political nature of rights. The higher the line, the worse off you the country is on rights. The higher line is El Salvador and the lower line is Chile. What is interesting about this is that El Salvador's changes in rights come from a series of events that happened during the civil war itself and, to a lesser extent, during the peace agreement. Once the peace agreements happened nothing else happens; there is no further improvement in rights. This flat line you see is El Salvador and absolutely nothing is happening. The paramilitary was one of the sides of the civil war, which was responsible for most of the human rights abuses in El Salvador, and today the party that grew out of that paramilitary is still in power. This party has absolutely no interest in opening this up. The judiciary is still not independent. It may have been improved in a number of ways, but its deference is towards the party that encouraged massive human rights violations. There is absolutely no interest in changing.

The contrast with Chile is interesting because El Salvador and Chile are the only two countries in Latin America that have a really strong left, a really strong

right and a strong center. They are kinds of a 1/3, 1/3, 1/3 countries so their opinions on a lot of things look similar. However, when you look at the story in Chile there is this huge drop in rights abuses. That is the transition effect and then you see the combination of the Pinochet case and Richard Lagos Escobar coming into power, which I would call the left effect. Then you see another huge drop. You do not see this in El Salvador, but you are beginning to see a difference in Guatemala, where there is a huge political interest in using these cases against different political actors who are well-known rights violators, which is not the case in El Salvador.

Finally, the left in Latin America has always prioritized socioeconomic issues and issues of addressing poverty above civil and political liberties, and that difference has been huge. Traditionally, everything was about addressing poverty and development issues, so-called second generation rights, instead of those of the first generation. But what is interesting is you see a somewhat different balance of first and second generation rights happening now. The ideology of defining a hierarchy of rights has changed somewhat based on who is in power and what has happened to them in their own experience. Leaders who have experienced repression, or whose friends and families have been affected, are valuing political and civil rights more than they have in the past, with Venezuela being the only exception.

The reason Venezuela is a dramatic exception is that the country does not have any recent history of serious internal repression. Yet it does have a real and grave history of massive problems in the distribution of its oil wealth. Thus the priority given by other countries to civil and political rights is simply not there. Instead, the situation is similar to Cuba or to a more traditional left in another time; rights are considered an instrument that the imperialists use to batter countries they do not like. You see this similarity manifested in the Venezuelan and the Cuban patterns of voting on every single human rights piece of legislation in the United Nations. The two countries vote the same, and they vote against the Americans. This means that they will support Turkmenistan, North Korea, Kazakhstan, or whomever, regardless of the record of human rights violations, because for them an insistence on rights protections is viewed a violation of national sovereignty. To them, rights criticism is a way of hitting small countries or preparing the ground for forcible regime change rather than a separate discourse that people in other parts of the region, feeling less threatened, have learned to value in itself.