

Law Under Siege: The Origins and Transformation of Brazil's Political Trials, 1964-1979

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INTRODUCTION

The authoritarian regimes of Argentina (1976-83), Brazil (1964-85), Chile (1973-90), and Uruguay (1973-84) all used violence to crush dissent, and the law to regulate and legitimate that violence. Repression under the Brazilian regime was particularly legalistic, meaning that the number of killings was relatively low and the rate of judicial prosecution was high. Available evidence suggests that more people were brought into courts - military courts - for political crimes in Brazil than in any other authoritarian regime in the region.¹

Surprisingly, given their importance to political repression, and the fact that Brazil is the only country in the region where military court documents are available to the public, these political trials have been little studied (exceptions are Reis Filho, 1989; and Ridenti, 1993). The best-known source of information on the trials is the book *Brasil: Nunca Mais (Brazil: Never Again)*, whose clandestine compilation, publication, and emergence on the country's best-seller list in the mid-1980s has been justly celebrated (Arquidiocese de São Paulo, 1985; published in English as Dassin, 1986; described by Weschler, 1990). Whereas the former is a work of human rights advocacy, the present study is an attempt to understand the power relations within an authoritarian regime through the lens provided by the political trials.

Of particular importance in this study is understanding the relationship between the military courts and the security forces on the front lines of the war against "subversion" and, more generally, between the regime's legality and its repressive practices. This relationship has been little theorized in the literature on state repression. One group of authors, for example, rightly points out that "there are many ways in which state policies involving the creation of extreme fear or terror can be made to conform to the legal code (or vice versa)" (Mitchell et al, 1986: 13), without listing these ways or examining their different political implications. Furthermore, some analyses of national security doctrine in Latin America imply that the doctrine was translated into state practice in a relatively

uncomplicated manner; if, as one scholar writes, national security doctrine decreed that "under all conditions, individual security is subordinate to national security" (Lopez, 1986: 84), he neglects to mention the considerable contradictions and tensions judiciaries experienced when faced with such a principle.

My main point is that military justice in Brazil was not a simple "extension of the military-police repressive apparatus" (Projeto Brasil: Nunca Mais, 1991: 178); if it had been, its usefulness as a legitimating device for the regime would have been negligible, and it would be hard to understand why people were put on trial at all. Instead, I argue that the courts were embedded in a "judicial field", connected to a civilian legal establishment, and this gave them some autonomy from other state institutions. Within this field, conflicts within the military regime over the treatment of dissent were worked out, and center-periphery loyalties consolidated. In a complex and contradictory fashion, the courts both legitimized state repression and provided space where that repression could be resisted and contested, in the context of a regime that gradually closed down most other public spaces. They neither consistently upheld individual rights against the claims of "national security", nor reflexively ratified every individual application of coercion by the security forces. The courts were also used by factions within the regime in ways that went beyond the control of the opposition. Careful examination of the political trials in the courts forces us to re-evaluate both our models of state repression and the nature of authoritarian legacies in Brazil today.

The article proceeds in the following fashion. Section I describes the data set upon which this research is based, and some basic attributes of military justice that it reveals. Section II argues that the military regime's prosecution of opponents built on a tradition of judicial repression of political opposition and national security doctrine in Brazil. Section III reviews the proceedings of the military courts, arguing that, while the system "stacked the deck" against defendants and maximized the room to maneuver of the prosecution, it also exhibited the resilience of traditional notions of individual rights, albeit of an elitist variety, among some judges. Section IV argues that a key to understanding the role of the courts in the regime is to appreciate how the treatment of cases changed over time in response to different phases of the repression. Section V summarizes the

implications of this research for our understanding of repression and authoritarian legacies in Latin America.

I BRASIL: NUNCA MAIS

The archive compiled by the team that produced Brasil: Nunca Mais offers a fascinating and still under-utilized source for uncovering the nature of political dissent and official views of "national security" under Brazil's military regime. It consists of 707 military court cases, involving more than 7,378 people charged with "crimes against national security", that were appealed to the Superior Military Court between 1964 and 1979. A further 6,385 people were investigated in military-police inquiries but never formally charged, while thousands of others were tried in regional court cases that were never appealed to a higher level. The cases tried range from high politics, such as the attempted assassination of presidential candidate Costa e Silva in 1966, to minor provincial dramas, such as the case of a drunken man caught scrawling pro-Castro graffiti in a small town in the interior state of Goiás in 1975. Most of the cases involve defendants whose expressed opinions or associations were deemed in some way to have threatened national security; more specifically, these defendants were also frequently accused of having links either with groups supportive of the Goulart government toppled by the 1964 military coup, or the numerous factions of the armed and unarmed left driven underground by the repressive crackdown of the late 1960s and early 1970s.

The present work is based on a data set of 259 cases, or roughly 37 percent of the total of 707 cases in the Brasil: Nunca Mais archive, involving 2,126 defendants.² The largest number of cases (26 percent) involve students, but members of the military (17 percent), trade unionists (16 percent), politicians (16 percent), clerics (6 percent) and other professional categories (16 percent) are also represented.³ This data set provides a window on the entire universe of cases and allows for the testing of generalizations about the political trials, when complemented by careful textual and conjunctural analysis.⁴

A review of the cases in the data set confirms the finding of Brasil: Nunca Mais that the torture of political prisoners was widespread, systematic, and largely condoned by the courts. It is easy to understand the reaction of one defendant, who refused to cooperate during his trial and denounced the proceedings as an "enormity of persecution and farce...mounted against me".⁵ However, a quantitative analysis of the cases reveals some surprising and relatively neglected aspects of the political trials. For example, the acquittal rate in the military courts was quite high: 48 percent in the lowest level of the court system, the regional military courts, according to one source (Heinz, 1992: 90). My own sample of 259 cases yields an acquittal rate of 54 percent. In addition, the available evidence suggests that the appellate court in the military justice system, the Superior Military Tribunal (Superior Tribunal Militar, STM), often overturned convictions and gave out lower average sentences than the lower courts. In my sample, the STM handed down an average sentence of 34 months compared to the lower courts' 47 months.⁶ Evidence also suggests that the STM was more likely to make the distinction between acts and speech, being less likely than the lower courts to consider the latter to be crimes against "national security". The average prison sentences in the courts were not draconian: 63 percent of those convicted, and for whom data is available, were given 4 years or less (Heinz, 1992: 91). In my sample, the average sentence is about 4 years.⁷ The courts avoided using the ultimate sanction, the death penalty, even though this was permitted after 1969.

Another important aspect of the trials concerns the selection and background of the judges in the military courts. Most military court judges were officers who lacked legal training and who were part of the chain of command within the armed forces. Furthermore, for most of the military regime, all civilian judges (including the ones who served in the military courts) lacked the job stability they had previously enjoyed, and can count on again today, in Brazil. The courts thus lacked both the competence and independence of a genuinely autonomous judiciary. However, not all judges were necessarily hard-liners connected to the security forces. Some scholars assert that moderate military officers were sometimes placed in the courts so as to remove them from active-duty command and thus control over troops (Skidmore, 1988: 131; Oliveira, 1992: 138). While systematic evidence about the political views and backgrounds of judges is presently unavailable, it is likely that both

hard-line officers connected to the security forces and more moderate officers distrusted by hardliners, as well as officers with views and affiliations in between these two poles, probably served as judges in the courts. This is reflected by the very different opinions expressed by judges in similar cases in the data set.

In summary, the relatively high acquittal rate and the apparently mixed backgrounds of the judges suggest that military justice played a complex political role within the regime. Military justice made some concessions to traditional legal concepts and was not always severe in its judgments and sentencing. The military courts were a site for the resolution of some of the regime's internal conflicts, which reflected disagreements on how to deal with the opposition but also who should dominate the coalition supporting military rule. The political trials thus had multiple political purposes, and military justice changed significantly over time.

II THE TRADITION OF BRAZILIAN LEGALISM

The courts became venues for resolving internecine conflict, in part, because they enjoyed some measure of legitimacy among most supporters, if not opponents, of the regime, and were able to deliver benefits to them. Both the practice of using the law to repress political opponents and the doctrine of national security were far older than the "revolution" of 1964 which, for all its rhetoric, relied heavily on tradition to legitimate its rule. The practice of judicial repression of political opposition, a major feature of the 1964-85 regime, was not unheard of in other periods of Brazilian history.

Appointing judges linked to particular landed elites had been, in Brazil, a privilege extended by the center in return for loyalty. Uricoechea notes the prominence of center-periphery relations in Brazilian history, in which state-builders faced the difficulties of centrally administering a continental-sized political community dominated by powerful landed oligarchies. To a greater extent than in Chile, Uruguay, and even Argentina, the centralization of state power was accompanied by a delicate balancing act of accommodating local, private power. In this sense the central state was somewhat more societally embedded than in the other three cases, "unable to rule effectively without

striking bargains with, and gaining the cooperation of, private groups...keenly conscious of the fragile limits of its authority" (Uriconchea, 1980: 54). National power rested on a dualism between the central state and its expanding bureaucracy of universal rules and impersonal administration, on one hand, and a landed oligarchy divided by competing networks of kinship and patron-client ties on the other.

Thus, the 1841 Law of Interpretation represented an expansion of central state capacity, in that it took the power to elect local judges away from municipal governments. However, due to a lack of qualified personnel, judgeships originally intended for qualified lawyers designated by the central administration were often entrusted to local notables (Uriconchea, 1980: 54). As the legal apparatus grew by leaps and bounds in the rest of the nineteenth-century, control over the local judiciary became a key prize in political conflicts between different clans within the landed upper class.⁸

The ideological roots of the political trials of the 1960s and 1970s can be traced back to global changes after the turn of the century. According to Ingraham, a relatively liberal, nineteenth-century view of political dissent gave way, around World War I, to a much more repressive conception of the requirements of national security in Western Europe and elsewhere. This new authoritarianism tended to dissolve the distinction between external and internal threats to national security, so that certain forms of domestic opposition to the government came to be seen as treasonous, especially after the Bolshevik revolution of 1917 (Ingraham, 1979: 219-220). The view came to be shared by the rulers of many Latin American states, especially those for whom heavy European immigration in prior decades had produced concern over the internalization of "foreign" threats.

Latin America, whose political elites defined themselves with reference to U.S. and European political models, was influenced by this turn towards more repressive conceptions of national security in the industrialized countries. In the context of weak civil societies and states with relatively dependent judiciaries and strong militaries, this repressive turn went farther in Latin America than it did in the advanced capitalist countries. The role of the military in this shift has been studied extensively, and will not be examined here, but much less attention has been paid to the judiciary. In twentieth-century Latin America, large masses of disenfranchised people were

effectively deprived of access to the courts, and the citizenship rights of the lower classes were generally unrecognized, especially in rural areas. Furthermore, in the civil law tradition, judges were seen, not as the creators of law through interpretation, as in the Anglo-American common law tradition, but as enforcers of law that was created only by the executive or legislature. While in practice judges in civil law systems did often create law through interpretation, especially in areas such as national security where laws were new and vague, they tended not to assert their independence vis-a-vis other branches of government to the extent of their common law counterparts.⁹

Brazilian society, with its history of slave-holding on a grand scale and the preservation of an empire, was more hierarchical, organicist, and authoritarian than many of its counterparts in the southern cone, especially the urbanized regions of Argentina, Chile, and Uruguay. These regions had gone through much larger mass mobilizations during the independence wars and been more influenced by republican and democratic ideas. This distinctiveness contributed to the development of a "Brazilian tradition" of political repression that became noticeable after World War I. The tradition consisted of the periodic use of exceptional state powers and the linkage of political dissidents with common criminals in official pronouncements. State leaders periodically used the exceptional powers granted during states of siege to move against both "undesirables" among the lower classes and political opponents, flouting legality in their treatment of the former, and applying more sophisticated legal cover to the repression of the latter. Thus, under the Old Republic, an insurrection in 1924 touched off a wave of trials of political opponents and the "cleansing" of cities such as São Paulo and Rio de Janeiro. In addition, the routine powers of the state were used to identify, monitor, and repress the politically suspect. The São Paulo political police (Delegacia, later Departamento, de Ordem Política e Social, DOPS), for example, established in 1925, was entrusted with "a most serious and permanent vigilance against the activities threatening to the traditional principles of Religion, Country, and Family". To this end, the DOPS had registered in its files 102,654 of the state's 300,000 workers by 1928 (Pinheiro, 1991: 111; 87-116; 320-322).

The most important precursor of the political trials of the 1960s and 1970s arose in this period as a reaction to the Communist uprising of 1935. The uprising, or conspiracy (intentona), as it was called by its opponents, was seen by the military not only as an attack on the state and therefore, in this view, an attack on the nation, but also as a "betrayal from within", because the plot had some support from within the armed forces. Although it was quickly suppressed, the intentona continued to be invoked by the armed forces for decades afterwards, a symbol of the limitless perfidy of the Communists and the consequent need for the military to be permanently vigilant in defense of the nation. More specifically, the intentona was cited to justify the internal purge of the armed forces and the repression of the rest of society at the time of the 1964 coup and afterwards.¹⁰

The government's response to the 1935 Communist uprising was the enactment of a series of repressive measures designed to go beyond what one government minister called outmoded "judicial traditionalism" (Campos, 1983: 39). To this end, the regime created the National Security Tribunal (Tribunal de Segurança Nacional, TSN) for the prosecution of those accused of political crimes. Established in 1936 (before the creation of the dictatorial New State, or Estado Novo) and continuing until 1945, this special court tried thousands of suspected Communists, fascist integralistas (after their failed insurrection of 1938), and merchants accused of violating the regulations of the Estado Novo's "popular economy". Initially part of military justice, it was made an independent tribunal in 1937. The special powers of its civilian and military judges, such as the right to decide by "free conviction" rather than the weight of the evidence, and many aspects of its procedures made the court a place in which the distinction between political dissent and subversion, fundamental to constitutional government, could be repeatedly ignored, to the advantage of office holders in the government of President Getúlio Vargas (Campos, 1983: 126; Loewenstein, 1942: 212-234; Pinheiro, 1991: 325).

While the National Security Tribunal died with the Estado Novo, the mentality that produced it did not. The post-World War II era ushered in the rise of the U.S. to global dominance, the Cold War, and a new era of concern for national security. Brazil's close ties to the U.S. military, furthered by the Brazilian Army's participation in the Italian campaign under U.S. command, were

strengthened in the late 1940s and 1950s through US military aid and the formation of transnational communities in international organizations involving both Brazilian and U.S. policymakers. These communities reinforced shared ideological orientations and contributed to the development of a Brazilian version of national security doctrine that drew heavily on, and creatively adapted, U.S. models. Brazil's 1953 national security law, which permitted, among other things, the prosecution of civilians in military courts for crimes involving external threats to national security, was an example of the updating of legislation for the new era. The growing strength and confidence of the military within the state contributed to the creation of an authoritarian regime inaugurated in 1964 that lasted considerably longer than the Estado Novo of 1937-45.

The contrast between the National Security Tribunal and the military courts highlights the militarization of the Brazilian state in the post-World War II period. Whereas the TSN had been dominated by civilians, and tried defendants arrested primarily by a civilian political police force, the military courts of 1964-79 were dominated by the military, and dealt with people who had mainly been arrested by the armed forces.¹¹ When civilians were subject to the jurisdiction of military courts in national security cases in 1965, military justice effectively usurped the civilian judiciary's traditional role of serving as an intermediary in local political conflicts. The delicate Brazilian art of accommodating particularistic local interests with those of the center became a military specialty.

The coup-makers of 1964, ardent opponents of Getúlio Vargas and his followers, would not have wanted to and did not re-create the TSN, but they used military courts for much the same purpose. Brazil's political trials of 1964-79 were thus a continuation of, and a major increase in, the political use of courts by political elites and the central state. They reflected a long process of state formation and not just the innovation of a particular political regime. In this process executive power, the role of the military within the executive, and the development of a distinctive national security ideology were steadily increasing.

The development of the latter reveals the importance of societal influences in shaping patterns of judicial repression. National security ideology was a product both of global trends and the adaptation of those trends to the needs of domestic rulers, jointly developed by both military and

civilians policymakers and theorists over several decades, beginning in the 1920s. While this national security alliance eventually led to the militarization of justice and the criminalization of dissent, it was the work of "civilian militarists" inside and outside of government as well as the military itself (Vagts, 1959: 453). Authoritarian elements in society, and not just an authoritarian state, produced Brazil's political trials.

III THE POLITICAL TRIALS

The political trials of 1964-79 took place in 21 military courts divided into twelve regions, each consisting of four military officers with only one civilian judge. Verdicts could be appealed to the Superior Military Court, made up of fifteen judges appointed by the president and approved by the senate, ten of whom were selected from the armed forces and five of whom were civilians (Ronning and Keith, 1979: 233). In some instances, appeals reached the civilian Supreme Court. Prosecutions in these cases were conducted by civilian lawyers in the Ministério Público; defence lawyers were usually civilians.

Brasil: Nunca Mais shows how the courts manipulated the law and "stacked the deck" against defendants who were, in the main, young, unarmed, male, middle-class civilians. These unlucky people had been apprehended by the security forces for engaging in "subversive" acts or speech, or being accused of subversion by a witness in a police inquiry or military-police inquiry (inquérito policial-militar, IPM). Numerous cases involve petty crimes (such as political graffiti), acts permitted by the pre-coup Goulart government and retroactively defined as crimes, or incidents that would not have been considered criminal under a democratic regime, such as strikes and the everyday expression, in speech, print, or other media, of political views. Seen strictly from the point of view of probable threats to the state, there is very little real "subversion" in these trials.¹² Furthermore, there is relatively little mass mobilization, and many small, isolated groups and individuals; compared to its counterparts in the southern cone, the Brazilian armed left was small and disconnected from the working-class and peasant social base in whose name it spoke.

Nevertheless, the charges of violating national security were taken seriously. Worse, confessions extracted under torture were frequently used to convict defendants in the absence of additional corroborating evidence, even when defendants retracted their confessions in court. Defense lawyers, few in number, were intimidated. Thus, the politics of "coerced consensus", in which consensus is said to exist even though state coercion is high, was extended from the macro to the micro-realm (Schirmer, 1996: 90). In addition, in 1969 the regime changed the law to require the prosecutors to appeal all cases in which defendants were acquitted, even if their own recommendation had been not to convict. In this way, defendants who were acquitted often had to languish in prison for several years until their appeal was decided upon in the Superior Military Court. Techniques of procedure were thus used to inflict punishment without sentences being passed.

Despite all this, the courts strove incessantly to garner the legitimacy which the judiciary of a rechstaat is supposed to enjoy. The military regime did not succeed in entirely extinguishing liberal juridical notions; hard-line interpretations of national security legislation existed alongside more discriminating readings of the rights of individuals in the courts. This was due in part to the close interweaving of military justice with civilian justice; Brazil's military courts were formally part of the judiciary, and (as we have seen) involved considerable civilian participation.¹³ There was thus a strong tension within the courts themselves between traditional legal notions of individual rights and authoritarian, statist conceptions of law that did allow some room for maneuver for defendants.

On one level, military justice did not oppose the logic of the repression. After the December 13, 1968 suspension of habeas corpus in cases of national security, detainees in the hands of the security forces had no legal existence. Until they were formally charged, they ran the risk of being killed and were frequently tortured. Judges in the military courts played no role in investigating the arrest and detention of suspects or allegations of torture, except in an exceptional case discussed later, and merely responded to legal procedures initiated by the government after detainees had been processed by the security forces. For this reason, there is little evidence that the hard-liners who ran the security organizations viewed the courts as an impediment to their operations. For example, a

general who had been in charge of army intelligence at the height of the repression, General Adyr Fiúza de Castro, said to an interviewer in 1993:

"I would say that more than 80 percent [of those detained by the security forces] were acquitted - they returned to the life of a petite bourgeois...And we thought that 45 days [the maximum time allowed to detain someone before legal proceedings were required to start after 1968] were sufficient punishment when there was not a crime involving death, when it was only a bank robbery, graffiti-writing, this, that...I, at least, thought that it was sufficient for, in the majority of cases, the comrade to abandon his subversive activity" (From D'Araujo, Soares, and Castro, 1994: 66).

While the estimate of the acquittal rate is exaggerated, the quote is significant in that it suggests that there was no great pressure from the security forces for military justice to have been more punitive than it was.

However, once detainees were encapsulated in the formal legal procedures of military justice, they usually enjoyed some protections unavailable to prisoners in clandestine captivity. By obliging authorities to keep written records and to observe certain formal procedures, the legal requirements of the courts - or, more accurately, the lawyers who used these legal requirements to defend their clients - probably saved lives. Furthermore, the moderation and legal scruples of some judges helped to result in acquittals, thereby diminishing some degree of human suffering. In terms of its effect on prisoners, it is immaterial that much of this legal formalism was maintained by the military regime merely to legitimate itself before world and domestic opinion, and amounted to the hypocritical compliment that vice pays to virtue. The point is that at a certain stage in the treatment of detainees, within military justice, the regime's desire to maintain legal-formal appearances mitigated some of its repressive tendencies.

The judges in the military justice system, therefore, did not always require the punishment of the accused individual. In fact, the regime pointed to the courts to claim legitimacy. To make this claim credible, the courts had to retain at least the pretense of consistently upholding certain legal principles. Jurists within the military regime spent considerable effort commenting on the military

courts' decisions and noting the refinement of the vague national security laws that was taking place within them.

The moderation of some military judges amounted to a kind of liberalism, but it was liberalism of a timid and highly inegalitarian nature. By liberalism I mean a doctrine that extolled and sought to preserve certain formal, individual liberties in the political sphere; in general, this involves "the defense of the individual against the hypertrophied state" (Campos, 1994: 857), and in institutional terms, the separation of powers and the existence of a judiciary capable of upholding individual rights against the claims of the state. However, the judges' liberalism was mitigated by a conviction that not all people were equally capable of exercising their liberties in a "responsible" manner; hence, some citizens would be more equal than others. A conception of social hierarchy thus undercut the premise of the radical equality of citizenship inherent in political liberalism. It is this uneasy combination of doctrines that I call "elitist liberalism".¹⁴

Opinions of the judges in the military court cases frequently reflected elitist liberalism, in that contestation within societal elites was expected and tolerated, but political appeals made to the lower classes were frowned upon as upsetting to the rules of the game. In macro-political terms, this means that restricted contestation was tolerated, but mass participation was not. In micro terms, it signifies that the interpretation of the law and the delivery of justice depended on the social status and political connections of the individual defendant.

An example of this occurs in a case brought before a military court in Rio de Janeiro in 1971. A young film-maker was accused of making a "subversive" film. His film, which contained scenes of student demonstrators being beaten by police, was exhibited by the Museum of Modern Art in São Paulo in 1969 in a private session attended by about ten people. The judges noted the small and select nature of the audience of the movie, and argued that therefore the work of art did not constitute subversive propaganda. They reasoned that the members of the cultural elite who saw the film were more discerning than the uneducated masses, and that the same film, if exhibited to a mass audience, would have been truly dangerous. The defendant was acquitted and the film was later ordered to be returned to him by the Superior Military Tribunal in 1972.¹⁵

The elitist liberalism of many of the judgments in the political trials enhanced the military courts' claims to legitimacy at the same time that it mitigated their repressive weight. In the pursuit of legitimacy, the interest in punishment of individuals was often less important than using symbolic power to normalize the established order, for both international and domestic audiences. In the official discourse of the courts, legal boundaries demarcated the state's enemies who, by definition, fell "outside the boundaries of law (with the military, by definition, within it), and simultaneously reinforce[d] the idea that violence occurs only outside state structures" (Schirmer, 1996: 92).

The courts' claim to legitimacy was bolstered by a certain measure of autonomy derived from their embeddedness in a "juridical field" (Bourdieu, 1987). Military justice was not entirely military; the participation of civilian lawyers and the use of traditional legal procedures within it was important. Although the Brazilian legal profession was (and still is) highly dependent on state employment, and thus often uncritical of the government of the day, it did contain many practitioners with traditional conceptions of law based on individual rights that opposed the repressive, authoritarian legalism of the military regime. The tension between these two conceptions of law can be seen in the court records. They are also marked by the statements of the Brazilian Bar Association (Organização dos Advogados do Brasil, OAB) in 1972 and 1977 calling on the military regime to protect human rights and to dismantle the most extreme features of the national security legislation (Gardner, 1980: 110).

IV PHASES OF REPRESSION AND THE CHANGING ROLES OF THE COURT

The military courts served to regulate state violence, with the objective of making it more efficient in the maintenance of order. They also legitimated state violence and disseminated news about the fate of enemies, deterring those who did not accept the regime as legitimate. But not all their activities concerned the opposition. The courts also gathered information on the security forces and provided a kind of equilibrium mechanism to rulers, effecting compromises between different factions within the regime and the national territory by investigating and prosecuting defendants in

the national security cases. In this sense the courts were involved in "two-level games", dealing with opposition but also mediating conflicts within and providing information to various components of the regime (Putnam, 1988). The nature of these games changed over time. By tracing the three main phases of the military trials, we can see that in each phase, the intensity of court activity, the relationship of the courts to other state institutions, particularly the security forces, the target of prosecution, and the political purposes of the trials differed significantly.

The first phase of court activity was the mid-1960s, when supporters of the Goulart administration were prosecuted. The primary targets of this repression were Communists and members of the Catholic and socialist left (especially in state bureaucracies, trade unions, peasant leagues, student organizations), members of the armed forces who had defied their officers or remained loyal to the constitutional government immediately before and during the military coup, and politicians associated with the toppled government of President João Goulart. This was part of a concerted action to use courts to vilify the previous regime and to purge the state administration of its supporters.

Compared to the brutality of the 1973 Chilean and 1976 Argentine coups, these purges were relatively restrained. General Castello Branco, the first president after the military took power expressed a desire to restore rule to civilians relatively quickly, and his supporters (castellistas) wanted to bar "extremists" from the political arena while retaining much continuity with the old order. The castellistas' extensive ties outside the military, represented most clearly in their consultations with the governors of the most powerful states before and after the coup, engaged them in the traditional Brazilian political art of regional accommodation. More hard-line "revolutionary" officers, centered around General Costa e Silva, with fewer ties to civilians and a more radical commitment to the military's corporate autonomy, remained subordinate in the first few years of the regime. They favored a more radical "cleansing" of society, but did not achieve it. However, disgusted as they were by the mild treatment of old regime supporters in the civilian courts, they did promulgate Institutional Act Number 2 (AI-2), a 1965 presidential decree giving

military courts sole jurisdiction in cases against civilians accused of crimes against national security.

During this phase, the courts, using the old 1953 national security law, were the main venue for the punishment of regime opponents. Many cases in this phase were based on post-facto denunciations of defendants made in official inquiries; hence the involvement of regional power-holders in determining who was to be investigated was probably higher than in later periods. The enemies, in these cases, were also well-known to the creators of the new order. In addition, the conviction rate was relatively high during this phase (1964-67) - 59 percent, according to my sample, compared to 32 percent in the period 1968-73 (n=256 cases). This suggests that people involved in the political mobilizations in support of the Goulart government were far more likely to be convicted in the military courts than non-violent dissenters against the military regime in later years. Repression in the courts, if not outside them, seems to have been harsher in the period of the foundation of the regime than it was under the consolidated regime of the late 1960s and early 1970s.

Unlike Argentina and Chile, the left had been easily defeated at the time of the coup and the new leaders' perception of threats was relatively low. Upon coming to power, the military regime faced only pockets of potential resistance over a wide geographic area - for example, supporters of Leonel Brizola in Rio Grande do Sul in the south, industrial workers in São Paulo and Rio de Janeiro in the center-south, and followers of Miguel Arraes in Pernambuco in the northeast. The wide dispersion of these targets of repression makes the Brazilian situation somewhat different from that facing the rulers of the southern cone military regimes, where left-wing mobilization was more massive and concentrated.

Military courts were thus a pre-existing institution that offered a cheap way to co-ordinate the prosecution of people in a wide geographical area, at the same time that they offered opportunities for local discretion to be used. The courts also allowed the military to oversee the work of the state-run political police forces, whose competence and loyalty the military regime's leaders doubted. Lacking an effective nation-wide intelligence capability at first - a central intelligence organ, the

National Information Service (Serviço Nacional de Informações, SNI) was founded after the coup on the foundations of the prior SFICI (Serviço Federal de Informações e Contra-Informações) - the courts in this early phase served as an interim stop-gap measure until a more impressive security apparatus could be constructed (Campos, 1994: 283).

A few years after the coup, it became clear that the regime's initial "clean-up", rather than dampening dissent, had merely shifted its locus, from that of trade unions, peasant leagues, and other groups to the student movement. At the same time, the gradual closing down of public space contributed to the alienation of many, particularly young people, and the formation of an armed left. Regime hard-liners, calling for more repression, gained in power after the coup, triggering a second phase of military justice. This second phase was marked by the ascension of President Costa e Silva in 1967, and the issuance of Institutional Act Number 5 (AI-5) and the closing of Congress at the end of 1968. By suspending habeas corpus in political cases, AI-5 gave tremendous discretion to the security forces and greatly reduced the powers of the courts. Rather than the first line against subversion, the inquiries and trials became an intermediate stage, behind the security institutions and their clandestine operations. In addition, successive revisions of the national security laws so broadened the state's right to suppress subversion that it allowed virtually anyone to be prosecuted. Non-violent critics of the regime were deemed to be potentially as dangerous as urban guerrillas because they fostered an intellectual climate in which the actions of the guerrillas could flourish.

A network of security forces that could hunt down the shadowy, fragmented armed left throughout the national territory was mounted by the end of the decade. Unlike prosecution in the courts, which aimed at regulating dissent, the security forces' goal was the absolute suppression of the armed rebels, an operation likened by General Fiúza de Castro to "killing a fly with a sledgehammer" (D'Araújo, Soares, and Castro, 1994: 20). At this time, there was a two-track repressive policy: death squad killings for those deemed most dangerous to the regime, trials for those whose dissent was deemed to facilitate the guerrillas. In this phase, the courts played an auxiliary role in gathering information on the armed left, about which the security forces initially knew little, and a major public relations role in denigrating the "terrorists" and "subversives".

The repression of this period generated a climate that changed the nature of politics in the country. This can be seen in the military court archives in at least two aspects. First, it induced citizens to censor themselves for fear of exhibiting ideologically "incorrect" attitudes. This applied to some people accused of subversion in the military courts, who recanted their previous views, but also to members of the society as a whole. Second, it transformed many political conflicts that in previous eras had been conducted at a purely local level into issues of "national security". This is because local office holders were able to draw upon contacts with patrons in the regime in order to use the military courts to prosecute their opponents. In this way, residents of small towns who did nothing more than criticize local officials, and were not necessarily opponents of the national regime, were drawn into the national security dragnet.

Examples of the first phenomenon, attestations of ideological correctness, abound. Many military court cases contain testimony from friends and patrons of the defendants as to the latter's scrupulous conformity to the ruling ideas of the military regime, or at least the lack of their opposition to them. Perhaps one of the most striking instances of the effects of the politics of fear is the case of two students, married to each other, who contacted the São Paulo political police in 1973. Living in West Germany, they wanted to return to Brazil, and contacted the DEOPS through a third party to request guarantees that they would not be prosecuted upon their return. Upon receiving these guarantees, they entered the country; the day after their arrival, they went to the DEOPS to say that they had been students at the University of São Paulo in 1967-69, and were willing to examine police photographs in order to identify possible "subversives" they had encountered during that time. In their testimony at the DEOPS, the students assured the political police that they had not been interested in leftist politics and "did not have time for anything else" except their new jobs as high school teachers. This incident reveals the extraordinary degree to which ideological policing could be internalized, and a self-preserving, each-against-all mentality could be adopted, by individuals coping with the uncertainties of a repressive regime.¹⁶

The second noticeable trend in this period was the use of national security legislation by local political officials. In one case, a fired municipal employee in São Sebastião in the state of São Paulo

called his mayor "corrupt" and "a thief" in 1968. The employee was then charged in the military court with an "offense against authority" under the national security legislation, and the case wound its way to a decision in the Superior Military Court three years later.¹⁷ In another, similar case, a shopkeeper in Agudos, São Paulo in 1968 said that a candidate for mayor for the ARENA party (the party of the military regime) would win the upcoming election because he had "bought" the local electoral judge. This remark resulted in the shopkeeper's prosecution for an "offense against authority" and "political-social nonconformity" in a case that was not decided in the STM until 1974.¹⁸ Both of these cases involved local officials using the regime and its military courts for their own ends, but the pressures could go the other way, as in a 1970 case in which ARENA politicians in Amazonas were prosecuted for beating and expelling a judge who challenged their list of registered voters. In this case, rather than being rewarded by the harassment of enemies, political clients of the regime were punished for violating the prerogatives of the judiciary.¹⁹ In my sample, about 15 percent of the total cases involved defendants who were prosecuted on the basis of criticism of or conflicts with local political officials, rather than the military regime itself (n=255).²⁰

Once the armed left had been defeated and political "decompression" was initiated in 1974, the courts entered yet another phase. In this period, the importance of the security forces within the regime gradually waned and political liberalization began to occur. Judges in the military courts were more frequently sensitive to individual rights and tended to interpret the national security legislation more narrowly than before. The acquittal rate in my sample rises to 89 percent in this period (n=20 cases and 75 defendants), and impressionistic evidence from court documents suggests that, with the political threat to the regime apparently receding, judges were more likely to be scrupulous in safeguarding individual rights in their decisions. Certainly the volume of court cases slowed greatly, as national security prosecution became a tactic of last resort for the regime. In addition, IPMs became a potential political tool the regime's top leaders could use against the security forces themselves. This is because the IPMs could always be used against individual members of the military and police; whereas before, they had been trained only on personnel suspected of being leftists, now they could be used to expose and disarm zealously hard-line

officials who blocked the way to the president's planned liberalization. Thus, President Geisel, against the protests of his Army Minister (whom he later fired), ordered that an IPM be carried out to investigate the death in custody of journalist Vladimir Herzog in São Paulo in 1975, a case that provoked widespread public protest and outrage (D'Araujo, Soares, and Castro, 1995: 65-66). In this instance, the legal procedures previously used to repress dissent on the left were utilized by the presidency to rein in renegades on the right within the security forces.

Perhaps the most extraordinary example of opposition to the arbitrary violence of the security forces from within military justice was a 1977 Superior Military Court decision. In this case, the STM decided to overturn Paulo José de Oliveira Morães' lower court conviction for bank robbery because of a medical examination that revealed that he had been tortured. In the words of one judge, "What we cannot admit is that a man, after being imprisoned, has his physical integrity attacked by cowardly individuals, in the majority of times of worse character than the detainee."²¹ In this unprecedented decision, which garnered considerable press attention at the time, the STM challenged a fundamental part of the security forces' modus operandi and a major basis of the military regime's rule. It went further in demanding that an IPM be established to determine the circumstances of the suspect's torture and to initiate legal proceedings against the torturers if that were appropriate.

However, a close examination of the case reveals the limits of the opposition that took place within military justice. First, this acquittal occurred very late, after the most severe repression had already been carried out, and President Geisel had already embarked on a program of political liberalization. Second, the suspected torturers were members of the civilian DOPS in Rio de Janeiro, not members of the military; an action such as this against the military would have been far less likely. Third, the STM judges were careful not to implicate any other members of the security forces in their statements. Instead, they strove to legitimate the regime and its repressive policies, by refusing to accept the "systematic allegations of torture that the accused who appear in military justice have made" and condemning only "the action of bad policemen who, happily, constitute a minority in this country".²² Finally, the IPM called for by the STM judges never took place;

instead, the governor of Rio de Janeiro refused to take action and no further repercussions from the incident occurred.

In summary, the courts played multiple roles in Brazil's military regime, and those roles changed over time. The courts' actions cannot be explained exclusively in terms of the perception of government leaders of the threat to their rule posed by various opposition groups. A significant amount of the political conflict in the courts was not diadic but triadic, involving contenders for power within the regime as well as the opposition. We need to disentangle these two types of conflict, seeing political trials as exercises in institutional coordination that are both externally and internally-oriented, and that are embedded in a complex and dynamic trajectory of repression.

V MODELS OF REPRESSION, LEGACIES OF AUTHORITARIANISM

The political impact of Brazil's political trials of 1964-79 is difficult to gauge. Scholars who see Brazil as engaged in a holistic process of democratic "consolidation" might be tempted to dismiss it as negligible, a quirky detour that has now been entirely corrected by the country's return to a civilian, multi-party, electoral regime. However, it seems more reasonable to disaggregate the notion of democratic consolidation (Schneider, 1995: 220-221), seeing it as involving a number of different transformations, each of which may be more or less advanced and more or less integrated with one another. Thus, legal norms may contain substantial authoritarian residues despite the end of the military regime in 1985. Evaluating the extent of such an authoritarian legacy is difficult because, as argued earlier, the "revolutionary" legalism that gave primacy to the state's national security concerns never totally colonized the legal establishment even during the most repressive periods of the military regime.

It could be said that the military court trials constituted a "perfect political crime" by giving the regime a liberal façade, making its claims of tolerance and consensus plausible to many, both within and outside the country, even after it had ended. This façade enabled the military to engineer one of the most controlled democratic transitions in the region, in which military prerogatives were little challenged even when they armed forces formally withdrew from direct control of the executive.

This continuity is revealed in the human rights field; unlike the southern cone cases, no-one in Brazil has yet been put on trial for human rights abuses committed under the military regime, even though extensive documentation of who carried out these abuses exists.²³

On the other hand, political trials in Brazil engendered an extensive counter-mobilization that successfully contested the regime's "official transcript" of the repression. A movement that began in the early 1970s fought successfully for the eventual release of all political prisoners and the return of some 10,000 exiles with the 1979 amnesty. Although some military court trials for national security violations occurred after this date, they were relatively few in number, especially after the modification of the national security legislation in 1983, and widespread prosecution of political opponents ceased to be a weapon in the military regime's arsenal. For this reason the 1979 amnesty was opposed by many regime hard-liners even as it protected the security forces from future prosecution. In addition, many activists in the amnesty movement and former political prisoners and exiles entered party politics in the 1980s, building up leftist coalitions that considerably altered Brazil's party political landscape.

Some political activists in contemporary Brazil identify as the most nefarious legacy of the military regime the falsification of history involved in the official versions of the deaths of the killed and the disappeared. Groups such as Torture: Never Again (Tortura: Nunca Mais) have campaigned for further investigation of crimes committed under the regime as well as compensation for families of the disappeared. This campaign partially succeeded when law 9140 was passed in August of 1995, acknowledging the state's responsibility for the deaths of 136 people under the military regime and ordering compensation for each family. It also created a commission that studied the requests of families of more than two hundred other victims who were not on the original list.²⁴ The symbolic importance of these actions is immense, in that they amount to the first official admission of responsibility by the Brazilian state for the crimes of its "dirty war".

However, the most important legacy of the military regime is probably its contribution to - rather than creation of - an authoritarian legal culture that tolerates abuses by security forces and is intolerant of political dissent. Brazil's new 1988 constitution, while considerably more democratic

than the 1967 document that it replaced, still contains traces of such a culture in that it allows for the prosecution of "political" crimes. Such crimes, although not defined, are formally within the jurisdiction of the Federal Supreme Court (Supremo Tribunal Federal; from Chapter 3, Section II, Article 102, IIb of the 1988 Constitution). The point here is not that the present civilian regime is intolerant of political dissent (on the contrary, political criticism flourishes in contemporary Brazil). It is that the legal machinery for the prosecution of political dissenters, while not in use, still exists.²⁵ The conflict between authoritarian and statist conceptions of law, on one hand, and more tolerant and societal notions, on the other, runs through the archives of the political trials and continues today in Brazilian society.

CONCLUSION

This article has argued for the complexity and ambiguity of Brazil's political trials of 1964-79 as venues in which authoritarian notions of national security clashed with traditional precepts of individual rights, and in which the legitimation of state violence coexisted with resistance to it. Law is a social and ideological construct that can be made an intrinsic part of an arbitrarily abusive state, be it military or civilian. This makes contemporary reformers' invocation of the need for a "rule of law" in Latin America somewhat ambiguous, since prior repressive regimes also spoke of the rule of law, albeit in the name of a law that gave primacy to the state and its prerogatives.

I have here argued that the evidence from Brazil's political trials of 1964-79 reflect a general need to re-think models of repression under authoritarian regimes in ways that link such repression to historical patterns of state coercion and intra-regime dynamics, and recognize the special role that courts and legal maneuverings can play in the deployment of violence by the state. Dyadic, functionalist accounts that explain repression in terms of single economic or political imperatives should be supplanted by something more nuanced. The use of the military courts by regime clients to harass local political enemies who were not opponents of the national regime is an example of a type of repression not commonly recognized by existing accounts of authoritarian regimes. The

examination offered here could be extended to the southern cone for, even though those military regimes were not as legalistic as Brazil's, they all used courts in similar ways.

The legal repression of the 1960s and 1970s was rooted in practices and mentalities that have a long history and continue to exist. In particular, elitist liberalism seems to be an enduring feature of Brazil's highly inegalitarian social order. The revisionist picture offered here therefore posits more continuity of the present legal order with that of the military regime, and a greater recognition of authoritarian precedents in civil society as well as the state, than many previous accounts. What is at stake in the politics of contemporary Brazil and much of the rest of Latin America is not merely the right to interpret history or to compensate victims of past injustice, but the right of contemporary citizens to a legal order that ensures, in a most difficult balancing act in a period of generalized violence, both safety from other citizens and protection against the arbitrary abuses of the state.

¹ In Uruguay, 4,933 people were prosecuted in military courts (and later imprisoned) between 1972 and 1985; in contrast, 282 people died in prison or were disappeared (Servicio Paz e Justicia, 1989: 121, 338-341). In Argentina, only about 300 people were tried in military courts during the 1976-1983 military regime, whereas an official commission estimated that 8,960 people had been "disappeared" in the same period (Argentine National Commission on the Disappeared, 1986: 447). The Chilean armed forces after 1973 used tribunales de guerra (war tribunals) to try 59 political prisoners (all of whom were subsequently executed). This is a low number compared to the number killed or disappeared in extrajudicial actions, listed as 2,279 in an official investigation (National Commission on Truth and Reconciliation, Chile, 1993: 900). In Brazil, over 7,378 people were tried in military courts, and an estimated 345 killed or disappeared between 1964 and 1979 (Comissão de Familiares de Mortos e Desaparecidos Políticos, 1995: 7-18). Therefore, the ratio of those tried to those killed extrajudicially appears to be highest in Brazil.

² This data set was created from the summaries of the cases provided by volume III, Perfil dos Atingidos (Profile of the Victims) of the twelve-volume Brasil: Nunca Mais "Project A", a summary of the entire archive. In addition, I added data on 52 other cases whose documents I consulted directly in the Brasil: Nunca Mais archive housed in the Edgar Leuenroth archive, State University of Campinas (UNICAMP), São Paulo state, Brazil in 1992 and 1994-95.

³ In some cases, data on the professional background of defendants was unavailable. Furthermore, some cases involve defendants from more than one professional category, which is why the percent total does not add up to 100.

⁴ As explained earlier, the bulk of the cases in this data-set were chosen by the Projeto Brasil: Nunca Mais team for summary. The Nunca Mais team dealt only with cases that were appealed to the Superior Military Court, ignoring all those cases that, for one reason or another, did not go beyond the first level of the military justice system. The criterion they used in selecting cases to

summarize was comprehensiveness: the team wanted to show the broad range of the defendants in these cases, which involved people from varied occupational groups and organizations, over a fairly long period of time. The cases I selected in the archive were chosen on the same basis. Therefore, my data set provides a large and fairly representative sample of the entire universe of cases.

⁵ Defendant Paulo de Tarso Vannuchi, March 14 1973, in a military court trial in São Paulo. From STM appeal number 40,577 as contained in BNM number 68.

⁶ The number of cases in this sample is 246 cases and 1,830 defendants in the lower courts, and 40 cases and 204 defendants in the STM. It should be noted that any convictions in the lower courts that were not appealed to the STM are not included here, because those cases were not available in the archive. Their inclusion might result in a somewhat lower average sentence in the lower courts.

⁷ The objection might be raised that the real punishment for political prisoners was torture (and sometimes death), not prison, making the acquittal rate and average sentence relatively unimportant; furthermore, some defendants who were acquitted had to await the decision in prison. While not denying the centrality of torture to the repressive apparatus, nor the problem of incarcerated defendants, I would argue that convictions and prison sentences imposed by the military justice system also inflicted considerable additional suffering on political prisoners, and should not be discounted from any thorough consideration of repression.

⁸ The remarkable growth in public expenditure on the judiciary in nineteenth-century Brazil is documented in Uricoechea, 1980: 46, 49. For a literary account of the importance of local judges to land disputes in early-twentieth century Bahia, see Jorge Amado, Terras do Sem Fim.

⁹ I here disagree with a previous generation of scholars who believed that Latin America's civil law system contained a philosophical bias against the protection of individual rights and in favor of the reflexive legitimation of state power; as Verner, 1984: 470-471 points out, this opinion was derived more from assertion than empirical research.

¹⁰ For example, Giordani, 1986 is a defence of the military regime and an attack on the Brasil: Nunca Mais project that begins with a chapter entitled "Remember 35!" The armed forces' annual commemoration of the defeat of the intentona on November 27 has been an important date in the calendar of military ritual in Brazil.

¹¹ Heinz, 1992: 86-87 presents data on the agencies responsible for the imprisonment of 5,104 political prisoners in the period 1964-79. Of the three main agencies responsible, the Army accounted for 1,043 prisoners (20 percent), DOI-CODI - controlled by the military with some civilian police involvement - another 884 (17 percent), and the political police 821 (16 percent).

¹² As one scholar points out, it is military officers' "conception of the threat their country faced, not our own, that is pertinent in making sense of their curiously perverse behavior" (Osiel, 1996: chapter 4, 9). However, for purposes of examining the degree to which liberal conceptions of individual rights survived in authoritarian Brazil, a comparative and historical assessment of the degree of "subversion" faced by the regime is necessary.

¹³ This is in contrast to Uruguay, where most defense lawyers in the military courts were members of the military (Servicio Justicia e Paz, Uruguay, 1988: 28-29, 115). Furthermore, the judiciary, of which the military courts were also a part, was more thoroughly subordinated to the executive than in Brazil. Uruguay's Institutional Act Number 8 of 1977 went so far as to strip the judiciary of its status as an independent power and incorporate it into the Ministry of Justice, while the name of the Supreme Court of Justice was changed to Court of Justice. This absurd state of affairs endured until Institutional Act Number 12 of 1981.

¹⁴ Uricoechea, 1980: 36 argues that elitist liberalism is not new in Brazil, and that liberalism there differed from that of North America and even the southern cone of South America in the nineteenth century in that it was pre-democratic and reflected the "hierarchical and organic character of its society".

¹⁵ Case 44/70 as contained in BNM 148.

¹⁶ Archive of the DEOPS, State Archive of São Paulo, Social Order, File 14 (Miscellaneous).

¹⁷ STM case number 38,628 in BNM number 480. The defendant was acquitted on the grounds that this particular offense against authority did not constitute a threat to national security.

¹⁸ STM case number 40,271 in BNM number 538. As in the other case, the defendant was acquitted, in this instance for insufficient evidence (the defendant denied making the statement, and a key witness for the prosecution changed his testimony and said that he had heard nothing).

¹⁹ STM number 38,791 in BNM 405. All defendants were acquitted in 1972 on the grounds that the actions did not constitute a threat to national security.

²⁰ If we included in this category cases of trade unionists accused of "subversive" strikes or land occupations, the number would increase substantially.

²¹ Comments of Admiral Julio de Sá Bierrenbach, Superior Military Court judge between 1977-87 to his fellow judges, on appeal case number 41,264.

²² Godinho, 1982: 49-51. Information on this case was also obtained from the author's interview with Julio de Sá Bierrenbach, Rio de Janeiro, November 27, 1996.

²³ In Argentina, well-known trials of some military regime leaders took place under the Alfonsín government, even though his successor, Carlos Menem, later pardoned all those convicted. In Chile, some twenty cases involving human rights abuses that occurred after the 1978 amnesty have been tried in the courts, while in Uruguay, some cases were tried before the Lei de Caducidade put a stop to them. From Kritz, 1995: 323-460.

²⁴ Interview with Jaime Wright, September 6, 1996 and Deputado Nilmário Miranda, November 20, 1996.

²⁵ Zaverucha, 1995: 4-5 argues that as the complementary legislation treating political crimes has not been passed by the Congress, these crimes continue to be the responsibility of military courts, which have been known to handle such cases. He cites a 1993 case in which four secessionists who advocated independence for southern Brazil were prosecuted in a military court in Paraná for political crime.