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The Omnipresence of the State? The Twentieth Century

6.1 Toward the Administrative State

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Described recently as an ineffectual "Paper Leviathan,"[1] the nineteenth-century Latin American state was hardly an omnipresent figure. As we shall see, two distinctive features of the region's historical development appeared as obstacles to the construction of an efficient state administrative machinery. First, despite the alleged centralist colonial heritage,[2] many observers lamented the structural weakness of the Latin American states that obstructed minimum acceptable levels of administrative control. Second, the new disciplines of public administration and administrative law, two bodies of knowledge born in European monarchical settings, and its institutions, such as a separate administrative jurisdiction, seemed to be incompatible with the fervent republican and democratic spirit that ran through the new nations, notwithstanding the Brazilian empire.

Despite numerous difficulties, however, by the early twentieth century, the Latin American states had gone through considerable transformations. Traveling through South America at the time, James Bryce, author of the renowned *American Commonwealth*, stated that "the growth of property and the development of industrial habits" brought about by economic modernization in the region had a stabilizing effect and served as a motor of progress. His conclusion was positive, "taking the eleven South American states as a whole, their condition is better than it was sixty years ago," and comparisons with European ideal types of state development appeared unfair:

1 M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (Cambridge: Cambridge University Press, 2013), 399.
2 Cf. C. Véliz, *The Centralist Tradition of Latin America* (Princeton: Princeton University Press, 1980).

> Every sensible man feels that the problems of government are far more difficult than our grandfathers had perceived, and that men have still much to learn from a fuller experience. These things being so, ought not the judgment passed on the Spanish Americans to be more lenient? Their difficulties were greater than any European people had to face, and there is no need to be despondent for their future.[3]

By the mid-twentieth century, the outlook was decidedly more positive: Latin American states were providers of a wide array of public goods, the sheer size of the administrative machinery had grown dramatically, and political and administrative centralization was the dominant model. "Between 1930 and the early 1980s," observed Lawrence Whitehead, "the ambitions, resources, and capabilities of virtually all the region's public authorities were incommensurably greater than they had been a half century before."[4] Similarly, during the same period, administrative law and the new science of public administration had replaced many of the tenets of liberal constitutionalism that had hitherto delineated the relationships of state and society.

Despite particularities in the different countries in terms of economic development, geographic and climatic determinants, and socio-political evolution, the whole region had gone through a similar process of transformation on the way toward the modernization of state structures. Economic growth via integration into the expansion of Atlantic capitalism facilitated the process of state building by the gradual improvement of state capacities. At the same time, new global currents of legal thought offered a reconceptualization of the normative frameworks in which the states operated. Section 6.1 traces these changes in the structure of the Latin American states and its conceptual bases in legal thought. This process led to a gradual displacement of the classic liberal constitutional models that had framed the independent

3 J. Bryce, *South America: Observations and Impressions* (London: MacMillan, 1912), 546–49, at 551. See, in a similar vein, W. Knöbl, "State Building in Western Europe and the Americas in the Long Nineteenth Century: Some Preliminary Observations," in M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (Cambridge: Cambridge University Press, 2013), 75: "The early history of the state in the Americas, especially in Latin America, should be judged very cautiously. At least one should not fall into the trap to measure state's 'failures' against the yardstick of a state model that even in Europe did not exist…." Therefore, "it is not possible any longer to classify every missing or 'odd' feature of state building in Latin America as a decisive hindrance for a full breakthrough to political modernity."

4 L. Whitehead, "State Organization in Latin America Since 1930," in L. Bethell (ed.), *The Cambridge History of Latin America, vol. VI: 1930 to the Present, Part 2: Politics and Society* (Cambridge: Cambridge University Press, 1994), 12.

new nations in favor of innovative principles organizing ever-expanding state activities.

This does not imply that what took place was a passive reception of European and North American legal doctrine by local jurists or a recreation of a "myth of origin" about Latin American Law (see Section 1.4). Rather, as has been pointed out in the introduction to this volume, it reveals "that many other regions of the globe had to deal with similar questions and that debates taking place in Latin America were often linked to discussions elsewhere, to which they both contributed as well as received." There are two shared features of these new currents worth mentioning here. The first was a corpus of knowledge circulating mostly within the universe of "the law of jurists," and it was "state-centered and legalistic," set apart from other forms of understanding the origins of norms.[5] Second, this corpus offered a new perspective on the strong links between the process of institutionalization of certain academic disciplines or forms of social knowledge and modern state building in Latin America, and in particular the role of the global and the local in such processes.[6]

Section 6.1 comprises four sections. The first two sections deal with precedents involving the tradition of police power in the region and the debates about centralization of authority in mid-nineteenth-century Latin America. The final two sections address the two primary forces behind the growth of the administrative state in the region: First, the process of modernization and economic structural change in the new nations, and second, the impact of new global currents of legal thought that helped to consolidate in the region the new disciplines of public administration and administrative law.

Police Power and Administrative Jurisdiction

One of the most important contributions of the new legal history has been the re-evaluation of the "state-centered paradigm" and its place in the evolution of normativity throughout history. The idea that in a "well-ordered society" the government should be concerned with the general welfare of the

5 Cf. Duve & Herzog, Introduction; and Dias Paes Section 1.4 in this volume; T. Herzog, "Latin American Legal Pluralism: The Old and the New," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 50(2) (2021), 705–36.

6 On this last point, see T. Duve, "What Is Global Legal History?," *Comparative Legal History* 8(2) (2020), 73–115; M. Plotkin and E. Zimmermann, "Introducción. Saberes de Estado en la Argentina, siglos XIX y XX," in M. Plotkin and E. Zimmermann (eds.), *Los saberes del Estado* (Buenos Aires: Edhasa, 2012), 9–28.

population, both in a spiritual and material sense, enjoys a long history with medieval roots – a tradition based on a very different rationale than that of the modern administrative state.[7]

The concept of "police" represents the starting point of our understanding of the functions of administration within the "jurisdictional paradigm": the regulation of conduct at the local level of matters pertaining to security, public health, morality and public order, as well as the development of commerce and economic transactions. In particular, as this literature emphasizes, these functions were seen as an extension of the patriarchal role within the household economy to the municipal environment (see also Section 3.3). As Castillo de Bovadilla stated in his *Política para corregidores* (1597): "The fair government of the household is the true model for the government of the Republic … because the household is like a small city, and the city is a large house…."[8] By the eighteenth century, the idea that the roots of state regulatory power laid in this notion of the police could be found in many different European sources. "By the public police and oeconomy I mean the due regulation and domestic order of the kingdom," is how Blackstone expressed it in his *Commentaries on the Laws of England*. The individuals of the state, *"like members of a well-governed family*, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." Adam Smith's *Lectures on Justice, Police, Revenue and Arms* (1762–1763), Johann Justi's *Polizeiwissenschaft* (1756), Nicolas De La Mare's *Traité de la Police* (1722), and the Spaniard Tomás Valeriola's *Idea General de la Policía* (1808) offered similar interpretations of "police."[9]

7 Cf. A. Agüero (ed.), "Justicia y Administración entre el antiguo régimen y el orden liberal: lecturas ius-históricas," dossier no. 125, *Programa Interuniversitario de Historia Política*, http://historiapolitica.com/dossiers/dossier-justicia-y-administracion-entre-antiguo-regimen-y-orden-liberal-lecturas-ius-historicas/.

8 Cited in Spanish in A. Agüero, "Herramientas conceptuales de los juristas del derecho común en el dominio de la Administración," in M. Lorente (ed.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes* (Madrid: Consejo General del Poder Judicial, 2009), 32; see also R. Zamora, *Casa poblada y buen gobierno. Oeconomia católica y servicio personal en San Miguel de Tucumán, siglo XVIII* (Buenos Aires: Prometeo Libros, 2017), 117. All translations from Spanish and Portuguese are my own.

9 Cf. M. D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005), 49; W. J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 1996), 12–14; M. Raeff, "The Well-Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe: An Attempt at a Comparative Approach," *The American Historical Review* 80(5) (1975), 1221–43; J. Vallejo, "Concepción de la policía," in Agüero (ed.), "Justicia y Administración," 1–23.

Police power thus understood was part of a process of "localization of the law" in the Hispanic colonial cities, a process that can be overlooked when we focus exclusively on the independent centralized national state as a source of the law (also see Sections 1.3, 1.4, 3.1, and 3.2).[10] Based on this considerable degree of normative autonomy, a large number of regulations on security, health, and public morality were sanctioned at the municipal level, gradually widening the scope of intervention of public authorities, and producing, as Jesús Vallejo put it, "state-generating" mechanisms ("*generaron Estado*").[11] The prevalence of local power to regulate such matters was a concept many of the Latin American constitutional orders of the independent era inherited. To illustrate this point, we can cite a number of decisions of the Argentine Supreme Court from the second half of the nineteenth century recognizing the legitimacy of police power developed by local authorities in Buenos Aires to regulate issues such as the location of markets and fairs, bull fighting rings, or slaughterhouses and tanneries in the city.[12] The political and administrative need of the many local normative orders in the region to exert greater degrees of control lent force to the arguments calling for further centralization as one of the elements the new administrative order would bring about, as we will see in the next section (see also Chapter 4).[13]

Hand in hand with the arguments about centralization, a second question was crucial to all the debates about the origins of administrative law in the region and its relation to the constitutional order. One of the legacies of the French Revolution and the First French Empire had been the creation of an

10 A. Agüero, "Ciudad y poder político en el Antiguo Régimen. La tradición castellana," *Cuadernos de Historia* 15 (2005), 127–30; A. Agüero, "Local Law and Localization of Law: Hispanic Legal Tradition and Colonial Culture (16th–18th Centuries)," in M. Meccarelli and M. J. Solla Sastre (eds.), *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries, Global Perspectives on Legal History* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2016), 101–29; A. Exbalin and F. Godicheau (eds.), *Los arrabales del imperio. Administrar los suburbios de las urbes en la Monarquía católica (Siglos XVI–XIX)* (Rosario: Prohistoria Ediciones, 2021), 11.

11 Vallejo, "Concepción de la policía," 12.

12 See Supreme Court of Argentina, "Varios puesteros próximos al Mercado del Centro c. Empresario del mismo Mercado," in *Fallos de la Corte Suprema de Justicia* 3:468 (1866); "Plaza de Toros," in *Fallos de la Corte Suprema de Justicia* 7:152 (1870); "Saladeristas Santiago, José y Jerónimo Podestá y otros c. Provincia de Buenos Aires," in *Fallos de la Corte Suprema de Justicia* 51:274 (1887).

13 Paradoxically, from the late nineteenth-century demands for centralization at the national level, administrative law now seems to be moving in the direction of de-nationalization, through the emergence of "global administrative law." See S. Cassese, "Administrative Law Without the State? The Challenge of Global Regulation," *New York University Journal of International Law and Politics* 37(4) (2005), 663–94; B. Kingsbury, N. Krisch, and R. B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68(3) (2005), 15–61.

independent administrative jurisdiction that exempted public agents from being judged by ordinary courts of law for their acts as public functionaries. This institution was, on the one hand, "unthinkable" within the "anti-statist legal-political universe of the Ancien Regime,"[14] and, on the other, its conciliation with the principle of the separation of powers of liberal constitutionalism was problematic, to say the least; hence, the resistance it encountered in Latin American republics. This separate administrative jurisdiction ("*contencioso-administrativo*") was adopted in Latin America only twice over the course of the "long nineteenth century" (though it became much more common in the second half of the twentieth century). The first instance of its adoption took place in Mexico under the dictatorship of General Santa Anna, and was promoted by Teodosio Lares.[15] The second instance occurred in Colombia in conjunction with the 1913 *Ley 130*, which organized the administrative jurisdiction based on the 1886 constitutional clause granting the National Congress this power.[16]

As we shall see, the gradual separation of the new discipline of administrative law from the received wisdom of the liberal constitutionalism, which had inspired much of the organization of the new nations (also see Section 5.1), rapidly grew from the second half of the nineteenth century to the first decades of the twentieth century. Prior to this, constitutional debates of the mid-nineteenth century focused on the crucial issue of centralization – both for and against – as the key to understanding the success or failure of the new institutional orders.

14 *"No podía siquiera concebirse en el universo jurídico-político anti-estatal del antiguo régimen."* C. Garriga, "Gobierno y Justicia: El gobierno de la justicia," in M. Lorente (ed.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes* (Madrid: Consejo General del Poder Judicial, 2009), 47–50; L. Mannori, "Justicia y Administración entre Antiguo y Nuevo Régimen," *Revista Jurídica de la Universidad Autónoma de Madrid* 15 (2007), 125–46.

15 For more on Teodosio Lares' role in the development of the administrative jurisdiction in nineteenth-century Mexico, see A. Lira González, "El contencioso administrativo y el poder judicial en México a mediados del siglo XIX. Notas sobre la obra de Teodosio Lares," *Memoria del II Congreso de Historia del Derecho Mexicano* (Mexico City: Universidad Nacional Autónoma de México, 1981), 621–34; A. Lira González, "Lo contencioso administrativo, ejemplo difícil para el constitucionalismo mexicano," in E. Ferrer Mac-Gregor and A. Zaldívar Lelo de Larrea (eds.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio* (Mexico City: Universidad Nacional Autónoma de México, 2008), 289–319; A. Lempérière, "El liberalismo hispanoamericano en el espejo del derecho," *Revista de Historia del Derecho* 57 (2019).

16 A more detailed analysis of the Colombian case can be found in M. Malagón Pinzón, *Vivir en policía. Una contralectura de los orígenes del derecho administrativo colombiano* (Bogotá: Universidad Externado de Colombia, 2007), 120–23; and M. Malagón Pinzón, *El pensamiento administrativo sobre el Ministerio Público en Colombia e Hispanoamérica* (Bogotá: Universidad Externado de Colombia, Universidad de Los Andes, 2017).

Centralization and the Constitutional Organization of Latin American States

In 1870, the Panamanian jurist Justo Arosemena offered an explanation for the decades of institutional disruptions and economic stagnation that had afflicted the new nations –one often repeated by others over the years[17]. There was a clash between formal principles established in constitutional models taught by "the abstract science of politics" and the realities revealed by "an applied political science." It was the divergence between these adopted abstract models and the concrete legacy of societies marked by "colonialism and revolution" that explained the instability of constitutional principles in Hispanic America (see also Section 5.3).[18] Even if many other Latin American jurists and statesmen accepted such a diagnosis, it was very difficult to reach a consensus about the best remedy to cure the affliction. Did the problem reside in the election of an unsuitable institutional model or in the incapacity of Latin American elites to adapt any such model to the particular realities of the region?

Two decades earlier, in one of the first texts to be published on the science of public administration in the region, Colombian jurist Florentino González discussed similar problems. "Reading Bonnin" (one of the French forerunners of the discipline), González stated, "I found a preference for a type of centralization that neglects all local interest, and, unfortunately, I have realized that our laws have been based on such pernicious doctrines." However, it was in the work of Tocqueville that he found "a torch guiding me to a new field of research: setting Bonnin aside, I began to think about the ways in which Great Britain and the United States organized social interests, and understood that the root of our evils was in the spirit of centralization that lives in our laws."[19]

17 On the centrality of constitutional debates and the idea of modernity in the region, see Section 5.1 by Portillo Valdés in this volume.

18 J. Arosemena, *Constituciones políticas de la América meridional reunidas y comentadas por Justo Arosemena. Abogado de Colombia y de Chile* (Havre: Imprenta A. Lemale Ainé, 1870), vol. I, xxvi.

19 F. González, *Elementos de Ciencia Administrativa* (Quito: Imprenta de la Enseñanza, 1847), vol. I, iv–vi. Another early introduction to the discipline, in a shorter text, published that same year in Bogotá, was C. Pinzón, *Principios sobre Administración Pública* (Bogotá: Imprenta de J. A. Cualla, 1847). The classic text by C.-J. Bonnin, *Principes d'Administration Publique* (Paris: Clament, 1809) had been summarized in two Spanish translations a few years prior: *Compendio de los Principios de Administración. Escrito en francés por C. J. Bonnin,* trans. J. M. Saavedra (Madrid: Imprenta de don José Palacios, 1834), and *Ciencia Administrativa: Principios de Administración Pública. Estractados de la obra francesa de Carlos Juan Bonnin*, trans. E. Febres Cordero (Panamá: Imprenta de José Ángel Santos, 1838). See Malagón Pinzón, *El pensamiento administrativo*.

In 1869, now appointed as the first Chair of Constitutional Law at the University of Buenos Aires, González expanded these views in his textbook *Lecciones de Derecho Constitucional*. His support for a radical version of democratic republicanism was based on a distinction between what he identified as "the European system," an "artificial" tradition of centralizing monarchies, and the "American system" of federal representative republics, based on the model provided by the 1787 Philadelphia Constitution.[20] José Manuel Estrada, who succeeded González as Chair of Constitutional Law in Buenos Aires, was also a harsh critic of the principles of centralization espoused by European administrativism. Addressing the graduates of the law school in 1881, Estrada concluded that the new discipline was "an unhealthy phase of modern legislation," the scientific expression of the process of centralization whereby modern societies were "subjected by the state."[21]

On the opposite side were those who defended centralization as one of the pillars of political stability and efficient public administration the region was lacking. When studying the collection of mid-nineteenth-century Hispanic American constitutional texts, the Spaniard Manuel Colmeiro did not hesitate in proclaiming that the imitation of the US constitutional model had been a tragic error. For instance, he attributed the costly Mexican defeat against the United States in their recent war to the weak political structure created by the Mexican Federal Constitution of 1824.[22] A few years earlier, Colmeiro had published another very influential text on the origins of public administration in Latin America: his two-volume *Derecho Administrativo Español*. In this work, he explains the basic principles of the discipline, drawing the crucial distinction between political and administrative centralization. If administrative centralization posed the risk of an excessive absorption of functions by the central government, "disregarding the provincial and municipal realities," Colmeiro was much more sanguine about the importance of political centralization. A logical consequence arising from the reaction against medieval dislocation of territories and governments, centralization meant "the triumph of a common body of law over privilege, of order over anarchy, of the authority

20 F. González, *Lecciones de Derecho Constitucional*, 5th ed. (París: Librería de la Vda. de Ch. Bouret, 1909 [1869]), ix–xiv.

21 J. M. Estrada, "A los nuevos doctores. Discurso de Colación de Grados de la Facultad de Derecho y Ciencias Sociales, 1881," in J. M. Estrada, *Obras completas* (Buenos Aires: Compañía Sudamericana de Billetes de Banco, 1905), vol. XII, 260.

22 M. Colmeiro, *Derecho Constitucional de las repúblicas hispano-americanas* (Madrid, Valparaíso, and Lima: Librerías de Don Ángel Calleja, 1858), xiii–xiv and 383–84.

incarnated in the monarchy over the dispersion of social forces that had characterized feudalism."[23]

Latin American political elites, constantly battling the threat of provincial uprisings and territorial fragmentation, probably favored this energetic defense of a central state and its unitary conception of the law, one found in the first administrative law textbooks produced in the region that departed from Florentino González's position. The Mexican jurist Teodosio Lares, for instance, stated very forcefully that centralization went hand in hand with the new science of administration. In Spain, he added – grounding his views in a long-term historical interpretation – the efforts made by the Catholic monarchs in order to systematize and standardize legislation were the first signals of the advantages of administrative unification. He concluded, however, that administrative uniformity had grown stronger as a result of Napoleon's aspirations for more control in Revolutionary France, as well as the work of the *Conseil d'État*.[24]

Other nineteenth-century Latin American authors explicitly adapted and/or literally copied Colmeiro's work. The Chilean Santiago Pardo made clear that he had taken much of his 1859 textbook directly from the pages of the Spaniard's work, as did the Argentinean Ramón Ferreyra when writing his 1866 treatise. Both agreed that the principle of centralization was, as Pardo expressed it, "a condition inherent to a good administration." Ferreyra went even further:

> I believe that in countries where a natural propensity derived from race, mores, and precedents have always led to a centralized, unitary form of life …, it is essential to set up a centralized administration in every activity. Without it, neither the rule by constitution nor any conception of responsibility would be possible.[25]

In a very different context, Paulino José Soares de Sousa, the Viscount of Uruguai, reflected along similar lines in his study of administrative law in the Brazilian empire. It was not the legacy of a monarchical tradition but instead the diversity of local conditions that seemed to inspire his analysis. Without centralization, he wondered, "how could we possibly unite the North and South of the

23 M. Colmeiro, *Derecho Administrativo Español*, 4th ed. (Madrid: Imprenta y Librería de Eduardo Martínez, 1876 [1850]), vol. I, cap. VI, "De la centralización," 19–32.

24 T. Lares, *Lecciones de Derecho Administrativo* (Mexico City: Imprenta de Ignacio Cumplido, 1852), 5–6.

25 R. Ferreyra, *Derecho administrativo general y argentino* (Buenos Aires: Imprenta de Pablo Coni, 1866), 167; S. Prado, *Principios Elementales de Derecho Administrativo Chileno* (Santiago: Imprenta Nacional, 1859), 14–15.

Empire, given so many dissimilarities in climate, territory, spirit, commercial interests, and social development? How could we promote the development of so many localities marked by indolence and inertia?"[26] The proposals introduced by the 1834 Additional Act of the Empire, conceding greater autonomy to the provinces through the establishment of provincial legislatures, were the main target of his criticism of liberal political decentralization. These were based, Soares de Sousa claimed, on "hatred of the central power" and would lead to "an anarchic and disorderly decentralization out of an exaggerated democratic opinion, … subversive and chaotic that would deliver a disarmed central executive power to provincial factions." He also condemned the idea of transplanting Anglo-American institutional models to Latin countries; those countries where this occurred fell into a political "barbarism."[27]

Juan Bautista Alberdi, one of the fathers of the 1853 Argentine Constitution, stated a different position based on two principles. The first one was that a republican order could and should defend the principles of *political* centralization. The problem faced by new nations was the excess of *administrative* centralized regulations imposed by colonial legislation:

> Amidst our proud independent republicanism, we maintained until recently a corpus of administrative and private laws that organized our economic serfdom in the *Leyes de Partida,* and even worse, in the *Leyes de Indias,* the *Novísima Recopilación,* and the *Reales Cédulas* dictated by absolutist monarchs…. The *Fuero Juzgo, Fuero Real, Leyes del Estilo, Siete Partidas, Ordenamiento de Alcalá, Ordenamiento Real, Nueva Recopilación, Recopilación de Indias, Reales Cédulas, Ordenanza de Minas, Ordenanzas de Bilbao, Ordenanza de Intendentes* show we are not lacking organizing principles. Maybe our disgrace lies in the excess of organization.[28]

As for the study of the new discipline, he advised a young student that France was not a suitable place to learn about administrative law, since it was not yet clear whether legislation in France would be "monarchical or republican."[29]

26 V. do Uruguai (P. J. Soares de Sousa), *Ensaio sobre o Direito Administrativo* (Rio de Janeiro: Typographia Nacional, 1862), vol. II, 177–78.

27 Do Uruguai, *Ensaio*, vol. II, 201 and 215–16. See also M. de Moraes Silveira, "'Referência ao Estado e instituições peculiares ao Brasil': Uma leitura do *Ensaio sobre o Direito Administrativo*," in C. Araújo Cabral, R. Amaro de Oliveira Lanari, T. L. T. Tolentino, and V. da Silva Cunha (eds.), *Cultura Intelectual em Perspectiva. Linguagens, Instituições e Trajetórias (Belo Horizonte: Letramento*, 2020), 187–207.

28 J. B. Alberdi, "Sistema económico y rentístico de la Confederación Argentina según su Constitución de 1853," in J. B. Alberdi, *Obras Completas de Juan Bautista Alberdi* (Buenos Aires: Imp., Lit. y Enc. de "La Tribuna Nacional", 1886), vol. IV, 208–9 and 244.

29 J. B. Alberdi, "Carta sobre los estudios convenientes para formar un abogado con arreglo a las necesidades de la sociedad actual en Sudamérica. Escrita por el abogado

Alberdi's second guiding principle pointed toward a renewal of public and private law that would serve as a suitable framework for the economic and social transformation of the new nations – one guided by the principles of classical political economy. The whole of South American public law during the initial decades after independence now seemed archaic and inadequate because its goals were now outdated:

> During that period – when democracy and independence were the only goal of our constitutions – wealth, material progress, commerce, population, industry, economic interests in general were considered secondary matters, accessories of a secondary order, badly studied and obviously not attended to.

The development of "free immigration, liberty of commerce, railways and unfettered industry" were the objectives that had to guide the new constitutionalism.[30]

Whether coming from a more conservative outlook aimed at preserving some of the features of the colonial past or within a liberal discourse looking for a dramatic transformation of the material reality, the law was now predominantly seen as a product emanating from a politically centralized national state. Other possible sources of norms and regulations of social life, such as provincial legislatures or the Church, were gradually subjected to this process of subordination (also see Section 5.2).

The centrifugal effects of strong regionalist movements and economic structural imbalances helped to consolidate a *caudillista* tradition of strong personalization of power in provincial leaders. This in turn led to the concentration of all functions of administration, legislation, and judicial power in one person, rendering the functional differentiation necessary for the process of rationalization of the law that liberal nation-builders saw as indispensable impossible.[31] During the period in which the federal regimes in many countries in the region were first organizing, those provinces that had up to this point considered themselves autonomous political spaces strongly resisted

Alberdi a un joven compatriota suyo, Estudiante de Derecho en la Universidad de Turín, en Italia (16 Apr. 1850)," in J. B. Alberdi, *Obras Completas de Juan Bautista Alberdi* (Buenos Aires: Imp., Lit. y Enc. de "La Tribuna Nacional", 1886), vol. III, 343–53.

30 J. B. Alberdi, "Bases y puntos de partida para la organización política de la República Argentina," in J. B. Alberdi, *Obras Completas de Juan Bautista Alberdi* (Buenos Aires: Imp., Lit. y Enc. de "La Tribuna Nacional", 1886), vol. III, cap. X, "Cuál debe ser el espíritu del nuevo derecho constitucional en Sud América," 388.

31 On *caudillismo*, see F. Safford, "The Problem of Political Order in Early Republican Spanish America," *Journal of Latin American Studies* 24 (1992), 83–97; J. C. Chasteen, "Making Sense of Caudillos and 'Revolutions' in Nineteenth-Century Latin America," in J. C. Chasteen and J. S. Tulchin (eds.), *Problems in Modern Latin American History: A Reader* (Wilmington: S.R. Books, 1994).

these centralizing tendencies, leading to bitter political conflicts and even civil wars. By the mid-nineteenth century, during the "heyday of liberal reform," the balance was tilted in favor of centralized national powers, for example, in Argentina and Mexico; on other occasions, for example, in Colombia, the provinces set very tight restrictions to the scope of the national government.[32]

Just as the provinces – as autonomous political entities – were seen as an obstacle to centralization, the Catholic Church was also a potential countervailing power that liberal nation-builders had to overcome in order to consolidate their rule. This was a thorny issue, given the age-old interplay between religion, morality, and the law in the Iberian world (see Section 3.2). Depending on several factors, such as the relative wealth and power of each of the national Churches, the different trajectories of the state-building processes, and the character and ideological leanings of the ruling elites, church-state relations varied among the different countries in the region. Despite the difference circumstances, the process of secularization, generally speaking, advanced hand in hand with the consolidation of state authority.[33]

Nineteenth-century Latin American elites embraced liberalism as an antidote to what they saw as the backwardness inherent in the legacy of these colonial institutions and values. Legal and judicial centralization played an important part in such a project. This juridical bent of Latin American liberal nation-building was expressed in the enthusiastic efforts made by those elites in favor of constitutionalism, codification, and the setting up of new judicial institutions at the local and national level. Along with the new constitutions (see Section 5.2), national codification was seen by defenders and opponents alike as an important political tool for the consolidation of a unified nation in Europe and Latin America (see Section 5.3). In this sense, codification operated

32 D. Bushnell and N. Macaulay, *The Emergence of Latin America in the Nineteenth Century* (Oxford: Oxford University Press), 193 and 221; T. E. Anna, "Inventing Mexico: Provincehood and Nationhood after Independence," *Bulletin of Latin American Research* 15(1) (1996), 7–17; J. C. Chiaramonte, "La formación de los estados nacionales en Iberoamérica," *Boletín del Instiuto Ravignani* 15 (1997), 143–65; A. Agüero, "Autonomía por soberanía provincial. Historia de un desplazamiento conceptual en el federalismo argentino (1860–1930)," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 43(1) (2014), 341–92; M. Carmagnani (ed.), *Federalismos latinoamericanos: México/Brasil/Argentina* (Mexico City: Fondo de Cultura Económica, 1993); D. Bushnell, *The Making of Modern Colombia. A Nation in Spite of Itself* (Berkeley: University of California Press, 1993). See also Chapter 4 in this volume.

33 V. Tau Anzoátegui, *El jurista en el Nuevo Mundo. Pensamiento. Doctrina. Mentalidad* (Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, 2016), 26; J. Lynch, "The Catholic Church in Latin America, 1830–1930," in L. Bethell (ed.), *The Cambridge History of Latin America, vol. IV: c.1870 to 1930* (Cambridge: Cambridge University Press, 1986), 529–30, 546–47, and 563. See also chapters 3.2 and 5.3 in this volume.

on two different levels. On the one hand, the new codes offered the possibility of achieving a certain legal homogeneity in territories where fragmentation and plurality of normative orders was more the rule than the exception. On the other hand, it operated as a powerful symbol of nationhood, since each of the new nations, despite similarities in historical trajectories and shared colonial legacies, could present its own codes as an expression of its own particular legal system.[34] Just as those defending the legacy of Hispanic or Portuguese colonial institutions could criticize the blind following of the US constitutional model, others pointed in the opposite direction. One of the most serious flaws of the 1869 Argentine Civil Code, according to its opponents, was that the drafter of the Argentine text, Dalmacio Vélez Sarsfield, had reproduced the antidemocratic and monarchical spirit that pervaded its main sources: the Napoleonic Code and the Brazilian *Esboço da consolidacao das leis*.[35]

Given the increase in state capacities resulting from the integration of the region to the Atlantic economy, which translated into larger fiscal revenues, these centralizing tendencies accelerated from the 1870s onwards. This, in turn, allowed for increased state control over the territories and material resources, the development of a "cognitive capacity" within an administrative infrastructure to manage those resources, and the symbolic capital that sustained its legitimation.[36] The ascendancy of positivism and different versions of "scientific politics" provided a new ideological framework: Notions of "order and progress" and the civilizing role of commerce would gradually displace the more exalted versions of liberal republicanism of previous decades.[37]

34 For the role of codification in the processes of national unification in Europe, see M. John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (Oxford: Clarendon Press, 1989), 6–7 and 18–20; J. A. Davis, *Conflict and Control: Law and Order in Nineteenth-Century Italy* (London: MacMillan, 1988), 122–25. See also, V. Tau Anzoátegui, *La codificación en la Argentina (1810–1870). Mentalidad social e ideas jurídicas* (Buenos Aires: Imprenta de la Universidad, 1977), 30–31.

35 J. B. Alberdi, "El proyecto de Código Civil para la República Argentina (1868)," in J. B. Alberdi, *Obras Completas de J. B. Alberdi* (Buenos Aires: Imp. de "La Tribuna Nacional", 1886), vol. VII, 80–135; V. Fidel López, "Crítica Jurídica," *Revista de Buenos Aires* XX (1869), 106–39.

36 Lawrence Whitehead defines the "cognitive capacity" of the administration as "the sustained organization to collect, process, analyse and deliver the types of information about society needed for a modern state to monitor and interpret the impact of its measures." Cf. Whitehead, "State Organization," 46–47. See also M. A. Centeno and A. E. Ferraro, "Republics of the Possible: State Building in Latin America and Spain," in M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (Cambridge: Cambridge University Press, 2013), 10–12.

37 C. A. Hale, "Political and Social Ideas in Latin America, 1870–1930," in L. Bethell, ed., *The Cambridge History of Latin America, vol. IV: c.1870 to 1930* (Cambridge: Cambridge University Press, 1986), 367–441; J. E. Sanders, *The Vanguard of the Atlantic World: Creating Modernity, Nation, and Democracy in Nineteenth-Century Latin America* (Durham and

Economic and social transformations, in turn, generated new pressures on the states. The emergence of urban middle sectors created new demands for a more generous provision of public goods such as internal security, communication and transportation infrastructure, better labor conditions, public education and health, all of which culminated in a more general transformation of the idea of citizenship and social rights. Each of these steps produced changes in the legal framework within which the states operated, and they favored the replacement of a traditional conception of local rule by the new centralized administrative techniques.

Economic Growth and the Expansion of State Capacities

Latin American economies during the second half of the nineteenth century participated in Atlantic capitalism mostly through the exports of primary commodities and the reception of European capital investments and credit. Relative institutional stability and attenuation of military conflicts opened up new opportunities for economic growth, which, in turn, facilitated the consolidation and expansion of state capacities in the region. Larger fiscal revenues allowed governments to channel increased resources to their military and police forces, thus helping to maintain internal security and face international threats. In addition, provision of basic public goods (education, justice, communication and transportation infrastructure, public health, and housing) conferred greater presence and visibility to state institutions in the different territories and frequently ensured a stronger sense of loyalty to the ruling political groups. Lastly, inflows of capital investments and credit facilitated the financing of such provisions and thus enabled governments to avoid imposing a higher tax burden on social actors who might otherwise become alienated.[38]

Wars, Public Finance, and State Building

Did internal military clashes and international wars play a role in the consolidation and expansion of Latin American states? Charles Tilly's influential historical sociology established a link between wars, the organization of

London: Duke University Press, 2014), 176–224; H. Sabato, *Republics of the New World: The Revolutionary Political Experiment in Nineteenth–Century Latin America* (Princeton: Princeton University Press, 2018), 197–202.

38 For general overviews of Latin American economic history during this period, see W. Glade, "Latin America and the International Economy, 1870–1914", in L. Bethell (ed.), *The Cambridge History of Latin America, vol. IV: c.1870 to 1930* (Cambridge: Cambridge University Press, 1989), 1–56; and R. Thorp, "Latin America and the International Economy from the First World War to the World Depression," in L. Bethell (ed.), *The Cambridge History of Latin America, vol. IV: c.1870 to 1930* (Cambridge: Cambridge University Press, 1989), 57–82.

fiscal procedures for the extraction of economic resources, and the origins of modern European states. States made wars and wars made states, Tilly concluded.[39] In Latin America, however, the almost constant presence of military conflicts in the history of the new nations imposed an excessive burden on the rather modest nineteenth-century states, and its incipient fiscal structures.[40] Unlike what Tilly's observations suggested for the European case, Latin American wars, Miguel Centeno stated, only left a trail of "blood and debt."[41]

The increased capacities of Latin American states, including the financing of military forces, was not due to wars or more efficient internal taxation systems; instead, it was the steady inflow of income generated by the customs, given the growth of international trade, and the availability of credit. Steven Topik observed that Brazil's integration into the international economy was crucial to the formation of the Brazilian state, and his analysis could just as easily be applied to much of the region. On the whole, the "foreign umbilical cord" nurtured the local regimes. Whereas in Europe, according to Topik, "war made the state and the state made war, in Brazil trade made the state and allowed the state to avoid internal wars." Similarly, Juan Carlos Garavaglia said of nineteenth-century Argentina: "[A]ll the mystery of political struggle and the civil wars of the period … can be summarized in the formula that linked for a long time the custom with the army."[42] Miguel Centeno compared custom revenues as a percentage of the total fiscal income between the UK and France, on the one hand, and Chile and Brazil, on the other. He showed the disproportionate presence of custom revenue (more

39 C. Tilly, "Reflections on the History of European State-Making," in C. Tilly (ed.), *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975), 73–76; C. Tilly, "War Making and State Making as Organized Crime," in P. B. Evans, D. Rueschmeyer, and T. Skocpol (eds.), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), 169–91.

40 J. C. Garavaglia, J. Pro Ruiz, and E. Zimmermann (eds.), *Las fuerzas de guerra en la construcción del Estado. América Latina, siglo XIX* (Rosario: Prohistoria, 2012); M. Deas, "The Fiscal Problems of Nineteenth-Century Colombia," *Journal of Latin American Studies* 14(2) (1982), 287–328.

41 M. Centeno, *Blood and Debt: War and the Nation-State in Latin America* (University Park: The Pennsylvania University Press, 2002). For other arguments about war and state-making in Latin America, see F. López-Alves, *State Formation and Democracy in Latin America, 1810–1900* (Durham: Duke University Press, 2000); M. J. Kurtz, *Latin American State Building in Comparative Perspective: Social Foundations of Institutional Order* (Cambridge: Cambridge University Press, 2013).

42 S. Topik, "The Hollow State: The Effect of the World Market on State-Building in Brazil in the Nineteenth Century," in J. Dunkerley (ed.), *Studies in the Formation of the Nation State in Latin America* (London: Institute of Latin American Studies, 2002), 112–32; J. C. Garavaglia, "La apoteosis del Leviathan: El estado en Buenos Aires durante la primera mitad del siglo XIX," *Latin American Research Review* 38(1) (2003), 135–68.

than two-thirds of the total) in the Latin American cases.[43] This dependency of fiscal revenue on foreign trade and international credit, therefore, was a crucial element in the history of state-building in the region, leaving a long-term legacy of weakness in the capacity to extract resources through taxation for much of the period.

Territoriality and State Capacities

Integration into the international economy also unevenly shaped the geographic distribution of economic activities within the new nations. Certain key products served as the primary engine of economic growth in specific regions: wool, hides, beef, and cereals in Argentina; copper and nitrates in Chile, coffee in Brazil and Colombia, guano and nitrates in Peru – to cite just a few examples. External demand coupled with a revolution in transportation and internal communication capable of satisfying this demand gave birth to a new economic geography that frequently generated a structural disequilibrium between regions. This imbalance resulted in political conflicts involving the national state and provincial governments or even clashes between different provinces. Therefore, debates about the relative merits of greater centralization or greater provincial autonomy involved not only doctrinal differences about constitutional theory but also a reflection on the different possibilities of economic development and political ascendancy of internal regions *vis-à-vis* the national states.

Railways and telegraphs became two of the most important means of development of the "infrastructural capacities" of the new states. They led to greater control of territoriality and facilitated centralization. Telegraphed communication about disturbances in any given province, for instance, made it possible for national governments to mobilize troops (by rail) and quickly pacify the situation and/or support friendly provincial authorities through federal intervention. The cases of Mexico, Argentina, and Brazil in the second half of the nineteenth century all illustrate the powerful role played by the railway – both with regard to its economic impact and how the effects of this impact were used as a tool to facilitate greater control over the territories by the national governments.[44] Similarly, centralized control of the territory

43 Centeno, *Blood and Debt*, 101–66.

44 See the cases analyzed in Carmagnani, *Federalismos Latinoamericanos*, 180–223; J. Coatsworth, *Growth Against Development: The Economic Impact of Railroads in Porfirian Mexico* (DeKalb: Northern Illinois University Press, 1981); C. M. Lewis, "The Political Economy of State-Making: The Argentine, 1852–1955," in J. Dunkerley (ed.), *Studies in the Formation of the Nation State in Latin America* (London: Institute of Latin American Studies, 2002), 161–88; S. Topik, *The Political Economy of the Brazilian State, 1889–1930* (Austin: University of Texas Press, 1987).

demanded and gradually produced the development of new "cognitive capacities" (see earlier footnote 36). Exploration and cartography, surveying the territories, establishing land registries and cadasters (both urban and rural), census taking, and compiling official statistics became crucial to the production of the "legibility" of society by state bureaucracies.[45] Postal services, established by private companies and "*mensajerías*," were eventually taken over by national governments.[46] Lastly, the development of national educational systems and federal judicial institutions also contributed to enhance the presence of the national government – both substantively and symbolically – along the territories, thus contributing to the consolidation of its authority.[47]

Two consequences emerged from these processes of expanding state capacities relevant to the gradual emergence of the administrative state in the region: the sanction of regulatory frameworks for these new public endeavors and the growth of new state bureaucracies. Regarding the first point, the law established a state monopoly for certain activities in some cases, while it regulated the private provision of certain services or utilities in others. In the case of Argentina, for instance, state ownership and management of postal services (public monopoly established by the 1876 *Ley 816*) and of water supply and drainage, the *Obras Sanitarias de la Nación* (the 1912 *Ley 8889*) were rare

45 J. C. Garavaglia and P. Gautreau (eds.), *Mensurar la tierra, controlar el territorio. América Latina, siglos XVIII–XIX* (Rosario: Prohistoria, State Building in Latin America, 2011); M. Loveman, "Census Taking and Nation Making in Nineteenth-Century Latin America," in Centeno and Ferraro, *State and Nation Making*, 329–355; Hernán Otero, *Estadística y Nación. Una historia conceptual del pensamiento censal de la Argentina moderna (1869–1914)* (Buenos Aires: Prometeo Libros, 2007); Nancy P. Appelbaum, "Envisioning the Nation: The Mid-Nineteenth-Century Colombian Chorographic Commission," in M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (Cambridge: Cambridge University Press, 2013), 375–95; J. C. Scott, *Seeing Like a State* (New Haven: Yale University Press, 1998), for a critical discussion of the consequences of the development of these state capacities for modern societies.

46 L. Caimari, "La carta y el paquete. Travesías de la palabra escrita entre Argentina y Chile a fines del siglo xix," *Anuario Colombiano de Historia Social y de la Cultura* 48(2) (2021), 177–208.

47 H. D. Soifer, "The Sources of Infrastructural Power: Evidence from Nineteenth-Century Chilean Education," *Latin American Research Review* 44(2) (2009), 158–80; H. D. Soifer, "Elite Preferences, Administrative Institutions, and Educational Development during Peru's Aristocratic Republic (1895–1919)," in M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (Cambridge: Cambridge University Press, 2013), 247–67; R. Salvatore, "Between *Empleomanía* and the Common Good: Expert Bureaucracies in Argentina (1870–1930)," in M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (Cambridge: Cambridge University Press, 2013), 225–46; E. Zimmermann (ed.), *Judicial Institutions in Nineteenth-Century Latin America* (London: Institute of Latin American Studies, 1999).

cases. On the other hand, private provision by concession was granted in the case of railways and electricity, with legislation regulating tariffs and conditions of service. A little later, licenses were granted for the provision of telephone services and the use of radio frequencies. It was only after the Second World War, in conjunction with the Perón administration, that Argentina underwent the large-scale nationalization of public services and utilities. This took place within the context of the expansion of the doctrine of "public service" (see next section), and it served as the foundation for a new conception of the state.[48] Mexico, in contrast, decided to nationalize the country's railway much earlier. Between 1903 and 1908, the Mexican government consolidated the different lines into one public national company, *Ferrocarriles Nacionales de México*, and granted a degree of managing autonomy to a semi-independent body consisting of executives from the merged companies.[49]

The number of people employed by the railway, postal service, schools, courts, and public institutions grew rapidly, and the regulatory bodies overseeing these activities, originally rather small and initially focused on national accounting, public finance (*hacienda*), and the organization of the armed forces and internal security, went on to become large bureaucracies.[50] By the end of the nineteenth century, public employment and its regulation had become a salient issue in the debates about the future of public administration in the different countries. The need to form a body of state bureaucrats with a shared sense of identity and purpose – one conducive to carrying out their functions efficiently, consistently, and competently – became a prime objective of the reformers. Only later did fears about the effects of electoral democratization on the administration of the state materialize, which served to reinforce the belief in the need to isolate state bureaucracies from the pressures exerted by party politics. This revealed the extent to which the perception of technical "experts" in the management of public affairs as an alternative to "ideology,"

48 H. A. Mairal, "La ideología del servicio público," *Revista de Derecho Administrativo* 5(14) (1993), 359–437.

49 P. Riguzzi, "Inversión extranjera e interés nacional en los ferrocarriles mexicanos, 1880–1914," in C. Marichal (ed.), *Las inversiones extranjeras en América Latina 1850–1930. Nuevos debates y problemas en historia económica comparada (Sección de obras de historia. Serie Ensayos)* (Mexico City: Fondo de Cultura Económica, El Colegio de México, Fideicomiso Historia de las Américas, 1995); Mairal, "La ideología," 359–437.

50 Detailed studies on various Latin American cases are compiled in J. C. Garavaglia and J. Pro Ruiz (eds.), *Latin American Bureaucracy and the State Building Process (1780–1860)* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013). See also D. Barría, "An Honourable Profession: Public Employees and Identity Construction in Chile, 1880–1920," *Bulletin of Latin American Research* 38(2) (2019), 179–91; E. López, "El proceso de formación de la burocracia estatal chilena, 1810–1930," in F. Rengifo (ed.), *Historia política de Chile, 1810–2010* (Santiago: Fondo de Cultura Económica, 2017), vol. II, 55–85.

corruption, demagogy, and the interests of political parties had progressed. This was part of a movement for the purification of public administration, allegedly corrupted by the "spoils system" advanced by political parties and advocated by specialists in public law.[51] In 1920s Argentina, Rafael Bielsa denounced "*empleomanía*" (the manic expansion of public employment) as a corruption of both the electoral institutions and of a healthy public administration. He contended that Argentine political life and the state financial situation could only be healed if the local "*política criolla*" were replaced by new scientific principles of public administration.

Technical Elites and Social Policies

By the early twentieth century, new social problems and new demands stemming from an expanded conception of citizenship in the region forced the Latin American state elites to elaborate and enforce more complex and sophisticated forms of public policy. This, as Lawrence Whitehead pointed out, "has provided the single most powerful impulse toward the construction of 'modern states' throughout Latin America."[52] Academics and university professors were summoned to contribute a new type of "social knowledge" that would serve as the foundation for the new state policies needed to address these economic, social, cultural, and political challenges. The global circulation of experts, ideas, and models for social policies (the "Atlantic Crossings" examined by Daniel Rodgers[53]) were a key part of state responses in Latin America to the "social question," and transfers and adaptations of "social technologies" abounded. As had been the case elsewhere, the "expert" became a key factor in the development of new techniques of governmentality in state-building in nineteenth-century Latin America. The march toward the administrative state made visible the ways in which "the symbols of knowledge – its acquisition, analysis and privileged possession – have come to occupy the cornerstone of authority."[54]

51 D. Kennedy, "Three Globalizations of Law and Legal Thought: 1850–2000," in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), 19–73, sees the rise and isolation of administrative "experts" as one of the features of the second globalization of legal thought.

52 Whitehead, "State Organization," 14.

53 D. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard University Press, 1998).

54 R. MacLeod (ed.), *Government and Expertise: Specialists, Administrators and Professionals, 1860–1919* (Cambridge: Cambridge University Press, 1988), xiv and 1; J. Leonhard, "The Rise of the Modern Leviathan: State Functions and State Features," in S. Berger (ed.), *A Companion to Nineteenth Century Europe, 1789–1914* (Oxford: Blackwell, 2006), 144–45.

Public hygiene and the control of epidemics were the first fields in which the demand for expert knowledge went hand in hand with claims for increased centralization of authority in the national governments.[55] The coupling of social welfare concerns with the defense of "national interests" helped legitimize the more centralized authority of the new institutions and mechanisms of intervention. This joint claim was frequently used to overrule objections arising from the defense of individual rights, voluntary associations, or the autonomy of local governments. In 1892, for instance, a report of the Argentine National Department of Hygiene summarized this philosophy as follows: "Hygiene does not admit the principle that an individual is the master of his person or property to the point of causing harm to public health, nor that local powers proceed in sanitary matters independently of the central power."[56] Similar concerns were expressed by some of the most prominent names in the development of hygiene and public medicine in the region, such as Oswaldo Cruz in Brazil, Eduardo Liceaga in Mexico, as well as Eduardo Wilde and José María Ramos Mejía in Argentina. Their efforts often tended to strengthen an already highly centralized form of government, displacing local authorities or voluntary associations.[57]

Other aspects of the Latin American "social question" exhibited similar patterns. The gradual development of social policies and labor regulations was shaped by this convergence of new state technical elites and centralized decision-making processes at the national level as a response to both the social demands and the consequent change in the idea of the limits of the law as an instrument for state action. Lawyers were at the center of the development of new labor regulations, for instance. As the Spanish reformer Adolfo Posada formulated it in his 1890 essay "Law and the Social Question": "The

On "governmentality," see M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (London: Palgrave Macmillan, 2007). For a brief review of the literature on these processes in Latin America, see M. B. Plotkin and E. Zimmermann (eds.), *Los saberes del Estado* (Buenos Aires: Edhasa, 2012), 9–28.

55 Cf. M. Cueto (ed.), *Salud, cultura y sociedad en América Latina* (Lima: Instituto de Estudios Peruanos, 1996).

56 Departamento Nacional de Higiene, "Higiene administrativa. Deberes y derechos de las autoridades sanitarias", *Anales del Departamento Nacional de Higiene* 2 (1892), 18–27.

57 N. Stepan, *Beginnings of Brazilian Science: Oswaldo Cruz, Medical Research and Policy, 1890–1920* (New York: Science History Publications, 1976); T. Meade, "'Civilizing Rio de Janeiro': The Public Health Campaign and the Riot of 1904," *Journal of Social History* 20(2) (1986), 301–22; J. Needell, "The *Revolta Contra Vacina* of 1904: The Revolt Against 'Modernization' in *Belle-Époque* Rio de Janeiro," *Hispanic American Historical Review* 67(2) (1987), 233–69; M. Cueto, "Sanitation from Above: Yellow Fever and Foreign Intervention in Peru, 1919–1922," *The Hispanic American Historical Review* 72(1) (1992), 1–22.

law is something that inevitably has to be encountered every time one wants to transform and improve the condition of men."[58]

The countries in this region each followed their own developmental path to what has been referred to as the "welfare-regulatory" state, or the "mediatory state" in instances in which the provision of welfare services and the regulation of labor disputes took place. Nevertheless, they shared a similar chronology in which two moments stand out. The first involves the "social question" of the early twentieth century, when the early consequences of economic modernization – incipient industrialization, urbanization, migrations – shaped liberal reform policies. The second occurred following the Great Depression of the 1930s, when many Latin American governments, within the framework of a more generalized critique of liberal constitutionalism and capitalism, began experimenting with corporatist models.[59]

Faced with the new economic and social reality, Uruguay underwent the most significant state transformation in Latin America. José Batlle y Ordoñez, who served two separate presidencies (1903–1907 and 1911–1915), laid the foundation for what could be called the first welfare state in the region. Batlle launched an ambitious program of social reforms that included an expansion of public education; the enactment of legislation regarding the maximum working day, minimum wage, the right to strike; the establishment of a national pension system; and compensation for industrial accidents. In this case, the process of advancing social legislation seems to have been the result of government initiatives rather than a response to pressure from organized groups. In the decades that followed, however, the expansion of the welfare state in Uruguay responded to the pressures and influences of an organized and mobilized labor movement.[60]

Developments in Chile, Argentina, Brazil, and Mexico combined the previously mentioned pattern of a first phase of "a paternalistic approach to

58 A. Posada, "El derecho y la cuestión social," in A. Menger, *El derecho civil y los pobres* (Madrid: Librería General de Victoriano Suárez, 1898), 8. The essay was the preliminary study of Posada's translation of A. Menger's *Das Bürgerliche Recht und die besitzlosen Volksklassen (Civil Law and the Poor)* (Tübingen: Laupp, 1890). On the role of legal culture in the origins of the "welfare-regulatory" state, L. M. Friedman, "Legal Culture and the Welfare State," in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin and New York: Walter de Gruyter & Co., 1988), 13–27.

59 L. Fink and J. M. Palacio (eds.), *Labor Justice across the Americas* (Urbana: University of Illinois Press, 2017), 47 and 260; E. Zimmermann, "The Welfare State in Latin America," in M. Mirow and V. Uribe-Urán (eds.), *A Companion to the Legal History of Latin America* (Leiden: Brill, forthcoming).

60 F. López-Alves, "State Reform and Welfare in Uruguay, 1890–1930," J. Dunkerley (ed.), *Studies in the Formation of the Nation State in Latin America* (London: Institute of Latin American Studies, 2002), 94–111.

social reform" within the framework of liberal institutions, and later corporatist experiments.[61] As we shall see in the next section, the 1930s and 1940s witnessed more profound transformations, in part driven by the crisis and replacement of the model of economic development that had prevailed in the previous period. The governments of Getúlio Vargas in Brazil and Perón in Argentina followed in the footsteps of the military governments of Ibáñez in Chile and Uriburu in Argentina. They combined the development of import substitution industrialization (ISI) with political authoritarianism, the expansion of social policies, and higher degrees of state intervention in the regulation of the economy.[62] This transformation included a corporate strategy of co-optation of the labor movement and the development of social legislation through direct interaction between executive and social actors that occasionally weakened parliamentary institutions.

In conjunction with the structural transformations that shaped anew the Latin American states, local jurists and legal scholars discussed and promoted new global currents of legal thought reconceptualizing the state and its functions. One of the elements contributing to the progress of the region in the early twentieth century, to cite James Bryce once more, was an openness to "the currents of world opinion … the principles and precedents in the art of government."[63] The circulation and adaptation of some of these "currents of opinion" – in this case, legal theories about the state – is the subject of the next section.

The "Administrative International"

Starting in the early twentieth century, different strands of legal and political thought circulating in the region offered new perspectives of the state and its regulatory powers[64]. Against the background of these welcomed ideas, the prior reservations regarding the administrative tradition, mentioned in the introduction to Section 6.1, gradually faded away. Crucial to this

61 A. Segura-Ubiergo, *The Political Economy of the Welfare State in Latin America: Globalization, Democracy, and Development* (Cambridge: Cambridge University Press, 2007); F. Rengifo, "Desigualdad e inclusión. La ruta del Estado de seguridad social chileno, 1920–1970," *Hispanic American Historical Review* 97(3) (2017), 485–522; J. M. Malloy, *The Politics of Social Security in Brazil* (Pittsburgh: University of Pittsburgh Press, 1979); T. Murai, "The Foundation of the Mexican Welfare State and Social Security Reform in the 1990s," *The Developing Economies* 42(2) (2004), 262–87.

62 Cf. P. Drinot and A. Knight (eds.), *The Great Depression in Latin America* (Durham and London: Duke University Press, 2014).

63 Bryce, *South America*, 549.

64 I thank José María Portillo Valdés for his observation about the rise of an "administrative international" in the period.

development was the way in which what was previously perceived in Latin America as opposing schools of thought on government and public administration – French versus Anglo-Americans – were gradually reconciled and fused into a new formula for approaching the development of the modern state. In the interwar period, new currents of European corporativist thought were added to the range of possible formulas for structuring state institutions and activities.

The impact of these currents of thought was shaped by the particular social mechanisms of the global circulation of knowledge operating differently in each nation. Book translations, lecture tours by European jurists, professional networking, specialized journals, parliamentary speeches, and the press were important channels for the dissemination of the new doctrines among the legal communities and the general public. In terms of content, all these currents shared a common thread: how to transcend the limited radius of action that liberal constitutionalism granted the state in modern society.

The political discourse of the French Third Republic, aided by the growing corpus of jurisprudence produced by the *Conseil d'État*, developed new doctrines about the relation of individuals and the state. If, on the one hand, judicial institutions should not block the action of administrative agents, then on the other, individuals needed to be protected from possible arbitrary actions by the state. The challenge was to transform a legacy of the *Ancien régime* into an effective system of protection of individual rights, while at the same time providing the state with new tools to efficiently face the challenges posed by economic and social modernization. These were the problems occupying some of the most distinguished French jurists of the period, such as Maurice Hauriou, Gastón Jèze, and Léon Duguit, all of whom exerted a great deal of influence within the Latin American legal academy.[65] The independent administrative jurisdiction so central to this tradition was, as we have seen, difficult to reconcile with the liberal constitutional framework inherited by many Latin American nations. A.V. Dicey's 1885 classic *Introduction to the Study of the Law of the Constitution* dedicated an entire chapter to the comparison of the rule of law with the French *"Droit Administratif."* Having analyzed

65 H. S. Jones, *The French State in Question: Public Law and Political Argument in the Third Republic* (Cambridge: Cambridge University Press, 1993), 45–54. On French administrative law, see also J. Donzelot, *L'invention du social. Essai sur le déclin des passions politiques* (Paris: Fayard, 1984); P. Rosanvallon, *L'État en France de 1789 à nos jours* (Paris: Seuil, 1990); and J.-M. Blanquer and M. Milet, *L'invention de l'État. Léon Duguit, Maurice Hauriou et la naissance du droit public moderne* (Paris: Odile Jacob, 2015).

many of the French authors' works, Dicey concluded that this tradition was completely alien to the British political tradition of the rule of law.[66]

This discrepancy was reinforced by the different traditions of thinking about the state and political development in continental Europe and the Anglo-American tradition. The latter, sometimes defined as a "stateless political culture," characterized by a fragmented or centrifugal understanding of public authority, represented the polar opposite of a more "state-centered" continental political culture, with its tendency to conceive public authority in unitary terms.[67]

By the late nineteenth century, however, that opposition was beginning to wane in the United States. In 1887, Woodrow Wilson claimed that:

> The English race … has long and successfully studied the art of curbing executive power to the constant neglect of the art of perfecting executive methods. It has exercised itself much more in controlling than in energizing government. It has been more concerned to render government just and moderate than to make it facile, well ordered, and effective. English and American political history has been a history, not of administrative development, but of legislative oversight, – not of progress in governmental organization, but of advance in law-making and political criticism.

Wilson concluded by stating: "The weightier debates of constitutional principle are even yet by no means concluded; but they are no longer of more immediate practical moment than questions of administration. It is getting to be harder to run a constitution than to frame one."[68] Ernest Freund,

66 A. V. Dicey, ch. XII "Rule of Law Compared with *Droit Administratif*," in A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, ed. R. E. Michener (Indianapolis: Liberty Classics, 1982 [1915]), 213–67. This strict opposition between the two systems established by Dicey was later discredited. See M. J. Horwitz, "Legal Realism, the Bureaucratic State, and the Rule of Law," in M. J. Horwitz, *The Transformation of American Law: 1870–1960. The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), 213–30. For recent re-evaluations of that relationship, see R. A. Epstein, "Why the Modern Administrative State Is Inconsistent with the Rule of Law," *New York University Journal of Law and Liberty* 3 (2008), 491–515; P. Hamburger, *Is Administrative Law Unlawful?* (Chicago: The University of Chicago Press, 2014).

67 Jones, *The French State in Question*, 12. See also S. Skowronek, *Building a New American State: The Expansion of National Administrative Capacities. 1877–1920* (Cambridge: Cambridge University Press, 1982), 3–18, on the sense of "statelessness" inherited in the American political tradition; and W. J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113(3) (2008), 752–72, for a critical discussion.

68 W. Wilson, "The Study of Administration," *Political Science Quarterly* 2(2) (1887), 206. A few years later, Wilson expanded on this point: "We printed the *SELF* large and the *government* small in almost every administrative arrangement we made; and that is still our attitude and preference. We have found that even among ourselves such arrangements are not universally convenient or serviceable. They give us untrained officials,

another prominent American jurist, agreed with this assessment. In 1894, he stated that it was remarkable how little attention the branch of public law dealing with the organization and action of the government had received from English and American jurists. Comparing the administrative systems of Europe and America, he concluded that the systems of the former exhibited a clear technical superiority over the latter.[69]

Far from having established some sort of rivalry between jurists on both sides of the Atlantic, considerable advancement toward a fusion of the two systems was made just a few years later. In 1905, Frank Goodnow published his *Principles of the Administrative Law of the United States*, drawing on continental ideas to advance a non-court-centered theory of administrative law. Two years later, French administrativist Gaston Jèze – who soon thereafter visited Latin America and was instrumental in establishing fluid contacts with local specialists in administrative law and public finance – translated Goodnow's book into French. In his introduction, Jèze pointed out that Goodnow made clear just how false the idea was that the Anglo Americans did not have a tradition of administrative law.[70] Similarly, in 1906, Maurice Hauriou claimed, echoing the statements made earlier by Wilson in the United States, that the development of administrative law aimed at providing a complete theory of the state, and rightly so. The modern state had been concerned with constitutional forms and civic liberties in its early stages of development, Hauriou contended, but now, at a more mature stage of development, had passed from political idealism to economic realism, "that is, to an administrative regime."[71]

From the Latin American standpoint, this rapprochement of American and European sources was of great importance. Latin American jurists could now perceive that the old antagonism between the defenders of the liberal constitutionalism – associated with the "American Model" – and the tradition

and an expert civil service is almost unknown amongst us." W. Wilson, "Democracy and Efficiency," *The Atlantic Monthly* 87(521) (1901), 289–99.

69 E. Freund, "The Law of the Administration in America," *Political Science Quarterly* 9(3) (1894), 404 and 423.

70 F. Goodnow, *Les principes du droit administratif des États-Unis* (Paris: V. Giard & E. Brière, 1907), i–ii. See also Horwitz, *The Transformation of American Law*, 224–25.

71 M. Hauriou, *Préface sur le droit public* (Paris: Imprimerie Contant-Laguerre, 1906), iii: "L'État moderne a été peu administratif pendant les premiers siècles de son existence … en un mot, on était dans la période d'idéalisme politique qui marque la jeunesse des peuples. Mais l'évolution s'est poursuivie, l'État moderne a pris de la maturité, il est passé de l'idéalisme politique au réalisme économique, c'est-à-dire au régime administratif." See also J.-L. Mestre, "France. The Vicissitudes of a Tradition" in P. Cane, H. Hofmann, E. Ip, and P. Lindseth (eds.), *The Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press, 2021), 23–51.

of administrative law – in the past linked to the "Latin tradition" of monarchical absolutism – was beginning to fade away. A novel fusion of European and American doctrines was giving birth to a new way of conceptualizing the modern state, which coincided with the needs of Latin American governments facing profound structural changes in their societies. Lecture tours in Latin America by some of the most prestigious authors associated with the administrative law tradition, not to mention the circulation of new Spanish translations of their works, facilitated the discussion of these new currents in the region. Three names in particular need to be mentioned in this context: the French jurists Léon Duguit and Gaston Jèze, and the Spaniard Adolfo Posada.

To celebrate the centennial festivities of the independence movements in Spanish America, the Spanish jurist Adolfo Posada embarked on a lecture tour in 1910 to Argentina, Chile, Uruguay, and Paraguay. Lecturing in Buenos Aires on "The Modern Idea of the State," Posada revealed the influence of Léon Duguit's ideas on his own thought.[72] Posada had already translated Duguit's book *Le droit social et le droit individuel et la transformation de l'État* (1908) into Spanish. Published in Madrid as *La transformación del Estado*, Posada included both an introductory study reviewing Duguit's ideas and a survey of the recent American and European developments in the theory of the state.[73]

Duguit himself visited Argentina and Chile the following year. Although his 1911 Buenos Aires lectures were dedicated to the analysis of recent changes in civil law doctrine, Duguit was by that time an established figure in public law. He had already published a number of works in which he put forward a new way of conceptualizing the state. Based on his Buenos Aires lectures, he published *Les transformations de droit public* (1913), an influential book summarizing the new doctrines about the state.[74] In this work, he targeted the concept of national sovereignty, which he considered an insufficient conceptual

72 A. Posada, "La idea moderna del Estado," *Revista Argentina de Ciencias Políticas* 1 (1910), 64–75. On Posada's South American tours, E. Zimmermann, "La proyección de los viajes de Adolfo Posada y Rafael Altamira en el reformismo liberal argentino," in J. Uría (ed.), *Institucionismo y reforma social en España. El Grupo de Oviedo* (Madrid: Editorial Talasa, 2000); E. Morales Raya, "La experiencia americana de Adolfo Posada en Paraguay (1910)," *Temas Americanistas* 32 (2014), 111–26.

73 L. Duguit, *La transformación del Estado*, trans. A. Posada, 2nd ed. (Madrid: F. Beltrán, 1922). On Posada and Duguit, see J. L. Monereo Pérez, *La reforma social en España: Adolfo Posada* (Madrid: MTAS, 2003); J. L. Monereo Pérez and J. Calvo González, "Léon Duguit (1859–1928): Jurista de una sociedad en transformación," *Revista de Derecho Constitucional Europeo* 4 (2005), 483–547.

74 During the interwar years, the influence of Duguit's new perspective on the state was such that Harold Laski described him in 1932 as a new Montesquieu, who had authored a new legal science for a new world. H. Laski, "La conception de l'État de Léon Duguit," *Archives de Philosophie du droit et de sociologie juridique* 1–2 (1932), 121–34.

foundation for the state. "Public service" became the cornerstone of the new theoretical foundation of state authority. Rather than focusing on its power to rule, the state was a national cooperative that guaranteed the ordered functioning of public services and its regulation. "Governments," Duguit concluded in the preface to the 1921 edition translated by Posada, "are no more than the managers of the public services."[75]

In 1921, Adolfo Posada visited Buenos Aires for a second time, and the lectures he gave were later published in book form as *Teoría social y jurídica del Estado*. The following year, Posada published in Madrid new editions of his Duguit translation and of Woodrow Wilson's *The State*. Both Posada's translations and his own texts were instrumental in making new ideas about the state available to legal scholars in Latin America. This represented a fusion of European public law, renewed by the administrative law tradition of Duguit and Hauriou, and the authors behind the latest innovations of American political science, whom Posada also analyzed in his texts (Frank Goodnow, Charles Merriam, Woodrow Wilson, and W. Willoughby). This fusion, as Posada stated, oriented the state to "a positive mission of promoting collective material and spiritual progress, considering the community as a whole," an idea already embraced by Latin American jurists.[76] Two years prior, in 1919, the Chilean Alejandro Álvarez, one of the most prestigious Latin American jurists of the twentieth century, had already highlighted the convergence of these new trends and suggested an inevitable result: "[T]he new idea of the state and its attributes will sketch the new conception of the law and its future orientation. This new conception is inspired by *solidarity*, by virtue of which legal relations must be regulated with collective, not individual, interests in mind." Álvarez remarked that administrative law – via its regulation of public services, police, and hygiene – was progressively delimiting private property for the benefit of the common good.[77]

75 L. Duguit, *Les transformations de droit public* (Paris: Librairie Armand Colin, 1913), xvi and 12; Duguit, *Transformación del Estado*, 8. See also Mairal, "La ideología," 361–65, arguing that the notion of "public service" became the central concept of the Administrative law tradition. On the Duguit lectures in Buenos Aires, see E. Zimmermann, "'Un espíritu nuevo': la cuestión social y el Derecho en la Argentina, 1890–1930," *Revista de Indias* 73(257) (2013), 81–106; J. A. Herrera, "Léon Duguit en Buenos Aires: sociabilidad y política en la recepción de una teoría jurídica," *Anuario de Filosofía y Teoría del Derecho* 8 (2014), 147–77.

76 A. Posada, "La nueva orientación del derecho político," in L. Duguit, *La transformación del Estado*, trans. A. Posada, 2nd ed. (Madrid: F. Beltrán, 1922), 207–17. Para la relevancia de esos autores en el desarrollo de la ciencia política de los Estados Unidos y en la reelaboración de la teoría del estado, véase.

77 A. Álvarez, *De la necesidad de una nueva concepción del Derecho. Memoria de incorporación del Miembro Académico de la Facultad de Leyes* (Santiago de Chile: Universidad de Chile, 1919), 189–94.

In 1923, Gaston Jèze – who, together with Duguit and Maurice Hauriou, represented the vanguard in the development of administrative law in France – toured Argentina and Chile, lecturing on his area of expertise, namely, public finance. Jèze was at the time director of both the *Revue de droit public* and the *Revue de science et de législation financière*. At this point, the reform of public finance and taxation was an issue closely linked to the idea of a healthy public administration in the region, a view energetically pushed by US diplomacy and testified to by the "Kemmerer missions" in Colombia, Chile, Ecuador, Perú, Bolivia, Mexico, and Guatemala.[78] In Buenos Aires, Jèze lectured at the School of Economics of the University of Buenos Aires, and his audience included a number of cabinet ministers and even the president, Marcelo T. de Alvear. His lectures were published the following year in Buenos Aires under the title *Finanzas públicas de la República Argentina*.[79] A few years later, Jèze expressed a rather pessimistic view of the ways in which Argentine society had naturalized the running of budget deficits, both in private and public life.[80]

As president of the prestigious *Institut International de Droit Public*, Jèze was also instrumental in forging a network of personal relations with Latin American jurists. In 1930, the Chilean Alejandro Álvarez became a "*Membre Titulaire*" of the institute – a distinction he shared with some of the most famous names in European and American public law and political science, such as Berthélemy, Carré de Malberg, Hans Kelsen, Adolfo Posada, Roscoe Pound, Ernest Freund, and Frank Goodnow. Among the "*membres associés*" were the Argentineans Rafael Bielsa ("*doyen de la Faculté de Droit de Rosario*") and Juan Antonio González Calderón ("*professeur a l'Université de Buenos Aires*").[81]

78 Cf. P. W. Drake, *The Money Doctor in the Andes: The Kemmerer Missions, 1923–1933* (Durham: Duke University Press, 1989); E. S. Rosenberg, *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy* (Cambridge: Harvard University Press, 1999), 155–66.

79 G. Jèze, *Las finanzas públicas de la República Argentina* (Buenos Aires: Le Courier de la Plata, 1924). On Jèze in Argentina see N. Bacolla, "La visita de Gaston Jèze a la Argentina en 1923. Circulación de ideas y claves de recepción: entre las experiencias de la Tercera República y la reforma política argentina," *Cuadernos del Ciesal* 10(12) (2013), 51–72; A. V. Persello, "Administración Pública y política: las transformaciones en el sistema tributario en los años '30'," *Seminario Problemas de la Historia Argentina Contemporánea* (Buenos Aires: Universidad Nacional de San Martín, 2010); J. A. Sánchez Román, *Los argentinos y los impuestos. Lazos frágiles entre sociedad y fisco en el siglo XX* (Buenos Aires: Siglo XXI Editores, 2013).

80 "Le déficit budgétaire est la plaie des finances argentines. Mais il n'a jamais beaucoup effrayé les Argentins, qui sont habitués à dépenser au delá de leurs revenus. C'est la coutume chez les particuliers. Quoi d'étonnant à constater les mêmes errements dans la gestion des deniers publics?" G. Jèze, "La situation des finances publiques," in T. A. Le Bretón, R. Gache, G. Jèze, L. Diffloth, M. Daireaux, P. Janet, F. Legueu, and F. Georges-Picot, *Initiation à la vie en Argentine (Choses d'Amérique)* (Paris: A. Colin, 1935), 54.

81 Institut de Droit International, *Annuaire de l'Institut International de Droit Public* (Paris: Les Presses universitaires de France, 1930), 20–24. In the following years (1932–1934)

As part of his South American tour, Jèze also lectured in the Argentine city of Rosario, where the dean of the law school, Rafael Bielsa, welcomed him.[82] In his 1923 Rosario lectures, Jèze touched on two other central topics in the development of the modern conception of the administrative state. One was the role of "public service" in a democratic state, and the other focused on the protection of individual rights through the development of legal actions against the arbitrary actions of public officials. When it comes to the topic of the "public service school," Jèze can be seen as a disciple of Duguit, who was a pioneer in this field. Public service, he reiterated, had replaced the idea of sovereignty as the foundation of the state and become "the fundamental notion of modern public law." Governments were the managers of these cooperatives of public services, and their actions as such were considered acts of public power. Administrative law was, largely, the body of norms regulating the working of public services.[83] In Rosario, he expanded these ideas, discussing the "democratic organization" of public services and its administrative regime.[84] As for the second theme, Hauriou had already claimed that the jurisprudence of the *Conseil d'État* had shown an evolution from its foundations on the prerogative of the administration to a jurisdiction of "equity."[85] In "*La defensa del ciudadano ante el avance del poder público*," another Rosario lecture that was expanded on in a French version and later published in *Institut's Annuaire*, Jèze claimed that the remedies developed by French administrative jurisprudence represented not only the single most important legal creation by French jurists but also the best possible protection of individual liberties known to the world.[86]

Bielsa published several contributions in the *Annuaire* on topics such as federal intervention in the provinces, the development of administrative regulations, and legal remedies and actions in Argentina.

82 M. Á. De Marco, "Rafael Bielsa y la conformación de un nuevo modelo de formación científica universitaria", *Revista de Historia del Derecho* 35 (2007), 83–171; M. Á. De Marco, "Estado, Universidad y política en la modernización argentina, 1927–1930. El aporte de lo regional al proceso nacional," *Temas de historia argentina y americana* 6 (2007), 49–80.

83 V. Kondylis, "La conception de la fonction publique dans l'œuvre de Gaston Jèze," *Revue d'histoire des facultés de droit et de la culture juridique, du monde des juristes et du livre juridique* 12 (1991), 43–54.

84 De Marco, "Rafael Bielsa," 99.

85 M. Hauriou, "Le dévelopment de la jurisprudence administrative depuis 1870," in Société de législation comparée, *Les transformations du droit dans les principaux pays depuis cinquante ans (1869–1919). Livre du cinquantenaire de la Société de législation comparée* (Paris: Librairie Générale de Droit et de Jurisprudence, 1923), vol II, 7.

86 G. Jèze, "Les libertés individuelles," in Institut de Droit International, *Annuaire de l'institut international de droit public* (Paris: Les Presses universitaires de France, 1929), 180: the *recours en excès de pouvoir*, «la plus merveilleuse création des juristes» was "l'arme la plus efficace, la plus économique et la plus pratique qui existe au monde pour défendre

The 1930s: Economic Crisis, Ideological Realignments, and Corporativism

It is widely acknowledged that the Great Depression of the 1930s brought about a number of far-reaching changes in Latin America. In the economic sphere, for example, there was the shift from export-led growth to ISI; in the political arena, there were numerous military coups replacing democratic regimes; and ideologically speaking, the simultaneous process of critique of capitalism and liberal democracy. As we have already discussed, the move toward centralization on the part of the national states had already started years earlier. But this global economic crisis served as a catalyst that accelerated this process and eventually set the stage for an even greater level of intervention in social and economic matters.[87] Moreover, the crisis revealed the circulation of similar models of state intervention. As Patel has pointed out, "the Great Depression did not just unmake and reestablish global links; it sometimes also synchronized debates, and even the political and societal answers given to them."[88]

The two most popular types of response regarding the organization of the state circulating in the West were the American New Deal, which quickly became a global icon for reformers everywhere, and the new experiments in corporativism launched by fascist regimes in Europe. Despite the very different ideological basis underpinning these two approaches, the "strange legal culture of the 1930s" and commonalities in terms of policy meant that a combination of the two was even possible.[89]

In the United States, the growth of administrative state action in the social and economic spheres resulted in the creation of multiple boards, commissions, and authorities that carried out functions traditionally assigned to the legislative and judicial branches. As one observer pointed out at the time, the increasing complexity of social phenomena had rendered the old theories and

les libertés." See also Jones, *The French State in Question*, 207–8: "The rejuvenators of the tradition of juristic reflection about the state … recognized that administrative justice had a vital role to play in giving substance to the concept of a state subject to law…. The separate administrative jurisdiction established … in French public life … has proved to be in some respects a much more effective protector of the rights and liberties of the citizen than the English legal tradition championed by Dicey."

87 Cf. Drinot and Knight, *The Great Depression*, 1–6.

88 K. K. Patel, *The New Deal: A Global History* (Princeton: Princeton University Press, 2016), 43.

89 On the New Deal as a "global icon," Patel, 298–300; on the "strange legal culture of the 1930s" and the presence of non-fascist corporativism in the New Deal, see J. Q. Whitman, "Of Corporatism, Fascism, and the First New Deal," *The American Journal of Comparative Law* 39(4) (1991), 747–78.

doctrines concerning the separation of powers obsolete. As a consequence of this situation:

> The most significant fact connected with this development has been the tendency to place final and conclusive authority in the hands of administrative officers, and thereby to exclude from the control of the judiciary a continually widening field of governmental authority…. Contrary to the insistence of many legal writers and judges that the principles of Anglo-American law were opposed to the growth of administrative law, it has found a secure place in these systems.[90]

The New Deal presented another feature relevant to the development of the administrative state: the demand for a more efficient administrative management of the executive branch. In 1937, President Roosevelt formed the Brownlow Committee to study the issue. When presenting the committee's results, he insisted that this was a long-standing problem, and that "the republican form of government" now demanded devotion to the task of "making that Government efficient."[91]

The other engine of state transformations was the adoption of models of corporativism that combined economic elements of labor and capital organization with a political project of transforming the models of representation of classical liberal democracy. In Brazil, after initial resistance during the First Republic (1889–1930) to the advancement of state intervention in economic and social matters, the demands posed by issues such as public health, urban planning, and the "social question" eased the transition toward an expanded administrative action. After the pioneering work of the Viscount of Uruguai, cited previously, it was Augusto Olympio Viveiros de Castro, with his early twentieth-century treatise *Tratado de sciencia da administração e direito administrativo*, who led the development of administrative law in the country.[92]

90 C. Grove Haines, "Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices," *The American Political Science Review* 26(5) (1932), 875–94.

91 "We know good management in the home, on the farm, and in business, big and little. If any nation can find the way to effective government, it should be the American people through their own democratic institutions," concluded Roosevelt. The President's Committee on Administrative Management, *Administrative Management in the Government of the United States* (Washington: United States Government Printing Office, 1937), iii.

92 A. O. Viveiros de Castro, *Tratado de sciencia da administração e direito administrativo*, 3rd ed. (Rio de Janeiro: Jacintho Ribeiro dos Santos Livreiro-Editor, 1914). See also A. Cerqueira-Leite Seelander, "O Direito Administrativo e a expansão do Estado na Primeira República: Notas preliminares a uma história da doutrina administrativa no Brasil," *Revista do Instituto Histórico e Geográfico Brasileiro* 485 (2021), 165–202.

In the 1930s, the works by Oliveira Vianna pointed to a more aggressive line of change, aiming at a substitution of liberal forms of political and economic organization with a corporativist framework. In his *Problemas de política objetiva* (1930), Vianna claimed that parliaments were "an expensive luxury" to be "cultivated only to a certain extent." Technical councils and the administrative organization of social classes were going to replace them (parliaments) as the true representative of mass opinion and the organs for the elaboration of the law. A few years later, in *Problemas de Direito Corporativo* (1938), he argued in favor of "functional and corporative autarchies" to replace "territorial autarchies (federalism and political decentralization)" and the expansion of "administrative tribunals."[93]

Similar developments were taking place in Argentina in the late 1920s, anticipating some of the initiatives of the 1930 military coup. A bill presented to the Chamber of Deputies in 1927 proposed a change in parliamentary representation in order to incorporate "industrial and economic interests" ("*las fuerzas vivas industriales y económicas*"). The following year, another bill directly proposed the adoption of a "National Corporative Organization," patterned after the models developed in Italy and Spain, creating technical councils and a more representative parliament than the one formed by "an amorphous universal suffrage."[94] Nevertheless, opposition by all of the political parties doomed the military government to reform the 1853 constitution in order to incorporate "functional representation" as a means of "perfecting democracy."[95]

It was clear at this point that the traditional conceptualization of the liberal state was in crisis. There was now a search for new foundations, and these could take one of three forms: the principles of public service or social solidarity developed mainly in France, the consolidation of the American school of public administration that received an important boost with Roosevelt's New Deal, or the principles of corporativism. In 1936, the Argentinean jurist

93 O. Vianna, *Problemas de política objetiva*, 2nd ed. (Sao Paulo: Companhia Editora Nacional, 1947 [1930]), 179; O. Vianna, *Problemas de Direito Corporativo* (Rio de Janeiro: J. Olympio, 1938), 49–50. See also F. R. Madeira Pinto, "A administrativização do direito constitucional: Oliveira Vianna e a absorção dos poderes legislativos e judiciário pelas corporações administrativas," *História do Direito* 2(3) (2021), 210–23; and W. Guandalini Jr. and A. Codato, "O Código Administrativo do Estado Novo: A distribuição jurídica do poder politico na ditadura," *Estudos Históricos* 29(58) (2016), 481–504.

94 *Diario de Sesiones de la Cámara de Diputados*, 14 Sept. 1927, 613–14; 21 Sept. 1928, 678–82.

95 On the military government's attempts to reform the constitution in Argentina, see J. L. Romero, *Las ideas políticas en Argentina* (Buenos Aires: Fondo de Cultura Económica, 1975); C. Ibarguren, *La historia que he vivido* (Buenos Aires: Ediciones Dictio, 1977). On the debates about state organization and public administration, see Persello, "Administración Pública y política."

Rafael Bielsa summarized how much this process of abandoning the liberal legal thinking, inherited from the nineteenth century, had spread throughout the region in favor of a legal philosophy that expanded the range of state activities. The mission of the jurist, Bielsa said, was:

> … to collaborate in the work of integration of public law, abandoning somewhat the overly broad formulas of that liberal political philosophy that has dominated the last century, formulas that served for the great proclamations stamped on constitutions, but which have not proved very efficient in the domain of the *concrete activity of the state*.[96]

A few years later, another Argentinean jurist, Arturo Sampay, followed a similar path in his book *The Crisis of the Liberal-Bourgeois Rule of Law* (1942). Sampay, who became one of the leading jurists of the *Peronista* regime, analyzed contemporary varieties of state organization: the fascist state, the Russian Soviet state, the national-socialist state, and the corporative state of Portugal. Sampay, citing the Romanian theoretician of corporativism Mihail Manoilesco, concluded: "[T]he twentieth century will be the century of corporatism, as the nineteenth century has been the century of liberalism."[97] This preference for corporatist formulas at the time of thinking up new constitutions was most fully manifested in the regimes of Getúlio Vargas in Brazil and Juan Domingo Perón in Argentina. The 1934 and 1937 Brazilian constitutions as well as the 1949 Argentine Constitution all exhibited this strong tendency toward the corporatist structuring of social interests accompanied by a pronounced concentration of authority in the national executive.[98]

The second half of the twentieth century brought with it new waves of military coups, with tragic consequences for human rights (see Sections 6.2 and 6.3). After a new wave of democratization, constitutional reforms tended to follow a similar pattern of concentration of authority in the "engine room of

96 R. Bielsa, "El desarrollo institucional del derecho administrativo y la jurisdicción contenciosa. Discurso de incorporación a la Academia Nacional de Derecho y Ciencias Sociales, 20 de agosto de 1936," in R. Bielsa (ed.), *Estudios de Derecho Público. Derecho Administrativo* (Buenos Aires: Editorial Depalma, 1950).

97 A. Sampay, *La crisis del estado de derecho liberal-burgués* (Buenos Aires: Losada, 1942), 353. See also, S. T. Ramella, "Arturo Enrique Sampay (Argentina, 1911–77)," in M. C. Mirow and R. Domingo (eds.), *Law and Christianity in Latin America: The Work of Great Jurists* (London: Routledge, 2021), 470–82.

98 G. L. Negretto, "El populismo constitucional en América Latina. Análisis crítico de la Constitución Argentina de 1949," in A. Luna-Fabritius, P. Mijangos y González, and R. Rojas Gutiérrez (eds.), *De Cádiz al Siglo XXI. Doscientos años de constitucionalismo en México e Hispanoamérica (1812–2012)* (Mexico City: Taurus, CIDE, 2012); L. Vita, "Weimar in Argentina: A Transnational Analysis of the 1949 Constitutional Reform," *Rechtsgeschichte – Legal History* 27 (2019), 176–83.

the constitution," as Roberto Gargarella put it, "without taking into account the impact that the organization of power tends to have upon those very rights."[99] The ascendance of the administrative state did little to improve the "weak culture of rights"[100] that had developed in the region during the early phases of independent life.

. . .

6.2 Dictatorships

CRISTIANO PAIXÃO

Dictatorships dominate the historical landscape of Latin America in the second half of the twentieth century. Authoritarian regimes established between the late 1950s and the mid-1970s developed and multiplied tools of repression and formed internal networks of collaboration. These authoritarian experiences had a significant impact on legal and judicial institutions, freedoms, and guarantees for citizens, groups, and political associations. There are multiple perspectives from which to observe the operation and language of law in these settings and understand the numerous influences, exchanges, and interrelations with other legal concepts and ideas developed or applied in countries outside the American continent.

In the following, I suggest to analyze these issues by looking at several aspects. First, I discuss the problematic relations between the authoritarian regimes and the constitutions that were in force when the dictatorships were established. I then turn to the role played by the judiciary and several other institutions in the development and consolidation of Latin American authoritarian regimes and describe the complex web of transnational repression by and resistance to Latin American dictatorships. This web of repression included the so-called Operation Condor, an initiative launched by the Chilean regime, in which several other countries participated (see also Section 5.3). The web of resistance is exemplified by the activities of the Second Russell Tribunal, which gave expression to various forms of resistance and solidarity with Latin America throughout the world. Finally, I will emphasize the impact of the repressive experience on the construction of

99 R. Gargarella, *Latin American Constitutionalism, 1810–2010. The Engine Room of the Constitution* (Oxford: Oxford University Press, 2013), 185.

100 C. Garriga (ed.), *Historia y Constitución. Trayectos del constitucionalismo hispano* (Mexico City: Instituto de Investigaciones Dr. José María Luis Mora, 2010), 19.

memorial sites around Latin America and will describe the biographic itineraries of three members of the Brazilian resistance. The analysis will focus on the historical developments that took place in the 1960s, 1970s, and 1980s, when ruptures, coups d'état, internal conflicts, and regime changes occurred more frequently.

Institutional Breaks: Constitutionalism, Coups d'État and the Role of the Judicial Power

There is no such thing as a "particular type" of Latin American dictatorship. Throughout the twentieth century, the region had many authoritarian regimes, and it is impossible to identify a "dominant form" that would allow for generalization. As will be highlighted here, there were common elements to several of these dictatorships, but it is also important to remember that there were many differences.

Establishing a dictatorship usually required the breakdown of the existing order. More often than not, such a breakdown involved a coup d'état – which in many countries had the military as protagonists, along with varying degrees of civilian participation. From a legal historical perspective, this kind of collapse implied a change in the foundations of legality. Establishing a dictatorship also involved redefining the legal order. This was one of the initial challenges of all attempts to seize power – and retain it – by force: overcoming barriers and constraints to the exercise of political power (which usually requires rotating governments, periodic elections, and the regular functioning of legal institutions run by civilians). However, the removal of the existing legal order usually implied not only a negative element, the obliterating of the already-existent legal bases. It also required presenting an alternative model to the existing legal framework.

In his study of the authoritarian regimes implemented in Chile and Argentina in the 1970s, Robert Barros expressly refers to the challenge of trying to destroy the legal foundation that existed in the period prior to the coups d'état that occurred in 1973 and 1976, respectively. According to Barros, the Chilean and Argentine dictatorships needed to bring about an abrupt transformation of the existing constitutional frameworks, and this occurred in two distinct thematic areas.[101] The first included an attack on the constitution as a higher law and the subversion of the classical separation of powers. In

101 R. Barros, "Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)," in T. Ginsburg, T. Moustafa (ed.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008), 156–79.

order to be successful, authoritarian governments must concentrate powers, intervene in parliamentary houses, and curtail the autonomy of the judiciary. For this to happen and result in a legal norm, the barriers set by constitutions of a liberal nature and informed by modern constitutionalism have to be removed. The second obstacle to the establishment of a dictatorship are the limits imposed by the very concept of the rule of law. If a political regime engages in acts such as imposing arbitrary arrests, declaring a state of siege or emergency, and persecuting or punishing its people, it becomes impossible to fulfill individual and collective guarantees, including the right to due legal process and to a full defense, for instance.

The incompatibility of the measures implemented by the Chilean and Argentine dictatorships with the standards of modern constitutionalism is thus evident. In both cases, existing governments were overthrown, parliaments were closed, the military openly assumed power, and emergency measures were adopted swiftly, including punishments, persecutions, state violence, and executions.[102] The same dynamic had already been displayed in the civil-military coup that occurred in Brazil in 1964, but with one key distinction: In the case of Brazil, the periods of parliamentary closure were relatively brief. However, many members of parliament – no less than 173 congressmen, according to the official figures from the House of Representatives – were expelled, which evidently affected the composition of Congress.[103] As a result, the legislative branch maintained a pro-regime majority for twenty-one years. Apart from this, the Brazilian dictatorship comprised all the features mentioned earlier.[104]

102 On the dictatorships in Argentina and Chile, see L. Bethell (ed.), *The Cambridge History of Latin America, vol. VIII: Latin America Since 1930: Spanish South America* (Cambridge: Cambridge University Press, 1999); J. Dávila, *Dictatorship in South America* (Chichester: Wiley-Blackwell, 2013); J. Grigera and L. Zorzoli (eds.), *The Argentinian Dictatorship and Its Legacy: Rethinking the Proceso* (Cham: Palgrave Macmillan, 2020); G. Águila, S. Garaño, and P. Scatizza (eds.), *Represión estatal y violencia paraestatal en la historia reciente argentina: Nuevos abordajes a 40 años del golpe de Estado* (La Plata: Universidad Nacional de La Plata. Facultad de Humanidades y Ciencias de la Educación, 2016); F. Finchelstein, *The Ideological Origins of the Dirty War: Fascism, Populism, and Dictatorship in Twentieth Century Argentina* (New-York: Oxford University Press, 2014); W.F. Sater and S. Collier, *Historia de Chile, 1808–2017* (Madrid: Akal, 2019); G. Salazar and J. Pinto, *Historia contemporánea de Chile I: Estado, legitimidad, ciudadanía* (Santiago de Chile: LOM, 1999).

103 D.B. Azevedo, M.N. Rabat, *Parlamento mutilado – deputados federais cassados pela ditadura de 1964* (Brasília: Edições Câmara dos Deputados, 2012), 19–23.

104 For an overview on the Brazilian military dictatorship, see A. Alonso and M. Dolhnikoff (eds.), *1964: do golpe à democracia* (São Paulo: Hedra, 2005); C.M. Santos, E. Teles, and J.A. Teles (eds.), *Desarquivando a ditadura: memória e justiça no Brasil* (São Paulo: Hucitec, 2009), vol. I/II; J. Ferreira and L.A.N. Delgado (eds.), *O Brasil*

From a legal history perspective, the Latin American dictatorships engaged in "de-constitutionalization" operations. These activities – in particular during the time immediately after the institutional and political break with the previous regime – took the shape of assaults on the established constitutional order. These operations were of a "de-constitutive" nature, in order to enable the implementation of extraordinary measures.[105]

These regimes then proceeded to issue unilateral norms, enforced by military commanders, which granted special powers to the newly installed government and had an element of self-protection – these acts could not be reviewed by the judiciary or any other branch of government. In Brazil, as of April 9, 1964, the so-called "institutional acts" selectively amended the pre-existing constitutional order and allowed the practice of "complementary acts" by government authorities.[106] In Chile, the so-called *bandos* were issued, signed by the military *junta* that assumed power on September 11, 1973; these acts were military documents declaring a state of war (in this case, an internal conflict) and emphasizing, among other aspects, patriotism, order, respect, discipline, and hierarchy as the values to be observed by the Chilean society from that moment onwards. In a second step, several decrees were issued which gradually modified the text of the 1925 Constitution, while a jurists' committee drafted a bill for a new constitution.[107] In Argentina, the military *junta* that took power on March 24, 1976, elaborated *actas institucionales*,

Republicano: o tempo do regime autoritário – ditadura militar e redemocratização, Quarta República (1964–1985) (Rio de Janeiro: Civilização Brasileira, 2019); R.P.S. Motta, *Passados presentes: o golpe de 1964 e a ditadura militar* (Rio de Janeiro: Zahar, 2021); C. Fico, "Ditadura militar brasileira: aproximações teóricas e historiográficas," *Tempo & Argumento*, 9(20) (2017), 5–74, and C. Fico, *Além do golpe: versões e controvérsias sobre 1964 e a Ditadura Militar* (Rio de Janeiro: Record, 2004).

105 On the topic of de-constitutionalization, see G. Pisarello, *Procesos constituyentes: caminos para la ruptura democrática* (Madrid: Trotta, 2014), 79–105; B. de S. Santos, *Construindo as Epistemologias do Sul: Antologia essencial – vol. II: Para um pensamento alternativo de alternativas* (Ciudad Autónoma de Buenos Aires: CLACSO, 2018), 245–46; M. Meccarelli and C. Paixão, "Costituzione e democrazia in emergenza: il problema delle categorie analitiche," in G. De Cosimo (ed.), *Curare la democrazia. Una riflessione multidisciplinare* (Padova: Wolters Kluwer/CEDAM, 2022).

106 C. Paixão, "Entre regra e exceção: normas constitucionais e atos institucionais na ditadura militar brasileira (1964–1985)," *História do Direito: RHD*, vol. I (1) (2020), 227–41; L.A.A. Barbosa, *História constitucional brasileira: mudança constitucional, autoritarismo e democracia no Brasil pós-1964* (Brasília: Edições Câmara, 2018), 49–141.

107 R. Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge: Cambridge University Press, 2004), 36–116; E. P. González and F. Z. Urbina, "La doctrina del gobierno de facto y las actas constitucionales de 1976: juristas chilenos avalando decretos leyes," *História do Direito: RHD* 2(3) (2021), 244–71; D. G. M. Araneda, "Legitimación e institucionalización. El poder militar disciplinario en Chile: bandos y decretos ley (1973–74)," *Estudios – Revista del Centro de Estudios Avanzados* 44 (2020), 185–206.

secret documents that suppressed guarantees set forth in the national constitution, decreed a state of emergency, and allowed the adoption of repressive measures against political opponents.[108]

Addressing these questions implies two different political developments. The first and most evident one was the Cold War. Latin America found itself in the zone of influence of the United States, which had become concerned about the growing number of left wing movements made up of peasants, workers, students, and liberal professionals, who increasingly occupied prominent positions and exerted a controlling influence within political parties. As a result, a close collaboration between the Latin American business sector and military and representatives of the US government developed, which included the training of the security forces of Latin American military governments on US soil. These concerns of the United States were amplified in 1959 with the unfolding of the Cuban Revolution.[109]

Another political conflict, which occurred between the late 1950s and early 1960s and was pivotal to the setup of Latin American dictatorships, was the Algerian War of Independence, which engaged the armed forces and political leaders of France. As is well known, one of the consequences of this war was the emergence of a clandestine force, the Secret Army Organization, within the French military. This organization expressed a radical opposition to Algeria's demands for independence and proceeded to act through the systematic use of torture, the infiltration of the independence movements by agents, and violence against civilians. The rationale for these actions was the idea that the "enemy" was not a conventional army, but a group that engaged in guerrilla warfare and had to be fought with more effective methods of repression. This clandestine organization engaged in what it described as a "revolutionary war."[110]

108 J. P. Bohoslavsky, "Introducción – entre complicidad militante, complacencia banal y valiente independencia," in J. P. Bohoslavsky (ed.), *¿Usted también, doctor? Complicidad de jueces, fiscales y abogados durante la dictadura* (Buenos Aires: Siglo Veintiuno, 2015), 15–27. The institutional acts from the whole dictatorship period are accessible at: www.argentina.gob.ar/defensa/archivos-abiertos/centro-de-documentos-digitalizados/Fondo-Junta-Militar (last accessed July 20, 2022).

109 S. Mainwaring and A. Pérez-Liñán, *Democracies and Dictatorships in Latin America: Emergence, Survival, and Fall* (Cambridge: Cambridge University Press, 2013), 63–92; C. Fico, *O Grande Irmão: da Operação Brother Sam aos anos de chumbo – O Governo dos Estados Unidos e a ditadura militar brasileira* (Rio de Janeiro: Civilização Brasileira, 2008).

110 M. Evans, *Algeria: France's Undeclared War* (Oxford: Oxford University Press, 2012); D. Leroux, "Promouvoir une armée révolutionnaire pendant la guerre d'Algérie: Le Centre d'instruction pacification et contre-guérilla d'Arzew (1957–1959)," *Vingtième Siècle. Revue d'Histoire*. 120 (2013), 101–12; J. R. Martins Filho, "Tortura e ideologia: os militares brasileiros e a doutrina da *guerre révolutionnaire* (1959–1974)," in Santos, Teles, and Teles, *Desarquivando a ditadura*, vol. I, 179–202.

The national security doctrine developed in South American countries to justify the coups d'état was directly inspired by this concept of revolutionary war. Four French lieutenant-colonels were sent to the Argentine War College in 1957 to train Argentine military personnel. In 1959, a Brazilian colonel, who had participated in the training sessions in Argentina, brought the basics of the revolutionary war to the Brazilian War College. This exchange remained active until the early 1960s; Argentinian and Brazilian documents on national security clearly show the impact of the concept of revolutionary war on Latin American actors.[111]

After successive coups d'état had taken place in Latin America, the dictatorial regimes began to search for consolidating formulas. These included procedures for rotation in the occupation of executive positions (many dictatorships had collegiate military *juntas*), agreements with segments of the political class, and responses to external pressure calling for a reduction of repressive actions. In this context, the ruling military, with greater or lesser support from civilians, moved to propose, at various levels of organization, solutions that would allow for the institutionalization of the regime – which, in many cases, involved the establishment of a new constitutional order. According to Alain Rouquié, the question that then followed was whether the rulers had *constituent capacity*, that is, whether they would succeed in re-constitutionalizing their authoritarian regimes, giving them new bases.[112]

The results were quite different in each country. In 1980, the regime in Chile succeeded in enacting a constitution that contained several self-protection mechanisms, that is, devices for blocking possible democratization efforts.[113] In Uruguay, a different scenario played out: The military government eventually proposed a draft for a new constitution, but this was rejected in a plebiscite, and negotiations began for the restoration of power to civilians.[114] In Brazil, the military regime imposed a constitution in 1967 and then took two years to elaborate another, but it did not have sufficient power to ensure that these norms (or any further constitution) would endure after the end of the

111 Martins Filho, "Tortura e ideologia" 180–82.

112 A. Rouquié, *À l'Ombre des Dictatures. La Démocratie en Amérique Latine* (Paris: Albin Michel, 2010), 136–48.

113 On the 1980 Chilean Constitution, see C. Paixão, "Past and Future of Authoritarian Regimes: Constitution, Transition to Democracy and Amnesty in Brazil and Chile," *Giornale di Storia Costituzionale* 30(2) (2015), 89–105; Barros, *Constitutionalism and Dictatorship*, 167–254; Dávila, *Dictatorship in South America*, 156–78.

114 A. Marchesi and P. Winn, "Uruguay: los tiempos de la memoria," in P. Winn, A. Marchesi, F. Lorenz, and S.J. Stern (eds.), *No hay mañana sin ayer – Uruguay y las batallas por la memoria histórica en el Cono Sur* (Santiago: LOM, 2014), 121–204, at 127–30.

military government. The twilight of the Brazilian dictatorship came about through a process of re-democratization through a constituent assembly.[115] The outcomes were numerous and diverse, but the analysis of the strategies employed to institutionalize regimes (whether successful or not) – and, therefore, to leave binding rules for the future – can be a good starting point from which to observe the various authoritarian regimes installed in Latin America in the second half of the twentieth century.[116]

Recent studies of Latin American dictatorships integrate dimensions that were not widely covered in the years immediately following the demise of these authoritarian regimes. At that early stage, the research had still focused on the strategies and forms of transition from authoritarianism to democracy, or the repressive structures and modes of resistance. However, more recently, other aspects have received greater attention, such as the role of certain institutions, the connection between the exercise of political power and economic agents,[117] or even themes related to morality and culture.[118]

115 C. Paixão, "Autonomia, democracia e poder constituinte no Brasil: disputas conceituais na experiência constitucional brasileira (1964–2014)," *Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno* 43(1) (2014), 415–58; Barbosa, *História constitucional brasileira*, 143–247.

116 We will not deal directly with Central American dictatorships, due to the region's specific context, with its experiences of rural guerrilla warfare and armed conflicts involving paramilitary groups. For a general overview see L. Bethell (ed.), *The Cambridge History of Latin America, vol. VII: Latin America Since 1930: Mexico, Central America and the Caribbean* (Cambridge: Cambridge University Press, 1996), 161–599; J.J. Moore Jr, "Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador," *Stanford Law Review*. 43(3) (1991), 733–77; L.E.A.F. Bastos, "A anistia brasileira em comparação com as da América Latina: uma análise na perspectiva do direito internacional," in Santos, Teles, and Teles, *Desarquivando a ditadura*, vol. II, 386–405.

117 Regarding the involvement of companies (multinationals or not) and economic agents in general in the emergence and consolidation of authoritarian regimes in Latin America, see the following references: H. Verbitsky and J. P. Bohoslavsky (eds.), *Cuentas pendientes: Los cómplices económicos de la dictadura* (Buenos Aires: Siglo Veintiuno, 2019); L.A. Payne and G. Pereira, "Corporate Complicity in International Human Rights Violations," *Annual Review of Law and Social Science* 12 (2016), 63–84; J. P. Bohoslavsky and M. Torelly, "Cumplicidade financeira na ditadura brasileira: implicações atuais," *Revista de Anistia Política e Justiça de Transição* 6 (2011), 70–116; P.H.P. Campos, R.V.M. Brandão, and R.L.C.N. Lemos (eds.), *Empresariado e ditadura no Brasil* (Rio de Janeiro: Consequência, 2020); P.E. Ghigliani (ed.), *Procesos represivos, empresas, trabajadores/as y sindicatos en América Latina: Actas del II Encuentro Internacional de la RIProR, La Plata, marzo 2019* (La Plata: Universidade Nacional de La Plata – Facultad de Humanidades y Ciencias de la Educación, 2021).

118 There is a wide range of literature on these topics. I mention, for illustrative purposes, works by D. D'Antonio, "State, Filmmaking, and Sexuality during the Military Dictatorship in Argentina (1976–1983)," in Grigera and Zorzoli, *The Argentinian Dictatorship and Its Legacy*, 123–46; M. Napolitano, "'Vencer Satã só com orações': políticas culturais e cultura de oposição no Brasil dos anos 1970," in D. Rollemberg

From a legal history point of view, one topic that deserves emphasis is the role played by judges and courts (and the justice system in general) in the establishment of Latin American dictatorships. This includes, of course, attempts undertaken by these regimes to legitimize breaking the rule of law and to normalize the emergency measures which they inevitably used for repressive purposes.

A common trait in the Argentine, Chilean, and Brazilian dictatorships was that the vast majority of courts and judges supported them. Obviously, there were isolated cases of resistance and confrontation by members of the judiciary, but those were the exception. As a rule, there was collaboration, support, and peaceful coexistence between the judiciary and the dictatorships. There are many explanations for this: the connection between those holding judicial positions and the political and economic elites, the significant power of co-optation held by the military governments with respect to staffing the courts (especially those at the highest levels), a strong sense of hierarchy and obedience in the ranks of the judiciary, and the fact that the countries analyzed here (particularly Brazil and Argentina) had experienced authoritarian regimes prior to the ones inaugurated in the 1960s and 1970s, regimes that required modes of collaboration and dialogue between the military and the judicial authorities.

Of course, the situations varied to certain degrees. In a pioneering study, Anthony Pereira indicates three trends in the countries mentioned here.[119] In Brazil, the regime achieved a high degree of judicialization, that is, the Brazilian dictatorship managed to establish links with the judiciary and thereby succeeded in conferring some measure of formality to its acts. Chile's approach was similar yet different in that the Pinochet regime made extensive use of military – not civilian – legal institutes and procedures, such as martial law and the publication of *bandos*. In Argentina, the military dictatorship resorted less to the judiciary because of the experience immediately prior to the 1976 coup.

and S. Quadrat (eds.), *A construção social dos regimes autoritários: legitimidade, consenso e consentimento no século XX – Brasil e América Latina* (Rio de Janeiro: Civilização Brasileira, 2010), 145–74; I.J. Hinojosa, "Discurso cultural da ditadura chilena: entre a pátria e o mercado," in R.P.S. Motta (ed.), *Ditaduras militares: Brasil, Argentina, Chile e Uruguai* (Belo Horizonte: Ed. UFMG, 2015), 313–33; A. Marchesi, "'Una parte del pueblo uruguayo feliz, contento, alegre': los caminos culturales del consenso autoritario durante la dictadura," in C. Demasi et. al., *La dictadura Cívico-Militar: Uruguay 1973–1985* (Montevideo: Ediciones de la Banda Oriental, 2013), 323–98.

119 A.W. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005); A.W. Pereira, "Sistemas judiciais e repressão política no Brasil, Chile e Argentina," in Santos, Teles, and Teles, *Desarquivando a ditadura*, vol. I, 203–24.

Juan Pablo Bohoslavsky describes how the military regime that lasted until 1973 sought to repress opponents by means of trials in a special court called "Camarón." When the Peronists reassumed power, the court was disbanded, and those that had been convicted received amnesty. This experience might have been a decisive factor why the agents of the Argentinian dictatorship unleashed a fierce policy of clandestine elimination of opponents outside the judicial proceedings, through executions and disappearances.[120]

These differences between the various countries, however, do not conceal the common element their regimes shared: the judiciary in these countries continued to carry out its activities during the dictatorships. More importantly, in the vast majority of cases, it acquiesced to the emergency procedures in place, which ended up weakening the use of legal procedures aimed at defending liberty, such as *habeas corpus*. In the overview offered by Bohoslavsky, this complicity is presented as a feature of several authoritarian regimes during the twentieth century (not only on the American continent):

> Authoritarian governments are usually interested, to a greater or lesser extent, in using the judiciary to promote and implement their own political agendas. From Russia under Stalin, Germany under Hitler, Spain under Franco, to Brazil during the dictatorship, South Africa during apartheid or Chile under Pinochet, repressive regimes generally have used the judiciary for their criminal purposes.[121]

These common features might have been the result of two different levels of judicial activity which consolidated during the dictatorships. On one level, there was the provision of ordinary jurisdiction, that is, the regular (and public) exercise of judicial power to adjudicate cases in compliance with the laws, codes, and procedural guarantees. On a second, less transparent level, more malleable types of jurisdictions were frequently created for emergency measures, such as for example, military tribunals. At this second level, there were fewer procedural guarantees, equality between the parties was not ensured, and political persecution was permitted.

The coexistence of two levels of judicial activity was nothing new. As Mario Sbriccoli and Massimo Meccarelli point out, this binary division originated in nineteenth-century Europe. There, the first level consisted of the codes and ordinary laws concerning criminal prosecution. On the second level were the so-called "special laws," which were present in dictatorial contexts: "national

120 Bohoslavsky, "Introducción," 18 and 36.
121 Bohoslavsky, "Introducción," 20 (unless otherwise indicated, all translations are by the author).

security" laws, extraordinary procedural norms for special courts, and military regulations. According to these two authors, the reason for this division was the necessity for European governments (in particular Italy and France) to control certain political movements that challenged the established order (such as anarchism, for example). The ordinary criminal jurisdiction proved insufficient to organize state repression: special rules and procedures were thus created[122] and a double level of legality established.[123]

Latin American dictatorial regimes shared common legal objectives, which they pursued in different ways. However, the transitional justice that developed in these countries after the dictatorships ended varied in form, intensity, and duration (see Section 6.3). Argentina was where the greatest resort to the judiciary took place, to prosecute those responsible for human rights violations during the dictatorship (which lasted from 1976 to 1983). According to an estimate by Human Rights Watch, based on data compiled through September 2019, in Argentina 3,329 persons were investigated for crimes against humanity, 997 persons were convicted, and 162 acquitted.[124]

In one of these lawsuits, the Argentine public prosecutor's office filed a criminal action to hold a number of judges, prosecutors, defenders, and judicial officials responsible for crimes against humanity in the province of Mendoza. The verdict handed down by the Oral Court in Criminal Court No. 1 of Mendoza, following extensive evidence gathered from four different criminal cases, led to the sentencing to life imprisonment of two former federal judges, a former federal prosecutor, and a public defender as well as other members of the justice system.[125] The ruling in this case, which became known as "*juicio a los jueces*," was affirmed, concerning the four cited

122 Here a fitting account is provided by Robert Barros: "Under the imperative of the emergency situation, constitutionally anticipated emergency powers allowed the abeyance of regular legal forms. The chief instrument that effected and typified this type of displacement of law was the provision for administrative arrest and detention without legal cause or due process under powers given by a state of siege." (Barros, "Courts Out of Context," 165).

123 M. Sbriccoli, "Caratteri originari e tratti permanenti del sistema penale italiano (1860–1990)," in L. Violante (ed.), *Storia d'Italia: legge, diritto, giustizia – Annali 14* (Torino, Einaudi, 1998), 487–551; M. Meccarelli, "Paradigmi dell'eccezione nella parabola della modernità penale," *Quaderni Storici* 131(2) (2009), 493–521.

124 See the Human Rights Watch report for Argentina at www.hrw.org/es/world-report/2021/country-chapters/377399#438aba (last accessed July 8, 2022).

125 The verdicts are described by the Argentine public prosecutor's office as follows: "Chamber IV of the Federal Criminal Cassation Division upheld the life sentences imposed on former magistrates Luis Miret (who died in September 2017), Guillermo Max Petra Recabarren, Rolando Evaristo Carrizo and Otilio Romano, convicted in July 2017 by the Federal Oral Federal Court No. 1 of Mendoza for their responsibility in crimes against humanity that consisted, according to the case, the crimes of abusive

convictions, by Chamber IV of the Federal Criminal Cassation Division, in a ruling released on September 6, 2019.

In Chile, where charges of human rights violations have been analyzed, especially since the imprisonment of former dictator Augusto Pinochet in London in 1998 following an order issued by the judge Baltasar Garzón,[126] there has been a significant movement by judges to examine the complicity of the judiciary with the dictatorship. On September 5, 2013 (just as the fortieth anniversary of the coup d'état was approaching) the National Association of Judicial Magistrates of Chile released a statement with an explicit appeal to be forgiven by the victims of the dictatorship (and their families) and Chilean society itself "for having failed, at this crucial moment in history, to guide, challenge and motivate our professional association and its members not to give up the fulfillment of their most basic and essential duties."[127]

Institutions and Social Movements: The Catholic Church, Students, and Workers

A central element in the analysis of the dictatorial regimes that emerged in Latin America in the post-war context is the complex role (or rather roles) played by the Catholic Church, both by its leadership and by lower-ranking priests. In Brazil, Chile and Argentina, the Catholic Church lent support to the coups d'état of 1964, 1973, and 1976. This was vital, because these coups cannot be understood only in their institutional perspective. Instead, the deposition of civilian governments in Latin America involved some degree of engagement in questions of morality and culture by the conservative forces in society. In Argentina, the regime assigned itself the task of carrying out a "process of national reorganization."[128] In Brazil, the coup of 1964 was preceded by a series of demonstrations summoned by Catholic groups – these were presented as marches "with God for the family and for freedom."[129]

deprivation of liberty, torture, aggravated homicide, breach of duty and illicit association, which the court considered as crimes against humanity perpetrated in the context of the international crime of genocide." www.fiscales.gob.ar/lesa-humanidad/juicio-a-los-jueces-casacion-confirmo-la-condena-a-prision-perpetua-de-cuatro-magistrados-por-crimenes-de-lesa-humanidad-en-mendoza/ (last accessed July 2022).

126 The main sources for the case that culminated in Pinochet's arrest are available in R. Brody and M. Ratner (eds.), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer Law International, 2000).

127 See https://elpais.com/internacional/2013/09/05/actualidad/1378356025_053445.html (last accessed June 30, 2022).

128 Finchelstein, *Ideological Origins*, 122–25.

129 A. Presot, "Celebrando a 'Revolução': as Marchas da Família com Deus pela Liberdade e o Golpe de 1964," in Rollemberg and Quadrat, *A construção social*, 71–96.

Engagement with morals and culture, however, was also evident on the other side of the spectrum. Before the coups d'état, there were organized, active student movements (which later would become central in the resistance to the dictatorships). The 1960s witnessed waves of demands for new patterns of socializing, freedom, and artistic expression.[130] In several countries around the world, students' revolts took place, and Latin America was part of this process, which also involved brutal repression by the state, as was the case in Mexico in 1968. In that country, which was about to host the Olympic Games, the university students movement grew throughout 1968. This was accompanied by an increasing number of demands made by health professionals, railway workers, peasants, and others. The goal of these movements was the improvement of living conditions and the full application of the 1917 Constitution, and one of the key instruments of these protests was strike.

The Mexican student movement participated in these struggles, with which it shared both the agenda and the methods. Student strikes were common, especially at the Universidad Nacional Autónoma de México (UNAM) and the Instituto Politécnico Nacional (IPN). The actions taken by the military and police forces (which included paramilitary groups) to quash these protests were usually violent and excessive. On October 2, 1968, the so-called "Massacre of Tlatelolco" took place in the *Plaza de las Tres Culturas*. Hundreds of students were killed by repressive forces, and the military subsequently occupied the university.[131]

In 1971, there was a new crackdown on student activity in Mexico. Similarly to the mobilization of 1968, the students advanced demands related to access to education, to university autonomy, and, above all, to internal democracy in the universities. Teachers and workers stood in solidarity with the students. However, on June 10 a group of paramilitaries known as "los halcones" violently crushed a student march, which resulted in approximately 120 students being killed. The episode, as traumatic as the Tlatelolco massacre, became known as "El Halconazo."[132]

130 R. P. S. Motta, "As políticas universitárias das ditaduras militares do Brasil, da Argentina e do Chile," in Motta, *Ditaduras militares*, 37–60; M. P. Araujo, "Esquerdas, juventude e radicalidade na América Latina nos anos 1960 e 1970," in C. Fico, M. M. Ferreira, M. P. Araujo, and S. Quadrat (eds.), *Ditadura e Democracia na América Latina: balanço histórico e perspectivas* (Rio de Janeiro: FGV, 2008), 247–73.

131 On the historical background leading up to the massacre, see P. H. Smith, "Mexico Since 1946," in Bethell, *The Cambridge History of Latin America, vol. VII*, 120–24.

132 C. V. Ovalle et al. (eds.), *A 50 Años del Halconazo – 10 de junio de 1971 – antología documental* (Mexico City: Instituto Nacional de Estudios Históricos de las Revoluciones de México, 2021); Smith, "Mexico Since 1946," 127–28.

Such brutal repression responded to a broader context of demands by students that were also voiced in other places, most famously in France and the United States, as part of the opposition against the Vietnam War. Gilberto Guevara Niebla, a student at UNAM and a student leader, said that "through television we knew what was happening in the United States and with the young people in France."[133]

Student movements were also very active in South American countries. In Argentina and Uruguay, they were integral elements of clandestine organizations such as the *Montoneros* and the *Tupamaros*, which began to carry out armed actions against political and military targets even before the 1973 and 1976 coups d'état. In Chile, the student movement was largely connected to the *Unidad Popular* throughout the turbulent presidency of Salvador Allende.[134] In Brazil, the National Union of Students was deeply involved in social causes and was part of movements fighting for better education, increased state participation in the economy, and improved living conditions for the low-income population. In all these countries, the student movements were among the main targets of the military regimes when those seized power.[135]

One of the outstanding features of these movements was the complex web of relationships and influences of which they formed part. They modeled themselves after the Chinese and Cuban revolutions and the orthodox orientation of Soviet communism; however, as is usual in such movements, there was much internal tension among the various currents.

This revolutionary, transgressive element of nonconformity adopted by the student movements was unacceptable to Catholic orthodoxy, Catholicism

133 A. Nájar, "La matanza de Tlatelolco: qué pasó el 2 de octubre de 1968, cuando un brutal golpe contra estudiantes cambió a México para siempre," BBC News Mundo, Mexico, Oct 2, 2018, updated Oct 2, 2020, www.bbc.com/mundo/noticias-america-latina-45714908 (last accessed June 13, 2022).

134 The *Unidad Popular* was a political and electoral coalition of parties, movements and social organizations of the center and the left led by Salvador Allende, who won the 1970 presidential election. A. Aggio, "O Chile de Allende: entre a derrota e o fracasso," in Fico et al., *Ditadura e Democracia na América Latina*, 77–93; A. Faure, "Las Batallas Cronopolíticas durante la Unidad Popular en Chile (1970–1973): Un esbozo de análisis," *Res Publica – Revista de Historia de las Ideas Políticas*, 24(3) (2021), 495–504. For the 1970 election, R. Simon, *O Brasil contra a democracia: a ditadura, o golpe no Chile e a Guerra Fria na América do Sul* (São Paulo: Companhia das Letras, 2021), 27–55.

135 H. Merele, "El proceso represivo en los años setenta constitucionales. De la 'depuración' interna del peronismo al accionar de las organizaciones paraestatales," in Águila, Garaño, and Scatizza, *Represión estatal*, 99–123; C. Aldrighi, *La Izquierda Armada: Ideología, ética e identidad en el MLN-Tupamaros* (Montevideo: Trilce, 2001); M.P.N. Araújo, "Memória e debate sobre a luta armada no Brasil e na Argentina," in S. Quadrat and D. Rollemberg (eds.), *História e memória das ditaduras do século XX* (Rio de Janeiro: FGV, 2015), vol. II, 245–64.

still being the vastly dominant religion in Latin America in the 1950s and 1960s. Furthermore, members of the ecclesiastical leadership had personal connections with the military and political elite. It was thus natural that the higher echelons of the Church would have a positive view of the institutional breakdown fostered by the military coups. The proposal of the dictatorial regimes encompassed a return to traditional values and social practices, especially in relation to the concept of family. In Brazil, the National Conference of Bishops of Brazil (CNBB) declared support for the coup of 1964, in Chile, the Episcopal Conference (CECH) offered to promote "national reconciliation" after the coup of September 11, 1973, and in the case of Argentina, the close ties between bishops and other segments of the Church and the military is documented in many historical sources.[136]

However, this was not the end of the story. While much of the Church hierarchy supported the coups, it is important to remember the role played by some segments of the Catholic Church in criticizing, resisting, and combating dictatorial regimes. Thus, if some members and organs of the Church were partners in repression, others were victims (often fatal) of these same dictatorships. How was this possible?

In a text from his youth, the controversial author and polemist Carl Schmitt (himself a practicing Catholic) summed up a central characteristic of the Roman Church: It can be classified as a "*complexio oppositorum*," that is, as a political body that houses in its ranks prelates with opposing orientations on Christian doctrine and on the role of the Church.[137] This insight fits the situation during the Latin American dictatorships, where the Church exhibited this kind of duality towards the regimes. Maria Angélica Cruz, in her analysis of the behavior of the Catholic Church during the Chilean regime, uses the expression "double game" – on the one hand, the Church conferred legitimacy to the military coup, on the other, it was concerned about the victims of the repression and tried to support them.[138] According to the author, over the course of the regime, the Church's dominant stance became more critical of the repression.

One of the main reasons for this ambivalent attitude of the Church was the orientation that emerged after the Second Vatican Council, concluded

136 C. Fico, *O golpe de 1964 – momentos decisivos* (Rio de Janeiro: FGV, 2014), 7–8; Finchelstein, *Ideological Origins*, 122–53; M.A. Cruz, "A Igreja católica, a ditadura e os dilemas da memória no Chile," in Quadrat and Rollemberg, *História e memória*, vol. I, 369–93.

137 C. Schmitt, *Roman Catholicism and Political Form* (Westport: Greenwood Publishing Group, 1996), 5–10.

138 Cruz, "A Igreja católica," 373–75.

in 1965. The renewal of the pastoral constitution envisaged by the Council would require increasing the number of organs and entities within the Church dedicated to the "social question," as well as to the question of how to bring the clergy and the low-income populations, especially peasants and workers, closer to one another. In Chile, the *Vicaría de la Solidariedad* was created, and in Brazil, there were the *Comunidades Eclesiais de Base*. Across the poorest communities in Latin America, the Church employed large numbers of priests – many from outside the Americas – not only for traditional evangelization efforts, but also to offer incentives for self-organization, to support the fight for social rights, and to mobilize people to demand agrarian reforms and political emancipation.[139]

As was to be expected, these activities were suppressed immediately by the military regimes, resulting in tensions on two different levels. Within the Church, differences increased between parts of the ecclesiastical leadership (who tended to support or collaborate with the dictatorial regimes) and priests dedicated to implementing the social doctrine established in the Second Vatican Council (who maintained a critical stance and resisted repressive measures). Rifts appeared between the Church and the military, and specific reprisals were carried out against religious orders and priests who had a leading role in public life and civil society.

It has been reported that under the Argentine dictatorship, at least twenty Catholic priests were murdered or disappeared, a hundred were kidnapped and taken to clandestine detention centers, and nine seminarians were murdered or disappeared. Two French nuns, Alice Domon, and Léonie Duquet, went missing in December 1977.[140] In the Brazilian countryside, especially in the north-eastern states, the presence of Italian and French priests was very common. At the end of the Brazilian dictatorship, an Italian priest, Vito Miracapillo, refused to celebrate a mass in commemoration of Brazil's independence, claiming that the country could not be considered an independent nation, given the precarious living conditions of a large part of its population. This made national news, and the minister of justice decided to expel the

139 For an account of this shift in Catholic Church, see L. A. N. Delgado and M. Passos, "Catolicismo: direitos sociais e direitos humanos (1960–1970)," in Ferreira and Delgado, *O Brasil Republicano*, 93–131.

140 For the estimation of the number of dead and missing, see *El Clarín*, March 20, 2006, updated February 24, 2017. The source for the newspaper is the *Movimiento Ecuménico por los Derechos Humanos*. For victims' names and facts about the crimes, see www.desaparecidos.org/arg/iglesia/des.html and www.desaparecidos.org/arg/iglesia/muertos.html (last accessed July 21, 2022). On the case of the French nuns, see M. S. Catoggio, "Las desaparecidas de la Iglesia: desentramando historias y memorias de mujeres en Argentina," in Águila, Garaño, and Scatizza, *Represión estatal*, 99–123.

priest from Brazil. This case is often mentioned as an example of the complicity of the judiciary with the policies of the military regime. Four *habeas corpus* proceedings brought before the Supreme Court, which sought the nullification of the expulsion decree, were unsuccessful.[141]

Finally, a crucial episode for the downfall of the Brazilian dictatorship was the murder of Vladimir Herzog and the reaction it triggered. Vladimir Herzog was born into a Jewish family in the city of Osijek, in the former Yugoslavia (now Croatia). His family moved to the Bosnian town of Banja Luka, and, with Nazi troops approaching, the family sought refuge in Italy. They lived in small towns in Veneto and the Marche until they managed to migrate to Brazil. A naturalized Brazilian, Vladimir graduated in philosophy at the University of São Paulo and became a very active journalist in the 1960s and 1970s. He covered the inauguration of Brasília in 1960, worked in the main newsrooms, was a correspondent for the BBC in London for three years, and then joined the staff of TV Cultura in São Paulo, where he took the post of director of journalism. He had ties to the Brazilian Communist Party (PCB), as did many other journalists at that time. Upon responding to a summons to give a statement in a police facility in São Paulo, he was arrested on the spot, tortured, and killed by the dictatorship's security forces on October 25, 1975.[142]

On October 31, 1975, an ecumenical service was held in the Cathedral of São Paulo in memory of Vladimir Herzog. At that time, the archdiocese of São Paulo was led by Cardinal Dom Paulo Evaristo Arns, an active defender of human rights who had publicly exposed the violations committed by the military regime. It is estimated that about eight thousand people attended the ceremony, which was celebrated by Dom Paulo, Rabbi Henry Sobel, and the Presbyterian Reverend Jaime Wright in defiance of the regime's express orders. This celebration signaled the resumption of protagonism by civil society in the struggle against the dictatorship, and Herzog gained the status of

141 The ruling from the *Supremo Tribunal Federal* (Brazilian Supreme Court) was issued in Habeas Corpus No. 58.409-8, *Diário da Justiça* from 28 Nov 1980. On this topic, see M. P. S. L. G. Dalledone, *O padre e a pátria: direito, transição política e o Supremo Tribunal Federal na expulsão de Vito Miracapillo (1980)* (Brasília: PhD Dissertation, University of Brasília Law School, 2016).

142 N. Miranda and C. Tibúrcio, *Dos filhos deste solo – mortos e desaparecidos políticos durante a ditadura militar: a responsabilidade do Estado* (São Paulo: Perseu Abramo/Boitempo, 2008), 423–24; M. H. M. Alves, *Estado e Oposição no Brasil (1964–1984)* (Petrópolis: Vozes, 1984), 201–8; M. V. M. Benevides, *Fé na luta: a Comissão Justiça e Paz de São Paulo, da ditadura à democratização* (São Paulo: Lettera.doc, 2009), 65–109; P. Montero, A. Brum, and R. Quintanilha, "Ritos católicos e ritos civis: a configuração da fala pública da Igreja Católica em dois atos em memória de Vladimir Herzog (1975/2015)," *Mana – Estudos de Antropologia Social* 22(3) (2016), 705–35.

a martyr. In 1978 (still under the authoritarian regime), a federal judge recognized the responsibility of the Brazilian state in Herzog's death, yet the proceedings continued for many years without any official recognition. Finally, on March 15, 2018, the Inter-American Court of Human Rights condemned the Brazilian state, explicitly pointing out "the failure to investigate, and also prosecute and punish those responsible for the torture and murder of Vladimir Herzog committed in a widespread and systematic context of attacks on the civilian population."[143]

Operation Condor, Its Origins and Aftermath: Collaborative Networks and Crimes on a Global Scale

One of the most discussed and researched feature of mid-twentieth century South American military dictatorships is the so-called Operation Condor, a program to carry out repressive operations. Created in the late 1970s by the Chilean dictatorship, it also involved the participation of Argentina, Uruguay, Bolivia, Paraguay, and Brazil. The structure and activities of Operation Condor are important, but it is also essential to point out that this operation was only part of a much more extensive and complex web of relations between Latin American countries as well as between them and other centers of power, such as the United States, European nations, and the former Soviet Union. The study of these links reveals the global character of the political struggles waged on the American continent during the period of the dictatorships.

Between the end of the 1960s and the beginning of the 1970s, the range of political options in Latin America was broad, particularly in the southern part of the continent. Brazil and Paraguay already had conservative military regimes due to the influence of the United States; however, in other countries the situation was different. In 1970, the *Unidad Popular*, which included left wing political associations, came to power in Chile with a pro-state platform to fight social inequality. In Bolivia, there were several coups d'état, but some of the generals who then held the presidency were supported by social movements.[144] These generals took a nationalist stance, moved away from the US sphere of influence, and nationalized industries. As noted earlier, in Argentina and Uruguay, students and workers actively mobilized against the

143 Inter-American Court of Human Rights, *Herzog et. al. v. Brazil*, judgment of March 15, 2018, www.corteidh.or.cr/docs/casos/articulos/seriec_353_ing.pdf (last accessed July 31, 2022).

144 For an overview, see L. Whitehead, "Bolivia since 1930," in Bethell, *The Cambridge History of Latin America, vol. VIII*, 509–83.

central governments, and guerrilla groups began to operate (*Montoneros* and *Tupamaros*).

As is well known, the Cuban Revolution, which concluded in 1959, exerted immense influence on political and social movements throughout the American continent. Ernesto Che Guevara, Argentinean by birth and one of the leaders of the Cuban Revolution, continued to engage in political activities outside Cuba and was murdered in Bolivia in 1967. With the rapprochement between Cuba and the Soviet regime, and given the strong influence of the United States in the region, the Cold War gained an additional dimension. Predictably, the US security apparatus began to operate in Latin America, always aiming to prevent the emergence of new regimes such as the one in Cuba.

Several documents recently declassified by the US government reveal the intense diplomatic and espionage activities carried out in order to contain possible leftist regimes. For this to succeed, forming alliances with dictatorships was crucial. A recently revealed memo documents a conversation between President Richard Nixon, Secretary of State Henry Kissinger, and British Prime Minister Edward Heath at a meeting in Bermuda on December 20, 1971. Nixon and Heath discuss Cuba and its possible influence in South America, with Nixon saying that in Chile "the left is in trouble, and there are forces at work which we are not discouraging," referring to the moves by US authorities to destabilize the Allende government. The conversation also reflected concerns with what was transpiring in Uruguay, where left and center-left parties created the *Frente Amplio*, and it seemed possible that it could win the elections (which it did not). According to Nixon, "Brazilians helped rig the Uruguayan election."[145] Whether this was true or not, we know that, given Brazil's interest in monitoring (and persecuting) Brazilian exiles on the other side of the border, there was intense participation by the Brazilian military regime in the repression of Uruguayan guerrilla forces.

The results of this coordination were clear. During the 1970s, dictatorships prevailed in South America. In Bolivia, General Hugo Banzer led a coup d'état. His predecessor, General Juan José Torres, was one of the first victims of Operation Condor. He was killed by a Bolivian military command (with the participation of Chilean agents linked to the CIA) in Buenos Aires, in July 1976.[146] In Uruguay, the President of the Republic Juan María Bordaberry led

145 White House Memorandum, Dec. 20, 1971, page 2, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB71/doc15.pdf (last accessed July 31, 2022).

146 J. P. McSherry, "Cross-Border Terrorism: Operation Condor," *NACLA Report on the Americas* 32(6) (1999), 34–35.

a self-coup, closed the Congress, and began acting as a dictator until he was deposed by a military *junta* that assumed *de facto* power in the country.[147] In Chile, the September 11, 1973 coup took place, and in Argentina, the "national reorganization process" started in March 1976. Most of the South American countries were now military dictatorships aligned with the United States at the international level.

Cooperation between the different military forces was also evident. Many Brazilian political exiles lived in Chile; a number of them were arrested and held at the National Stadium in Santiago and report having been tortured by Brazilian military personnel.[148] Argentine commandos were looking for exiles in Brazil, and on some occasions, groups composed of Brazilian and Argentinean soldiers tortured the exiles they tracked down. However, while collaboration throughout the 1970s was random, in 1976 Chile proposed a broader initiative, the earlier-mentioned Operation Condor.

This new type of collaboration was discussed between members of the armed forces and intelligence communities of the South American countries in a meeting that took place in Chile from November 25 to December 1, 1975, attended by delegations from Brazil, Argentina, Paraguay, Uruguay, and Bolivia. As previously stated, the military and security forces of the various dictatorships had already pursued joint activities and conducted operations in more than one country. At this November meeting, however, Chile sought to establish a more systematical approach to these operations.[149] Its immediate goal was to intensify efforts to detain opponents of the military regimes who were exiled in other countries.[150]

The plan did not end there. While collaboration between dictatorships and their security and intelligence bodies continued (both inside and outside Condor), another cooperative plan emerged from an initiative by the

147 F. Lessa, *Justicia o impunidad? Cuentas pendientes en el Uruguay post-dictadura* (Montevideo: Debate, 2014), 55–72.

148 R. Simon, *O Brasil contra a democracia*, 236–52.

149 Despite being present at the meeting, Brazil did not sign the official document that established Operation Condor; formal adhesion only took place in June 1976. Simon, *O Brasil contra a democracia*, 332. In 1978 Ecuador and Peru joined the group, F. Lessa, "Justice Entrepreneurs and the Struggle for Accountability in South America: Comparative Reflections on Transitional Justice and Operation Condor," in C. Paixão and M. Meccarelli (eds.), *Comparing Transitions to Democracy: Law and Justice in South America and Europe* (Cham: Springer, 2021), 111–36, at 123.

150 For a more general overview of Operation Condor, for example, F. Lessa, "Justice beyond Borders: The Operation Condor Trial and Accountability for Transnational Crimes in South America," *International Journal of m* 9 (2015), 494–506; Simon, *O Brasil contra a democracia*, 329–38; J. Dinges, *The Condor Years: How Pinochet and His Allies Brought Terrorism to Three Continents* (New York: The New Press, 2004), and

Chilean, Argentine, and Uruguayan regimes: Operation Teseo. Its purpose was to expand activities beyond the boundaries of the Americas. As various coups d'état occurred in South America, many exiles who initially went to Uruguay, Chile, and Argentina sought new places of refuge, particularly in Europe. Paris and Lisbon concentrated the largest number of regime opponents. Operation Teseo was a plot intended to enable the assassination of exiles living in Europe.

The Chilean regime already had some experience in operating outside its own borders. Dina (*Dirección de Inteligencia Nacional*), Chile's political police, had been active on European territory. In Rome, on October 5, 1975, Chilean agents, with the backing of militants from an Italian extreme right-wing group, shot Bernardo Leighton, a Christian Democrat politician and former interior minister of Chile, and his wife Anita Fresno. Both survived the attack, albeit with serious injuries. In addition to Dina agents, Stefano Delle Chiaie, a known member of the radical right-wing group *Avanguarda Nazionale*, also participated in the assassination. Delle Chiaie, who had met with Pinochet in Madrid a month earlier, was assisted by Michael Townley, a US citizen who was a Dina agent.[151] Townley had also been involved in the murder of the Chilean general Carlos Prats and his wife in Buenos Aires on September 30, 1974.[152]

An equally well-known case was an operation executed outside of Condor's channels that resulted in the killing of Orlando Letelier, who had served as minister in Allende's government. Letelier was murdered in Washington DC on September 19, 1976; the assassination was organized and executed by Dina, again with the participation of Michael Townley, among many other agents. Armando Fernández Larios, one of these agents, was present at the attack on September 11, 1973, on the Palacio de la Moneda, the seat of the Chilean government, occupied at the time by Salvador Allende. Fernández Larios had also taken part in several repressive actions by a group that became known in Chile as the "Caravans of Death," and he traveled throughout Brazil in 1976 before heading to Washington to be part of the Letelier killing.[153]

S. V. Quadrat, "Violência política e justiça sem fronteiras," in Santos, Teles, and Teles, *Desarquivando a ditadura*, vol. I, 250–66.

151 US intelligence report on Dina's activities, Jan. 21, 1982, pages 3–6. https://nsarchive2.gwu.edu/NSAEBB/NSAEBB8/ch02-01.htm (last accessed July 31, 2022).

152 US intelligence report, pages 5–6.

153 Simon, *O Brasil contra a democracia*, 319. Larios would confess in the 1980s to his participation in Letelier's murder. He agreed to enter into a plea bargain with the United States Department of Justice in which he obtained a reduced sentence and provided information about the operation that resulted in Letelier's death. Criminal Case No. 78-0367. The plea agreement is available at https://cja.org/wp-content/uploads/downloads/lariosPleabargain.pdf (last accessed July 31, 2022).

Although there were transnational collaborative networks involving Chilean, Argentine, and Uruguayan agencies (with most operations originating in Chile), some of these networks were fragile. The US government was visibly upset with the operation against Letelier, which resulted in the death of a US citizen, Ronni Moffit, who had been working with Allende's former minister. In addition, after a group consisting of Argentine and Uruguayan military was sent to Paris with the purpose of assassinating Uruguayan opponents living there, the French intelligence services became aware of their presence (as part of Operation Teseo), alerted the possible targets, and protested the situation to the Chilean Embassy in Paris.[154]

The extension of collaboration between South American dictatorships, which ranged from persecuting opponents on the American continent to collaborating in their elimination even on European territory, was made possible through the participation of European extreme right-wing groups. Pinochet, while in Spain for Franco's funerals, contacted extremist groups in order to obtain support for killings across Europe.[155] As Branch and Propper rightly point out, the timing was symbolic, as Pinochet sought to be identified with the legacy of Francoism and considered himself "the historical re-creation of Franco."[156]

In the early 1980s, in the context of intensified Cold War clashes, and driven by the election of Ronald Reagan as president of the United States, Argentina became the leading country in transnational political repression. How this complex and intricate situation came about illustrates the impressive ability of the United States (and its allies in Latin America) to interfere in the political struggles fought in countries located in the US sphere of influence.

When Reagan took office, there were several areas of tension with the Soviet Union. The Cold War theater of operations was about to shift into a higher gear after a period of relative stability. One of Reagan's main targets was the new Sandinista regime in Nicaragua, which was established following a civil war that culminated in the removal from power of the then-dictator Anastasio Somoza. Members of the US government planned to provide training to the so-called *contras*, who opposed the Sandinista regime. The US Congress, with the Democratic Party holding the majority, vetoed the sale

154 Simon, *O Brasil contra a democracia*, 333–34.

155 See R. Vilaro, "Pinochet mantuvo conversaciones secretas en Madrid durante los funerales de Franco para actuar contra la oposición chilena," El Pais, April 13, 1982, https://elpais.com/diario/1982/04/13/internacional/387496804_850215.html (last accessed July 31, 2022).

156 T. Branch and E. Propper, *Labyrinth* (New York: Viking Press, 1982), 314.

of arms to the Nicaraguan opposition. To tackle this situation, the solution chosen was to activate sectors of the repressive apparatus in Latin America. Argentine military offered training to paramilitary groups in Guatemala and sold weapons to the *contras* with the support of the US government. Sectors of the collaborative network that had already been activated in the 1970s in Europe were once again put into action. Stefano Delle Chiaie, the Italian far-right militant who, as we have already seen, assisted the Chilean dictatorship in actions in Europe, traveled to Bolivia and Argentina where he collaborated directly with members of the Argentine government in their joint efforts with the United States to supply weapons and training to the Nicaraguan *contras*. The partnership between Argentina and sectors of the US government came to an end in 1982, when the Falklands (also known as Malvinas) War broke out and the United States supported Britain.[157]

According to the data collected by Francesca Lessa in the database on South America's Transnational Human Rights Violations, between August 1969 and February 1981, 805 people fell victim to this transnational repression (which, as we have seen, was broader than Operation Condor). Among these were 382 cases of illegal detention with torture, 367 deaths or disappearances, and 25 kidnappings of babies. The victims' nationalities were distributed as follows: 384 Uruguayans, 191 Argentineans, 115 Chileans, 40 Paraguayans, 33 Brazilians, 13 Peruvians, 17 Bolivians, and 12 others (the United States, Italy, France, Cuba, Great Britain, and Spain).[158]

Operation Condor, given its scope and the countless human rights violations it inflicted, was the subject of important lawsuits in several countries that sought to establish the responsibility of the perpetrators. These cases – which have the potential to raise new questions because of the emergence and disclosure of previously unknown sources – are central to understanding different features of the operation, but they are also an important source for legal history. It is well established that authoritarian regimes tend to lack transparency and publicity in their actions. Secrecy becomes the rule, and there is no public control over governmental actions. Hence, lawsuits concerning the criminal accountability of agents who have perpetrated human rights violations play a central role, also in the writing of legal history. With instruments

157 For an elaborate description of the complex web of connections between multiple countries and regimes established in the context of US influence in Central America, which also involved, among others, Israel, Taiwan, El Salvador, and Guatemala, see P. D. Scott, "Contragate: Reagan, Foreign Money, and the Contra Deal," *Crime and Social Justice* 27/28 (1987), 110–48.

158 Database available at: https://sites.google.com/view/operationcondorjustice/database (last accessed July 31, 2022). Also Lessa, "Justice Entrepreneurs," 124.

such as universal jurisdiction and doctrines such as the imprescriptibility of crimes against humanity, the judicial authorities are able – when the political circumstances of each nation permit this openness – to carry out an impartial investigation and examination of the authoritarian past.[159]

Lawsuits can recreate factual contexts, draw attention to collected documentation and testimonies, and bypass restrictions, for example, in crimes against humanity, where statutory limitations don't apply. Criminal judges have broad powers to collect evidence – they can summon witnesses, request documents, carry out inspections, and ask that technical evidence be produced. In this way, judicial institutions play multiple roles. They hold agents accountable for rights violations, they contribute to the knowledge of history, and they can also provide reparation, as survivors, as well as descendants of victims, are eligible to receive restitution for past events.

With respect to Operation Condor, at least two cases are of particular historical interest. The first one is a trial held by the Argentine judiciary – Oral Court in Federal Criminal Court No. 1 – which concluded on May 27, 2016. This was a major criminal lawsuit, which was initiated in 1999 and encompassed a variety of related cases. Of the seventeen defendants who were tried, fifteen were sentenced to terms ranging from 8 to 25 years in prison. The victims were of many nationalities: There were Argentineans, Bolivians, Chileans, Paraguayans, Peruvians, and Uruguayans.[160] The second significant criminal case regarding the accountability of agents involved in Operation Condor was brought before Italian courts, since some of the victims held Italian nationality and the Italian Penal Code allows the persecution of crimes committed outside Italy. In a first trial, the *III Corte di Assise di Roma* condemned several of the defendants to sentences up to life imprisonment. However, in the judgment released on January 17, 2017, most of the accused (nineteen out of twenty-seven) were acquitted. An appeal was filed, and the first-instance decision was reversed by the *Corte di Assise di Appello di Roma, Sezione 1 bis*. The grounds of the decision were published on December 27, 2019. In addition to the eight life sentences already handed down by the lower

159 On the importance of court records, see C. Ginzburg, *Il Giudice e lo Storico – Considerazioni in margine al processo Sofri* (Milano: Feltrinelli, 2006); J-C. Passeron and J. Revel, "Penser par cas. Raisonner à partir de singularités," in J-C. Passeron and J. Revel (eds.), *Penser par cas* (Paris: Éditions de l'EHESS, 2005), 9–44, and A. Farge, *Le goût de l'archive* (Paris: Seuil, 1997).

160 The ruling can be found, in its complete form, on the official web page of the Attorney General's Office of the Argentine public prosecutor's office: www.mpf.gob.ar/plan-condor/files/2019/04/Sentencia-Plan-C%C3%B3ndor.pdf (last accessed July 31, 2022).

court – including life imprisonment for Luis Garcia Meza, former president of Bolivia – the appellate court ordered the conviction of sixteen further defendants, leaving only one acquitted. The defendants – of Uruguayan, Chilean, Bolivian, and Peruvian nationalities – were held accountable for the murder of forty-three people. After this ruling, an appeal was filed with the *Corte Suprema di Cassazione*, which, through the *I Sezione Penale*, upheld the convictions imposed (with the exception of one defendant who had died during the trial) and modified only part of the civil reparations.[161]

As Francesca Lessa pointed out, these trials revealed the depth and complexity of the transnational network of repression, torture, killings, and disappearances that was built up in the 1970s. Moreover, these cases prompted national judicial authorities to carry out new investigations into human rights violations committed against victims from various countries.[162]

Transnational Legal Mobilization: The Second Russell Tribunal for Latin America

As explained previously, the thinking of regimes in Latin America was influenced by the decolonization process in Africa and Asia; the Cold War – and even more so the Cuban Revolution – pushed the region into a position of global prominence. The strategic importance of what transpired across the continent became clear in the 1970s, when a transnational mobilization of solidarity with Latin American peoples emerged, initially as a byproduct of the so-called Russell Tribunal. This extra-judicial "International War Crimes Tribunal," held between 1966 and 1967 and charged with investigating the US-American intervention in Vietnam, was an initiative of the philosopher Bertrand Russell, who invited Jean-Paul Sartre and Simone de Beauvoir to head the tribunal's formation. Several other political and cultural figures, mostly from western Europe, joined the tribunal, which held two sessions in Sweden and Denmark in 1967.[163]

161 The first-instance judgment, the ruling of the *Corte di Appello* and the verdict of the *Corte Suprema di Cassazione* are available on the webpage 24 marzo Onlus (an Italian NGO). Cf. www.24marzo.it/ (last accessed July 31, 2022). For an in-depth discussion on the importance of the Italian case, see F. Lessa, "Operation Condor: the Responsibility of the Middle Rank," *Justiceinfo.net*, January 21, (2020), available at: www.justiceinfo.net/en/43584-operation-condor-responsibility-middle-rank.html (last accessed July 31, 2022).

162 Lessa, "Justice Entrepreneurs," 133–34.

163 For the setting up and unfolding of the first Russell Tribunal, see the account by U. Tulli, "Wielding the Human Rights Weapon against the American Empire: The Second Russell Tribunal and Human Rights in Transatlantic Relations," *Journal of Transatlantic Studies* 19 (2021), 215–37, esp. 218–24.

One of the participants of this first Russell Tribunal, the Italian politician Lelio Basso, was a member of the Italian resistance, acted as a representative on the Constituent Assembly formed in the post-war period, and served as a deputy and senator. During a visit to Chile in 1971, Basso instigated contact with Brazilian exiles who opposed the dictatorship, such as Theotonio dos Santos, Almino Affonso (who had been a minister in the João Goulart government, overthrown in 1964 by the military), Herbert de Souza, and José Serra (a former student leader). This group of exiles asked Basso to set up a new tribunal, similar to the one created to investigate the American intervention in Vietnam, but with the purpose of inquiring into and prosecuting the military dictatorship in Brazil.[164]

Basso returned to Italy convinced of the need to set up a second Russell Tribunal. Initially, this was intended to hear only the Brazilian case. However, with the coup d'état staged by Pinochet and the Chilean armed forces on September 11, 1973, it became clear that the military spread of dictatorships in Latin America had reached a point that required an expansion of the tribunal's scope. Accordingly, the cases of the dictatorial regimes in Chile and, subsequently, Uruguay and Bolivia were included. One of the tribunal's main lines of investigation was US intervention in local political affairs and the role of transnational companies in supporting the military and civilian sectors willing to break away from democratic regimes (particularly those of Brazil and Chile, which had a statist orientation and engaged in the nationalization of foreign companies).

CIA-produced documents indicate that the move to establish the second Russell Tribunal was closely monitored by the United States. Three reports, written between November 1973 and March 1974, outlined the minutiae of the tribunal's formation. In November 1973, a communiqué from the American Embassy in Brussels noted: "Although the tribunal had been conceived originally to investigate allegations of torture and political repression in Brazil, it was the unanimous decision of the participants in the Brussels meeting that the tribunal should extend its investigations to Chile and other Latin American countries."[165] Another US intelligence report, written in the last days of March 1974, disclosed that the tribunal had designated a session to "hear testimony

164 Regarding Basso's first contacts with the Brazilian exiles and the steps necessary to establish the Tribunal, see S. Fraudatario, "Le Reti di solidarietà per il Tribunale Russell II negli archive dela Fondazione Lelio e Lisli Basso," in G. Monina (ed.), *Memorie di repressione, resistenza e solidarietà in Brasile e in America Latina* (Rome: Ediesse, 2013), 315–60.

165 Report from the American Embassy in Brussels, dated 3 November 1973, www.cia.gov/readingroom/docs/DOC_0005431000.pdf (last accessed July 31, 2022).

and accept documentation and reports assembled by various commissions on violation of human rights in Brazil, Chile, Uruguay, Paraguay, Bolivia, and Guatemala." The document then went on to list some of the participants, among them Lelio Basso, Vladimir Dedijer, Gabriel Garcia Marquez, Herbert Marcuse, Albert Soboul, Pierre Vidal-Naquet, and François Rigaux. Later, the report added that "Simone de Beauvoir and Jean-Paul Sartre would be unable to continue their tribunal activities because of ill health."[166]

After considerable efforts by Lelio Basso, Linda Bimbi (an Italian nun who had lived in Brazil for many years), and other collaborators, the financial means to convene the second Russell Tribunal were secured. The tribunal held three sessions: in Rome from March 30 to April 6, 1974, in Brussels from January 11 to 18, 1975, and again in Rome from January 10 to 18, 1976.[167] The proceedings produced abundant evidence regarding the dictatorial regimes in Latin America. This evidence enables an understanding of the global dimension of the political struggles that were waged in the region. The tribunal's conclusions had considerable repercussions in the international sphere, but curiously enough, until now, there is no significant literature describing and analyzing its activities. As Umberto Tulli points out, "the 'second' Russell is a neglected and overlooked field of research," especially when compared with the Vietnam War Tribunal.[168] Yet, as Tulli himself makes clear, there were substantial differences between the two iterations, even if many of the members were the same. The first Russell Tribunal scrutinized the United States' behavior as a country that had initiated an armed conflict with another nation, which led to the perpetration of war crimes. The second tribunal, however, depicted another form of US-American intervention, which included economic influence and the role of large multinational corporations. What was

166 CIA report dated late March 1974, www.cia.gov/readingroom/docs/DOC_0005430997.pdf (last accessed July 31, 2022).

167 Fraudatario, "Le Reti di solidarietà," 318.

168 Tulli, "Wielding the Human Rights Weapon," 216. There are nevertheless important publishing initiatives of the proceedings of the second Russell Tribunal, notably the effort made by Giuseppe Tosi and Lúcia de Fátima Guerra Ferreira, professors at the Federal University of Paraíba, Brazil, who organized, with the support of the Amnesty Commission of the Brazilian Ministry of Justice, the full publication of the proceedings in four different volumes. G. Tosi and L.F.G. Ferreira (eds.), *Brasil, violação dos direitos humanos – Tribunal Russell II* (João Pessoa: Ed. UFPB, 2014). There is considerable literature in Italy related to the trajectory of human rights activists such as Lelio Basso, Linda Bimbi, Salvatore Senese and others. S. Rodotà, "Prefazione," in L. Basso, *Il principe senza scettro* (Milano: Feltrinelli, 1998), 7–13; G. Tognoni, "Prefazione," in Monina, *Memorie di repressione*, 9–16; A. Mulas, "Lelio Basso e l'America Latina (1961–1978): Un percorso politico, intellettuale e umano," in G. Monina (ed.), *Novecento contemporaneo. Studi su Lelio Basso* (Rome: Ediesse, 2009), 157–82.

under discussion here was the economic model itself, as well as the emergence of networks of solidarity and resistance. Thus, Tulli concludes, "the first Russell Tribunal was a specific expression of a global movement against the Vietnam War, whereas the second drew inspiration from transnational activism for human rights."[169]

Transnational mobilization of solidarity was evident not only in the activities of the tribunal, but also in the efforts to establish it. Simona Fraudatario reports a proliferation of international committees that supported the creation of the tribunal: following Lelio Basso and Linda Bimbi's trips to several European countries, committees were formed in the Netherlands, Belgium, West Germany, and France. The mobilization spread to other countries and continents: In the United States, student groups in Chicago and Philadelphia came up with supporting manifestos. In Toronto, a Bertrand Russell Tribunal Canadian Support Committee was created, and similar bodies were established in Panama, Puerto Rico, and Argentina – the latter in 1975, before the military coup that would drag the country into a new dictatorship took place.[170]

The verdict issued by the second Russell Tribunal was published at the closing of the first session, which took place in Rome between March 30 and April 5, 1974. In the concluding part of the ruling, the tribunal "declares guilty of serious, repeated and systematic violations of human rights, the authorities who in fact exercise power in Brazil, Chile, Uruguay and Bolivia."[171] Lelio Basso, the jury's president, produced the closing passage, in which he paid tribute to the victims of the dictatorships and their families. Basso stated that "tragic faces" had been present in the tribunal, bearing witness to the atrocities committed by the authoritarian regimes. However, the text ended in an uplifting tone:

> The men and women who today, in most Latin American countries, suffer hidden and locked away in their cells, in the darkness imposed by the hood,

169 Tulli, "Wielding the Human Rights Weapon," 216. On the discussion around the economic models in dispute, see the careful analysis by D. Conti, "La repression politico-sociale in Brasile nelle carte del Tribunal Russell II," in Monina, *Memorie di repressione*, 91–130.

170 Fraudatario, "Le Reti di solidarietà," 347–51. The author mentions a manifesto "to men of good will" released in early 1972, when the tribunal was still being designed with emphasis on the Brazilian case. According to Fraudatario, "the manifesto was signed by numerous Latin American and European personalities representative of the political, scientific, Catholic, Protestant world and the world of music, cinema, theater, arts, and literature … [such as] poet Pablo Neruda, singer Mercedes Sosa, actress Inda Ledesma, writer Gilles Martinet, painter Renato Guttuso, film director Ettore Scola, philosopher Noam Chomsky" ("Le Reti di solidarietà," 353).

171 For the full text of the verdict, see G. Tosi and L. F. G. Ferreira (eds.), *Chile, Bolívia e Uruguai: Atas da Primeira Sessão do Tribunal Russell II* (João Pessoa: Ed. UFPB, 2014), 361–74. The excerpt quoted is on page 371.

in forced isolation, or else, who lead an uncertain and tragic life in secrecy, threatened at every moment, are living witnesses that alert us that it is not necessary to wait for the sun to rise in order to believe in the light. This light that today shines in their indomitable hearts, tomorrow will illuminate the new paths of humanity.[172]

Urban Interventions in the Post-Dictatorship Period: Memory Sites

The dictatorships' brutal actions created a topography of repression. As Francesca Lessa remarked regarding Operation Condor, "[o]ne major location of crimes was Buenos Aires, due to the large number of political exiles living there since the 1960s," but other cities also accommodated locations (usually secret) for the practice of human rights violations. In 1976 Argentina, a clandestine detention center called *Automotores Orletti* was the site for activities related to Operation Condor. Other secret locations were *Pozo de Banfield* and *Pozo de Quilmes*. In Chile, there were the *Villa Grimaldi* and *Londres 38*; in Uruguay, the *Punta Gorda* house, a site called *300 Carlos*, and the Intelligence and Defense Service (SID) building; and in Paraguay, the Department of Police Investigations in Asunción. All these places fulfilled the same role.[173]

South American dictatorships were overcome, and processes of re-democratization began in the 1980s. In some countries, politicians linked to the dictatorships accumulated sufficient political capital during the re-democratization process to remain influential even after the dictatorships ceased to exist. The most striking examples are Brazil and Chile. But even where this kind of continuity was possible, spaces of memory connected to the time of repression emerged. Torture centers, clandestine detention camps, secret places for the interrogation, torture, and execution of opponents had become part of the landscape of South American cities; now questions were raised as to what should be done with these repressive structures, which epitomized the state terror inflicted by the dictatorial regimes.

The subsequent fate of these places varied greatly. In many countries, a number of military and police facilities involved in the repression continue to fulfill their original functions. Others, however, carried greater symbolism and stood as reminders of the oppression, and consequently underwent a re-dedication of their purpose. In Chile, two sites were converted into memory sites: *Londres 38* (a house located in central Santiago) and *Villa Grimaldi* (a property located on the outskirts of the Chilean capital) had served as

172 Basso in Tosi and Guerra, *Chile, Bolívia e Uruguai*, 377–78.
173 Lessa, "Justice Entrepreneurs," 125.

clandestine sites for the detention, torture, execution, and disappearance of hundreds of opponents of various nationalities. After the dictatorship, and mainly at the initiative of former president Michelle Bachelet, these places have become memory museums that seek to reconstruct the resistance to the Chilean dictatorship and bear witness to the trajectories of the victims. They are joined by the "Museum of Memory and Human Rights," also located in Santiago, which is renowned for its innovative use of transparent materials and the various shades of light inside and outside, creating an architectural and museological ensemble that focuses on remembering the victims of the Chilean regime.[174]

In Argentina, the *Parque de la Memoria* or "Memorial Park," which is located in the Belgrano neighborhood of Buenos Aires and includes the *Monumento a las Victimas del Terrorismo de Estado* or "Monument to the Victims" fulfills the same task. The park is situated near the estuary of the *Río de la Plata*, into which the bodies of opponents who have disappeared have been thrown; it is also in close proximity to one of the most notorious detention, torture, and execution centers of the Argentine regime, the *ESMA – Escuela de Mecánica de la Armada*, which has also been transformed into a memory museum (*Espacio Memoria y Derechos Humanos*). By providing these kinds of memory sites, urban interventions can shift the memory of oppression, reconnect the city to the river that is one of its main symbols, and enable a public display of recollection and remembering.[175]

In a seminal text, Andreas Huyssen highlights the layers of historicity that are revealed in the uncovering and processing of memories of these periods of arbitrary rule, and its unfolding in relation to the global context of human rights violations in the twentieth century. Huyssen connects the architectural and political choices featured in the design of the Memorial Park with two other major memorial sites conceived in a post-traumatic context: the Jewish Museum in Berlin and the Vietnam Veterans Memorial in Washington DC. While Huyssen refuses to draw a direct analogy between the Argentine dictatorship with its state terrorism and the Third Reich or the American invasion of Vietnam, he nonetheless mentions evidently common features between these monuments: for instance, asymmetrical lines that punctuate

174 For the site Londres 38, see www.londres38.cl/1937/w3-channel.html; for Villa Grimaldi, http://villagrimaldi.cl/; for the Museum of Memory and Human Rights, https://web.museodelamemoria.cl/ (all websites last accessed July 21, 2022).

175 For the Parque de la Memoria, see https://parquedelamemoria.org.ar/; for Espacio Memoria y Derechos Humanos, www.espaciomemoria.ar/ (both websites last accessed July 21, 2022).

the tortuous path of the political history of the twentieth century, expressing a fragmentation, an interruption of projects (with the persistence of empty spaces inside the building, a clear option in the Jewish Museum in Berlin); walls with inscriptions of the victims' names; and the use of underground spaces. With regard to the victims of the Argentine dictatorship (students and workers honored on the walls of the Monument to the Victims), Huyssen notes that the Buenos Aires Park "is also part of the global legacy of 1968, together with the mass shooting of students in Mexico City and the Soviet invasion of Czechoslovakia."[176]

Another urban intervention related to repression by authoritarian regimes is the transformation of the *Punta Carretas* prison in Montevideo. Inaugurated as a regular prison in 1915, it gradually also became a political prison where several members of guerrilla groups were detained before and after the coup d'état of 1973. This penitentiary, which eventually became a maximum-security prison, was abandoned in the late 1980s and then, between 1991 and 1994, converted into a luxury shopping mall.[177] In a suggestive analysis, Susana Draper connects the opening of the mall to the failure to recall the crimes of the Uruguayan military regime. She explains that, after the restoration of democracy in Uruguay, the 1986 *Ley de Caducidad de la Pretensión Punitiva del Estado* granted amnesty for crimes committed during the dictatorship, including those committed by agents of the regime. The law was submitted to a referendum, followed by a plebiscite, in March 1989, with the majority of votes cast in favor of the project. According to Draper, the conversion of the prison into a shopping mall must be understood within this broader historical process, which involved a new vision of the future and a "metaphor for a peculiar form of transition from the carceral past to the consumerist present." This became clear, according to the author: "After the decision voted in the plebiscite, the new prison-mall became both the paradoxical monument to forgetting and the prized example of the new regime's discourse, transactions, and measures."[178]

176 A. Huyssen, *Present Pasts: Urban Palimpsests and the Politics of Memory* (Stanford: Stanford University Press, 2003), 105.

177 See https://montevideoantiguo.net/index.php/ausentes/penal-de-punta-carretas.html. It is worth noting that the mall's website, when referring to the building's history, only mentions the opening, in 1915, of a penitentiary, emphasizing that the prison was a "building of truly impressive intensity." See www.puntacarretas.com.uy/nosotros/ (both websites mentioned in this footnote were last accessed July 21, 2022).

178 Both excerpts quoted in this paragraph are from S. Draper, *Afterlives of Confinement: Spatial Transitions in Postdictatorship Latin America* (Pittsburgh: University of Pittsburgh Press, 2012), 23. For reflections on memory sites, among many others, J. Winter, "Sites of Memory," in S. Radstone and B. Schwarz (eds.), *Memory: Histories, Theories, Debates*

Transnational Journeys: Paths of Resistance

The opponents of Latin American dictatorships included peasants, workers, students, dissenting members of the military, and several other social segments. Between the 1960s and 1970s, they reflected an enormous range of ideological tendencies, groups preaching political change, and texts that could inspire acts of resistance. There were various options for action: The opposition could engage exclusively in the "institutional way," that is, attempt to defeat the dictatorship in a peaceful manner, through the procedures established in the legal system then in force – or follow the path of open defiance, using armed struggle and guerrilla warfare.

This diversity is manifested in the trajectories of three opponents to the Brazilian military dictatorship. As will be demonstrated, each biographical path featured a selection of choices, contact with many different sources of influences, and journeys around the world before and during the Brazilian dictatorship (which began with the coup d'état of March/April 1964). These individual experiences exemplify many of the dilemmas faced by groups that opposed the Latin American authoritarian regimes, as well as many of the possible strategies for combating them.

1 Davi Capistrano da Costa (1913–1974)

Capistrano's biographical journey is connected to some of the main political conflicts of the twentieth century. Born in a small town in the Brazilian Northeast region, Davi Capistrano joined the ranks of the PCB and became involved in a military uprising against the government of President Getúlio Vargas in 1935. Sentenced to prison, he managed to escape into exile in Uruguay. He then joined a group of Latin Americans who volunteered to fight on the Republican side in the Spanish Civil War – the International Brigades, more specifically the Garibaldi Brigade, commanded by Italian communist leader Luigi Longo. He participated in several battles, including the famous Ebro campaign.

When the Spanish conflict ended (with the victory of the Francoist forces), Capistrano moved to France. There he was recruited by André Marty, a communist leader, and participated in the French Resistance at the beginning of World War II. Early in the conflict, he was taken prisoner and detained in

(New York: Fordham University Press, 2010), 312–24; P. Connerton, *How Modernity Forgets* (Cambridge: Cambridge University Press, 2009), 7–39 and 132–47; A. Assmann, *Cultural Memory and Western Civilization: Functions, Media, Archives* (Cambridge: Cambridge University Press, 2013), 312–24.

the Gurs detention camp in the Pyrenees (run by the Vichy Regime). After several years of detention, Capistrano was released and returned to Uruguay. In 1944, after Brazil entered World War II, he returned to his home country and enlisted in the Brazilian army. However, because his conviction for participating in the 1935 uprising was still in force, Capistrano remained in prison in the state of Rio de Janeiro until April 1945, when he was granted amnesty.

Following the end of the Vargas regime, Capistrano performed various political functions in the Communist Party, and was elected a state deputy in Pernambuco (a north-eastern Brazilian state). When the communist party was outlawed in 1947, Capistrano nevertheless remained politically active in secret and continued to hold party positions. In the 1950s, he was sent to a leadership training school of the Communist Party of the Soviet Union in Moscow for two years. Upon his return to Brazil, he continued being politically active, always within the structures of the Communist Party.

Soon after the 1964 coup d'état, Capistrano came under persecution by the military regime. He nonetheless managed to remain active in the resistance movement, even editing an underground newspaper. His party sent him to Czechoslovakia in 1972, and he spent two years in Prague. When, upon returning to Brazil in March 1974, Capistrano crossed the Uruguayan border, he was intercepted by agents of the military government; it is presumed that he was taken to a clandestine torture and detention center in the city of Petrópolis and executed there. His remains have never been located, and he is recognized by statute as a politically disappeared person.

Davi Capistrano remained attached to the PCB throughout his political life and followed the party's orientation in the struggle against the dictatorship. The party had opted for a "peaceful way" of fighting the Brazilian military regime, that is, it rejected the armed struggle as an instrument of resistance. After the other organizations that opposed the regime were annihilated or neutralized by the military, an operation to eliminate the main leaders of the PCB was also unleashed. It was in this operation that Capistrano was captured, detained, and murdered.[179]

179 The information related to Capistrano's itinerary was taken from several sources, the main ones being: Centro de Pesquisa e Documentação de História Contemporânea do Brasil; "Davi Capistrano da Costa," in *Dicionário Histórico-Biográfico Brasileiro*; www.fgv.br/cpdoc/acervo/dicionarios/verbete-biografico/davi-capistrano-da-costa (last accessed July 25, 2022); N. Miranda and C. Tibúrcio, *Dos filhos deste solo*, 406–8; Report of the Brazilian National Truth Commission (2015, vol. III, 1616–621), http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/volume_3_digital.pdf (last accessed July 31, 2022). On the involvement of Brazilians in the Spanish Civil War, see P. R. Almeida, "Brasileiros na Guerra Civil Espanhola: combatentes na luta contra o

2 Carlos Marighella (1911–1969)

Of the three opponents to the Brazilian dictatorship portrayed here, only Carlos Marighella, born in Salvador (Bahia), was not a politically disappeared person. One of the most prominent leaders of the resistance, his trajectory is unique and remarkable. In his youth, he joined the Communist Party and moved to Rio de Janeiro, where he frequently clashed with the political police of Getúlio Vargas, president of the Republic between 1930 and 1945. He was arrested and tortured several times. At the end of Vargas' regime, he was released, returned to political activity, and was elected to the National Constituent Assembly. He played an active role in drafting the Brazilian Constitution of 1946.

In 1952, Marighella traveled to China to study its revolution. He continued to be active in the PCB until 1964, when the coup d'état took place in Brazil. From then on, he distanced himself from the party's choice of how to resist the dictatorship. As mentioned earlier, the PCB opted for peaceful resistance and refused to engage in an armed struggle or to build guerrilla units, but Marighella pursued a different option. In 1967 he traveled to Cuba for the First Conference of the Latin American Solidarity Organization. There, he came into contact with members of communist groups from across Latin America, including Ernesto Che Guevara. He was expelled from the PCB for his defense of the armed struggle as a method to combat the Brazilian military dictatorship.

Back in Brazil, in February 1968 Marighella founded the *Ação Libertadora Nacional* (ALN, National Liberation Action), which was organized in small autonomous units with the purpose of executing direct actions to fight the regime, such as bank robberies, attacks on military institutions, and participation in the kidnapping of diplomats and foreign representatives. This line of action was innovative, as it combined the "guerrilla focus," widely used in the Cuban Revolution, with urban guerrilla tactics. It was the creation of this particular form of action that brought a global attention to Marighella.

In 1969 Marighella wrote the "Minimanual of the Urban Guerrilla," a small book (fifty-one typewritten pages) that had a significant impact on revolutionary struggles beyond the American continent. Marighella became known to the European public through an interview given to the Belgian journalist Conrad Detrez, published in *Front* magazine in November 1969. That same

fascismo," *Revista de Sociologia e Política* 12 (1999), 35–66. On the Gurs detention camp, see A. Rutkowski, "Le camp d'internement de Gurs," *Le Monde Juif* 16(4) (1980), 128–47.

year, texts authored by Marighella were published in *Les Temps Modernes* on the initiative of Jean-Paul Sartre (who had received them in Rome in a French translation by an ALN member, Ana Corbisier). The Minimanual was published in France by Éditions du Seuil in March 1970. The French Ministry of the Interior decided to prohibit the book's sale, which generated an immediate reaction from twenty-four publishers who re-released it and, by doing so, rendered the ban ineffective. In 1971 the Minimanual was published in English, and its readership grew quickly in the context of student revolts and the political struggles in Europe and Latin America.

Contemporary interpretations of the Minimanual as well as Marighella's own proposals for how to combat dictatorship hold that he was mainly influenced by the actions of the French resistance during the German occupation in World War II, the initiatives of the Algerian guerrillas in the War for Independence, and the fight against British colonial domination in Palestine in the 1940s. Marighella himself, when interviewed by Conrad Detrez, named the Vietnamese struggle against US invasion and the military actions undertaken by the Cuban revolutionaries as significant.

Marighella was killed in an ambush by Brazilian forces in São Paulo on November 4, 1969. After the end of the military regime, he was recognized by two state commissions as a victim of the dictatorship. His remains were transported to his hometown Salvador, where they rest in a tomb designed by the architect Oscar Niemeyer. The writer Jorge Amado and the abbot of the São Bento Monastery, Dom Timóteo Anastácio, delivered the eulogy at the funeral ceremony held on December 10, 1979.[180]

3 Osvaldo Orlando da Costa (1938–1974)

One of the most remarkable characters of the Brazilian resistance to the dictatorship was Osvaldo Orlando da Costa. Born in the countryside of Minas Gerais (southeastern Brazil), the grandson of slaves, Osvaldo da Costa

180 All information regarding Carlos Marighella and the Minimanual of the Urban Guerrilla was taken from the following sources, among several others: M. Magalhães, *Marighella: o guerrilheiro que incendiou o mundo* (São Paulo: Companhia das Letras, 2012), 499–512; M. Malin, "Carlos Marighella," in *Dicionário Histórico-Biográfico Brasileiro*, Centro de Pesquisa e Documentação de História Contemporânea do Brasil; www.fgv.br/cpdoc/acervo/dicionarios/verbete-biografico/marighella-carlos (last accessed July 25, 2022); J. Gorender, *Combate nas trevas – a esquerda brasileira: das ilusões perdidas à luta armada* (São Paulo: Ática, 1987), 153–78; Miranda and Tibúrcio, *Dos filhos deste solo*, 96–103; Report of the Brazilian National Truth Commission (2015, vol. III, 361–73), available at: http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/volume_3_digital.pdf (last accessed July 31, 2022). The English edition of the Minimanual: C. Marighella, *Mini-Manual of the Urban Guerrilla* (Montreal: Abraham Guillen Press, 2002).

moved to Rio de Janeiro where he took a technical course on mechanics and engineering. He was a boxer, competing and winning tournaments in the state of Rio de Janeiro, and also served in the army, graduating with the rank of officer.

The year 1961 represented the beginning of a unique period in Brazil's social and political history. Pressure from workers and unions for reforms increased, as did the protest against economic inequality. At the same time, the international situation after the Cuban Revolution was tense and full of uncertainties. North American pressure against the government of João Goulart was growing, and internal initiatives for political destabilization were taking shape. In that same year, 1961, Osvaldo da Costa had his first international experience: He was awarded a scholarship and went to Czechoslovakia to study mining engineering at the Technical University of Prague. It was during his time in Europe that his political militancy was consolidated. He joined the Communist Party of Brazil (PCdoB), a party that split off from the PCB and its orthodox Soviet orientation. In April 1964, right after the coup d'état in Brazil, Osvaldo da Costa left for military training in China, where he stayed for six months, in Beijing and Nanking.

The PCdoB chose to adopt the Chinese and Albanian political line of action. This model was of a "pure" guerrilla focus, that is, warfare that was entirely connected to the life of the peasants. The idea, mirrored in the experiences of the Chinese revolution, was to stimulate a revolution by establishing a rural guerrilla war, in places that were difficult to access for the repressive forces. For the strategy conceived by the PCdoB, "the revolutionary struggle would have its most important stage in the Brazilian rural area, through a war sustained, from its beginning, by strong popular contingents, especially peasants."[181]

The leadership of the PCdoB decided to establish the base for its guerilla activities in a remote area in northern Brazil, on the banks of the Araguaia River. Osvaldo Orlando da Costa was the first party leader to arrive there and established solid ties with the region's population. Several accounts testify to his popularity among the peasants. After several unsuccessful attempts to disband the fighters of the PCdoB, the Brazilian army decided to annihilate the guerrillas. The vast majority of guerrilla members were summarily executed, and many are still missing. In 1995, during the period of Brazilian re-democratization, a federal law recognized the killing and disappearance of persons by the state for political reasons. Of the 136 cases known at that time,

181 Miranda and Tibúrcio, *Dos filhos deste solo*, 231.

fifty-eight are PCdoB guerrilla fighters from Araguaia. Osvaldo da Costa was one of the last to be executed, according to sources, in February 1974. His body was never found.[182]

Concluding Remarks

Latin American dictatorships made extensive use of various legal mechanisms. Parliaments and courts suffered intervention in their institutional operations or were simply closed down. In addition, the legal system was used as a tool for repression, investigation, and the punishment of opponents. This leading role of legal institutions can be explained by two factors, both addressed throughout Section 6.2: the attempt to legitimize the regimes (which sought to consolidate themselves in institutional terms) and the wish to persecute and punish opponents (through the activation of courts and prosecuting agencies).

It is important, however, to place many of the reasons used by political actors (military and civilian) to justify the institutional break with the preexisting regimes within the context of the Cold War and contemporary geopolitical conflicts, which greatly affected the continent but were nonetheless external to Latin America. These conditions influenced the political and legal practice of the dictatorships and triggered the creation of networks of collaboration and resistance, which then also spread beyond Latin America. In other words, the global element was a central feature of the dictatorships and worked as an active and intense factor for mobilizing both repressive forces and resistance movements. The pivotal role of the Cold War and its aftermath, for example, was crucial to the building and consolidation of dictatorships, as exemplified by Operation Condor, which was one of the modalities employed for expanding repressive activities. At the same time, resistance to authoritarian regimes also relied on an intense transnational mobilization through political actors, organizations, and institutions that reached a global sphere of action on behalf of freedom and human rights.

As we reach the final stage of our historical reconstruction, one question remains to be asked: How did the dictatorships come to an end?

182 Information about Osvaldo Orlando da Costa comes from the following sources: R.L. Petta, *A memória dos moradores do Araguaia sobre "Osvaldão": liderança, luta e resistência!* (São Paulo: Masters Dissertation, School of Arts, Sciences and Humanities, 2017), 31–43; R. Vecchi, "O passado subtraído da desaparição forçada: Araguaia como palimpsesto," *Estudos de literatura brasileira contemporânea* 43 (2014), 133–49; Gorender, *Combate nas trevas*, 207–41; Miranda and Tibúrcio, *Dos filhos deste solo*, 230–72; Report of the Brazilian National Truth Commission (2015, vol. III, 1590–594), available at: http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/volume_3_digital.pdf (last accessed July 31, 2022).

The decline of authoritarian regimes was shaped by a mix of different elements. Foreign policies, economic issues, and actions by opponents all contributed to this demise. Nevertheless, the patterns, speed, and outcomes of this demise were different in each case. As noted earlier, Latin American dictatorships, notably the ones in Chile, Brazil, and Argentina, shared a foundational element: the search for a legal justification. Institutional acts, *bandos*, decree-laws, secret acts, in short, a series of rules established by military *juntas* all sought to translate into legal terms the violent break with the rule of law. These disruptive measures were followed by attempts at institutionalization of varying intensity, form, and time, as observed earlier.

This authoritarian legacy had to be confronted. Persecution, torture, executions, and disappearances presented a huge challenge for transitional justice policies (see, in this regard, Section 6.3). Moreover, these practices cast a shadow over the institutionalization of the post-dictatorship legal order. Doubts have arisen as to how to deal with the remaining elements of the authoritarian legal order. What to do with the constitutional documents produced by the dictatorships? What type of continuity or disruption must be established between the practices of legal professionals in the authoritarian and the democratic periods?

Naturally, the answers will be diverse. Consider, briefly, as a mode of example, the challenges involved in the constitution-making process. At first glance, Brazil and Chile seem to have followed similar paths. In both cases, intense negotiations took place between the military occupants of power and civilian politicians interested in re-democratization. In both countries, the military retained a considerable share of the political power even at the end of the authoritarian regime. The similarities end there, however, as the chronology was very different. In Brazil, a constitution was enacted immediately after the end of the dictatorship, with significant democratizing elements. In Chile, the 1980 constitution, drafted by a commission directly controlled by the military *junta* and led by jurists loyal to the regime, was upheld.[183] Evidently, factors other than a constitution are also involved in defining the continuity or rupture of the legal system, such as the efficacy of amnesties

183 On September 4, 2022, a referendum was held on the draft constitution proposed by a Constitutional Convention elected in 2020 with the specific purpose of preparing a new constitution for Chile. The text was rejected by the majority of voters (about 62 percent voted for rejection, 38 percent for approval). The 1980 Constitution remains in full force. For a general overview, see www.bbc.com/mundo/noticias-america-latina-62790788 (last accessed Feb. 20, 2023). For a discussion, from various perspectives, of the factors that led to the text's rejection, see the symposium organized by I-CONnect (blog of the International Journal of Constitutional Law): www.iconnectblog.com/tag/chilean-constitution/ (last accessed Feb. 20, 2023).

granted during the dictatorship, the permanence of authoritarian practices in democratic periods, and many others.

In all these cases, a time-driven operation came into play. First, the most essential question was how to overcome mechanisms granting exceptions, which were typical of authoritarian regimes. But the new democratic regimes also faced another risk – which, to a certain extent, persisted throughout the post-dictatorial period in Latin America – namely the normalization of the authoritarian rule, that is, incorporating legal practices developed during the dictatorships into democratic regimes.

The literature on the demise of dictatorships tended not to center on this risk of normalization. Instead, a persistent topic in the historical literature related to authoritarian regimes, especially in Latin America, included narratives of transition. For a long time, the end of dictatorships was associated with the form, duration, and characteristics of political processes labeled "transitions." An extensive literature has built up on the subject, including a discrete field of political science, the so-called "transitology."[184] Nevertheless, narratives of transition have their pitfalls; they grant a special status to the supposed "time of transition," which should enable societies that lived under dictatorships to prepare for a transition to democratic rule. But what constituted this time of transition? Historical observation indicates that Latin American nations that faced dictatorships in the context of the Cold War were affected (and still are) by the political struggles waged between the regime (and its civilian and military supporters) and the various forms of resistance (articulated both internally and through transnational mobilization). As a result, there are no qualitative differences between the "time of dictatorships" and the "time of transitions." Instead, there are different phases of political dispute, with the "transition" being merely a stage in this struggle, in which the political actors seek to maintain a certain amount of power and influence.[185] Naming

184 See, among many other references, G. O'Donnell, P. C. Schmitter, and L. Whitehead (eds.), *Transitions from Authoritarian Rule: Latin America* (Baltimore and London: Johns Hopkins University Press, 1993); J. J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore and London: Johns Hopkins University Press, 1996); K. Stoner and M. McFaul (eds.), *Transitions to Democracy: A Comparative Perspective* (Baltimore: Johns Hopkins University Press, 2013).

185 For a critical approach on the idea of transition, see the pioneering works of W. Thayer, *La crisis no moderna de la Universidad moderna (epílogo de El Conflicto de las Facultades)* (Santiago de Chile: Editorial Cuarto Propio, 1996); Thayer, "La firma Pinochet," *Re-Presentaciones – Investigación en Comunicación* 15 (2021), 122–43. See also C. Paixão and C. P. Carvalho, "Mudança constitucional, luta política e o caminho para a democracia: uma análise do "emendão" de 1982," *História do Direito: RHD* 2(3) (2021), 300–19.

a particular time "transition" may confer greater density to this period, but it tends to overemphasize the willingness to negotiate by those occupying power. Suffice it to consider the cases of Chile and Brazil, where the military retained political capital even after the end of the dictatorships. In these cases, the transition concealed strategies by the exiting regime to exert influence in the ensuing political arena. The time of transition lingered after the dictatorial regime and projected its effects into the immediate future.[186] This issue, transition, illustrates the complexity of the debate surrounding dictatorships, their frequent use of legal institutions and emergency measures, and their impact on the democratic regimes that were established thereafter, often bringing to the forefront their particular features, setbacks, and uncertainties.

. . .

6.3 Transitional Justice and Human Rights

RUTI TEITEL AND VALERIA VEGH WEIS

This section examines the relations between human rights, transitional justice, and the global legal framework. While most narratives that examine this issue tend to focus on how European powers contributed to the development of these fields, we wish to offer a different perspective, that of the Latin American contribution. In this section, we will show that the development of human rights law and transitional justice during the late twentieth and early twenty-first centuries were the consequence of crucial struggles that, in periods of political transition, sought to respond to mass atrocities and demanded different forms of accountability. As a result, since the 1980s, the most significant advancements in human rights and the most remarkable transitional processes worldwide happened in the Global South (mainly in Latin America but also in South Africa and Rwanda, among many others).[187]

186 This concept of transition time has been called, by Massimo Meccarelli, a kind of "ascriptive time." Cf., in this regard, M. Meccarelli, "Time of innovation and time of transition shaping the legal dimension: A methodological approach from legal history," in M. Meccarelli, C. Paixão, and C. Roesler (eds.), *Innovation and Transition in Law: Experiences and Theoretical Settings* (Madrid: Dykinson, 2020), 23–44; on the historical significance of transitions, also C. Paixão and M. Meccarelli, "Constituent power and constitution-making process in Brazil: concepts, themes, problems," *Giornale di Storia Costituzionale* 4(2) (2020), 29–54.

187 D. A. Zysman Quirós, "Punishment, Democracy and Transitional Justice in Argentina (1983–2015)," *International Journal for Crime, Justice and Social Democracy* 6(1) (2017), 88–102.

Our aim therefore is to break with a narrative that understands normative transfers as unidirectional processes that begin with empires and imperial legal projects, and insists that the Global South can (must?) learn from the experience of the Global North. This account has been so pervasive that it has led, in the words of Santos, to an "epistemicide" that "either silenced or made invisible, irrelevant, or non-existent" the expertise of populations traditionally subjected to colonial or neocolonial sociability. Santos concludes that "in the last 500 years, the colonized world has not just been a source of raw materials for the industries of the metropolis, it has also been a source of raw materials for metropolitan sciences."[188]

Breaking with the mainstream logic that centered on the European contribution or that, in the exceptional instances when it did pay attention to the South, tended to look at it from a Northern perspective and was largely expressed by Northern scholars and practitioners, this section aims to clarify the role of Latin American actors as vital participants in, and not just recipients of, European and international law.[189] Moreover, the section will pay attention to the crucial role of Latin American civil society in initiating legal innovations, particularly in Argentina.[190] In this regard, it will demonstrate how norms transfer from and to the Americas, and from and to the European and international spheres, operate not only in terms of the relevant legal regimes and related jurisprudence but also by affecting social practices and politics.

To elaborate this argument, this section focuses on the normative development of a distinctive human rights violation: the crime of "enforced disappearances." This account illuminates the role of Latin America and its strong civil society as the leading normative protagonists within a network of global interactions that function through a dialogic process in which Latin America both *draws from* and *informs* law and legal practices elsewhere

188 See B. de Sousa Santos and M. P. Meneses (eds.), *Knowledges Born in the Struggle: Constructing the Epistemologies of the Global South* (New York: Routledge, 2020), xvii–xliii, Chapters 3 and 4.

189 J. Braithwaite, "Criminology, Peacebuilding and Transitional Justice: Lessons from the Global South," in K. Carrington, R. Hogg, J. Scott, and M. Sozzo (eds.), *The Palgrave Handbook of Criminology and the Global South* (New York: Palgrave Macmillan, 2018), 971–90; V. Vegh Weis, "Towards a Critical Green Southern Criminology: An Analysis of Criminal Selectivity, Indigenous Peoples and Green Harms in Argentina," *International Journal for Crime, Justice and Social Democracy* 8(3) (2019), 38–55; K. Härter and V. Vegh Weis, "Transnational Criminal Law in Transatlantic Perspective (1870–1945): Introductory Notes, Initial Results," *Rechtsgeschichte – Legal History* 30 (2022), 84–94. On the term Latin America and its multiple dimensions, see Duve and Herzog's introduction to this volume.

190 K. Sikkink, "From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights," *Latin American Politics and Society* 50(1) (2008), 1–29.

around the globe. Specifically, it will highlight the contributions of the Inter-American Human Rights System and engaged Southern civil society actors such as NGOs or lawyers for victims' families, who have developed and brought to court claims after successive administrations failed to respond to wrongdoings, giving birth to a creative jurisprudence that has also influenced European and international law.[191]

The Southern Perspective

Global agreements on civil and political rights can work as valuable tools to prevent violations of human rights through early denunciation or, when these violations have already taken place, to bring awareness both locally and internationally to these breaches. Most particularly, international human rights and humanitarian law can be used by engaged social actors to push forward democratic transformations after periods of political violence, to bring perpetrators to justice before either domestic or international courts, to secure reparations for victims, and even to help develop public policies aimed at avoiding the repetition of such crimes.

Given these characteristics of modern geopolitical history (colonization, neocolonization) and the experiences with massive violence, resistance, and transition to democracy, it is not surprising that the South has been a true laboratory of transitional justice, especially in the 1980s and early 1990s. Yet as Carozza points out:

> [E]ven among human rights enthusiasts and activists, Latin America has long been regarded as the object of human rights concerns more than a contributor to human rights thinking. Or rather, its "contributions" have been perceived almost exclusively in negative terms. For example, the creativity of its repressive regimes in fashioning new forms of abuse, like the "disappearance," provoked the governments and human rights organizations of Europe and North America to come up with new norms and institutions to address the problems.... But the affirmative dimensions of human rights in Latin America, instead, have much more often been seen to be tarnished and inferior copies of grand, rich European ideas.[192]

Identifying the problematic logic behind this structural silencing or systemic diminishment of Southern contributions, the field of Southern/Decolonial

191 For a comprehensive discussion of these petitions, see P. Palacios Zuloaga, "Judging Human Rights in Latin America: The Riddle of Compliance in Inter-American Human Rights Law," unpublished J.S.D. dissertation, New York University (2013).

192 P. Carozza, "From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights," *Human Rights Quarterly* 25 (2003), 281–313, at 283.

Studies seeks to shed light on how such views hinder the democratization of knowledge and limit the story that can be told. Because research has generally excluded the experiences and perspectives of the Global South, we still lack a deeper analysis of fundamental issues that would enrich our understanding of violations in the Global North and, potentially, worldwide.[193] Among other things, this is the case because neither human rights instruments nor the jurisprudence emanating from regional and global tribunals can be understood as politically neutral or informed solely by legal and/or constitutional principles. Instead, it is inevitably shaped by struggles and interests based on criteria of class, gender, race, and ethnicity, among others.

A Marxist critique to the first universal normative instrument, the Declaration of the Rights of Man and the Citizen passed by the French revolutionary National Assembly in 1789, argued that reality was ignored in the text.[194] According to this critique, while the "citizen" (the abstract figure) was conceived as a rights holder who represents the ideal version of the law, the "man" (the concrete person) was the real person, conditioned by the socio-economic context that may well inhibit the enforcement of the proclaimed rights.[195] For example, the Declaration established the formal freedom to work, but the market imposes limits that may leave many unemployed; the Declaration recognized freedom of speech and association, but exercising it requires the appropriate means, which are often not readily available, hence resulting in the silencing of many views.[196] Similarly, international law also generally assumes the formal equality of all actors, requiring states and individuals to comply with the same globalizing normative order despite the radically varying situations and the consequently different efforts demanded of each member state to achieve the stipulated aims.[197] In other

193 B. de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Epistemologies of the South) (New York: Routledge, 2014).

194 For a related contemporary critique, see S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010); L. Obregón, "Peripheral Histories of International Law," *Annual Review of Law and Social Science* 15 (2019), 437–51.

195 V. Vegh Weis, *Marxism and Criminology: A History of Criminal Selectivity* (Studies in Critical Social Sciences 104) (Leiden: Brill, 2017); and V. Vegh Weis, "A Marxist Analysis of International Criminal Law and Its Potential as a Counter-Hegemonic Project," in F. Jeßberger, L. Steinl, and K. Mehta (eds.), *International Criminal Law – A Counter-Hegemonic Project?* (International Criminal Justice Series 31) (The Hague: T.M.C. Asser Press 2022), 63–84.

196 K. Marx, "On *The Jewish Question*" (1843), *Marxists Internet Archive*, www.marxists.org/archive/marx/works/1844/jewish-question/ (last accessed Feb. 17, 2023).

197 Vegh Weis, "A Marxist Analysis."

words, international law speaks to the global, but it tends to overlook structural differences and diversity in local contexts.

This Northern conception of human rights has been characterized in the following way:

> [R]ights are universally valid irrespective of the social, political and cultural context in which different human rights regimes operate in the diverse regions of the world; they start from a conception of human nature that is individual, self-sustaining and qualitatively different from non-human nature; universal declarations, multilateral institutions (courts and commissions) and non-governmental organizations (predominantly based in the North) define what is a human rights violation; the recurrent phenomenon of double standards in assessing human rights compliance in no way compromises the universal validity of human rights; respect for human rights is much more problematic in the global South than in the global North.[198]

Yet, from a Southern viewpoint, rights are often understood to be contextualized, with civil and political rights conceptualized as indivisibly attached to socio-economic ones. In the South, rights are often considered a collective, not an individual enterprise. It is often the case that fundamental rights for the South (e.g., debt relief as a human right) are ignored by Northern member states. Often ignored phenomena in the North can be incorporated as fundamental rights in the South, including a stand for debt relief, historical justice for the colonial past, and global equality.[199] The expansion of human rights to include collective and historical claims is a result of the crucial particularities regarding normative knowledge in the South, where it is not conceived in abstract academic settings and detached from social suffering, but, on the contrary, is generally "born in struggles against capitalism, colonialism, and patriarchy, produced by the social groups and classes that have suffered most from the injustices caused by such domination," and where expertise is entwined with social processes on the ground.[200]

Drawing attention to Southern contributions to human rights thinking and transitional justice does not seek to displace or negate but rather aims

198 B. de Sousa Santos, *If God Were a Human Rights Activist* (Stanford: Stanford University Press, 2015).

199 R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); and W. Kaleck, "On Double Standards and Emerging European Custom on Accountability for Colonial Crimes," in M. Bergsmo, W. Kaleck, and K. Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law* (Brussels: Torkel Opsahl Academic EPublisher, 2020), 1–40.

200 Sousa Santos and Meneses, *Knowledges Born in the Struggle*; B. de Sousa Santos and B. Sena Martins, *El pluriverso de los derechos humanos. La diversidad de las luchas por la dignidad* (Epistemologías del Sur) (Mexico City: Ediciones AKAL, 2020).

to *complement* prevailing knowledge of Northern legal developments. Santos conceptualized this view as an "ecology of knowledge."[201] Contrary to "knowledge transfers," a term often used to describe how knowledge evolves and spreads, stressing disequilibrium, tensions, contradictions, and conflict, Santos uses the expression "ecology of knowledge" to highlight stability and equilibrium. The phrase also expresses an aspiration to redress the balance in our knowledge cosmovision, as it views Northern or Southern "bits" of knowledge in and of themselves as partial or incomplete, and acknowledges this reciprocal incompleteness as a necessary condition for summing up in order to build comprehensive knowledge.[202]

When applied at the jurisprudential level, "ecology of knowledge" can be framed as "cross judging," that is, the regular reference to jurisprudence of courts and tribunals from other legal systems, often outside hierarchic or other conventions relating to uses of precedent or sources of law.[203] In the context of international law, cross-judging describes the transfer of legal knowledge to and from the different regional courts and international bodies. It takes place even when the various courts do not explicitly cite each other, and reveals how approaches taken by different tribunals can strengthen each other's arguments. Thus, while international law is often characterized as decentralized, fragmented, and lacking in legal integration *vis-a-vis* domestic law, cross-judging provides a counter-narrative,[204] emphasizing the existence of a network of global interactions through a dialogic process in which Latin America both *draws from* and *informs* law and legal practices elsewhere around the globe.

Human Rights and Transitional Justice in Latin America: The Crime of Enforced Disappearance and the Centrality of Grassroots Organizations

Human rights are strongly entangled with the contemporary history of Latin America. Of particular importance are Latin American contributions to the development of transitional justice in the 1970s and 1980s. Though transitional

201 Sousa Santos, *Epistemologies of the South*.
202 Sousa Santos and Meneses, *Knowledges Born in the Struggle*.
203 R. Teitel and R. Howse, "Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order. Symposium – The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems," *New York University Journal of International Law and Politics* 41 (2009), 959–90.
204 M. Koskenniemi and the Study Group of the UN International Law Commission, "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law," A/CN.4/L.702 (Geneva: United Nations, 2006), https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (last accessed Jan. 19, 2022).

justice as an area of study only emerged around twenty years ago, it has rapidly acquired recognition as an independent field.[205] This recognition is based on the observation that similar experiences in dealing with the aftermath of periods of state repression and atrocities "travel" from one country and region to another and very often use the language and the instruments of the law in general and human rights in particular. In other words, norms, legal practices, and networks from one region are replicated, transformed, and vernacularized in others under new and local premises. Transitional justice seeks to capture these entanglements as well as to adopt a forward-looking emphasis that wishes to transform cross-knowledge into mechanisms that would guarantee non-recurrence through prevention.

The term "transitional justice" was coined by Ruti Teitel, who defined it as "a distinctive conception of law and justice in the context of political transformation."[206] The leading Global North NGO working on the topic, the International Center for Transitional Justice (ICTJ), refers to transitional justice as "a branch of justice that states a different approach to the conventional, assumed by societies to address the legacy of widespread and systematic violations of human rights."[207] Another key definition relates to the forms of justice. The UN Secretary-General's report *The rule of law and transitional justice in conflict and post conflict societies* defined transitional justice as comprising "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses,"[208] Stanley Cohen described it as "how societies going through democratic changes should deal with atrocities committed by the previous regime,"[209] and, according to Jon Elster, it is "made up of the processes of trials, purges, and reparations that take place after the transition from one political regime to another."[210] Overall,

205 K. McEvoy, "Travel, Dilemmas and Nonrecurrence: Observations on the 'Respectabilisation' of Transitional Justice," *International Journal of Transitional Justice* 12(2) (2018), 185–93; R. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (New York: Oxford University Press, 2014).

206 Teitel, *Transitional Justice*, 4; R. Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation," *The Yale Law Journal* 106(7) (1997), 2009–80.

207 International Center for Transitional Justice (ICTJ), "What is Transitional Justice?," *International Center for Transitional Justice* (2020), www.ictj.org/about/transitional-justice (last accessed Mar. 27, 2023).

208 UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, S/2004/616 (Aug. 23, 2004), 4.

209 S. Cohen, "Unspeakable Memories and Commensurable Laws," in S. Karstedt (ed.), *Legal Institutions and Collective Memories, Unspeakable Memories* (Oxford: Hart Publishing, 2009), 27–39, at 29.

210 J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 1.

transitional justice encompasses the broad range of mechanisms and practices that make it possible to transition from a period of massive persecution or related abuses to a more human rights-protective aftermath.

Latin American contributions to transitional justice are tied to the political situation in the 1970s and 1980s. During this period and amid the geopolitics of the Cold War, the so-called "Operation Condor," a network of collaborations between dictatorships in the region orchestrated with the support of the United States, aimed at eliminating left wing movements. Argentina, Bolivia, Brazil, Chile, Paraguay, Uruguay, and, to a lesser extent, Colombia, Peru, and Venezuela were involved in this continental program of military terror. Meanwhile, Panama was under the dictatorship of Manuel Antonio Noriega; Colombia was struggling with a long-lasting armed conflict, and Guatemala and the Dominican Republic were amid civil war.[211] The regional policy of terror was predicated on extrajudicial killings and torture, but also on a novel method later labeled "enforced disappearances": a pattern of abductions of civilians followed by governmental cover-up and a blackout of information about the victims.

In these cases, the state was the perpetrator, and therefore would not be the one pushing for accountability, nor could the criminal justice system be employed to stop these violations. Instead, a bottom-up movement emerged, even amid the state terror, which sought justice abroad by appealing to organizations and public opinion on the international level. In an important legal strategy of resistance, civil society organizations promoted and defended the notion of "disappearance" as a specific legal category of atrocity, describing those subjected to this unlawful practice as the "disappeared" or *desaparecidos*. Particularly active were the "Mothers and Grandmothers of Plaza de Mayo" in Argentina, who realized early on the political potential of the term.[212] Accepting the lack of information as proof of the death of their children, they argued, would be to absolve the state from the responsibility of accounting for their lives. Sticking to the category of "disappeared," therefore, became an act of resistance and a tool for sustaining claims before the state.[213] Through systematic claims-making and denunciation of the kidnappings, relatives of

211 J. Agüero García, "América Latina Durante La Guerra Fría (1947–1989): Una Introducción," *InterSedes* 17(35) (2016), 2–34.

212 V. Vegh Weis "The Relevance of Victims' Organizations in Transitional Justice Processes: The Case of the Grandmothers of Plaza de Mayo in Argentina," *Intercultural Human Rights Law Review* 12 (2017), 1–70.

213 E. Schindel, "Under-Researched, Transnational, Silent: Disappearances in Transit to Europe," www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/10/under-researched (last accessed Jan. 20, 2022).

the victims helped give a new name to state terror by creating a new legal category that established the concept of "enforced disappearance." In other words,

> rather than being passive spectators of the international theatre, Latin Americans became writers, directors, producers, and actors of the international response to enforced disappearances. In addition, their strategic advocacy promoted the transformation of the international legal system to respond to the needs and reality present in Latin America.[214]

Latin American human rights activism also led to additional developments. Relatives of the forced disappeared in Latin America gathered in a continental network, FEDEFAM (*Federación Latinoamericana de Familiares de Detenidos-Desaparecidos*), and gave the definitive impulse to the creation of a UN Working Group on Forced and Involuntary Disappearances in the 1980s, the first thematic mechanism on this crime with a universal mandate.[215] This working group, in turn, fostered the approval of a treaty specifically focused on this crime. In 2006, the UN General Assembly issued the International Convention for the Protection of All Persons from Enforced Disappearance, which in article 2 defines the crime as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." The implementation is monitored by the Committee on Enforced Disappearances.

Latin American activism has also been crucial in promoting the development of other practices, such as forensic examinations, to prove enforced disappearances. In more philosophical terms, this activism also made it possible to distinguish death, even murder, from disappearance, by illuminating the consequences of the ongoing denial or cover-up, which impedes closure and the possibility of mourning.[216]

214 A. E. Dulitzky, "The Latin-American Flavor of Enforced Disappearances," *Chicago Journal of International Law* 19(2) (2019), 423–89.

215 Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos (FEDEFAM), "Fighting against Forced Disappearances in Latin America," www.desaparecidos.org/fedefam/eng.html.

216 G. Gatti, "Las narrativas del detenido-desaparecido (o de los problemas de la representación ante las catástrofes sociales)," *CONfines. Revista de Relaciones Internationales y Cienca Política* 4(2) (2006), 27–38, www.redalyc.org/pdf/633/63320403.pdf (last accessed Jan. 25, 2022).

Born out of grassroots usage as part of civil struggle against Latin American dictatorships, denunciations of forced disappearances ultimately gave way to the transitional justice processes of the 1980s.[217] When the transitions to democracy took place, these grassroots actors also occupied a central role in fostering transitional justice remedies that would seek justice for victims of enforced disappearances – as well as of other crimes, including extrajudicial killings and torture – in a particular manner that would set new paths worldwide. It is generally agreed that the modern history of human rights began with the Nuremberg Trials in the aftermath of the Second World War along with associated developments, such as the United Nations Charter, the Universal Declaration of Human Rights, and subsequent covenants.[218] Notwithstanding the horrors of the Holocaust, the focus at Nuremberg and related war crimes trials was on the perpetrators rather than the victims. By contrast, transitional justice as it evolved in Latin America, and to some extent South Africa in the 1990s, was distinct because it explicitly referred to the needs of victims and these actors were involved in the deliberations. The aim was to express "an awareness of the centrality of victims/survivors and their needs throughout the process."[219]

A crucial means of meeting victims' needs for information and recognition are truth commissions, which have evolved into mechanisms for victims to bear witness. The first modern commission was the 1983 Argentine truth commission, also known as the National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP). Since the creation of this commission, over forty others have been established worldwide to investigate massive human rights violations, with more than a third taking place in Latin America.[220] CONADEP's success, which paved the way for similar commissions elsewhere around the globe, was tied to the commitment of civil society organizations.[221] Grassroots activism not only helped raise awareness of the centrality of the crime of enforced disappearance, it also supported CONADEP's work while pushing the scope of its

217 See Section 6.2 in this volume.

218 R. Teitel, "Human Rights Genealogy," *Fordham Law Review* 66(2) (1997), 301–18.

219 S. Robins "Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal," *International Journal of Transitional Justice* 5(1) (2011), 75–98.

220 E. Skaar, E. Wiebelhaus-Brahm, and J. García-Godos, *Exploring Truth Commission Recommendations in a Comparative Perspective: Beyond Words* (Series on Transitional Justice 27) (Cambridge: Intersentia, 2022), vol. I.

221 E. Crenzel, "Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice," *International Journal of Transitional Justice* 2(2) (2008), 173–91.

mandate. For example, during the commission's investigative period, the victims' organizations pushed it to search for the disappeared in different locations. Later on, they also pressed the commission to issue more ambitious recommendations. Once the final CONADEP report, entitled *Nunca Más*, was released, the victims' networks helped disseminate the commission's findings and established them as the authoritative record. Subsequently, these findings led to further accountability by providing the basis for the initiation of criminal cases.[222] Subsequent truth commissions have followed the example of CONADEP by moving away from expert and forensic-led truth-gathering processes to emphasizing survivor testimony, civil society participation, and grassroots projects.[223] In fact, CONADEP's findings led to the Junta Trial (1985), the first criminal process carried out by domestic judges and deploying domestic law that judged the Argentinean perpetrators of massive human rights violations. This process was made possible by the testimonies of courageous survivors and relatives of victims who dared to testify – despite the ongoing risks, given that there was still military opposition, which later led to limiting the prosecutions.[224]

Chile supplies another pathbreaking example of influential transitional justice practices involving strong grassroots organizations and two truth commissions that elaborated detailed recommendations and produced broad memorialization. Indeed, even during Pinochet's dictatorship, human rights groups and relatives of the victims documented and called international attention to the pervasiveness of enforced disappearances and demanded these be recognized as human rights violations.[225] After the transition to democracy in 1990, a first truth commission was convened. However, civil society organizations, particularly the *Cómisión Etica contra la Tortura y la Organización de Defensa Popular*, demanded that the government go beyond the institution of a

222 V. Vegh Weis, "Exploring the World's First Successful Truth Commission: Argentina's CONADEP and the Role of Victims in Truth-Seeking," *Journal of Human Rights Practice* (2023), https://doi.org/10.1093/jhuman/huac060 (last accessed Mar. 27, 2023); P. Lundy and M. McGovern, "The Role of Community in Participatory Transitional Justice," in K. McEvoy and L. McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Human Rights Law in Perspective 14) (Oxford and Portland: Hart Publishing, 2008), 99–120.

223 R. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003), 69–94.

224 V. Vegh Weis, "Argentine Truth Commission," in S. Parmentier (ed.), *Romero: Memory Papers* (Leuven: Leuven University Press, forthcoming).

225 J. Zalaquett, "The Emergence of 'Disappearances' as a Normative Issue Presentation," in C. Booth Walling and S. Waltz (eds.), *Human Rights: From Practice to Policy. Proceedings of a Research Workshop Gerald R. Ford School of Public Policy* (Ann Arbor: University of Michigan, 2010).

simple truth commission and instead create a new mechanism with a broader scope. The result was the Investigative Commission on Truth, Justice and Reparation (*Comisión Investigadora de Verdad, Justicia y Reparación*), which was instituted a decade later.

Later on, the truth commissions in Peru and Guatemala marked another milestone by including – though not without shortcomings[226] – the voices of indigenous peoples and rural communities, who had been systematically marginalized from the political discussion despite the fact that they had been targeted by massive violence during the civil conflicts:[227] For example, 75 percent of the 69,000 people forcibly disappeared and murdered in the Peruvian conflict had Quechua or other indigenous languages as their mother tongue.[228]

An even more recent example of how Latin American grassroots involvement produced legal innovations regarding the crime of enforced disappearances comes from Colombia, where it is estimated that there were between 80,000 and 120,000 victims of such crimes. There, in light of the indifference of the state, relatives of the victims and entire communities developed their own legal and fact-finding methods to seek out the disappeared. Among their many successes was their ability to push the government to legally recognize this crime in 2000 and to create a special unit aimed at tracing those whose whereabouts are unknown, the *Unidad de Búsqueda de Personas dadas por Desaparecidas* (UBPD).[229]

This normative creativity and legal innovation persists in Latin America, drawing from its immediate political past and giving birth to what some have termed a "justice cascade" in human rights, that is, a sustained imperative for accountability and human rights enforcement in the region and globally.[230] The use of human rights discourse helped ensure that these local developments transcended their place of origin and shaped the understandings both

226 P. E. Andriessen, "La Comisión de la Verdad y Reconciliación peruana como una plataforma para la sanación comunal. Un análisis psicosocial," *Xipe Totek* 2(118) (2020), 132–49.

227 S. Rodríguez Maeso, "Política del testimonio y reconocimiento en las comisiones de la verdad guatemalteca y peruana: En torno a la figura del 'indio subversivo'," *Revista Crítica de Ciências Sociais* 88 (2010), 23–55.

228 "El Perú, 10 años después de la Comisión de la Verdad," *ICTJ*, www.ictj.org/es/news/peru-10-anos-despues-de-la-comision-de-la-verdad (last accessed Mar. 27, 2023).

229 Comisión de la Verdad, "Reconocemos su búsqueda incansable: la búsqueda de familiares desaparecidos en Colombia," Aug. 23, 2019, https://web.comisiondelaverdad.co/actualidad/noticias/reconocemos-su-busqueda-incansable-busqueda-familiares-desaparecidos-colombia (last accessed Mar. 27, 2023).

230 K. Sikkink, *The Justice Cascade: How Human Rights Prosecutors Are Changing World Politics* (New York: W. W. Norton & Co, 2011).

of repression and of responses to it globally, leading to the creation of unprecedented legal mechanisms.[231]

The Inter-American Human Rights System

Particularly significant within the Latin American grassroots legal innovations has been the deployment of the Inter-American Human Rights System. Even before the transition to democracy, civil society organizations throughout Latin America valued the role of regional legal bodies, most particularly the Inter-American rights system, which they identified as an important resource that would enable them to amplify their demands in the international arena and to redress the lack of sufficient support from local legal institutions. Members of civil society organizations demanded justice but also wished to generate awareness of extrajudicial killings, gender-based and other crimes by looking for specific legal solutions. Within a few decades, these demands generated jurisprudence, which in turn inspired change worldwide.[232]

The Inter-American Human Rights System was born in 1948, when the Ninth International Conference of American States approved the American Declaration of the Rights and Duties of Man as well as the Charter of the Organization of the American States (OAS), which were both aimed at ensuring full respect for human rights on the American continent. The Charter created the Inter-American Commission on Human Rights (IACHR), which was established a decade later in 1959. The Commission, headquartered in Costa Rica since its foundation, has three functions: It receives individual complaints on human rights violations, monitors the situation of human rights in member states by issuing an annual report, and has developed "priority" thematic areas. In 2019, transitional justice became one of these priority areas through the establishment of the Rapporteurship on Memory, Truth, and Justice, which supports "contributions to the fight against impunity and the promotion of comprehensive reparation, truth, and memory in the continent, evidencing the structural links between the past and the present."[233]

In 1979, the OAS also established the Inter-American Court of Human Rights as a regional body with jurisdiction to interpret and apply the American Convention of Human Rights in cases presented by individuals or groups from the member states. The Court, also located in Costa Rica, is composed of seven judges and has jurisdiction within twenty-five of the thirty-five

231 Vegh Weis, "Relevance of Victims' Organizations," 1–70.
232 Sikkink, *The Justice Cascade*.
233 For more on the rapporteurship, see the IACHR website: www.oas.org/en/IACHR/jsform/?File=/en/IACHR/r/MVJ/default.asp (last accessed Mar. 27, 2023).

member states of the OAS. The judges meet in at least seven sessions per year, during which they host hearings and issue resolutions. The cases they hear can involve adjudication, in which the Court determines if a state has incurred in international responsibility for violating a right included in the American Convention or other human rights treaties that form part of the Inter-American System. The Court's decisions can include provisional measures when there is a serious, urgent risk that irreparable harm will occur; can consist of advisory opinions, answering questions posted by member states on the interpretation of the American Convention; and can assess compliance with the issued judgments. The Court's judgments are binding and not subject to appeal.[234] From its very early days, the Inter-American Court of Human Rights has been adjudicating cases involving transitional justice. Its first contentious case, *Velasquez Rodriguez v. Honduras,* decided in 1988, remains a landmark in jurisprudence, establishing rights for the disappeared and their kin to truth and other reparatory measures.[235]

The Inter-American Human Rights System was informed by, benefited from, and developed because of the engagement by Latin American civil society. From relatively humble beginnings as a fledgling entity for rights-related adjudication, over time, the IACHR and the Inter-American Court of Human Rights became solidly established bodies on equal footing with their counterparts in other world regions (the European Court of Human Rights and the African Court of Justice and Human Rights), initiating and engaging in continuous dialogue with these other bodies.

The importance of civil society activism in the promotion of the Inter-American Human Rights System can be demonstrated, for example, by the outcomes of Report 28/92, written by the IACHR.[236] The report concluded that two Argentine impunity-related laws – the Full Stop Law (Law no. 23,492 of December 12, 1986) and the Due Obedience Law (Law no. 23,521 of June 4, 1987) – as well as the pardon decrees that followed at the end of the 1980s and beginning of the 1990s, were incompatible with the American Declaration of the Rights and Duties of Man and the American Convention on Human

234 "What is the IACHR?," *IACHR*, www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp (last accessed Mar. 27, 2023).

235 *Velasquez-Rodriguez v. Honduras*, judgment (merits), IACtHR (ser. C) no. 4 (July 29, 1988), para. 153. The Inter-American Court's judgments are cited using the official English translations available on the Court's website, https://corteidh.or.cr/casos_sentencias.cfm?lang=en (last accessed Apr. 3, 2023).

236 Inter-American Commission of Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1992–1993*, Report no. 28/92 (Oct. 2, 1992), www.cidh.oas.org/annualrep/92eng/argentina10.147.htm (last accessed Mar. 27, 2023).

Rights. The document recommended that the Argentine government award compensation to the victims of the dictatorship and that it "adopt the necessary measures to clarify the facts and identify those responsible for the Human Rights violations." The report was used by civil society organizations to fight impunity and sustain the struggle for truth, justice, reparations, and guarantees of non-repetition, thus becoming a milestone in the transitional justice process. When in 1995, an army official, Captain Adolfo Scilingo, confessed on a radio broadcast that he had thrown people out of government jets into the sea, the Center for Legal and Social Studies (CELS) – a leading human rights organization in the country – invoked the Commission's Report 28/92 to pressure the Argentine justice system to prosecute in order to obtain information about what had transpired.[237] While the case would ultimately necessitate transnational action in the form of Spanish intervention, it was enormously consequential in Argentina in reopening the question of accountability and another phase of trials. Although the IACHR issued similar reports in reference to other Latin American countries, the victims' organizations there did not use these to pressure for accountability.[238]

The judges of the Inter-American Court have demonstrated a strong commitment to the protection of human rights. In 2006, they ruled that human rights provide a significant basis for normative interpretation and that international human rights law also includes the judgments of the Court, including both the judicial opinions as well as their rationale.[239] The Inter-American Court has continuously asserted that international law can operate as a normative constraint on positive law.[240] Judge Cançado Trindade, for example, offered in 2001:

> The very emergence and consolidation of the *corpus juris* of the International Law of Human Rights are due to the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (*el Derecho*) came to the encounter of the human being, the ultimate addressee of its norms of protection…. With the demystification of the postulates of voluntarist positivism, it became evident one can only find an answer to the problem of the foundations and validity of

237 Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1992–1993*, OEA/Ser.L/V/II.83 Doc. 14 (1993).

238 H. Verbitsky, "La sombra de la memoria," *Pagina/12* (Dec. 14, 2014), www.pagina12.com.ar/diario/autores/horacio_verbitsky/index-2014-12-14.html (last accessed Mar. 27, 2023).

239 *Almonacid-Arellano v. Chile*, judgment (preliminary objections, merits, reparations and costs), IACtHR (ser. C) no. 154 (Sept. 26, 2006); and *La Cantuta v. Peru*, judgment (merits, reparations and costs), IACtHR (ser. C) no. 162 (Nov. 29, 2006), para. 80.

240 C. Hesse and R. Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999).

> general international law in the universal juridical conscience, starting with the assertion of the idea of an objective justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from international law, and not subjected, thereby, to the vicissitudes of domestic law.[241]

This understanding embodies an approach to legal interpretation that considers the effective transformation of deeply entrenched structures toward a more egalitarian or democratic society one of the paramount goals of interpretative practice, which has been conceptualized by some as "Latin American transformative constitutionalism."[242]

The Inter-American Court of Human Rights has also systematically recognized the centrality of grassroots actors, particularly of victims, in promoting these rights-related changes. Judge Cançado Trindade stated that "it is the International Law of Human Rights that, clearly and decidedly, comes to rescue the central position of the victims, as it is oriented towards their protection and the satisfaction of their needs."[243] Similarly, in other cases, the Inter-American Court pointed out that the state's obligation to provide reparations to victims constitutes the cornerstone of the system of international human rights protection.

The Transmission of Knowledge: Latin American Usage and Innovation and European Jurisprudence

The jurisprudence of the Inter-American Court of Human Rights, most particularly regarding the crime of enforced disappearance, relied on the American Convention on Human Rights. It has drawn extensively on an innovative continental legal framework that puts human rights and victims at the center, and has also engaged with global and regional legal developments, an array of international conventions, and the use of comparative law across judicial systems.[244] The Court adopted the judicial practice of interpretation

241 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, advisory opinion OC 16/99 (concurring opinion of Judge A. A. Cançado Trindade), IACtHR (ser. A) no. 16 (Oct. 1, 1999), paras. 4 and 14 (emphases in the original).

242 A. von Bogdandy and R. Urueña, "International Transformative Constitutionalism in Latin America," *American Journal of International Law* 114(3) (2020), 403–42, at 405. On Latin American constitutionalism before the twentieth century, see Section 5.1 in this volume.

243 *"Street Children" (Villagran-Morales et al.) v. Guatemala,* judgment (reparation and costs) (separate opinion of Judge A. A. Cançado Trindade), IACtHR (ser. C) no. 77 (May 26, 2001), para. 15.

244 See for example, *Heliodoro Portugal v. Panama*, judgment (preliminary objections, merits, reparations and costs), IACtHR (ser. C) no. 186 (Aug. 12, 2008), para. 31 n. 15 and para. 111 n. 70.

across jurisdictions,[245] relying in part on the case law of the European Court of Human Rights (ECHR).[246] For example, it referred to the ECHR's verdict in *Kurt v. Turkey*, which emphasized "the fundamental importance of the guarantees contained in Article 5 [of the European Convention of Human Rights] for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities" or the obligation to interpret narrowly any exception to "a most basic guarantee of individual freedom."[247]

Drawing on these European precedents, the Inter-American Court of Human Rights developed distinctive doctrines regarding the legal dimensions of enforced disappearance, most particularly, concerning the responsibility of the state for crimes committed by individuals who complied with its orders. In one of its seminal decisions, *La Cantuta v. Peru* in 2006, the Court distinguished its novel analysis from the prevailing understanding of state responsibility whether under international law, international criminal law, or domestic law:

> *International liability of the States arises automatically with an international wrong attributable to the State* and, unlike under domestic criminal law, in order to establish that there has been a violation of the rights enshrined in the American Convention, it is not necessary to determine the responsibility of its author or their intention, nor is it necessary to identify individually the agents who are attributed with the violations. In this context, the Court ascertains the international liability of the State in this case, which may not be made modeled after structures that belong exclusively to domestic or international criminal law, which in turn defines responsibility or individual criminal liability; nor is it necessary to define the scope of action and rank of each state officials involved in the events.[248]

In another seminal decision (*Goiburú et al.*), the Court turned to highlight the relevance of the context of the crime for its impact on the "increase in State's international responsibility."[249] In this case, the relevant context was "Operation Condor" and the regional collaboration between dictatorships in 1970s Latin America, when "the intelligence services of several countries of the Southern Cone … established a criminal inter-State organization with a

245 Teitel and Howse, "Cross-Judging."
246 See for example, *Gomes Lund et al. v. Brazil*, judgment (preliminary objections, merits, reparations and costs), IACtHR (ser. C) no. 219 (Nov. 24, 2010), para. 145.
247 *Kurt v. Turkey*, no. 15/1997/799/1002, ECHR 1998-III, para. 122.
248 *La Cantuta v. Peru*, judgment (merits, reparations and costs), para. 156 (emphasis added.)
249 *Goiburú et al. v. Paraguay*, judgment (merits, reparations and costs), IACtHR (ser. C) no. 153 (Sept. 22, 2006), paras. 86–94.

complex assemblage, the scope of which is still being revealed today; in other words, there was a systematic practice of 'State terrorism' at an inter-State level." This transnational practice was understood by the court as being in "absolute contradiction to the principal objects and purposes of the organization of the international community in both international bodies and the American Convention itself."[250] The Court also stated that it had verified that a "general situation of impunity" had existed at the time, which had "conditioned the protection of the rights in question."[251] Even after the fall of the dictatorial regime in 1989, the practice of enforced disappearance had "reproduce[d] the conditions of impunity."[252] The Court's recognition of this context became the basis for shedding light on the transnational dimension of the crimes of enforced disappearance, conceived as violations towards all (*erga omnes*), and therefore triggering also the responsibility of other states, and the international community.[253]

In its interpretation of the American Convention, and in drawing yet also innovating on what the ECHR had established, the Inter-American Court of Human Rights also concluded as early as 1988 that enforced disappearance constituted a complex offense because it involves multiple ongoing offenses, including systemic denials and failure to prevent, investigate, and punish.[254] Thus, as explicitly stated in the case of *Gomes Lund*, it can be defined as "the unlawful detention by agents or governmental agencies or organized groups of private individuals acting in the name of the State or counting on its support, authorization or consent,"[255] but also as "the refusal to acknowledge the detention and to reveal the situation or the whereabouts of the interested person."[256] On this basis, the Court concluded that the state's refusal "to acknowledge the detention and to reveal the situation or the whereabouts of the interested person" constitutes the crime of enforced disappearance regardless of whether the original act can be attributed to the state or not.[257] This was a significant shift in the understanding of accountability: Even where states may not be the direct perpetrators of the crimes, they can still be found accountable in terms of their ongoing

250 *Goiburú et al. v. Paraguay*, judgment (merits, reparations and costs), para. 72.
251 Ibid., para. 88. 252 Ibid., para. 89. 253 Ibid., paras. 93, 128 and 129.
254 *Velásquez-Rodriguez v. Honduras*, judgment (merits), IACtHR (ser. C) no. 4 (July 29, 1988), para. 147.
255 *Gomes Lund et al. v. Brazil*, judgment (preliminary objections, merits, reparations and costs), para. 102.
256 Ibid., para. 104.
257 *Gomes Lund et al. v. Brazil*, judgment (preliminary objections, merits, reparations and costs).

obligation to investigate the offenses and to search for the whereabouts of those who had disappeared, among other duties.

An added distinctive dimension of the Inter-American Court of Human Rights' characterization of the complex character of the crime of enforced disappearance was the judicial determination that this violation could be conceived as a continuous offense: an "autonomous offense of a continuing or permanent nature with its multiple elements";[258] a "permanent and ongoing" crime.[259] The crime of disappearance, the Court ruled, begins with the "deprivation of liberty …, followed by the lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared person are found and the true identity is revealed with certainty."[260] Here too, the Court elaborated its jurisprudence based on precedents in the ECHR, most particularly, in *Varnava and Others v. Turkey*, where the ECHR found that Turkey was obliged to provide an account of the fate of disappeared people and that this obligation was of a continuing nature regardless of the passage of time.[261]

In line with this comprehensive definition, the Inter-American Court of Human Rights offered what would become a jurisprudential landmark in terms of the characterization and timing of the remedy requested, solving some of the difficulties entailed in questions of retroactivity and impact on the pursuit of remedies in cases after the passage of time. Once the Court introduced its interpretation of enforced disappearances as both a complex and continuous crime, it cleared the way for a ruling that human rights litigation was possible for kidnappings that had occurred decades (in some cases half a century) before. For example, in the milestone case of *Heliodoro Portugal*, the Court evaluated whether it had jurisdiction to hear a case involving an abduction that occurred at the hands of state officials in 1970, long before Panama had accepted the jurisdiction of the regional human rights court. Notwithstanding the arguable jurisdictional issues as well as the passage of time, the Court concluded that the offense at stake should not be considered as merely involving detention or loss of life, but rather that "the deprivation

258 *Heliodoro Portugal v. Panama*, judgment (preliminary objections, merits, reparations and costs), para. 112.

259 *Goiburú et al. v. Paraguay*, judgment (merits, reparations and costs).

260 *Gomes Lund et al. v. Brazil*, judgment (preliminary objections, merits, reparations and costs), para. 103.

261 *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009-V. Incidentally, in its decision, the ECHR itself drew heavily on jurisprudence of the Inter-American Court, as will be discussed later.

of liberty of the individual must be understood merely as the beginning of the constitution of a complex violation that is prolonged over time until the fate and whereabouts of the alleged victim are established."[262] For the Court, the violation, in this case, was considered to be ongoing until the victim's remains were identified in 2000, even though this was three decades after the abduction.[263] The Court further observed that "the general obligation to ensure the human rights embodied in the [American] Convention [on Human Rights], contained in article 1(1), gives rise to the obligation to investigate violations of the substantive rights that should be protected, ensured or guaranteed…."[264] It also established that the extended passage of time in and of itself demonstrated the need for accountability, and ultimately set the basis for supranational judicial intervention of the sort provided by the regional rights court, as it pointed to the political failure and/or deeply rooted pathology of impunity that justifies judicial review as both plausible and legitimate.[265]

The Transmission of Knowledge: European and International Law Usage and Innovation on Latin American Jurisprudence

The earlier discussion has demonstrated how the Inter-American Court of Human Rights has both used European jurisprudence to inform its decisions and subsequently introduced important innovations that developed it further. To what extent have international law and regional bodies, such as the ECHR, in turn, learned from the jurisprudence generated in Latin America?

There are numerous illustrations of such cross-judging taking place. For example, in *Margus v. Croatia*, the ECHR, reviewing atrocities that had been committed in 1991 during the Balkan conflicts/Croatian war, relied on an amnesty doctrine that originated in the Inter-American Court of Human Rights.[266] Following the logic of the Inter-American Court in *Barrios Altos v. Peru*, the ECHR found that the Croatian amnesty law constituted an illegal exercise of impunity, because a blanket amnesty aimed at shielding perpetrators from

262 *Heliodoro Portugal v. Panama*, judgment (preliminary objections, merits, reparations and costs), para. 112.

263 *Heliodoro Portugal v. Panama*, judgment (preliminary objections, merits, reparations and costs), para. 113, referring to the violation of article 7 of the American Convention on Human Rights.

264 *Heliodoro Portugal v. Panama*, judgment (preliminary objections, merits, reparations and costs), para. 115.

265 L. E. Fletcher, J. Rowen, and H. M. Weinstein, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31(1) (2009), 163–220.

266 *Margus v. Croatia*, [GC], no. 4455/10, ECHR 2014-III.

prosecution would be in contravention of multiple provisions of conventions of human rights, including the rights to investigation, truth, and justice:[267]

> The Court also notes the jurisprudence of the Inter-American Court of Human Rights, notably the above-cited cases of *Barrios Altos*, *Gomes Lund et al.*, *Gelman* and *The Massacres of El Mozote and Nearby Places*, where that court took a firmer stance and, relying on its previous findings, as well as those of the Inter-American Commission on Human Rights, the organs of the United Nations and other universal and regional organs for the protection of human rights, found that no amnesties were acceptable in connection with grave breaches of fundamental human rights since any such amnesty would seriously undermine the States' duty to investigate and punish the perpetrators of such acts (see *Gelman*, § 195, and *Gomes Lund et al.*, § 171…). It emphasised that such amnesties contravene irrevocable rights recognised by international human rights law (see *Gomes Lund et al.*, § 171).[268]

The European Court seemed to have followed the logic of the IACHR, which had ruled:

> Amnesty laws and provisions designed to prevent investigation and punishment for Human Rights abuses violate non-derogable human rights by obstructing victims' access to justice, preventing victims from knowing the truth, and blocking victims' access to adequate reparations…. By adopting the amnesty laws, the State prevented the deceased victims' next of kin and surviving victims from being able to be heard by a judge, in violation of Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal)…. Similarly, the amnesty laws prevented the State from investigating, capturing, prosecuting, and convicting the individuals responsible for the Barrios Altos massacre, thus violating the right to judicial protection for the victims and victims' next of kin in violation of Article 25…. By violating these articles through the implementation of its amnesty laws, the State necessarily violated its general obligation of Article 1(1) (Obligation to Respect Rights), as well as its obligation to adopt internal legislation in support of these rights encompassed by Article 2.[269]

Relying on these decisions and recommendations, as well as on a vast array of international law materials, the ECHR thus concluded that a significant

267 *Barrios Altos v. Peru*, judgment (merits), IACtHR (ser. C) no.75 (Mar. 14, 2001). In this case, the court interpreted the American Convention of Human Rights. See *Margus v. Croatia*, para. 19.

268 *Margus v. Croatia*, para. 138.

269 K. Benson, "Barrios Altos v. Peru," *Loyola of Los Angeles International and Comparative Law Review* 37(4) (2015), 1145–174, at 1157 (internal citations removed), https://iachr.lls.edu/sites/default/files/iachr/Cases/Barrios_Altos_v_Peru/benson_barrios_altos_v._peru.pdf (last accessed Mar. 27, 2023).

doctrine had developed against such amnesties being applicable to violations of human rights of the sort at issue in the case it was reviewing.

With regards to the crime of enforced disappearance, there are various examples of norm transfer from Latin America to Europe and international law relating to the passage of time and issues of retroactivity. In several cases that shared characteristics with Latin American disappearances, the ECHR explicitly invoked the Inter-American Court of Human Rights and the UN Human Rights Committee. For example, in *Varnava and others*, a case involving the disappearance of Greek Cypriots during the 1970s where adjudication occurred after a considerable passage of time (as discussed earlier), the European Court noted the relevance of dealing with the allegations of denial of justice or judicial protection "even where the disappearance occurred before recognition of its jurisdiction."[270] To make its point, the European Court relied on instances from the Inter-American Court as well as the Inter-American Commission of Human Rights dealing with the international law on enforced disappearances. It declared enforced disappearance as a continuing act[271] and stated that the state had a procedural obligation to investigate.[272] As we saw earlier, this declaration was later taken up by the Inter-American Court, which used it to coin a new doctrine regarding the particular character of the crime of enforced disappearance that entails that "[t]he State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person."[273]

Somewhat similarly – though without explicitly mentioning the Inter-American Court – the European Court ruled in *Timurtaş* that Turkey's investigation of disappearances had been "inadequate and therefore in breach of the State's procedural obligations to protect the right to life."[274] It also found, as the Inter-American Court had done before, that the delay involved in the investigation of the case should be considered part of the basis for judicial intervention:

> [T]he lethargy displayed by the investigating authorities poignantly bears out the importance of the prompt judicial intervention required by Articles 5, 3

270 *Varnava and Others v. Turkey*, para. 147.
271 *Blake v. Guatemala*, judgment (preliminary objections), IACtHR (ser. C) no. 27 (July 2, 1996). See factsheet at www.corteidh.or.cr/cf/jurisprudencia2/ficha_tecnica.cfm?lang=es&nId_Ficha=317 (last accessed Mar. 27, 2023).
272 *Valle Jaramillo et al. v. Colombia*, judgment (merits, reparations and costs), IACtHR (ser. C) no. 192 (Nov. 27, 2008).
273 United Nations Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48 (Jan. 26, 2011).
274 *Timurtaş v. Turkey*, no. 23531/94, ECHR 2000-VI, para. 90.

> and 4 of the [European] Convention [of Human Rights] which … may lead to the detection and prevention of life-threatening measures in violation of the fundamental guarantees contained in Article 2.[275]

The European Court was equally inspired by the Inter-American Court and the Latin American Human Rights System when it began insisting on the relevance of context, for example, to justify European jurisdiction over the so-called "war on terror."[276] Among other things, the Inter-American Court has helped elaborate new duties of prevention and accountability, investigation, repair, punishment, and other remedies, such as the erection of monuments or establishing museums.[277] What is still unclear, however, is whether the Inter-American precedents, which have already impacted the international law of state responsibility, would also recognize the duties of the state not only as deriving from the initial offense but also as arising because of the state's subsequent failure to act.[278]

Thus we can see that there is an evident connection between the jurisprudence of the Inter-American Court and the ECHR, with both sharing an understanding of the central features of the crime of enforced disappearance, as well as of a range of other related issues regarding state responsibility and the existence of a "right of accountability" that can override doctrinal obstacles regarding important questions such as standing, state attribution, evidence, or exhaustion of local remedies. The result is the continuous expansion of state responsibilities deriving from the protection of the core human right to life.

Furthermore, the influence of doctrines and practices originating in Latin America is felt beyond the regional human rights bodies, such as the ECHR, as it penetrates international organs as well. For example, there is an emerging consensus in the UN Human Rights Committee regarding state responsibility and duty of accountability for human rights violations.[279] Relatedly, the International Court of Justice and the International Criminal Court have been conceptualizing state responsibility for past human rights abuses,

275 *Timurtaş v. Turkey*, para. 89.

276 *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012-VI.

277 *Goiburú et al. v. Paraguay*, judgment (merits, reparations and costs), para. 254.

278 R. Teitel, "Transitional Justice and Judicial Activism – A Right to Accountability," *Cornell International Law Journal* 48(2) (2015), 385–422.

279 UN Human Rights Committee, *Concluding Observations on the Second Periodic Report on Bosnia and Herzegovina* (Geneva: UN, 2012); see *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff,* UN Doc. A/HRC/21/46 (Aug. 9, 2012).

including enforced disappearances, equally in terms of the duties to investigate, prosecute, and remedy.[280] The text of the International Convention for the Protection of All Persons from Enforced Disappearance (2010) builds on the Inter-American Convention on Enforced Disappearance of Persons (dated 1994),[281] defining the offense as "the arrest, detention, abduction or any other form of deprivation of liberty that is perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty."[282]

Norm transfer, however, is not only operative on the jurisprudential and institutional level. The inputs from the Inter-American System and the normative, activist, and jurisprudential work regarding enforced disappearances have proved pivotal to the exploration of international crimes perpetrated in the Mediterranean in relation to asylum seekers. The UN Working Group on Enforced and Involuntary Disappearances, originally promoted by FEDEFAM, currently focuses on the crimes in the Mediterranean Sea and characterizes disappearances in the context of migration as "an involuntary but direct consequence of the actions of the State."[283] Genuinely global cross-knowledge enables the drawing of these connections, and many more.

Conclusions

Section 6.3 has drawn attention to the role of the Global South, specifically Latin America, in the development of international human rights and transitional justice, most particularly, the legal emergence of a core international crime that has been at the crux of the story of human rights violations both in the region and globally: enforced disappearances. This grievous offense offers a remarkable landmark for the construction of a truly global history of human rights and transitional justice and introduces "an alternative account

280 *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment, ICJ Reports (Feb. 26, 2007); and Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS. 91, preamble (referring to jurisdiction along with complementarity basis); Teitel, "Transitional Justice and Judicial Activism."

281 E. Schindel, "Deaths and Disappearances in Migration to Europe: Exploring the Uses of a Transnationalized Category," *American Behavioral Scientist* 64 (2020), 389–407.

282 Office of the High Commissioner for Human Rights, "International Convention for the Protection of All Persons from Enforced Disappearance" (Dec. 23, 2010), art. 2.

283 Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, Note by the Secretariat, UN Doc. A/HRC/36/39/Add.2 (July 28, 2017), para. 82.

to the prevailing narrative of the evolution of the human rights idea and movement, one which restores Latin America to its rightful place having a central and leading role in developing a proper framework, which has then been diffused throughout the world."[284]

Employing the concept of "ecology of knowledge" and observing "cross-judging," Section 6.3 demonstrated that retrieving Southern knowledges does not necessarily involve disregarding or displacing the contributions of the North, but rather fosters fruitful dialogue in order to elaborate a comprehensive epistemic understanding. In this regard, the section explored how the Inter-American Court of Human Rights learned and incorporated inputs from the ECHR and international law, innovated on them, and in turn influenced European and international norms.

Finally, the section also sheds light on the role of civil society actors and grassroots organizations in pushing forward normative developments, which in turn have been put into force through practices in both the domestic and the international arena. The study of the example of enforced disappearance – a crime against humanity – revealed that the development of this offense, and the related jurisprudence, was largely impelled/driven by the work of NGOs as petitioners, or by lawyers for victims' families, after successive administrations failed to respond to wrongdoing. Further research is needed to explore the uneven knowledge distribution and silenced contributions in the normative transfers *from* the regional bodies *to* each individual state and *from* these states *to* the regional bodies.

284 Dulitzky, "Latin-American Flavor."