

The Road to Retribution: Judicial Independence in Transitional Justice

By Chuyue Frances Huang

Introduction

After mass atrocities, post-conflict societies around the world usually adopt one of the several models to address the human rights violations. Empirically speaking, the onset of retributive mechanisms—holding the perpetrators accountability through legal channels—occurs much later than non-retributive, restorative ones because of the political, legal, and social constraints on the societies (Horne 2016). Sometimes, countries would even favor impunity over accountability (Serrano 2012), as scholars have witnessed a wave of “limited criminal sanction” in transitional societies (Lutz and Sikkink 2001). To explain such phenomenon, one should explore the interaction between the slow and gradual development of an independent judiciary, the willingness of the executive to punish the perpetrators, and the residual influence from the former regime. Although various other socio-political elements can play a role, one may still wonder which of the three factors matter the most in the early years of transition. Under what circumstances is retribution most likely to take place? How might the first factor, judicial independence, increase the tendency for directly punishing the perpetrators through legal means?

Drawing on both quantitative and qualitative data on judicial independence and transitional justice mechanisms, I argue that retribution is more likely to occur under the two conditions: 1) the judiciary is independent from all branches of the government as well as the former regime; 2) the executive leans in favor of directly holding members of the past regime accountable. Even in cases when the executive opposes to retributive mechanisms, legal sanctions can still

occur as a result of the institutional structures and guarantees that enable greater judicial power and judicial activism. Compared to previous research on similar topics, my arguments not only have greater explanatory power but also frame the higher rate of prosecution as a direct result of a strategic alliance of the executive and the judiciary. I will further argue that between the two actors, it is the latter—the judiciary—that matters more for the outcome.

In this paper, I will first analyze the key elements in my argument and propose four models of retribution. After reviewing and critiquing past literature on this topic, I will define the key variables in the data and methods section, followed by a quantitative analysis of the regression. In the qualitative section, I will examine four countries—Argentina, Chile, Poland, and Hungary—to illustrate regional differences and the specific causal links. Lastly, I will briefly touch upon the limitation of this paper before concluding the major findings.

Models of Judicial Independence and Retribution

A comprehensive examination of the interaction between the executive will and judicial independence needs to be placed in the context of legal reforms during the transition, because the judicial systems in post-conflict societies generally lack administrative and institutional safeguards to stay independent from the executive as well as influence from the predecessor regime (Grotsky 2015). Often times, the head of the executive branch (the President or the Prime Minister) or influential figures from the previous regime is able to take advantage of the weak and subservient judiciary and exercise immense political influence. For example, in the absence of another governmental body to supervise judicial independence, the executives tend to pack the courts—the Supreme Court in particular—with judges who are sympathetic to the former regime and in favor of the amnesty laws (Sikkink and Walling 2006). As a result, the decision to prosecute becomes completely dependent on the will of the executive when the court lacks independence. In this case, judicial independence is a necessary condition.

Another way to view the impact of such interaction on legal sanctions is through the lens of judicial activism. When the executive does not prefer prosecution to other no retributive

measures, the only way that trials can take place is if judges are independent and active in pursuing the human rights agenda. This scenario is rare but has taken place in Argentina and Chile. Both cases serve as further examples of judicial independence being the necessary condition, or otherwise the cases files would sit on the judges' desks for years. However, a slightly more nuanced interpretation of this scenario reveals that judicial independence is not a sufficient condition for retribution. Since judges cannot initiate cases themselves, they are less likely to go forward with the cases or review the corrupted officials fairly unless the judges see a green light from the executive and the domestic environment, which favors retribution over other lenient forms of justice mechanisms and demands greater degrees of accountability. In this scenario, the judiciary and the executive need to be on the same side in order for prosecution to be the dominant strategy for transitional justice. Also considering that no outcome in the transitional setting would have a unilateral cause, I thus frame my argument to include this "alliance" as the more optimal condition for retributive justice. It would be naïve for one to believe that the strengthening of the judicial power and its independence alone can lead to more legal sanctions and disregard the political elements at play, so I believe that the independent courts are necessary but not sufficient.

Summing up my arguments from the previous two paragraphs, I hypothesized four models on the likelihood of retribution based on different combinations of conditions, which are listed in Table I below. To show that judicial independence indeed plays a more important role than the executive will, a country should demonstrate one of the two types of transition: 1) from Model A to Model C; 2) from Model B to Model D. The logic here is relatively straightforward. For both types of transitions, the executive will stay constant, but a change in judicial independent from "No" to "Yes" leads to a change in likelihood. I will further discuss this point and apply these models in the case studies section.

Models	Executive Will	Judicial Independence	Likelihood of Retribution
A	No	No	Low
B	Yes	No	Low
C	No	Yes	High
D	Yes	Yes	High

Source: Author's Analysis

Table I: Author's Models of Conditions for Retribution

Indeed, to go beyond these simple “Yes/No” models and uncover the causal mechanisms, I compared and contrasted the specific ways that institutional improvement of the courts can strength their independence in different countries. Since all transitional experiences are unique to each state's political, cultural and historical background, these mechanisms vary across different regions. Particularly, I observe that in most post-Communist states in the Eastern Europe, the likelihood of trials and lustration policies increase along with the step-by-step legal reform. These reforms typically grant the judicial branch greater institution and administrative power, which serves as a leverage against the influence of the executive, even when the executive or the residual influence from the Communist past opposed to retributive sanctions. In the Latin American context, the tension between the two actors manifests itself mostly on the appointment process of the judges. The executive exerted massive influence on the court by packing it with anti-prosecution judges, and only a handful of judges were able to carry out the investigation when the executive opposed.

Therefore, the specific arguments on the regional different will focus on two different sets of causal links regarding the institutional structure of judicial independence. For Hungary and Poland, the link is the independence and the expansion of review powers of the Constitutional Court and the administrative council that interprets legal codes and oversees the lustration process, whereas in Argentina and Chile, the link is the independent selection process of the

judges. Before I discuss these findings, I need to first review some of the past findings and examine how they help answer the questions of this paper.

Literature Review

On the broader topic on rule of law and legal sanctions, much of the existing literature on transition justice has discussed in depth the complexity of their relationship and point to various institutional barriers faced by the successor democratic regimes (Huntington 1991).

Specifically, they argue that judicial independence becomes a more critical determinant when the residual influence from the old regime remains strong and disruptive (Roht-Arriaza 2005).

They claim that judicial independence has the greatest impact when the balance of power tilts in favor of the predecessor regime (Teitel 2000). To support this claim, they often use cases from Latin America, where the military still has a heavy presence in the society, and ones from Eastern Europe, where the influence from the secret police and the former communist members perpetrates almost every corner (Nalepa 2010). In this scenario, the successor regimes are hesitant to punish the human rights abusers through legal channels unless minimal institutional guarantees are met, because they are concerned that the outcome of the trials might be detrimental to the legitimacy of the legal system and also unintentionally committed injustice in the name of accountability (Méndez 1997).

Specifically, on the interaction between judicial independence and the executive branch, Elin Skaar (2011) examines empirical evidence from three Latin American countries, Argentina, Chile, and Uruguay, and concludes that the likelihood of trials increases when the judiciary is (formally) independent. Nonetheless, she notices the nuances in this argument and the variations in the executive branch's willingness to prosecute across regimes and periods within the same regime. Therefore, she proposes four different lessons to take away from Latin American countries, which are summarized in Table II below. First, no trials would occur when the courts lack independence unless the executive branch favors it. Second, trials would occur only when both the independent judiciary and the executive favor trials. Third, when the

judiciary does not favor prosecution, the number of trials would decrease even if the executive favors the trials. Lastly, trials can occur when the judiciary is independent. Like other scholars who studied the rule of law and transitional justice, Skaar attributes the greater number of trials to judicial activism and the change in attitude toward prosecution among the judges. In other words, the merits of judicial independence and the liberal attitudes of the judges are more likely to manifest themselves when the domestic environment—such as the public opinion and most importantly the executive will—leans in favor of prosecution.

<u>Branch</u>	<u>Judiciary</u>	<u>Executive</u>	<u>Trials?</u>	
<u>Action/Quality</u>	<u>Independence</u>	<u>Favor</u>	<u>Favor</u>	
(1)	No	\	Yes	Yes
(2)	Yes	Yes	Yes	Yes
(3)	\	No	Yes	No
(4)	Yes	\	No	Yes

Source: Skaar(2011)

Table II: Skaar’s Models of Prosecutions

Skaar’s research provides much valuable insight into the dynamic duo of judicial independence and the executive will in the Latin American context, but the strength of this argument can still be augmented. First, she codes the outcome variable “trials” using a binary scale (“Yes” or “No”), which may seem too arbitrary considering that the influence of the independent should not be taken as all or nothing. This is problematic because Model (1) seems to suggest that the executive alone can make prosecution happen. Therefore, the four models I proposed in Table I uses a more qualitative degree of measure and rate the likelihood of retribution as either high or low.

Additionally, Skaar’s models are limited in their explanatory powers. Since her analysis draws upon mainly empirical qualitative evidence from Latin America, the lessons cannot be extended to other parts of the world and other transitional societies under different political and judicial contexts. Particularly, she only studies criminal prosecution as the main form of retributive

mechanisms, but as I mentioned before, lustration policy, as the primary form of legal sanction in Eastern European states, also deserves attention on this issue.

However, scholars analyzing legal reforms in the Eastern European context focus extensively on the impact of lustration policies (Walicki 1997) and do not explicitly identify interaction of conditions that contribute to an increase in the likelihood of legal sanctions. Their account of the transition justice experiences is oftentimes overtly descriptive and thus unable to illuminate the broader patterns and the specific causal links.

Building upon these past works and keeping in mind their strengths and limitations; I seek to use both quantitative and qualitative data from two regions to prove my argument. In the next section, I will first define the variables for this research and discuss how I plan to use such data to perform the analysis.

Data and Methods

In this paper, I focus on two causal variables: judicial independence and the executive will. The definition of that most scholars agree has three components: 1) judicial decisions should be impartial; 2) the decisions, once rendered, should be respected; 3) the judiciary is free from interference from other branches of the government (of the Human Rights N.d.). Additionally, I added independence from the former regime—including the military—to this definition, because as we will later in this paper, this element is crucial in the context of transitional justice. The term “executive will” is defined as the executive’s preference for addressing past human rights abusers through legal channels, such as lustration and criminal prosecution. Additionally, as Skaar points out, judicial behavior is conditioned upon many institutional, legal and individual factors at the national, region and international levels (Skaar 2011). Consequently, executive influence on the judiciary cannot be isolated from the concept of judicial independence, because insulating judges from officials of other branches of government is often taken to be the most important aspect of judicial independence (Landes and Posner 1975). Therefore, I also use the term “judicial-executive alliance” to evaluate their influence on each other.

Key	Measurement	Years	Percentage	
injud	ordinal, 3	1981-2011	2%	(Cingranelli and Clay 2015)
xconst	ordinal, 7	1800-2015	4.5%	(Marshall and Jaggers 2015)
dfji, djji	interval: 0-1	1965-2008	3%	(Melton and Ginsburg 2014)
rr, rt	ordinal	1970-2005	/	(Olsen and Reiter 2010 <i>b</i>)

Table III: Summary of Datasets Used in this Paper

Moreover, to explore the global pattern of retribution, I used three sets of time-series, cross-national (TCSN) data collected by respected scholars in the field (see the first three rows of Table III). These TCSN data provide a relatively reliable and consistent set of measurements of judicial independence. First, I obtained the “XCONST” variable from the PolityIV dataset (Marshall and Jaggers 2015), which measures the extent of institutionalized constraints on the decision-making process of the executives. Marshall et al (2015) suggests that even though the sources of constraints vary from country to country, the most common one is a strong, independent judiciary. In the dataset, this variable is coded as one of seven categories, from Level 1 (“Unlimited Authority”) to “7” (“Executive Parity or Subordination”).

The second indicator I used, a more direct measurement of judicial independence, comes from the CIRI Human Rights dataset (Cingranelli and Clay 2015) and evaluates the extent to which the judiciary is independent of control from other sources, such as the government or the military. For example, a country scoring a “2” (highest level) is deemed to have a generally independent judiciary, which means that (1) the courts have the right to rule on the constitutionality of legislative acts and executive decrees; (2) judges at the highest level have a minimum of a seven-year tenure; (3) the President of Minister of Justice cannot directly or remove judges; (4) the courts can challenge the executive and legislative branch; (5) All court hearings are public; (6) Judgeships are held only by eligible professionals. On the contrary, the judiciary system of a country scoring a “0” would suggest that judges can be dismissed for political reasons, and the judiciary is heavily corrupted and frequently interfered by other branches of the government. The last two indicators for the dependent variable come from

Melton and Ginsburg. The “dfji” variable measures *de facto* judicial independence, and the “diji” variable measures the life term, selection procedure, removal conditions and other *de jure* aspects of the judicial system (Melton and Ginsburg 2014).

Furthermore, I collected data from Olsen et al (2010)’s transitional justice dataset, which includes information on the implementation of the five justice mechanisms for transitional justice countries around the world. The five mechanisms are trials, lustration, amnesty, reparations, and truth commissions. To construct my dependent variable, I created two new indicators. The first one is called “rr (relative retribution),” which is the difference in number between retributive mechanisms (trials and lustrations) and non-retributive ones (amnesty, reparations, and truth commissions). The second one, “rt (relative trial),” is the numerical difference between the number of trials and non retributive mechanisms.

I analyzed these data in two different ways. First, in order to illustrate the general correlation between judicial independence and prosecutions, I would regress the “rr” variable on the three different indicators for judicial independence. Since the unit of analysis in all of the datasets is country-year, I used the Newey-West standard errors instead of the HCO standard errors in order to adjust for autocorrelation within countries. The basic idea behind this adjustment is that regular standard errors from the regression output are usually biased downward and therefore underestimate the amount of variation in time-series, cross-national (TSCN) data. Meanwhile, there will be three panels in the regression table. Panel A uses all countries, while Panel B and C only use cases from Latin American and Eastern European countries. In addition, since lustration is rare in Latin America (Olsen and Reiter 2010b), the regressions in Panel B uses the “rt (which does not include lustration)” instead of “rl” as the dependent variable. What’s more, I constructed Panel B and C because the models there can better control for other key variables that might influence prosecutions, such as the former regime type. Whereas most Latin American countries have a military past, the Eastern European states were under communist

governance until the fall of the Soviet Union. Admittedly, this control for confounders is far from perfect as I do not have a separate variable to control for regime type.

Moreover, considering that quantitative analysis is best at delineating broad patterns but restricted in explaining the specific causal mechanisms, I will perform some case studies in the qualitative section. I selected Argentina and Chile for my case studies on Latin America because they best exemplify how retribution is hindered by the lack of independent judges and anti-prosecution will of the executive. As for post-Communist states, I examined Hungary and Poland because both of them wait for the institutional guarantees of judicial independence to consolidate before implementing retributive mechanisms. To establish causal relations, I used the proximity in the timings of events to isolate the effect of other confounders. Essentially, for each country, I would identify a “temporal divider,” which is usually a short period during which multiple events concerning judicial independence and retribution occurred. By comparing the judicial behavior, the executive preference, the amount of retribution, and the model shift (Table I) before and after this “divider,” I can make claims about causality. In the next section, I will present the results from the regression analysis first.

Regression Analysis

Table 4: Regression Output of Judicial Independence and Prosecutions

Outcome	Retributive vs. Non-Retributive			
Variable Name	Independent Judiciary	Institutional Constraints	<i>de facto</i> JI	<i>de jure</i> JI
Covariates	Yes			
Panel A: All Cases				
Model	(1)	(2)	(3)	(4)
Jl Indicator	0.157*** (0.025)	0.081*** (0.019)	0.740*** (0.173)	0.284** (0.120)
Observations	552	675	755	644
R ²	0.015	0.033	0.030	0.016
Panel B: Latin America				
Model	(5)	(6)	(7)	(8)
Jl Indicators	0.099** (0.039)	0.083** (0.036)	0.798* (0.422)	0.293 (0.219)
Observations	112	139	148	137
R ²	0.020	0.041	0.028	0.018
Panel C: Eastern Europe				
Model	(9)	(10)	(11)	(12)
Jl Indicators	0.051 (0.078)	0.183*** (0.058)	0.645 (0.440)	0.533 (0.456)
Observations	85	97	115	105
R ²	0.008	0.095	0.022	0.017

Source: Author's Analysis

*p<0.1; **p<0.05; ***p<0.01

The regression table uses four different indicators for judicial independent and produces twelve models in total. The numbers in the “JI Indicator” row are the coefficients for the linear regressions. The number of asterisks next to the coefficients indicate the level of statistical significance: whereas three asterisks denotes the highest significance (the p-value is smaller than 0.01), zero asterisk implies no significance. The footnote at the bottom right of the table provides additional information on the different levels of statistical significance. In addition, the numbers in parentheses are the Newey-West standard errors.

Results from Panel A clearly confirm my original hypothesis that judicial independence and the likelihood for retribution are positively correlated: for all four measurements of judicial

independence, the regression coefficients are both positive and statistically significant. This provides very strong evidence for my hypothesis. Since the courts usually become more and more independent every year in post-conflict societies, such positive correlation shows that countries usually wait until the courts to be more capable and independent to impose legal sanctions on the past perpetrators. These coefficients also imply that during earlier years of the transition, countries are more likely to adopt other non-prosecutorial and non-retributive mechanisms, particularly amnesty and truth commissions. However, because the observational data on transitional justice mechanisms do not imply underlying randomized experiment, we should not the result as indications of a direct causal relationship between the variables. In other words, higher levels of independence by no means cause the post-conflict society to hold more trials. Nonetheless, I can still argue that the result here shows that judicial independence is an important pre-condition for retributions.

Panels B and C also show a positive correlation between the two variables of interests, but some of the models—the ones without asterisks—lack statistical significance, partially because of the limited number of cases used in the models (shown in the “Observations” row). Between the two regions, Latin American exhibits more positive correlation between judicial independence and retribution. As for Eastern European nations, the relatively bigger standard errors there suggest the some degrees of within-region variations. Based on the result, I also speculate that lustration policies are prioritized over trials during the first years of transitions, but I need qualitative evidence to backup these speculations. Table V in the appendix (after the reference section) sums up the major findings from all four case studies. In the next section, I will first examine the two Latin American cases—Argentina and Chile—to evaluate the claim that independence of the courts is the prerequisite for retribution.

Post-Military Latin America

Two key external variables need extra attention in the Latin American context. The first one is the threat from the outgoing military regime. For judges to act impartially on the human right

cases, it is not sufficient for them to be independent from the executive will: their interests also cannot be tied to those of the military. Additionally, Latin American judges do not have the power to initiate cases themselves (Helmke 2005), so the presence of trials was very much contingent upon the executive preference and the domestic attitude toward punishment.

Nonetheless, I still observe that trials were most likely to take place when constitutional reforms bestowed institutional guarantees of independence to the judges coincided with a human rights agenda from the executive. Although formal institutional guarantees of judicial independence is the minimal requirement for prosecutions, once these safeguards—including a more impartial selection process of the judges—are in place, the executive becomes less relevant than the independent judges in determining retribution.

Argentina

The Argentine judiciary from Menem to de la Rúa supports the claim as it shifted from Model A to Model C (Table I). Before I analyze the substantive causal links, I need to briefly explain why such shift proves that judicial independence takes priority over the executive will. First, a unique characteristic of the Argentine judicial system is the dominance of executive power over the court. Before 1994, every new president appoints his own court. This feature makes the judicial-executive relations especially critical for my arguments. Second, both models (A and C) lack executive preference for retribution, but only Model C includes judicial independence. Hence, one can reasonably infer that judicial independence is the more important factor here because only the latter model results in a higher likelihood for prosecution. Let us now examine closely how Argentina fits into this illustration.

Figure 1 below gives an overview of the changes in judicial independence in Argentina since Alfonsín. I plotted time (year) on the x-axis and the level of judiciary independence on the y-axis, using the “dfji” variable from the Melton(2014) dataset. The vertical dotted lines divide the three administrative periods under three different presidents: Alfonsín, Menem, and de la Ru´a.

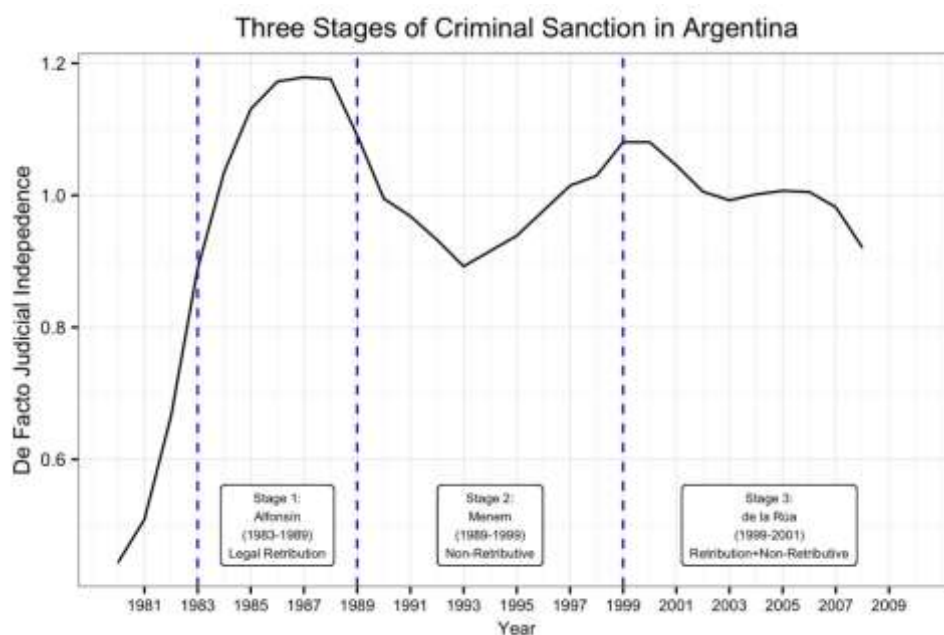


Figure 1: Three Stages of Criminal Sanction in Argentina

The temporal divider for identifying causal mechanism here is the year of 1994, where the constitution reforms passed by the Congress strengthened judicial independence in the following ways: a) creating a Judicial Council; b) creating a disciplinary council; c) declaring a public ministry as the independent judiciary organ; d) changing the nomination process of the judges; e) expanding judicial review power of the courts(Helmke 2005). It is all of these institutional guarantees of judicial independence that lead to a small increase of prosecutions and dramatic one at the beginning of the de la Ru´a regime. A direct comparison of the number of prosecutions before and after 1994 will illustrate this point.

During the first and the second Menem administration, prosecutions were rare, because the courts were subject to the influence of the executive. Specifically, before the 1994 reform, judges were named by the president and thus highly subordinate to their superiors. Worried

about backlash from the military, Menem actively opposed to prosecution and packed the Supreme Court with “his business associates, friends, or members of the political party, who had not the slightest interests in pursuing legal careers, let alone legal objectives of punishing the human right abusers” (Roht-Arriaza 2005). As a direct result of the increasing executive influence on the judiciary, both the level of judicial independence (see Figure 1) and the likelihood of prosecution declined.

The 1994 reform thus became a turning point for Argentina and made a difference in the number of prosecutions by changing the selection process of the judges, particularly the lower and appellate court judges. As mentioned, the 1994 reform created a Judicial Council, which then had the authority to select federal judges (except for Supreme Court judges) and supervise the daily operation of the judiciary. After this reform, although the judges in the Supreme Court were still on the same side as Menem and opposed to prosecution during the second Menem regime (1994-1999), the newly-appointed liberal judges at the lower level courts could act independently from the executive and went ahead with the cases brought forward by NGOs and other human rights organizations (Sikkink and Walling 2006). Then, Argentina transitioned into Model C, and the same pattern of judicial behavior and activism continued under the de la Rúa regime. Although de la Rúa, like Menem, did not favor trials against the military and inherited a court packed with Menem-loyalists, the number of trials increased as a direct result of the formal institutional guarantees of judicial independence that enabled active judges to pursue cases without the fear of repercussion (Smulovitz 2012). Simply put, the contrast between prosecutions before and after 1994 shows that independent judges, free from executive influence, increased the likelihood of accountability.

Chile

Similar to the case of Argentina, the successful legal proceedings against military officers in Chile can be attributed to the increasing independence of the judiciary and judicial activism. Unlike Argentina, however, Chile went from Model B to Model D in 1998, when the former

military dictator Augusto Pinochet was arrested in London. 1998 is thus the temporal divider line. Thus, the key causal link between the judiciary and criminal cases is the Chilean context is the independence of the court from the Pinochet regime in addition to the executive. Here, I will first compare the differences in the scale of prosecutions before and after 1998 and then analyze how the structural changes in the legal system created greater independence, changed norms in the legal environment and encouraged judicial activism (Fuentes 2012).

Before 1998, Chile was in the state of Model B, where a court system subservient to the former regime and packed with military-friendly judges stood in the way between accountability and justice. Under the Aylwin administration (1990-1994), the unwillingness of the Chilean courts becomes a nearly perfect illustration of how the lack of independence contributes to impunity. Aylwin attempted twice to reform the judiciary to make the court more independent from the military. In his attempt, he sought to create a national judicial council, set mandatory retirement ages for judges, increase the size of the Supreme Court and amended the clauses regarding the separation of powers (Skaar and Garcia-Godos 2016). The second time he wanted to bypass the Amnesty law of 1978 and proposed a negotiated bill that would allow more prosecution on human right cases. However, both attempts failed. The Supreme Court judges unanimously upheld the amnesty laws from 1978 and ruled that amnesty laws prohibited not only prosecution of the former military members, but also investigation into cases brought to the civilian courts. All the civilian judges on all levels of courts acted in favor of the military by dismissing the cases or sending them to military courts that eventually closed them. Frustrated with these roadblocks to retribution, Aylwin's administration eventually turned to non-retributive, restorative mechanisms. Here, one can see clearly see that the during this period, the court and the executive were not able to form a strategic alliance because there were not many independent judges.

However, the judges changed their indifferent attitudes toward human rights violations in 1998, when Pinochet was arrested in Britain. Immediately after Spain requested his extradition, the

number of trials against Pinochet and his military allies skyrocketed: 28 people were convicted by 2000, and 204 more by 2009 (Skaar 2011). The timing of the two incidences is crucial here for identifying causal mechanisms, because his arrest denotes a decrease in the influence from the military. Nonetheless, the radical change of the court's behavior had occurred on a smaller scale prior before his arrest because of two factors related to judicial independence. In fact, 12 cases were already in the Santiago Court of Appeals in January 1998. The first factor here is the generational shift in the composition of the court, as the liberal judges replaced the Pinochet-friendly ones and thus gave rise to greater independence of the court.

Moreover, the second factor is the broader and gradual institutional and structural change within the Chilean court system that generated greater administrative power and independence. There are four causal elements in this transition: the modified selection procedure of the judges, the expansion of the judicial review powers, deference of power from the Supreme Court to the lower courts, and the shift in norm among the judges. In terms of the first element, the process to initiate trials sped up because more qualified and impartial judges are appointed. (Wright 2014). Judgeship was no longer tied up to political preference, and therefore they enjoy higher level of independence from political influence from the military. Additionally, the Supreme Courts became more willing to exercise its judicial review power and took a more critical look at the amnesty laws and question its constitutionality. The Supreme Court also loosened its control over the lower courts, whose judges then had greater freedom to partake in judicial activism and investigated human rights cases. Meanwhile, as the judges gradually distanced themselves from Pinochet's shadow, the overall attitude toward prosecuting the military changed from conservatism to liberalism. Many Chilean judges looked to Judge Garzón from Spain as the key influencer on such shift in the norm, because he was the one insisting on accountability by request an extradition of Pinochet.

Evidently, all these four structural changes occurred because the court gained greater independence from the military around the time Pinochet was arrested. At the turn of the

century, Chile observed a surge in judicial activism as the new, liberal, and independent judges actively pursued accountability thanks to the institutional change that have been going on behind the scene since the mid-1990s. Thus, the Chilean case provides further support for the argument that judicial independence leads to more retribution. In the next section, the Eastern European states also show similar patterns of institutional change that enable greater extent of retribution, but they operate under a different political background. There, the institutional changes made the courts more willing to re-interpret the clauses regarding the statute of limitation and also made the judges more likely to review the lustration cases in a fair and unbiased fashion.

Post-Communist Eastern Europe

As I explained in the methodology section, lustration should be seen as a form of retributive mechanisms in the Central Eastern European context, because lustrating public officers with ties to the secret police or the former Communist regime also constitutes a form of backward-looking means to achieve “discontinuity with the past” (David 2003)) and promotes accountability. More importantly, lustration operates through legal channels, and its successful implementation and reinforcement require the same set of legal and institutional framework that enabled trials and prosecutions (Uzelac 2007). Nonetheless, lustration tends to be highly politicized by the new officials, as they can use the new personnel system to secure electoral votes and increase their own political power. Therefore, the relationship between the judiciary and executive is important for the Eastern European cases.

Another challenge of criminal and legal sanctions in the Eastern European context is the statute of limitation, which prevents the prosecution of many government officials since a lot of Communist-era crimes were committed back in the 1960s (Stan 2009). Thus, judicial independence is the pre-condition for the independent courts to review and revise the statute of limitation as well as upholding lustration policies. The transitional justice experience in both

Poland and Hungary demonstrate that a strong and independent judiciary is crucial for trials and lustration to take place in a fair and non-politicized fashion.

Poland

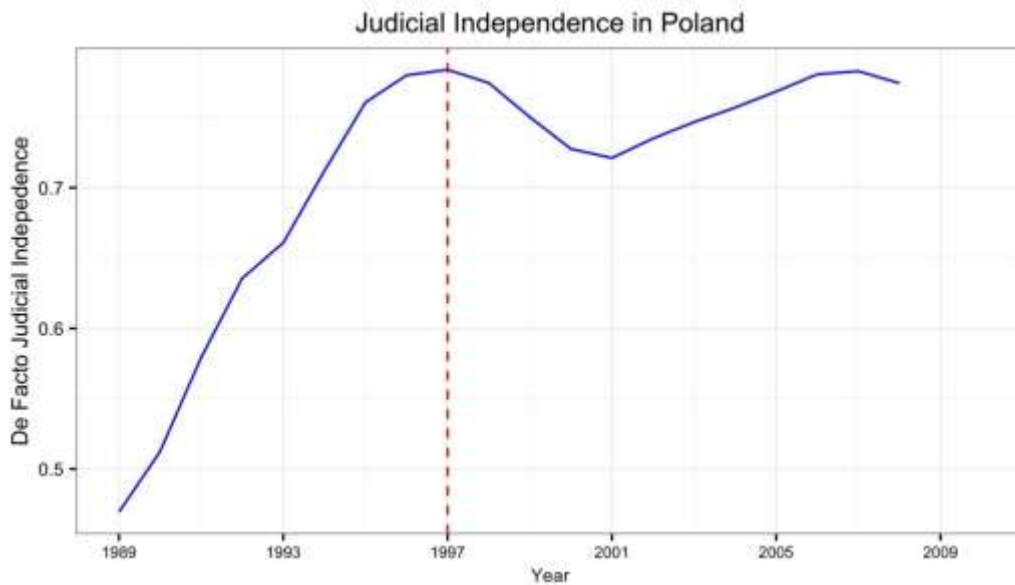


Figure 2: Judicial Independence in Poland

As Figure 2 demonstrates, Poland experienced the highest level of judicial independence from 1998 to 2000, which happens to be the same period when lustration was in effect and the number of trials surged (Nalepa 2012). Such inclination toward retribution can be attributed to two events that took place in the year of 1997, the turning point for Poland. First, the Polish Constitution of 1997 includes provisions to ensure *de jure* judicial independence. Second, the Lustration Act of 1997 was passed and upheld by the Constitutional Court. Both of these elements are crucial in bringing about high degree of accountability. We will now take a closer look at these elements.

First, Article 10 and Article 173 of the Polish Constitution adopted in 1997 both provide that courts and tribunals shall constitute a separate power and be independent of to her branches of power (Bodnar and Bojarski 2012). Furthermore, Article 178(1) explicitly gives judges institutional safeguards and states that “judges, within the exercise of their office, shall be

independent and subject only to the Constitution and statutes.” This requirement is a significant improvement compared to the earlier ones, since the Ministry of Justice struggled to verify judges in the early 1990s. Hundreds of judges were “politically tainted” because of their political association and unfair verdict in the past (Nalepa 2010). To re-institute independence of the judiciary and clean up compromised members, the High Council of Judiciary (HJC) in Poland decided to augment the strength of judicial governance by reshuffling the system with new appointees (Piana 2009).

Such process was not completed until 1997, when the courts finally gained more independence. These judges therefore decided to uphold the provisions of the Lustration Act, which gives rise to more cases of lustration and open up opportunities for more trials after the year of 1998. A formal trial against the foot soldiers and their commanders who ordered the attack on the Wujek miners in 1981 did not take place until the early 2000s. Although there have been efforts in the mid-1990s to hold the former president Wojciech Jaruzelski and former interior minister, General Czesław Kiszczak, accountable for the martial laws in 1981 and killings of the workers of the Solidarity movement (Nalepa 2012), the largest trial did not take place until July 2000, when prosecutors from the Institute of National Remembrance brought charges in the national court. Thus, it is clear to see that in Poland’s transition, *de facto* judicial independence became the pre-condition to retribution.

Hungary

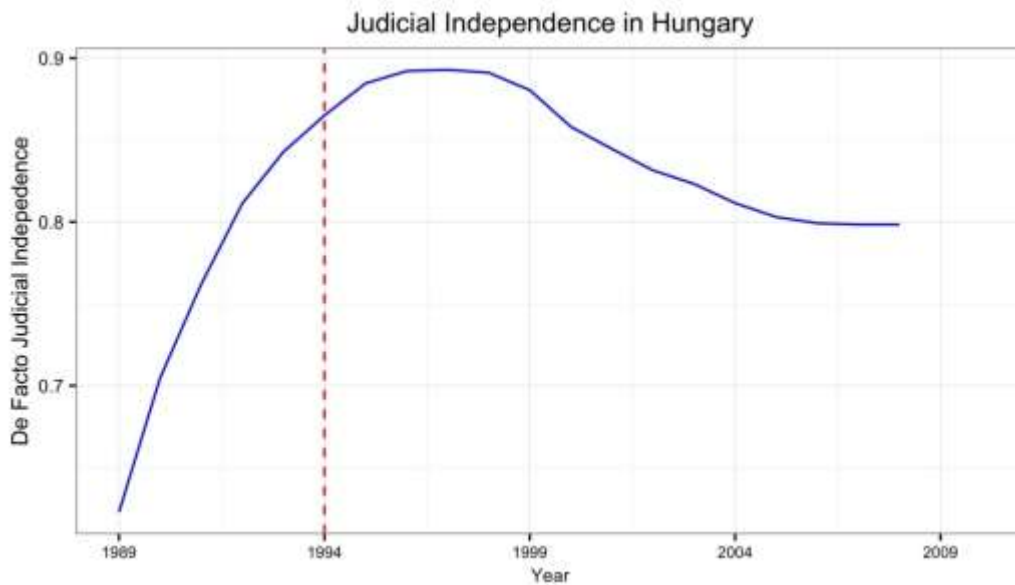


Figure 3: Judicial Independence in Hungary

Likewise, the post-Communist Hungary also witnessed higher levels of judicial independence coinciding with higher rates of lustration and criminal prosecutions. Specifically, the year of 1993—when the Lustration Act requiring background checks on individuals holding public office was passed—is the temporal divider of interest. Figure 3 above shows that the level of judicial independence peaked around the year of 1994. Before 1994, lustration and trials were rare and infrequent, whereas after 1994, they become more prevalent (Stan 2013). According to Olsen’s transitional justice database (Olsen and Reiter 2010*b*), the two former military men were tried and convicted in 1995.

Considering that judges play a important role in shaping the retributive agenda in Hungary, such phenomenon is unsurprising. First, to carry out the lustration policies, the parliament needs to construct a review panel to examine the conducts of the suspicious personnel. However, initially when the panels were first set up, the judiciary was not independent. Many judges still had ties to the old Communist organs and therefore could be easily tampered with by the government officials who themselves were under review (Halmai and Scheppele 1997). If the judges were biased, lustration would not be implemented, as the judges themselves would be unwilling to review the “tainted” officials. It was not until 1994, when some of these judges

were fired and replaced by the “cleaner” ones, that the courts system as a whole had the ability review the lustration cases in a more unbiased way.

Furthermore, isolation from the political interference is necessary for the courts to revise the legal clauses regarding the statute of limitation and jumpstart prosecution. In particular, the behavioral change in the Constitutional Court around this time exemplifies a shift from Model A to Model C, which was caused by the increasing level of judicial independence. Before 1993, the Hungarian Parliament drafted several laws to lift the statute of limitation on crimes against humanity that took place during the 1956 Revolution. At the time, President Göncz was reluctant to initiate trials and referred the laws to the Constitution Court. Lacking formal independence from the other two branches, the judges at the Constitutional Court unanimously struck down the laws. But in 1993, when the same process repeated itself, the Constitutional Court upheld provisions that made it possible to prosecute crimes against humanity or war crimes as covered by the international law (Halmai and Scheppele 1997). It is exactly this new interpretation of the laws that increased the likelihood for retribution and allowed greater scale of criminal sanction. Immediately after this decision, in June 1994, the first trial in Hungary began in the Budapest City Court. Again in January 1996, two cases regarding the government shootings into demonstrators in 1956 were brought forward to the Supreme Court (Piana 2009). Finally, the post-1994 Hungary transitioned into Model C, as the likelihood of fair trials and unbiased implementation of the lustration policies is high when judges are more independent and free from interference by external political influences. Yet one can also see that in the Hungarian case, the Parliament also has a significant voice in the process because they had the authority to pass lustration policies. Nonetheless, the Hungarian case still exemplifies a positive correlation between judicial independence and retribution. After examining all four cases, in the final paragraph, I will discuss some of the other complicated factors relating to the main findings and then conclude with a proposal for future research.

Conclusion

Combining regression-based quantitative analysis and case studies on two regions, this paper has highlighted the importance of judicial independence on bringing about retributive mechanisms in transitional societies. It also establishes judicial independence as the necessary but insufficient condition for retribution, and it has successfully used the proximity in the timings of relevant events to isolate the effects of confounding variables to maximize the chance of identifying the causal links in region contexts. Some of the links are generational shift of judges, judicial activism, the expansion of judicial review power, and revision of the statute of limitations. Moreover, this paper uses the cases of Argentina and Chile to further support the claim that the probability of retribution is the highest under a combination of judicial independence and executive preference.

It is still important to note some of the methodological challenges mentioned before and recognize that the causal identification in this paper is by no means perfect and applicable in every case. As the case studies show, the presence of retributive mechanisms—trials or lustration—can be subject to many other factors, such as the legislature, the public will, and even international pressure. If we hold all these other factors constant, the argument of this paper implies that successful implementation of retributive methods requires a strong and impartial judiciary working with the executive, so societies in transition need to pay more attention to reforms on legal institutions.

A suggestion for further examination on this issue is to extend the analysis to other regions around the world. Although the number of political and cultural variations may increase, I suspect that similar correlations would still hold, as the institutional safeguards behind the independent judiciaries are among the primary motivations for post-conflict societies to adopt a firmer stance on past human rights violations and employ harsher retributive mechanisms to promote accountability.

Chuyue “Chu” Huang is a junior at UC Berkeley double majoring in statistics and political science. She has collaborated with various professors and graduate students on projects relating to political behavior, public opinion, and polling. Currently on an exchange program at Sciences Po Paris, she is most passionate about applying statistical and formal models to social science research and interested in conducting more research on voter choice and rational theory of decision-making. In the future, she hopes to become an education policy analyst.

References

- Bodnar, Adam, and Lukasz Bojarski. 2012. "Judicial Independence in Poland." In *Judicial Independence in Transition*, ed. Anja Seibert-Fohr. Springer.
- Cingranelli, David, David L. Richards, and K. Chad Clay. 2015. "CIRI Human Rights Data Project."
- David, Roman. 2003. "Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)." *Law Social Inquiry* 28(2): 387–440.
- Domingo, Pilar. 2012. "Accountability, the Rule of Law and Transitional Justice in Latin America." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. United Nations University Press.
- Fijalkowski, Agata. 2015. "Transitional Criminal Justice: The Polish Way." In *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies*, eds. Agata Fijalkowski, and Raluca Grosescu. Intersentia: Cambridge.
- Fuentes, Claudio. 2012. "The Unlikely Outcome: transitional Justice in Chile, 1990-2008." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. Tokyo: United Nations University Press.
- Grodsky, Brian K. 2010. *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses*. University of Notre Dame Press.
- Grodsky, Brian K. 2015. "Transitional Justice and Political Goods." In *Post-Communist Transitional Justice: Lessons from Twenty-Five Years of Experience*, eds. Lavina Stan, and Nadya Nedelsky. Cambridge University Press.

Grosescu, Raluca, and Raluca Ursachi. 2015. "The Case of Romanian December 1989 Events." In *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies*, eds. Agata Fijalkowski, and Raluca Grosescu. Intersentia: Cambridge.

Halmai, Gabor, and Kim Lane Scheppele. 1997. "The Hungarian Approach to the Past." In *Transitional Justice and the Rule of Law in the New Democracies*. University of Notre Dame Press.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.

Horne, Cythia M. 2016. "Transitional Justice: Vetting and Lustration." In *Research Handbook on Transitional Justice*, ed. D Jacobs. Edward Elgar Publishing Limited.

Huntington, Samuel. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press.

Krygier, Martin. 2005. "Rethinking the Rule of Law After Communism." In *Rethinking the Rule of Law After Communism*, eds. Martin Krygier Adam Czarnota, and Wojciech Sadurski. CEU Press.

Landes, William M., and Richard A. Posner. 1975. "The Independent Judiciary in an Interest-Group Perspective." 18:875-901.

Lavina, Stan. 2012. "Neither Forging Nor Punishing? Evaluating Transitional Justice in Romania." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. United Nations University Press.

Lutz, Ellen. 2006. "Transitional Justice: Lessons Learned and the Road Ahead." In *Transitional Justice in the Twenty-First Century*, eds. Naomi Roht-Arriaza, and Javier Mariezcurrena. Cambridge University Press.

Lutz, Ellen, and Kathryn Sikkink. 2001. "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America." *Chicago Journal of International Law* 2(1)(3).

Marshall, Monty G., Ted R. Gurr, and Keith Jagers. 2015. "Political Regime Characteristics and Transitions, 1800-2015."

Melton, James, and Tom Ginsburg. 2014. "Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence." *Journal of Law and Courts* Fall.

M'endez, Juan E. 1997. "In Defense of Transitional Justice." In *Transitional Justice and the Rule of Law in the New Democracies*. University of Notre Dame Press.

Nalepa, Monika. 2010. *Skeletons in the Closet: Transitional Justice in Post-Communist Europe*. Cambridge University Press.

Nalepa, Monika. 2012. "Lustration as a trust-building mechanism? Transitional justice in Poland." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. Tokyo: United Nations University Press.

O'Donnell, Guillermo, and Phillippe C. Schmitter. 1984. *Transition from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*. John Hopkins Press.

of the Human Rights, United Nations Office. N.d. "Basic Principles on the Independence of the Judiciary."

Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. 2010a. "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy." *Human Rights Quarterly* 32(4): 980–1005.

Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. 2010b. "Transitional Justice in the World: Insights from a New Dataset." *Journal of Peace Research* 47(6): 803–809.

Piana, Dianela. 2009. *Judicial Accountability in New Europe from the Rule of Law to Quality of Justice*. Ashgate.

Popovski, Vesselin. 2012. "Complexity and Effectiveness." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. Tokyo: United Nations University Press.

Roht-Arriaza, Naomi. 2005. *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. University of Pennsylvania Press.

Serrano, Monika. 2012. "Transitional Justice and Democratic Consolidation." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. Tokyo: United Nations University Press.

Sikkink, Kathryn, and Carrie Booth Walling. 2006. "Argentina and Global Trends in Transitional Justice." In *Transitional Justice in the Twenty-First Century*, eds. Naomi Roht-Arriaza, and Javier Mariezcurrena. Cambridge University Press.

Simonovic, I. 2004. "Attitudes and Types of Reaction toward Past War Crimes and Human Rights Abuses." *Yale Journal of International Law* 29(2): 343–362.

Skaar, Elin. 2011. *Judicial Independence and Human Rights in Latin America : Violations, Politics, and prosecution*. New York : Palgrave Macmillan.

Skaar, Elin, Cath Collins, and Jemima Garcia-Godos. 2016. "Conclusions: The uneven road towards accountability in Latin America." In *Transitional Justice in Latin America: The Uneven Road from Impunity Towards Accountability*, eds. Elin Skaar, Jemima Garcia-Godos, and Cath Collins. GlassHouse.

Smulovitz, Catalina. 2012. ""The Past is Never Dead: Accountability and Justice for Past Human Rights Violations in Argentina." In *After Oppression: Transitional Justice in Latin America and Eastern Europe*, eds. Vesselin Popovski, and Monica Serrano. Tokyo: United Nations University Press.

Stan, Lavina. 2009. "Romania." In *Transitional Justice in Eastern Europe and the Former Soviet Union*, ed. Lavina Stan. Routledge.

Stan, Lavina. 2013. *Transitional justice in Post-Communist Romania : The Politics of Memory*. New York: Cambridge University Press.

Teitel, Ruti. 2000. *Transitional Justice*. Oxford University Press.

Teitel, Ruti. 2005. "Transitional Rule of Law." In *Rethinking the Rule of Law after Communism*, eds. Martin Krygier Adam Czarnota, and Wojciech Sadurski. CEU Press.

Uzelac, Alan. 2007. "(In)Surpassable Barriers to Lustration: Quis custodiet ipsos ustodes?" In *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, ed. Vladimír Dvořák. CPI/PSRC.

Walicki, Andrzej S. 1997. "Transitional Justice and the Political Struggles of PostCommunist Poland." In *Transitional Justice and the Rule of Law in the New Democracies*. University of Notre Dame Press.

Wright, Thomas C. 2014. *Impunity, Human Rights, and Democracy: Chile and Argentina, 1990-2005*. University of Texas Press.

Appendix

Table V: Summary of the Four Case Studies

Country	Temporal	Major Event	<i>Model Shift</i>	Key Actor/Factor
Argentina	1994	Constitutional Reform	A to C	lower level judges
Chile	1998	Pinochet's Arrest	B to D	lower level judges
Poland	1997	Constitutional Reform	A to C	Constitutional Court
Hungary	1994	Revision of the Statute of Limitation Revision of the Lustration Law	A to C	Constitutional Court