# Global rule of law support and problems in implementation

-

# An analysis of rule of law supporting activities of the World Bank and the Inter-American Court of Human Rights in Peru and Argentina

**Fachbereich Gesellschafts- und Geschichtswissenschaften der**

**Technischen Universität Darmstadt**

zur Erlangung des Grades

Doctor philosophiae (Dr. phil.)

**Dissertation von**

**Julia Johanna Liebermann**

Erstgutachter: **Prof. Dr. Jens Steffek**

Zweitgutachter: **Prof. Dr. Jonas Wolff**

Darmstadt 2022

Liebermann, Julia Johanna: Global rule of law support and problems in implementation - An analysis of rule of law supporting activities of the World Bank and the Inter-American Court of Human Rights in Peru and Argentina

Darmstadt, Technische Universität Darmstadt
Jahr der Veröffentlichung der Dissertation auf TUprints: 2024
Tag der mündlichen Prüfung: 13.10.2022

# Contents

# Introduction

International governance is populated by rule of law promoters.[1] Rule of law is an idea, a goal and an activity at the same time (Humphreys 2012). However, global rule of law supporting activities often fail, are implemented incompletely, or are rejected at national level (Carothers 2010). Literature stresses implementation problems[2] as reasons for these failures. Why is rule of law support by global governance actors troublesome and how are problems unfolding during implementation?

In this study, I analyze rule of law supporting activities and implementation processes by the World Bank and the Inter-American Court of Human Rights (IACtHR)[3] in Peru and Argentina between 1998 and 2018 from critical perspectives. The study builds on exploratory process tracing and the analysis of semi-structured qualitative interviews with staff of World Bank and IACtHR as well as representatives of national branches of government involved in the implementation process, primary documents, and participatory observation. I compare the approaches to rule of law promotion by the two global governance actors, focusing on the operationalization of rule of law support and processes during implementation. Adopting a critical pragmatist stance, I suggest reconceptualizing incomplete implementation of reforms and non-compliance with judgments as parts of rule of law development. I argue that implementation problems are more than failed attempts to judicial reforms and non-compliance with judgments but can be what I call "constitutive moments" for rule of law development. In constitutive moments, aspects of state ordering and international-national relationships lay open. These moments of momentary instability, non-compliance and incomplete implementation reveal the procedural, conflictive, and potentially interest-mediating character in the development of rule of law.

Conventional scholarly literature often discusses failed development reforms and non-compliance with international judgments as implementation and law enforcement problems. These readings of implementation problems fall short in addressing contradictions between and

[1] In this study I use the terms promotion and support interchangeably.
[2] During the course of this study, I will present arguments for distinguishing between implementation problems, defined as problems in relation to the promoting activities and problems during implementation, as conflictive moments during rule of law development, on the one hand, and failures and non-compliance with reforms and judgements as unproductive binary categories, on the other hand (see also in chapter three analytical framework).
[3] In the following I will also refer to the World Bank as the "Bank" and to the IACtHR as the "Court".

within the logics of change[4] and the applied procedures; often they do not consider national politics of implementation. I argue that binary categories of success and failure in rule of law supporting activities are not productive as they neglect the procedural character of rule of law development.

I have been circling around implementation problems in development cooperation, enforcement problems in international human rights law, and the rule of law as a state ordering concept for some time. What attracts my attention the most is that logics of change for altering the power balances at national level are postulating transformation while the structure of intervention and the procedures are rather static and affirm executive-centric models of states. Thus, logics of change and procedures bear contradictory elements. Not taking tensions and reshuffling of power, institutional dynamics, and negotiation into account seemed illogical to me, especially in rule of law supporting activities. Exploring scholarly research, I found this mismatch little addressed. Many conventional scholarly explanations for implementation problems barely acknowledge the contradictions or reduce the problems to single aspects without addressing the connection to the postulated goal – rule of law development – as a whole. My academic irritation motivated me to study the "problems" themselves to understand them better.

This study has a twofold aim: to **explore** elements of implementation processes and to **reconceptualize** implementation problems in global rule of law support from critical perspectives. I opted for an exploratory approach in process tracing for studying implementation processes in Peru and Argentina, comprising several rounds of coding of material including 35 semi-structured interviews, and 60 primary documents and field notes. The analysis is structured along the dimensions of context, design, and coordination that emerged from the coding exercise. The study builds on critical theoretical perspectives to development and international law. I look deeper into the interactions and dynamics of branches of government and global governance actors during implementation. I suggest alternative readings of implementation problems and point out constitutive moments for rule of law development during the implementation processes. Based on a different understanding of the implementation problems I suggest ways to flexibilize procedures during interventions of World Bank and Inter-American Court of Human Rights.

[4] I decided to use the terminology "logics of change" to describe the approaches to transformation through rule of law supporting activities of the Bank and the IACtHR as opposed to the term "theory of change" coined by development actors, or theories of "transition", often used in international law circles. See also next chapter.

Global rule of law support activities focus on the state as the central guarantor of rights. Activities often seek to strengthen state institutions to bring about more rule of law. However, hierarchically designed interventions and top-down implemented procedures also run the risk of simultaneously undermining institutions in the state and the institutional fabric altogether (Humphreys 2012). Rule of law support includes a variety of activities from judicial sector reform, to rewriting constitutions and laws, to attempts to strengthen civil society organizations, legal training, and infrastructure measures for judiciaries. Approaches by a multitude of actors differ considerably and can be described on a spectrum depending on the type of actor, the field of engagement, the involved counterparts, and the means and procedures of intervention. Often actors in this broad field justify their engagement with the need for effective statehood and "good governance" based on the "deep-seated will to civilize" while the activities "reaffirm [...] sacred values of the aid domain: modernity, rationality and political neutrality" (Gould 2005). Conceptualizing the rule of law from a Western liberal perspective is predominant in global governance organizations (Dezalay and Garth 2002a, 2011; de Sousa Santos 2002; de Sousa Santos and Rodríguez-Garavito 2006; Humphreys 2012; Desai and Woolcook 2015 in relation to the World Bank).[5] Critical scholars and critiques of development cooperation have claimed over decades that the teleological approach to institutional transformation sustained by a logic of modernization is problematic, both on conceptual and on practical levels of implementation (Escobar 2011; Ziai 2015; Sachs 1997, 2019; Dhawan et al. 2016). Upendra Baxi describes the importance of effectiveness in a dominant Western approach to institutions as follows: "Government is a descriptive category signifying effective jurisdiction. "Effectiveness" entails no ethically grounded judgment about types/forms of government; in international law, states equal effective governments in terms of effective control over persons, populations, territory and resources" (2015: 164). Law and judiciaries play an important part in such transformations as the assumed lever for change and at the same time, the institutions are transformed in the activities. Thus, approaching political issues and questions of state ordering (such as security and guarantees of basic rights) via judicial means has increasingly become a characteristic of rule of law interventions especially in Latin American states (Domingo and Sieder 2001; Sieder et al. 2005).

[5] See also the next chapter for the evolvement of the discourse and use of the term by international financial development actors.

Theorizing in global governance about the rule of law stresses good governance as a central element in state ordering (Tamanaha 2004; Bellamy 2017).[6] Good governance is equaled to lawful governance. Concepts such as human rights, separations of power, bureaucracy, and functioning judiciaries are fundamental parts in these approaches and are often based on European-centered thinking on state ordering and governance. Activities in development cooperation and human rights litigation evolved from it and reinforce this dominant conceptualization in turn. Stressing the normative values and the superiority of a state organized along principles of equality and legality, rule of law in a liberal reading is inherently connected to ideas of civilized societies and good forms of governance. At the same time, a reductionist reading of liberal traditions oftentimes singled out aspects of rule of law reducing it to legality and law enforcement (e.g., Waldron 2002). As Dezalay and Garth (2002a) argue conceptualizations of rule of law at global level are a patchwork of liberal ideas, neoliberal ideals, and policies and are shaped by intra-organizational interests and logics.[7] In these logics, the rule of law is a precondition for the realization of human rights and economic prosperity. In consequence, the violation of fundamental rights is assumed to occur because of a lack of rule of law, which in turn provides grounds for initiating supporting activities. Rights-based approaches to development entering the development cooperation arena around the mid-1990s helped to glue together "rights" and "development", thereby sustaining the importance of economic prosperity for the realization of third generation human rights (e.g., Gauri and Gloppen 2012). Similarly, judicial enforcement of human rights became an increasingly important activity in global governance. Karen Alter describes the increase in human rights litigation and a rapid proliferation of international courts in the post-Cold war period (Alter 2006; 2018).[8]

In this study I focus on rule of law supporting activities by the World Bank, a major financial development actor, and the Inter-American Court of Human rights as a regional human rights court. In logics of change of Bank and Court the rule of law an antithesis to anarchy and liberal

[6] Desai and Woolcock (2015) confirm that many of those authors currently concerned with rule of law reform refer to classic texts, mainly to legal positivist Joseph Raz or Ronald Dworkin rebutting positivism to rework debates on the rule of law as, for example, negative/positive, instrumental/intrinsic, or formal/substantive.

[7] I will come back to this strange mix of liberal and neoliberal ideology and policies in the next chapter.

[8] For a list see the chart provided by the international project on International Courts and Tribunals, available at: https://elaw.org/system/files/intl%20tribunals%20synoptic_chart2.pdf, last accessed 02.05.2022. Human rights do not exist in a vacuum: rights are enshrined in conventions and soft law that develop over time, see e.g., Buergenthal (2006) on the evolvement of the international human rights system. See also more in general the finish scholar Martii Koskenniemi (2006) on the fragmentation and development of law over time. Because human rights are not self-enforcing, regional and international human rights systems developed with the aim to make rights justiciable, see e.g., Cerna, (2016).

ideas on the role of law – such as separation of powers and legal security, predictability, and protection against arbitrary use of power – merge with neoliberal elements of rule of law support. Neoliberal ideas feed into and mingle with underlying assumptions in global rule of law support on the project of modernity, the creation, and importance of wealth and prosperity, including famously individual liberty and the rule of law (e.g., Whyte 2019[9]; Slobodian 2021). Authors have continuously claimed and criticized the way neoliberalism – as a body of thought and not just a mere economic doctrine that places market economy and individual liberty at the center – is also concerned with constitutionalism, issues of human rights and state organization (Rodríguez-Garavito 2011a; Biebricher 2018; Pistor 2019).[10] In his work, Thomas Biebricher describes how neoliberalism developed not just around economic issues but also centrally addresses political questions comprising output of state activities and state structure (2012, 2021).[11] In its beginning, neoliberalism thus grew as a political-ideological guideline for well governed states.[12] Neoliberal thought emerged already before it saw relatively widespread and rapidly growing practical application in policies, e.g., Thatcherism in the UK and the Reagan administration in the USA as well as in global governance activities. I approach neoliberalism in this study not just as a set of policies but as a flexible body of thought and a correspondence of ideology and policy stressing individualism, property rights, liberty, and market economy. Neoliberals do not necessarily reject the state, instead institutions, especially legal institutions, serve as a means to the realization of the proposed policies and rule of law supporting activities – thus the state order is crucial for organizing the neoliberal policies. State institutions become a means to secure rights of the individuals, whereas risks remain within accountabilities of states. However, mediation of interest between different political camps in the state is not a central purpose any longer. The promulgation of "thin version" is common in neoliberalist versions of rule of law (Rodríguez-Garavito 2011b). Summarizing in relation to rule of law

[9] Jessica Whyte (2019) describes the parallel rise of human rights and neoliberalism, framing rights as tools to depoliticize civil society, protect private investments and shape liberal subjects. See also Samuel Moyn finding that neoliberalism and human rights overlap, inasmuch as both share a focus on individualism. Criticizing human rights from a perspective of political economy, Samuel Moyn finds "human rights guarantee status equality but not distributive equality" (2018: 213). With this central bias at heart, idealizing human rights in a neoliberal world makes the discourse and the practice prone to critique from populist and the left alike.

[10] Among others Pistor (2019) critically discusses law as the "code of capital" (see also Buckel and Fischer-Lescarno 2007), Rodríguez-Garavito describes legal institutions as critical pillars of neoliberal world order and Biebricher stresses the role of new constitutionalism as a description of global political economy. Rodríguez-Garavito also engages with the parallel rise of neo-constitutionalism and neoliberalism and the constitutional revolutions interaction with neoliberal policies in Latin America from the 1990s onwards (2011a).

[11] Biebricher also engaged with the debate on whether neoliberalism is a useful scholarly category given its overuse and politicization (Biebricher 2012:15), hence neoliberalism has been declared dead many times and risen from its grave as zombie neoliberalism (Crouch 2011; Phlewe et al. 2020).

[12] Biebricher also describes how Hayek preferred to use government as the central unit his thought was concerned with instead of states (Biebricher 2021: 57 fn 6).

support, while in liberal readings of rule of law separation of powers is more strongly pronounced. A neoliberalist reading privileges the market-enhancing function of judiciaries and institutions, individual rights and law enforcement.[13] I will denominate the approaches to rule of law support by Bank and Court neoliberal precisely because they are characterized simultaneously by liberal ideals on separated powers and accountability and a strong focus on individualized rights while procedures are depoliticized the connection between the economic sphere and the realization of rights is undertheorized (Bank) or carved out of the debate (Court).

In this study, I address contradictions between and within logics of change and procedures applied during the implementation of rule of law supporting activities. I discuss how rule of law is oftentimes reduced to law enforcement. Consequently, strong institutions are framed as the means to bring rule of law development about. This narrow conceptualization of rule of law is supported by eurocentric approaches to state ordering and sustained by claims of universality. As Humphreys (2012) suggests,

> "[T]he state itself effectively becomes the administrative face of an apparent international will. This involves a curious reversal of the standard international law account of the relation between the state and the international sphere, with the former a product of the latter, rather than vice versa." (2012: 173).

Development is rendered as something in the interest of all; just like the ideal of rule of law is rendered an ideal, one would and could hardly argue against. International development strategies, thereby, construct a union of interest between the governed and the international community, without having identified neither the governed, nor the interest of the international community. Instead, they often represent the interests of the governing elite.[14] As Maxwell Chibundu puts it:

> "[P]retending a concurrence of interests exists among 'democratically elected governments' and 'civil society' in the West, and 'civil society' elsewhere – a concurrence whose plausibility modern technological developments all-too-readily have transformed from the realm of the imaginary to that of reality" (1999: 113).

[13] Stressing the neoliberal approach in the Bank at that time, singling out institutions for providing the framework for a well-functioning state order that in turn allows a flourishing market-economy, Ibrahim Shihata finds in regard to the importance of rule of law support in Latin America "Especially in Latin America and the Caribbean, as in other regions, experience has clearly demonstrated the quintessential role of law in development and, especially the need for the ROL [rule of law] and for well-functioning judicial institutions. This is particular evident in the private sector, where the ROL is a precondition for sector development. It creates certainty and predictability; leads to lower transaction costs, and greater access to capital [...]. In fact, worldwide experience confirms the importance to rapid and sustainable development of the clarification and protection of property rights, the enforcement of contractual obligations, and the enactment and application of rigorous regulatory regimes. (1995: 12-13). However, Biebricher also centrally addresses the decline of the separation of powers doctrine as a central characteristic in political systems and phenomena that occupied neoliberalist thinkers. While liberal political though emphasized horizontal and vertical separation of powers in traditional approaches to rule of law, neoliberalist thinkers centrally discus the overlap of executive and legislative power (2021:86-91).

[14] Rule of law processes studied in this work are still largely owned by elite actors and rarely provide room for types of transformations initiated by social actors and civil society from within the processes.

By conceptualizing the development of judiciaries as something that is in the interest of all actors (not only international and national, but among national actors), reforms grounded in external rule of law support mask power asymmetries in the process and neglect to acknowledge underlying conflicts of interest. Because the questions whose laws and whose developments are rarely asked (Kennedy 2006), research addressing institutional dynamics and conflict becomes even more pressing. Not only is the state in development cooperation and human rights adjudication oftentimes depicted as monolithic, but also the Global South is homogenized and "developmentalized" (Escobar 2011) which is what has made blueprint solutions to generalized problems possible.

Global governance actors question the capacity of state performance, especially the one of formerly colonized states in the Global South. Activities thus seek to restrain abusive exercise of state power, and simultaneously rely on those selfsame national institutions to carry out and enforce rule of law supporting activities. Humphreys stresses this central challenge:

> "[A]n effective state is a *necessary* prerequisite of the rule of law which must therefore be constructed sequentially". One cannot, he points out, "be overly concerned with limiting the state until there is an effective state to limit." (2012:164, italics in the original). [15]

Rule of law development is a procedure marked by tensions and characterized by conflicts, as has been well demonstrated in relation to intra-state processes of rule of law development (see chapter one and two). Since the rise of the liberal nation-state, the rule of law is one predominant structuring mode to organize power distribution and accommodate the permanent tensions between groups and institutions. Consequently, institutional reform and the establishment and enforcement of the rule of law are sites of permanent contestation.[16] Daniel Brinks emphasizes the two dimensions of the rule of law: structuring and empowering the state, on the one hand, and at the same time, restraining this necessarily powerful state from itself, predating upon citizens and violating their rights (2009:4).[17] The goal of establishing the rule of law can

[15] David Huddart puts it in relation to the underlying narrative: "Under globalization, the international language of rights apparently undermines the centrality of the nation state. However, at the same time this language develops out of liberal assumptions about internationalism."(2007: 24).

[16] Constructivist international scholarship stresses the importance of norm-development in the processes of contestation about meaning (see e.g., Adler 2013; Wiener 2014). Contestation can be defined as an interactive social practice, which involves "discursive and critical engagement with norms of governance" (Wiener 2014: 2) This work is not dealing with contestation of norms, as it is largely excluded from the processes by the logics of change and the operationalization thereof outlined in the following chapters. Having said this, norm contestation is not absent altogether, but might take place outside the implementation processes or in the aftermath, and even as a direct consequence of the reforms and judgements. I suggest the implementation problems that are emerging are neither primarily nor solely attached to the judgments or projects or the norm(s) as such embodied in them.

[17] Brinks (2009) calls them Hobbesian dimension and Madisonian function. The prominent quote by Joseph Raz on the rule of law reflects this relational aspect but reflects on a narrow understanding of it: "The rule of law means

therefore be described as an attempt to reach an equilibrium at horizontal and vertical level, roughly speaking between the individuals and the state, holding the ruler accountable through elections, and among the different powers in the state.[18] Even in thin definitions, those in power are ideally as much subjected to the law as those with less power (equality before the law); however, the form of governance is not necessarily a democratic one. Guillermo O'Donnell works with a minimal definition of the rule of law, stressing the aspect of equality by finding "whatever law there is, it is fairly applied by the relevant state institutions, including but not exclusively, the judiciary" and specifies "fairly applied" as "consistency across equivalent cases" (1995: 33). He furthermore distinguishes between a horizontal and a vertical dimension of accountability in rule of law (O'Donnell 1995, 2007), thereby outlining the axis for potential tensions.[19] Horizontal accountability describes the degree of possibly holding abusive officials accountable for their action.[20] Rule of law, in a liberal reading, simultaneously constrains institutions and checks the state with the help of the institutions. Accountability and impunity or arbitrary action appear in this definition as two ends of the spectrum.

Given the gap between law, legal action and law enforcement, global rule of law promotion often focuses not (only) on establishing laws, but seeks to contribute to their application and enforcement. Law enforcement in this logic is central for accountability and legal security.[21] Rule of law relates to the relationship between branches of government and the relationship between states and societies. However, applying a reductionist approach to rule of law international neoliberal global rule of law promotion often focuses solely on strengthening the judicial branch of government and law enforcement. By approaching rule of law from this narrow angle, compliance with judgments and implementation of reforms has become the international equivalent to accountability. As rule of law has been upscaled to international level, it singles out the component of compliance and law enforcement instead of stressing

literally, what it says: the rule of the law. Taken in its broadest sense, this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it." (1979: 212)

[18] However, horizontal accountability in O'Donnells work is wider and encompasses "Ombudsmen, accounting offices, fiscalias [prosecutors' office] and the like" (1998: 119).

[19] The United Nation adds a functional dimension to the coining of the term, stressing "adherence to the principles of supremacy of the law, equality before the law, accountability of the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency", (UN 2008: 1).

[20] Gloppen et al. (2004) emphasize the role of courts as key actors for all types of accountabilities. Smulovitz and Peruzzoti (1997) focus especially on societal accountability and point out the importance in this form of accountability in the institutional and societal fabric in Latin America.

[21] Rule of law support addresses access to justice, structural independency of organs, as well as law enforcement. Even if prosecution is structurally possible and not hampered by corruption, enforcement of the verdict might pose another problem, thereby jeopardizing judicial security in the first place. In this logic, lacking enforcement hampers the other dimensions, diminishing also the deterrence function.

checks and balances between different branches of government. Criticizing the analogy and the practice derived from it, Ian Hurd finds that the practice of international law contradicts compliance. Instead, he suggests that international rule of law is the dynamic between legal resources and political instrumentalism (Hurd 2015, 2017). Thus, mainstream neoliberal approaches to rule of law support run the risk of favoring enforcement of the law over dynamic processes to reconcile different interests in society. Because checks and balances and discussions about the content are largely taken out of the equation in rule of law strengthening, the door is wide open for accountability shifting and political maneuvering during implementation at national level. Shifting of accountability also refers to the relationship between global governance and national level, as Humphreys stresses:

> "[I]nternational agencies are deresponsibilised while the nascent state is burdened with immediate responsibilities: obligation moves to the state, which takes on a debt both to the citizenry and the international 'community', while the lead agents, by contrast, do not incur a debt [...]." (2012: 172).

Placing adherence to the law and law enforcement capacities at the center of rule of law development has limited the possibilities to contribute to actual transformations in states.
Literature discusses a set of explanations for implementation problems, commonly framing them as failures of reforms and non-compliance with judgments among them lacking political will at national level, problems in design of reforms, and judgments and insufficient institutional capacities for implementation. Do global rule of law supporting activities really fail? Rather, what is failing when judicial reform initiatives supported by the World Bank and judgments of the IACtHR are not implemented or only partly implemented? Instead of looking at the problems only from a perspective of the global governance actors, this study develops elements of problems in the dimensions of context, design and coordination as parts of implementation processes.

I argue in this study for leaving dichotomies of failure and success of reforms aside, underline the procedural character and study more in-depth constitutional moments that bear the chance of rule of law development. Moreover, I suggest that implementation processes must be repoliticized. This is a new approach to discussing global governance interventions, suggesting that they might trigger crucial moments in national politics for reordering of institutions and reshuffling of power. If those moments turn out to be constitutive for rule of law development is yet on a different page and cannot merely be influenced by global governance actors, but at the modest be supported and not hindered by strict implementation procedures and narrow design.

Thus, I argue that logics of change are characterized by eurocentric, state-centric, universalitic and neoliberal elements. In contrast to the logics of change applied by World Bank and IACtHR, in my analysis I adopt a critical pragmatist stance and suggest an alternative approach to law and the role of law, the development of pluralistic institutions, and the development of the rule of law as non-linear and non-western. I suggest to reconceptualize the problems as constitutive moments and approach rule of law reform as deliberative acts and processes of reordering and negotiation.

The study contributes to literature on global governance and rule of law support, by stringing together a conceptual and pragmatic critique on activities of two global governance actors. The two actors engage in rather distinct activities and address state ordering from different angles. However, they face similar implementation problems and arouse similar critique. Potentially the critique formulated in this study also extent to other policy areas and development activities such as interventions in social and economic policies. As such, this study is a critique of development politics and international human rights politics as such, since I formulate a central critique on the narrowly defined logics of change and limited procedures applied by the two international actors. Whether implementation problems in other policy areas show along similar dimensions or differ in the dynamics and scope is yet subject to new studies.
Critical readings of neoliberal rule of law support have their origins in post-colonial and post-development scholarship. On a political level, right-wing attacks on global institutions and regional courts have become more prominent, e.g., the UK under several administrations rejecting the jurisdiction of the ECtHR and the Trump administration in the USA attacking multilateral organizations (however, not the World Bank).[22] Without falling into the trap of defending sovereignty from nationalist perspectives, this study seeks to dig deeper and base the critique on the rule of law supporting activities on the pragmatic level revealing contradictions in the implementation of rule of law supporting activities.

This thesis proceeds as follows:

The first part of the study introduces rule of law support in global governance and discusses problems in the logics of change of Bank and Court. It outlines the original puzzle of the

[22] Discussion about the right-wing critique on the "globalists" are especially prominent in debates concerned with the contemporary rise of authoritarian, illiberal, nationalist, anti-globalist, and antidemocratic tendencies often subsumed in debates on new types of right-wing populism. At the same time, critique on multilateralism and regional organizations also emerges from neoliberalist camps, as Quinn Slobodian stresses in his book Globalists (2018, see also Slobodian 2021).

research, develops the analytical framework, and presents the epistemological and methodological approach.

The **first chapter** introduces the global governance actors World Bank and Inter-American Court of Human Rights and their approaches and activities in rule of law promotion. This chapter shows how mainstream approaches in the academic and practitioner literature frame implementation problems as failure of rule of law reforms by the financial development actor and non-compliance with judgments of the regional human rights actor.

**Chapter two** discusses critical readings of global rule of law support and presents the theoretical backbone underlying the critical pragmatist stance in this study. The chapter develops a more critical and national actor-centered approach to understanding problems during implementation processes.

**Chapter three** presents the research design and methodology in this work. It explains the critical pragmatist approach and introduces exploratory process tracing as the chosen method for analyzing implementation processes in Argentina and Peru and for developing the elements within the analytical dimensions of context, design and coordination.

The second part of the study, comprising the fourth, fifth and sixth chapter turn to the analysis of the empirical material. They discuss the interventions of Bank and Court in Peru and Argentina from 1998 to 2018.

The **fourth chapter** outlines the implementation structure of the global governance actors Bank and Court.

The **fifth and sixth chapter** are structured in the same way: They first introduce features of the institutional and political landscape in the two settings, present the judicial reforms and the human rights judgments, and then proceed to the exploration of the dimensions and the analysis of the implementation processes structured along context, design and coordination.

**Chapter seven** compares the findings from the case studies Peru and Argentina. It reveals the inherent flaws in the operationalization of rule of law support by global rule of law supporters. The chapter suggests an alternative approach to understanding implementation problems and discusses ways to flexibilize procedures of Bank and Court during implementation.

The **conclusion** sums up the findings of the study, discusses how implementation problems can contribute to question principles of (state) ordering and rule of law, both nationally and internationally and presents areas of interest for future research.

By comparing approaches of two distinct global governance actors, the work reveals flaws in underlying claims about the rule of law in global rule of law support. It offers a detailed analysis of the implementation processes in Peru and Argentina throughout two decades. The study discusses implementation problems as entry points for rethinking global governances' logic of change and the procedures in global rule of law supporting activities and contributes to conceptualizing implementation processes differently.

# Chapter 1 Approaches to rule of law support in global governance

In this chapter, I introduce World Bank (1.1) and Inter-American Court of Human Rights (1.2) as actors in rule of law support. I outline their approaches to rule of law support and discuss explanations put forward in scholarly literature for failure of judicial reform projects supported by the Bank and non-compliance with judgments of the regional Human Rights Court. I then draw attention to the global governance actors in comparative perspective (1.3) outlining flaws in logics of change and flaws in the operationalization of rule of law supporting activities.

In this study, I address implementation problems in relation to rule of law supporting activities of two seemingly different global governance actors: the World Bank and the Inter-American Court of Human Rights. Discussing overlaps and similarities in the approaches and differences in procedures of the two global governance actors contributes to reconceptualize the analysis of implementation problems in global rule of law supporting activities. This study focusses on global governance rule of law support that addresses state institutions. Other projects and actors in global governance seek to strengthen non-state actors and civil society organizations for supporting the rule of law, such as *Human Rights Watch*, *Transparency International* or national development agencies and UN Organizations often intervening financially on a smaller scale or focusing on specific topics. I chose to look at the Bank and the IACtHR precisely because they work with state institutions on the highest level of state authority to strengthen the rule of law. The Bank and the IACtHR do so from different angles: one angle primarily economically focused and driven by financial development logics, the other one judicial in nature and relying on international arbitration and human rights logics. Nevertheless, the actors share central assumptions in their logics of change,[23] have common problems in implementation and engage with similar actors at national level.

Studying the rule of law supporting activities of two very different global governance actors meant engaging with different scholar communities and a range of literature during the research.

[23] Development terminology oftentimes uses the wording "theory of change" in development projects. World Bank uses this term to describe "a detailed description of the mechanisms through which a change is expected to occur in a particular situation. A theory of change identifies the goals, preconditions, requirements, assumptions, interventions, and indicators of a program, providing important insight into and guidance on intervention and impact evaluation design", see https://dimewiki.worldbank.org/Theory_of_Change, last accessed 16.04.2022. However, neither are theories of change always explicit, nor coherent. I suggest, they are always also structured by the underlying assumptions and characteristics I describe in chapter two. The "theories of change" nurturing the approach of the IACtHR are connected to theories in transitional justice literature, see e.g., Ruti Teitel (2000) giving an overview of approaches to transitional justice. Theories of change within the IACtHR are additionally informed by the particular Latin American regional context, I outline in the empirical chapters and in the following chapter.

Research communities discuss questions of authority of international courts (e.g., von Bogdandy and Venzke 2012; Alter 2014; Alter et al. 2018) and their effectiveness and impact (e.g., Hawkins and Jacoby 2010; Helfer 2014; Engstrom 2019). A large body of literature also deals with obstacles in implementation in development projects (e.g., Ferguson 1990 as the classical work; Cohen and Easterly 2005; Pritchett et al 2010) including global governance actor centered perspectives (e.g., Trubek and Santos 2006). Scholars have also been engaging with broader structural questions especially in Latin America addressing separation of powers and institutional instability (Helmke 2010, 2017), juridification as well as questions of subsidiarity (Gargarella et al. 2004; Gargarella 2015a, 2015b) and questions in relation to transformative aspects in rule of law (support) (e.g., Kennedy 2003, 2018). While discussion on the authority of global governance actors and the impact of development projects and international judgments and studies on transitional justice informed my work, I focus on implementation processes as such. Implementation in this study is defined differently to effectiveness or impact of the reforms and judgments. I do not seek to contribute to measuring the outcome of reforms or the implementation rate, but rather to focus on the process of implementation itself as a constitutive aspect of rule of law development at national level.

Two main fields in scholarly literature deal with implementation problems in rule of law support by global governance actors. One is attached to studies of development cooperation projects, studying the postulated connection between law and development. The other one is embedded in international law and international relations scholarship, dealing with human rights and the work of international courts. Mainstream approaches in these two fields coincide in their understanding of human rights and rule of law as a frame of reference for political and economic stability.

> "[T]he Bank and international human rights law appear to share this common focus: the reform of the state is necessary and the type of reform promoted by the Bank furthers and complements the work of human rights" (Anghie 1999: 261).

A few scholars have engaged in pointing out this overlap in the reference frame and in actual activities in relation to Bank and Court (Santos 2006; Urueña 2014, in relation to indicators; von Bogdandy and Ebert 2018).[24] However, this remains the exception and studying the intersections of the logics of change and the practical work of development actors and

[24] Activities of the two actors potentially might be overlapping in practice, e.g., in relation to judgements of the IACtHR and access to justice and World Bank reform projects. However, no institutionalized channel of communication exists neither do meetings between the two global governance actor take place.

international courts oftentimes remain underexplored. Providing a comprehensive discussion of possible conceptual entry points for focusing on this intersection is beyond the realm of this research, as it is to connect all the possible dots in compliance literature and law and development literature at implementation level. The purpose of jointly discussing literature on implementation problems in international adjudication and international financial development cooperation is to reveal overlaps in the approach to rule of law in their logics of change.

The chapter briefly outlines the trajectories of Bank and Court to become engaged in rule of law support and describes how literature approaches and discusses failure of development reforms and non-compliance with judgments. It then maps the patterns of explanations put forward for understanding failure and non-compliance during implementation. The chapter first discusses rule of law promotion by international financial development actors (1.1) focusing on the Bank (1.1.1) and turns to explanations discussed regarding the failure of judicial reform support initiatives (1.1.2). The second part outlines rule of law support in international adjudication (1.2) focusing on the IACtHR (1.2.1) and subsequently engages with discussions on problems during the implementation of judgments (1.2.3). In the last part of the chapter (1.3), I describe different aspects of implementation problems in the activities of the Bank and the Court. In a joint perspective, I focus the logic of change (1.3.1), operationalization (1.3.2), and implementation (1.3.3). The last section sums up contradictions and flaws in the logics of change and the operationalization and points out gaps in research (1.3.4).

## 1.1 The World Bank and rule of law support

In a liberal reading, rule of law is the prerequisite for establishing any kind of reform in states as it secures legal security and predictability concerning government activities. This subchapter discusses how the financial development actor World Bank embarked on the journey for becoming a rule of law supporter as part of the global governance agenda in the 1990s, and introduces explanations put forward for understanding the failures of many reform initiatives in this sector.

### 1.1.1 Law and development – rise and fall of a movement that left traces

International development cooperation adopted rule of law support as one important pillar of democracy strengthening and economic development in the cold war era. In different kinds of activities rule of law often served as a placeholder for multiple democratic values and development aims (Humphreys 2012). Considering the assumed importance of rule of law for

the stability of countries legal aid, technical assistance and legal transplantation[25] became common practices within the development reform agendas (Carothers 2001; see also Domingo and Sieder 2001; Trubek 2005). In the beginning, projects often emphasized the role of the judiciary as a counterweight to abusive executive practices and a guarantor for a stable legal framework. According to the logic, this legal framework was necessary for investment and consequently projects aimed at strengthening institutional stability. This institutional stability in turn was assumed to boost political stability and development. However, scholars and practitioners alike soon began to question underlying logics of linear progress[26] and the relationship between technical institutional strengthening and political development as the connections were far from being theoretically sound and empirically tested (Trubek and Santos 2006; Carothers 2010; Hammergren 2003, 2015).

The *Law and Development Movement*[27] of the 1950s/60s was led by a small group of liberal lawyers working in development agencies, foundations and universities in the US and Europe.[28] The group was mainly interested in legal education and reforming laws to bring about changes in legal institutions in Latin America. This was seen as a way to shape legal cultures according to Western ideals and was also connected to previous doctrines of US dominance in the region and the Cold War context. The movement was short-lived, lacked a theoretical grounding and did not reach its own objectives, but it did put law and the relation to development on the intellectual agenda (Trubek 2005).[29]

During the 1950s, development assistance increasingly embraced legal approaches in projects. Law seen as "impersonal governance through universal rules" and governance through law holding the promise of "inclusive and more equal treatment of citizens" (Galanter and Trubek 1974: 1074) guided the reform agenda. The legal liberalism that informed the early movement depicted the state as the primary agent of social control. Hence, the movement did not consider forms of legal frameworks at communal level, informal rules, power relationships, economic-

[25] The term legal transplantation describes the transfer of laws and legal frameworks (including constitutional frameworks) from one state and/or legal entity (e.g., international organizations) to another. See also scholarly debate on legal transplants between authors provided in fn 33.

[26] Note the circularity in the argument: rule of law is a symptom of consolidated democracies, but also a cause (see Farer 1995: 1329).

[27] Trubek and Galanter explain the movement denomination instead of field by its activist character (1974: 1068).

[28] Humphreys underlines this movement was not a new invention by US academics and practitioners but instead "they merely complemented an equivalent body of work being undertaken by former European colonial powers, both bilaterally and in concert." (2012:120).

[29] Trubek and Galanter describe how lawyers were latecomers to the development research game (1974:1065). Examining reasons for the failure of the movement, Trubek and Galanter track the lack of theoretical foundation and disparate research agendas back to the parallel evolvement of practice and scholarship (1974: 1063). The lacking theoretical basis is discussed up until today (Carothers 2010; Tan 2018; Hoffmann 2018).

political interplays, and other types of ordering such as indigenous cosmovisions and forms of state ordering.[30] Within the approach on institutional strengthening, the focus on Judiciaries as levers for change was particularly strong. In 1974, David Trubek and Mark Galanter, two of the driving scholars behind the early law and development movement, already discussed dangers of juridification and legalism. Their concerns related to the rationale of engagement and feared an expanded and modernized legal profession would possibly increase inequality and reduce participation (1974: 1076). Some 40 years later, David Trubek summarizes setbacks in scholarship and projects and feared overenthusiastic reformers faced the possibility that instead legalism, instrumentalism and authoritarianism form a "stable amalgam" (Trubek 2006:79).

The second phase of orthodox law and development doctrine dates to the 1980s and was heavily influenced by neoliberal development ideas. The focus rested on supporting reforms to changing laws to facilitate the integration of developing states into the world economy (Kennedy 2003; Trubek and Santos 2006). The *New Institutional Economist* (NIE) approach influencing this new wave of law and development led to focus on institutions and the role of law in fostering economic development (e.g., North 1992; Posner 1993).[31] The technocratic approach to law singled out the judiciary as the watchdog for the relationship between the state and private actors in the neoliberal approach to law and development. David Trubek and Alvaro Santos (2006:6) underline how the second wave framed law as a tool for market economy rather than as an instrument of state power and focused on the judiciary and formalistic methods, universalistic models[32] heavily relying on legal transplants[33]. The development narrative seeing law as a factor for development and economic performance which was predominant in the 1970s and 1980s, was followed by a discourse on the rule of law as a means to bring about justice and stability and as a critical aspect of governance in the beginning of the 1990s (e.g., Rodríguez-Garavito 2006; Porter et al. 2013; Trebilcock and Davies 2001, 2009).[34] The

[30] Lacking consideration of legal pluralism is still a concern in today's scholarly discussion see e.g., Faundez (2011b).

[31] Douglass North as a leading figure in the New Institutional Economics suggested that the nature and effectiveness of a country's institutions are critical to the development process because they set the environment within which an economy performs. For a discussion of North' influence on the Bank and his importance for the law and development scholarship see Faundez (2016).

[32] For a critique on universalist legal approaches in development interventions see e.g., Faundez (2011b) advocating legal pluralism.

[33] For early discussions of legal transplants see Watson, (1976) and Legrand, (1997) stating the impossibility of 'legal transplants'. See also the work of Günter Frankenberg on constitutional transfer (2010, 2013).

[34] In her work focusing on justice reform projects in Argentina Tuozzo identifies two phases in the evolution of the concept of governance, recalling "in the first phase, from early 1990 until 1996, governance was largely informed by neoliberal assumptions. In the second phase, from 1997 onwards, its original content was gradually adjusted to follow NIE ideas, at least in its rhetoric if not in all its operations. The neoliberal definition of

development paradigm shifted to issues of domestic governance. This shift also coincides with rights-based approaches in development cooperation in general (Gauri and Gloppen 2012).

Criticism on global rule of law activities addressing the connection between rule of law and development is present until recent times. Michael Trebilcock and Ronald Daniels (2009) underline blind spots about elites in government in of rule of law and development practices of that time. They implicitly reject both the too expansive role of state and the law of the early movement, as well as the too narrow view of the states' role in development in the Washington Consensus[35]. Contributors to Trubek and Santos' (2006) edited volume on *Law and Development* assess these paradigm shifts. Trubek and Santos distinguish between three, however poorly connected, spheres of law and development: economic theory, legal theory, and institutional practices. They claim rule of law has moved on from an instrument to an end allowing for decoupling arguments for projects from the need of achieving economic growth. Centrally, they underline how instrumental legal thought and formalism form a stable block that is nurtured by the disillusion of extensive state intervention and the spread of constitutionalism and judicial review (2006: 1- 9).[36] As with regard to newer projects in the line of the law and development movement, David Kennedy criticizes (2003) the current emphasis on formalization in law and development and the focus on the elimination of corruption as a precondition for economic growth on the basis that it downplays the importance of the informal sector, determines categories of reforms and narrows room for contestation. He also outlines how the narratives in law and development coin the uniform vocabulary of people across the political spectrum, benefitting thereby an environment in which rejection of rule of law reforms is almost impossible (Kennedy 2006). More recently, scholars argued a new turn had taken place in law and development that aligns with critical thinking about the relationship of law and development (e.g., Tan 2018). This strand, however, is far from cultivating heterodoxy.

To summarize: While the engagement of global governance actors in rule of law support has increased, the theoretical and empirical basis remains thin. The literature dealing with the

governance was widely promoted by the World Bank when the credibility of the Washington Consensus was still strong. Essentially, it meant better enforcement of regulation. It entailed the separation of governing, as a process, from government, as a particular agent |… | it constituted an instrument focused upon effectiveness and delinked from political aims. (Tuozzo 2009: 480)

[35] The Washington Consensus is a term coined by John Williamson, developing guidelines for good governance for a conference in Washington in 1989 comprising market economy, deregulation and privatization. The term later on was used in a broader sense relating to market oriented policies strongly advocated for by Washington based institutions such as the World Bank, the IMF and thinks tanks.

[36] David Kennedy notes in the same volume "[t]he focus on courts also accompanied a retreat from the legislative and administrative positivism of the modest interventionist period" (2006:139).

evolvement of the law and development doctrine centrally stresses the lack of knowledge and the search for new paradigms. Tracing the history of rule of law engagement helps to understand how a blurry concept of rule of law allows setting up a wide range of programs and limits possibilities for objecting the intervention.

### 1.1.2 The World Bank – good governance and law

Rule of law entered the World Bank portfolio with the turn to good governance. Despite the close connection between scholars and practitioners in the early rule of law movement, knowledge exchange and theory building efforts were complicated. Paradigm shifts and turns in scholarly literature and policy papers issued by practitioners contributed to a conglomerate of approaches to rule of law within the Word Bank (Santos 2006). Different conceptions of rule of law and a variety of approaches in operationalization continue to exist alongside each other. Yves Dezalay and Bryant Garth describe in their monograph on legal elites also how "the message sent from the north" varied over time (2002a), describing how the conceptualizations of rule of law in the projects were inconsistent. They focus on different conceptions within the World Bank and how they translate to national level as "palace wars". These palace wars at national level are characterized by the fight of national actors to gain power through international resources and expertise. In a later paper, Garth explains the phenomena of half-failed reforms with a simple yet convincing logic: "Each generation must bring the latest technologies, now meaning a requirement for a strong and independent judiciary, to fight against their predecessors and parents and at the same time upgrade and re-legitimize their governance" (2002: 396). Thereby, he boils down the choice of design to the interest of the local and international cosmopolitan elite in maintaining the status quo.

As the biggest financial development actor, the World Bank early on stressed the market-oriented aspect in rule of law.[37] Rule of law entered the Bank with the institutional turn and the focus on good governance. The suggested link between governance and development brought the role of state institutions back to the fundamentals of economic growth, while at the same time playing down distributional issues and evading political and social questions (see Polidano and Hulme 1999). In theory bound to a non-political mandate[38], the Bank framed the rule of law as an integral aspect of corruption mitigation and a prerequisite for economic growth.

[37] The Bretton Woods system and the Bank as the development arm of this system are linked to interests and prominent ideologies of economic elites and ideologist in the states sustaining the system and at the same tine set standards and promote development paradigms (see e.g., Dezalay and Garth 2002b).
[38] See chapter 4 in this work.

Thereby, the Bank entered through the backdoor in projects concerning political questions of state ordering. The approach of the Bank changed over time from a modernization theory-based development and neo-institutional approach to a good governance approach. While the paradigm shifts carry a notion of new beginnings, they are never clear-cut. As Sundhya Pahuja finds, as "governance appears in the Bank lexicon [it] begins to carry the weight of past failures and future hopes" (2011: 192).

Embarking on rule of law reform, the Bank took a leading position in bringing law back on the development agenda and defined the framework for reform. Julio Faundez affirms the World Bank called for a major shift in the role of law and institutions in the 1980s, when legal scholars and other development agencies still largely ignored the field (2011a: 6ff.). In the 1990s, the Bank defined four pillars of good governance: public sector management, accountability, legal framework for development and information and transparency (World Bank 1992).[39] Leading economists at the Bank fostered this shift and stressed the importance of laws for creating investors' confidence. Increasing the predictability of judicial action was assumed key for promoting economic growth (e.g., Posner 1998). Former General Counsel Ibrahim Shihata suggests: "The transformation of economies from command to market systems cannot [...] be successfully achieved in the absence of workable, comprehensive legal infrastructures" (2000:276). Therefore, an approach should include legislative, administrative and judicial reforms, stressing the independence of the judiciary and judicial management as important pillars of the reform package of the Bank (Shihata 1995). Influenced by NIE proponents within and outside the development institution, the Bank stressed the importance of the process through which the rules are applied and of the institutions supporting the legal framework (Shihata 1995:368; see also North 1992; North et al. 2007). Institutional transfer and legal borrowing became the dominant means, as institutions were assumed central in the light of their relation to markets and in terms of securing the state's effective organization (Tuozzo 2009: 480). While time and context have changed and research and practice largely proved the narrow focus to be unsuccessful, Garth (2002) confirms the focus on judicial proceedings and the judiciary largely remains unchanged.

[39] The Bank shifted to this good governance approach during the time under General Counsel Ibrahim Shihata (1983 – 1998), continued with a focus on corruption under President James Wolfensohn (1995 – 2005) and later under Paul Wolfowitz (2005 – 2007). Under the presidency of James Wolfenson the knowledge management agenda in the World Bank grew and strongly influenced law and development approaches in Bank projects (see also Tuozzo 2009).

Gordon Barron (2006) reviews the Banks engagement in rule of law reform around the globe and confirms the heavy focus on institutional reform. The Bank for example engaged in the support of justice institutions with reforms of management system and infrastructure measures. It also engaged in reforms in the development of regulatory frameworks in particular policy fields to support legal security and economic growth.[40] Criticizing a narrow approach, Barron doubts the connection between institution building and the rule of law, and strongly advocates for moving beyond a mere "makeover" for the judiciary (2006: 34).[41] In the same vein, Carlos Santiso accuses the mainstreaming of good governance is "giv[ing] governance a false sense of political neutrality, as it portrays development without politics" (2001: 4; see also Kapur et al. 2011). Similarly, Luis Pásara (2012) criticizes the artificial separation between technical and political projects and outlines how infrastructure projects have been prominent in the early years of Bank engagement in the rule of law sector yet were rarely purely technical. Desai and Woolcock accordingly find a "technical understanding of rule of law masks political contestation around this [...] concept and its role in shaping politics, society and the economy" (2012: 7). The focus on technical framing thus impedes contestation and excludes actors. At the same time, it is the basis for justifying the engagement and is determining the means. Acknowledging challenges in implementation in rule of law support, the 1997 *World Development Report* (WDR) stresses political aspects: "The broader the separation of powers, the greater will be the number of veto points to be navigated to change any rule-based commitments" (WDR 1997: 100). Similarly, the 2017 WDR "Governance and the Law", seemed to reflect a revival of the topic within the Bank, paying special attention to national power structures in reform projects (WDR 2017), yet it remains silent on how the Bank plans to approach national dynamics. [42]

Regarding the empirical basis for the connection between governance, institutions and law, the Bank relies largely on indicators (e.g., Merry et al. 2015).[43] The Bank itself is a vital actor in

[40] See also chapter 4 for more examples on the kind of projects the Bank was involved in.
[41] Barron also points out that approaching the rule of law from a more ends-based approach and its programming within Bank projects might lead to conflicts with its non-political mandate (2006:34). The focus on institutional strengthening must also be read in light of the liberal approach to rule of law reducing it to capabilities to enforcing the laws as discussed previously.
[42] See Deval Desai (2018) discussing the importance of the report critically.
[43] The world justice project is currently providing the most widely used rule of law index, available at: https://worldjusticeproject.org/rule-of-law-index/, accessed 21.08.2021. For a critique of seven different indices see Skaaning, (2010) discussing difficulties in measuring the rule of law.

providing these indicators.[44] It has its own research department and constantly issues policy papers on law and development. In the often-cited World Bank research paper "Governance Matters", Daniel Kaufmann and colleagues (1999) developed aggregated governance indicators from different sources measuring institutional quality along the lines of six dimensions – voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. They stressed the importance for thorough baseline studies to be developed along the lines of those indicators. Even though after that a great number of World Bank research papers has been produced on the same topic, scholars claim that baseline studies in projects often remain poor (Hammergren 2003, 2015; Santos 2006). They describe the frequent lack of a thorough country analysis as a missed opportunity, given that the country data are often available, yet must be processed and integrated into project design (Santos 2006: 291; Hammergren 2003).[45] In addition, the question of agency in knowledge production in the reports is not even addressed.

Throughout time, the World Bank has become an important actor engaging in rule of law support in the 1990s in Eastern Europe and early on in Latin America. In Eastern Europe after the fall of the Berlin Wall, the Bank engaged in justice reform to ensure "a marked friendly" transition. Courts and reliable judicial frameworks were assumed to provide stability to newly privatized national enterprises and foreign business and attract investment. Legal technical assistance therefore started in a transition context with an economic rationale. In its early engagement in legal reforms focusing on infrastructure for Courts and training of personnel, the Bank also conducted large-scale operations in Venezuela and in Peru.[46] These early projects already demonstrated problems regarding context-sensitive project design and problems of

[44] E.g., the Doing Business Index, available at: https://www.doingbusiness.org/en/doingbusiness, last accessed 26.06.2021. For learning more about the manipulated country ranking in the World Bank Doing Business Report of the Bachelet regime in Chile see: The New York Times, "Chile Slams World Bank Amid Charges of Political Bias", By Pascale Bonnefoy and Ernesto Londoño, Jan. 13, 2018, available at: https://www.nytimes.com/2018/01/13/world/americas/chile-world-bank-michelle-bachelet-augusto-lopez-claros.html, accessed 26.06.2021.

[45] An interview partner, formerly working in rule of law projects of the Bank stressed in regard: and "[T]he longer I am with [the Bank], the more frustrated I am that people are not more precise, that they don't measure better and that they just don't define what it is they are doing instead they just....It's the lawyers bias. A lot of words. And very little precision." (Interview #4).

[46] The first stand-alone project of the Bank in the judicial sector was carried out in Venezuela in the early 1990s. The Bank engaged in two large-scale projects in Venezuela (the 30 Mio US Dollar "Judicial Infrastructure Project" and the 4.7 million US Dollar "Supreme Court Modernization Project"). The first project consisted in renovating the court and equipping it as well as training personnel to use this equipment. The project was hampered by serious political impediments and rivalries in the Supreme Court (Barron 2000: 30). Albeit it was technical in nature, the political climate influenced the project to a great deal producing considerable delays in the implementation phase. See also chapter on Peru for a particularly dark chapter of the Banks involvement in judicial reforms which was the legal project underway in Peru under former President Fujimori.

adjustments of political dynamics during implementation. Simultaneously, the Bank was also massively engaged in structural adjustment policies in Latin America stipulating neoliberal public policy reforms and causing wide-spread rejection of this actor among parts of the society until today. Stretching the boundaries of its non-political mandate already, the Bank has also been criticized for its policy-based lending approach that attaches conditions to loans and requires recipients to enact market-friendly legislation (Faundez 2009). On a more general level, the critique concerns not only the implementation of reforms (Carothers 2003; Hammergren 2015) but also the legitimacy of the Bank's involvement in legal reforms overall (Tshuma 1999).

In sum, by framing rule of law as an integral part of political and economic governance, the World Bank built the basis for engagement in rule of law supporting activities. Being a major development actor, the Bank also largely contributed to setting the global agenda for technical rule of law support. Nevertheless, the outcome of the reform attempts showed meager success, both in self-assessment and in external contracted assessments. The next section turns to explanatory patterns put forward in scholarly literature for past failures in rule of law supporting activities by the Bank.

### 1.1.3 Failure of rule of law reforms – explanations put forward for implementation problems

Literature confirms Bank reforms in the legal sector have rarely been reaching their own set goals of enhancing economic performance via strengthening state capacities (Carothers 1998; Kleinfeld 2006; Peerenboom et al. 2012; Pásara 2012). [47] Scholars have discussed different reasons for the failure of World Bank projects singling out three main blocks of explanations: 1. lack of knowledge[48] and organizational particularities; 2. project design and the structure of cooperation; and 3. implementation problems and the lack of political will at national level.[49] The next section discusses this literature and outlines gaps.

---

[47] Bank projects in for rule of law support often combine various objectives, prominently democracy promotion, economic development, human rights and social justice, anti-corruption and law enforcement. See the empirical chapters for outlining the goals of the reform attempts in Peru and Argentina.

[48] This knowledge is referring to the type of knowledge produced and disseminated in the Bank. Chapter two discusses post-colonial critique regarding hegemonic knowledge concerning institutional functioning.

[49] Literature engaging with problems in liberal democracy promotion in development projects have been singling out similar problems: "(I) available knowledge on the process of and (pre)conditions for democratisation; (II) political decisions in democracy-promoting countries; (III) conceptualisation and implementation of democracy promotion; (IV) assessment of its effectiveness" (Grävingholt et al. 2009: [ ]). In their policy paper Joern Grävingholt, Julia Leininger and Oliver Schlumberger find: "Processes of democratization are macro-political transformations comprising the rearrangement of political power [...]. Thus democracy promotion [...] addresses the political process as such." And continue: "Democracy is a complex system, the effectiveness of its individual elements depending both on one another and on specific contextual conditions. External support for decontextualised individual elements of democracy thus often leads to "façade democracy" only." (Grävingholt et

Turning to the first set of explanations: lack of knowledge as the basis for the logics of change and organizational particularities of the Bank. Thomas Carothers already in 1998 questioned the utility of rule of law programmes altogether, finding millions of dollars were spent on programs which were not proven to be effective (1998). Summarizing this critique later he claimed the field of rule of law reforms lacked "a well-grounded rationale, a clear understanding of the essential problem, a proven analytic method, and an understanding of results achieved" (2006: 28). Testing the empirical basis of the law and development nexus, Richard Messick reviews studies on judicial reform and economic development. According to Messick, several studies find correlations between the two; however, how these connections exactly play out, still lacks understanding (1999: 123). The moment rule of law support has become an end with the good governance agenda, decoupling the justification of engagement from the need to stipulate economic development, lacking evidence for the nexus law and development ceases to be problematic for the Bank.

Rule of law reforms, such as the restructuring of legal and administrative procedures, infrastructure measures for national courts, and educational programmes for judicial personnel to enhance Courts performance remain largely a field of trial and error. Scholars have pointed out the importance of tackling this lack of knowledge with empirical research to distinguish lessons learnt from mere rule of law anecdotes and beliefs about what works in rule of law programming (Hammergren 2003, 2008, 2015; Domingo 2016). Linn Hammergren, a former USAID (*United States Agency for International Development*) and World Bank consultant finds reforms are overly ambitious, often impossible to implement (1999: 4), and are frequently not meeting the needs in the project country (1998: 316). According to Hammergren (2015), the failure of reforms and goal adjustments after the end of projects have been masked by the fuzziness of the concept of judicial reform in development circles. She tries to unpack the

al. 2009:2) Thereby stressing a similar point made by scholars in relation to the makeover of institutions in Latin America leading to "Potemkin Courts" (Brinks and Blass 2013). Lant Pritchett, Michael Woolcock and Matthew Andrews (2010) research reasons for failed implementation of development projects in general and stress how it also long been a topic of scholarly concern. They sum up how liberal approaches usually stress weak capacities of government, poor project design, underfunding, flawed coordination and poor context assessment. More critical scholarship stresses that projects do not fail per se, but work within national power dynamics, having effects without intending, usually strengthening already powerful actors. The classical study on this is James Ferguson (1990) on rural development in Lesotho, stressing depolitization in development politics as effectively sustaining power. See also James Scott (2008) "Seeing like a state" Yale University Press. Discussing how the solely focus on formal, epistemic knowledge in development theory" and imperialistic state planning lead to failure. See also scholars discussing impediments to negotiations in democracy promotion e.g., Poppe and Wolff (2013); and Leininger et al. (2019); Poppe et al. (2019) and international adjudication e.g., Humphreys (2012).

elements of failure, especially outlining problems regarding measuring justice sector performance. Ending with proposing a function- and problem-oriented approach rather than a structural or holistic one, she advocates for a stronger baseline diagnostic, prioritization in reform-initiatives and better integration of knowledge of donor country justice professionals (2015: 215- 231).

Concerning organizational particularities, the failure of the Bank to learn from unsuccessful past projects has been attributed to the forward-looking logic of the agency and the lack of knowledge sharing between departments of the Bank and with other development actors (Dezalay and Garth 2002a, 200b, 2006; Barron 2005; Santos 2006). Institutional shortcomings, amounting to "bureaucratic imperatives" that originate from the structure of the financial organization influence unfavorable outcome of reforms, with loan structure ranging prominent among them (Pásara 2012:12). Alvaro Santos researches how the different paradigm shifts in thinking about the role of law in development are reflected in different departments of the Bank (2006). Santos' research resonates with the work of Dezalay and Garth and emphasizes the close connection between scholarly thinking, the waves of framing development, and its operationalization. Santos finds the ambiguous rhetoric of the Bank had two major effects: firstly, it allows policy makers to be unclear about what they mean when they invoke the rule of law, and secondly, it allows for goal-post-shifting, meaning that goals could be reformulated when the projects have not achieved the desired goals (2006: 282). Furthermore, Santos underlines professional interests and career aspirations as motivations for selling rule of law projects as a necessary and workable enterprise (2006: 290).

Whereas diverging opinions within the Bank have been discussed as reasons for incoherent project design throughout time and divisions, elitist "silo thinking" has also influenced unrealistic, non-innovative approaches, detached from political realities and demands articulated in civil society (Domingo 2016). This dynamic of silo thinking is exacerbated by the "revolving door phenomenon", relating to Bank staff members that have been appointed a political position in their national government, sometimes going back and forth between national and supranational level (Dezalay and Garth 2002a; see also Santos 2006: 296).

A second set of explanations for failed judicial sector projects of the Bank refers to the design of reforms and the structure of interaction with the national counterparts. Scholars outline that

designs are too rigid and often rely on legal transplantation[50] (Faundez 2000; 2011a). Others stress the poor analysis of the country situation; therefore, projects would lack context sensitivity and had bad timing (Pásara 2012; Hammergren 2015). Rachel Kleinfeld discusses the focus on institutional approaches instead of ends-based approaches and outlines the mismatch between reform intention and the operationalization of rule of law into limited implementation strategies (Kleinfeld 2010). She advocates for a stronger focus on the rule of law's ends instead of institutional attributes in means-based approaches and emphasizes the importance of carrying out reforms across institutions, not just within them (2010: 34-36). In her critique, Kleinfeld addresses a central problem in reforms: rule of law being a system-wide concept, while the Bank's approach to building the rule of law is often a sectoral one.

The loan structure of the Bank in specific and the structure of global governance determine the type of interaction with the national level, the executive being the primordial entry point. Even though awareness in the Bank of considering national power struggles for implementation seems to have been rising (e.g., WDR 2017), practitioners at the Bank and scholars alike struggle to understand dynamics at national level and the challenges interventions pose to intra-branch relations. Literature is scarce regarding how project design and the structure of cooperation inflicts and interacts with intra-branch rivalries at national level during rule of law reforms (Riggirozzi 2005 and Tuozzo 2009 being the exceptions providing empirical studies, see below). Cooperation and stakeholder selection often remain rigid, relying on old patterns of previous involvement. With regard to the effects of the stakeholder selection and the relationship between national actors and the Bank, Pásara underlines how national actors use projects to gain legitimacy and prestige at national level while he also affirms the international intervention bears the risk of national actors loosing local authority and initiative (2012: 14). Pásara finds international donors have sometimes been "cultivating national officials to serve as an anchor for the projects" (2012:15). Alberto Binder and Jorge Obando call this relationship a "tacit pact [...] of procreation" (2004:61), outlining financial dependency but also the attribution of legitimacy. Cultivation in this sense provides stakeholders selected by the Bank with additional leverage vis-à-vis other actors at national level.

[50] Criticising the legal reform orthodoxy, and especially the process of legal transplantation, Scott Newton emphasizes that "[i]n transplantation as in transition, the emphasis on product over process works to privilege legality over legitimacy" (2003: 163).

As one of the few empirical studies on national stakeholders and international-national relationships during Bank projects, Pia Riggirozzi (2005) describes how the international intervention in justice reforms in Argentina changed the initial bargaining situation, set the agenda and provided resources. By opening the black box Bank, she analyzes how the different units of the Bank engage with local stakeholders, disseminate, and negotiate knowledge in different ways. More specifically, Riggirozzi focuses on the implementation of two governance-related reforms in Argentina; judicial reform and anti-corruption policies carried out in the mid-1990s. She points out how the Bank aligns with local actors creating "pro-reform-networks" [51]. Albeit she stresses the interaction between the Bank and the local actors and structural features influencing the form and type if cooperation, her research falls short in analyzing the dynamics among the national actors. According to Riggirozzi, the Bank created both the dominant development paradigm in the reform and the demand for it. In later research, she points out that "Bank staff endorse power relations that in some cases reinforce and in others limit the implementation of policy reforms" (2007: 204), thereby stressing how altering the power balance in Bank reform has potentially destabilizing effects.

In another study focusing on the Model Court Project PROJUM in Argentina, María Tuozzo singles out three aspects of the approach applied by the Bank: donor-driven designs of project reforms, reliance on technical approaches, and selective involvement of key stakeholders on project initiatives (2009).[52] Especially the selection of stakeholders played a key role in the failure of the PROJUM project in Argentina dealt with in this study as well. Tuozzo strongly criticizes the Bank's approach, calling into question the suitability of the Bank to endorse those kinds of reforms she finds: "World Bank influence in Argentina contributed to the adoption of inadequately defined and designed institutional reforms which yielded piecemeal changes and contributed to the reinforcement of particularistic and exclusionary practices. [...] World Bank governance operations were ill equipped to address what are essentially politically related governance problems dealing with norms (both formal and informal) and power struggles within national institutions." (2009: 468).

[51] Focusing on the interaction and knowledge disseminations, Riggirozi finds "|o|nce knowledge has become routinized as accepted social practice; it is established as a norm around which practices are oriented. Second, knowledge creates new lending instruments for policy reform and reinforces their implementation. Yet 'knowledge transferred' is not necessarily 'knowledge taken'"(2005: 6). For other project of the Bank in the good governance sector between 1990 and 2005 see Riggirozzi Table 1: World Bank's Governance related Programmeas in Argentina 1990-2005 (2005: 149 – 150)

[52] See also an earlier paper on the influence of World Bank led reform projects on democracy in Argentina by Tuozzo (2004).

The two studies come closest to the focus of this research and provide valuable insights into aspects of implementation relating to structural factors.[53] Yet, they fall short on assessing different analytical dimension in combination and in paying sufficient attention to how structural factors interact with larger national power dynamics and do not analyze negotiations in a critical perspective.

A last set of explanations for failure of reforms refer to the dynamics at national level. Failures of reforms have been ascribed to a lack of behavioral changes of national actors, sometimes referred to as the "legal culture" (Faundez 2011a) and power politics among branches. Within this strand of scholarship researching possible explanations, resistance within judiciaries and open or hidden agendas of elites in search of securing their status quo (Dezalay and Garth 2002a) have been pointed out as obstacles to long-term reform success. Whereas legal culture is located at deeper institutional levels, political will for single reform projects tends to be generated on a shorter-term basis. However, political wills also always carry historical baggage, recalling older alliances and rivalries among actors involved in the process. In this regard, Carothers underlines "aid cannot substantially modify unfavorable configurations of interest or counteract powerful contrary actors" (1999:305,107; see also Popkin 2000). Scholars and practitioners agree on the importance for finding political will and generating consensus (Garth 2002: 388; Santos 2006) and invoke lacking political will as reason for failure.

Approaching the topic of national power struggles, Deval Desai and Michael Woolcock, stress in their work how elites engage in the legalization of rule of law in unpredictable ways. According to them, the transformation of rule of law reforms and acknowledgment of the procedural character of legalization are key to understand hybrid outcomes of reforms (2012: 8, 13). Their research helps to approach the political dimension in rule of law reforms, and especially the tension between the attractiveness of building the rule of law as a policy agenda (nationally and internationally) and the inherently contested nature of law (also Desai and Woolcock 2015: 169).

Literature focusing more in general on judicial reforms (without necessarily involving third-party engagement) described the fragility of the reform situation possibly leading to power imbalances. Andrea Castagnola and Aníbal Pérez-Liñán study judicial reform and institutional stability, departing from the question whether institutional reform effectively predicts institutional independency. They call this phenomenon the "reform paradox" to point out how

[53] To my knowledge, there is no systematic study on national dynamics with regard to reform projects by the Bank and national politics in Peru.

institutional reforms could trigger periods of institutional instability and challenge the balance of power. They argue the act of the reform itself, not only the nature of the reform would provide an opportunity for instability to rise (2016). In that sense, reforms per se are anchor points for power struggles. Daniel Brinks and Abby Blass deal in their work with the stability of high courts throughout the Latin American region and pay special attention to the to reform initiatives of international actors (2013, 2018). They study the different mechanisms and reform approaches applied that were assumed to introduce more stability and create more independent courts and find that also some "poison pills" have been introduced, meaning mechanisms that had a countering effect on the efficacy of courts.

While the authors referring to political dynamics at national level and lacking political will for reform address different aspects, they share a focus on the interplay of interests in reforms. These diverging interests can emerge between and among branches of government (inter and intra-branch crisis) or in relation to the international intervention itself. Political will to reform, coordination, and national political struggles and dynamics emerging in relation to the reform attempts are characterized by these interests. Few scholars have engaged in unpacking this political will at national level and in exploring how the coordination during implementation is carried out and how reforms provide anchor points for national political struggle.

This section looked at how rule of law support became an important pillar in international financial development cooperation. It revealed the paradigm shift in the World Bank towards a good governance approach with and a focus on the judiciary and law enforcement.

Three dimensions have been stressed in literature for problems in implementation: 1. organizational impediments and context insensitive reform design, 2. the centrality of institutions and the structure of cooperation, and 3. the problem of selection of stakeholders and of identifying the political dynamics at national level. How the dimensions relate to each other and what the problems look like during specific implementation processes is underexplored to date. I suggest to better describe the different dimensions of the problems.

The next section introduces the Inter-American Court of Human Rights as rule of law promoter, looks at literature dealing with international adjudication, and discusses explanatory patterns in relation to implementation problems during the implementation of human rights judgments.

## 1.2 The Inter-American Court of Human Rights as a rule of law supporter

Strengthening rule of law at national level and checking power is a central aim of the Inter-American Court of Human Rights. The mandate of the IACtHR defines the purpose of the Court

to check and control abusive state behavior and the IACtHR Rules of Procedure define the procedures to address human rights violations mainly through reparation orders in judgments. The IACtHR relies on national actors to provide information on the case, enforce the judgments and implement the measures. The following subchapters focuses on the role of the IACtHR in rule of law support, outlines scholarly discussions on enforcement and implementation problems in international human rights law more in general and then turns to the problems during the implementation of judgments of the IACtHR.

### 1.2.1 The Inter-American Court – promoting change through law

The Inter-American Human Rights System has two main organs: the *Inter-American Commission on Human Rights* (IACHR) and the *Inter-American Court of Human Rights* (IACtHR). The organs were created by the *Organization of American States* (OAS)[54] and exercise a twofold function: to promote and to protect human rights.

Established in 1979, the Court historically was that of a stronghold against authoritarian regimes in the region (Engstrom and Hurrel 2010; Pasqualucci 2012).[55] Building its authority on the particular historical context in which it emerged, the role of the IACtHR has changed over time and it is now operating in a political and legal landscape characterized by predominantly democratic systems.[56] Scholars have underlined the important contribution of the IACtHR in processes of democratic consolidation and transitional justice in the last decades e.g., in the context of transitions from military dictatorships to more democratic forms of governance. Stressing mainly how the Court served as an anchor point for promoting and providing access to justice when national judiciaries were biased or weak, it supported the fight against impunity and stroke down human rights violating legislation (Binder 2012; Huneeus 2016; Skaar et al. 2016). Court and Commission jointly engage in research activities, public conferences and activities with civil society seeking to support human rights education and awareness. However, more directly yet hard to pin down, the influence of the IACtHR in rule of law promotion

[54] For a discussion on the OAS democratic charter see eg. Fabry (2009).

[55] The Court was officially established in 1979 but did not receive its first cases until 1986. Its first judgement was issued in 1987 on the *Velasqez-Rodriguéz v. Honduras* case.

[56] Engstrom and Hurrell point out in this regard "[th]e historical legacies of processes of state formation has therefore continued to shape bot the character of human rights violations and the capacity of states to address them (including, for example, the often difficult political and legal relationship between federal government and local authorities, or between the army and different parts of the policy service)" (2010: 42). Haugen and Boutros confirm "[t]he tragic irony, however, is that the enforcement of these rights was left to utterly dysfunctional national law enforcement institutions. Most public justice systems in the developing world have their roots in the colonial era, when their core function was to serve those in power-usually the colonial state." (2010: 55). For the regional character of democratization see for example the seminal work of Guillermo A. O'Donnell researching authoritarianism and democratization and the consolidation of nation states in Latin America (e.g., 1993, 1996).

develops via landmark cases, advisory opinions, conventionality control and judgments, sometimes dictating legal and institutional changes and public policy. Court and Commission are also important normative actors in rule of law support as their judgments oftentimes have spill-over effects, shaping national jurisprudence and public policy alike (Skaar et al. 2016; Føllesdal 2016). This research concentrates less on the role of the Court as a norm promoter and more on the concrete implementation process of judgments and the relationship with rule of law support. This said, in some judgments the Court also directly seeks to strike down national legislation or dictates the change of specific policy or the creation of specific organs considering concrete past violations to heighten chances to provide rule of law adherence in the future.

The Court has decided on the incompatibility of amnesty laws with the *American Convention on Human Rights* (ACHR)[57] in its 2001 landmark case *Barrios Altos v. Peru* and later in *La Cantuta v. Peru* (2006) and *Almonacid v. Chile* (2006). These landmark decisions served to set the agenda for other countries. National courts have utilized IACtHR jurisprudence to strike down national amnesty laws designed to protect former military regimes. Christina Binder (2012) describes how the evolution of the IACtHR amnesty jurisprudence created spill-over effects on Colombia and Argentina and was an important step to support national efforts in fights against impunity (see also Pasqualucci 2012: 322–323).[58] The jurisprudence also credited the Court with legitimacy in a broader perspective by setting legal standards on amnesties internationally (Binder 2012). Alexandra Huneeus (2016) discusses how the de facto power of the IACtHR to shape government behavior varies from country to country and expands beyond judgment compliance, via spillover effects of legislation, and political pressure by civil society. She explains the finding with different national constitutional practices and constitutional politics, suggesting that the Courts authority depends on the domestic constellation of lawyers and political reformers. Raffaela Kunz (2020) studies the role of national parliaments in the implementation of judgments of the European Court of Human Rights and the IACtHR and discussed how the intersection of different legal regimes in human rights judgments clearly reveals questions regarding constitutional functions and norms of respective nation-states.

Much scholarly attention arose in relation to the doctrine of conventionality control, which stipulates an obligation of national courts to control domestic provision for their compatibility

[57] Herein after the Convention.

[58] American Convention Art. 68 stipulates that Court rulings have effects *inter partes.* However, effects of rulings also extended into other jurisdictions in different ways, see e.g., Sikkink (2014) for a discussion of Latin American countries as norm protagonist in human rights.

with the Convention and the interpretation by the Court.[59] Whereas some scholars have praised this doctrine (Hitters 2017; Gonzáles-Domínguez 2018), others have criticized it mainly for its infringement on national sovereignty (Contesse 2017a; 2017b; for a reply see Carozza and Gonzáles-Domínguez 2017).

Throughout time, the Court has expanded its jurisdiction now embarking also on labor rights and economic, social and cultural rights[60] (e.g., Tinta 2007). Regarding the changing nature of cases dealt with by the Court, Par Engstrom and Andrew Hurrell confirm that "more attention rest on challenges to the rule of law" (2010: 11), such as separation of powers and institutional and procedural legal safeguards, in contrast to the historical decisions embarking on cases of traditional human rights law and of international humanitarian law. With the expansion of its de jure power *ratione materiae*, now often engaging in the design public policies and demanding legal reforms, the Court has also become more prone to get caught in political maneuvering and chances for manipulation. In this regard, scholars and practitioners have outlined the provisional measures issued by the Court as an opportunity for being politicized given that these measures sometimes relate to unsolved and ongoing political disputes and arrive at the Court almost in "real time" (Landa 2018; Bazán and Fuchs 2018).

In recent years the IACtHR has experienced a backlash to its jurisdiction (Soley and Steiniger 2018;[61] see also Amato 2012; Oquendo 2017). Critique of the court has been articulated along three mayor lines: 1. bias against states in favor of victims, 2. breach of the principle of subsidiarity, and lastly 3. a lack of context sensitivity and ease of manipulation for political gains. Firstly, the Court has been described as an "activist Court" that sides with the victims and as being politicized (e.g., Bazán and Fuchs 2018 providing differing views) and infringing with public policies in the judgments. Whereas the Court has traditionally been placed in the left corner of the political spectrum (Binder 2012; Pasqualucci 2012), it has also been accused of being biased against left-wing governments, and of generally embodying a neoliberal ideology (Zschirnt 2017). Secondly, the Court has criticized for breaching of the principle of

[59] In *Almonacid v. Chile* (2006) the Court established the doctrine, finding that all judges in states under its jurisdiction have the duty to review legislation under Convention and "must refrain from enforcing any laws contrary to such Convention" (*Almonacid Arellano and others v. Chile*, 2006, para. 124).

[60] See for example the recent IACtHR case *Lagos del Campo v. Peru* concerning Art. 26 of the Convention. As discussed by Lucas Sánchez (2018) "Der IAGMR und WSK-Rechte. Eine wegweisende Rechtsprechungsänderung", *Völkerrechtsblog*, 20 August 2018, https://voelkerrechtsblog.org/der-iagmr-und-wsk-rechte/, last accessed 29.05.2022.

[61] Soley and Steiniger differentiate between backlash, contestation and resistance against the Court, arguing that there is room for managing the discontent within the regional human rights system stating the "framework of the IACtHR allows for innovative starting points to manage state discontent, in particular the two-tiered structure, the alliance with civil society, and the presence of compliance partners within the state." (2018: 238).

subsidiarity, bypassing national institutions and hampering the democratic decision-making process. Especially the case *Gelman v. Uruguay* gave rise to the critique the Court would ignore domestic political process in Uruguay issuing an amnesty provision (Gargarella 201a). Andreas Føllesdal underlines how the normative theory of subsidiarity presupposes a state's "prima facie priorization" for deciding on the matter of law (2016). Discussing this principle of subsidiarity in the Latin American context, Contesse (2016) finds the Inter-American Court embraces a maximalist model of adjudication (see also Hawkins and Jacoby 2010 below), not leaving much room for states to reach their own decisions and explains its role mostly by the historical context in which it emerged. The requirement of exhaustion of national remedies directly refers to the capacity of national judicial system to deal with the violations. The Inter-American Court also aims at strengthening the autonomy of domestic courts to fulfil their role in the domestic prosecution of perpetrators of human rights violations.[62] Therefore strengthening national judiciaries and upholding their independence is both task of the Court and central to the principle of subsidiarity in the first place. Jorge Contesse finds due to the changed political context the Court is embedded in, it now often deals with cases in which the violations alleged of are of a less extreme and less obvious nature than in cases before the Court in the past (2016: 127; see also Engstrom and Hurrell 2010: 10-11), triggering questions about the Courts new positions towards subsidiarity. Finally, he concludes that a less maximalist approach to subsidiarity would allow acknowledging state positions as fundamental actors for the enforcement of international human rights norms, "thereby ensuring that international governance rises in accordance to the domestic unit that creates and sustains it" (2016: 145). The central cleavages of national actors and between national and international level crystallizes in the litigation before the Court during contentious and supervision stage. However, the negotiation of diverging interests and tensions are hard to be accommodated into a rather strict legal regime and implementing procedures. More broad questions of concrete interplays between the procedures of implementation and rule of law support at national level have rarely been studied.

[62] The Court has a longstanding line of jurisprudence specifically concerning independence of the judiciary. See IACtHR, Constitutional Court v. Peru, 1999, IACtHR, Five Pensionersv. Peru, 2003, IACtHR, Apitz Barbera et al.v. Venezuela, 2008, IACtHR, Acevedo Buendia et al. (Discharged and Retired Employees of the Controller) v. Peru, 2009, IACtHR, Barreto Leivav. Venezuela, 2009, IACtHR, Reverón Trujillov. Venezuela, 2009, IACtHR, Chocrón Chocrónv. Venezuela, 2011; IACtHR, Mejía Idrovov. Ecuador, 2012, IACtHR, Constitutional Tribunal (Camba Campos et al) v. Ecuador,2013, IACtHR, Supreme Court of Justice (Quintana Coello et al) v. Ecuador.

The Inter-American System has also been criticized for its remoteness from the political, social and legal context of its member states (Neumann 2006; Oquendo 2017).[63] Other scholars argued in favor of a Court distanced from political context underlining it as a necessary requirement for independence and for upholding judicial functions (for a discussion see Gonzáles-Domínguez 2018). Regarding context sensitivity, James Cavallaro and Stephanie Brewer (2008) find the Court has done much in terms of reaching out to the broader public, appealing to particular interest groups and the media. Thereby, they argue, the Court's work expands beyond individual cases and has the chance to trigger broader societal change (2008).[64] However, they also underline they are not suggesting that the Court should limit itself to hearing popular cases but should pay more attention to the local context (Brewer and Cavallaro 2008: 792).[65] Brewer and Cavallaro's argument is a pragmatic more than a normative one as they plea for understanding the context as a necessity for ensuring its relevance and effectiveness (2008: 770). In a similar vein, Guillermo Garcia Sanchez describes the political costs the Court might pay when relying solely on legal reasoning, underscoring that the maintenance of a conventional human rights system is a political task (2017: 600).

Bearing in mind the historic impact and the current importance of judgments of the Court in the region on shaping judicial and political systems in Latin America, understanding how and why judgments are implemented or not becomes of particular interest for better understanding rule of law supporting activities and rule of law development. The next section maps explanations put forward for understanding implementation problems.

### 1.2.2 International courts and rule of law support, implementation and enforcement problems

With the creation of international courts and other institutions for dispute resolution,[66] international adjudication has become a field in international governance for promoting the rule of law at national and international level (Hirschl 2009; Kingsbury 2009). Courts address conflicts between states, private entities but also between states and their citizens. Studying the

[63] The debate has gained prominence in light of the advisory opinion on same-sex marriage issued in January 2018 which is assumed to have influenced the Costa Rican presidential elections. See Bazán and Fuchs (2018), Advisory Opinion (OC) (2017), Inter-A,. Ct. H.R. (ser. A) No. 24/17, (November 24, 2017).

[64] This outreach is central in the debate on what effects international adjudication can have in general and how tribunals expand their authority from individual cases to generating effects on the broader public and political sphere and whether they have the legitimacy to do so. For a discussion about the relationship between effectiveness, authority and compliance see Alter, K.et al (2006).

[65] Brewer and Cavallaro discuss this under the heading advancing vs. overlegalizing human rights (2008: 817).

[66] Broadly one can distinguish between seven types of international adjudication bodies: International judicial bodies for resolving disputes among between states, international criminal courts, international human rights courts, court of regional economic and political integration, international claims and compensation bodies, investment arbitration, international administrative tribunals. For a discussion of International Criminal Courts see e.g., Schabas, W. A. (2011).

ways courts engage in global governance has gained prominence in scholarly literature since the emergence of courts in the international arena (Teitel 2000; von Bogdandy and Venzke 2012; Romano at al. 2014). Karen J. Alter (2008; 2014) points out how new international courts contribute to international politics and normalize our understanding of their influence in transnational governance. She outlines the characteristics of new courts – among them compulsory jurisdictions, access for non-state actors – and finds they influence states presences and behavior and international politics to a great degree, as opposed to old international courts exercising a role based on voluntary inter-state dispute settlement (2014). According to her, the paradigm shift is a shift towards rule of law expectations of compliance with the rules regardless of what other states might be doing, and therefore not based on reciprocity (2014: 15). In the same line, she stresses that international courts can circumvent governments, inducing administrative agencies and national judges to reinterpret domestic law, thereby changing laws "regardless or even despite the preference of ruling governments" (2014: 17, 23).

The discussion about the role of courts in general and international courts in particular in institutional change and rule of law has parallels to discussion on juridification[67] and rights-based approaches in development cooperation. Advocating a strong legal positivist view, David Stewart and Michael Dennis argue in favor of promoting social change through international adjudication, finding that international judicial or quasi-judicial decisions can produce more insightful policy choices than their legislative counterparts (2004).[68] A number of scholars, among them centrally Roberto Gargarella, claim the instrumental nature of legality would impede dialogue (Gargarella 2015a, 2015b) and strongly oppose an instrumental view on law. As a general trend, more and more rights become inscribed into constitutions, often making them the central point of reference in legislative activities at national and international level (Negretto 2013).[69] Recent constitutional changes in Latin American countries were hailed as "constitutional revolutions" (Schilling-Vacaflor 2016).[70] Gargarella (2015b) doubts the

[67] Juridification is a phenomenon that is upstream of the judicial interventions, I discuss in this work, and at the same time a product of it.

[68] Critically reflecting the way non-state entities and international organizations are portrayed in the making of international law, Maxwell Chibundu finds: "The ascendance of non-governmental entities as the purveyors of power is hailed as a blessing because it reduces the influence of governments in the making of international law. The values that these entities espouse and which, presumably, are thereby embedded in the international legal system that they foster, are those which promote the interest of the individual over those of the State, human rights over State rights, democracy over autocracy, and legality over lawlessness" (1999: 107).

[69] Human rights are increasingly enshrined in the new constitutions. This said, the type of right enshrined in the constitution and the effective justiciabilty is important for the doctrine of conventionality control established in many Latin American countries. Constitutions also became a central focal point for human rights litigation and anchors for advocacy, e.g., *amparo* proceedings.

[70] See also Uprimny (2011) on constitutional transformations in Latin America and Gargarella, (2015b) for a historical take on constitutions in Latin America focusing on the period 1810-2010.

revolutionary potential in these developments and finds that instead of allowing for transformation the way constitutions are currently reformed are actually shielding the powerful from the demands of the people.[71] Further critique concerns the gap between the formally enacted laws and the reality of their application. Gargarella's central critique consists in rebutting a reading of international judgments as supporting emancipatory acts that allow for social mobilization. Instead, he suggests international judgments are impeding national political processes to unfold (2015a). Embedded in a larger discussion on global constitutionalism[72] Ran Hirschl (2009) outlines a trend in politics towards a "juristocracy" and criticizes the shift away from majoritarian decision-making arenas towards professional policy-making institutions. International lawyers – among them those supporting the *ius constitutionale commune* in Latin America (e.g., von Bogdandy 2015)[73] – also stressed ideas of transformative constitutionalism, however, neglecting to problematize the colonial underpinning of universalist approaches and the repressive character of law.

Despite several mechanisms, institutions, and legal frameworks set up in global governance to regulate governance globally, the relationship among states and between global governance institutions and national actors continues to be characterized by what has been called the "anarchic framework" of international relations.[74] The absence of a supranational entity to enforce law with a simultaneous development of regional and international courts is the background for the effectiveness, compliance, and enforcement debates in international law scholarship. A first approach to effectiveness of international norms and implementation of judgments[75] refers to the imposition of penalties or rewards (Simmons 2000; Hafner-Burton 2005). Beth Simmons suggests that states are likely to comply with international commitments

[71] Trubek and Santos (2006) recall how the practice of supporting constitutional drafting processes was and, in some cases, still is part of legal aid.
[72] See also Peters, A. (2009) and Lang and Wiener (2017) on global constitutionalism.
[73] Scholars meeting at the *Max Planck Institute for International Law* in Heidelberg have worked on an approach they call *ius constitutionale commune de America Latina* (ICCAL). In the ICCAL approach they discuss the transformative character of constitutions in Latin America and the harmonizing effects as well as the impact of the Inter-American Human Rights System. See von Bogdandy, A. et al. (Eds.). (2017) and Morales, M. (2015).
[74] The status of anarchy in international relations is an ongoing debate mostly framed scholars from the neoliberal and neorealist camp see for example the work of Robert Keohane, Kenneth Waltz or Alexander Wendt influential in German IR. See also e.g., Robert Cox and Stephen Gill and their neo gramscian approach for alternative perspectives. In chapter two I discuss how post-colonial scholars dismantle this nominal anarchy in international relations.
[75] Other categorization more in general in relation to the power of international litigation differentiates between the Managerial school (Chayes and Chayes 1995 ), the enforcement school (Keck and Sikkink 1998, Keohane 1984 , Simmons 2009), referring to events that build up pressure for national government like retaliation, reputation, and the constructivist school Risse et al. (1999); Checkel (2005); Goodman and Jinks (2004), stressing norm translation processes and the famous studies on "norm cascades" and norm life cycle by Finnemore and Sikkink (1998), see also Acharya (2004) for early work on norms.

to maintain their good international reputation for predictable and law-abiding behavior. States enjoying such reputations are likely to be rewarded through mechanisms such as increased investment (2000). Compliance in this understanding is a result of states' socialization into the international community and an over-arching normative commitment to the principle of *pacta sunt servanda.*

A second approach emphasizes the ways in which management problems influence the implementation at national level (Chayes and Chayes 1993; Chayes et al. 1998). This managerial thesis focuses on three reasons for problems in implementation: 1. ambiguity and indeterminacy of treaty language, 2. limitations on the capacity of parties to carry out their undertakings, and 3. the temporal dimension of the social and economic changes contemplated by regulatory treaties (Chayes and Chayes 1993: 188). Chayes and Chayes find international litigators use these set of explanations as defenses to excuse or justify a violation of the treaty (1993: 188).[76] They underline "financial, administrative, informational or regulatory capacities" as underlying problems in implementation and stress the need for capacity building (Chayes et.al. 1998: 40-41, 52). Abram Chayes, Antonia Chayes and Ronald Mitchell underline the nature of international rules and the capabilities of states, rather than motives, of states and the rewards or punishments for their behavior (Chayes et al. 1998). In line with the managerial approach, albeit focusing on the side of the international institution, Lawrence Helfer and Anne-Marie Slaughter (1997) have argued that the institutional design of courts influences the level of compliance with judgments. Departing from their assessment of the supranational adjudication in Europe (*European Court of Justice,* ECJ, and *European Court of Human Rights*, ECtHR) as a success story, they develop a checklist for factors that encourage effective judgments (1997: 300–314; see also Helfer 2008).[77] Turning to the state level, they underline the importance of opening the black box state when analyzing implementation and argue in favor of disaggregating governments into their component parts or branches (Helfer and Slaughter 1997: 289–90; see also Slaughter 1995).[78] Robert Keohane and colleagues argue the more the international courts are independent from state pressure, the higher the extent to which individual and NGOs have access to these courts and the closer domestic courts are tied to international courts, the better is the prospect of implementing judgments successfully

[76] Note here also the multiplying effect the defection of one state could have on the others states in the system.

[77] The checklist comprises that tribunals are composed of senior, respected jurists with substantial terms, they have an independence fact-finding capacity, their decisions are binding as international law, they make decisions on the basis of principles rather than power and they engage in high-quality legal reasoning (Helfer and Slaughter 1997: 300-314).

[78] See also Grugel and Peruzzotti (2012) on the domestic Politics of implementation focusing on the Convention on the Rights of the Child in Ecuador, Chile, and Argentina. See also Simmons (2009) discussing the correlation between ratification of human rights treaties and rights practice.

(Keohane et al. 2000). Eric Posner and John Yoo (2005), on the other hand, argue that independent international courts are more likely to issue more controversial judgments that in turn are less likely to be complied with. While clearly marking a realist approach, their contribution is also conflating institutionalization with independence. However, it is valuable as it stipulates thinking about false assumption and about easily transferring conventional believes about judicial independence from the national to the international arena. On the other hand, authors have argued that the distinctions between domestic courts and international courts in terms of independency, rulemaking and enforceability are overstated (Staton and Moore 2011; see also Ginsburg 2014: 486).

A third approach to implementation relates to domestic policy preferences. George Downs and colleagues argue that states calculate the costs and benefits of changing policy (Downs et. al. 1996). When costs are high, compliance is low. They argue that deep cooperation is rare and that many agreements reflect a situation where states agreed to do something they would have done regardless of the treaty. In their reading, compliance is rather convergence of interest than cooperation. Focusing on interest and actors, this strand of literature also admits that the "political will" of states is difficult to observe (von Stein 2005). In line with this actor-oriented domestic policy approach, Keohane, Moravcsik and Slaughter argue that compliance is more likely when international Courts established a relationship with the domestic judicial who favor abiding by the rule of law (Keohane et al. 2000). They define high independence, access and embeddedness[79] as the ideal type of transnational dispute resolution. Although they admit that a high degree of embeddedness, which is characterized by "direct enforcement through domestic courts and executive agents who are responsive to judicial decisions" is an ideal type (2000: 476), they do not consider that even though the embeddedness may be high, those domestic courts and executive agents might not be responsive to the international dispute resolution. Lawrence Helfer and Anne-Marie Slaughter suggest governments with a strong domestic system and adherence to the rule of law might find they had no need for supervision and that interference with their domestic system by international judgments might even weaken the system (1997: 332). Depending on the subject they deal with and the mechanisms at their disposal, the compliance with judgments vary from court to court. Tom Ginsburg affirms that the "strategic decision space" of a court is influenced by the power structure of the regime they

[79]According to Keohane and colleagues embeddedness in strong when national courts can enforce international judgements against their own governments (2000: 468) and international legal norms are embedded in domestic legal system through legal incorporation or constitutional recognition (2000: 467). Concerning the legal characteristics of international courts and tribunals, the article ranks the IACtHR with moderate independence, high access, and moderate embeddedness (2000: 469) referring to Sands, P. et al. (Eds.). (1999) Manual on International Courts and Tribunals.

are embedded in (2014: 494). The courts, however, also shape these underlying power structures and provide opportunities for changing the dynamics among national actors. Helfer argues that effectiveness of courts goes beyond mere compliance, bearing in mind e.g., *erga omnes* effects and national and transnational legal dynamics (2014).

### 1.2.3 Low implementation rate of judgments – explanations put forward for non-compliance

The IACtHR describes prompt and full implementation of reparations as an integral aspect of the right to access to justice.[80] Because one party before the IACtHR is a state, the implementation of judgments directly affects state institutions and requires state institutions for being implemented. Thus, the implementation of judgments at national level has implications for inter-branch relations and the rule of law (see also Kapiszewski and Taylor 2008).

International courts have little enforcement authority as they rely on actors within the states to implement judgments. However, the IACtHR created a unit to supervise the implementation of judgments. The supervision unit of the IACtHR started working in 2015. Whereas the *European Court of Human Rights* (ECtHR) has with the Committee of Ministers an individual body overseeing the implementation of its judgments,[81] the Court's supervision unit is not institutionally independent and has no other political leverage than announcing non-compliance to the OAS.[82] The focus on supervision of judgments within the Inter-American system is a relatively new trend, both among scholars (Cavallaro and Brewer 2008; Gonzalez-Salzberg 2010; Pasqualucci 2012; Baluarte 2012; Gamboa 2014) and from within the Court or practitioners involved in the proceedings (e.g., Annual report 2011; 2017; CEJIL 2009; Perez 2018; Saavedra Alessandri 2020).[83] Much of the literature is focusing on the question whether or not states implement Court orders and the specific types of reparations; less literature deals with the question how states implement them.

---

[80] *Banea Ricardo et al. v. Panama* (No. 104, 2003), para. 72. Accordingly, in its 2011 annual report the Court states that "[m]onitoring compliance has become one of the most demanding activities of the Court." (IACtHR Annual Report 2011: 19).

[81] Several scholars have focused on the implementation of judgments of the ECtHR (von Staden 2018; Helfer 2008; Hillebrecht 2014b). On compliance with the African Court of Human and Peoples Rights see e.g., Viljoen, and Louw (2007).

[82] Art. 65 American Convention.

[83] The IACtHR itself is active in developing and reforming the supervision stage and engages critically with scholarship concerning its work. Edward Pérez (2018), former lawyer at the IACtHR and scholar outlines possibilities for a more comprehensive supervision procedure in the Court. He underlines the processual flexibility of the Court during supervision stage and suggests more precise formulation of remedies, inclusion of indicator for measuring the success of compliance with public policies and advocating for the inclusion of more actors and institutions at national stage into the implementation procedure. In a similar vein, another practice note of Pablo Saavedra Alessandri (2020) Secretary of the IACtHR, suggests measures to flexibilize the supervision stage. However, as outlined in this chapter, the IACtHR is only one of the multitude of actors important in this process.

In its 2017 *Annual Report*, the Court reported full compliance in four cases, while currently 189 contentious cases are still at the stage of supervision with judgments entailing 1,008 measures of reparations[84] (2017: 65, 81, 84). In 2017, the Court issued 29 orders on monitoring compliance while engaging in the monitoring of 42 cases (2017: 77). Regarding the average time for closing cases, Jorge Gamboa states the timeframe for implementing all the reparations issued in a judgment often exceeds 15 years (2014: 109). When looking at compliance, one can distinguish between compliance with cases and compliance with individual reparation orders (most of the time more than one in one case)[85]. Overall, the compliance record for cases is rather meager (CEJIL 2009, Basch et al. 2010; Gonzalez-Salzberg 2010; Annual Report 2017). Tania Vivas-Barrera affirms that as of 2014, especially the countries with the biggest number of cases at the supervision stage – among them Argentina (15) and Peru (28) – have an average of only one closed case (2014: 177). Rachel Murray and Clara Sandoval (2020) attest the IACtHR a non-implementation rate of around 60%.[86]

Approaching compliance by addressing the time of compliance (by its Spanish abbreviation *Tiempo de Cumplimiento,* TEC) might be a good way to analyze more closely the changing contextual factors over time for implementation (e.g., Pérez-Liñán et al. 2019). By drawing attention to the time, the government is initiating steps to implement, or partially implements reparations, it is possible to identify political factors contributing to the implementation. However, this approach pays much attention to politics of implementation during presidential terms and changing dynamics and less attention to smaller range changes in institutions over time favoring or hindering implementation.[87]

More recently, scholarly attention arose regarding the distinction between compliance, impact and implementation (Helfer 2014; Shany 2014; Engstrom 2019; Murray and Sandoval 2020). A differentiation between the three seems helpful, since a judgment might have political and legal impact independent from the level of compliance with all orders (e.g., striking down

[84] In this study I use the terms measures, reparations and orders indistinctively.

[85] The number of reparations dictated vary between cases, 80% of the rulings involve 10 measures or less.

[86] The study of the IACtHR is part of a large research research project on the dynamics of implementation of human rights judgments in different regional context in which Murray, Sandoval and colleagues also applied process tracing and triangulation of data.

[87] The work of Pérez-Liñán and colleagues 2019) gives first insight into temporal aspects of implementation, paying attention to political debates and dynamics during one legislative term and the changes in compliance in relation to special human rights policies. Most implementation processes are extending one legislative term. This could indicate the necessity of a more long-term approach to supervision and the need to diversify the dialogue with counterparts to the Court. Assessing the context, as I will suggest later, relates not only to the changes in administration from legislation to legislation but also to the dynamics among branches influencing implementation at different levels.

certain legislation, triggering political debate about a topic). It also helps in drawing attention to the procedural character of implementation. Compliance might have unintended consequences and negative effects not foreseen in the original judgments (e.g., Correa 1999, Gilbert 2017 referring to negative impact of strategic litigation in indigenous cases), like a polarization of political discourse, the widening of inter-institutional gaps, or a shift in public spending due to a policy change. It is therefore helpful to differentiate between the three terms to then dedicate more attention to their relationship and interplay, without falling into the trap of assuming too easily that implementation always leads to compliance that then causes impact. Scholars have outlined that implementation depends on the types of reparations in question (Basch et al. 2010; Hawkins and Jacoby 2010; Baluarte 2012; Londoño Lázaro and Hurtado 2017).[88] When looking deeper at the level of single reparations dictated, Fernando Basch and others provide data for 2010[89] about the reparations dictated by both organs Court and Commission (Basch et al. 2010: 18)[90]. They confirm a 58% compliance of reparations dictated regarding monetary compensation, followed by 52% with regard to symbolic reparations. The reparations that have been least complied with are those that require legal reforms (14%) and investigation and sanctions with legal reform (14%) (2010: 18).[91] With regard to the average time of compliance with reparations, Basch et al. confirm one year and eight months for the Court (2010: 25). Alexandra Huneeus (2011) shows that the rate of compliance varies between different types of remedies depending on the domestic actor responsible for compliance, categorizing remedies according to the branch of government involved in the implementation. In a study that combines data from both the IACtHR and the ECtHR, Courtney Hillebrecht finds that executive constraints correlate positively with compliance (2014a; see also 2014b focusing solely on the ECtHR).[92]

[88] Basch et al. (2010), Hawkins and Jacoby (2010) and Baluarte (2012) are using different methodologies and therefore present different results in relation to compliance rates. In the following section I will refer to Basch et al. for they provide the most detailed numbers on different reparation orders. Since the measurement of compliance rate is not topic of concern in this research, I will not engage at this point with discussions regarding methodological choices. Murray and Sandoval find in regard that while several studies have systematically examined the covariates of compliance with IACtHR remedial orders, existing analyses are based only on relatively small subsets of IACtHR (Murray and Sandoval 2020).

[89] To my knowledge, there is no more recent study on the compliance with regard to the different reparations.

[90] Their sample concerns all the 462 reparations dictated from 2001 to 2006. For a detailed record of the different types of reparations dictated, see Basch et al. (2010: 18 – 21).

[91] Peru and Argentina having a level of non-compliance of 41% and 51% respectively (2010: 23). With respect to the preventive measures Peru and Argentina, rank among the countries with low levels of compliance 7-25% (Basch et al. 2010: 22).

[92] In her book on domestic politics and international human rights tribunals Courtney Hillebrecht (2014a) distinguishes between `financial reparations,` `symbolic measures,` `retrials and accountability,` `measures of non-repetition,` and `individual measures` and finds that compliance politics vary depending on the type of task.

Recently scholarly attention grew regarding more nuanced reasons for compliance with Court orders (Staton and Romero 2019; Stiansen et al. 2020; Donald et al. 2020), paying attention to more dynamic approaches instead of research on causalities between types of reparation orders and compliance rates. However, country specific studies looking at politics of implementation combining factors outlined in the impact camp, the effectiveness camp and the compliance camp are still scarce (for an exception see Anzola et al. 2015; see also Murray and Sandoval 2020). Focusing on national implementation strategies within the Inter-American System, Jeffrey Staton and Alexia Romero find "non-compliant outcomes are not necessarily a clear signal of weak judicial institutions but instead a natural piece of the process by which judges manage difficult policy-making tasks" (2019: 477). Staton and Romero find the likelihood of compliance is correlated with the clarity of remedial orders. Opposed to other scholars suggesting that reparations in judgments are often formulated too narrowly (e.g., Hancco 2017; CELS 2017; see below), they find that "[v]agueness can be used to provide state officials with a measure of discretion, allowing them freedom to use local knowledge about particular processes and actors to reach outcomes [...]" (2019: 478) and argue that the IACtHR often provides this leeway. Non-compliance in this reading is better understood as a problem of policymaking than it is solely one of institutional inefficiency and coordination. Other scholars, paying more attention to institutions, have found bureaucratic capacity to be an important determinant of compliance outcomes (Hawkins and Jacoby 2010).

Explanations for the failure to implement the judgments of the Court can be grouped into three camps.[93] Scholars have been outlining 1. political factors and the cooperation between national and international level, 2. factors that can be attributed to the design of judgments and the measurement of compliance, and 3. national coordination problems and domestic political factors. Some of the authors engage with more than one of the factors in the explanatory dimensions; however, how they are connected is underexplored.

Referring to the first set of explanations and the relationship between national and international level, Alexandra Huneeus advocates for a stronger dialogue with national judicial systems

[93] Providing a comprehensive overview on scholarly literature and suggesting a division of the factors, and Murray and Sandoval (2020) group the factors in a special issue in the Journal of Human Rights Practice in domestic factors, international factors, and case-specific factors. In the same special issues on dynamics of implementation Donald and Speck outline drivers for implementation including both drivers at supranational and national level (Donald and Speck 2020; see also Sandoval, Leach and Murray 2020).

(2012: 532).[94] Drawing attention to the centrally-placed executive branch in the communication with supranational organs, she stressed a mismatch in means concerning the importance of the judiciary in the implementation process of international judgments (2012: 532).[95] Making an even stronger point, Courtney Hillebrecht argues that the rulings of international tribunals invest executives with agenda-setting powers (2012: 985). In a similar vein, Guillermo J. Garcia Sanchez studies the effect of the gatekeeper function of the executive in the contentious litigation process in three case studies.[96] Against findings from previous studies saying that the existence of supranational judicial bodies helps domestic judiciaries become more independent, he suggests domestic political actors can use the expansion of supranational adjudication to limit the work of domestic judges (2017: 562), thereby identifying counter-effects of international adjudication that could hamper judicial independence.

Turning to the second set of explanations, the design of judgments and the measurement of compliance, Jorge Contesse argues in favor of a "less aggressive manner" of reviewing state compliance and a more open approach to remedies (2016: 143). Comparing the implementation of judgments of the ECtHR and the ones of the IACtHR, Hawkins and Jacoby focus on the nature of compliance, and differentiate between four different forms of partial compliance[97] at national level: "1) split decisions, where states do some of what a court orders but not all; 2) state substitution, where states sidestep a court order, implementing an alternative response to the decision; 3) slow motion, where states move so slowly that it is difficult to say that full compliance occurs; and 4) ambiguous compliance amid complexity, in which states face particular daunting or demanding tasks" (2010: 38). They observe two different compliance regimes at the regional level: the ECtHR exercising "delegative compliance" giving the prerogative to European states to specify their own measures to comply with the court's findings, whereas the IACtHR exercises "checklist compliance" when defining the specific

[94]However, the intensification of dialogue with national judiciaries and other actors are a delicate matter, concerning the already tense relationships with some of the countries executives. A change in policy not communicated carefully could be perceived as bypassing the official diplomatic way. See also Saul, M. (2017) on the interaction between international human rights judiciary and national parliaments. The importance of dialogue is also strongly advocated for from within the Court (Saavedra Alessandri 2020, Perez 2018).

[95] Keohane and colleagues underline how states act as gatekeeper to the international legal process and from that process back to national level (2000: 457). For a study on the relationship between ECtHR and national Courts see for example Slaughter et al. (Eds.) (1998).

[96] Venezuela (the *Caracazo Case*), Chile (*The Last temptation of Christ Case*) and Costa Rica (*The Artavia Saga Case*).

[97] For a discussion on the "acceptable level of compliance", see Chayes and Chayes (1993: 201-204). Discussing also the accepted level of compliance varies across regime times: partial compliance with the ban of nuclear weapons would be a suboptimal outcome, whereas economic social and cultural rights might be "progressively realized".

steps necessary for compliance (2010: 4). The flexibility of the state at the implementation stage is therefore seriously limited. The authors state that regarding partial compliance, the record of the Inter-American system is better than the European one and find that compliance is higher when the measures dictated are less complex and easier to follow (e.g., monetary compensation). However, they found little evidence that state compliance varies in ways that are related to prominent domestic political factors.[98] They found compliance rates are the lowest when the Court orders to amend, repeal, or adopt laws or judgments. Similarly, measures of non-repetition that stipulate systematic change ordering the government to take specific measures to ensure that the committed violations will not occur again, are seldom complied with (2010: 57). This finding resonates with the research undertaken by María Carmelia Londoño Lázaro and Monica Hurtado, who focus especially on the reparations of non-repetition that require the amendments of laws and judgments. Within this type of reparation, they distinguish between reparations that seek to derogate, create, modify, and educate. They affirm that the reparations concerning non-repetition aiming at the correction of structural failures in the judicial systems of the states, seek to provoke collective effects via the initial judgment (2017: 727). However, no systematic analysis concerning how the type of reparations determines the implementation has been conducted yet. Brewer and Cavallaro also affirm from their review of Court orders that compliance is less likely with more far-reaching measures to reduce impunity such as changing laws and practices and almost never complete regarding the reparations dictating the investigation and punishment of perpetrators of human rights violations (Brewer and Cavallaro 2008: 785). Not only the type of reparations but also the narrow design of single reparations has been pointed out as an obstacle to implementation. Scholars and practitioners alike have criticized the Court for too narrow formulations of reparations, complicating compliance and narrowing scope for negotiation (Gargarella 2015a; Hancco 2017; CELS 2017). On the other hand, scholars have also outlined that dictated reparations are sometimes not clear enough or too broad to be implemented (Vannuccini 2012: 243). The distinction between political factors and factors relating to the design of judgments might conflate since design determines the actors at national level involved in implementation.

[98] However, they admit that the uneven distribution of cases among states makes it difficult in their research design which measures compliance, to determine the influence of domestic factors. They find, in relation to Peru that its "justice and political system have been particularly unstable, suggesting that low levels of compliance correspond to higher level of domestic and political and judicial instability" (Hawkins and Jacoby 2010:29-30).

Turning to the last set of explanations, domestic factors, Viviana Krsticevic, a senior representative for victims at the Court,[99] emphasizes the importance of institutional and legal structures within countries as the key to the implementation of the decisions. Pointing out coordination problems, she argues in favor of adopting formal implementation procedures such as ad hoc committees that bring the actors necessary for implementation to one table (Krsticevic 2007: 84-91).[100] A report of the Center for International Law and Justice (CEJIL) found implementation policies or mechanisms for coordination between agencies and special procedures in the judicial sphere would help to overcome barriers to implementation[101]. Accordingly, the Court should push for states to make Court orders self-executing through constitutional amendments or legislation (2009). James Carvarallo and Emily Schaffer, on the other hand, emphasize that the creation of these mechanisms and laws is not enough to ensure compliance but must be accompanied by incentivizing the public debate and provide anchor points for the mobilization of advocacy networks, pressuring the government to implement (2004). They also warn against the counterproductive effects of rights-based approaches to change; namely they could produce decisions unlikely to be enforced and binding energy in the litigation that could better be invested elsewhere (2004: 236; see also Torelly 2017). In this regard, their work resonates with work of scholars focusing on possible effects of juridification outlined in the previous chapter (e.g., Sieder et al. 2005). Concerning the coordination of actors, Sabrina Vannuccini finds in her research compliance with judgments of the Court is lowest when all three branches of government are involved in the dictated reparation (2012: 239; see also Huneeus 2012: 507–508). Additionally, compliance seems to cause more problems where structural change is at stake (2012: 238). Vannuccini affirms that the most critical aspect of reparations – the administration of justice[102] – shows the highest rates of non-compliance. Orders requesting legislative and administrative measures for non-repetition are complied with in 5 to 11% of the cases (2012: 238). Not surprisingly, she therefore argues that the deeper the

[99] In her function as the president of Center for Justice and International Law (CEJIL) a human rights NGO litigating for the victims as a party before the Court in several cases.

[100] Research indicates that reparation orders involving more branches of government show lower compliance rates (Vannuccini 2014, see below). Some countries have standing national organs for the implementation of regional and international judgements (e.g., Paraguay and Guatemala). Other national human rights institutions (NRIs) that coordinate human rights efforts (such as Ombudsman offices, etc.) can also positively influence coordination. Additionally, the existence of a national human rights networks (HRNs) has influenced the implementation and effective compliance (see. Dotan 2015; Cavallaro et al. 2019). See sections 5.1.3. and 6.1.3. in the empirical chapters outlining the national implementation structure in Peru and Argentina.

[101] This was echoed by other civil society actors, calling for increasing interaction between international organs and domestic institutions. Due Process of Law Foundation (2007) Victims Unsilenced. The Inter-American Human Rights System and Transitional Justice in Latin America. available at: http://www.dplf.org/sites/default/files/1190403828.pdf, last accessed 06.08.2018.

[102] Pursuant to Art. 8 of the American Convention, Right to Fair Trial, and Art. 25, Right to Judicial Protection

requested institutional change, the lower the rate of compliance (2012: 242). According to Vannuccini, the difficulty in implementing the reparation is in the nature of the actor rather than in the nature of the action, the challenge is to get different actors from competing fractions to agree to change legislation (2012: 242). Vannuccini seems to rely on a dual approach, giving explanations falling into the realm of the lack of a political will as well as the lack of capacities of national actors and frameworks for implementation. While providing valuable insights, her study falls short regarding empirical evidence for this coordination problem and underestimates how the structure influences the bargaining situation of the actors in question. Stressing an actors-centered approach, Alexandra Huneeus finds in her research that judges and prosecutors are far less likely to undertake actions demanded by the Court than executives (2011: 494) due to different incentive structures[103] (2011: 514–515)[104]. Because the Inter-American human rights system is less deferential than the European system and often requires specific remedial actions, full compliance turns on the will of the justice system actors. Huneeus therefore suggests that the compliance gap between executives and justice system actors implies that the Court could increase compliance by engaging with national judges and prosecutors (2011: 495; 521 – 524). She argues that prosecutorial and judicial politics must be considered when analyzing states compliance (2011: 495; see also Engstrom and Hurrell 2010). Referring not only to the structural features of the Inter-American Human Rights systems, but more in general to the structure of transnational governance, Huneeus confirms that many supra-national institutions engage with the foreign ministry "when it is *other* state actors who hold the key to their success" [italics in original] (Huneeus 2011: 497; see also Haugen and Boutros 2010)[105]. Furthermore, she argued the inaction of the justice sector actors is rooted in the institutional constraints, culture and politics of these actors (2011: 497). According to her, little scholarly attention has been paid to this special relationship while the national justice system has been "a central project, and a main interlocutor" of the Court since the mid-1990s (2011: 504). In her work she provided data for her theory about the low likelihood of compliance when all state

[103] See also Courtney Hillebrecht on the different incentive structures (2012; 2014a) According to Hillebrecht "[e]xecutives face a range of incentives for accepting and even advocating for compliance with the tribunals' rulings, including: 1) fulfilling a personal commitment to a particular human rights norm or case; 2) leveraging compliance to set the human rights agenda; and 3) using compliance to frame the domestic human rights agenda with the goal of reaping reputational and material gains (2012: 967).

[104] Huneeus argues that whereas executive and congress will eventually be changed, the judiciary may be the branch most reluctant to turn against the former regime (Huneeus 2011: 514). This resonates with Gretchen Helmkes study on inter-branch crisis (2017).

[105] From its 114 contentious cases before the Court from1979 to 2009, the Court ordered reparations that required action by the national judiciary in 78 (Huneeus 2011:502). See also fn 50 in Huneeus for an explanation concerning her methodology how to define the involvement of the judiciary. Engstrom and Hurrel argue that the development of human rights "presses up against the inherent statistics of traditional law and relations" (2010: 5).

branches are involved: for orders that invoke action by the executive and the judiciary compliance is 36%, for orders requiring action by the legislature and the executive, compliance is 22% and for orders invoking action by the executive, the public ministry and the judiciary, the compliance rate is 2% (2011: 508- 509).[106] According to Huneeus, the different structure, logics and cultures of the branches lead to coordination problems, the executive being the most hierarchical branch. In her view, the coordination requirement adds to problems of complex judgments during implementation (2011: 509-510; 513). Huneeus' work is an important contribution to disentangling the "political will" into different fragments and aspects. Huneeus suggests that the Court – much like development agencies when identifying "change agents" or "stakeholder" – could name specific actors for implementation (2011: 523). Although she identifies practical problems of knowing the national system to a sufficient degree to do so (2011: 524), what she does not addresses are problems in relation to altering national power balances.

Also stressing national politics, Courtney Hillebrecht studies the implementation of judgments of the IACtHR and the ECtHR and finds judgments of the Courts often served as anchor points for national politics. Judgments thus enter the political game and have become subject to political maneuvering (Hillebrecht 2012: 966).[107] Reasons for compliance in this view are, to a certain degree, decoupled from commitment to human rights. In line with Huneeus, though taking an approach that centers on the action of the national branches, Hillebrecht argues that compliance with international rulings depends on the will of the executive and their ability to build coalitions with judges and legislators (2012: 959). In this regard and alluding to the phenomenon of the politicization of the judiciary, Hillebrecht stresses how domestic political elites have started to see the implementation process as a political currency (2012: 960). Any of the actors involved in the implementation might prefer maintaining the status quo (2012: 971). In her 2014 monograph, Hillebrecht finds the most powerful factor determining compliance is the degree of executive constraint and stressed states with stronger constraints on the executive are more likely to engage in deeper more systemic reform (Hillebrecht 2014a). However, according to earlier work of hers, if the executive blocks the compliance, there is little chance of the other actors to work their way around this branch (Hillebrecht 2012: 971-972). Supporting a same line of argumentation, Sonia Cardenas finds "which actor wins a

[106] See also table provided by Huneeus (2011:509).

[107] In a similar vein, Beth Símmons (2009) research focuses on three ways international human rights law plays a role domestic politics: 1) enabling the executive to set the national agenda on human rights; 2) providing an important, substantive source of law; and 3) empowering domestic constituents to mobilize for their rights.

domestic battle over state compliance may in the end have more to do with who has the greatest institutional power than who is committed most firmly to an international norm." (2007: 13).

Whereas jurisprudential aspects of the decision of the Inter-American human rights system have often been analyzed, the implementation of the judgments has received less scholarly attention. Even though several scholars have been paying attention to domestic explanations for implementation problems, the literature still falls short of in-depth case studies. While authors have claimed that international courts have provided the arena for interaction and norm diffusion and sometimes facilitated the opening of spaces of social participation (Risse-Kappen et al. 1999; Abrahmovic 2006; Hillebrecht 2014a), this work seeks to address how the structure or international adjudication interacts with the chances of rule of law development.

This section pointed out the role of courts in promoting the rule of law and changes in the justice system. The last part turned to explanations for problems during the implementation stage, outlining the structure of global governance, the design of judgments and domestic politics as major obstacles.

The next section continues to discuss problems in the approaches to rule of law support of Bank and Court and outlines the research gaps.

## 1.3 The actors Bank and Court in comparative perspective

The following subsection compares approaches of Bank and Court and draws attention to the logic of change and accountability (1.3.1) to operationalization and enforcement (1.3.2) and to implementation procedures and coordination[108] (1.3.3). The last section reveals mismatches between logics of change and operationalization and outlines the research gaps (1.3.4).

Bank and Court are actors in global governance seemingly at opposing ends of the spectrum of rule of law support. The Bank is a global governance actor dominated by states from the Global North (prominently the U.S.) and approaches state transformation from a financial development angle. The Court is a regional organization in the Global South approaching state organization

[108] In this thesis, the term coordination refers to the coordination of state actors during implementation, mostly branches of government but also lower administrative units e.g., in Courts, it also applies to the coordination between state actors and the global governance actors Bank and Court. Coordination or lack thereof can also refer to coordination among global governance actors engaging in judicial reforms projects or institutional change (e.g., between IDB, USAID, GIZ and World Bank) often referred to as "donor coordination". Without disputing that lacking coordination also influences national actors' politics, this is not the concern of this research. However, there is one instance when I refer to lacking donor coordination; creating parallel structures at national level (see e.g., section of Argentina and parallel discussions on judicial reforms in a forum financed by UNDP in the empirical chapter concerning processes in Argentina).

and institutional support from a legal angle. Nevertheless, as argued earlier, both actors are trapped in neoliberal logics of rule of law support as they embrace a state-centered and institution-based logic of rights enforcement. The logics stipulate a change by legal means and through judicial reform therewith seeking to contribute to a rule of law strengthening.

### 1.3.1 Logic of change and accountability

Bank and Court have a non-political mandate. Enshrined in this mandate is the logic of change and the purpose of transformation. Both actors depart from a notion of rule of law that focuses on the states duty to provide legal security to individuals, by focusing on securing property rights and individual human rights.[109] In this logics, rule of law is reduced to legal security and enforcement of rights. Global rule of law supporting activities thus seek to contribute to (re)gaining basic state functions and to secure individual and property rights. The logics thus center on the accountabilities of the state. [110]

Rule of law promotion by Bank and Court addresses and tries to reduce a lack of accountability in states. Judgments of the Inter-American Court go beyond a notion of justice that relies on punitive measures but also address legislative changes e.g., in relation to custody of juveniles in Argentina and structural changes relating to public policies and memory policies in Peru. The goal of implementation is not only punishing the perpetrators of human rights violations but also to initiate structural changes that ensure non-repetition of the violation. Consequently, non-implementation means not only that human rights perpetrators go unpunished for their crimes but also contribute in a broader sense to impunity. Non-implementation implies a spectrum of lacking accountability: ranging from individual accountability e.g., judges refraining from revoking rulings or initiating investigations, to the accountability of the state, which is not correcting institutional structures that contribute to ongoing or future violations.

While the Bank has no legal mandate to address impunity, judicial projects always depart from the assumed deficit of accountability as the reason for intervention. The structure for implementation singles out actors, the executive remaining the entry point for global governance activities and neglects the interplay between branches of government in rule of law

[109] As Wolfgang Sachs puts it: "In fact, lumping together human rights and consumer rights is the legacy of the concept of development, which is blind to class relations." (Sachs 2019: xv).

[110] Similarly, the international actors show low levels of accountability for their own activities. They are being shielded from critique through their mandate, structural deficits that foresee no supervision of activities and their power over the national level in terms of financial and/or political leverage. On judicial review in development aid and other accountability mechanisms see e.g., Dann, P. (2006). As the global governance actor have to satisfy different constituencies among them the borrowing countries or the countries being addressed in judgements, the major donor countries and increasingly also NGOs and civil society, accountability of the global governance actor also has many facets.

support during implementation. I suggest the bypassing of branches is enshrined in the structure of global governance. Through addressing branches of government as black boxes thereby simultaneously a monolithic vision of the state actors is reinforced.

Coming to the aspect of vertical accountability, states subscribing a loan and accepting jurisdiction of the global governance actors, accept additional accountability of the state in relation to the mandate of the global governance actor. The state, nevertheless, remains in the position of being accountable to at least two constituencies: the global governance actor and the people. The two types of accountabilities are not weighted equally. Compliance and non-implementation debates often lose sight of the importance of the accountability towards the people instead of the importance to fulfil contractual obligation with the global governance actor. The non-fulfillment of the international contract is framed as implementation problems.

### 1.3.2 Operationalization and enforcement

Strengthening state institutions capacities in the logics of change of Bank and IACtHR is only an intermediary purpose for making state institutions efficient enough to secure individual rights. Securing the integrity of statehood and strengthening the monopoly of power is central for this. To "hold the state accountable", there has to be a state. International law and global governance are designed around a particular form of state and state organization. Thereby the global rule of law supporting activities are ultimately running the risk of supporting an unbalanced and unequal system, without addressing inequality and power in law and judicial systems themselves. Law becomes functional to the maintenance of the status quo and transforms into an expression and a tool for globalization.

States are the addresses of the Bank and Court. The mandate of the Bank stipulates an imperative of loan disbursement. The mandate of the IACtHR instructs the regional Court to follow the imperative of rendering judgments. Thus, both mandates adhere to an outcome-oriented logic. The capitalist notion of linear time and newness – once something new emerges everything preceding vanishes – is stronger in the Bank, I argue. The legal organ Court, on the other hand, is less influenced by capitalist logics of linear progress but rather trapped by a dogmatic approach to coherency in jurisprudence. New interpretations are bound to the canon of doctrinal law. However, procedures are not strictly determined to follow these logics, but theoretically provide more flexibility.

Bank and Court both depart from an ideal of ordered statehood. The telos of institution building and strengthening is to reach this ideal: a state granting and securing rights. States are the central addressees of reform intent and counterparts in implementation. The means to bring the rule of

law about are development projects and judgments. Both actors ascribe key roles to the state and law while reducing rule of law to legal aspects, without engaging with interest mediating, economic and political aspects. Pressing for policy change through legal action or changing the legal framework for enabling foreign investment and economic policies bear the danger of a juridification. Debates on human rights embark on all areas of societal interaction, be it the freedom of expression, framing of internal conflict and terrorism, what is defined as a crime and how it is prosecuted or if a convicted can be pardoned. Similarly, judicial reforms aiming to secure an investor-friendly legal secure environment cover-up discussion in society about what kind of investment and development should be attracted and pursued. Juridification is at both ends of the logics of change: logics are nurtured by it, and it can be a possible outcome of the activities. Thus, the logics of change stipulate that political content and functioning, balance of power or good governance, is framed in judicial language and treated in judicial proceedings.

The operationalization of the logic into reforms and judgments depend not only on mandate of the actor and approach to activity but also on capacity of the global governance actors themselves. Especially the Bank has the financial resources to introduce additional budget, build institutions and organs that operate outside of the normal political economy. Thereby national political processes can be sidelined, and negotiations altered or inhibited. The intervention of the Court is not adding resources but possibly binding additional financial resources. In most cases, Court orders are also not stipulating the creation of organs for execution of the judgment or new political institutions (except e.g., units for the search of missing persons) but rather mandating new policies themselves requiring resources of the state (e.g., by ordering new policies of education and/or human rights training to armed forces). Albeit the Court might have advantages for assessing regional contexts, given background of the staff, input through the work of the Inter-American Commission, amicus curiae etc., it also has considerable limitation regarding the financial capacity for the elaboration of judgments (that is the assessment of the context, the design of the reparations and the interpretation of the implementation). The Bank might be less capable and willing to take context into consideration but has advantages in the flexibility of design and financial resources. The ways Bank and Court present leverage, provide anchor points, press for state obligations and become part of political maneuvering, thus, are quite different.

### 1.3.3 Implementation and coordination among branches of government

Bank and Court activities in rule of law support trigger branches of government to position themselves not only in relation to the foreseen activities but also in relation to problems in implementation. Oftentimes activities require the interpretation of constitutional norms and a (re)definition of the relationship between national and international law and hence put the topic rule of law to light at least theoretically. Inefficiency in institutions provides the rationale and the justification for intervention. Placing subsidiarity in the center, the mandates formally prohibit securing rights *in lieu* of the state or engage in institution building without the acceptance of the state. Bearing in mind that the process of implementation itself is part of the reparation orders and the way reform processes are carried out, can be crucial for rule of law strengthening. Procedures that circumvent branches and enable the shifting of burdens can contradict the self-proclaimed goals of the intervention. They also provide incentives or leverage to certain actors to accumulate power and to engage in political maneuvering. Judgments and reforms stipulate the coordination of multiple actors, yet the global governance structure determines clear gatekeeper positions. Rule of law support by the Bank and judgments of the Court address structural issues relating to state organization and policy issues in relation to the role of law in society and its role for transformation. However, conflicts about public policies and emerging or existing tension between actors (both internationally-nationally and among national actors) during the implementation phase are framed as problems. Full and complete implementation of the designed measures is more important than the process of implementation. Attesting failure and non-compliance is attached to the postulated goals and the applied procedures.

### 1.3.4 Flawed logics, flawed operationalization – missing links in research

Bank and Court depart in their approach to rule of law from narrow conceptual premises that center on adherence to law and institutional effectiveness to stipulate rule of law. In the chapter, I discussed how liberal claims about the role of law in states and for state ordering led to a strange fusion in the spread of neoliberal market logics sustained by global governance actors and surprisingly rarely addressed by the actor Court. Economic and state theory mix and form a stable but nevertheless contradictory basis for intervention.

I suggest in this research that a lacking focus on the interplay of branches in logics of change in the Bank and the Court translate to a mismatch in operationalization. I argue, approaches are contradictory in themselves as they do not acknowledge reshuffling of power at national level among branches, focus on single branches of government and, yet, at the same time address a

concept – rule of law – that concerns a dynamic development, interest mediation and checks among branches of government.

How actors at national level coordinate during the implementation process has received little scholarly attention. Moreover, institutional dynamics, national-international relationships and tensions among actors at national levels are rarely reflected in documents issued by the Bank and the Court. Bearing in mind the political character of intervention and the financial and judicial leverage/burden the activities place on the national level, additional tensions in reform processes can be expected to emerge when global governance actors intervene. Scholarly literature has rarely addressed the contradiction within the logics of change in global rule of law support and between the logics of change and the operationalization and the phenomenon "implementation problems". Literature stresses implementation problems as reasons for failure of Bank reforms and non-compliance with international judgments (see discussion in 1.1.3 and 1.2.3). However, little empirical research has systematically addressed the dimensions to these problems and the connection to rule of law developments procedural character. Authors continue to claim this lack of knowledge on the "how" in implementation processes of judicial reform. Stressing the research gap in relation to the Bank, Desai and Woolcock (2012; 2015) stress the scarce knowledge and research on how judicial reforms of the Bank are implemented and what kind of problems unfold during the procedures. Kapiszewski and Taylor (2008) point out the lack on empirical studies on national politics and implementation of judgments. Scholars have been engaging in more empirical approaches to studying implementation of rule of law support by financial actors and development support (e.g., Riggirozzi 2005 focusing on knowledge; Zimmermann 2013 focusing on norm diffusion)[111]. Usually, critique focuses on the following: global governance actors' organizational structure (Desai 2018; Santos 2006), top-down implementation (Desai and Woolcock 2015) of the approach to law and development (Kennedy 2006) or is developed from arguments placing pluralist approaches to law centrally (Dezalay and Garth 2002a; Faundez 2011a, 2011b). However, how conflicts and tensions, usually called as implementation problems, emerge during implementation, has been less explored (Grimm and Leininger 2012 making this point in relation to democracy promotion; Kapiszweski and Taylor 2008 in relation judicial reforms).

Turning to shortcomings in the conventional patterns for explaining implementation problems. Different strands of literature introduced in this chapter attributed failure of judicial reforms of the Bank to 1. lacking knowledge about the relationship between law and development in the

[111] See also Acharya (2004) focusing on norms in the Asian context

Bank and lacking knowledge about the contexts of implementation 2. project design and the structure of cooperation, and 3. problems of inefficient institutions and lack of political will at national level. Explanations for the failure to implement the judgments of the Court emerged along similar lines: 1. explanation relation to difficult relationships between national and international level, 2. rigid design of judgments and narrow assessment of compliance, and 3. national coordination problems and domestic political factors. Both bodies of literature show considerable measurement and explanatory challenges in relation to failed rule of law reforms and non-compliance with judicial decisions of regional human rights bodies. This study develops on the explanatory challenges.

For example, Linn Hammergren's work (2003, 2008, 2015) is providing useful insights into practicability of means and organizational shortcoming. However, she does not engage explicitly with the problematic selection of stakeholders and the analysis of the wider institutional setting. She is not addressing the central contradiction between logics of change and operationalization. Explanations put forward referring to political factors and the lack of political will for implementation (Hillebrecht 2012, 2014a, 2014b; Huneeus 2015; Desai and Woolcock 2012, 2015) oftentimes fall short on differentiating between competing interests and wills on the national level and how they conflict with the structure of implementation that singles out branches. The gatekeeping function of executive and the necessity of this branch to cooperate for implement the reforms might clash with the focus on the judiciary in the logics of change. Garcia Sanchez (2017) outlines the importance of the gate-keeping positions of the executive in the implementation of IACtHR reparation orders. While clearly pointing out the prerogative of the executive to defend a state in international litigation, the explicit burden shifting taking place during the implementation phase of litigation is not analyzed thoroughly in Garcia Sanchez' work. Similarly, Hillebrecht stresses in relation to the Court, the executive is in positions to "either withholding support for compliance or [to] pushing the question of compliance onto the legislature's agenda and the judiciary's docket" (2012:966). While the gatekeeper function of the executive has been identified as one problematic aspect (Garcia Sanchez 2017; Huneeus 2012; Hillebrecht 2014), studies are oftentimes not clear on how the executive's prerogative has influenced domestic political settings during the implementation processes. This work seeks to partly fill this gap.

Rather than criticizing the global rule of law support solely on a conceptual level, this study seeks to develop the critique from implementation level, based on the empirical approach and process tracing. Research has so far neglected dynamics in rule of law development during the process of implementation. Exploring the dynamics during international interventions in

national institutional systems is at the core of this research. Instead of focusing on failure of reforms and non-compliance, I suggest focusing on the procedural character[112] of the implementation process to reveal the tensions and identify potentials.

In the next chapter I discuss critique on the logics of change prevailing in Bank and Court from post-colonial and critical perspectives. Building on the theoretical approaches, I argue that dichotomies of failure and non-compliance are not helpful are suggest implementation must be approached differently. Rule of law support by the Bank might fail but not only because the projects fail to be implemented. Similarly, non-compliance with judgments of the IACtHR might relate to problems in rule of law adherence and accountability but not necessarily the way the explanations put forward in literature have suggested.

# Chapter 2 Problems in global rule of law support

In this chapter I introduces critical discussions on approaches in global rule of law support. I first draw attention to central elements in the liberal logics (2.1) feeding into approaches of Bank and Court, mingling with neoliberal rule of law ideals in good governance (2.2). I then outline central flaws on conceptual level, namely eurocentrism (2.3), claims about the universal application (2.4) and claims about the ordering character of rule of law (2.5) suggesting they translate to contradictions at operational level. Taking the critique further, I suggest the way problems in interventions of global governance actors are framed is problematic and outline the research puzzle (2.6). Distinct to approaches that rebut interventions altogether, this study takes a critical pragmatist stance, the last section (2.7) develops on the approach of this study.

In the chapter I criticize neoliberal approaches to rule of law support, revealing underlying assumptions that build on modernization logics and eurocentric approaches to good governance and ordered statehood that have been discussed widely in critical scholarly literature. I argue that in doing so, the approaches run the risk of becoming conceptually reductionist by stressing law enforcement as a central element to rule of law, therewith not only omitting the law-power-nexus but also centrally neglecting the importance of interest mediation and dynamics between branches in rule of law development. Problems on a conceptual level and on an operational

[112] Alice Donald finds, "implementation is a dynamic and iterative process: the desired end point might not become evident for months or even years and may only emerge through the—possibly repeated—participation of multiple actors in the design of reparations that are both congruent with the decision and politically realizable." (2020: 145).

level are connected. Thus, contradictions between and within logics of change and means of implementation are to be expected. Different strands of critique concerning eurocentric approaches to development and international law have problematized good governance on conceptual level and have addressed central problems in rule of law support, human rights adjudication and institution building. The strands are in themselves connected,[113] sometimes more radically rebutting intervention altogether, and are formulating ways to deconstruct hegemonic frameworks for interpreting implementation problems. This works seeks to contribute to formulating this critique. I am developing critical approaches further by suggesting ways to reconceptualize problems in global governance departing from conventional readings of implementation problems. This approach differs from existing critical approach that rebut interventions on conceptual level, by taking a critical pragmatist stance, studying implementation at empirical level and suggesting that implementation problems can be constitutive moments for rule of law development. Omissions and shortcomings in the in critical approaches to global rule of law are a strong focus on deconstructing law and judicial institutions without engaging with the global rule of law supporting activities and processes as such.

## 2.1 Rule of law – approaching the normative liberal concept

This section discusses the concept of the rule of law and its origins in liberal political thought. It first outlines elements and defining characteristics and then turns to the global spread of the liberal rule of law. Classical liberal notions of the rule of law[114] stress the separation of powers as the fundamental state organizing principle leading to a balanced and ordered statehood benefiting the people within the jurisdiction of the state (Montesquieu 1758/1989; Shklar discussing Montesquieu and Aristotle 1987[115]; see also Dicey 1885/2013, Raz 1979/2009[116]; Fuller 1964/1969). In an ideal version, state institutions remaining within their constitutionally defined boundaries and in capacity to exercise full functionality, exercise the power ascribed to them by the people. Rule of law, by law and through law is secured through legal institutions interpreting the law, the executive enacting and enforcing the law and the parliaments giving

[113] I borrow from critical legal studies and critical development studies, strands of Marxist critique of capital and human rights postcolonial theories. My wording is not necessarily referring to a particular tradition.

[114] Probably A.C. Dicey coining the phrase in modern theory in the Law of the Constitution from 1885 (2013 published by OUP). Key for Dicey was legal equality, the rule of law, not of men. Shklar finds concerning Dicey's popularity and coining of the phrase: "The most influential restatement of the Rule of Law since the 18th century has been Dicey's unfortunate outburst of Anglo-Saxon parochialism." (1987: 5)

[115] According to Shklar, this notion of the rule of law as constraining political institutions can be attributed to Montesquieu, while she attributes the original reading of the rule of law as a form of life to Aristotle 1(987: 1-5).

[116] In Raz's positivist view, the rule of law is indifferent to human rights (Raz 2009). For Raz, rule of law is a purely formal/procedural ideal.

the law, all of them also being subjected to law. On a more general level, rule of law describes the relationship between law and the exercise of power. Because rule of law seeks to restrain power, it becomes functional to diminish the danger of oppression and persecution secured by and through the state. Legal security, predictability and protection against arbitrary use of power are central purposes at the heart of liberal approaches to rule of law, making it the antithesis to anarchy. Law regulates state functions and human behavior and reduces arbitrary exercise of power. The establishment of a public order is the purpose of its existence. Even in thin versions, orders issued by the state must be general, clear, prospective, public, and relatively stable, constituting a rule by law.[117] However, without a moral component other than providing legal security and predictability of those governed by law, rule of law remains instrumental to the purposes of states (Goodpaster 2003: 686; see also Winston 2005: 316). The monopoly of power continues to rest with the state, even if parts of the state apparatus are in blunt breach of their duties and commit violation of the rights whose guardians they are at the same time.[118] This monopoly of power is not compromised by the violation but affirmed through correction and then reparation. Separation of power guarantees accountability of the state within its boundaries. Accountability in a vertical and horizontal dimension is secured through checks and balances between institutions. The law is secured through institutional safeguards (e.g., Holmes 2004). While thin definitions of the rule of law show no preferences for forms of governance, in thick definitions, rule of law only exists in democratic forms of governance. However, constraints on the rule of law and the separation of power can be acknowledged and sometimes embedded. The term "delegative democracies" coined by Guillermo O'Donnell describes those kinds of governments in which a concentration of power in one branch, in this case in the executive branch, stands in the way of rule of law and accountability of other democratic institutions (O'Donnell 1994).[119]

Human rights and property rights informed by a liberal logic are individualized rights that are themselves in need of the state. Thus, rule of law in a liberal tradition is necessarily state affirming. Adherence to law and enforcement of law is crucial to the liberal reading. The legal order stipulates a certain form of state organization; as such, law becomes instrumental to

[117] Jeremy Waldron outlines in the Stanford Encyclopedia of Philosophy the formal and the procedural character "The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered, and the institutions—like courts and an independent judiciary that their administration requires." (Waldron 2016).

[118] For a recent discussion on the right to legitimate resistance against the state see e.g., discussion and sentence in Argentina on "*Contraofensiva Montoneros*".

[119] The outcome is a form of polyarchy, which O'Donnell calls "delegative". In this form, the legal dimension of accountability is largely absent and the only control of governmental action is pots-fact through elections (1995).

securing state power and is beyond the reach of normative questioning. State action is normatively legitimate because legal rules bind and enable the state apparatus.

The approaches to rule of law support by the global governance I discuss in this study mingle liberal and neoliberal ideals about the role of law and rule of law as state (and market) ordering concepts.[120] The Word Bank switched from a formal definition under General Counsel Shihata[121] to a substantive definition under General Counsel Tung, then defining rule of law as follows:

> "(1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy" (World Bank 2004:2-3).

Neoliberal approaches to rule of law in development cooperation and approaches in human rights adjudication themselves possibly clash and meet versions of rule of law in post-colonial states. In addition, in post-colonial states, the meaning and the operationalization of neoliberal rule of law activities as well as the logic of transformation through law can evoke memories of previous experiences of imposed institutions and ideals of state ordering by colonial rule.

Throughout all states and societies, the meanings of the terms *rule of law,*[122] *Rechtsstaat*[123] and *estado de derecho*[124] and their particularities in different regional contexts are essentially contested (e.g., Fallon 1997; Waldron 2002; Adelman and Centeno 2002). Attempts to conceptualize rule of law often distinguish between thin and thick definitions and then further between formalist and substantive conceptions. Thin (minimalist) definitions view law as an

[120] Milton Friedman, George Stigler, Friedrich Hayek, and James Buchanan are scholars usually strongly associated with having contributed to the backbone of neoliberalist thought. However, neoliberalism itself is characterized by a variety of schools of thought among them prominently, German ordoliberals, the Chicago School and the disciples of Murray Rothbard. Neoliberal thinkers have also prominently gathered in the Mont Pelerin Society (MPS) from 1947 onward (see Biebricher 2012 and 2021 for a comprehensive discussion of the development and the different influences in neoliberalism).

[121] In this formal definition rule of law is defined as "a) there is a set of rules which are known in advance; b) such rules are actually in force; c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures; d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body; and e) there are known procedures for amending the rules when they no longer serve their purpose."(Shihata 1991:85)

[122] This work uses the English translation "rule of law", however, I acknowledge that the concepts 'rule of law' and 'estado de derecho' carry different connotations. In the interviews, the distinctive meanings were sometimes explicitly mentioned; I highlight different connotations in the quotes whenever possible. However, the terms also conflate, not only because of the translation but also because of the background of many of the interview partners in doctrinal legal traditions from the Global North and heavy influence of international jurisprudence in Courts work and the Bank alike. I did not always ask back whether the interview partner's use of the term was intentional.

[123] For a discussion on the term 'Rechtsstaat' and constitutional and administrative aspects see e.g., Sobota (1997).

[124] For a discussion on the term 'estado de derecho' see e.g., O'Donnell (2004) and Casagrande (2018).

instrument of government action. Formalistic views entail that law must be prospective, well known, and have characteristics of generality, equality, and certainty. Thicker (maximalist) conceptions add normative requirements like the adherence to democratic principles and consent-based determination on the content of the law, and add equality and welfare to the substantive dimension (Moeller and Skaaning 2012; see also Tamanaha 2004).[125] Instead of defining democracy as the frame of reference for mapping the rule of law, Jorgen Moeller and Svend-Erik Skaaning suggest to map conceptions of the rule of law along the analytical categories of "shape of the rules", "sanctions to the rules", "the source of the rules", and the substance of the rules".[126] They emphasize that conceptualization is a logical prior to measurement (2012:148), an argument that gains importance when analyzing messy conceptualizations in development projects. The approach taken to rule of law is connected to the configuration of knowledge, as it shapes the understanding of state organization. The terms 'Rechtsstaat' and 'estado de derecho' explicitly name the two subjects – the state and the law – whose relationship is supposed to be defined. The term 'rule of law' draws attention to the governing aspect inherent in the concept. 'Rule of law', 'Rechtsstaat' and 'estado de derecho' are at the core of conceptualizations of statehood (e.g., Kelsen 2017).

Rule of law as a state-ordering concept can show many shapes in practice. Augustín Casagrande (2018) analyzes in relation to Argentina how the concept 'estado de derecho' was first introduced on a political level and later institutionalized, leading to problems in the application process. Outlining the particularities of the state building process in Argentina, he depicts the concept as an emotive one, central to the process of conceptualizing the state. Two observations can be drawn from Casagrande's study: 1. the power of 'estado de derecho' as a strategic political project related to a discourse on statehood rather than a historical process and 2. the regional particularities in the framing and application of the concept. In relation to both observations, I would like to draw parallels to rule of law promotion in global governance: Firstly, to the outlined tension between hierarchical decisions on a political level to establish a certain form of ordering statehood[127] and the bumpy road of institution building often following different political logics and, secondly, to processes of borrowing and hierarchical and

[125] Similarly attempts to categorize rule of law have been distinguishing between formal, procedural and substantive requirements. A well-known list of formal requirements was provided by Lon Fuller in the Morality of Law (1969): generality; publicity; prospectivity; intelligibility; consistency; practicability; stability; and congruence. Stating these principles are formal, because they concern the form of the norms that are applied to our conduct.

[126] They then propose a systematic distinction between 'rule by law', 'formal legality', 'safeguarded rule of law', 'liberal rule of law', democratic rule of law, and social democratic rule of law (Moller and Skaaning 2012).

[127] Stressing the aspect of coercion rather than an organic development, Humphreys describes current rule of law promotion activities as the "mechanical imposition of a uniform imported paradigm that aims specifically to undo any relationship between rights and locality" (2012: 210).

involuntary transfer from one region to another with regard to conceptions of statehood and problems that emerge.. Imposed and transferred harmonized concepts of rule of law oftentimes conflict with historical patterns and institutional legacies. At the same time, transplants meet other transplants previously imposed by colonial rule, rendering the development of alternative rule of law from within the process of institutional development difficult. Reinhart Kößler (2013) outlines how the spread of rule of law norms and institutions is therefore simultaneously a global and a national process. Logics that frame law as a tool and a guarantee for good governance and functioning state institutions thereby securing investors friendly economic environments and non-corruption, have contributed to rule of law becoming synonymous with modern and just statehood.

## 2.2 Global spread of rule of law ideals in good governance

Authors across ideological lines have claimed the looseness of the rule of law concept in global governance (e.g., Miéville 2005; Kennedy 2006; Humphreys 2012). Stephen Humphreys (2012) stresses the ample reach of the concept finding rule of law is not only a tool in global governance but also a way to introduce a global language, structure, and formality for ordering things and state institutions.[128] Given the undisputed importance of "rule of law", invoking it secures a high level of support. As an outcome of this popularity and overuse across the political spectrum, the term has become hollow, serving as a placeholder for multiple democratic values.[129] According to Simon Chesterman, the conceptual looseness leads to a situation where the concept is overburdened and undertheorized at the same time (2008: 2).[130] Chesterman furthermore points out rule of law at international level is seen as "a means rather than an end, as serving a function rather than a defining status" (2008: 1). Authors also claimed that conceptual looseness, on the one hand, and reductionist approaches to technocratic state ordering, on the other hand, are stripping away possibilities to contest the norm on a political

[128] In a similar vein, Ulrich Brand argues "global governance" is as a discourse on political regulation of effects of globalization (2005:160) and serves to make the handling of globalization-induced crises more effective.

[129] The omnipresent narrative of the "defense" of the rule of law has been invoked for starting a war, intervening countries in the defense of marginalized sections of the population in humanitarian interventions starting investigation in international criminal law, as versions of securing the rule of law abroad. It has similarly been invoked at national level by states for restricting civil rights in the war on terror, issuing new security doctrines (the rule of law narrative as opposed to the attempt of left guerilla groups to throw countries into anarchy), political and judicial measures against left oriented opposition and measures against right-wing opponents of the state.

[130] On a more general level, international laws multiple uses and faces have been described prominently by Marti Koskenniemi. In his seminal work "From Apology to Utopia" he describes international law both "over- and under legitimizing: it is over legitimizing as it can be ultimately invoked to justify any behavior (apologism), it is under legitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism)" (1989:48).

level[131] (Wiener 2008; see Zimmermann for human rights norm translation at local level 2017).[132] The functionalist approach and reductionist and eurocentric approaches to rule of law neglects an analysis of inherent power relationships. Thus, rule of law support escapes critique too easily.

Rule of law has become a central prerequisite for the membership in the club of well governed states. Brian Tamanaha stresses that "no other single political ideal has ever achieved global endorsement" (2004: 3). Assuming a largely undisputed position within global governance, better and strengthened rule of law has become an imperative for an effective and institutionally balanced statehood with checked institutions at its core.[133] Defenders of "liberal cosmopolitanism" and "global governance" advanced this amalgam of liberal-neoliberal hegemonic rule of law discourse. Peter Gowan, Leo Panitch and Martin Shaw find:

> "we thus have the prospect of a globe which is entirely liberalized and democratised, and [...] this transformation of the globe will bring with it a new kind of world order – a cosmopolitan world order – going beyond the old Westphalian world order which was characterised by the absolute rights of states." (2001: 4-5).

The rule of law revival in global governance can also be connected to the surge of international legal cosmopolitanism and liberal human rights activism themselves mingled with neoliberal logics in development cooperation. David Kennedy (2003) argues the turn to law in financial

[131] Nikita Dhawan points out how global governance serves to exercise a form of dominance without hegemony. However, she describes that the power of persuasion still contains elements of force. Depending on the international actors, the degree of force varies. However, the decision to enter into the agreement or to accept jurisdiction does not show this characteristic of force but is again better explainable by global hegemonic structures. Dhawan furthermore stresses that dominant structures that rely on force rather than on persuasion, lack the opportunity of contestation. Consequently, individuals under this kind of regime become subjects rather than citizens (2012: 30-31).

[132] In an attempt to bring more clarity to the empty signifier rule of law, Antje Wiener focuses on the relationship of the rule of law with democracy and its international encounters. She points out how norms and meanings evolve through the interaction in context and are contested by default. Wiener describes how fundamental norms derived from 'core constitutional norms' (from domestic frameworks) or 'basic procedural norms' in world politics, among them the (un)specific norm of the rule of law, function as organizing principles and as legitimating ideals in democratic governance. She furthermore outlines how the routine application of these norms and the conditionalities attached to them, have undermined the substantive meaning of these norms, favoring instead the function with regard to standards of democratic governance (Wiener 2008: 121). Without tackling norm contestation in this research, this argumentation is still valuable for explaining the functionalist approaches to law and rule of law that will be addressed in this chapter and throughout the work. Scholars interested in the promotion and/or diffusion of international norms have increasingly emphasized the relevance of processes of norm contestation, appropriation and localization. Lisbeth Zimmermann (2017) offers in her study on localization of norms in Guatemala a different approach. These impossibilities of contestation have prominently been discussed in subaltern studies see e.g., Anghie (2008a) focusing on international law.

[133] Andrea Bianchi (2016) sustains there has been a shift in international law from a de facto approach to statehood and government towards a normative commitment in favor of liberal democracies. For Christina Cerna (1995) the existence of a democratic form of government – evidenced by fair and free periodic elections, three branches of government, an independent judiciary, freedom of political expression, equality before the law and due process – are necessary conditions for the enjoyment of human rights. However, as I will be developing in the course of this thesis, the rule of law promotion activities in this thesis are not democracy promotion since logics of change applied promote an impoverished version of rule of law.

development institutions shifted attention away from the flaws of their models of development. In expanding the concept, rule of law became an elixir for all sorts of problems in political and economic systems and was expected to bring about stability

Placing the importance of rule of law at the center for stable order and economic growth, legal aid and legal transplantation have become common practices within reform agendas of international actors often subsumed in the field "law and development" (e.g., Domingo and Sieder 2001; Trubek and Santos 2006; Kleinfeld 2010). Promoting rule of law as a government of law supports a technocratic approach to state ordering and furthers juridification and apolitical understandings of law. Global rule of law support seeks to restrain sovereign power by counterbalancing abusive state behavior on two levels: firstly, through checks at international level and secondly, through supporting national branches and institutions. The approaches, I argue, support a rather static vision on rule of law perceived as a conglomerate of effective institutions that are functioning besides political disputes. However, political volatility, political maneuvering, and economic interest are not only present alongside rule of law interventions but are part of the rule of law development. If stability is the goal of the intervention, how can one expect rule of law promotion to transform the status quo?

Human rights and the rule of law form part of a political project of modernity supported in development cooperation and in international adjudication (Panizza 1995).[134] Because of their origin and continued practice human rights institutions and doctrines with their Western roots and liberal bent are largely limiting visions of rights to Western conceptions, supporting also a Western version of institutions sustaining those rights (Rajagopal 2006). Developing new approaches to institutional functioning and law would require not only thinking about institutions differently but also rethinking their function in society. Or as Walter Mignolo and Catherine Walsh put it: putting institutions at the service of people instead the other way around (2018: 126). Thus, innovative approaches from within the global governance activities to e.g., plurinational, indigenous, and non-state approaches to rule of law are difficult because logics of change largely stipulate means of intervention that renew patterns of Western institutions and legal frameworks. The following section discusses problematic and core underlying assumptions in approaches to rule of law. The section draws attention to modernization logics and teleological approaches to development through law (2.3), discusses the eurocentric

[134] National and international litigation increasingly recognize human rights cases, and human rights courts are a preferred site for intervention of international rule of law promoters. Evan finds: "human rights law has been advanced to support the idea of 'low intensity democracies" and "polyarchies' with the idea of legitimizing internal orders which favor foreign investment and provide stable social and political conditions for its operation" (1997:9).

conceptualization and claim for universality in the concept (2.4) and then turns to assumptions about the ordering character of the rule of law (2.5).

## 2.3 Eurocentrism – modernization logics, institutional efficiency, and civilizing missions

European theoretical traditions and practices continue to form part of development agendas and activities. Previous sections discussed how liberal conceptualizations as predominant modes of interpreting the rule of law as a state ordering framework derive from European traditions of state theory. Additionally, colonial practices contributed to set up institutions in artificially and technocratic defined nation-state boundaries. More recently, global governance institutions have been drivers for norm expansion and diffusion processes (Risse et al 1999; Sikkink 2014; Zimmermann 2017) and adopted practices of legal transplantations (Faundez 2000, 2011b). Arturo Escobar (2011) describes in his seminal work *Encountering Development* how Western perceptions of institutions and state ordering became powerful in the post-world war II period at global scale.[135] In a similar vein, Dipesh Chakrabarty describes eurocentrism in development as follows: "The phenomenon of 'political modernity - namely, the rule by modern institutions of the state, bureaucracy, and capitalist enterprise is impossible to think of anywhere in the world without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological traditions of Europe" (2000: 4). Statehood and conceptualizations of modernity in Latin America[136] are connected to hegemonic European traditions. Discussions on multiple modernities, reflect and discuss why the connection is neither necessarily affirmative nor negating Western theorems (e.g., Quijano 2000; Eisenstadt 2003; Bhambra 2010; for a discussion see Wehr 2014). Modernities also evolve independently building on traditions, without evolving against the backdrop of the theorems or counteract the modernization strategies.

[135] See also Ziai in 'Negotiating Normativity' (2016) on the appropriation of the development discourse by actors in the global South in the second half of the 20th century.

[136] It would by far extend the objective of this thesis to outline the vast body of literature discussing modernity, statehood and political economy in Latin America. For discussions on modernization theory and the critique thereof see e.g., Cardoso and Faletto (1990), Escobar (2010) discussing post-liberalism, or post-development. For a discussion on the shift from classical dependence theory to theories of multiple modernity's see e.g., Wehr (2014). See also Bhambra (2010) criticizing the concept of modernity in the multiple modernity's approach. See also Wallerstein's world system theory as challenge to the dependency theories (1974), e.g. criticized by Quijano (2007). Scholars engaging with the concept of "entangled modernities" criticize eurocentric and state-centric conceptualizations of modernity and suggest that processes of modernization influence and constitute each other and are not determined by patterns of evolution and borders, see e.g. Eisenstadt (2006). However, as authors promoting theories of multiple modernities and dependent modernity's thesis suggest, neither is the European project of modernization the only one influencing visions of statehood, nor is the encounter linear or reciprocal.

Modernization logics build on an assumed backwardness of regions and institutional frameworks as origin on underdevelopment. Outlining the underdevelopment discourse as a central paradigm in international cooperation, Escobar coined the term "developmentalization" of the Third World (2002: 24) in order to describe forms of labelling states as underdeveloped while creating the need for activities steering states towards more and better development. Ideals and activities in the "law and development movement" can be criticized from an angle of development critique as such (see centrally Sachs 1997; Escobar 2011; Ziai 2015).[137] The previous chapter outlined how intervention logics of the actors Bank and Court changed over time but centrally continue to carry a notion of institutional inefficiency and underdevelopment. Drawing a parallel to Escobar who stresses how development started to function as a discourse that "created a space in which only certain things could be said and even imagined" (2011: 39), I suggest that the prominence of the enforcement paradigm in rule of law support and the structure of global governance largely blinded the actors for more dynamic and process-oriented approaches to rule of law. The enforcement paradigm concerns the relationship between normalized "ordered statehood", rights protection and ideals of effective judiciaries. The point of reference for efficient judiciary and the rule of law is determined by the global organizations promoting the idea. Maxwell Chibundu criticizes the dominant reading of rule of law in the "new economic institutionalism"[138] prominent in development circles, pointing out that rule of law is more defined with the capacities and functioning of the implementing institutions and less regarding the substance and the procedures (1999: 90).

Following a teleological logic, these approaches frame rule of law as something that can be brought about by means for good governance, stipulated by human rights verdicts, introduced through new institutions and into existing institutions by rule of law promotion, that is, the activity of fostering the rule of law. Rule of law, hence, is not (only) something that is organically developing and thus can have different shapes but something that can be externally formed, advocated for, implemented and, finally, achieved. In this logic, promotion strategies start with a streamlined and homogenized conception of the rule of law.

[137] Different approaches to development have been suggested by authors like Alberto Acosta coining the concept buen vivir (2012), Sen (1988/2010) also stipulating a changed relationship between the state, territory and individuals.

[138] See e.g., North, (1986) as a prominent proponent of the new institutional economics (NIE) movement. See also discussion in the next chapter. The discourses of development have been deployed, as Escobar points out as "the professionalization of development knowledge and the institutionalization of development practices (2011: 17).

## 2.4 Universal application of rights and harmonization of systems

Mainstream development paradigms show strong preferences for a nation-state affirming and progress-oriented version of rule of law enforcement while rule of law ideals in human rights theoretically often also carry a notion of law as an emancipatory tool for social transformation. Bearing inherent tensions, approaches in development cooperation, and international adjudication also show considerable overlap. Rule of law mainstreaming converges in the view on rule of law as an elixir for economic growth and a guarantor for human rights while largely neglecting critical stances concerning states and power. The universalism inherent in the approaches has been criticized from different angles. The critique against neoliberal rule of law support can be approached from an angle of a general critique of international law. Sundhya Pahuja points out the dual character of international law being both imperial and counter-imperial. Its imperial character derives from its origin and its structure. Being in the beginning largely an invention of elites, Pahuja stresses how the idea of international law emancipated and was developed further gaining counter-imperial force.[139] Having stressed this dual character, Pahuja discusses the underlying claim to universality in international law that relates to a claim concerning the existence of universal values of the international community.[140] He quickly dismantles this claim pointing out: "[T]hese values are not universal *in fact*, nor are they universal in origin. Their claim to be such is a normative one. They are universal because they *should* apply to everyone" (2011: 30, italics in original). Relying on this claim in international law, TWAIL (*Third World Approaches to International Law*) scholars underline how this universalism fosters legal imperialism (see also Esteva and Prakash 2014).[141] In consequence, the instrumentalization of law undermines its potential emancipatory character and its capacity to change. Law remains functional in the logic of repression and can be instrumentalized by elites as a political tool (Blass and Brinks 2013: 26). Law and especially international law serve to maintaining the status quo rather than serving to restrict elites (Trebilcock and Daniels 2009). The logic of universalism helps to unify interests at state level and international level and portrays cosmopolitan elites[142] as the actor working towards the goal

[139] For an introduction into the *Third World Approaches to International Law* (TWAIL)-movement see e.g., Anghie, A. (2008b). For a discussion on the imperial force of international law see e.g., Chibundu (1999). Chibundu finds "once made, law typically abjures the invocation of power as an integral element of its legitimation - or perhaps more appropriately, law so enfolds power in itself that they become one" (1999:107).

[140] See also Esteva and Prakash finding that "[t]he universality of human rights is the second modern sacred cow. It constitutes the moral justification behind 'Think Global'" and they continue: "The western re-colonization inherent in the global declaration of these human rights remains as imperceptible to post-modernists as to the modernists they accuse of cultural imperialism" (1998: 293).

[141] Esteva and Prakash portray human rights as the Trojan horse that enables recolonization and find human rights have become a moral currency of cultural imperialism (2014: 110ff).

[142] Among many others criticizing this logic, Homi Bhaba and colleagues find that eurocentric cosmopolitanism is inadequate to a world in which "centers are everywhere and circumferences nowhere" (Bhaba et al. 2000: 588)

of the realization of rights and justice. However, Boaventura de Sousa Santos and Cesár Rodríguez-Garavito warn against too easily conflating all "legal elites" into a generic category of global orthodoxies (2005: 12). I argue that rule of law support contributes to an uncritical stance towards the potentially repressive character of law and judicial institutions by portraying legal stability and institutions as the solution to economic growth and human rights protection. Furthermore, supporting universal solutions to different institutional frameworks and applying jurisprudence based on a rationale of coherency and compliance, conflicts with national possibilities to transform and develop versions of rule of law during the supporting activities.

The "civilizing mission" is the rationale that seeks to legitimize activities of legal and institutional transfer and global rule of law enforcement and harmonization of systems. Being unclear about the exact content of the concept rule of law implies that measuring progress becomes difficult. The "ultimate goal"[143] is not clearly defined, yet activities aspire to reach an ideal state of rule of law adherence that secures law and development as the realization of rights. At the core of this endeavor is the idea of progressive realization.[144] This idea is seemingly paying tribute to different capabilities of states. However, it is still upholding a logic of universally applicable and unalienable rights and the telos of activities: strengthening the state as the guarantor of rights. Global financial development activities sustaining the need for harmonizing the legal system through the centrality of legal security for development. Activities often stipulate the replacement of national laws and procedures by global standards to remove barriers to capital accumulation at the global level. Ulrich Brand outlines the neoliberal logic: democratic national discourses are reduced to questions of whether an action or omission contributes to international competitiveness (2005: 164). This logic of competitiveness and comparability is central in harmonizing approaches both within international human rights and within development cooperation.

Especially subaltern and post-colonial scholars have long claimed problems of conceptualizing human rights and rule of law as universally applicable concepts (e.g., Chakrabarty 2000; Chibber 2014 criticizing approaches in subaltern studies)[145] Claiming there is no such thing as a universal law, universal accountability or a universal subject of law. They find, things *are* universalized to *serve* the universal. Legal systems that built on false consensus, instead crystallize and reveal the oppressive character of law. I argue that by neglecting the economic

[143] The last chapter outlined how this allows for goal post shifting in the design of the projects.

[144] Heavily criticizing this approach, Esteva and Prakash find that "[t]he tautology of the modern definition of human beings is their subordination to the laws of scarcity" (2014: 122).

[145] Chakrabarty defines universalization is the ability to present the own interest as consistent with the interest of the nation state and those supposedly represented by it.

and the political dimensions, neoliberal approaches to rule of law contribute to reducing human rights, social justice, and state order to the legal sphere. At the same time, state ordering via legal means and legal institutions remains inherently political.

## 2.5 States centrality, accountability, separation of power – the ordering character of rule of law

In human rights law, different to international criminal law, states remain the main interlocutor and accountable subject of law, oftentimes in its negative obligation to refrain from interfering with the rights of citizens. However, as the structure has developed around nation states, international human rights Courts face similar problems related to implementation as international criminal courts: limited enforcement capabilities. Efficiency of national institutions is a problem to implementation and oftentimes at the same time the very goal of human rights interventions. Reparation measures such as ordering investigations into the human rights violations, creating search units for disappeared persons, or educational trainings for police officers do not only rely on institutions to be implemented in the first place but simultaneously seek to transforming and strengthening them. In a similar vein, the logic of institutional strengthening in development cooperation is characterized by a similar logic.. As institution building and strengthening is not only a technocratic exercise but inherently political, it is a crucial window of opportunity to reshape the functioning and the compositions of the institutions. This political aspect applies to the aim of the intervention as such – guided by logics of change that rely on a mostly eurocentric approach to functioning institutions – as well as to the national politics shaped by intra-branch and inter-branch crisis. Sometimes, these politics conflict e.g., when the judiciary is approached as a lever of change while at the same time inner-institutional rivalries impede transformation. International politics and national politics may also align e.g., when the executive branch is granted a large margin for pushing through reforms by international donors and organs and has the political and financial resources at national level to do so. I argue both scenarios, however, do not necessarily lead to institutional or rule of law strengthening.

In international logics, the narrative of backwarded inefficient institutions creates the need for modernizing the institutions. However, interventions carried out by international actors also run the risk of overrule and undermine national institutions and institutional functioning.

Scholars with a state-centric perspective focusing on state transformation processes in Latin America have long been outlining institution inefficiency and informal arrangements as key characteristics of statehood and state reform in the region (e.g., Helmke and Levitsky 2006; see

also de Sousa Santos 2014 stressing alternative approaches[146]).[147] As global rule of law support increasingly adopted good governance approaches, global governance actors have become involved in these transformation processes. In logics of change informed by law and development and good governance agendas the judiciary shifted to the focus of attention, as an alternative way to seek justice and foster development while the executive power is oftentimes portrayed as arbitrarily exercised, abusive and corrupt. The logics place legal transformation at the center as it is assumed that social transformation and balanced and ordered statehood will follow when legal institutions are functioning, and rights are enforced. The approaches, however, oftentimes neglect the horizontal dimension of rule of law and dynamics among national branches of government.

To channel power through law, human rights shifted attention to the relationship between the individual and the state that is the vertical dimension of rule of law. Human rights were born out of an idea to limit arbitrary use of state power (Ansaldi 1986; Duxbury 2011; Alston and Goodman 2013). Notwithstanding, the realization of human rights also strongly relies on the horizontal dimension and the interaction of governmental branches. Human rights therefore directly address the relationship between individual and state, placing a heavy burden on the state to realize human rights and simultaneously strengthening the state in this role. Gustavo Esteva and Madhu Suri Prakash underline: "[t]he birth of universal human rights is inextricably bound up with the global manufacture of the independent western nation-state" (2014: 114). The realization of rights and the form of the institutions enforcing rights are also intrinsically bound to the form of government and approaches to state ordering. Rule of law constantly transforms in states and rule of law support transforms in waves of globalization. Neoliberal notions of rule of law (prominently Hayek 1973) focus on securing individual rights to ensure economic individualism and freedom in free market terms and the state order and institutions alike securing the enactment of neoliberal policies. Individualism is central to the conceptualization of the rule of law in this neoliberal logic as it forms the basis for the rationale of the existence of the state (see also Biebricher 2012). The state serves to secure individual rights, providing security to individuals for infringements in their autonomy and certainty for their activities.

[146] De Sousa Santos is one of the most prominent scholars advocating for a counter-hegemonic model he calls "subaltern cosmopolitanism" that departs from human rights without the mediation of states or even a central role of them.

[147] Having said this, the body of literature on transformation processes in Latin America from perspectives not centering on institutions is vast. Especially research on social movements (see e.g., Escobar 2018) and indigenous movements (see e.g., Yashar 2005) builds the majority of this scholarship. For the transformation of movements into parties in Latin America (see e.g., van Cott 2010).

This section stressed how states continue to be the principal addresses and actors in international human rights law and in financial development policies. More complex questions in relation to the mediation of interest in rule of law development and struggles for representation are neglected. I argue, however, dynamics among branches and the interplay of actors and policies during implementation are part of rule of law development. Thus, the so-called "will of states" is a construct created by a hegemonic and homogenized approach to statehood. In addition, interests are rarely articulated unanimously or orderly. The section also stressed how law in rule of law support has become functional to the maintenance of the institutional structure and state power.[148] Therefore, the question *if* law rules has become more important than *what* law rules. Because of the focus on legal institutions and law as a lever for change, judicial reforms and international human rights judgments run the risk to fostering juridification at national and international level. Therewith, interventions contribute to levelling the playing field for economic and legal actors while making law the battleground for discussions on statehood and global governance rather than economics or politics. Therewith, neoliberal approaches to rule of law support contribute to depoliticizing content and procedures. The logic of change stipulates a legal approach to transformation, making juridification[149] a reason for and an outcome of support activities. I suggest juridification is problematic at least for two reasons: on the one hand, it portrays the judiciary as a panacea for solving institutional shortcomings in the other branches of government, on the other hand, it neglects that the judiciary itself can be the source of abuse, corruption and the locus of political deadlock. Based on a claim of universal application of rights, adherence to rule of law and good functioning institutions are rendered a precondition for regional and international integration:[150] Pahuja argues that in this logic and

[148] This said, I do not wish to advocate a one-dimensional view on human rights as purely an affirmative discourse and practice for the powerful. This would neglect many aspects of human rights advocacy and grass-roots work, and even the effects of some international strategies. My argument relates to the structure of international human rights arbitration.

[149] Neil Tate and Torbjorn Vallinder define juridification as "the infusion of courts into political arenas, and the adoption of court-like or legalistic decision-making procedures in non-judicial settings" (1995:13). Lars Blichner and Anders Molander (2005) outline five dimensions of juridification and discuss their relationship: 1. Constitutive juridification; 2. Juridifications as law's expansion and differentiation; 3. Juridification as increased conflict solving with reference to law; 4. Juridification as increased judicial power; 5. Juridification as legal framing. This work focuses on the fourth dimension, however, not neglecting that the other dimensions influence the designing and perception of the reforms and judgements. Warning against effects of juridification, Peter Gabel and Paul Harris find "rights-consciousness tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of power resides in the state rather than in the people themselves" (1982: 375).

[150] See James Tully for a discussion on universality in constitutionalism suggesting that "the world of constitutionalism is not a universe, but a multiverse" (1995:131) and the discussion by Antje Wiener (2008) on plurality and the constitution of politics.

by applying a universalistic approach to the rule of law the international community becomes the arbiter of a state's legitimacy (2011: 222).

I depart from conventional critical approaches in scholarly literature dealing with global rule of law support as I place emphasis on dynamics among branches and institutions as such without aiming at deconstructing the kind of power exercised by them. However, I do not seek to suggest a deconstruction is not necessary; I will simply not tackle this within the realm of this project. My aim is to reveal contradictions in current rule of law support and to take this as a starting point for reconceptualizations of implementation problems. Neoliberal rule of law approaches depend on the nation state and sovereignty is the principle that legitimizes the use of power. Miéville warns: "[A]ttempts to reform through law can only ever tinker with the surface level of institutions" (2005:316). Thus, global governance interventions to support the rule of law by institutional strengthening of the judiciary and law enforcement affirm state-centric models without acknowledging potential for transformation. Framing problems of failed interventions and not enforced judgment as problems of not enough law remains in the same logic.

## 2.6 Outlining the research puzzle – problems in rule of law support

Previous chapters have outlined how law and legal institutions have become focal points in human rights and developmental debates and practices of rule of law support by global governance actors. Reference to the rule of law as an organizing principle for modern statehood and to independent judiciaries as guarantors of rights has gained prominence in development and human rights circles. Within the approaches to development and human rights, national institutions in states of the Global South continue to be portrayed as "deficient" and failing *vis à vis* the citizens and in relation to investors, thus hindering development and the realization of rights. Logics of change in global rule of law support determine the road ahead for judiciaries to function efficiently. The means applied in the intervention dictate the conditions under which the reforms can be realized, and the interpretation schemes stipulated by the global governance actors render the status of the interventions successful or failed. More so, only by way of continuously framing the problem[151] are global governance actors able to offer particular answers throughout time.

[151] Ulrich Brand finds with regard to the global governance discourse in general: "[t]he priorities of the problems (which are relevant for the 'North') and their treatment (cooperatively) are given, (sic!) priorities which are connected with the power to interpret" (2005: 166).

In this study, I challenge the notion of problems in rule of law support that are attached to logics of change that focus on outcome rather than process and rely on neoliberal statehood and effective judicial institutions as guarantors for rights and a bulwark against arbitrary use of power. Instead, I draw attention to more complex institutional dynamics. I analyze politics during the implementation of rule of law supporting activities. Seeking to reveal central contradictions within and between logics of change and procedures applied during the implementation, I draw attention to ways in which conflictive processes during implementation are rendered problematic to rule of law rather than a constitutive element of it.

This chapter summarized underlying assumption in approaches to rule of law and revealed how human rights approaches and economic readings of law and development converge in their neoliberal approach to law and legal institutions as a lever to change. The approaches strongly attach law to stable statehood and reduced law to law enforcement while negotiations and procedural character are left at the margins.

## 2.7 Approach of this study

In this study I explore implementation processes of rule of law support by global governance actors in a critical pragmatist approach. I address failure of Bank reforms and non-compliance with judgments of the IACtHR as the central puzzle and point of departure for approaching implementation problems in international financial development cooperation and enforcement problems in human rights adjudication. Rather than criticizing global interventions on a mere theoretical level, the study turns to the problems in implementation, contributes to reconceptualizing them, and discusses problems as constitutive moments for rule of law development. I will proceed as follows: firstly, I explore elements to implementation processes; secondly, I suggest reconceptualizations of implementation problems. Exploring the processes of implementation in this study, I ask:

*How are World Bank supported judicial reform projects and judgments of the Inter-American Court of Human implemented by national actors in Peru and Argentina?*

Different to most conventional approaches, I adopt a stronger process-oriented approach focusing on the interplay between the actors during implementation, centrally including the politics of implementation of national branches of government (see Hillebrecht 2012, 2014a with a similar approach). At the same time and distinguishing my approach also from traditional

critical positions that criticize international law and financial development cooperation for its intrusive character on national politics (Anghie 2008a; Escobar 2011, Chimni 2017), I seek to dig deeper and describe different elements to processes of implementation and the dynamics among actors that span around the interventions. Combining in the analysis a focus on the logics of change and the operationalization during the rule of law supporting activities, I develop the critique on global rule of law support and suggest ways to read problems during implementation as parts of rule of law development. Lastly, I suggest ways to flexibilize approaches of the actors Bank and Court.

By analyzing the processes and revealing the weaknesses of the logics of change of the two actors Bank and Court, I approach the interventions in a critical and pragmatic manner. I subscribe to the view that critical scholarship can dismiss development paradigms and still focus in the research on analyzing implementation processes for revealing weaknesses in the concepts and procedures applied. I seek to challenge outcome-oriented ideals on rule of law levels and suggest a procedural reading of rule of law development as processes of balancing powers. This allows reading elements of implementation problems differently to static approaches measuring success or failure and helps identifying constitutive moments that can bear more transformative potential. The following part recalls arguments from previous sections and develops this argument further.

*Constitutive moments for rule of law development*

Implementation processes play a central part of national politics and thus become subject to political maneuvering and control. Problems in implementation can be expressions of checks and balances at a national level. Thus, reducing non-compliance with international law and incomplete implementation to non-adherence with rule of law principles is reductionist as it falls short in acknowledging moments of instability and procedural development. Framing failures of project and a lack of compliance as problems in implementation thus is reaffirming approaches to global rule of law support rather than questioning the logics of change and the means applied. I suggest procedural approaches to studying rule of law support can help to read tensions not as hurdles to implementation and lacking political will but as part of the reform. I call these constitutive moments, as political maneuvering becomes apparent and conflicts among branches emerge or manifest. In these moments, questions in relation to rule of law come to the surface, thus the moments bear the potential to rethink and check the principles of state ordering.

In a liberal theoretical approach in state theory, the concept rule of law holds the promise to mediate and moderate interests among branches of government in a political way. Interestingly, human rights and development approaches combine liberal traditions stressing states centrality for rights guarantees and neoliberal approaches to states functionality for the market and ordering character. While neglecting the political and social aspect of rule of law, at the same time they also silence the economic dimension, as they do not address questions of redistribution and thus, share a fundamental blind spot in this respect. Law and legal systems have a central role in structuring the state and human behavior. Hence, they are shaping, political, economic and social activity influencing every sphere of social interaction (e.g., Dworkin 1986). Critical legal studies scholars have outlined this close connection of law and politics (e.g., Tushnet 1986; Fischer-Lescano 2005; Buckel and Fischer-Lescano 2007; Kennedy 2006). They have also prominently advocated for a narrower coupling of decision-making and discussion, given that law is a manifestation of political decision (Buckel and Fischer-Lescano 2007: 100). Joel Trachtman finds "[a]rguments about what the law should be are inevitably arguments about public policy" (2008: xiv), stressing the political character of law while underlining the importance of negotiating form and substance of law. Approaching the role of law in transformation from this angle, changes the question from how the rule of law is currently framed to how it should be framed when and if the political aspect of law is negotiable. I suggest global governance actors' activities in judicial reform and international arbitration are inherently political. However, neoliberal global governance supporting activities fall short in acknowledging the negotiation and mediation aspect in rule of law development, neoliberal academics neglect political dimensions in favor of legal and economic aspects, and critical scholars oftentimes stop at criticizing legal interventions from a perspective of agency and power.

Neoliberal approaches to rule of law are predominant in global governance and shape rule of law support strategies (Rodríguez-Garavito 2011a). The "cosmopolitan dream" (Kennedy 2006) of rule of law has informed discourses and is inscribed into the structure and procedures of global governance organizations. International human rights arbitration and development cooperation departs from the assumption that the realization of human rights can no longer be assured (only) by the national level, therefore providing a third instance or a safeguard in the international realm. Yet, they reaffirm the nation-state and a nation-state-based conception of human rights. Rule of law support in global governance relies on the assumption the state had failed because human rights violations and bad investor governance would not have occurred in states where adherence to rule of law is high. The enforcement of rights relies on good

functioning governmental branches and their respective adherence to the rule of law. In this logic, the implementation of human rights judgments and enactment of law *is* the rule of law. Law adherence becomes a means to become part of social and economic modernity. As the rule of law has a function in hegemonic politics, compliance becomes an expression of its overall ordering power (Humphreys 2012). Judicial reforms and reparation orders stress the ordering character of rule of law. However, reshuffling of power is an element in rule of law as it is constantly negotiated. Tensions among branches emerge and are mediated trough the rule of law as the ordering principle. The separation of powers is the principle securing checks and balances for these interests to be negotiated. Because national politics of implementation happen in and alongside implementation processes, tensions do not vanish. I seek to explore these tensions as parts of implementation.

Negotiations and momentary unbalanced power are part of rule of law as it bears a strong mediating element. According to Gerard Alexander (2002), rule of law is both "institutionalized certainty" and "institutionalized uncertainty". Deval Desai and Michael Woolcock (2012) underline how, depending on who is in charge of the reform and which groups are empowered, reforms might as well seriously alter the balance of power in favor of the rule of a particular group. Following this line of thought, only temporarily unbalanced power would allow for transformation. In the struggle of strengthening, the rule of law unstable situations could emerge, breaking up old power constellations and uplifting new actors onto the political stage. However, depending on the procedures and the actors in cooperation and institutional reform attempts, rule of law support can also stabilize the status quo. Strengthening institutions in a top-down manner dictates reforms and impedes transformation. The way rule of law promotion is currently framed comes down to sovereign enablement. In this light, the rule of law promises to restrain sovereign power cannot be upheld; instead, it might as well stabilize the status quo.

In this chapter, I laid out key features of the critique on eurocentric neoliberal approaches in human rights and development that justify the reform necessity by an assumed backwardness of legal systems and institutions. I also discussed and challenged universalism and state centrality as central characteristics of the logics of change as they are based on a conflation of interests of states and global governance actors, and therewith diminish different positions and interests. Lastly, I outlined the road ahead for revealing from within the process the contradictions in the approach to be able to read the problems in failed rule of law reforms of the World Bank and non-complied judgments of the IACtHR differently.

# Chapter 3 Methodology – studying implementation processes

In the study I explore so-called "implementation problems" in international human rights law and international development cooperation. I criticize the conceptually narrow and procedurally hierarchical approaches to rule of law support in global governance. I seek to reveal core contradictions in the approaches that focus on strengthening institutions to foster the rule of law development. I explore processes in the implementation from a critical pragmatist angle along the three dimensions of context, design and coordination as elements to implementation problems. Basing my critique on an in-depth analysis of implementation processes in Peru and Argentina from 1998 until 2018; I explore the dimensions and problematize the way implementation problems are framed in conventional scholarly literature. Rather than aligning with studies on authority of courts or impact of development projects, in this study I turn to implementation itself and suggest alternative readings of the problems. Eventually, this reconceptualization helps to identifying constitutive moments for rule of law development.

In the first chapter, I introduced the approaches of the World Bank and the IACtHR in rule of law support, described contradictions in the logics of change and means of implementation and outlined overlapping explanatory patterns for implementation problems discussed in scholarly literature. I shifted attention to research gaps in relation to critically analyze the problems – especially regarding context assessment, to assess negotiations of project and reparation order design and to take into account the interplay of global governance and national politics, struggles for power, and dynamics among branches during implementation. Little empirical research exists on processes of implementation of rule of law supporting activities in general and about how global governance activities interact with institutional dynamics and negotiations about rule of law at national level and questions of separation of power. The novelty in this research is that it brings together an analysis of the involvement of two seemingly very different actors – Bank and Court – and reveals flaws on conceptual and operational level in global governance rule of law support. In the second chapter, I discussed problems in global rule of law support from post-colonial and critical legal perspectives, outlining eurocentrism, universalism and state-centrism as central characteristics in mainstream development cooperation and human rights adjudication.

In this chapter, I describe the epistemological approach of the study (3.1), firstly by outlining my approach to critical pragmatism (3.1.1) and sharing reflections on my positionality (3.1.2). In the next part of the chapter, I turn to methodological choices (3.2), introduce exploratory

process tracing (3.2.1), outline how I develop and explore the dimensions of context, design and coordination in my analysis (3.2.2), introduce my approach on qualitative interviews and participatory observation (3.2.3), discuss the comparative aspects in the study (3.2.4), give insights into the coding process and the material (3.2.5), and introduce central elements in my analytical framework (3.2.6).

Logics of change in financial development cooperation and in human rights adjudication overlap in portraying an efficient judiciary as the solution to problems of meager human rights and economic performance. The World Bank and the Inter-American Court of Human Rights as rule of law promoters sustain their engagement in rule of law support on logics that are singling out the role of the judiciary and law in processes of transformation. Not surprisingly, the World Bank and the IACtHR diagnose the causes for non-adherence to the rule of law as a problem for human rights enforcement and good economic performance. Both actors consider the solution for this problem lays largely in institutional strengthening.[152] The chapter suggested that this problem diagnosis depends on the World Bank's and IACtHR's theoretical framing of the rule of law as a state ordering concept, while the cure offered to strengthen the rule of law in countries is linked to their mandate and the means of intervention at their disposal. In the absence of a supranational enforcement mechanism, Bank and Court rely on national actors to implement judgments and reforms. Both international actors seek structural changes rather than sectoral ones. Bank and Court both rely on the executive as a gatekeeper in negotiations, yet the implementation of reparations in judgments and reforms often depends on the cooperation of more than one branch. The global governance interventions meet institutional tensions and the reshuffling of power among branches. When assessed in measurement schemes of indicator fulfilment and compliance with judgments, these activities show meager success: projects fail to be implemented and non-compliance rates are high. The previous chapter discusses how scholarly literature oftentimes falls into the same trap and discuss problems during rule of law promotion in terms of failed reforms and non-compliance with judgments. The analysis in this study seeks to explore further the implementation problems and suggest interpreting failure of reforms and non-compliance with judgments differently.

[152] I acknowledge and discuss also the important symbolic function of the judgements of the IACtHR and the importance of the reparation orders for individuals. However, what I am referring to at this point in the study and those measures of the Court that seek to address problems of structural and sustained violence in the state apparatus (see also chapter 2 for a discussion of different measures and importantly chapter 5.1.3. and 6.1.3. and the historical discussions of transitional justice in Peru and Argentina and the role of the Court.

Reform processes are chaotic and dynamic. National actors might resist implementing projects or judgments because it suits them to resist *in this very moment*; at other moments, implementation may be the action of choice. Projects and judgments might not be implemented because the procedure of implementation provides the very loopholes for what the rule of law activities seek to overcome: lacking accountability. There is more to implementation processes than mere failure of reforms and judgments that is not solely attributable to inability, deficits in capacity or insufficient political will. I suggest implementation is highly context dependent as it is part of international and national political maneuvering and political struggle.

Negotiations about design and procedures for implementation as well as reporting on implementation problems in global rule of law support processes often take place behind closed doors. Little knowledge on the "how" of implementation exists. Several elements contribute to this scarce knowledge on the how of implementations; among them the limited structure of reporting contributes to this as well as the oftentimes closed circles of practitioners and state officials involved and the technical language in the processes. It is also a question of the focus in research as the processes have received little scholarly attention. Elements contributing to troublesome implementation haven been identified in literature, focusing on problems in context assessment (in development terminology: "baseline studies") and lacking political will, the rigid or legalistic content of reforms and judgments, and insufficient nation state level capacities and/or rigid procedure for implementation. The empirical basis for an analysis of the implementation problems, however, is thin. Similarly, the factors have not been developed systematically or approached from perspectives that are more critical. The exploratory research approach in this study seeks to address this gap.

The research question that addresses the "how" of implementation can be divided in several sub-research questions relating to a) the relationships and coordination between the international and the national level focusing on constraints and limitations within the structure of international financial development cooperation and international adjudication. It also addresses b) the dynamics and the cooperation among the actors at national level possibly shedding light on short-term effects of the (failing) cooperation during judicial reforms and the implementation of judgments. Indicating comparative research, the question also implies that variations or similarities in findings will inform my analysis and the exploration of the dimensions regarding how the implementation processes differed in Bank and Court activities in Peru and Argentina.

During research, I paid special attention to the element of failure in implementation of reforms and judgments and the problems that are attributed to it. Asking how failure is addressed and framed, I explored how "failure" and "non-compliance" mean different things to different actors: activities "fail" in logics of change applied in the measurement of global governance actors; however, they might not necessarily "fail" from the perspective national actors, because they can manoeuvre in the processes to increase political leverage at national level.

## 3.1 Epistemological approach

I opted for an exploratory approach to study elements of implementation problems adopting a critical pragmatic lens.[153] I draw on the pragmatist theory of inquiry developed by John Dewey and combine it with critical and decolonial approaches to knowledge (Mignolo 2002, 2009, 2012, Quijano 2000, 2010; de Sousa Santos 2002). This means the process of the inquiry might surely be influenced by conventional readings of implementation problems in Western scholarly tradition; however, in the irritation that motivated me to explore the processes I seeks to take the colonial differences as a starting point for this research. In relation to producing knowledge from colonial difference in decolonial tradition, Walter Mignolo finds

> "[B]oth Quijano and Dussel have been proposing and claiming that the starting point of knowledge and thinking must be the colonial difference, not the narrative of Western civilization or the narrative of the modern worldsystem. Thus transmodernity and coloniality of power highlight the epistemic colonial difference, essentially the fact that it is urgently necessary to think and produce knowledge from the colonial difference. (2002: 85).

In an inquiry process of "epistemic disobedience" (Mignolo 2009), I seek to question traditional approaches to knowledge rebutting universality and racism enabling and constituting it. I explore what has been framed as implementation problems departing from an exercise of empirical inquiry to problematize the problems on conceptual grounds, the one activity nurturing the other. In the next sections, I outline my approach to critical pragmatism (3.1.1.) and then introduce some positions that characterize my work and reflect on them (3.1.2.).

### 3.1.1 Critical pragmatism

In this work, I address conceptual contradictions in logics of change and inconsistencies in rule of law support by global governance actors. Looking at the original puzzle of failed reforms and non-complied judgments, I start from implementation level and analyze problems in global rule of law supporting interventions.

[153] Probably John Forester (1999) coining this term in the combination in his book on creative negotiations in planning.

For John Dewey, a point of departure for exploring social phenomena was an empirical inquiry that can form the basis for exploring the "inconsistencies", the incoherencies, the compromises, the failures, between the actual practices and the theory at the basis of these practices" (Dewey, 1891: 190 as cited in Zimmermann 2018: 943). My approach is grounded in iterative practices and best described as an abductive approach as introduced by Charles Peirce (1934) and developed further for qualitative research and theory building (Tavory and Timmermans 2014), meaning "a permanent and integrated back and forth movement between [...] knowledge production i.e., between empirical and conceptual inquiry" (Zimmermann 2018: 943). In Dewey's theory of inquiry, importance rests on the adaption of knowledge, hence it is neither certain nor permanent.[154] Furthermore, by stressing the instrumentalist approach in Dewey's approach, during the process of inquiry, I developed the elements to the analytical dimensions for exploring the phenomena of implementation problems. Larry Hickman stresses,

> "inquiry is thus a reflective activity in which existing tools and materials (both of which may be either tangible or conceptual) are brought together in novel and creative arrangements in order to produce something new. The by-products of this process often include improved tools and materials which can then be applied to the next occasion on which inquiry is required" (Hickman 2019: 210).

Thus, departing from initial moments of inquiry and irritation,[155] I then developed my framework for approaching implementation problems in a scientific and critically reflected way. I am not adopting a general deductive framework for this, for the conceptual and theoretical approaches presented in previous chapters remain eclectic but place importance on exploration. This said, my "normative yardsticks" (Zimmermann 2018: 943) are critical approaches to rule of law and development. These theories and concepts inform my analysis of the empirical material. I am indebted to reflective and decolonial epistemological stances as I question knowledge production about rule of law and state ordering. I anchor my critical judgment in post-colonial, post-development thoughts on law and transformation, social order and the state apparatus as opposed to the liberal reductionist approach that stipulates a narrowly defined law as a vehicle for individual rights and rule of law as a status-maintaining ordering concept.

---

[154] Larry Hickman elaborates on Deweys approach to inquiry: "Because inquiry is an organic activity, and because organisms encounter constraints as well as facilities, assertions must continually be tested and new warrants must continually be issued. Successful living requires an active and ongoing reconstruction of experienced situations. Dewey's notion of warranted assertibility, therefore, unlike the concept of knowledge as it has functioned in systems such as those of Plato, Descartes, and many contemporary philosophers, is not a matter of a spectator getting a better view of a fixed state of affairs that is already ``out there'' (or even ``in there'')." (Hickman 2019: 208). Hickman also points out, for Dewey common sense and science are no ontological difference but they have different logical *forms*. Science grows out of common sense as its tools of inquiry become more refined. But science is not final in the sense of being the end or point of inquiry." (2019: 213).

[155] In which my conventional approach to reality triggers an inquiry and my approach to common sense is irritated.

I am also aware that pragmatism has been criticized[156] for providing an apology to the status quo by the uncritical approach to experience.[157] Antonio Gramsci and Max Horkheimer prominently sustained pragmatism would not contain sufficient normative force because it fails to appeal to an objective notion of real interests; they identified pragmatism with vulgar positivism. For Gramsci (1928/2007), the dimension of everyday experience was correct but insufficiently mediated by critical reflection. I seek to look beyond "vulgar materialism" and to describe and analyze processes characterized by hegemonic power and to suggest alternative readings of problems. Exploring the elements in implementation problems shifts attention to processes and procedures. Drawing on Zimmerman (2019), I approach critical pragmatism to "look out for systematic silences or distortions", as he recalls that critical pragmatism is emphasizing that failure to perceive or define a problem is problematic in itself.

Exploring different non-western approaches to epistemic questions requires stepping away from a traditional idea of neutrality, objectivity or impartiality and reflecting on my position as a researcher. As researchers are "historically and socially [...] linked with the areas we study" (Gupta and Ferguson 1997:38), my position as a researcher from the Global North engaging on topics of institutional settings and rule of law in the Global South[158] is inevitably linked to coloniality and power in state ordering and capitalist nation-states.

### 3.1.2 Reflections on positionality

Throughout my research, I continuously reflected on my positions, my interactions with others and my motivation for carrying out the research to reconceptualize implementation problems. Some core positions are reflected in my theoretical anchoring points and methodological choices. However, much of the positions remain and will possibly continue to remain unconscious. This subchapter nevertheless tries to lay open some of them. Positionality is not only oftentimes unconscious but also undergoes constant changes. The different phases of the research and processes of writing, fieldworks and academic discussions heavily influenced the

[156] I do not attempt to grasp all lawyers of the critique of critical theorist towards pragmatism here nor do I want to overcome the gap between the approaches by combining elements in this research. Nevertheless, I see potential in combining critical and pragmatist stances in my research. I also do not wish to make a statement about other attempts to reconcile perspectives here.

[157] Experience is centrality in Dewey theory. Molly Cochran finds: "Dewey's point was that inquiry requires us to muddy ourselves, so to speak, in the everyday realm of experience," (2002: 529). Nevertheless, momentary control over social phenomena serves merely "to establish a temporary and contingent resting place for inquiry" (2002: 527).

[158] Global South being a "metaphor for human suffering under global capitalism" as Boaventura de Sousa Santos (2002) famously described the term.

trajectory of time in which this work emerged – the transformation will necessarily be reflected in the product. However, the product – the dissertation itself – is also one piece and yet not subject to constant change any longer but represents an outcome at a given time. The study ties together findings that developed from assumptions I adopted or neglected, research setbacks and changes of focus and academic discussions that shaped my thoughts and reflections. I consider reflecting on my positionality as part of my work and working ethos (see Sylvester 2013; Hamati-Ataya 2020). Unconsciousness about many positions render the task to constantly reflect during research ever more important, since this way they can eventually begin to be discussed and questioned in a joint exercise with others. Some of my reflections on positionality were central during research, such as those on topics, concepts, and tools in my work, my positionality as a researcher, and my relationship with and the position in academia. In the following, I will summarize some of the thoughts regarding the topics.

My position towards global rule of law support is critical; therefore, I engage with critical theoretical positions. The position on means of rule of law promotion is skeptical. Therefore, I choose an analytical method that is open to exploration and would allow to explore tensions and to identify moments of potentially disordering character. Framing my research interest as exploratory surely helped me to access interview partners with more reactionary positions regarding the rule of law. For example, some interview partners expressed opinions about the generically described "left" as always opposing World Bank reforms.. Discussions also touched upon state terrorism, legitimacy and resistance of left guerilla groups, activism and the role of Germany in supporting structural adjustment policies and economic crisis. I never tried to hide my opinions or my research approach. I spoke openly about them while at the same time remaining in a position of an interviewer and observer. My exploratory and pragmatist stance also helped to approach, on the outset, more liberally minded staff from within global governance institutions to shed light on alternative means during implementation.

Reflections on my interactions with others are closely connected to my personality and my motivation and yet I assumed different roles throughout the research. Reflections on me as a researcher and my positioning throughout the process were constantly ongoing. I influenced the research situations e.g., positioning myself as external to institutional settings and securing a confidential handling of information, adapting a dress code, speaking a certain language and joining an expert terminology on rule of law. The way people read my background, of me being a white, female researcher coming from a German university and my behavior, influenced the encounters. The way it has influenced my research remains largely unknown to me, as it did

not explicitly form part of my research and engagement with the interview partners to reflect on the interaction itself. However, I assume that my background in a university from the Global North, as well as the funding and academic prestige attached to it, opened doors in global governance institutions. Some of the interview partners reflected on this ascribing a sense of neutrality to my research. My gender also influenced the interview situations: being female in a male-dominated research and working environment possibly influenced the dynamics in the encounters in a way that male interview partners sometimes saw their role in educating me about a certain topic. In fact, I came to the situations to explore a phenomenon and listen to the interview partners – but as a researcher.

Strategically positioning myself as being external to the institutional settings and yet as being familiar with the epistemological communities, by adapting the language and dropping information in the beginnings of the interviews might have contributed to interview partners speaking more openly about thoughts and political topics. Previous longer stays in the region, familiarity with broader, and sometimes more specific, political settings and the ability to speak Spanish and conduct the interviewes in the native languages of the interview partners (if requested) possibly additionally influenced the openness for sharing thoughts and the environments of the interviews sometimes being rather non-formal. As previously said, these thoughts on my influence on the research situation remain speculation. If I had not been white, female and coming from a university in the Global North, I might not have been able to access the institutions due to a lack of funding, to establish contacts with the interview partners due to reluctance to cooperate, or to engage in discussions on the implementation problems due to hesitation to share information on politically sensible topics. It might also have been the other way round: more familiarity with the political settings and an ethnical background of Latin-American countries might have influenced the encounters in a way that other questions in relation to institutional dynamics could have been discussed more easily and more rapidly considering the limited time during interviews and less hesitation to speak openly. This said, the work and the interactions during research necessarily influence the world in ways that I cannot and could not control. Laying open my reflected positions during research and reflecting on them in written form are a form of making them accessibly and discussible.

Starting with an inquiry into the empirical process not an abstract "fact" or a theoretical question also implied reflecting on my approach to inquiry as such. What irritates me and why? Hickman finds "inquiry is always a behavioral response of a reflective organism to its environing conditions" (2019: 214). The inquiry is connected to my actions and my behavior rather than

just existing mentally or psychologically. It also required me to think of my relationship to abstraction and experience as I chose such an "insecure path" of experimental inquiry. The developed elements as part of implementation problems, this whole work remain part of the inquiry, as they are product of it. In a similar vein, the work constantly required me to reflect on my own underlying assumptions about law and rule of law. Can I think of the concepts without what I know of a state and why do I think of a state and its functions the way I do?[159] This thinking process was part of the research and informed me throughout the analysis. Thinking differently about these relationships in this research culminates in reconceptualizing the problems; describing and exploring alternative ways is left for another time and another study. In chapter two I discussed critical positions on law in state ordering endeavors, in the last chapter of this study I elaborate briefly on alternative, more community-based forms. Looking at the regime of neoliberal rule of law implied for me also looking at the anti-regime.

Lastly, I will turn to reflections on my position in academia: I was not socialized into post-colonial and critical approaches in my first Master's Program in Area Studies where interdisciplinary largely blinded for a theoretically driven questioning of the way to "study" "areas", neither was this at the core of the approach taught in my second Master's program in Human Rights Law. However, criticality is not only taught, nor can it be "untaught". I was socialized in other ways and nurtured my critical positions throughout my personal and "academic life" and found my way into theories and approaches, in scholarly and personal discussions and personal practice (see Alejandro 2021: 167). My socialization into criticality was piecemeal and largely self-made, influenced by my experience and confirmed by some insights into development institutions, and yet my approach remains eclectic. Without reflecting on my positionality, I think I would not have been able to see how much colonial differences on knowledge disseminated in global rule of law supporting activities shapes the means of the intervention. I think I would also not have been able to approach tensions and dynamics among institutions not through a lens of eurocentric state ordering and theory but in a critical way exploring them as part of development in institutional settings characterized by political volatility, informal rules and differences in institutional efficiency. Lastly, and this is going back in my reflections during my academic studies, I would not have been able to think about different forms of developments, rules of law, and modernities as such.

[159] See e.g., Gupta and Ferguson (2002) on thinking differently about the state and neoliberal governmentality.

The above detailed reflection influenced my research practice by ways of constantly reminding myself on questioning what I experienced, wrote down and assessed and the way I did it, even if it is practically impossible to be aware of it all the time. However, instead of controlling and limiting the process, the critical reflections helped to broaden my abilities to perceive the phenomena and to establish a research practice and ethos based on the reflections.

## 3.2 Methodological choices

To explore implementation problems in of rule of law projects and human rights judgments, I opted for a qualitative, exploratory approach adopting process tracing as a guiding methodology. In the research, I focus on interventions of World Bank and the IACtHR in Peru and Argentina between 1998 and 2018. The analysis of the implementation processes draws on 35 qualitative interviews and fieldwork carried out in Washington D.C., San José (Costa Rica), Buenos Aires and Lima in late 2017 and beginning of 2018.

I opted for a qualitative methodology er to explore the problems during implementation. Measuring compliance rates in the case of judgments or indicators of projects fulfilment is telling little about the political processes and dynamics during implementation. Compliance rates change over time within one country and depending on the case. Similarly, little information about the actual negotiations behind closed doors and on political maneuvering is available since official documentation is outcome- rather than process-oriented and only provides room for the stories of selected actors in a predetermined format and language. I decided on an exploratory process tracing approach as the method of choice for this study. Process tracing allows me to include longer historical descriptions of institutional dynamics necessary for the analysis because implementation spans over longer periods and processes are oftentimes not blocked altogether but show periods of smoother implementation and setbacks in other political constellations and periods. Qualitative research also allowed me to include interview partners from different governmental branches and institutions and to cast a wide net of material. Elements might be more problematic to some actors than to others and reform processes might be integrated and implemented by a particular actor at national level and rejected by others. I combine in the approach in exploratory process tracing qualitative interviews, participatory observation as well as primary documents on historical background information about the institutional settings, cases, and reforms as auxiliary sources. In the following section, I describe the different elements of the methodological approach in this study. Firstly, outlining variants and uses of process tracing (3.2.1) and analytical tools

supporting my research (3.2.2 and 3.2.3) before moving on to the logic of comparison (3.2.4), the coding process (3.2.5) and elements in my analytical framework (3.2.6).

### 3.2.1 Exploratory process tracing

The research addresses problems in implementation of judicial reforms in financial development support and international human rights judgments. In scholarly literature, different explanatory patterns for the problems can be identified, relating to context, design, and coordination of actors during procedures. In an exploratory variant of process tracing, I seek to carve out elements of these dimensions and approach them differently in the analysis to ultimately reconceptualize the problems. The research is exploratory as it builds on explanatory patterns put forward in literature and develops them further. The research is critical as it questions the framing of the problems and suggests alternative readings. The approach in this study differs from traditional positivist process tracing that relies on strong assumptions of causality.

Traditional process tracing approaches seek to test different causal mechanisms throughout the process for their contribution to a specific outcome (George and Bennett 2005; Goertz and Mahoney 2012; Beach and Pedersen 2013; see also Bennett and Checkel 2014). Jeffrey T. Checkel describes causal mechanisms as a "set of hypotheses that could be the explanation for one social phenomena" (2008: 115). I am not following a causality approach in process tracing (PT) but instead adopt an exploratory and interpretative approach relying on abduction, starting with the puzzle of troublesome implementation. Therewith, I seek to contribute to a more nuanced description of elements in dimensions of problems in a particular setting and lastly also to questioning the interpretation of the outcome – failed reforms and non-complied judgments – and suggest this reading is shorthanded and problematic in itself.

Literature distinguishes between three variants of PT and three different purposes differentiating it into a theory testing, a theory building and an explaining-outcome variant (George and Bennett 2005; Beach and Pedersen 2013), each one having specific methodological implications for research design. PT can serve for (1) testing whether a generalizable causal mechanism exists in a case and functions as expected; (2) building a generalizable mechanism from evidence in a case, and (3) explaining a particular outcome. The

methods differ regarding whether they are theory- or case-centric, along with what they are tracing and the types of inferences they enable (Beach and Pedersen 2013: 22).[160]
The theory building and theory-testing variant of PT have in common that they focus on tracing a hypothetical causal mechanism by detecting its empirical manifestations. The main difference lies in the inductive approach in theory building and the deductive approach in theory testing. I am applying an iterative approach, with rounds of coding and memo writing. I apply a variant of a theory building in this research, aiming at reconceptualizing implementation problems in global rule of law support by exploring elements to the processes along the analytical dimensions of context, design, and coordination based on empirical research. The theory building effort in this study lies in fleshing out the explanatory elements for implementation problems and in comparing the two different actors in global governance engaging in rule of law support to then reconceptualize the problems during implementation. Understanding the problems better and differently can help to identify problems as constitutive moments for rule of law development.

Albeit PT is nowadays in IR scholarship oftentimes referred to in its positivist, that is, the deductive variant, Vennesson underlines that in the original formulation induction played a major role (2008) also generating new mechanisms and refining existing ones from evidence. He underlines how a combination of deductive ex-post reasoning based in combination with inductive theory building helps to exploring the "how" of the research question (2008: 224, 232- 236). In this study, I focus on the "how of implementation". I do not seek to establish a formal link (presence or absence) between X and Y but to explore and refine new elements in dimensions to implementation problems and to question conventional explanations. I seek to explore how the different problems "manifest and the context in which it happens" fleshing out the different dimensions of the social and political phenomena (Vennesson 2008: 233). I am relying mainly on qualitative interviews, document analysis and literature review for historical background analysis. Without delving too deep into historical analysis, I also included historical

[160] Beach and Pedersen sum up: "The core difference between theory- testing and – building process- tracing involves theory before fact versus fact before theory. In theory- building process- tracing, empirical material is used to build a hypothesized theory, inferring first that what is found reflects the observable implications of an underlying causal mechanism. A second leap is then made by inferring from these observable implications that they reflected an underlying causal mechanism. However, both variants share a focus on tracing a generalizable causal mechanism by detecting its empirical manifestations." (2013:16)

description of the institutional settings for setting up the context of the process tracing exercise.[161]

### 3.2.2 Developing elements to the dimensions of implementation problems: context, design and coordination

The process tracing exercise starts with describing the political background of the implementation processes in which the political phenomena – failed reforms and non-complied judgments – occur. The puzzling observation when looking at the implementation problems was that I expected tensions and dynamics among branches in such highly political interventions, yet they were framed as problems to implementation rather than parts of the development processes. The process of abduction started with approaching these problems. Implementation problems did not manifest in the same way in the two countries; however, the puzzling observation was that albeit the implementation context was different, and the reform and judgments differed, similarities were observable along different dimensions to the problems.

Literature stresses context insensitivity (Kleinfeld 2010; Hillebrecht 2012; Hammergren 2015) opposition against the international actor (Soley and Steininger 2018) incapacity and coordination problems (Chayes et al.1998; Riggirozzi 2005; Huneeus 2011; Vannuccini 2012) as factors influencing "failed reforms" and "low compliance rates" with international judgments. Yet, as Kapiszweski and Taylor (2008, 2013) stress, more empirical studies could help to reveal elements of the processes and the factors themselves.

For my analytical framework, I draw on dimensions of explanatory patterns put forward in scholarly literature. Through iterative rounds of coding and memo writing, I revealed additional elements of the dimensions to implementation problems. Approaching the analysis along the dimensions of context, design and cooperation from critical perspectives helped to develop further the nuances of the elements and to suggest ways to interpret the problems differently. I focused in the empirical chapters on two aspects of relationships: 1. problems between international actor and national actors and 2. problems among national actors. For exploring the processes, I approached moments in which problems emerged. Dimensions of implementation problems are intertwined and yet can also be approached separately. During the coding several

[161] Bengtsson and Ruonavaara emphasize: "The choice of what is narrated is, to a certain extent, theoretically laden. Tracing a path dependent process requires distinguishing what is completely contingent from what is expected on the grounds of what has happened before, something that implies contrastive thinking." (2017: 51) I precisely depart from traditional process tracing in the focus on path dependencies (see e.g., Mahoney 2000) producing event sequences in processes and institutions in exploring how problems and factors contributing to problems can initiate change (see also Bengtsson and Ruonavaara 2017).

questions emerged, that allowed me building clusters for identifying elements or components of the dimensions. These questions helped to identify what might indicate "implementation problems" in the different dimensions e.g., a blockade situation among branches of government, rivalries in implementing bodies, arguments put forward in public hearings and official reports for rejecting the design of reforms/reparation orders, and political struggle and burden shifting among actors to take responsibility for implementing parts of reforms/judgments.

In relation to **context,** the following questions emerged during the coding exercise that helped me identifying evidence for implementation problems:
*How did global governance actors assess the context? Did they take the previous assessment into account, neglect information?*
*How where the different branches of government approaching implementation? Did some or all actors block implementation? If so, on what grounds? Were political debates at national level salient concerning the process of implementation and/or the content of reform/judgment?*

In relation to **design and form of reforms and judgments,** I addressed the following questions during analysis:
*Did branches of government/actors claim institutional incapacity for implementation problems? Did they claim other previously overlooked structural obstacles (e.g., bureaucratic, financial)?*
*How were global governance actors negotiating possible changes/amendments of reforms? How did the Court interpret the compliance with judgments?*
*Was the national legislation necessary for implementation already in place or did it have to be changed?*

Addressing **coordination**, I developed the following questions:
*Did global governance actors specify the entity at national level in charge for implementing the judgments or reforms? Did they neglect to include important actors?*
*Was one branch of government predominantly addressed or equipped with resources during implementation?*
*Were branches of government shifting burdens and responsibilities to implement the judgments or reforms amongst them during implementation?*

The questions and elements to the dimensions evolved inductively during the analysis of the material and after fieldwork and compose elements like sequencing and timing of procedures, reporting procedures. Different to the explanatory patterns in literature that imply causality for the factors leading to failure of reforms and judgments, I approach the processes in an open-ended manner, not focusing solely on successful implementation but exploring the processes as such.

The analysis concerns the international governance structure and structures and dynamics at national level, including different branches of government and administrative bodies. Addressing actors' dynamics and policies at national level and helps to reveal the mismatch between approaching states as monolithic blocks, on the one hand, and in practice implementation relying on fractions within the state, on the other. The analysis, therefore, addresses factors including the structural level (macro level) and factors that concern the meso level (that is state actor level, different state departments, ministries) (see Beach and Pedersen 2013: 42 – 43, 54). By combining in the analysis factors from different levels, I seek to address the relationship between the structure of global governance and procedures, and structure and politics of implementation at national level. In all, I maintain that actors cannot be separated from structures and vice-versa (Maurice 1998; see also Landman 2000).

*Limitations and generalizability of the study and challenges of the research*

I depart from traditional process tracing by having a lighter approach on the units for analysis – namely the causal mechanism – by looking at the elements and interaction of what I termed dimensions to the problems. In traditional process tracing, causality is defined too narrowly[162]. I approach exploratory process tracing as a variant that is focusing on the exploration of the dimensions and a reconceptualization of explanations for the phenomena – the failure and non-compliance – rather than an approach that seeks to establish or test causality between factors and outcome. This process of abduction is reconcilable with my epistemological approach adopting critical pragmatist approach in this study. This said, I would like to draw attention to some caveats in my research:

I am looking at state agents and global governance actors, state institutions, and governance structures. Other entities such as NGOs and civil society actors' part of implementation processes are not addressed in this research. A methodological challenge is the impossibility to tell apart actors from structure. I did not focus in my research on the relationship between actors and structure in single events of problems to determine whether one or the other was

[162] Albeit conventional constructivist also adopted process tracing as a method (see e.g., Risse et al.1999).

predominant in specific dimension to the problems. I rather attempt to describe tendencies and the interplay of both throughout the process in a bracketing exercise.

Lastly, limitations of the findings regarding the time and space: I explored implementation problems in processes in Peru and Argentina in a timespan from 1998 to 2018. Albeit the research is designed comparatively, the generalizability of the findings and the contribution to theory building is thus limited as the problems happen in a particular historical and regional setting. Analyzing the interventions of two seemingly different global governance actors, Bank and Court in two countries over time, however, allow me to make cross-case interference and to describe and compare how the elements to the problems vary in different institutional settings. Implementation problems are manifest in almost all countries involved in judicial reform and members of the American Convention implementing judgments of the IACtHR. The exercise of exploring the processes, thus, could be expanded to other institutional settings and other policy fields, possibly giving insights into more variations of functioning of the elements to the dimensions of problems. By exploring them and describing the elements, I seek to take a start and to contribute to theory building for conceptualizing differently implementation problems in rule of law support.

I focus on rule of law support activities that address state actors. My empirical analysis is thus limited to the actors and the institutional frameworks and seeks to study contradictions and problems from within these processes. The adopted approach rules out a more bottom-up approach for studying perils of judicial change, state ordering or change through law. This is the major caveat of this work. However, I analyze these activities to not only point out contradictions and problems but also suggest to reconceptualize the interpretation of problems and to flexibilize the means of intervention. Eventually, albeit outside the scope of the analysis in this study, alternative versions of state ordering could emerge in such constitutive moments. The last chapter provides a glimpse on how tensions could bear transformative potential outside mainstream state ordering and hegemonic global governance.

I am not suggesting that intra-institutional and inter-institutional dynamics are not troublesome even without the interference of international actors. The point is exactly to acknowledge and explore the tensions and the relationship with global governance activities. I do not seek to measure the degree of instability and intra-institutional power struggles or the level of institutional strengthening but to explore the processes. Vennesson outlines four main challenges of process tracing: the reliance on pre-existing theories, the assumption that a case can be treated autonomously and that the cases are distinct from one another; the need for

empirical data; and the pitfalls of cognitive biases (2008: 236; see also Mahoney 2012). I confront those challenges, firstly, by adopting an approach that seeks to explore the elements to the process. Secondly, by analyzing the interconnectedness of the dimensions. I also describe how the processes as such influence each other especially regarding political maneuvering in one process also influencing other processes e.g., the open rejection of the authority of actors and by recognizing spillover effects. Dealing with the fourth challenge of cognitive bias that implies ignoring negative results, I seek confrontation by considering alternative explanations for implementation problems that came up as additional elements or contradictory elements and discuss them in chapter seven.

### 3.2.3 Qualitative interviews and participatory observation

For the process tracing, I draw strongly on expert interviews that took place during two fieldwork stages and a three-month-long period of participant observation in Costa Rica with the Inter-American Court of Human Rights.

In line with Ronald Hitzler and colleagues (1994), in this research I consider a person an expert if they possess an "institutionalized authority to construct reality". The knowledge of the experts is expected to "structure [...] the conditions of action of other actors in the expert's field" (Bogner et al. 2009:55). Following Alexander Bogner and colleagues (2009) I approached the experts that participated in the interviews as representatives of the groups that take part in negotiating and implementing judicial reforms and IACtHR judgments. Some of the experts still working at the two institutions were not only involved in carrying out the reforms itself during the period I am focusing on but form part of the current staff, contributing to shape and act on approaches of Bank and Court described in previous chapters.

Selecting expert interviews as one of the tools for studying the process of state ordering, means positioning myself regarding the knowledge I defined as necessary and important for understanding problems in implementation. The scope of the study and the research question points to these actors. As outlined previously, my research is centered on global governance actors and institutional actors. The state-centered approach in my study is also the limitation for my selection of interview partners: I did not include views and voices from social actors and other groups structurally excluded from the processes of institution building and reform projects of Bank and Court. Thus, what I know (interview related) about institutions, I learnt from people working at the institutions. Drawing on scholars working on epistemic communities in development and law, I consider knowledge oftentimes as circular and embedded in the narratives of modernization (e.g., Santos 2006; Kennedy 2018; see also Meuser and Nagel

2009b on epistemic communities). This said and recognizing the limitations of my selection process, I nevertheless attempted to include a variety of actors with different ideological background involved in the implementation processes. I aimed at selecting the interview partners paying attention and seeking to include the various actors and fractions involved in the processes (e.g., representatives of the global governance actors, the executive, the judiciary, representatives of the victims before the IACtHR). This was not possible for each case and project, sometimes not all the participating actors in projects and the implementation of reparation orders were interviewed. Sometimes interview partners covered various cases or were involved in several reforms of the Bank. Some of the interviewed persons changed positions in government and/or global governance institutions (see Annex 1 for a list of the interviewed persons).

In late 2017, I interviewed staff at the World Bank headquarter in Washington D.C. In early 2018, I spent a research fellowship at the Inter-American Court of Human Rights in San José. In this time, I engaged closely with lawyers at the IACtHR and the research community based in Costa Rica or travelling to visit public audiences at the Court. During this three-month research stage, I contributed to the work of the team in charge of the supervision of compliance with judgments within the Court. The first case the team was involved in during my fellowship was the *Case Barrios Altos* and *La Cantuta.* Representation of the victims had requested a public hearing at the Court and the team was preparing the meeting and memorandums for the judges of the Court including jurisprudence concerning humanitarian pardons. I was asked to provide research on international jurisprudence drawing mostly on international criminal law. Later during the fellowship, I contributed to preparing the joint supervision of reparation orders for other cases, engaging with, by then, still confidential official reports of the parties to the Court.[163] Being embedded in the work of the team, having access to the reporting material and actively participating in public hearings and team meetings, informed my understanding of the implementation but simultaneously possibly blurred my analysis of this process as I was personally involved and attached. From the beginning onwards, I tried to be as transparent as possible about my position as a researcher was but also as a visiting fellow working in cases. Both, observing the work and participating in daily tasks required me to switch positions, and to reflect on the processes. My observations and reflection form part of the field notes. The fact

[163] The Court started publishing these reports of the parties to the case in 2019.

that I did not engage in participatory observation with the World Bank possibly presents a bias of the research, engaging less with practitioners and procedures at this institution.[164]

Subsequently, in April and May 2018, I interviewed representatives of government bodies in charge of the implementation of judicial reforms and the implementation of judgments, judges and human rights lawyers in Peru and Argentina and interviewed former and current World Bank staff in the countries.

The sequencing of the field research stages is important for understanding the development of the questionnaire and my own position as a researcher, given that "interviewing is unavoidably historically, politically and contextually bound" (Fontana and Frey 2005: 965). The first two stages at the institutions Bank and Court gave me opportunities to develop the historical backgrounds, to understand politics around implementation and approaches of the global governance actors and to learn about procedural aspects. Interviews also often provided the basis to later establish contact with people in Peru and Argentina working on the projects and in government positions. At the same time, this experience also informed my professionalism in the interview situations and the ways I structured the encounters, and so the interview focus and techniques adapted, influencing the subsequent interviews in Peru and Argentina. As the situations developed and initial elements in the problems emerged more clearly, it helped to focus my questions in relation to e.g., the dynamics among branches. However, focusing also entailed narrowing down my attention and capacity to perceive other phenomena in the field e.g., power struggles over resources. Furthermore, travelling first to Peru then to Argentina meant that experiences in Peru changed my approach and style in conducting the interviews, possibly leading to positioning myself and framing questions in subsequent interviews differently. It also meant the process of comparison did not start only in the analysis back in Germany. Fieldwork, therefore, refers to four different sequences and one field at the time. The material and the analysis that follow in the next chapters will necessarily reflect my different roles and my changing position throughout the field research and the distance/closeness to the field.

*Identifying and approaching the interview partners*

I identified interview partners mainly through three techniques: gatekeepers, snowballing, and review of literature, primary material and organigrams (see e.g., King et al. 2018). I approached

[164] However, practical insights of the work and processes of other developing agencies, IOs and NGOs part of judicial reform processes informed my understanding of the development context, e.g., background interviews with members of GIZ projects and practical insights into the work of the German Federal Ministry for Economic and Development cooperation, and the Credit Institute for Reconstruction (Kreditanstalt für Wiederaufbau, KfW).

experts identified in academic literature, official documents, and organigrams mostly via e-mail. During the stay at the IACtHR, I personally interacted with the interviewees beforehand. Some persons were gatekeepers for establishing contacts with colleagues in the field, academics working in related fields, and former staff members of Bank and Court. Following their suggestions and mentioning the names of my contacts opened doors in institutions, ministries, and organizations. Interview partners also directly established those contacts for me. This snowballing allowed me to identify interview partners I had not previously considered but that were key to the process. Snowballing bears the risk of leaving out crucial interview partners or views on a certain topic relying too much on the expertise of the experts of knowing the field and suggesting like-minded people (King et al. 2018: 32-35). Aware of this risk, I tried to also channel and control the process guided by the premise of approaching people with diverse backgrounds and views e.g., including member of the judiciary in Peru having a conservative approach towards the IACtHR and persons with a seemingly more progressive standpoint. The process of interview partner selection developed organically during fieldwork, but it was also closely monitored and corrected with a view to representation when necessary. Additionally, I aimed to include experts with different positions within the institutions. People have or had high-ranking positions in government, national courts, or global governance institutions; others were or are more closely involved in the implementation of reforms and judgments. Interview partners also sometimes engaged in academia and performing a practitioner's role e.g., as consultants in projects; others switched from active positions in litigation to academia.[165] About half of the interview partners also published their work on the different subjects, in either academic journals or practitioner literature and policy reports.

Oftentimes during interviews, people knew and referred to each other. Sometimes this provided rich grounds for initial comparison of standpoints and views. However, the closeness of the field also possibly constituted a hindrance for speaking openly. Since many of the people interviewed are or have been part of litigation processes that are partially confidential or were part of a team working in politically sensible environments conducting Bank reforms, ethical conduct had high priority during fieldwork. Being transparent about my research, working with informed consent forms, and protecting anonymity when requested hopefully contributed to a confident environment both for the interview partners and for myself. I always explained the

[165] While this might be especially interesting for network analysis and practice theory, it is less relevant in this particular study since I do not aim to map epistemic communities or identify practices than can be attributed to only one group of interview partners. However, seeing two or more sides of the process might inform the implementation process on the individual level.

framework and terms of our interview including the possibility to withdraw from the situation and to request subsequent information.

*Interview style and guidelines for questionnaire*

The guidelines for the interviews developed over time and were adopted after interviews and individualized according to the profile of the interviewed person (e.g., previous staff of Bank, consultant for Bank and/or government, member of the judiciary, attorney in the Court and/or academic). The structure, however, remained broadly the same: comprising sections relating to the professional background of the interviewed person, specific questions relating to projects and judgments and more broad questions regarding separation of powers, institutional dynamics and juridification and politicization (see Annex 3 for guidelines). The first set of questions I developed based on initial readings on the so-called implementation problems. Working with initially guiding questions allowed me to provide consistency regarding the structure but also to adapt not only to the interviewee but also to carefully refocus my study during the fieldwork (King et al. 2018: 27-28, 38) e.g., in relation to the topic of the gatekeeping position of the executive and burden shifting among branches of government.

The interviews were semi-structured. The form of the interviews was open, and I formulated follow-up questions during the interviews.[166] Often subsequent email contact with the interviewees completed our conversation, e.g., providing information on issues touched upon during the interview. The overall duration of the interviews was one hour. Interviews were conducted in English, Spanish, and German. Most interviews took place in person. Only four interviews were conducted via Skype. Unless otherwise requested, they were recorded and subsequently transcribed. In addition to the recording and the transcription, notes taken during the interview together with preliminary observations and thoughts I had after the interview (collected in sketchbooks) also informed the coding process. Not only the interviews but also talks over lunch with other visiting scholars and staff of the Court, discussions with academics during and after the research stage, academic discussions at conferences and in colloquia informed my understanding and the research process.

[166] In framing and interpreting, the interview the researcher is inevitably able to influence the analysis (Fontana and Frey 2005: 713-714). Framing in the interviews took place regarding the use of specific vocabulary and reference to cases and/or projects, creating a "sharedness of meanings" (Fontana and Frey 2005: 713). On the one hand, this served for creating common ground between interviewer and interviewee and established trust, on the other hand, it determined the style of conversation (e.g., technical, legal), recalled immediately only certain cases and reforms and limited the interview to the "expert group" and the quasi expert, the interviewer (Pfadenhauer 2009: 81-87). This framing possibly closed room for alternative ideas and interpretations.

Only a few problems emerged during interviews among them critical time management (e.g., not having asked all questions before the interview partner had to leave) due to spontaneously upcoming other obligations of the interview partners. Only two interviews were not included in the corpus of material because the interview turned into directions not directly related to the research itself. Regarding the point fair share of all institutions included in the process I found myself unable to confirm an interview with current staff of the department representing Argentina before the Court. Albeit requested several times and having established first contact, the interview never materialized. However, I was able to speak to staff formerly active in this department during the beginning of the 2000s.

*Selection of judgments and reforms*

The study covers all judicial reform projects of the Bank that took place in Peru and Argentina during the time span 1998 - 2018; however, it does not cover the implementation processes of all judgments issued. Thus, the sample of cases in the time span under consideration is not comprehensive but focused on a selection of judgments (see Annex 2). Since it is not enough to look at the number of resolutions issued during supervisions to identify "problematic implementations", I asked the interviewees to give examples of cases, and clarifications of their framework for "good" and "bad" and "failed" examples of implementation. The selection is therefore also based on what cases and reforms interview partners mentioned as "most troublesome" or "smooth implementation", on the one hand, and on official documents and secondary literature, on the other. Differences in the views of the interviewees as well as parallels among them concerning troublesome examples for implementation thus also informed my analysis.

In relation to the Bank, I included reform projects that specifically addressed the judicial branch e.g., Model Court Projects, measures concerning the equipment of the judiciary, E-Governance; other projects e.g., transparency projects or mitigation of corruption projects are not included in the analyses. However, I recognize a potential influence of other projects financed by the Bank in negotiations and tried to refer to them explicit in quotes provided in the analytical sections as well as in the sections providing background information of the Banks engagement in the countries.

*Document analysis and other auxiliary sources*

I also engaged in document analysis including official documents issued by the Bank and the Court in the coding process (see Annex 2). Analyzing the content helped to deduct the

contextual part of process tracing. The document analysis also included an analysis of the form of the reporting structure. The review of documents was not comprehensive, as I did not include all resolutions of supervisions and all reports issued in relation to the Bank projects that have been implemented. The selection of documents included in the analysis was determined by a pre-selection singling out documents that helped to identify reports and resolutions relating to problems in implementation. Audio material from public hearings in the cases *Fonteveccia v. Argentina* and joint supervision *Barrios Altos/La Cantuta v. Peru* was also included in the analysis as auxiliary sources. Media coverage and newspaper articles (including online and print media) provided contextual information on institutional dynamics, politically salient debates, and intra-branch crisis (e.g., in relation to corruption scandals in the Argentine judiciary, or the leaving of office of former President Kuczynski in Peru). Studying media was also necessary for preparing myself before interviews, as some of the interview partners were involved in daily politics. The analysis also helped to being able to situate the implementation processes of judgments and reforms in the broader political context.

### 3.2.4 Comparative aspects

The exploration of elements to the dimensions of implementation problems draws on the comparative analysis of interventions of Bank and Court in Peru and Argentina. Combining in the research a study of interventions of the financial global development actor World Bank and the normative and judicial regional actor Court is also a novelty in approaches to studying implementation problems in global rule of law support. Therewith, I hope to contribute to a more generalizable pragmatist critique on implementation problems in rule of law supporting activities.

International comparative research studies the manifestation of a phenomenon in more than one spatial and temporal setting, using the same research tools r to compare the cases systematically (Hantrais 2008: 2). I studied the interventions of the global governance actors in two different institutional settings. Institutional settings for the purpose of this study are defined as arrangements and dynamics among institutions within one country in a specific period and the interaction with the global governance institutions during that time. Applying this comparative research strategy, I explore the dimensions to the problems in Peru and Argentina and compare the approaches of Bank and Court. In a second step, I draw on the comparison of how the elements played out in Peru and Argentina to find out more about what might be generalizable beyond the institutional settings. The specific problems during implementation are findings "that are temporarily limited to the cases studied" (Della Porta 2008: 206). Further research,

including more global rule of law actors and processes in other institutional settings or a comparison throughout time, could provide insights into the multiple problems of implementation of global governance rule of law promotion. This study provides a glimpse on why comparative research can help to formulate and deepen the critique on global governance interventions and the framing of implementation problems. The institutional settings I focus on are the manifest scope of study. The potential scope of study extends to other Latin American countries in which the IACtHR is supervising judgments, and the World Bank conducts financial development projects in the judicial sector. The selection of the institutional settings and the specific period are connected to my research puzzle: post-authoritarian Latin American democracies in which both Bank and Court actively engage in rule of law promotion by supporting reforms and issuing judgments. The selection process was therefore also influenced by the scarceness/existence of events (Della Porta 2008: 213). In other Latin American countries, few judgments have been implemented and/or there were few or no interventions in the judicial sector by the World Bank. Access to the field, my own previous familiarity with institutional settings and the availability of information on the implementation problems were additional factors influencing the choice for comparisons.

The following sections described more in detail reasons for comparing the global governance actors Bank and Court and the selection of the institutional settings.

*Reasons for comparing Bank and Court*

I am comparing global governance rule of law promotion by World Bank and Inter-American Court of Human Rights. In previous chapters, I outlined the convergence of approaches to rule of law support of the two actors that are seemingly at opposing ends of the global governance actor spectrum, politically and in relation to the means applied. The character of their intervention is different and yet logics of change overlap considerably. I decided for a comparative research strategy because I wanted to approach implementation problems in global rule of law support from a broader angle. Based on an initial inquiry about the problematic framing of failed projects and non-complied judgment I seek to approach implementation problems from a conceptual and a practical level.

The selection of actors in this regional context was also dependent on their range of activities and the relative institutional power in comparison to other global governance actors.

As discussed in previous chapters, the approach to rule of law support of the two actors seek to focus on institutional strengthening. Other actors like the *Inter-American Development Bank*

(IDB),[167] the *US Department for International Development* (USAID), UN organizations or the *German Development Agency* (GIZ) in the development realm, or the Andean Court and other regional commercial Courts also engage on different levels e.g., with civil society actors and with projects of different financial volume in Peru and Argentina. However, what is particular of the actors Bank and Court is the scope of intervention (and resources attached to it) into the institutional fabric, addressing institutional reordering and structural changes. Whereas mandates and means of the financial actor World Bank and the human rights actor IACtHR are distinct, both engage with questions of institutional strengthening sometimes stipulating similar activities (e.g., changing of laws) and engaging with similar actors (e.g., judiciaries, high courts). The Bank calls the supporting activities "reforms", without them necessarily being reforms in the sense of a change in a particular policy field but rather a project that seeks to stimulate or contribute a larger transformation in a sector. The IACtHR has a judicial mandate and issues judgments, advisory opinions, and provisional measures. The judicial rule of law supporting activities indirectly and directly address institutional ordering, demanding national legislative action and/or demanding judicial and executive action. The IACtHR is a particularly interesting choice of actors since it is described as a relatively progressive regional Court in is approach to interpret international human rights law. When it comes to implementation, however, the IACtHR largely relies on conventional structures for enforcement and procedures.

*Reasons for studying problems in implementation processes in Peru and Argentina*

Peru and Argentina share characteristics of their institutional settings. The institutional fabric in both countries is characterized by strong presidentialism as power is concentrated in the executive branch. The executive in both countries is oftentimes infringing with judicial power. Paru and Argentina also have a history of interventions of international financial institutions. World Bank and IMF (International Monetary Fund) supported structural adjustment policies in the 1980s and the strong focus on neoliberal reforms under President Fujimori supported by international economic actors heavily influenced Peru's economy and political system. In Argentina, the deep interconnectedness to international creditors became especially apparent in the 2000/2001 economic crisis that also led to a crisis of the political system. The Inter-American Court influenced both countries in periods after autocratic rulers and military dictatorship, especially by issuing landmark decisions that stroke down amnesty provisions.

[167] The informal division of labor between the World Bank and the IDB (sometimes the USAID) is that the IDB engages in issues of criminal law, whereas the other organizations remain focused on to structural judicial questions (see also Rodríguez-Garavito 2011a on actors in this field in Latin America).

While the institutional settings share characteristics in institutional fabric and historic relationships with global governance actors like the influence of IACtHR jurisprudence on national litigation, strong presidentialism, and an autocratic past, they also show considerable differences in some aspects e.g., in relation to pressure from civil society regarding loans and implementation of reparation orders, different roles of the judiciaries in the countries in the balance of power, political volatility, and presidential terms.

In comparison with Peru, Argentina has a more active parliament controlling the other branches and a less pronounced rivalry between the branches blocking each other, thereby potentially easing coordination problems. The judiciary in both countries plays an active role controlling the executive nowadays as well as in the past, including being an active player in transitional justice efforts, judging high-ranking officials in the aftermath of autocratic rule. However, the level of confrontation with the executive and the dynamics of these branches differed over time. Again, broadly speaking, the institutional setting in Peru being more volatile, dynamic and tense regarding inter-institutional and intra-institutional rivalries is assumed to influence the implementation process differently than it did in the Argentine context. The institutional settings will also be described in the beginning of the empirical chapters.

Beyond this background, I seek to explore implementation problems. Measured in conventional terms of compliance rates and success/failure of reforms the countries at the outset seem to be at opposed ends of the spectrum: Argentina seemingly complying with more reparation orders but implementing Bank projects less successfully while Peru is complying less with IACtHR orders and more successfully executing the projects. Peru was long considered the "poster boy" by the Bank for successful projects under Fujimori (1990–2000) and subsequent governments. The implementation of human rights judgments has stagnated and triggered conflicts during implementation. In Argentina, international financial development cooperation was rejected during the Kirchner era (2003–2015), while during that time the government pursued a proactive human rights policy. The government of Mauricio Macri (2015–2019) seemed to have reversed those tendencies. The approaches the executive took during the period are at a first glance somehow diametric: In Argentina, the executive leaned in favor of the Court, rejecting the Bank during the Kirchner era, opened towards the Bank, and interacted more critically towards the Court during Macri. In Peru, all subsequent governments have welcomed Bank reforms after Fujimori while the compliance rate with Court judgments was low.

These institutional settings allow for exploring the elements to implementation analyzing the relationship and interplay between the national actors as well as the interaction with the global governance actors. As outlined before, implementation and problems therein are not necessarily

only connected to official government policies that trickle down to lower administrative bodies but also to more nuanced and complicated power struggles. The project thus seeks to explore elements in different institutional settings and shed light on those dynamics of the actors involved in the processes.

*Timeframe and context*

The researched timeframe spans across almost two decades, starting in 1998 and ending in 2018. In Peru, this is the time after the autocratic government of Fujimori. In Argentina, the period comprises research activities of the Bank in the 1990s but starts with the analysis of the processes in the aftermath of the political reordering after the financial default in 2001. In relation to the global governance actors, the time frame includes the implementation periods of a series of judgments of the IACtHR and Bank projects in Peru (2004–2011 and 2011–2016) and in Argentina (1998–2006). As outlined above, I will not be able to trace the entire implementation processes of all judgments and reforms. Rather, I seek to analyze specific moments of the implementation period. Collier stresses in regard: "[T]he *descriptive* component of process tracing begins not with observing change or sequence, but rather with taking good snapshots at a series of specific moments. To characterize a process, we must be able to characterize key steps in the process, which in turn permits good analysis of change and sequence." (Collier 2011: 824, italics in original). Similarly, I will not be able to analyze all tensions among actors and all dynamics between them throughout the entire time. The study aims at shedding light on problems during implementation and to reveal the tensions and dynamics evolving around them and suggest problems can be constitutive moments for rule of law development.[168]

The relationship among actors, both internally as well as the relationship with the global governance actors, changed throughout the time I consider for analysis of implementation processes in this research. Political changes also marked the period of field research. For example, the IACtHR was heavily criticized during early 2018 for its political interference in

[168] This is different to the concept of critical junctures as suggested for example by Collier and Collier (1991); Mahoney (2000). This concept describes periods of significant transition where institutional change could follow turning one way or the other. I also do not approach the constitutive moments in terms of focal points (as suggested by Hillebrecht 2012, 2014b in relation to the Courts judgements) where actors can orientate their policy concerning a special event or policy. Bengtsson and Ruonavaara approach focal points for such decision points, where the restricting role of dominant institutions is made explicit." (2017: 52). My approach resonates with them as they also stress "However, more often, the decision-making at political focal points only served to confirm and highlight the path dependence of existing institutions." (2017: 53). However, constitutive moments are still different to this approach as I suggest that agency is restricted. Constitutive moments are thus, moments where criticality can enter the process; but without necessarily having possibilities to exercise formal decision-making power.

Peru. That was the period of the participatory observation at the IACtHR, moving on to interviews in Peru. In addition, political turmoil at national levels e.g., corruption scandals, resigning of presidents/impeachments characterized the period covered in this study. What is more, the political turmoils have been the context of my fieldwork, yet they did not change the availability of key actors for interviews or hindered me in carrying out my research in other ways e.g., geographical restrictions due to protest, closing of congress, et cetera.

These changing circumstances, albeit they might represent peaks in the political day-to-day business, I consider important in my research as they include studying political volatility as an element to cooperation problems. Instead of presenting a problem for the consistency of the institutional settings and the elements, they are part of my analysis and context alike.

### 3.2.5 Material, coding and analysis

The material comprises 35 interviews, transcripts, memos, and field notes as well as 55 primary documents of Bank and Court including project implementation reports, judgments, and resolutions of supervision (see Annex 2). I analyzed interview transcripts and primary documents using coding techniques (Fielding and Lee 1998; Weston et al. 2001) and triangulation (Kapiszweski et al. 2015). Coding helped to explore the dimensions discussed and analyzed in the empirical chapters and to write the descriptive part for process tracing. I follow Cynthia Weston and colleagues in their understanding of coding as being part of the analysis instead of merely a previous step, as they underline "[t]here is a reciprocal relationship between the development of a coding system and the evolution of understanding a phenomenon." Weston and colleagues therefore suggest the "development of the coding system is a critical analysis tool" itself (2001: 397). I used initial categories of codes to pre-structure the material and then subsequently engaged in several rounds of coding, exploring elements and phenomena spanning across the dimensions while also getting more familiar with the processes and their relationships. However, Fielding and Lee remind that one must be cautious that coding is not taking over the analysis rather than serving it (Fielding and Lee 1998: 119). I coded the interview transcripts to prepare them for comparative analysis. Drawing on coding techniques described by Johnny Saldana (2013), I first inductively built units of meaning across the elements in relation to the assumptions and subsequently refined those elements. Lastly, I restructured the dimensions and analyzed the patterns across them (see e.g., Maykut and Morehouse 2002). Since coding in my research strategy was also an exercise of identifying new features of other codes emerging from the data were grouped together, building a new cluster or typology eventually developed into elements of the dimensions (see chapter 7 reflecting on

the development of these elements). Analytic concepts were simultaneously applied to structure the material and emerged from the material, applying an abductive approach in different rounds of coding (see Annex 4). Coding eventually helped to identify constitutive elements in the problems during the processes (see chapter, 7.2).

To build the basis for the analysis, I used triangulation of data (Fielding 2012; Humphrey and Watson 2009), from expert interviews, secondary and primary sources, and participatory observation during fieldwork. Triangulation of data also helped me to understand some of the political dynamics. Secondary literature as well as interviews helped to construct the descriptive part of the process tracing before which the implementation problems unfolded.

In accordance with my critical pragmatist approach, I regard the results as preliminary only crystallizing after rounds of analysis. Even after the analysis, the developed elements and suggested alternative readings albeit guided by a moral assessment, are not determining factors for problems in and of global governance but a starting point for further inquiries.

Some interviews are weighted more in the analysis than others (see Gläser and Laudel 2009 for prioritization of interviews). Depending on their own background and position in the institutional settings, interview partners shared different types of information with me: some talked more about the relationship of the actors in the field; others referred more to historical connections or explained in detail litigation strategies or technical issues. Interviewees that referred to these kinds of dynamics were central for the development of elements and problematizing the problems, while others helped me to understand the processes during fieldwork and to supporting the construction of the descriptive component of process tracing.

### 3.2.6 Analytical framework and concepts

The following section outlines key concepts for the analytical framework and defines their use in the scope of this research.

*Implementation period and processes*

For the sake of this research, the period for implementation considers the time between closing of a loan agreement and the end-date of the reform project of the Bank and the time after the Court issued a judgment and the time it declared total compliance of the orders of judgment.. The global governance actors determine according to their mandate and procedures the start and the end date of implementation. I approach the implementation period as defined by the global governance actors. At the same time, I explore what is more to the implementation process than compliance with judgments and execution of reform as I study the processes that

unfold during the time more openly and explore the politics of implementation. The implementation stage is interwoven with the decisions and interactions during the design phase of the project and the merits stage of the judgments, as these phases determine the measures applied also influencing the choice of actors and the sectors addressed. More precisely, implementation during the compliance and supervisions of judgements phase of the IACtHR is linked to the merits stage of the case in which the Court assesses the context of the case and defines the reparation orders. During the supervision stage the Court interprets the compliance with judgments through assessment of the written reports and in hearing with the parties issuing new resolutions of supervisions. Implementation in the case of the Bank relates to previous risk analysis studies and broader country partnership frameworks building the base for project design and loan negotiations, the set-up of the implementing structure, and extends into the execution phase of the project in which the Bank assesses the indicator fulfilment previously defined in the loan agreement. I also approach implementation processes as processes that are additionally structured by the shadow of older power relationships and past interventions. This relates to the history of intervention with the specific actor in question (Bank and Court) as well as the interplay with other international actors' intervention (e.g., USAID and IDB) and the power constellations among the branches of government at national level. Therefore, I also go back in time and look around to a certain degree to gain a clearer picture.

Since I approach implementation as an open-ended non-linear process, the problems and possible effects strictly speaking have no start and end. The same applies to the elements I discuss: some dynamics and structures have persisted historically for many decades, some are recent; some of the elements or structures set up for implementation will vanish when the interaction between global governance actors and national actors ceases (e.g., executing agencies and implementing bodies). Other elements will likely remain or even be pronounced stronger (like rivalries between branches). This is to say that I approach implementation processes in a much wider way than solely looking at compliance and project execution.

*Coordination, dynamics and procedural character*

I am analyzing the process of implementation drawing attention to dynamics and coordination during that time. My approach to coordination is wide and describes the interaction (written or oral) between two or more state actors and/or international actors during a certain period structured by procedures. More specifically, for the purposes of this study, I define coordination as the interactions between Bank and national counterparts and Court and national counterparts during implementation in official procedures. Institutionalized procedures include audiences of

supervisions, negotiations in coordination committees for project implementation[169] as well as interactions among branches and other state actors involved in the processes of implementation. This interaction is structured by choice of actors, choice of design, and procedures of the encounter all of it characterized by relationships of power. I draw on elements from post-colonial and critical approaches that stress that agency by national actors and power of international development actors interact in human rights adjudication (e.g., Anghie 2008a, see also chapter two).[170] During research, I was exploring instances and ways in which coordination took place in rule of law promotion. In my approach to coordination, I also draw on elements developed by Annika Elena Poppe and colleagues (2019) provided in a paper on negotiations in democracy promotion.[171] In the paper, they conceptualize negotiations in order to enable systematic investigation of negotiation processes in the international promotion of democracy and suggest an approach that "acknowledges the relevance of agency and structure as well as their mutual co-constituency" (2019: 781).[172]

*Implementation problems and constitutive moments*

In this research I explore how tensions and dynamics among branches interact with a rigid implementation structure of international governance. I argue that the perils and the potential of the tensions are neglected in current readings of implementation problems.

Chapter two discussed arguments criticizing current approaches to rule of law support as based on eurocentric ideals of functioning and efficient institutions and guarantors for rule of law. I am neither subscribing to a static critical view of law as solely a tool of the powerful to secure

[169] This includes in case of the Bank executing agencies, as the institutions chosen by the Bank to be in lead in the project, and executing committees set up and consisting of several organs at national level for smoothening the implementation process.

[170] In chapter one, I described the substantial omission in approaches to rule of law not discussing the economic dimension of human rights and rule of law, however, I am not embarking on this dimension (see e.g. Hardt and Negri 2003 discussing a political economy approach). Including the dimension political economy and power would imply a different focus of the study, e.g., concentrating on elite networks throughout branches of government, in which Peru and Argentina would have made rich case studies.

[171] Poppe and colleagues shift attention to negotiations in democracy promotion turning "to the ways in which meaningful (communicative) action on the part of both democracy promoters and local actors is structured by, and in turn shapes, the relationship, including the power relation, between the two as well as the dominant ideological assumptions, aims and operating procedures that guide democracy promotion in a specific context." (Poppe et al. 2019: 281). While the rule of law promotion activities I study in this thesis differ from democracy promotion (see chapter discussing logics of change and the reduced versions of rule of law), I draw in my definition of coordination on Poppe et al. but have a lighter take on the importance of "deliberative acts" and legitimacy during coordination, as I sustain that procedures are limiting the ways negotiations can take place.

[172] They outline the underlying norms in negotiations and their effect on the position of the actor in the negotiation game. See also table 1 (2019:787) for an overview of the actors' characteristics. On more general terms, Jane Mansbridge and colleagues stress that "a negotiation process is unlikely to be fully just unless it incorporates two elements often viewed as (normatively) essential to democracy: (1) inclusion on fair terms of the affected parties, and (2) the equal power of the negotiators." (Mansbridge et al. 2013:86).

interests, nor to the dominant neoliberal view that powerless groups in society can gradually improve their position by getting more rights. Instead, I argue during this thesis that problems in rule of law support can represent constitutive moments for rule of law development, as dynamics among branches and political maneuvering become apparent, and power relationships between national and international level are possibly (re)negotiated. I am drawing in my argumentation on Pérez-Liñán and Castagnola (2016) putting forward the idea that the act of the reform itself, not only the nature of the reform and change, provide windows of opportunity and might cause political and institutional instability. I acknowledge that these negotiations and developments are characterized by limited agency and predefined versions of rule of law that are on the table. The emergence of alternative versions of state ordering is thus not stipulated by the reforms or judgments as such but could develop against the backdrop of this rigid implementation framework, questioning current forms of authority in global rule of law support and criticizing the exercise of power of branches at national level. The problems are not necessarily open contestation, resistance, or a fully-fledged proposal of alternative concepts of state ordering but can indicate constitutive moments. Tensions and renegotiation of power during implementation are not per se drivers for transformation and rule of law development. Power imbalances could also exacerbate over the course of implementation and the status quo can be confirmed rather than questioned. However, problems could also be an initial spark that leads to momentary institutional instability.

The next part of the study turns to the analysis of implementation processes in the case studies. Chapter four outlines the institutional implementation structure of the global governance actors Bank and IACtHR. Chapter five and six move on to the analysis of implementation processes in Peru and Argentina. Turning first to Peru, chapter five describes some of the characteristics of the institutional settings in Peru and introduces the judicial reform projects of the Bank and the judgments of the IACtHR whose implementation process will be analyzed more in depth. It then discusses the implementation problems focusing on the dimensions of context, design and coordination and develops the elements of the analytical dimensions further. Chapter six turns to the implementation processes in Argentina and proceeds in the same way and order.
The analysis of the empirical material helps to develop the arguments for a reconceptualization of implementation problems and the basis for a flexibilization of means in the rule of law supporting activities of the Bank and the IACtHR.

# Chapter 4 Implementation structure of Bank and IACtHR – mandate, activities and reporting structure

Bank and IACtHR as global governance actors follow development and human rights logics of change that inform the operationalization of the projects and the implementation of judgments of the Court. The implementation structure is embedded in broader structures of global governance. The procedures applied by Bank and IACtHR are influenced by the mandate of the actors and laid down in the Rules of Procedures and Articles of Agreement and By-laws of the actors. However, the procedures applied during implementation are also subject to interpretation during application and change throughout time. They are stable in a way as they form the core for the structure for engagement of the actors. The following subchapter introduces the implementation structure of Bank and Court and the procedures applied during the interventions.

The following section (4.1) describe the mandate and activities of Bank in the legal sector (4.1.1), elements of the loan regime and the implementation structure of the Bank and national counterparts (4.1.2) to outline the structural background during implementation period. The subsequent section turns to the implementation structure of the IACtHR (4.2), introducing the mandate (4.2.1) reparations regime and the reporting procedures (4.2.2) as key elements for the supervision of judgments and the implementation stage (4.2.3).

## 4.1 Judicial reforms in the World Bank portfolio and their implementation

Recalling the discussion in chapter two, from a conceptual point of view, the World Bank continues to distinguish between a thin and a thick approach to rule of law:

> "From among various definitions of the rule of law, two main dimensions emerge: the instrumental, which concentrates on the formal elements necessary for a system of law to exist; and the substantive, which refers to the content of the law and concepts such as justice (for example, due process), fairness (the principle of equality), and liberty (civil and political rights)." (World Bank 1992:30).

In addition to the logic of change underlying the intervention, several other factors also influence the specific means of implementation chosen for particular projects, among them the operating unit in the bank in charge and the specific partnership framework and treaties with the country. Chapter one outlined how hegemonic knowledge about project design travels to a certain degree within the Bank (see Dezalay and Garth 2002a; Santos 2006); however, it is also bound to personal ties and not necessarily institutionalized systematically (Interview #6). Legally, the country partnership framework that the Bank sets up with national executives in

bilateral agreements sets the priorities for the financial development engagement of the Bank over certain periods. Albeit priorities about the sectors the Bank engages in in specific countries might change in these country partnership frameworks, the structures for interaction with the national level is not negotiated in these frameworks but rather stipulated in the Articles of Agreement of the Bank. As foreseen in this structure, the executive branch remains the primordial entry point for negotiations of reforms with the Bank, and it is also legally the actor in charge for signing loan agreements. The way reform priorities and the content of judicial reforms are negotiated is influenced by the agendas of the government in place during the negotiation and the agenda of the Bank. Former General Counsel Ibrahim Shihata finds the different types of engagement in the judicial sector concerning:

> "I personally believe that this kind of reforms should not be rushed through and that a country must have the opportunity to conduct broad consultation and an extensive debate before introducing a comprehensive legal reform. If only for this practical reason, in my own conviction, technical assistance loans would be a better instrument [than conditionality under adjustment loans] for financing legal reforms [...]. At any event, and as practical matter, legal reform cannot take place without a request from the government involved." (Shihata 2000: 277, at fn. 103)

While Shihata suggests the request from the governments in which the Bank must be approached by the executive branch is central to initiate reform, the judiciary is oftentimes the institution mainly addressed in the projects. This mismatch between entities involved does not only apply to implementation partner and subject of reform but is also apparent in the discourse of the Bank that renders the executive branch to be mistrusted while legal institutions are hailed for their potential contribution to transformation processes. Regarding the centrality of the judiciary for development, the Bank stresses in its 1997 World Development Report:

> "[T]he judiciary [is] in a unique position to support sustainable development, by holding the other two branches accountable for their decisions and underpinning the credibility of the overall business and political environment. Yet judiciaries can play this role only when three core conditions are met: independence, the power to enforce rulings, and efficient organization." (World Bank 1997:100)

As of 2009 – the mid-point of the time under consideration in this study – the Bank's justice sector assistance portfolio comprised nearly 2,500 justice reforms activities. Activities might include loans or credits, grants, technical assistance and research (Laver 2011). Between 1994 and 2011, the Bank spent 850 million $ in 36 projects solely dedicated to justice reform (also known as stand-alone justice reform projects) (World Bank 2012: 2).

Judicial reforms as a special type of institutional transformation have been especially salient in rule of law engagement. Since the beginning of the Banks engagement in rule of law reform, the Bank has been especially active in the Latin American region (Rowat et al. 1995; Dakolias 1996; Rodríguez-Garavito 2006, 2011a). Scholars have outlined several reasons for this

regional focus. Among the reasons they named the aim to stabilize countries politically and economically after transitions to democracy in the direct aftermath of the cold war (Dezalay and Garth 2011), the previous engagement in structural adjustment policies and the long-lasting structures with national stakeholders (Hammergren 2015) and lastly the influence of powerful donors in the Bank (Carothers 1998; Pásara 2012). Overall, the Bank has for a long period been considerably engaged in Latin America with several activities ranging from infrastructure and environmental projects to administrative and judicial reform. However, it was not always the Bank activities alone but also the politics of the IMF intervening in the region's economy and politics thereby coining the image of the two Bretton Woods institutions. Some projects in the judicial sector are of minor scope (e.g., engaging in infrastructure measures of court buildings) other projects envisage a broader institutional change (e.g., a change of administrative practices and the handling of cases in courts). The following sections outline the mandate regarding judicial reforms and the loan structure of the Bank.

### 4.1.1 Mandate of the Bank

Activities of the Bank are covered by its economic development mandate that emerged from the Bretton Woods Agreement of 1944.[173] The Articles of Agreement characterize the World Bank as the major financial economic actor at global scale for lending money to countries for development projects.

The World Bank defines its mission within the 2030 development agenda as guided by two goals: ending extreme poverty and promoting shared prosperity (World Bank 2014; 2017). In chapter one, I outlined how rule of law forms an important pillar for the Bank in the development projects to achieve these goals. Formally, the mandate of the Bank inhibits interference with political affairs. Art. IV section 10 of the World Bank Articles of Agreement reads:

> "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." (Art IV Agreement)

[173] The Bretton Woods Conference, taking place on the 1st of July of 1944 was held to agree on a system of economic order and international cooperation that would help countries recover from the war and foster long-term global growth. The Conference (formally called the. United Nations Monetary and Financial *Conference)* ended with an agreement of the attendees on the Articles of Agreement for the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF). The IBRD Articles of Agreement were ratified on December 27th, 1945. Initially twenty-one countries signed the agreement, then becoming the first members of the Bank, today 189 countries are members.

Throughout time, the mandate of the Bank has been interpreted widely. In chapter one, I discussed how the Bank adopted a good governance agenda in the 1990s, thereby including most prominently judicial reforms and corruption into the reform agenda and eventually circumventing the obligation to not interfere with political affairs in the partner countries. Within the range of legal reforms[174] the Bank engages in are so called infrastructure measures (e.g., the building of new court houses) or technical issues such as plans for administrative improvements e.g., referring to better statistics and improving of court management systems. The Bank also engages in more sensitive issues in the reforms like measures that address judicial independence (e.g., the creation of a body for the selection process of judges). Each project is governed by a legal agreement between the World Bank and the Borrower government agency who receives the funds; this is called the executing agency. One of the key obligations in this loan agreement is that governments abide by the Bank's procurement policies.

### 4.1.2 Loan structure and project cycle

In general, the Banks project cycle consist of seven phases: the Identification phase, the Preparation Phase, the Project Appraisal Phase, Negotiations with the partners in the country and the Approval trough the Bank Board, the Implementation and Supervision of the projects, and the Implementation and Completion Phase (World Bank 2016:114).

In most countries, the Bank has a country office which is providing information on World Bank activities and "business opportunities" (The World Bank 2016: 29). The country office establishes contacts with local counterparts and is involved in the implementation of the World Bank activities. Justice Sector Reforms are usually carried out with the financing instrument[175] *Development Policy Financing* (DPF): a loan or grant is provided by the Bank to guarantee budget support to governments or a political subdivision for a program of policy and institutional actions. The Bank's use of DPF and any other type of engagement in a country is determined in the context of the *Country Partnership Framework* (CPF).[176] The CPF determines which interventions (detailing both the type and specific content of the intervention)

[174] The 2012 strategy "New Directions in Justice Reform" underlines the connection between governance, justice reform and corruption, identifying three important developmental functions of justice systems: "1. Preventing and mitigating conflict, crime, and violence; 2. Ensuring executive accountability and 3. Fostering private sector growth in compliance with legal and regulatory frameworks." (WBG 2012: 2).

[175] The Bank has seven types of financing instruments: Investment Project Financing; Development Policy Financing (DPF), Program-for-Results; Trust funds and grants; Private sector options, Customized options and risk management and Multiphase Programmatic Approach.

[176] Before 2014 known as *Country Assistance Strategy* (CMA).

will be implemented over the course of four years being the normal timeline, including little flexibility for change. The Bank also provides *Institutional Development Grants* (IDF) supporting for example Ombudsman Offices. Based on the CPF the World Bank and the borrower country agree on an initial project concept. Sometimes a baseline study is conducted before starting the designing phase of the project.[177] The World Bank signs the bilateral contract with the government of the borrower country. Initiatives for reform projects are often launched under the presidency of a particular government, signed by a different administration and implemented by the following one. The first natural counterpart for the Bank is the Ministry of Finance or the Ministry of International Cooperation, depending on the country and whether such a ministry exist. Often, the design and implementation of Bank projects exceeds the timespan of one legislative term, therefore counterparts in the ministries might change during that time. The borrower country, not the government, has legal personality and is reliable for paying back the loan. Agendas and policies of the administration in charge, the international reputation for doing business with the World Bank, and even the restructuring of the institutional landscape is very much business of the political actors in charge when signing the loan.

I will now turn to instrument and implementation structure for justice reforms in the World Bank. In 1994, General Counsel Shihata summarized the instruments available for the Bank to support judicial reform:

a) A free standing loan for judicial reform as a self-contained project |… |
b) Project loans of a broader scope (normally of an institutional development character) which include judicial reform as a component of the project |… |
c) Components of the measures to be implemented under an adjustment loan |… |
d) Studies and pilot projects financed by a grant from the |… | Fund for Institutional Development |… |
e) Other studies for Bank operations |… | (Shihata 1995: 389- 390)

The World Bank often co-finances projects with governments and other multilateral institutions and private sector investors. In the Latin American region, the Bank often collaborates with the

[177] Practitioners and scholars alike identify knowledge gaps in justice sector reforms and suggest the solution offered often mismatches the actual needs and projects lack solid baseline studies (centrally Hammergren 2003, 2008, 2015). Referring to justice sector projects in Latin America, Linn Hammergren affirms that little effort has been made as with regard to monitor the long-term impact of reforms. In addition, she criticizes that most projects rely on what she calls "conventional wisdom" and the perception of "experts" about the function and role of courts and the justice system in societies. This conventional wisdom, she argues, is a very thin basis for the design of reforms. (2005). Hammergren also conducted a World Bank funded study, in Argentina, Mexico, Peru, Ecuador and Brazil to test these common beliefs against the data presented by court case files (Hammergren 2003). The degree to which this informs later projects in these countries is questionable. None of my interview partners mentioned the study. This in turn underlines the problematic knowledge transfer within the Bank.

Inter-American Development Bank (IADB).[178] The projects in the judicial sector address the independency of the judicial branch, their efficacy, the access to justice, and the personnel of legal institutions. Faundez summarizes:

> "These activities include building infrastructure for courts, designing and implementing automated information systems, modernizing the organizational and functional capabilities of courts, establishing career paths for judicial and administrative personnel, strengthening the transparency of the judicial branch, introducing alternative dispute resolution mechanisms to improve access to justice, establishing programmes to promote awareness of the legal needs of disadvantaged groups, especially aimed at women, youth and indigenous people, implementation of mobile court programmes, establishing legal aid clinics, strengthening public defenders offices and improving the efficiency of judicial services for small businesses" (2009: 190).[179]

More broadly, Vivek Maru groups World Bank activities in judicial reform into six categories: court reforms, legal aid, information dissemination and education, alternative dispute resolution, public sector accountability, and research (2010: 259). Engaging in issues of criminal justice (including police reform, security sector reforms) remains outside the World Bank's mandate (Laver 2012) but it is oftentimes other development agencies (including European donors and IADB) and support in a regional framework e.g., by regional actors (OAS) taking up on these sectors (Tomesani 2018).

Justice is not a separate practice[180] in the World Bank structure[181] but a sub-field in World Bank activities. There is no single entity in the Bank responsible for designing justice sector interventions. Rather the projects that entail elements of justice sector or stand-alone projects are designed and carried out by several units and might show considerable differences in the measures applied. This said, justice sector projects could be characterized by coordination problems within the Bank and at national level alike, as justice sector reforms often require the coordination among actors like the Ministry of Justice, Courts, and public defender offices. The role of the Bank in judicial reforms has been described as "knowledge provider" or "honest

[178] The Bank usually does not engage with criminal code reforms and other substantial changes in laws, due to its limited mandate but also due to a division of labor between the World Bank and the Inter-American Bank for Development, which conducted reforms in this area (see e.g., edited volume by Domingo and Sieder 2001).

[179] Faundez (2009) states this list is largely taken from a project appraisal document of the Bank in Honduras summarizing the World Bank portfolio in the area at the time.

[180] The Bank has 14 global practices (areas of work) Agriculture; Education; Energy, Environment & Natural Resources; Finance, Competitiveness & Innovation, Governance; Health, Nutrition & Population; Macroeconomics, Trade & Investment Poverty; Social Protection, Social, Urban, Rural & Resilience; Transport, Digital Development and Waterand five gobal themes:. Climate Change; Fragility, Conflict &Violence; Gender; Infrastructure and Public-Private Partnerships and Knowledge Management.

[181] The World Bank Group consists of five institutions: International Centre for Settlement of Investment Disputes (ICSID); International Finance Cooperation (IFC) and the Multilateral Investment Guarantee Agency (MIGA); International bank for Reconstruction and Development (IBRD) and International Development Association (IDA). World Bank and Bank refers only to the IBDR and the IDA). The IBDR works with "middle-income and creditworthy poorer countries" whereas the IDA "focuses exclusively on the world's poorest countries." (WBG 2016: 11). The IBRD was established in 1944 and has 187 member countries. The IBDR has 25 executive directors. The five largest shareholders the Unites States (16.06%). Japan (9.54%), Germany (4.40%), France (4.22%) and the United Kingdom (4.22%) each appoint one executive director (WBG 2011: 9- 10).

broker" (Riggirrozi 2005). The study draws attention to the role of the Bank as a third party intervening in often tense national institutional dynamics stipulating reforms that require one or more branches of government to interact. Even if measures are merely administrative in nature, often they must be approved by the legislative branch. Therefore, very often all three branches are involved in the reform project.

The Bank attributes the lead for reform projects determine the *executing agency* that is in charge of disbursing the money and responsible for reporting to the Bank about project success. Additionally, structures like *executing committees* might be formed to ease coordination between the organs involved in the project process. The project design stipulates the placing of the executing agencies in a specific branch, according to the Bank's assessment of the context. The executing agency is usually defined in the loan agreements and can hardly be changed afterwards.

Once the project starts to be implemented, the government agency is responsible for regularly executing reports on the project's activities. When a project is completed, an *Implementation Completion and Results Report* (ICR) is produced by the Bank.[182] The reports provide a self-assessment of the Banks performance after projects are closed. The reports classify the implementation of the projects in satisfactory, moderately satisfactory, and moderate according to the indicator fulfilment.[183] A second report, the *Implementation Completion and Results Report Review* (ICRR), is produced as a desk-study by the *Independent Evaluation Group* (IEG), a unit within the World Bank Group in charge of evaluating the development effectiveness of the World Bank projects.[184] While ICR and ICRR might rate projects as moderate, the reports rarely address tensions that emerged during the implementation phase and dynamics among branches.

The next subchapter turns to the contentious jurisdiction of the IACtHR, the implementation structure for judgments, and the reporting procedure during supervision.

[182] According to the guidelines for World Bank staff this report should provide "a complete and systematic account of the performance and results of each project […]. Capture and disseminate experience from the design and implementation of a project […].Provide accountability and transparency at the level of individual projects with respect to the activities of the Bank, the borrower, and involved stakeholders." (World Bank 2017:3).

[183] The Implementation Completion and Results Report (ICR) is one of the World Bank's main instruments for self-evaluation. It is prepared by the World Bank at the close of every project funded by the International Development Association (IDA) or the International Bank for Reconstruction and Development (IBRD), or, in the case of a series of programmatic policy operations, at the end of a series of projects (World Bank 2017:3).

[184] For more research on external and internal accountability mechanisms in the World Bank see e.g., Heldt (2018).

## 4.2 Contentious jurisdiction of the IACtHR and supervision of judgments

The Inter-American human rights system is based on the *American Convention on Human Rights* adopted in 1969 and the *American Declaration of the Rights and Duties of Man* adopted in 1948 by the OAS.[185] The treaties form the basis for the regional human rights system. The system was established with the goal to "uphold democratic values such as liberty, equality and social justice and the rule of law as the indispensable framework for guaranteeing human rights". The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights[186] issue case law and provide framework legislation to this purpose.

The following section points out the mandate and Rules of Procedure of the Court with regard to the reparations regime and the monitoring stage for judgments, thereby outlining the guiding principle for the procedures and the interaction with the state.

### 4.2.1 Origin and mandate of the IACtHR

The role of the Court as a regional human rights actor changed considerably over time. During transition periods from autocratic regimes and military dictatorships in many Latin American countries in the 1980s and 1990s, the IACtHR monitored the political processes while the organ also legally supported national attempts in transitional justice e.g., through landmark decisions regarding amnesty laws and advisory opinions. During this time, the Court was often referred to as a third-party guarantor of rights and a control mechanism to national institutions. More recently, however, the Court has embarked on different areas in jurisprudence and finds its role in a changed political, legal, and social environment. Most Latin American countries are now formally semi-consolidated democratic systems. This said, state organization in the region is still characterized by severe political and social struggles and high levels of socio-economic inequality, arbitrary use of violence by state agents, and impunity (e.g., Abrahmovic 2009). In recent jurisprudence, the Court increasingly engages in public policy seeking also to address structural obstacles to the realization of human rights (e.g., access to justice and impunity). Similarly, the Court has issued advisory opinions on same-sex marriage (OC-22/16), the rights of nature (OC-23/17) and numerous decisions in relation to indigenous rights and land rights (Navarro 2021), therewith coping with social struggles fought in the region. However, it also continues to address institutional and structural problems in its judgments, addressing e.g.,

[185] Further framework legislations are the additional protocol to the Convention *Protocolo Adicional a la Convención Americana sobre Derechos Humanos en Materia de Derechos Económicos, Sociales y Culturales, "Protocolo de San Salvador"*.

[186] On the relationship between Commission and Court in the early years of their work see for example Medina (1990).

institutional shortcomings for human rights education in the military and police forces contributing to systematic human rights violations e.g., during protest and police operations. Similar to developments in the European Court of Human Rights (ECtHR), the IACtHR over time engaged more in structural adjudication. Alexandra Huneeus finds "by undertaking structural reform adjudication human rights courts are stretching if not rewriting their mandates", expanding their role to an administrative and legislative one (2015: 4) while it is not having an equivalent to nation-state separations of power. Recognizing this turn to structural adjudication, the changes in the political climate, lacking enforcement capacities and the structural prerequisites (or the non-existence thereof) that accompany these activities is important for the critical take in this study on analyzing implementation processes of judgments.

The Court is a normative and a legal actor, engaging in rule of law support in several ways including jurisprudence, conference organization, educational series, and diplomatic meetings. This thesis analyzes the role of the Court as a rule of law supporter via the judgments issued that address judicial restructuring and institutional design; it engages less with the normative dimension of its work.[187]

This study analyzes processes during the supervisions stage after the IACtHR has issued judgments, often named the enforcement of judgments. As outlined in the previous chapters, the rationale for the Court's engagement in human rights adjudication rests on its subsidiary action. National institutions including weakly institutionalized judiciaries are found to be incapable or inactive of independently carrying measures and reforms to comply with human rights obligations. The Court works jointly with the Inter-American Commission that processes individual cases and proceeds to determine the admissibility and the merits of the case. If the Commission considers a case admissible, it sends information to the states regarding the allegations and may hold hearings to determine the merits. Once the merits are decided, the Commission issues a report with its conclusions and recommendations to the state. The state is given a period to comply with these recommendations. If the state does not comply with the Commission's recommendations, either the Commission can publish a new report with further recommendations and an extended deadline, or it can submit the case to the IACtHR.[188]

[187] The Inter-American Commission on Human Rights also makes recommendations about public policy in its country reports. It may also issue thematic reports that cover topics of regional interest or concerning several states.
[188] American Convention, Art. 61.

Albeit the number of judgments issued by the Court is relatively small in comparison to the ECtHR[189], the output is impressive considering its meager budget and scarce personnel. Judgments also often have spillover effects and as such affect the Latin American region by their emblematic character, setting human rights standards not only in specific cases but affecting national legislation (Gargarella 2015a; Huneuus 2015). The Court has advisory jurisdiction[190] and contentious jurisdiction,[191] it is in charge of the supervision of judgments[192] and it can issue provisional measures. The reparations regime of the Court is based on the Art. 63(1) of the American Convention of Human Rights that is consulted if the IACtHR has found a violation:

> "[T]he Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party." (Art. 63(1) American Convention)

### 4.2.2 Reparations regime of the Court

The Inter-American Court can dictate six different types of reparation orders: restitution (*restitutio in integrum*); rehabilitation (the state must ensure the injured party the enjoyment of the right or freedom violated); satisfaction (the state must take measure to remedy immaterial damages of the violation); guarantees of no repetition; duty to investigate, identify, publicize, and punish; compensation for pecuniary injuries, non-pecuniary injuries, and costs and expenses (Pasqualucci 2012).[193] However, the categories for the types of reparations are not always clear cut: sometimes one reparation may entail elements of many categories. Furthermore, the categorization of reparation measures as stipulated by the Court in the judgments is not always coherent in jurisprudence. In consequence, more careful considerations should be exercised in statistics and scholarship that are aiming at establishing causal relationships between categories of reparation orders and of compliance.

---

[189] Since 1978, the IACtHR has issued almost 400 cases. As of September 2019, the Court had issued judgments and decisions in 267 distinct contentious cases. Of these, 248 cases have received a judgment on the merits. In addition, the court has rendered 26 advisory opinions.

[190] The mandate to issue advisory opinions, allows the Court to examine specific problems that go beyond contentious cases and often address problems in a more systematic matter, amounting to rule of law promotion and suggesting institutional change, e.g., rulings on same-sex-marriage OC24, the rights of nature OC23.

[191] Twenty member states accepted the contentious jurisdiction of the court Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haití, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, República Dominicana, Surinam y Uruguay. States also openly confronted the Court. Trinidad and Tobago denounced the American Convention in late 1990 and under the government of Fujimori Peru did not recognized the jurisdiction of the Court however not denouncing the Convention. Venezuela denounced the Convention in 2013 and the Dominican Republic is considering doing the same.

[192] The terms supervision and monitoring are used synonymously in this work.

[193] In Spanish: restitución, rehabilitación, satisfacción, garantías de no repetición, obligación de investigar, juzgar y, si procede, condenar, a la compensación y el reembolso de costas y gastos. For a detailed explanation of these kind of reparations and examples of cases before the IACtHR see Pasqualucci (2012: 196 – 250).

Reparations vary from restitutions of lands of traditional communities to building memorials and naming schools and streets in honor of the memory of victims. Reparations also sometimes address guarantees of access to water, food, medicine, and housing and seek to safeguard the right to life in cases involving death penalties challenge of amnesty laws (de Araúja Calabria 2018: 238–239). Judgments may also contain reparations that dictate the changing of a certain law because it violates human rights structurally or stipulate the adoption of a public policy seeking to guarantee human rights violations are not repeated in the future (measures of non-repetition).[194] In this sense, the impact of reparations might exceed the single case, seek to stipulate changes in the system as a whole in relation to improving rule of law, or as Alexandra Huneuus puts it, international courts are "using remedies for individual rights violations as a platform from which to restructure state policies and institutions" (2015: 3).[195]

Some states in the region have developed a specialized state bureaucracy for human rights to manage the affairs internally and before international courts. That often happens in the form of ombudsman, human rights secretariats and commissions, and specialized division in the Foreign Ministry. However, the existence of such administrative structures does not necessarily mean that states have developed a special policy regarding implementation of human rights judgments. Not all states have developed an infrastructure for litigation – and if they have, often the units have limited capacity to influence the implementation of judgments but are only formally in charge of litigation before the international court. Institutionally anchored organs established by law exist in Peru, Paraguay, and Colombia.[196] However, coordination during implementation still with national coordinating organs in place remains difficult as they sit in broader institutional structures.

Depending on the reparations dictated, the compliance with judgments might require the coordination of various branches. States must comply promptly[197] with all judgments of the

[194] For Alexandra Huneuus (2015) the IACtHR departed from the traditional model of compensatory remedies soon after it issued its first judgements and included measures of non-repetition thereby slowly engaging in structural reforms. Abraham Chayes confirms that albeit the claim is individual the implications go beyond the particular case being "grievance about the operation of policy" (1976: 1302) thereby underlining the turn in human rights structural litigation.

[195] See also Ximena Soley (2017) on the transformative dimension of judgements of the IACtHR, similarly see Douglas Cassel (2010) on the impact and expanding scope of judgements of the IACtHR.

[196] Colombia, Law 288/96, Regulate the Procedure for the Indemnity of Victims of Human Rights Violations (July 5, 1996) Peru, Supreme decree 014-2000-JUS, Regulate the Procedure to Follow-Up on the recommendations of International Human Rights Bodies (December 22, 2000) Supreme Decree No 015-2001-JUS, Approve the Regulations of the National Human Rights Advisory and Create the Special Commission to Follow-Up on International Procedures (Apr. 27, 2001); Law No 27.775, Regulate the Procedure for the Execution of judgments Emitted by Supranational Tribunals (June 27, 2002). Legislative attempts to develop implementation laws in Argentina and Brazil have not produced concrete results. CEJIL implementation supra note 52, appendix.

[197] Pasqualucci stresses the six-month period for the payment of pecuniary reparations (2012: 365).

Court.[198] States also have an obligation to comply under customary international law in accordance with the principle *pact sunt servanda,* stipulating that treaties must be complied with. These obligations also imply in theory that state authorities are bound by the Courts judgment and cannot revoke national law to justify a failure to comply.

### 4.2.3 Monitoring stage[199] and reporting procedures

From issuing the first judgment, the IACtHR underlined its own obligation to monitor the implementation.[200] However, only in 1996 did the Court begin to systematically approach the obligation, starting to issue periodic reports and supervising the compliance with its judgments. After the state Panama questioned the competence of the Court in 2003, the IACtHR reaffirmed its authority to monitor state compliance with reparations, stating "the effectiveness of judgments depends on the compliance with them."[201] As with regard to the exact procedure of supervision, the *American Convention on Human Rights* did not establish criteria for this stage. Specifications of the reparation regimes are laid out in the *Rules of Procedure* of the Court. The Art. 69 of the Rules of Procedure of the IACtHR reads:

> 1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives.
> 2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate.
> 3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing.
> 4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders.
> 5. These rules also apply to cases that have not been submitted by the Commission (Art. 69 Rules of Procedure).

A separate unit for supervision of the judgments was formally established in 2009 and the Courts Rules of Procedure were amended respectively.[202] Before this time, the task of

---

[198] American Convention, Art. 68.

[199] In the course of this study, I will refer to the monitoring stage as supervision stage, both terms can be used synonymously. However, the original rule of law procedure text uses monitoring stage.

[200] Corte IDH, Caso Velásquez Rodríguez vs. Honduras, Sentencia del 21 de julio de 1989, Reparaciones y Costas, Serie C, núm. 7, párr. 60.

[201] Baena-Ricardo et al. v. Panama (November 28, 2003, Competence) Art. 4, para. 129.

[202] Within the European system the Council of Europe's Committee of Ministers is in charge for monitoring the Court decisions; the Inter-American system knows no such mechanism; the supervision remains the responsibility of the same organ issuing the judgement. Note in this regard that the former president of the IACtHR Antônio Augusto Cançado Trindade became a strong advocate for the "Europeanization" of the Court with regard to implementation and suggested that supervision competences should be transferred to OAS organs. Especially the idea to create a permanent organ within the OEA to monitor the compliance of judgements was discussed. See Caso Blanco Romero y otros vs. Venezuela, Resolución de 22 de noviembre de 2011, Supervisión de Cumplimiento de Sentencia, voto concurrente del juez Eduardo Vio Grossi; Corte IDH, Caso Caesar vs. Trinidad

supervision of judgments was split up between the lawyers at the secretariat dealing with the respective cases. Formally and institutionally establishing a separate unit in the Court for supervision, should thus help to create more consistency in supervision and to strengthen adherence to judgments. Additionally, new mechanisms during the supervision stage entered the Courts repertoire: in 2015, the Court began to conduct *in situ* procedures for monitoring compliance with judgments. In this type of procedure, the Court seeks to verify the implementation status of the measures directly in a country visit, engaging in meetings with the parties to the case including the various state officials and authorities directly responsible for the implementation.

During the supervision phase, the court issues compliance orders and resolutions of supervision. Over the years it has developed a body of jurisprudence in relation to supervision that has to be analyzed thoroughly yet. Literature emerging from scholarly production and practitioners' engagement also looked at the way measures of the Court during implementation changed over time, outlining how the Court has certain flexibility in the form it applies in the supervision of judgments (the seminal work is Pasqualucci 2012). Edward Pérez, lawyer in the Court secretariat, identifies six practices the Court has established to monitor the compliance with judgments: 1. requesting information of the Commission and the parties to the case; 2. requesting information from other sources (Art. 69(2) Rules of Procedure); 3. joint supervision of cases and certain reparations; 4. convening public or private audiences; 5. carrying out country visits, and 6. issuing resolutions to determine the status of compliance and convening Art. 65 of the ACHR in case of complete incompliance (2018: 343–352).

To determine compliance, the Courts asks victims' representatives, the Commission and the state to submit reports regarding states actions (IACHR 2006: 41–42). The Court may also request a hearing to decide on the level of compliance. The regularity in which the compliance reports are issued is determined by the unit in the Court in charge of supervision; there is no regulation to be found in the Rules of Procedure. After the judgment was issued, the state has one year to present a written report on the status of compliance of the reparation orders. The state reports are shared with the other parties to the case, which then have the duty to react within a timespan issued by the secretariat, usually granting six weeks. In this written procedure, the parties have the opportunity to express concern and disagreement or agreement with regard to the reported compliance with reparations in the state reports. After this, the

y Tobago, Sentencia de 11 de marzo 2005, Fondo, Reparaciones y Costas, Serie C, núm. 123, voto razonado del juez Manuel E. Ventura Robles, pp. 185-190.

secretariat of the Court has the right to request the status again in periodic intervals, check on obstacles to compliance or follow up, and request information on other issues as raised in reports of the victims and the Commission. During this process, delays and incomplete reporting practices are very common e.g., referring only to one reparation order while neglecting to report on another.[203] In reaction to the information presented during the written procedure, the Courts secretariat can issue a resolution regarding the compliance, request other information, and/or convene public or private audiences. As a novelty in the supervision process, in 2019 the Court started to publish the reports of the parties to the case on its website, therewith seeking more transparency and heighten accountability of the parties involved in the case (representatives of the victims, Inter-American Commission of Human Rights, and the representation of the state accused in the case).

For the state defense, the national actor that bears the duty to report to the IACtHR is the executive branch also representing the state before the Court. It is the state as a whole that is responsible in Human Rights Law and bears the duty to comply with the reparation orders. However, in the reports often all branches or institutions in charge enforcing the reparation order (including often the judiciary) inform about advances in completing the reparations. The patchwork of information provided sometimes leads to contradictory reports. Not only state actors but also non-state actors can provide information during the monitoring stage.[204] According to the 2017 Annual Report, the Court has only made use of the possibility of requesting information from other sources than the state in nine occasions (2017: 8). While the opportunity has been little explored to date (Huneuus 2015: 38), it is increasingly acknowledged in the Court that requesting information from other sources could be a useful tool for identifying obstacles to compliance like the coordination among branches (Pérez 2018: 346). In addition, the joint supervision of cases and certain reparations, for example regarding medical treatment of victims of human rights violations in Colombia,[205] allows the Court to address more systematically structural obstacles to compliance on a state level. In the same vein, public and

[203] In the Fontevecchia case, the state of Argentina did not present any report on the compliance for more than three years. Corte IDH, Caso Fontevecchia y D'Amico vs. Argentina, Resolución de la Corte Interamericana de Derechos Humanos de 1 de septiembre de 2015, Supervisión de Cumplimiento de Sentencia, considerando 8. See also, Corte IDH, Caso Fleury y otros vs. Haití, Resolución de la Corte Interamericana de Derechos Humanos de 22 de noviembre de 2016, Supervisión de Cumplimiento de Sentencia, considerando 4. See next chapter discussing in particular the implementation process in the Fontevecchia case.

[204] For example in the form of amicus curiae briefs or information presented by appointed experts (peritos).

[205] Corte IDH, Resolución del Presidente de la Corte Interamericana de Derechos Humanos de 8 de febrero de 2012, Supervisión de Cumplimiento de las Medidas de Reparación sobre Atención Médica y Psicológica Ordenadas en Nueve Casos Colombianos.

private audiences as well as country visits allow the court to communicate more directly with local authorities to reveal problems in implementation.

Oftentimes judgments were issued a long time ago, and consequently the political legal and institutional setting might have changed in the run up to implementation. The issued reparation orders might simply not be executable any longer for structural reasons. How to deal with those kinds of reparations that are not "fitting" any longer due to the changing circumstances of implementation and how this might be adapted is a challenge not only for the parties involved in the process but also on an analytical level when studying problems during implementation.

In contrast to the European System of Human Rights, in the Inter-American System states have little margin of appreciation during the implementation process.[206] Relying on the principle of subsidiarity,[207] the margin of appreciation grants the states the more flexibly for implementing judgments of international courts. Andreas Føllesdal argues in favor of adopting a margin of appreciation in the Inter-American system (2017: 360) since the political circumstances for implementation have changed. A larger margin of appreciation, on the one hand, would provide states more flexibility concerning the implementation at national level, and on the other hand, it would alleviate the Court from knowing each specific country background.

Edward Pérez suggests a series of practices that the supranational Court applied during the supervision of judgments that could be applied in national jurisdictions to help improving the compliance record.[208] He advocates for more flexibility – however, only regarding the maneuvering of the Court – and at the same time pleas for a more rigid formulation of judgments. The rigidity in the substance and wording of the judgments, states have claimed, sometimes conflict with the necessity for communicating the judgments politically at home. It

[206] In Lawless v. Ireland the European Court of Human Rights (ECtHR) defined the margin of appreciation doctrine as follows: "(…) a Government's discharge of (...) responsibilities [in maintaining law and order] is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the...Court is satisfied that the Government's appreciation is at least on the margin of powers..., then the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation." Lawles v.Ireland, 1 ECtHR (ser. B) at 408 (1960-1961)

[207] Jo Pasqualucci summarizes: "The duty to make reparation when human rights are violated should be ordered first and foremost by domestic courts. The absence of an effective domestic remedy is itself a violation of the American Convention. The resort to the Inter-American human rights system can be made only after the domestic system has failed to provide the victim with an effective remedy." (2012: 189). Pablo Contreras (2014) discusses different views on the margin of appreciation doctrine in Latin America.

[208] Summarizing Pérez (2018) suggestions: 1. High procedural flexibility (as explained above singling out the different tools at the disposal of the Court ranging from audiences to written proceedings and country visits); 2. A very precise formulation of the reparation in order to ensure judicial security for the parties; 3. The incorporation of indicators in reparations pointing towards changes in public policy; 4. The supranational Court as the facilitator of communication among the parties involved in the case; 5. Approaching the multiple institutions at state level involved in the enforcement.

is the supranational Court, not the entities involved at state level (including non-state actors or local authorities), that can opt for the various mechanisms during supervision outlined above. Hence, flexibility can only be introduced in the current process for by the Court.

The next empirical chapters explore problems during implementation processes of Bank reforms and IACtHR judgments in Peru and Argentina from 1998 until 2018. They address the central puzzle of the study of failed reforms and non-complied judgments and seek to answer the research question "how" processes of implementation unfold.

The chapters are structured in a similar way, and I will proceed as follows: I will first outline features of the institutional landscape in the countries and introduce the specific reforms and judgments addressed in this study. The objective is to give background information on the institutional dynamics surrounding the implementation process and the content of the rule of law supporting activities. I will then develop the dimensions of implementation context, design and coordination and subsequently analyze problems in the implementation processes in the two countries along these lines. Subsequently, in chapter seven I tie together the findings from the empirical chapter and the explored dimensions in a joint discussion of the global governance actors Bank and Court and suggest alternative readings of the implementation problems as constitutive moments for rule of law development.

# Chapter 5 Implementation and rule of law support in Peru

In this chapter, I turn to the analysis of implementation processes of Bank reforms and Court judgments in Peru. In an exploratory approach to process tracing, I analyze implementation processes and explore the elements to the processes along the dimensions of context, design and coordination. I depart from explanatory patterns in literature discussed in chapter one and explore the elements critically from post-colonial and critical legal perspectives drawing on crucial problematic assumptions and practices in development and human rights interventions as introduced in chapter two.

The three dimensions of context, design and coordination serve as an orientation for the analysis. However, the lines between the dimensions are not fixed and the problems span across the dimensions. In an abductive approach to research, I explore those elements to the dimensions to better describe problems in implementation. Exploring and developing the elements can help to identify roads ahead for alternative conceptualizations of problems, for

discussing current explanatory patterns and problematic structures in international development and human rights governance, and to identify neuralgic points and rooms for flexibilizing procedures during the processes.

The first section gives an overview of features of the political and institutional landscape in Peru in order to map the context for implementation, paying special attention to the executive-judiciary relationship and providing key historical background information for the process tracing (5.1). The next section outlines the main lines of action of the judicial reforms the World Bank conducted and the reparation orders in the judgments of the Court under consideration in Peru (5.2). These introductory sections are followed by the analysis of the empirical material (5.3), structured around the three dimensions of context (5.3.1 and 5.3.2), design of reforms and judgments (5.3.3 and 5.3.4) and coordination (5.3.5 and 5.3.6).

## 5.1 Features of the institutional and political landscape in Peru

The political institutional structure of Peru, especially the dynamics among branches and the political climate are strongly influenced in recent history[209] by the autocratic regime of Alberto Fujimori Fujimori (1990–2000). One of the major characteristics of the Fujimori regime was an expansion of the concentration of power of the executive branch, an autocratic style of governance, and a simultaneous hollowing out of political institutions. The ruling elite around Fujimori undermined the independent functioning of political institutions contributing to already existing distrust in politics and the political class alike. Fujimori's centralized, autocratic style of government marked the political and societal climate for years (Vergara and Watanabe 2016; Levitsky and Cameron 2003). Fujimori left behind weakened political institutions and exclusionary neoliberal economic structures (Torres 2005; Quijano 2002).[210] Anibal Quijano describes Fujimorismo as "an authoritarian political regime, becoming increasingly vertical in character, which embodies a coalition of power between financial and speculative capitalists, prominent members of the armed forces, and a selected group of technobureaucrats" (2005). The Fujimori era was also marked by an escalating violent conflict

[209] More broadly, the colonial legacy and its influence on class structure, the societal fabric and on political institutions and practices has been discussed most prominently by the Peruvian Marxist Carlos Mariátegui in his seminal book "Siete ensayos de interpretación de la realidad peruana"(1928/1979) paying special attention to class, questions of land and the indigenous and rural populations.

[210] See e.g., Aníbal Quijano (2002) discussing the prevailing fujimorismo in the government of Toledo and for more details on the consequences of these reforms in society, increasing inequality despite economic growth.

within Peru. Fujimori conducted a hard-liner military strategy in the conflict against the rebel groups *Shining Path*[211] and *Túpac Amaru Revolutionary Movement (MRTA)*[212].

The Fujimori regime not only left traces in the institutions of the country but also damaged the social fabric of Peru's society until today. Political polarization and social and economic inequality are high, while trust in political representation remains low and the way to deal with the past remains highly disputed (Quijano 2002; Bueno-Hansen 2015).[213]

This section briefly describes features of the institutional and political landscape. It focusses on hyper-presidentialism and the erosion of the party system (5.1.1), the role of the judiciary during and in the aftermath of Fujimori regime (5.1.2), and on transitional justice in the country (5.1.3).

### 5.1.1 Hyper-presidentialism and party system erosion

The autocratic regime of Fujimori and his supporters largely destroyed institutional checks. Political parties and the fragmented opposition also failed in stopping him. After a self-coup in 1992,[214] Fujimori dismantled democratic institutions of the country and shut down congress temporarily. Executive ruling per decree became a common style of governance. Largely

---

[211] The Shining Path (*Sendero Luminoso – Partido Comunista de Perú*) is a revolutionary communist party and political organization in Peru inspired by Marxism-Leninism-Maoism, funded by Abimael Guzmán in 1969. From 1980 to 1992, Shining Path, Peruvian state forces, and Andean peasants waged a civil war. The activities and counteractivities of the state left more than 69,000 people dead, (see e.g., la Selva 2012). The Peruvian Sociologist Anibal Quijano described this time as the time of "'dirty war' [guerra sucia], switching between state-terrorism and subversive/guerilla terrorism" (Quijano 2002: 72).

[212] The MRTA was a Marxist guerrilla group that started in the early 1980s, aiming to establish a socialist state and providing an alternative to the more radical Shining Path. The group was led by Víctor Polay Campos and by Néstor Cerpa Cartolini.

[213] I will not be able to discuss here the presidential election in 2021 in which the daughter of Fujimori, Keiko Fujimori, formerly accused and convicted of corruption but later released, ran against the socialist Pedro Castillo. However, the polarization in society (additionally the rural-urban divide and class cleavages), the severely hampered institutional fabric including constitutional rules and procedures and the scarceness of political alternatives became very apparent during the process and the aftermath. See e.g., https://www.jacobinmag.com/2021/06/pedro-castillo-president-peru-libre.

[214] The Inter-American Commission on Human Rights summarizes the facts in its report Nº 46/97 in the case Walter Humberto Vásquez:

> 1. On Sunday, April 5, 1992, the so-called "self-coup" occurred in Peru, when, by means of Decree Law No. 25.413, known as the Basic Government Law on Emergencies and National Reconstruction, President Alberto Fujimori Fujimori dissolved the Congress, the Court of Constitutional Guarantees, and the National Council of the Judiciary.
>
> 2. In conformity with this Decree Law, President Fujimori began what he described as "the organization of the judiciary, the Court of Constitutional Guarantees, the National Council of the Judiciary, and the Public Ministry, to turn them into democratic institutions, to help bring about the pacification of Peru, to afford access to proper administration of justice for the great majority, to definitively eliminate the corruption rampant in the judicial apparatus, and to seek to prevent impunity for crimes perpetrated by terrorists, drug traffickers, and organized crime".
>
> 3. To that end, the Government of Emergency and Reconstruction issued Decree Law No. 25.423 published in the April 9, 1992 issue of the Official Gazette, "El Peruano", which in its sole article removed from office thirteen Supreme Court justices in conformity with Decree Law No. 25.418, without providing any reason or legal grounds. This measure paralyzed the administration of justice, and the regular operations of the Judiciary were temporarily suspended (Decree Law No. 25.419), with the access of magistrates, officials, and litigants to the Palace of Justice prohibited by force. (IACHR 1997).

unchecked, Fujimori introduced a new round of neoliberal reforms in Peru, leaving economic policies to technocrats inspired by the Washington Consensus (Torres 2005).[215]

In 1993, a new constitution was enacted during the internal conflict, thereby further consolidating power around the presidency (Vergara and Watanabe 2016:149).[216] The Constitution of 1993 served as an important pillar for the neoliberal restructuring under the auspice of economist Hernando de Soto.[217] Until now, the concentration of power in the executive continues to characterize the institutional system.

Central legislative organ is the Peruvian congress, after the 1993 constitutional reform only consisting in one chamber. Parties in the congress largely adapted and internalized neoliberal orthodoxies from the 1990s and the technocratic style. The congress remains in a traditionally weak position towards other state organs and rarely provides counterbalances *vis à vis* executive encroachment on judicial matters (Thiery 2016: 163).

Fujimori resigned in 2000 after internal power struggles with the then Head of Secret Security Service, Vladimiro Montesinos. The dictator fled the country but later was trialed in Peru for crimes committed during his regime and was convicted (see discussion below for the humanitarian pardon granted to Fujimori in 2017). The transition government under Valentín Paniagua (2000–2001) ended with the election of the new President Alejandro Toledo. Despite a formal return to democracy, mechanisms of representation remained relatively weak and the electoral strategies in the post-authoritarian time reproduced the *Fujimorista* style (Levitsky and Cameron 2003:22).[218]

Under the presidency of Alejandro Toledo (2001–2006), congress and courts regained independency. However, president Toledo did not break with the neoliberal economic model introduced in the Fujimori time. Economy continued to grow while the government was welcoming foreign investment. From 2006 to 2011 Alan García from APRA (*Alianza Popular Revolucionaria Americana* – Popular Revolutionary American Party) ruled the country, maintaining the status quo. Corruption flourished while the economic boom continued (Vergara and Watanabe 2016: 151). After the presidency of Ollanta Humala (2011–2016), a former army

[215] For a discussion of the autonomy and the role of those technocratic experts, shaping policies in a comparative perspective studying Peru and Colombia see Eduardo Dargent (2011). Note the ample history of technocratic intervention in Peru and its relationship with the World Bank. Fujimori introduced in concordance with the IWF his own style of national economic shock therapy to counter the hyperinflation.

[216] Cameron (2019) additionally stresses the political climate in which the constitution emerged, assembling power in the Executive for striking down rebel groups and ending the civil war.

[217] Similar to the Chilean social revolt starting in its massive form in 2019, in 2020 Peruvians protested over weeks against the Peruvian Constitution as a neoliberal stronghold, securing resource exploitation and the maintenance of institutional power of elites.

[218] Until to date the Fujimoristas play an important role in the Peruvian Congress.

colonel and ex-World Bank technocrat, Pedro Pablo Kuczyinsky took office.[219] Soon thereafter, Pedro Pablo Kuczyinsky forcibly stepped down after being entangled in the Odebrecht corruption scandal in early 2018[220] – however, not before having granted a humanitarian pardon to Alberto Fujimori on December 24th, 2017.[221]

Despite the continued concentration of power in the executive branch, authors like Vergara and Watanabe (2016) draw a positive picture for checks and balances in post-Fujimori Peru, finding: "In recent years, congress, the judiciary, and other institutions have shown that they can check presidents—that is, enforce horizontal accountability—thereby preventing Peru's chief executives from accumulating power [...]." (2016: 149). However, they also find: "[T]his situation [the lack of vertical accountability] might be a problem for democracy, but it is convenient for weak presidents who want to switch policies. Without parties, presidents face no threats from militants in their base or constituents" (2016: 153), stressing how checks and representation through political parties remain a neglected factor in Peruvian political institutionality.

During political rivalries in congress marked by strong right-wing propaganda, presidents entangled in corruption scandals were forced to step down with the help of judicial means.[222] While institutional rivalries exacerbated, political debates vanished in the background. Political volatility remained a common feature in Peruvian politics and reform initiatives stagnated. Vergara and Watanabe sum up: "In the last fifteen years, no president won office openly defending the status quo, but all have embraced it by the time they stepped down, undeterred by low approval ratings. Certainly, continuing economic growth and entrenched technocrats are part of the explanation for this outcome." (2016: 155).

[219] Stanford educated economist PPK, served as Minister for economics under the presidency of Toledo and worked in high-level positions in the World Bank and IMF supporting free-market reforms.

[220] The construction conglomerate Odebrecht carried out a large number of big infrastructure projects in Latin America and was one of the first firm caught in the Operation "Lava Jato" that started with investigations into corruption in Petrobras in Brazil in 2015. Confessions made in the Odebrecht case revealed the involvement of many high politicians including state presidents, in bribery and acts of corruption and had strong economic and political repercussions in the region. Odebrecht is known as one of the biggest corruption scandal in history.

[221] In 2019, all living previous presidents of Peru faced charges. Alan García died by suicide in April 2019 in his home before being captured and taken into custody by the police.

[222] This cultivation of a political style often called "lawfare" also became increasingly a style of politics in other Latin American countries including Argentina and prominently Brazil (affairs including former president Luiz Inácio Lula and Dilma Rousseff).

Rebuilding parties after the 1992 self-coup of Fujimori proved to be a difficult task (Levitsky and Cameron 2003; see also Seawright 2012).[223] Not only the legacy of the autocratic leadership, but also a history of corruption scandals in the political elite in Peru[224] had eroded parties as primary democratic institutions. One interviewee describes the erosion of the party system and the Fujimori legacy, outlining a particular anti-voting behavior:

> "Peru is a very politicized country and very polarized when it comes to topics in relation to Fujimori. The last president [Kuczynski] very likely won the presidency with an anti-Fujimori vote rather than a vote supporting him." (Interview #23, own translation)

Despite Keiko Fujimori, Alberto Fujimori's daughter, not winning the presidential election in 2016 and in 2021,[225] the *Fujimoristas* block in congress remains strong.[226] Congress is highly polarized and public trust in the legislative remains low (Latinobarometro 2019; see also Vergara and Watanabe 2016).[227] Political parties in Peru are less vehicles for mediating interest but over time have become stronger involved in horizontal rivalries.

> "So, one of the features of today's reality is the dominance of the congress, which is concentrating the power in the executive and also in the [Constitutional] Tribunal, and this is because the congress consists of a high percentage of 70% of representatives of the Fujimorismo. Moreover, shortly ago this led to a situation where the congress forced the president to resign. It seems as if there is a balance of power but in reality, it is a huge misbalance." (Interview# 21, own translation)

At least from 2016 onward, Peru's institutions went into considerable gridlock.[228] Democratic debates often fell short or were reduced to power politics and reform initiatives were blocked. Beyond the background of such a gridlock, national deliberation in congress and negotiation of reforms arguable become difficult. The combination of corruption scandals[229] and the political impasse leads to high turnover of political personnel, hampering continuity in politics and

[223] Levitsky and Cameron find: "Throughout most of the 1980s, Peru possessed a relatively coherent (if weakly institutionalized) four-party system, consisting of the leftist United Left (IU), the populist American Popular Revolutionary Alliance (APRA), the centrist Popular Action (AP), and the conservative Popular Christian Party (PPC). Although the strength of these parties has been the subject of debate, all possessed national structures, discernible programs or ideologies, and identifiable social bases." (2003:6). The era Peru is often described as an example of post party politics (see Levitsky 1999; 2018).

[224] For a discussion on the *Lava Jato* case and the regional implications see e.g., Wesche and Zilla (2017).

[225] Kuczynski won by a margin of 0.25% in the final count. However, having the majority in congress, Keiko Fujimori's party *Fuerza Popular* represented troubles for Kuczynski's government and his predecessor Vizcarra alike, who was also forced to step down in 2020.

[226] McNulty finds: "Fujimori's regime—arguably bequeathed to his daughter—left structures and leaders in place that have prevented reform efforts from gaining strength" (2018: 61).

[227] Vergara and Watanabe find: "political parties, congress, the judiciary, and other key democratic institutions all suffer distrust bordering on rejection." (2016: 148).

[228] Another interviewee stressed this gridlock in the following words: "Laws are being passed just like that, so these are authoritarian formulas within a parliamentary regime, so there is a danger of a parliamentary dictatorship. If these powers are exercised - as they have been exercised - to remove the president, to bring down a cabinet, to impeach the public prosecutor, to impeach the judges of the court... it is very dangerous. (Interview #15, own translation)

[229] El Comercio (2018) is summing up corruption scandal Odebrecht, CNM etc. Distrust among the society towards the executive is longstanding and was exacerbated due to the political scandal involving the vacancy of Kuczynski.

exacerbating the chances for reform initiatives. That also means a high turnover in negotiation partners for external rule of law supporting actors, like the World Bank and the IACtHR.

### 5.1.2 The judiciary in Peru

With the new Constitution of 1993, three new justice institutions were created: the Constitutional Tribunal (*Tribunal Constitucional*) (CT), in charge of protecting fundamental rights; the National Magistrate Council (*Consejo Nacional de la Magistratura*) (CNM), an institutionally autonomous organ responsible for the selection and evaluation of judges; and the Judicial Academy (*Academia de la Magistratura*) (AMAG), in charge of training activities for judges. Furthermore, Peru's justice sector consists of the judiciary, constituted by the Supreme Court and lower courts; the Public Ministry; and the Ombudsman's Office. After a series of corruption scandals,[230] the *Consejo Nacional de la Magistratura* (CNM) was dissolved in 2018. From 2019 onwards, the *Junta Nacional de Justicia* took over the job of selecting judges for judicial service in Peru.

Throughout the Fujimori era, independence of justice was severely limited. During the 1990s, all justice sector agencies were affected by serious political interference,[231] encroaching upon judicial independence among others by ways of impeaching personnel[232] or by replacing personnel at high level with Fujimoristas. Even though independent functioning of the judiciary was formally reactivated after the end of the Fujimori era, public confidence in the judiciary remained low. Judicial scandals, widespread corruption, and clientelism continued to hamper the functioning of judicial organs (Interview #15).

Judicial reform has been on the table for almost 50 years in Peru. A plan of a complete judicial reform project was drafted in 2004 by the *Special Commission for the Integral Reform of the Justice System* (CERIAJUS) but abandoned in the subsequent years despite the initial support of all political forces (Yupanqui et al. 2003). Problems in the justice sector in Peru comprise challenges in personnel, structural (including infrastructure), and financial level (Pásara 2019). Access to justice remains difficult (Burt and Cagley 2013), especially for people with few

[230] The independent platform *IDL reporteros* revealed a series of corruption scandals starting with audio records of CNM members, among them judge César Hinostroza, talking and accepting bribes. The CNM Audios investigations later on revealed in detail the deep corruption at the highest levels of Peru's justice system. The CNM audios initiated a stronger call for a reform in 2018, than all previous internal and externally supported reform efforts (Pàsara 2019).

[231] In 1996, an interim arrangement was established, purportedly to foster a "reform process," during an emergency period this arrangement suspended the Judiciary's Organic Law and allowed for intervention by the Executive Branch in the affairs of the Judicial Branch.

[232] In 1997, the Fujimoristas in congress voted to impeach three members of the Constitutional Tribunal, which were never replaced securing a conservative majority in the Tribunal. The members were later reinstalled by the IACtHR, see *Constitutional Court Case*.

economic resources and the rural population. In addition, impunity rates continue to be high in Peru and law enforcement remains a problematic area (APRODEH 2018).

Within the institutional landscape, the *Constitutional Tribunal* (CT) of Peru (also Constitutional Court of Peru) plays an important yet controversial role, often being a veto player in legislative matters and in constant rivalry with the Ministry of Justice. One interviewee described the current situation in the Tribunal as follows:

> "But since it became clear that it was an organ that gained power, the parties started to have interests in the Constitutional Tribunal. The Aprista party coopted the CT, they infiltrated it, because they had parliamentary representation, given that the seven judges of the Court are nominated by the congress in a qualified majority vote of 2/3. And the Fujimorismo also hampered the CT, they never liked it. This is why the balance [of power] always goes one step forward, one step back. I would say, right now that CT is in an autumnal season of the year stage, because there have been improvements but also a lot of decisions that have been surprisingly against rights and liberties that usually should be protected, what is normally what gives legitimacy to the CT in the view of the society. But there have also been decisions in favor of this protection of rights of the most vulnerable, which demonstrates the political crisis, the fight of democracy against autocracy." (Interview #15, own translation).

Party power politics as well as societal cleavages often crystallize in the CT (Interview #15, #23). Lower courts transfer politically delicate matters to the CT, therewith often neglecting their duty and competence to rule on that matter.

> "Not to speak of a pardon granted to a person associated with terrorism, this is a topic that is taboo and a judge will rarely decide upon that matter. And this is where the CT plays an important role. Programs are being developed, the Ministry of Justice has a program that starts to look at the topic of forced sterilizations[233] during the Fujimori time, but it remains difficult to treat some topic even in Court. The TC is very shy in a lot of decisions because of this public polarization." (Interview #23, own translation)

As in other countries, the CT is formally the supreme organ for upholding democratic structures and values and securing the balance of power. It is also simultaneously part of the institutional dynamics. Given that many political disputes crystallize here, struggles over power in this organ can be expected to be fierce. Additionally, the organ sits uneasily within the institutional structure and has few allies in the ordinary judiciary and the Ministry of Justice (Interview #16, #18). While constitutional tribunals are politicized in many countries of the world, the combination in Peru with a gridlock in other branches make the CT prone to become a tool for fighting fierce political struggles by judicial means.

### 5.1.3 Human rights and transitional justice in Peru

Institutional conditions, political constellations and not at last continued societal polarization in relation to the internal conflict and a pronounced right-left rivalry in Peru, were initially

[233] On the topic forced sterilization see e.g., Bueno Hansen (2015) writing on Feminism and Human Rights struggles in general, outlining also the infringement into reproductive right under Fujimori carrying out large-scale forced sterilizations primarily amongst indigenous women.

unfavorable conditions for strong transitional justice efforts after the Fujimori regime. Some allies of the Fujimori regime remain in high positions in the country. This said, prosecuting individuals and investigating the role of the judiciary during the autocratic regime was difficult to begin with (González-Ocantez 2016). Fujimori and his allies also institutionally secured a maintenance of neoliberal policies and anchored repressive political elements such as anti-terrorist laws constitutionally. The government passed a number of antiterrorist laws that greatly undermined due process and judicial guarantees. Despite the strong repressive environment during and in the aftermath of Fujimori's regime, civil society organizations in Peru importantly contributed to documenting human rights violations and pressured for institutional changes. González-Ocantez underlines the importance of human rights organizations in Peru for documenting human rights violations given the "states' abdication of its duty to protect citizens from violence" (2016: 145). However, the network is not as strong as in other countries in the region as the organizations had a hard time to organize themselves (APRODEH 2018). Civil society in the two decades following Fujimori was weakly institutionalized and exercised little power for checking state institutions (Vergara and Watanabe 2016: 154).[234]

The years after Fujimori left the country and resigned presidency were marked by a relatively open stance towards international jurisdiction and national prosecution. In 2006, the positive climate for human rights prosecution and human rights defenders changed again and turned to conservative if not hostile stances during the presidency of Alan Garcia (González-Ocantez 2016: 147). With the rise of the power of APRA in 2006[235] and the electoral recovery of Fujimori's party, the tide turned and the official government line and the environment was more hostile towards implementation of human rights judgments. Trials were considerably delayed, disrespecting due process, and especially national human rights litigation began to become more difficult (González-Ocantez 2016; see also APRODEH 2018).

As national human rights policies changed over time and were characterized by the institutional dynamics, the relationship between Peru and the IACtHR also changed in the two decades after

[234] For more information on the work of the NGO Asociación Pro Derechos Humanos see APRODEH homepage: https://www.aprodeh.org.pe. The University of San Marcos has strong student unions engaging in human rights work; approaching transitional justice and corruption topics from an investigative journalism angle see the work of IDL reporteros: https://www.idl-reporteros.pe/.

[235] In 2006 Toledo handed the presidency to Alan Garcia who was accused of being responsible for human rights violations under its former presidency in the later 1980. Among the human right violations he had been accused of was the murder of prisoners in the massacre in the Penal Castro Castro, a case that ended up before the IACtHR named "El Frontón", judgment issued November 2006.

Fujimori. Peru is a member to the American Convention of Human Rights. The Constitutional Court of Peru has referred to the Inter-American Court as the "ultimate guardian of rights in the region"[236], emphasizing its positive stance towards the supranational organ. The Peruvian Constitutional Tribunal asserts that the Inter-American Court's judgments and interpretations of the American Convention's provisions in those procedures are binding on the national government of Peru – even when Peru is not a party to the case, which represents a strong version of monistic incorporation of regional human rights legislation. The cases against Peru before the internationalcCourt vary considerably in subject matter and are high in number:

> "Peru is the country that is most condemned by the IACtHR – quantitively after Guatemala. With regard to the subject matter, the cases concern individual interests like forced disappearance or of collective interest, like amnesty laws that the Court declared invalid, or they concern individual cases but have high transcendence for example for the independency of the judiciary when the Court said the suspended Constitutional Court judges had to be restituted." (Interview #15, own translation)

The IACtHR also ruled in several landmark cases against Peru (see subchapter 5.2.2), developing an impact for the whole region. By doing so, it also prominently exposed itself to criticism in Peru accusing the IACtHR of severe political infringement by engaging in matters of amnesties after the Fujimori dictatorship.

## 5.2 Judicial reforms of the Bank and judgments of the Court

Strong institutional rivalries, severe tensions among branches, and a continued gridlock situation in congress, as well as high polarization in society and tendencies of juridification form the background for the intervention of World Bank and IACtHR. At the outset, the environment for the implementation of human rights judgments seems to have been rather unfriendly, while past presidencies welcomed World Bank involvement and neoliberal policies. The following sections outline reform plans of the Bank (5.2.1) and IACtHR judgments (5.2.2), pointing out goals, reparation orders, and obstacles during implementation before continuing to the analysis of the implementation processes in chapter 5.3.

### 5.2.1 Bank judicial reforms – goals, implementation and obstacles

Since Peru's government embraced financial adjustment policies in the 1990s, the World Bank engagement in the country steadily increased. The governments continuing to welcome foreign investment and global actors, the Bank portrayed Peru as a success story in its engagement in

[236] Cartegena Vargas, No. 218–02-HC/TC, Tribunal Constitucional de Peru, 17 April 2002, "Fundamentos," para. 2.

the region (CSP 2007)[237] including the reform projects that involve the judiciary. Projects were conducted in a political climate marked by power imbalances, personal volatility, and institutional rivalries. Official documents provide little information on tensions among actors; similarly, there is no independent study or scholarly work focusing on the implementation process of Bank led judicial reforms in Peru. This section outlines the main goals of the judicial reform initiatives of the Bank from 2001 to 2018 according to Bank documents and outlines the implementation structure.[238]

*Cancelled Project (1997–1998)*

During the Fujimori era, the Bank designed and signed a loan agreement for a judicial reform project with the government. Albeit by the time of designing the government already had a bad record in terms of centralization of power and an international reputation for human rights violations, the board of the Bank approved a loan of 22.5 million US Dollar in late 1997. The Bank press release of the same year does not mention political context but instead focuses on the rationale of securing economic growth through judicial reform:

> "In recent years, the World Bank, in partnership with its clients, has focused on the governance and institutional changes required to consolidate economic growth. Among these changes is judicial reform, fast becoming a recognized priority for the region." (WB Press Release 1997).

Due to a technical clause that prohibited the disbursement of the first tranche and case of flaws in the checks and balances becoming apparent, that loan was cancelled by the Peruvian government in September 1998. Neoliberal technocrats in the government first engaged with the World Bank but later the political dimension came to the forefront and the legal obligations forced the government to resign the treaty. However, some of the counterparts foreseen for the 1997 project were also involved in the subsequent projects. In February 1999, the Bank provided a 500,000 US Dollar IDF Grant to the Ombudsman's Office for an institutional strengthening project. The grant was fully disbursed by October 2001. According to the Bank, the project outcome was rated as highly satisfactory.

[237] In 2016, the World Bank ranks Peru 50th in the Doing Business Report, two ranks behind Chile and with the third highest score in Latin America. For a critical view on of WBs engagement from a practitioner's perspective see Alice Martin-Prével and NaYeon Kim in a report of the Oakland Institute (2015).

[238] Other smaller projects of the Bank in Peru were a Civil Society and Rule of Law project, a project dealing with the Ombudsman's Office Institutional Development (P065840), a Property Rights Consolidation Project (P078894), an Urban Property Rights Project (P039086) and a project called Integrated Legal Strategies for the Poor (P125551) (WBG 2012: 92-97).

*The Justice Sector Improvement Project I (2004–2011)*

After the end of the Fujimori government in 2000, the Bank saw another window of opportunity to engage in reform processes of judicial institutions in Peru. The Bank initiated a project called *Justice Service Improvement Project I* with a volume of 15.2 million US Dollar (contribution of Peru: 3 million US Dollar) which lasted from 2004 until 2011. World Bank documents stress the ambitious goal "to set the foundation for a long term, participatory and sustainable reform process for Peru's justice sector." (ICRR 2011: 1).[239] The Banks *Country Partnership Strategy* (CPS) for the 2007–2011 period identified the modernization of state institutions as one of its key pillars, recognizing a special focus on improving justice and reducing corruption (WB CPS Peru 2006). The *Project Appraisal Document* (PAD) states the following sub-objectives:

> "(a) to strengthen institutional capacity to lead the reform process and achieve specific improvements in justice services delivery, in particular in the judiciary and in selected project districts; (b) to establish human resource management systems that ensure independence, transparency and integrity; and (c) to enhance access to justice services for the Peruvian society, in particular the poor." (PAD 2004: 7). [240]

One interviewee that formed part of Bank activities reflects on the overambitious goal of sustainably reforming judiciaries by strengthening the "institutional capacity" and "justice service delivery" instead of engaging in more traditional financial support approaches of the Bank to finance infrastructure projects. Thus "building institutions" in this project leaves the ambit of contributing to a better physical infrastructure and enters the realm of reforming the judiciary in its functioning as a political institution. The interview partner criticizes the range of activities of the Bank and reflects on the term institution building as opposed to merely providing infrastructure for courts:

> "I don't think the number or the types of activities have expanded that much since the beginning although the title has changed and occasionally you see some different emphasis. But, I mean, what's institution building, are we sure we were building institutions instead of just constructing courts? Are we institution builders? I don't know." (Interview #4)

---

[239] The Project Appraisal Document (PAD) states with regard to the reasoning for the project:
"*An efficient and equitable justice system can provide significant benefits for society at large through the provision of quality and accessible services. Justice sector institutions are fundamental to the promotion of the rule of law, thus strengthening the environment for better economic performance, creating a predictable climate for trade and investment, and expanding people's employment and income opportunities. Most importantly, the rule of law plays a crucial role in protecting the rights of all citizens and is key for the poor, who have little knowledge of the justice system and scarce resources to protect their rights [...] While the entire justice sector is not involved in this Project, the key institutions will be transformed into more modem, responsive and accessible public service providers for the benefit of the Peruvian society.*" (PAD 2004: 6-7).

[240] As one activity, contributing to the enhanced access to justice services pillar in the project, under the auspices of MINJUS, introduced 15 legal aid clinics where *Asistencia Legal Gratuita* (ALEGRAs) was offered. In 2006 the legislative approved a new criminal procedural code (NCPC), which started being gradually introduced in courts between 2008 and 2010.The ICRR finds that objectives were highly relevant and consistent with the PAD and previous World Bank studies (ICRR 2011:2). From 2003 to 2015 the German Development Agency (GIZ by its German Acronyms) also conducted a judicial development reform project in Peru, addressing mainly procedures in criminal justice. Lead executing agencies were the Ministry of Justice, Supreme Court, see https://www.giz.de/en/worldwide/29636.html, last accessed 02.06.2022.

In 2004, a *Steering Committee* (*Comité Directivo*) was established which consisted of representatives from four institutions: the judiciary; the National Judicial Council (CNM); the Judicial Academy (AMAG); and the Ministry of Justice (MINJUS), chaired by the president of the Supreme Court. The executing agency, meaning the agency having the lead in the implementation period and disbursing the money was placed in the judiciary. A *Project Coordination Unit* (PCU) was responsible for financial management, monitoring, and evaluation.

The Implementation Completion and Results Report Review (ICRR) rates the overall outcome of the project as satisfactory, finding the project generated "reasonable results and introduced a results culture among participating agencies. The project increased efficiency in the justice system by improving coordination among the participating agencies" (2011:4). In the report, the Independent Evaluation Group (IEG) rates the performance of participating actors in the projects in the categories as satisfactory, moderately satisfactory and moderate according to the indicator fulfillment – however, without providing criteria for this assessment.
While rating the Bank's performance as satisfactory (quality of supervision) and moderately satisfactory (ensuring quality-at-entry and overall Bank performance), the report rates the government performance as satisfactory as well as the performance of the implementing agency (the judiciary) (2011: 5). Regarding the monitoring and evaluation design, implementation and utilization, it reports a more moderate assessment of Banks performance stating:

> "The team identified the inadequacy of the monitoring framework and tried to rectify it by adding more specific indicators. A user survey was financed only in 2006/2007 to collect baseline data on user satisfaction—but this was late into project implementation leaving only a short period before project closing for improvements to occur." (ICRR 2011: 6)

The closing date for the project was extended thrice for a total of 21 months. Project design was rated highly relevant, aiming to bring together four key institutions, finding: "Although the joint coordination mechanism was ambitious, this turned out to be a strong implementation feature, which worked well." (ICRR 2011: 2). Overall, few obstacles and problems are mentioned in the report. When mentioned they refer to delays and the replacement of the first manager of the Project Coordinating Unit (PCU).

*Justice Sector Service Improvement II (2011–2016)*

For the follow-up project, *Justice Service Improvement Project II* (2011–2016), the steering committee was accomplished through an additional representative from the Attorney General's Office. The main goal was formulated similar to the first period of the project, aiming at

"support[ing] the Government's comprehensive modernization strategy in a context in which institutions were strengthening their newly found independence." (ICR 2016:i). The executing agency again was placed in the judiciary.

According to the Bank the outcomes were moderately satisfactory in total, with Bank and borrower performance also moderately satisfactory (ICR 2016:i). The ICR report for the Justice Service Improvement II project mentions as challenges during the project that a reduction in time/speed of trial (from beginning to end of trial process) (Indicator 1) was not achieved, finding:

> "It is important to note that the result of this indicator was deeply affected by the executive branch's decision to postpone the implementation of the New Criminal Procedural Code in Lima and Callao regions, which was outside the control of the counterparts in the judiciary." (ICR 2016:ii)

In consequence, a restructuring of the project took place; however, not in substance, but in implementation period length and disbursement, foreseeing

> "[e]xtension of the closing date, reallocation and revision of the results framework to drop indicators related to the implementation of the new criminal procedural code in the Northern Lima districts." (ICR 2016: vi)

From 2016 onwards, a new project was negotiated, focusing on e-governance and the introduction of the electronic filing system for cases. The project named *Improving the Performance of Non-criminal Justice Service* will have two executing agencies: the executing unit in the judicial branch (Poder Judicial, UE-PJ) and the executing unit in the executive branch (MINJUSDH,UE-MINJUSDH) (PAD 2019: 28). [241]

The next section turns to the cases of the IACtHR in Peru under supervision of compliance during the timeframe 1998 – 2018.

### 5.2.2 IACtHR cases – reparations orders, compliance with judgments

Most studies find that Peru has low compliance rates with Courts judgments. Compliance is especially low with regard to orders dictating financial compensation; symbolic acts of reparation and the duty to investigate, sanction, and punish (Cavallaro and Brewer 2008: 787–789, 820, 824; Hawkins and Jacoby 2010).[242] Throughout the period and in the aftermath of the internal armed conflict in Peru, the Inter-American Commission on Human Rights, acting as a gatekeeper and filter to the Court, received complaints involving Peru with regard to the guarantee of fair trial (25% of the total complaints) and with regard to the treatment of persons

[241] This project is not included in the analysis but is mentioned here for reasons of completeness because many interview partners knew about the ongoing negotiations.

[242] See also the Court's homepage for stages of compliance listing the Peruvian Cases in supervision stage. Available at: https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm, last accessed 02.06.2022.

that have been charged with the crime of terrorism (18%). Many cases related to the functioning of the judicial system in Peru and to the content of laws in relation to crimes of terrorism (Ministerio de Justicia 2016: 13–14). Between 1990 and 2016, a total of 42 cases involving Peru were negotiated before the Court; 15 of them between 2011 and 2016, thereby marking a peak of the Court's activity in relation to Peru. The *Procuraduría Pública Espacializada Supranacional* (PPES) (Public Prosecutors Office for international affairs), placed in the Ministry of Justice of Peru, is in charge of representing the country of Peru in the Inter-American Court System.[243] However, it is not in charge of coordinating the implementation process. A specialized organ in charge of implementation does not exist.

During Fujimori in the 1990s, Peru attempted to withdraw from the IACtHR (Cassel 1999; see also Soley and Steiniger 2018).[244] The influence of the Court on national politics was again debated fiercely in the aftermath of the humanitarian pardon granted to Fujimori in 2017 and the intervention of the regional Court in that regard (see El Comercio 2018). In light of the resistance in large parts of the national judiciary to prosecute crimes, national human rights organizations and victims' associations in Peru oftentimes relied on the Court as a last resort for transitional justice initiatives. The relationship with the IACtHR and the public perception of the IACtHR in Peru also has a strong historical dimension given a landmark decision in which the Court established the prohibition of amnesty laws (e.g., Binder 2012). The judgments changed not only national legislation and opened the way for national ways of prosecuting

[243] The Peruvian Government formed a working group under the Ministry of Justice in 2015 in order to work on a comprehensive and consistent line of action with regard to accusation before the court (see Ministerio de Justicia 2016: 10).

[244] The Inter-American Commission reiterates the Peruvian position in its 2000 report on Peru:

"On July 9, 1999, the Peruvian State announced that it was withdrawing its acceptance of the Court's contentious jurisdiction, and also announced that its withdrawal had "immediate effect." The Inter-American Court rejected the claimed withdrawal, declaring it "inadmissible." Peru announced that it was not going to participate in the judicial proceedings before the Court in two recently-submitted cases, and that it was not going to carry out either the judgment in a case that the Court recently decided or the judgment on reparations handed down by the Court in a second case. Without prejudice to the Court rejecting the withdrawal *infra*, and given that this act may affect the Peruvian population and have a negative impact on the system, the Commission has prepared the following analysis. [...] On July 1, 1999, the Peruvian State submitted a note to the Secretary General of the OAS in which it announced that it would not comply with the judgments of the Court in the case of Castillo Petruzzi et al. nor with the judgment on reparations in the Loayza Tamayo case. In that note, the Government of Peru set forth its position and the legal bases invoked in support of that decision, in relation to the impediments to compliance with these two judgments of the Court. Peru emphasized the need to set forth in clear terms its position in relation to the Court's legal conclusions in cases in which "terrorists who have been convicted and sentenced" claim to call into question the methods Peru has been forced to use to eradicate terrorist violence and protect the human rights of the Peruvian population [...]. The government refused to comply with the Castillo Petruzzi judgment, asserting that the Court's order were an intrusion upon state sovereignty (Castillo Petruzzi, Compliance with Judgement, Inter-Am. Ct. H.R. (ser. C) No. 59, at 3, para. 3 (Nov. 17, 1999) but the Peruvian Congress refused to approve a resolution attempting to retract Peru's recognition of the Court's jurisdiction. (Inter-American Commission 2000).

Soley and Steinger (2018) provide a sound analysis of the cases triggering the backlash against the IACtHR and the reasons brought forward by the government mainly alleging to anti-terrorist threats.

crimes committed under Fujimori, but it also made the IACtHR and its role in Peru subject to public and political debate.

The following section outlines the background of judgments of the IACtHR, introduces the reparation orders and the compliance reported by the Court, and outlines some challenges that emerged during the implementation process.

*The Constitutional Court Case*

In the Constitutional Court Case of 2001 (*Tribunal Constitucional v. Peru*), the Court was involved in questions of judicial independency. Three Constitutional Court justices had been dismissed unconstitutionally from the Peruvian Constitutional Court by an act of congress after having issued a judgment on the interpretation of the Constitution in relation to the legality of president Fujimori running for a third term of presidency. During 1996 and 1997, the conflict of constitutional organs, more specifically the judiciary, against the executive and legislative branch, arose in relation to this matter. The Court found that the state violated the guarantees of the judicial process and judicial protection under the American Convention on Human Rights. The state of Peru reinstated them while their case was being handled by the Inter-American Court. However, as of 2020, two reparations are still pending: investigating the persons responsible for the human rights violations and paying the money that corresponds to the missed salaries while suspended to the victims. The Court issued four resolutions of supervision (2001, 2005, 2009, 2010); however, the issue was little controversial as Peru reinstated the judges, aiming at repairing the damage done by the infringement into judicial independency.

*Barrios Altos*

In the Barrios Altos Case (*Barrios Altos v. Peru*), the Court found the state of Peru guilty of violating the right to life of 15 persons and the right to personal integrity in the case of four persons, which were hurt gravely in a neighborhood center known as "Barrios Altos", in November 1991 in Lima. The crime was committed by members of the "Grupo Colina", a group in the National Intelligence Service in charge of carrying out an antiterrorist policy against suspected members of the *Shining Path*. That group was supposed to have acted with knowledge of the presidency of the republic. In the landmark judgment of 2009, the National Supreme Court found that the chain of command has been proven and found Alberto Fujimori

guilty of the crimes committed by the Grupo Colina.[245] The national judiciary established the guilt of Fujimori as one of the perpetrators and sentences him to 25 year of imprisonment in 2009. With Fujimori being only one of the perpetrators in the case, the IACtHR consistently found that the reparation order to investigate, sanction and to punish was not complied with by the state. The non-compliance caused special political tension in light of the humanitarian pardon granted to Alberto Fujimori in December 2017 by then-President Kuczynski[246]. His parole was seen by the victims' representatives as a violation of the IACtHR order and they requested a public audience in the regional Court. Furthermore, no national legislation for the crime of extrajudicial killings has been introduced into the national criminal code.[247] In total, the regional Court issued eight resolutions of supervision in this case (2002, 2003, 2004, 2007, 2008, 2009, and 2010).

*Durand and Ugarte "El Frontón"*

In the case *Durand and Ugarte v. Peru*, the Court declared Peru had violated the right to life, the right to judicial protection and fair trial, and the right to personal integrity in the cases of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, both imprisoned for supposed acts of terrorism in the penal facility "El Frontón" but never convicted.[248] The Court ordered a number of reparations among them the payment of a compensation (*indemnización*) to the families of the Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera and an act of public pardon. These two measures have been declared as complied with by the Court (IACtHR Resolution of Supervision "El Frontón" 2009). The Court also dictated as measures of reparation to publish the judgment in a national newspaper and in other media with national wide reach and to continue the search and identification of the mortal rests of the two victims and to hand them over to their families. Those reparations have been partially complied with. Furthermore, the Court order to investigate the perpetrators was not complied with.

[245] Sala Penal Especial, Corte Suprema de Justicia Peru, Exp. No. A.V. 19-2001, Sentencia Alberto Fujimori Fujimori, 07 April 2009.Available at: https://www.legal-tools.org/doc/3236e2/pdf/, last accessed02.06.2022.
[246] After an alleged impeachment that Kuczynski only survived due to the votes of the party Popular Force, led by Kenji Fujimori, it seemed obvious that Kenji Fujimori, son of Alberto Fujimori and Kuczynski had made a deal.
[247] Note here that the Court explicitly stated that "the appropriate legal concept"" ["la figura que resulte más conveniente" in the Spanish original text, para. 44, Sentencia 2001] should be introduced, leaving a wide margin for implementation for the national legislators.
[248] In June 1986, a penitentiary mutiny took place in El Frontón, which was knocked down by the armed forces the following day, resulting in the death and injury of various persons. The bodies of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were never found and the case was never investigated.

*Provisional measure granted in relation to "El Frontón"*

Therefore, the victims recurred to the Court and asked for granting a provisional measure to ensure judicial independency in light of a suspected removal of four Constitutional Court judges that had been involved in the case "El Frontón" at national level in the past.[249] The victims feared the removal would risk judicial independence and put in jeopardy the investigation. In a provisional measure granted in February 2018, the IACtHR ordered to stop immediately the procedure of suspension of the four constitutional judges. The measure was criticized within Peru (El Comercio 2018) and in the scholarly community (e.g., Bazán and Fuchs 2018) as being intrusive and an expansion of the mandate of the IACtHR. The argument put forward was the Court acted as an activist and intervened with a view to ensure judicial independence in general,[250] instead of ruling upon the case in question, given that the beneficiaries of the provisional measure were not directly related to the case before the IACtHR.

*Penal Miguel Castro Castro known as "Ojo que llora"*

In the case Penal Miguel Castro Castro,[251] the Court determined that Peru was responsible for having violated the right to life and the right to personal integrity in the massacre, the extrajudicial killings and the acts of torture committed during the 6th and 9th of May 1992 in the penal facility "Castro Castro" in the so called "Operativo Mudanza 1" against prisoners accused of or sanctioned for terrorism or treason, among them pregnant women in ward 1A and 4B.[252]
In the judgment, the Court ordered the state among other reparations to establish a monument carrying the names of the victims of the massacre. This monument, called "Ojo que llora", caused a dispute at national level and with the Court. The dispute crystallized around the issue that the Court ordered to include both the names of victims of state terrorism and the names of people that died in acts committed by the Shining Path, which caused conflict and polarized society. The reparation dictated was considered to be context insensitive and too rigid, causing a backlash against the Court (Hite 2007; see also Astete 2015). Furthermore, the Court dictated reparation orders to provide for medical attention to the families of the victims and victims living abroad and to find the bodily remains of victims of the massacre, measures that have not

[249] The judges in danger of being removed were Eloy Espinoza-Saldaña, Marianella Ledesma, Manuel Miranda and Carlos Ramos.
[250] The provisional measure reads in the Spanish original: "Dicha solicitud fue presentada para resguardar la "estabilidad en sus puestos" de cuatro magistrados del Tribunal Constitucional del Perú que emitieron decisiones en los años 2016 y 2017 con respecto a la sentencia que resolvió una demanda de agravio constitucional interpuesta a favor de imputados del proceso penal que se sigue por los hechos ocurridos en 1986 en el establecimiento penal "El Frontón"." (Medida provisional 2018)
[251] Miguel Castro Castro Prison v. Peru, inter-Am. Ct. H.R. (ser. C) No. 160, at 2, para. 3 (nov. 25, 2006).
[252] In those wards approximately 135 women and 450 men were imprisoned (resolution of supervision 2018: fn2)

been complied with. Out of 16 reparation orders, 15 have not been complied with, one has been declared partially complied with which is the reparation order that dictates the publishing of the crimes committed in an official newspaper.

*La Cantuta*

In *La Cantuta v. Peru*, the state recognized partial responsibility and was found guilty by the Inter-American Court of Human Rights for violating the right to life, the right to personal integrity and of personal freedom of one university professor and students of the *Universidad Nacional de Educación Enrique Guzmán y Valle - La Cantuta*. The professor and nine students were arbitrarily detained in July 1992 in Lima. Two of them were executed and eight were forced disappeared. It the cases *Barrios Altos* and *La Cantuta*, the Court famously established the prohibition of amnesties. The "Grupo Colina" was proven to be involved. Given the humanitarian pardon concerning the two cases *Barrios Altos* and *La Cantuta*, the Court called for a joint supervision in a public audience in February 2018 on request of the victims in the case. Three reparation orders in *La Cantuta* have not been complied with: providing medical assistance to the victims' families, paying financial reparations to the victims' families, paying the amount indicated in the judgment for the concept of disbursement to two persons. The Court declared Peru to have partly complied with five reparation measures, among them the full investigation of the crime, the search for the mortal rests of the victims, the publication of the judgment, the implementation of human rights programs for members of the armed forces and the national police. Two reparation orders have been declared complied with: a public act of recognition of the crimes committed the inscription of the names of 10 persons declared victims into the monument "Ojo que llora".

Summarizing the general picture for implementation of judicial ruling and judicial reforms in Peru before coming to an in-depth analysis: Financial judicial projects of the World Bank showed several challenges during implementation period in Peru in both subsequent Judicial Sector Reform Projects. Nevertheless, the Bank rates its performance overall as satisfactory. The official documentation tells little about obstacles to implementation but rather reaffirms the Bank had done everything in its capacity to realize the reform. Branches of government in Peru went into considerable gridlock after the end of the Fujimori regime and judicial independence was seriously hampered throughout all subsequent administrations. Similarly, state activities and organs were characterized by acts of corruption. Beyond this background,

the Bank decided to support the judicial branch in the proposed judicial sector reforms. Coordination between executive and judiciary did not go smoothly in the process.

In relation to the implementation of international judgments, for most cases under supervision in Peru, official IACtHR reports provide a rather meager performance regarding compliance with reparation orders. In several occasions the IACtHR pronounced judgments in favor of upholding judicial independency and was even called to intervene directly a new attempt to dismiss several judges of the Constitutional Court. Similarly, delays in judicial proceedings, the failure to investigate, sanction and punish the perpetrators of past human rights violations were addressed in IACtHR orders. While the institutional Peruvian fabric continues to be characterized by past autocratic episodes, and party alliances eroded, the society is also polarized regarding how to deal with the past human rights violations, the internal conflict, and the strong political divide. Addressing delays and insufficient levels of implementation is part of the legal mandate of the regional Court. Denouncing non-compliance can also be approached from a political point of view, where the Court fulfills a role of the guardian of the Convention, and thus there is also a symbolic and diplomatic element in openly calling out countries on their meager human rights performance. However, I seek to explore what is more to implementation problems than simple statistics and international reputational issues. What exactly happens when implementation problems arise?

The next sections explore implementation problems along the lines of the three analytical dimensions of context, design and coordination, seeking to study implementation problems with a view to answering the research question how global governance rule of law supporting activities are implemented at national level.

## 5.3 Analysis of the dimensions of context, design and coordination during implementation

This subchapter engages with the analysis of the implementation processes of judicial reforms initiated by the Bank and of Court judgments in Peru. It draws on material from field research, participatory observation, and on primary documents. The chapter jointly discusses problems in implementation in judicial sector reforms and in the judgments as it is structured around the dimensions of context, design and coordination and explores and develops them further.

The coding exercise allowed to identify elements of the dimensions. The context dimension entails elements in relation to technical v. political framing, agenda setting power, knowledge production and dissemination, and discussions around timing of the intervention and

sovereignty infringement. The dimension of design of judgments and reforms entails elements in relation to blueprint solutions, inflexibility of content and timing of implementation, reporting procedures, coherency and design and issues in relation to incompatibility with national legislation. The coordination dimension comprises elements in relation to the selection of stakeholder, political will and political volatility of the counterparts' burden shifting in implementation.

Exploring and developing the dimensions and describing the elements is a joint research outcome of analysis of implementation processes in Peru and Argentina. However, major findings regarding the description of the elements to these dimensions are not chronologically developed and presented but introduced already in this chapter at the beginning of the empirical analysis of the processes in Peru to give a better reading experience.

### 5.3.1 Exploring the context dimension

Global governance interferes with and sometimes changes national politics. A requirement for intervention that is often emphasized in guidelines for interventions and projects is a basic understanding of the political context in which activities will take place. Similarly, courts as international global governance actors engage in analysis of the background of the cases at hand and the wider political context. This said, what comprises the category context is already subject to interpretation. "Context" can range from political system to institutional structures, to cleavages in society, to linguistic particularities. Assessing and interpreting the political context is itself a political exercise often predominantly carried out by the international governance actors in e.g., previous baseline studies or fact-finding missions. As such, it is influenced by their approach to knowledge production, interpretation, and dissemination.

The analysis of the empirical material revealed a lack of assessment of political intra-branch dynamics in the aftermath of the Fujimori dictatorship as crucial in implementation problems. Additionally, the analysis showed how problems emerged also in relation to attempts of agenda setting by the Bank and Court, problematic official reporting structure and problems in relation to the negation of the political dimensions of judgments and reforms as elements in the processes.

*Negating the political nature of context*

> "But I mean the World Bank is the least political of any institutions. It does rule of law reform in dictatorships. Its's just because it is a nice term. I guess. Ah, it [the Bank] does not use the word democracy ever. And I guess although apparently it is kind of discussable whether it does human rights or not. Its approach to human rights is certainly not what the human rights activists would like." (Interview #4)

Disregarding the political context is a political decision and can have political effects, especially when interventions are framed technical or legal in highly politicized environments. Framing rule of law support as non-political thus is not merely a rhetorical move, motivated by mandate-based restrictions, but also carries potential consequences in relation to the actors involved in the processes, and national debates about the suggested rule of law support changes. As such, a technical framing also reveals contradictions in the logics of change of the Bank and the Court addressing questions of state ordering through the backdoor. On a pragmatic level, rationales for a negation of the political nature of intervention can be connected to restrictions in the mandates of the global governance actors. The World Bank has a non-political mandate, prohibiting interference with political affairs. Chapter one discussed the ways the Bank circumvented this prohibition by framing rule of law promotion as an important pillar of good governance and a precondition for economic growth. As loans are policy-based, meaning they must be spent in accordance with the contractually agreed policies and reforms stipulated in the Bank project, money is attached to political content and structure. Loans are often negotiated over a longer period, making the analysis of the political context a task that additionally has to be coordinated with the time of the project implementation period.

Engaging with the prosecution of human rights violations and confronting states' abuses of power is at the core of the mandate of the IACtHR. Nevertheless, being legal actors, the mandate of international human rights courts also draws boundaries of their interventions that works in at least two ways: securing court channels to intervene in political heavily disputed topics oftentimes in problematic political structures and securing states that agreed to grant the court's jurisdiction non-interference with their political systems as such. However, lines are almost never that clear cut. This said, as courts depend to a great degree on the collaboration of nation states, that are at the same time the entities they address as potential violators in the cases, maintaining good diplomatic ties and strong relationships with specific national actors helps the courts to secure that their activities can continue. Sticking to legal procedures, adopting legal language and stressing the legal nature of interventions, thus, can help to reframe the interventions as legal to have access. Framing their intervention in legal terms can therefore work in two directions: as a protection and a façade at the same time. However, the gap between the political topic at hand and addressed in the cases and the legal attitude of the IACtHR becomes even more apparent. The courts run the risk of losing authority and on a more pragmatic level partners for implementation. Thus, engaging with the political sphere becomes necessary and stipulates an analysis of the wider political context of engagement. On a more

practical level, taking context into consideration is not only important with regard to deciding when to engage and with whom, but also for changing the course during implementation.

The technical or judicial nature of an activity is sometimes invoked as an argument for not engaging into an analysis of the political situation in the country to stress the political neutrality of the global governance actor. Thus, rendering the intervention as either economic or demanded by the law that must be applicable in equal terms regardless of context helps to support this argument of maintaining a neutral stance towards technical or legal problems in specific countries. One interview partner engaged in activities of the IACtHR elaborates on his view of the importance of the sense of neutrality:

> "I can't imagine how it would be to judge in a case that is political, because what the Court does, is to apply the convention in relation to the facts in concrete cases." (Interview #10, own translation)

The positions reflected in this quote can be attributed to a rather traditional approach to adjudication that silences or negates the political dimension. It suggests that the IACtHR is a legal organ and thus the nature of intervention must be of legal nature. The organ thus has a duty to act and issue judgments regardless of the context to fulfil its mandate and judge in accordance with the law. In this logic, consequently, negotiations about procedures and content that are not referring to the legal argument as such become difficult. Furthermore, this framing determines agency as arguments can only be voiced by those familiar with the legal procedure, narrowing down the circle of political debate and debaters.

However, more flexible approaches to accepting the political component in adjudication were voiced during fieldwork, especially regarding the possibility to heighten the feasibility of the implementation of the judgment. Several interviewees also expressed the opposing view, arguing that law and especially international law is always inherently political and must and does consider context (e.g., Interview #8, #13, #34, #35).

Framing of interventions also often carries historical baggage and follows previously established patterns. As described in the section about the political and institutional landscape, historically, technocratic top-down economic intervention has played a major role in Peruvian politics. Underlining a supposed need for technocratic intervention in the judicial sector, one interviewee working in the World Bank stressed:

> "Even if the Peruvian authorities they know a lot about the judicial system in Peru, they do not necessarily know a lot about justice reform. They did know, for example how to prepare a survey for reasonable workload, how to create a platform for handling cases. All these things are great in particular. [...] All this knowledge the Peruvians and many other countries they don't have a roadmap to do the policy. I mean, they do have a plan and we have our expert, most of them internal experts, from Think Tanks etc. but there are more in the business of solving the problems... So in general there is a lack of knowledge on how to design projects in this area. (Interview #1)

The interviewee emphasized the supposed lack of expertise and the technical nature of the intervention, while at the same time the person clearly outlined the political dimension ("a roadmap to do the policy"). In a similar vein, another interviewee suggested:

> "But that is the other problem: finding anyone on the [national] courts that has any idea that one that they have a problem, and two, that they have any idea what they want to do about it." (Interview #4)

Both excerpts show how the dichotomy "technical" v. "political" is invoked, while the interview partners clearly also fuel the narrative about the institutional incapacity and national deficits put forward by the Bank as reasons for intervention:

> "Everyone is always complaining these projects are too technical. I don't think they are technical enough! What westerners have to offer are techniques for doing very specific things like the kind of things you can do to reduce delays. Kinds of things you can do to ensure that you are asking for enough money in the right places, the kinds of things you can do to ensure that your budget office has the right people in it. These are the kinds of things we are good at because we have done them. Is this enough to pull a law system? God knows." (Interview #4)

Litigation in a case and the design of reforms undoubtedly have a strong technical dimension. However, acknowledging possible political implication, the political structures involved in implementation and political dynamics that shape the process does not necessarily stand at odds with this technical substance. Invoking the dichotomy technical v. political is not only counterproductive to implementation but it also serves to hide how agency and procedures are interwoven in the activities. Approaches are problematic on a pragmatic level of operationalization and on the level of logics of change. This applies even more so considering that the implementation period is dynamic and contexts change.

*Understanding contexts*

> "We certainly can't do politics. Half the time we are completely defueled by what is really going on in the country. And the banks in particular are fairly bad about being able to see the writing on the wall." (Interview #4)

While risk analysis is something the World Bank does before approving projects, it can arguably not be something the IACtHR engages in before issuing judgments. The regional court cannot do feasibility studies for the reparation orders it plans to issue. Litigation also takes place and judgments are issued when the context for implementation is not favorable; otherwise, the intervention of the IACtHR would miss the point. By definition, the Court engages in problematic political contexts. This makes the activity even more politically sensitive.

> "I think that the Court should not only issue judgments irrespectively of the political context, it has to take the political situation into consideration. Doing this, does not imply to have the consent of the high-ranking positions. Obviously, a decision will never have a 100% acceptance. But if in a given moment conservative spectrum is powerful, it would have to control the effects of the judgments for those sectors. I am not saying it should abandon its principles of the defense of human rights but maybe not with the intensity, some sectors would like to see it [...]. It has to do what it has to do, but maybe in a more sensitive way, not in a brusque manner." (Interview #21, own translation)

In this quote, the interview partner working in the judicial sector in Peru, voices a plea for a more context sensitive attitude of the IACtHR regarding the context of intervention and national politics. On a more general level, foreseeing or controlling the political effects of judgments is not possible. Taking context into account must necessarily be an estimation based on assessment of the IACtHR and the relationship of the global governance actor with the national actors at a given time. However, considering also that a hierarchical intervention regardless of context possibly sets the margins for future interventions and might alter the relationship between national actors and the IACtHR altogether, context sensitivity as a necessity exceeds the case at hand. This said, the IACtHR has limited means for context assessment concerning financial and personnel resources. However, as cases concern political and historical contexts and seek to establish facts, judgments of the IACtHR engage to a large degree with exploring the background to the case. The ways how context is approached and related in facts thus matter. This said, knowledge about the background of the case is not equal to knowledge about the context of implementation for the reparation measures issued. This entails knowing how national institutions, legislation, and power dynamics at national level play out which can hardly ever be achieved in the time for preparing a judgment (Interview #12).

Despite the Bank institutionally having better capacities for context analysis, more personnel, and abundant financial resources, lacking knowledge about the institutional landscape and the political context the Bank engages with in the activities has been pointed out in scholarly literature as one element leading to failure of reforms. The process tracing also indicated that lacking knowledge does not necessarily equal a lack of information as such or scarce opportunities to assess the context. It can also be a misinterpretation, flawed or interest driven assessment of generated information. Thus, flaws in context assessment of the World Bank can be described as a combination of institutional incapacity and legalistic and paternalistic interpretation of context knowledge. Regarding the openness to assesses and interpret the context, one interviewee said in relation to the IACtHR:

> "I think they [the Court] are open to such a dialogue which supposes to respect national customs and norms or traditions in the moment of issuing a judgment. At least, be aware of what will be the impact of such decisions. This requires understanding the countries context, study its legislation, its national law. Including the democratic perspectives in the country, this should also be a point of reference for issuing more country specific judgments." (Interview #15, own translation)

Understanding the context also entails an element of intent, as context can be respected or ignored, and everything in between. Context can be misread or ignored due to poor previous analysis or the simple exercise of copying from previous assessments or judgments (Interview

#4; #12; #13). Understanding the context and acting according to it can be two different things, both of which itself are structured by approaches to knowledge – that is hegemonic and universal – and procedures – that are hierarchical – of the context assessing global governance actors.

*Limiting context in reports*

Official documentation of the implementation period is most of the time issued or summarized by the international actor (for an exception see next chapter: letter by the Argentine government sent to the Bank and included in the report). Documentation structure is highly standardized, and language is diplomatic and technical. The documents – in this research, implementation completion report and resolutions of supervisions – contain little information about conflicts and/or the relationship among actors at national level or elaborate on this relationship from the perspective of the global governance actors. Additionally, the structure of the reports provides clear guidelines for what is said and when by whom. Language of reports and structure are determined by the nature of intervention (economic or legal) and reporting procedure is oftentimes enshrined in the Rules of Procedure of the respective actor. Thus, the structure of reports and resolutions possibly hides tensions due to language and the actors participating in the reporting structure. An interview partner engaged in World Bank activities elaborates on limitations and language choice in official reports of the Bank:

> "Obviously, an official document of the Bank will never tell you that the congress is coopted but it will in a diplomatic way, in a very polite way, state that there are challenges or that it is unclear. There exist certain key words that indicate that you have a problem here in relation to the topics in the report. "(Interview #23, own translation)

While the Court oftentimes formulates a legal position in resolutions of supervisions more antagonistic to states and more demanding in relation to the implementation delays, it still uses technical legal language which limits communication. The judicial organ frames and re-narrates the context of implementation in relation to the case, rendering the interpretation of political dynamics a legal act.

On a more abstract level, the duty to ensure transparency and accountability, on the one hand, and the quest for confidentiality, on the other, enter into tension and often make documentation a superficial exercise. Even differing opinions within the team dealing with the case or the reform at international level can only be accommodated in the preexisting structure seeking a consensus on the matter e.g., in the form of dissenting opinions of judges, preexisting template for reporting procedure of the World Bank.

The uniform reporting procedure in turn, reinforces the harmonized and monolithic perception of a political will and lastly nurtures the state-centric, executive-based structure in global governance. Resolutions of supervision, even informal memos on the progress, always aggregate information and necessarily reflect a specific moment in time of the process. The global governance actor determines this moment. Reports are one official channel during implementation for communication regarding the progress of reforms and judgments. Having said this, the communication is largely one-directional – the parties and national actors report to the global governance actors – and highly standardized, as outlined before. In the documents, the global governance actors determine the status of implementation. In consequence, despite official documentation seeking to meet the need of transparency, it does oftentimes reveal little about what is happening on the ground during implementation.

*Changing the context*

> "I would say it [the need for intervention] has to do with the [national] institutional incapacity to create change." (Interview #12, own translation)

How far are international actors seeking to change the context and what can this change look like if the assessment of context is flawed and guided by problematic premises? While it is beyond the scope of this study to assess impact of interventions, I still find it necessary to address points in which agenda-setting and attempts to change the political context through intervention were on the table and discussed in interview situations. Addressing this question helps to exploring context and transition as dimension to implementation problems.

Judicial reform projects and interventions of the Court that seek to alter public policy and bring about structural changes seek change per definition. One former official of the Bank brings up the common problem of the "attribution gap", relating to a problematic causal assumption between development intervention and subsequent change:

> "They all [the international development actors] take credit for positive things that happen. See, I mean you go there and they say: 'I did it' and someone else 'I did it'. So they all think they did it." (Interview #4)

What is silenced in taking credit for "positive things that happened", is the potential responsibility for negative things that happened and more importantly in this study, the gap between what "is happening" at national level and the intended transition to a strengthened rule of law. I argue that this attributional gap is particularly wide regarding rule of law supporting activities.

I described the Bank and the Court as actors embedded in and contributing to development agendas. The style of intervention was criticized as being too invasive (#8; #15; #18; #21).

However, questioning the exercise of activities or the interpretation of the mandate did not necessarily amount to rebutting the concept – rule of law – per se.

Interview partners expressed concern about a wide interpretation of their mandate to address structural questions and engage in rule of law support. Sometimes, activities had wide-reaching consequences. One interviewee familiar with IACtHR activities stressed the *erga omnes* effect of a decision in the famous *Gelman Case*[253] in Uruguay:

> "In the Gelman case it says 'the effect of this judgment of the Court has an obligatory effect for all the states [member to the American Convention]', so there is an element of vanguardism, judicial activism of the Court. In some cases, it has neglected to measure the consequences of its theoretical decisions." (Interview #15, own translation)

The Gelman case provoked strong resistance against the IACtHR, accusing the Court of infringement with national sovereignty. Judicial reforms and judgments meeting heated national debates might cause stronger resistance or more prompt resistance. However, implementation problems do not only concern open resistance against a global governance actor but oftentimes concern deeper political levels, as they are context dependent. Attempts by the global governance actor to change the context thus influence implementation depending on the context. They might also depend on the way the global governance actor is perceived in each moment in a country and not necessarily only be the planned and initiated rule of law supporting activity. One interview partner reflects on the possible impact of interventions of the IACtHR on the separation of powers in a country:

> "I don't think the Court is after all a political actor. What could happen is that it influences the distribution of power, the sovereignty, if based on the rights [in the Convention] it [the Court] goes further and crosses the line from what was expected in this moment of it." (Interview #18, own translation)

The interview partner suggests in this quote that the IACtHR could set the agenda by default, departing from a single case and ending up stipulation a change in distribution of power among national branches. Attempts to transform the context are not always amounting to setting the agenda. However, rule of law supporting activities would miss the point if they were not influenced by a certain development aim. Setting the agenda can be influenced by the dominant development paradigm of the intervening actor and/or the persons involved in design.

> "When I was in the Bank in this moment, what I heard of is that during the 90s the IDB and the Bank divided the topics to deal with, the IDB did penal topics, the Bank non-penal. In this epoch the justice topic was very strong inside the Bank and there were a lot of people pushing it. Today it comes back to the agenda." (Interview #23, own translation)

I described earlier possible problems in the conflation of interest of international governance and national governance or rule of law promoter. However, creating a supposed "union of

[253] See e.g., Roberto Gargarellas (2015a) arguing the decision in the Gelman case in Uruguay undermined democratic decision making.

interests" between national and international level might fail at instances when national powerful actors enter into conflict. While the subject of this study is not to determine if Bank and Court are pushing states to reform agendas they would not have done otherwise or done anyways[254], I like to draw attention to agenda-setting as a factor in the implementation process possibly contributing to problems. One interview partner working in the judicial sector in Peru sustains the view that the IACtHR often works as agenda setter in Peru:

> "The Peruvian state is used to the Court dictating that it has to investigate crimes of human rights, because in its own initiative it would never have done so. The Truth Commission maybe, but not the Peruvian state." (Interview #18, own translation)

Another interviewee, former World Bank staff from Peru and anti-corruption specialist, stressed in relation to agenda setting by international actors in general:

> "There is a vacuum in national politics, meaning no one ever talked about lowering the taxes for coping with the situation of informal [labor]. The vacuum is real in relation to national politics." (Interview #20, own translation)

Not talking about something does not necessarily mean a lack of knowledge or a vacuum. What the quote stresses is that global governance actors sometimes address areas that have not been addressed in national politics. However, omission could also imply that negotiations have exhausted or that there is no consensus over initiating reforms. This would render the intervention by Bank and Court not a reaction towards a demand but amount to setting the agenda on own initiative or siding with reform willing actors in the state.

In a similar vein, stressing the agenda setting power of the IACtHR and yet going even a step further describing the regional Court as a defender of national state institutions, an interview partner from the judicial sector in Peru stressed the following:

> "So it is clear that it [the Court] is not only a Human Rights actor, it also has an institutional dimension. Clearly, the Court has been elected…but it is also clear that a judge ruling upon right can never close its eyes before the reality of the case. Similarly, it is clear that it is another question what they ought to do. However, with respect to political rights and the consensus in the region with regard to the Democratic Charter [of the OAS], what they have to do is clear. So, based on the minimal judgments, I think that the Court can legitimately act to defend basic state institutions." (Interview #18, own translation)

The quote reflects a view of the Court as almost omnipotent: a legal actor and human rights defender and an organ that can secure separation of powers at a national level when endangered. This said, initiating change in a given context is a wide array; capacities and legitimate exercised activities are not necessarily in line with the array of activities the global rule of law supporters engage in. Supporting rule of law and "initiating change" can refer to changing or strengthening institutions, creating new organs, changing legislation, training personnel etc. and

[254] See e.g., argumentation of Hathaways (2007) in relation to compliance with international judgments.

implying change through awareness rising activities and other training. Judgments of the IACtHR oftentimes address broader structural changes. One interview partner from the Peruvian National Prosecutors office stressed how the reparation orders press for a policy change:

> "The judgments of the Court concerning Peru, at least in some cases, refer to structural problems. There are more than five cases concerning forced disappearance, so one realizes that there exists an institutional deficit. If there are five cases, there could be more. So, I already have five judgments that are dictating different standards, and demanding the Public Ministry to comply with those, also demanding the judicial branch to comply with the standards, because if you do not, in the future there will be other cases. So, we have to prevent that. There is a lot of progress… the criminal code has been changed, an entity for searching for disappeared persons has been created… this might be one of the most beautiful outcomes to look at when evaluating how the Peruvian state has developed." (Interview #17, own translation)

### 5.3.2 Context insensitivity and implementation in Peru

After exploring different elements to the dimension context, I will now turn to analyze context in relation to specific implementation problems in Bank projects and judgments of the IACtHR in Peru during the time span 1998 to 2018. The section will discuss the dimension in relation to the Bank and Court jointly. This said, the analysis is not a continuous "tracing exercise" of entire implementation processes but it rather discusses problematic moments during implementation.

*Bank*

> "[A]fter Fujimori left, donors came in." (Interview #4)

The period after Fujimori fled the country was a window of opportunity for the Bank to initiate reforms and sign loans with the new government(s). Relying on previously established ties with state actors and deepening them the Bank sought to continue shaping institutions and the justice sector now in a country formally recovering from autocratic leadership and reestablishing rule of law and functioning institutions. To initiate the Justice Sector project, Bank officials conducted an analysis of the institutional landscape and finally decided to place the executing agency, the agency in lead for disbursing the money and coordinating the execution of the proposed reform, in the judiciary. The reasoning for this placement was the openly communicated hope to thereby counterbalance the predominant executive power in the delicate institutional fabric after Fujimori. Bank staff involved in the decisions at the time underlined in interviews the placement of the executing agency was the outcome of a joint discussion with national counterparts (Interview #14; Interview #23).

*Poor context assessment and political maneuvering*

Given that the Bank projects were follow-up measures and built on previous engagement in the country and in other sectors under Fujimori, Bank officials had good personal ties with national actors and chances for a comprehensive country assessment were good. However, the level of corruption in the judiciary was still neglected, making the primordial counterpart of the Bank in the project prone to political turmoil.[255] Additionally, systematized research concerning the structural problems of the judicial sector, meaning the problems the project wanted to address and eventually remedy the activities was scarce (Interview #3; #15).

In the direct aftermath of the dictatorship, dependency of national actors on international financial creditors was high. The national positions to bargain terms for reform were weak. The context of intervention thus was politically fragile, and chances were good for the Bank to singlehandedly dictate terms in relation to reform content and structure of implementation and in relation to selecting the stakeholders. One interview partner confirmed the delicate political maneuvering the Bank engaged in:

> "We set it up there [the executing agency in the judiciary] [...]. [A]nd then I convinced Nelson Shack who was the former budget director of Toledo to be the project director. [...] And when we had our launching ceremony, President Toledo actually came. [...] And I was able to convince the Chief Justice who had been kicked out by the executive of Fujimori to personally invite the president to come. And he did. So it was a great moment of reconciliation to show that executive and judicial branch together can work for the benefit of the country. And this was a great message to send. [...] So, we did the launching ceremony and the project went off to an excellent start. If I go through all the details of it, we will get off track but we used up all of the money. And in the next project, the second project, the only other institution that we added was the actual Fiscalía.[256] Because I wanted to do more criminal justice." (Interview #3)

Signing loans with international creditor does thus not only have long-term consequences concerning the accumulated debtor obligations for the country but also short time political consequences of structural, symbolic, and financial nature. The procedure for initiating the reform potentially sideline national political procedures (e.g., approval by the parliament) and might inject money in sectors previously not considered in the financial household. As political consequences, placement of executing agencies, and selection of counterparts in the reform can lift actors in privileged positions (e.g., the judiciary in the first judicial reform project in Peru) and attributing additional resources while excluding others centrally parts of the executive ready

[255] In 2018, the *Consejo de la Magistratura*, one of the four key actors in the executing committee was dissolved due to massive corruption scandals, rendering questionable in retrospective its role in previous reform initiatives.

[256] The *Fiscalía (Ministerio Público Fiscalía de la Nación, MPFN)* in Peru is the Public Prosecutor's Office. The Public Prosecutors Office in Peru is an autonomous institutional body, hierarchically organized and integrated into the process of administration of justice and the defense of the constitutional and legal rights. The National Public Prosecutor presides over the Public Prosecutor's Office and together with the Supreme Public Prosecutors constitute the Board of Supreme Public Prosecutors. It is this body that elects the highest representative of the Public Prosecutor's Office. Its authority extends to all magistrates, officials and civil servants who are members of it. See also footnote below explaining the position and functioning of the Public Prosecutor (*Fiscál de la Nación*).

to block the reform. In the Peruvian case, the judiciary was in a privileged position to disburse money for reform to other agencies.

*Context and opposition*

However, the reform was still blocked at other levels. Coming to a second element of context in relation to implementation problems that is missing the potential national opposition to the projects by actors involved in the implementation but not included in negotiations. Official project documentation of the Bank proceedings told little about branches of government spoiling the implementation of the Sector Reform Project I (ICRR 2011). Interview partners repeatedly confirmed that albeit not being blocked entirely, the reform was little sustainable since it was not backed up by parts of the judicial branch and technically designed (#1; #3; #4). The picture changed slightly with the second reform project initiated by the Bank. According to interview partners taking part in negotiations that ultimately resulted in the Justice Sector Reform Project II, the Bank granted more room for previous debate during design phase than in the previous project (Interview # 14; #19). A wider range of counterparts (judiciary, Ministry of Justice, Judicial Academy, Attorney General's Office, National Judicial Council) was included and context assessment could also build on previously identified gaps in the past judicial reform project. Opposition did not manifest, like in the first project. The executing committee[257] included heads of the organs involved in the implementation process, being able to preserve their interest and power (Interview #14). Nevertheless, the executive did block parts of the reform initiative in the Justice Sector Program II postponing the implementation of the new criminal code in Lima and Callao. According to Bank documentation, this development was "outside the control of the counterparts in the judiciary" (ICR 2016:ii). However, the Bank did miss the context that is the necessity of having the executive on board in the initial design. Similarly, later it was not reacting in light of this blockade. Implementation problems, therefore, emerge because agency was singlehandedly attributed to one branch, marginalized the position of the executive in the project design while misreading its unwavering power. Instead of debating the actual content of the judicial reform packages, the blockade among branches resulted in shutting down debates

[257] Structurally the executive is the natural counterpart to negotiate with the Bank as a global financial institution. At the same time in projects, the Bank sets up different formats of exchange in projects and the execution of projects: the executing agency is the agency in lead for project implementation; the executing committee is a larger group of organs involved in the process. The composition still does not necessarily include all the organs concerned, nor necessarily the heads of these organs (see also section 4.1.2).

(Interview #19). Opposition also did not manifest regarding the rightfulness of the intervention itself but rather as a manifestation of executive power to halt a reform.

As outlined, parts of the judicial reforms were blocked, or not sustained by all branches of government, but intervention was not rejected altogether. On a more general level, the absence of implementation problems can also be a sign for actors to have been coopted or the relative weakness of opposition outside the process, meaning that the opposition is not in a position to speak or to be heard as potential opposition. Thus, the selection of actors defines an inside and an outside in reform processes. Problems oftentimes only emerge when actors inside the negotiation circle are powerful enough or if the opposition is in a position to block the reform.

*Anticipating effects and timing*

*IACtHR*

Was the Court neglecting an analysis of the Peruvian political and legal context in its judgments? As previously outlined, a thorough analysis of legislation, institutional dynamics, and internal rivalries in each country member to the Court is not practicable given also the limited number of personnel working in the Secretariat of the Court.

Even more so, a careful interpretation of the context and context sensitivity e.g., regarding timing is more crucial. In the case of *"Ojo que llora" (Penal Miguel Castro Castro)* in Peru, one reparation order dealing with the monument for victims of the violent internal conflict, the Court underestimated to a great degree the effects the reparation order would cause in a polarized society. Ultimately, the debate about memory policies that span around the reparation order, lead to a rejection to implement the reparation order altogether and to a backlash against the regional organ overall. This said, problems in the implementation process were an example of a constitutive moment in political debate in Peru entering into discussions on who to consider the victim and who the perpetrator of the internal conflict.

*Context and intervention*

Sometimes the judicial interventions of the Court seek to have direct effects e.g., intervening in favor of a person at risk or at an institutional level seeking to secure the independency of the judiciary. A precautionary measure granted in the case *El Frontón* (*Durand and Ugarte v. Peru*) in favor of four Constitutional Court judges to prevent them from being suspended was contextualized by one interviewee as follows:

> "At this moment the congress was investigating the Fiscal de la Nación [Public Prosecutor][258]. It was investigating situations in the Consejo Nacional de la Magistratura[259]. It was trying to attack the Constitutional Court and it was trying to remove the president. This is to say: all at the same time. Very clearly, this was an attempt to occupy the power in the country. So, the Court intervened. [...] It was a warning, a sign saying "stop it" until here and no further." (Interview #18, own translation)

Albeit intervening on a large scale in the balance of the political system, interview partners stressed the IACtHR had granted "security" in a critical moment of instability in the Peruvian political system by these measures and that described the intervention as "correct and necessary" (Interview #17 and #21). Other interview partners opposed this view. They found to the contrary the suspension of the Constitutional Court judges that implied a new selection of judges to be a normal political process and that the international Court should stay out of this matter. In their view, the intervention of the IACtHR was not securing judicial independency but infringing national sovereignty and the democratic process (Interview #15, #18, #19). One interview partner working at the IACtHR underlined its criticism of the decision of the regional Court and found the IACtHR had overstepped its mandate. The interview partner sustained the provisional measure that granted protection to people [the judges], not originally addressed in the case, was outside the direct jurisdiction of the IACtHR. By intervening in the political balance of the Peruvian institutional system the Court did not stick to its duties concerning the case at such but attempted to secure the outcomes of the trials the Constitutional Tribunal by intervening in favor of progressive judges (Interview #13). It is speculative if the Court had intervened in favor of conservative judges if they had been pushed out of office by allegedly unconstitutional acts. The international support exercised by the IACtHR for the progressive members of the Constitutional Tribunal was discussed as a breach of mandate trying to maintain a composition in the Constitutional that secured a fair and politically balanced prosecution and monitoring of human rights cases. It was not discussed much in relation to an overall role of international organs in rebalancing power among branches at national level as part of rule of law activities (Interview #19). However, this instance and the processes spanning around the intervention were still potentially constitutive for rule of law development, as questions about balance of power at national level and internal interventions emerged.

[258] The term of the Public Prosecutor (*Fiscál de la Nación*) lasts for three years and may be extended by reelection for two additional years. For information see https://www.mpfn.gob.pe/fiscal_de_la_nacion/,last accessed 02.06.2022.

[259] The National Council of the Magistracy (CNM) was an autonomous constitutional body of the Republic of Peru whose main function was to select, appoint, ratify and dismiss the country's magistrates. It was suspended in 2018 and formally being dissolved in 2019 because of corruption scandals and replaced by the National Board of Justice, see section 5.1.2.

Seeking to secure judicial independency by provisional measures is clearly an intervention into the political fabric of a country. Additionally, the effects of the intervention are not foreseeable. Understanding the context and issuing measures seeking to strengthen one branch or individuals, does not necessarily strengthen the institutions in the short or long-term. One possible reading would therefore be the Court in exercising not originally granted power, contributed to cement institutional antagonism at national level. However, issuing a "warning, a sign saying 'stop it' until here and no further" as described in the quote above has also a symbolic character of judicial oversight. The oversight in this case, referred to overseeing the institutional balance. Helping branches to withstand attack of infringement by other state-actors is not originally a task of regional human rights courts. In this sense, the situation was also a moment for calling into questions the authority of the Court and the legitimacy to act as a guardian of progressive members of the national court. In addition, the measures triggered discussions and fueled the heated debate around the pardon granted for Fujimori in which the Constitutional Tribunal had to decide in a national verdict.

Given that the Court must act upon cases referred to it when found admissible by the Commission, it cannot decide to refrain from action if topics are delicate and debated fiercely at national level. It could, however, time its decision in a context-sensitive way (e.g., not before political elections, etc.) abstaining from issuing judgments while national deliberation is underway that is if judicial decisions are taken (depending on the interpretation of the subsidiarity clause). In the case of the presidential humanitarian pardon granted to Alberto Fujimori and the subsequent public audience held at the Court for supervision of the cases *Barrios Altos* and *La Cantuta*, the Court refrained from intervention and granted the state time to solve the issue at national level, remaining largely in a position of subsidiary action. However, interpreting subsidiarity still depends on the IACtHR and its assessment of national institutional capacity.

The implementation of reparation orders in cases in Peru was also blocked due to the opposition of one branch of government not directly addressed in the judgment but affected by the reparation order. Financial compensation to the victims often is an integral part of judgments of the IACtHR. The congress in Peru blocked implementation of regional judgments by issuing national legislation that prohibited the smooth payment of monetary compensation. Albeit the amount of money dedicated to pay the compensation was relatively small, national debate about the financial loss of Peru was still fierce (Interview #16). Rejecting the IACtHR also has a

historical dimension in Peru; therefore, referring to national sovereignty also has symbolic character and can serve as political currency. Peru threatened to resign the American Convention twice. First under Fujimori, and again in the discussion surrounding the humanitarian pardon granted to him. One interview partner, a lawyer and Peruvian academic underlined how the political debate about the Court being too invasive, too much of a human rights activist, continues to be present.

> "The Court knows this is like a Trojan horse: it is granting a decision that could cause a reaction against the Court." (Interview #15 own translation)

*Context and positioning*

Due to its acting in recent interventions, the Court has been portrayed as an organ siding with the Constitutional Tribunal and similarly, as the institutional antagonist to the Peruvian executive. Fearing backlash when issuing judgments is not an option for the legal body. However, trying to secure the independency of branches of government instead of purely focusing on the rights of the victims to the case might also jeopardize implementation. Implementation depends on institutional independency and at the same time seeks to strengthen this independency. The backlash against the Court in Peru did not cross the line or rhetorical statements (Interviews #12, #13). Peru did not resign the American Convention or withdrew from the Courts jurisdiction.[260] Nevertheless, interventions in political volatile situations in favour of particular institutions might risk the Courts legitimacy and, on a pragmatic level, it might possibly weaken the institutional fabric overall, as it creates dependency on the global governance actor to back up the institution. A rejection of the intervention of the Court is not necessarily only related to actual infringement of sovereignty, the content of the reparations at hand or the overall relationship with the Court; it is also part of political national currency and provides an opportunity for national political dynamics to manifest:

> "I don't think there have been judgments of the Court that were looking for structural changes. The backlash has been caused more due to the dichotomy liberal-conservative in Peru than by the state feeling it was infringed in its sovereignty." (Interview #18, own translation)

As such, the issuing of judgments and the subsequent reaction of the IACtHR during supervision is always highly context-dependent and politically sensitive.

In sum, Bank and Court both lacked good previous assessment of context in Peru. The analysis showed how problems during the implementation process manifested in relation to context

[260] The government of the UK in several occasions before the Brexit announced it would withdrew from the jurisdiction of the ECtHR. See e.g., https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum,last accessed: 02.06.2022.

insensitivity and different elements of it: neglecting or missing power plays among national actors involved in the process, marginalizing actors in design or placing organs more centrally, neglecting ongoing corruption, and direct involvement into ongoing political debates and intra-institutional rivalries. The degree to which they must leave politics aside according to their mandate, is discussible. This said, mandate is already widely interpreted by the global governance actors engaging in structural changes in the justice sectors of the countries they intervene to begin with. Thus, it would be a double standard to refrain from context analysis beyond economic and legal questions referring to restrictions by mandate while at the same time stretching and bending the mandate in the rule of law supporting activities stipulated by the global governance actors Bank and Court.

### 5.3.3 Exploring the design dimension

The analysis of the design dimensions in implementation processes in Peru revealed blueprint solutions and inflexible design of judgments and reforms as problematic elements in implementation. Importantly, the inflexibility of timespans for implementation showed to be a problem in processes, as well as poor context assessment regarding national legislative requirements and frameworks and flexible adaption of the design reforms or interpretation of reparation orders of the Court. The elements coherency and legal and procedural security provided by inflexible frameworks also emerged during the analysis of the material.

As the global governance actors Bank and Court are respectively an economic and a human rights actor, the structure and the design of the reforms and judgments are influenced by the nature of the actors. Reforms are attached to loans and specific disbursement and reporting practices and judgments of the IACtHR are designed in a legal form; the supervision's structure responds to this. However, there also exist certain leeway within these boundaries as defined by the nature of the intervention and the nature of the global governance actors involved in the design of the reform and the judgments (see also section 7.3.4 describing this leeway further). This section turns to exploring elements to the dimension design of judicial reforms and legal human rights judgments in relation to implementation problems.

*Applying blueprint solutions*

The Court follows in its practice a logic of coherency. When dictating reparation orders in cases, the IACtHR draws on jurisprudence from its own previous cases and on international jurisprudence alike. While I do not suggest that the Court applies blueprint solution to different

types of cases, there is an element of repetition in its reparation orders. This legal practice can be attributed to an approach seeking the coherent application of the American Convention. However, remaining too much tied to coherent application of the Convention the IACtHR could also lose sight of different contexts for implementation, possibly contributing to troublesome implementation. This means similar types of human rights violation will not necessarily stipulate the same type of reparation order, throughout time and depending on the actors involved. For instance, while it might be feasible for one country to establish without parliamentary support a search unit for victims that have been forcibly disappeared, in other countries, democratic requirements for doing so might be different.

World Bank judicial reforms also carry elements that are replicated. The Bank oftentimes starts by applying blueprint solutions that might be adapted to the institutional and political-economic context. The adaption of design depends on context assessment and is attached to development paradigms described in chapter one and two of this study. Uniform design, thus, can be stipulated by assumptions about universally applicable institutional features. Interview partners also referred to the rationale of knowledge sharing and replicability when talking about blueprints in reforms (Interview #6; #1), while risks of generalizing the solutions to previously universalized problems and missing context-relevant structures are downplayed. Interview partners involved in judicial reforms anticipated criticism regarding this universalist and interest-led agenda by the Bank during interviews.

> "So, in contrast to what people often think about the Bank, that they come in with a preexisting agenda and impose it on the countries, in these types of interventions [judicial reforms] it always has to be based on a quest of the country." (Interview #23, own translation)

The statement reflects and reiterates the dogma of national ownership as a prerequisite for institution building that also repeated in development practice manuals. Bearing also in mind strong incentives for conflating the national demand with the international offer and sustain it in discourse, the locus of the project's initiative becomes a mere formality. The initiative for starting negotiations about a loan with the Bank is not necessarily saying anything about the negotiability of the content of the reforms. Having quick and readymade solutions to predefined and framed development problems also give an advantage of leverage in negotiation situations that are time-sensitive e.g., a government wants to close a loan before a change of administration. Similarly, national debate on a given reform might not take place because the topic is not salient enough but because the dialogue is blocked institutionally. Negotiating the design of reforms while bypassing important actors that later have to implement the policies and institutional changes, bears the risk of hampering institutionality instead of strengthening it.

Similarly, in theory, international human rights litigation and practice recognizes the principle of subsidiarity and departs from the requirement of an exhaustion of national remedies, meaning that international institutional activities are not activities *in lieu* of national institutional functioning but subsidiary to it. However, if national remedies are exhausted or institutional capacities are too weak to guarantee rights in the first place, it lies within the discretionary power of the regional court at hand. Claiming institutional weakness at national level can also be a political currency, transferring debates to the international level while national debates are stuck or blocked. Relating to the aspect of how this transfer of political debates to the IACtHR possibly furthers juridification, one interview partner from Peru suggested:

> "I think when the Peruvian State is accused [before the IACtHR] often no national dialogue takes place, but instead the dialogue transfers directly to the Tribunal which leads to a situation in which the parties defending the victims or the state dialog via the Court." (Interview #15, own translation)

Thus, „national ownership" in the case of the Court can be split up in at least two elements: national ownership of the debate of the political topic at hand and national ownership of the institutional activities in relation to treat the human rights violations and the implementation of judgment; that is also an element related to institutional capacities.

*Paternalizing national actors*

> "I mean, at the World Bank at the implementation level, there is recipes for everything. Everything has been done, there is nothing new under the sun. Everything. It is like, that point is the greatest value of the World Bank. A repository of living knowledge that can be transferred to countries that are definitely in a different stage of development. Everything is about to be, there is a recipe for doing justice services, case workloads, case management system, selection of cases, evaluation of... there is nothing new, and that is where we can offer value to these guys. Because they do not know these things. They ignore many times these things. An ignorance that is like, unbearable. It is like, look I am going to the school and do not know how to read." (Interview #1)

As a clear example of the "civilizing mission" in development cooperation, the interview partner in this quote stresses his paternalistic view on how to bring reforms about and the locus of the knowledge that is the Bank. In a similar vein, interview partners also have recalled a leftist opposition to the Bank as reason for the rejection of the global governance intervention:

> "Of course, I think political groups from the left, extreme left especially; they think that what the Bank wants, the IDB, the International Monetary Fund, what they want is to run everything. This is the first enemy. There exists a lot of resistance towards them. Especially because it is a loan, with loans you have to pay interests. And they think, in reality, when the project comes, it comes with a determined recipe." (Interview #20, own translation)

While the first quote clearly shows reasons for disregarding national approaches to design being based in supposed cultural superiority, the second quote attributes rejection of the Bank to leftist

rhetoric without acknowledging that critique might refer also to the substance of reform.

Inflexible and paternalistic design of reforms and judgments might not suit the context and can influence the implementation processes. While there exists flexibility about the design phase, once the reform program is set and the judgment is issued, some boundaries are structurally set. Loan agreements with the Bank stipulate contractual obligations for Bank and state alike. Similarly, judgments cannot be changed afterwards. Bearing in mind, the goal to provide judicial security at supranational level, changing reparation orders would run counter to the goal of intervention and largely undermine the Court's authority overall. However, the interpretation of the indicator fulfilment and the compliance with judgments as well as the actual processes of implementation are more flexible but also potentially bear conflict during the implementation phase. At least two points are of special interest: inflexible implementation procedures and timespans, and incompatibility with national legislation.

*Issuing inflexible timespans for implementation*

> "Well, I think none of the projects are long enough. Obviously, it's [policy change] going to take a lot of time so you stick with it." (Interview #4)

Interview partners pointed out that inflexible timespans foreseen by the international actors for implementation is oftentimes crucial for problems that emerge during implementation (Interview #12, #28, #32). e.g., Demanding the change of a certain law within the timespan of two years might simply not be compatible with national parliamentary requirements, and thus already in design run counter to strengthening rule of law.

In a similar vein, stipulating the change of systems of case-administration in provincial courts within a Bank project designed for an implementation period of three years might simply be unrealistic and yet stipulated by the forward-looking and result-oriented logic of development projects. On a more theoretical level, time is crucial for questions of justice. Accountability has been delayed oftentimes for many years when a case reaches the IACtHR. Sometimes the human rights violation before the court dates back more than ten years (e.g., in *Barrios Altos*). This means, the IACtHR might be tempted to issue a reparation order that offers quick remedy to victims in search for justice over decades. While in some cases, the rationale for issuing short time spans for implementation of reparations is to offer quick relieve to victims or families of deceased victims in immediate danger (e.g., not being able to secure the livelihood), other reparation orders indicating timespans for implementation do not necessarily have a similar urgency.

Issuing not feasible timespans for implementation is not only possibly provoking implementation problems but the IACtHR jeopardizes authority in future implementation processes. Issues of timing and flexibility of reparation order become especially apparent when the Court dictates reparations about public policies:

> "[...] I think when we dictate public policies or changes in legislation we have to be realistic with the places [timespans]. For example, imagine if someone would say: 'You have to make a legislative change within one year.' And this would imply a change in the Constitution. And the Constitution of this country says that two legislative terms are required for a change. So you already know that they are not going to comply with the judgment." (Interview #12, own translation)

Delays in the implementation of judgments also represent a problem for ensuring the non-repetition of the violation. The latter is directly addressing accountability of institutions to prevent the repetition of structural human rights violations. The quote above reveals a strong mismatch between black letter law and the theoretically claimed transformative purpose with an eye to pragmatism. In the practice of the Court the feasibility of reparation orders could therefor become more important in a long-term perspective. This will also depend on how the jurisprudence of the Court transforms in the future, e.g., if the IACtHR continues to issue more judgments on economic, social and political and cultural rights. The quote above already alludes to a possibly even more active role of the Court in public policy.

Measuring compliance and the fulfilment of indicators can hardly grasp long-term consequences of reforms and judgments. In rule of law supporting activities Bank and Court pursue long-term goals, yet the evaluation only refers to short-term compliance and reform success. Interviewees stressed the increasing awareness about the above-mentioned gap between transformative claim, on the one hand, and the problems of shortsighted design and assessment, on the other. Interview partners affiliated with the IACtHR stressed:

> "So for example there are structural changes that take years, decades and centuries and you think you will reach that within a year?! Some things only come step by step, but yes, I do think we should be more pushing in this." (Interview #12, own translation).

While on conceptual level, the global governance actors might intent to pursue more long-term approaches, at operational level also procedures restrict them formally to engage in more structural approaches to rule of law. In relation to the Bank, interview partners also pointed out personal ambitions to close deals would lead to projects being approved quickly and for short periods (Interview #2). Longer timespans for implementation have their upsides and downsides. On the one hand, longer timespans for implementation might heighten chances for sustainability and coordinated activities among national actors and provide room for national institutional procedures to develop. On the other hand, shorter timespans for implementation can provide

flexibility for amending designs and reparations, or to stop the cooperation altogether, close the chapter and retract from engagement.

*Providing security by inflexible design*

Flexibility in relation to the timespan for implementation is not necessarily relating to changes of the design itself. Interview partners pointed out those rigid approaches in either long-term or short-term approaches to judicial reforms would also serve to prevent corruption and personal or group agendas becoming too strong. One interview partner engaged in Bank activities confirmed in relation to preventing corruption by inflexible allocation schemes for money in judicial reforms:

> "After a lot of negotiation a lot of recognition that in fact we were never going to allow certain percentages to be moved around and reallocated. What was going to be given to the Ministry of Justice was always going to be for the Ministry of Justice." (Interview #3)

In relation to the Court, one interviewee also pointed out the advantage of giving precise indications for financial reparations, thereby avoiding national bureaucracy:

> "For instance in the case Acevedo Jaramillo [v. Peru] the Court left it to the internal tribunal to decide [the amount of financial reparations] whereas [...] more recently in the case Petroperú [v. Peru] the Court already established the amounts to be paid to avoid more bureaucracy in the course of compliance with the judgment." (Interview #12, own translation)

The interviewee continued to stress that designing clear reparation orders could also contribute to prevent burden shifting among branches at national level:

> "Another important aspect has to do with us [the Secretariat of the Court], it has to do with how we are dictating the reparation orders. They must be very clear. The broader they are, the more complex it gets, because this implies that they [the actors at national level] have to find common ground and a way to implement. This is sometimes harder than just saying 'you have to do this, and this, and this.'" (Interview #12, own translation)

The interview partner rendered clear and precise reparations orders an integral part for implementation success. However, implementation success does not necessarily equal institutional strengthening. Rigidly designed and hierarchically implemented reparation orders reflect a logic of transformation in which the knowledge about good institutional changes resides with the IACtHR. Leaving leeway for "finding the common ground to implement" might serve institutional development better, while compliance with the judgment might lower. Reforms and judgments can be clearly formulated. Reforms can also be amended later and reparation orders can be specified in subsequent hearings.[261] Providing clarity with regard to the content of the reform is not necessarily translating to rigid implementation procedures. Structural obstacles at national level for implementation – e.g., missing financial resource,

[261] See E.g., interpretation of the Judgment on Merits, Reparations, and Costs of 2 August 2008, in the Case Penal Miguel Castro Castro v. Peru.

lacking legislation for initiate or sustain the envisaged institutional or legal reform – might only become apparent during time. Therefore, ongoing context assessment, amendment of design and flexibility in procedures are intertwined.

*Ignoring incompatibility with national legislation*

Reparation orders and reforms oftentimes require national legislative action because to become effective. For the Bank activities a change in legislation is oftentimes a prerequisite for the reforms to begin to be implemented, e.g., setting up new organs, enacting legislation for new procedures in the justice system. For the implementation of most of the reparation orders the IACtHR relies on national legislation already in place (e.g., the prosecution of human rights perpetrators, judicial principles as fair trail that are constitutionally enshrined). This means the IACtHR orders the states to enforce already existing national law. National institutions are then also obliged to enforce the order dictated by the international Court. However, the IACtHR might also order changes in legislation as it renders national procedures in breach of the Inter-American Convention of Human Rights. Changes in legislation can be the goal of the intervention and existing and enforced national legislation is a prerequisite necessary for the implementation at the same time:

> "Another thing is that here must be national legislation that permits the execution of the judgment. This is to say, if it is already established by law, this will make the execution much easier and it is less within the decision of the government if it wants to comply or not." (Interview #12, own translation)

Legislation can be in place without being enacted, stipulating the intervention in the first place. This can support an intervention based on an argument about institutional inefficiency that stipulates subsidiary action. In addition, loopholes in existing legislation or contradictions are not only a hindrance for the activities, but also the purpose of the global rule of law activities. Sometimes judgments directly order changes of legislation. Reforms and judgments can also be issued in disregard of conflicting national legislation. Thus, the global rule of law intervention might inflict with national laws or stipulate activities – e.g., setting up new judicial organs in a short period of time – that are not compatible with national procedural requirements.

### 5.3.4 Inflexible design and implementation in Peru

The section turns to analyzing different elements of design in relation to implementation problems of reforms and judgments in Peru.

*Bank*

*Delays in implementation and postponement of closing dates*

Overall, judicial reforms projects of the Bank in Peru followed a rigid design. Amendments in the process referred, if at all, to postponement of closing-dates. In general, project measures were mostly designed in a way they did not counteract national legislative or other bureaucratic national requirements. Turning to questions of inflexibility in relation to timespans for implementation. The timespan for implementation in the first Bank project was amended several times, however, without changing the design of the reform itself. Emphasizing a certain degree of flexibility, the evaluation report of the Justice Improvement I project reads:

> "There were, however, two main implementation delays: a 22-month delay between the signing of the loan and effectiveness, and the second, to coordinate efforts between 4 different institutions across two branches of the State. This resulted in the project being extended for eighteen months." (ICRR Report Justice Improvement I 2011: 187)

The Bank granted more leeway and larger timespans for implementation, instead of a renegotiation of terms or a changing on the content of reforms. Because the Bank foresaw that there will be delays, the implementation period was prolonged. National actors can only "flexibilize" the process by defecting and non-implementation. Interview partners affiliated with the Bank stressed how the experience in the first project led to slightly adjusting the design in the second Justice Improvement II project (Interview #2; #3). In the stakeholder selection process the in the second phase, the Attorney General's Office was included in the steering committee; however, the executive branch was still little represented in the reform process. The implementation of the new criminal code in Lima and Callao necessary for the Justice Sector Improvement Project to go ahead was postponed by the executive several times. Thus, the Justice Sector Improvement Project II project was prolonged. The possibility for such a delay can be attributed to poor context design and poor choice of contributing actor during the design phase: the necessity for executive approval. In consequence, the project implementation period was prolonged and the indicator 1 that was not achieved was "relocated and revised" in the results framework to "drop indicators related to the implementation of the new criminal procedural code" (ICR 2016: vi).

Thus, design was not flexible in relation to the content of reform but regarding prolonging the time for implementation of the foreseen measures, and in relation to evaluating the project once one indicator for successful implementation was not met.

For the project in preparation from 2016 onward, political changes and volatility in relation to personnel lead to longer negotiation phases before a loan was on the table to be signed by the government of Peru (Interview #23). A fundamental part of the new project is a modernization

strategy for administrative procedures in the judiciary and the use of electronic files. Electronic files have been on the table internationally supported reform plans in Peru for a while. One interview partner expressed his view on how different steps must be coordinated and branches have to work together in such a process:

> "Having e-files is a prerequisite for electronic litigation. Has the decision for the introduction of e-files been taken already? National legislative action is required here because it is not only a decision of the judiciary internally. This cannot be brought about with internal changes of rules [*reglamentos*], because those changes have no binding effect for other actors. I need a legislation for this. This is pretty clear. So there was nothing in place. Therefore, the whole thing was dismissed." (Interview #19, own translation)

Albeit other activities in the two subsequent Bank projects did not rely on the existence of such a legal amendment, a steady shift towards e-governance has been part of the design in all three subsequent projects, to relieve national court workload and for better transparency. Now, pointing out the necessity for previous legislative action for such a reform to be successful reveals a considerable weak spot and connection between context assessment and project design. If international actors ignore or chose to neglect the necessity of legislative approval, the project might be blocked legislatively. The gridlock situation among branches in Peru persisted to varying degrees during the implementation span of the two justice sector reforms. Recognizing this blockage is not a question of designing the content of the judicial reform more context specific but it also relates to the decision of Bank to set the agenda and select the counterparts in the first place. Not considering that a change in national legislation might not be feasible, renders the implementation problematic from the beginning onwards.

*IACtHR*

In the Court, structural problems to implementation caused by the design of the reparation sometimes disappear during communication. In the reporting structure it is the state as a whole that has the duty to report on the implementation status to the IACtHR. Thus, this exercise of channeling information through the state can lead to an omission of information about mismatching legislation, bureaucratic hindrances, and issues of timing, institutional obstacles or other problems claimed by the actors involved in implementation in relation to the design of the reparation orders. However, also the opposite can be the case: state reports providing information by several ministries and entities without processing or summarizing the information and assuming responsibility for the implementation (see also next chapter). The decision of the Court to allow the publishing of the communication of the parties to the cases, could contribute to disentangle where exactly one branch or different branches claim inflexibility in relation to the design was a hindrance to implementation. This offers an opportunity for civil society, researchers, media and the public to look inside the black box state

during implementation. However, is does not do away problems relating to inflexible design or implementation procedure; it helps to identify them. At the same time, actors at national level claiming in the reporting to be unable to implement due to structural concerns are not necessarily unable to do so in reality. A more detailed and transparent reporting procedure could therefore contribute to fostering negotiations about implementation processes and changes regarding the design of the reparations. One interview partner involved in the Governments Prosecutors Office for Supranational Affairs claimed in relation to design of judgments and institutional incapacities:

> "[t [the judgment] does not only demand the modification of the penal code which is already in conformity with what the Court dictated but also the creation of a department for the search of missing persons. Maybe the difficulty the Interior Ministry has in relation to investigate, to put on trial and to sanction is more a problem of institutional capacity. I don't know if it is the capacitation of the civil servant, more budget... I don't know what would be necessary." (Interview #17, own translation)

The quote illustrates several important points in relation to the design of judgments:

First, one reparation order can stipulate two or more activities at national level, e.g., a) the changing of the penal code and b) simultaneously the creation of a new department for the search of missing persons. Where this department should be placed in the administrative structure of the state is not necessarily detailed in the judgments of the Court can has to be decided by the implementing state. Secondly, the problems that should be addressed by the reparation order – the lack of investigation, trial, and sanction – for crimes in relation to forced disappearances is not necessarily solved by changing penal codes and setting up new departments in charge for the search. The interview partner confirms that the solution might lie in several aspects: e.g., "institutional capacity, personnel capacity, more budget". The reparation order is designed in a way that it suggests remedies for addressing institutional incapacities, but the remedies dictated are not necessarily helping to prevent the violation in the future or to do contribute to the search for justice and the remains of the forcibly disappeared person in the case at hand. The overarching goal of the reparation orders in conjunction is the need for a new state policy for the search for forcibly disappeared persons. Not fulfilling the reparation order does not always mean that the policy is not set in motion.

Thus, problems in implementing a reparation order can be a constitutive moment for rule of law development, because state actors can search for alternative ways to set up a structure that sustains such as policy.

*Coherency and Inflexible design*

Coming to a second element, inflexibility of design attributable to coherency in the overall jurisprudence: Reparation measures in judgments are individually designed while they also bear

the characteristic of coherency on jurisprudence. However, even within the same country and regarding the same types of violated rights there exists variation. While judgments are per se not flexible, the reaction of the IACtHR during supervision is more flexible and individually designed, the same applies to provisional measures of protection granted by the IACtHR as they often relate to a recent need of protection for persons in cases pending the final decision in a dispute. As described previously, provisional measures need to be related to dictated persons involved in cases admitted to the Court.

> "And there are cases with a direct reaction in which topics of actual relevance can be touched upon by means of provisional measures and supervision. Barrios Altos and La Cantuta for example and Durand y Ugarte with regard to the Constitutional Process |… |." (Interview # 12, own translation)

The interview partner stressed how the IACtHR used the possibility to hear parties to the case and to issue direct intervention in relation to the judgment in several cases in Peru. This is, however, not flexibilizing the reparation orders per se but reacting flexibly to problems and dangers for persons involved during implementation. The intervention of the Court can be opportunities to (re)negotiate the elements to the judgment at hand and thus can bear constitutive character for rule of law development. The intervention of the Court with a provisional measure, e.g., to secure the independence of the Constitutional Court might not be legally legitimate; however, it can still indicate a severe political crisis and a situation of power imbalances among branches of government. The public hearing in the Court in February 2018 for the provisional measures requested in Barrios Altos and La Cantuta for example and Durand and Ugarte about the Constitutional Process thus amounted to a discussion about institutional independence in Peru overall. This said, the debate was still framed in legal terms and took place within an internationally structured legal procedure.

*Partial implementation and defection*

Because the content of reparation orders is little negotiable, partial implementation or defection to implement can be a way to amend the reparation orders to the national context. For most cases in Peru, inflexible reparation orders have been raised as reasons for non-compliance by some interview partners e.g., in relation to the case "Ojo que llora" in relation to particularly heated topics at national level such as the past internal conflict. Interview partners also voiced that timing and the places granted for implementation have played a role for causing problems during implementation of judgments (Interview# 15, #16, #18).

Coming to the element compatibility of the reparation order and legislative framework: Assessing the aptness of the legal framework for the implementation of Court orders in Peru

shows a mixed picture. Changes in law have both been favorable to implementation and an obstacle.

> "Peru is a more complicated case where you can best see the incompliance in relation to the payment of the compensations. The legislative branch designed a budgetary law, which determines that the payment of the compensations cannot be done in one tranche but has to be done according to specific rules and in a very bureaucratic manner. This leads to a situation where the whole compliance is complicated because [the state] pays little by little over the years." (Interview #12, own translation)

However, the interview partners involved with the IACtHR also reflected on positive examples of enactment of legislation.

> "Then you also have success stories, like for example in many Peruvian cases the reparation order is that forced disappearance has to be typified [by law] and in the case *Penal Castro Castro* it also dictates that there must be a public policy established for the search of disappeared persons. And finally, the legislative branch approves a law and it is applied. This can be seen for example in the case *Terrones Silva* [v. Peru]." (Interview #12, own translation)

Legal changes and amendments of the framework resulted in both advantages and disadvantages for the implementation. Being a judicial actor is an advantage for the IACtHR when examining the legal framework of countries in the cases. In Peru, rigid design did not clash with structural legal hindrances at national level. This said, some reparation orders stipulated changes in the legal order of the country, e.g., prominently in relation to the prohibition of amnesty laws in the case *Barrios Altos*.

In sum, amendments and changes in the dimension "design" refer mostly to the actors Bank and Court granting flexibility for the time span for implementation or in the way how they interpreted the compliance and the indicator fulfilment, flexibility in design related less to amending the content of the reform projects or the reparation orders itself. The power for flexibilizing the process rests with the global governance actors. Negotiating the content from within is at least difficult, given that reporting procedures are restricted for negotiation during implementation (e.g., public hearings, executing committees) and are determined to a large degree by the international actors.

When the content itself was not possible to contest or to change for the national actors, implementation problems manifested in defection and failure to implementation. A teleological approach to reforms in the design and a linear approach to transformation does not consider the procedural character of rule of law development. Inflexible design might block transformation altogether or lead to outcomes that remain marginal and yet are a waste of money and time, potentially steering these two things away from national reform efforts. However, incomplete implementation or problems in relation to design of reparation orders and reforms in Peru also

touched larger questions of institutional dynamics and power imbalances among branches in Peru, potentially constitutive for rule of law development.

### 5.3.5 Exploring the coordination dimension

In the analysis of the coordination dimension in implementation processes in Peru, the composition or the absence of mechanisms set up for implementation emerged as an important element in implementation problems. The composition and the actors addressed by Bank and Court are linked to previous context assessment and design of the reforms and judgments, as this frames who is involved in implementation and who is in charge of it. Burden shifting of the responsibility to implement showed to be an additional important phenomenon.. In addition, the way the global governance actors dealt with political volatility often leading to changing counterparts, the need for renewed and ongoing assessment of context, and changes in the institutional setting also clearly emerged as central elements to this dimension.

The cooperation is linked to the previous two dimensions discussed as assessment of the context is necessary for context-sensitive designed reforms and judgments and adjustments.

Bank and Court have different approaches to securing implementation. While the Bank has a more intrusive or hands-on approach, oftentimes setting up coordination committees, the Court leaves coordination for implementation largely to the states; however, it monitors the process closely. This section outlines the selection of stakeholder, drawing attention to political volatility and the "political will" and then continues to discuss approaches to coordination, the risk of burden shifting and the possibility to negotiate procedures.

*Selecting stakeholders*

Interview partners affiliated with the Bank stressed that the selection of stakeholders for reforms is first and foremost linked to the previous context assessment in which the actors have been identified (Interview #2, #23). However, the selection and the formation of the coordination committees is also linked to previously established networks and patterns that emerged in previous projects (Interview #3). Thus, who is included in a judicial reform project is not politically neutral but necessarily part of setting the agenda because the location of the lead agency attributes political and financial leverage, and the framing of the project determines which actors are participating and which actors stay outside the reform process. However, in Bank reforms and in Court cases alike the actors formally addressed in the activities are not necessarily the only actors affected by the activities or needed for implementation. A logic of

change that focusses on the judiciary, thus potentially misses the dynamics among branches of government as important part in rule of law development. Structures and procedures that exclude actors and limit coordination, potentially inflict with the goal of rule of law development. Narrowly exercised selection of actors can become a problem during implementation processes. Furthermore, as one interview partner engaged in judicial development activities for many years confirms, actors in rule of law reforms come in with their own agenda and stressed political aspects in the selection process:

> "And you need to understand you will not be working with good guys. Everyone has got their own agenda. You need to, as far as possible, understand what the agendas of your counterparts are and then try and reach a common ground where each of you can win a little. Without compromising your own principles." (Interview #4)

Being less critical about the political component in the selection of actors for reforms, another interviewee engaged in past judicial reforms in Peru referred mainly to knowledge and legitimacy-based selection criteria:

> "It works like that. I think for securing the sustainability one has to conduct projects that are, this is key, legitimate. Or to say it better, there must be representatives in charge that are informed and that have legitimacy. The second thing is that for conducting those projects and for conducting the groups one has to assure that the boss, the executive, the one in charge is a very pro person, an expert." (Interview #20, own translation)

Selecting stakeholders for Bank projects is also determined by personal affiliations, thus, deciding who has "stakes" in processes is also an individual assessment - making sure, you are selecting the right people in the agencies and not only the right agencies for the agenda. This does not rule out that global governance actors miss important actors for implementation, who then have the potential to spoil the process, e.g., not including the executive that then does not implement an important change in the criminal code, like in the Judicial Reform Project in Peru.

The Court cannot "select" stakeholder as the Bank does, in the sense that it cannot only cooperate with people showing a favorable stance for implementation. It determines the national actors by responsibility; they are not stakeholders as in holding a stake but rather "duty bearers".

*Determining the political wills*

> "So, the political will is manifested at many different levels of the state, from the high-ranking authorities to the experts who have to implement, follow up, report. [...] I will never say that the political can only be found in one actor of the state, but in multiples, depending on the case. You have to think it from the bottom to the top, starting with the most technical expert, the normal civil servant that has to start making changes for it to work." (Interview #12, own translation)

The above statement issued by interview partners working with the IACtHR, renders the excuse of a generic "lacking political will" in implementation an easy excuse for not disentangling the

more complicated processes of coordination during the process. As currently assessed, the political will is looked at from the "top to the bottom" not from the "bottom the top" as suggested in this quote. Natural counterparts of Bank and Court are high-ranking actors in branches of government, including prominently actors from the executive branch. For an assessment of "political will" it is not only important to unpack the entity that bears this will – a state organ – but a previously defined nature of this will to be found – that is a reform willing actor. When turning to the Court, singling out actors in reparation orders that are at national level responsible for implementation and determining political wills is more complicated than choosing to cooperate with the actors willing to go ahead with a loan and cut out the others. Oftentimes, it is not even the entity in the state, originally responsible for the violation that is addressed in the reparations. Implementation is channeled through the executive and nevertheless, accountability might fall short in this mediation process. For the sake of better chances of implementation, one interviewee suggested the following:

> "So, it would not be a list of reparations, but a list naming the entities in charge of carrying out the changes. They do not necessarily have to be responsible. They are not the ones negotiating the outcome of the trial. The trial already established who is responsible. What we have to do is to decide how to solve it. It would be better, I think." (Interview #18: own translation)

Singling out actors in charge for implementation would be a solution-oriented approach to reparation in the Court. However, "willingness to implement" is not necessarily coupled with the capacity to implement. This differentiated approach could contribute to strengthen the institutions, granting large margin to the national level. It would depart from conventional legal procedures in international human rights courts, stressing dispute resolution and coordination instead of only determining responsibility. Suggesting to flexibilize the implementation procedure attributing tasks to specific actors, the quote reveals the mismatch between burden taker and the actor responsible for implementation. The state, in human rights litigation, is liable as such, not parts of the state. Neglecting that the state is formed by disputing actors and characterized by a complex dynamic in the state apparatus, however, is not paying tribute to the procedural character of implementation.

*Setting up coordination committees*

For implementation of judicial reform projects, the Bank oftentimes sets up coordination committees and determines the executing agency for project implementation. In theory, this could by any organ in any branch of government the Bank is negotiating with as counterpart. Due to the nature of the Bank being a financial development actor, it cannot cut out entirely the executive and the Ministry of Finance in the process. However, as outlined previously in

judicial reform projects, the logic of change places heavy burden on the judiciary as the lever of change for rule of law development and ultimately economic growth. The goal in setting up coordination committees is to ensure smooth implementation, strengthening institutional ties, share information about the process and to ensuring transparency. Regarding the formation of coordination committees being a goal in itself in rule of law strengthening projects, one interview partner outlined the processes in the committees during projects in Peru:

> "Everyone is connected in the discussion, everyone is included, everyone knows what the other entity is saying. So it is a very transparent process. We had a sheet with all the activities that was circulated amongst all the entities involved." (Interview #23, own translation)

Albeit depending on the coordination of actors at national level, the Court, on the other hand, cannot determine the national coordination structure. In general, the state being represented by state actors' members of the executive is responsible for the representation of the state before the Court and in lead during implementation. Some countries have specialized agencies at national level to litigate before the Court, however, they are not necessarily in charge of coordinating the implementation. Suggesting a different structure for implementation, one interviewee supported the idea to set up a coordination committee for joint implementation in cases relating to similar structural problems in human rights violations:

> "So, another opportunity is to create a roundtable for each case with the actors involved in it. Instead of passing everything through the Public Defense Office for international affairs [la procuraduría pública especializada supranacional] whose responsibility is different. But it is until today the only entity that is centralizing the communication. So, instead set up a committee or something. Because in lots of the reparations there is more than one entity involved." (Interview #18, own translation)

The parties involved in and affected by implementation are not necessarily the ones reporting on the status of implementation or being heard in official court procedures. The relationship among the actors involved in implementation might be troublesome and characterized by negotiations and political power plays that are connected not only to the case at hand but also entangled with older structure and institutional dynamics.

*Burden shifting in implementation*

Unclear coordination structures during implementation provide loopholes for burden shifting. By burden shifting, I describe the observation during field research and in the analysis of the material that one branch of government or actor is blaming other state entities to be responsible for delays in the implementation without assuming responsibility for the process as a whole or for coordinating activities. This, I claim, is different to invoking checks and balances. The reporting structure supports this blame game, since it rarely specifically requests information from the actor in charge for implementation but the executive provides information. For example, the Court is not rarely directly addressing the prosecutor's office for delays in

proceedings about the duty to investigate, but instead orders the state to provide information on reparation orders in cases. Instead, the executive issues the state reports and communication are channeled through this branch of state, sometimes summing up and altering information provided by other state actors, sometimes passing through report e.g., of parts of the police on the status of a search for a missing person without putting them into context of the reparation orders in conjunction. Thus, reports send to the IACtHR on implementation progress are not necessarily coherent or providing information on the entirety of reparation orders or the implementation status. Sometimes, the reports are a patchwork of information, or they are omitting answers to the implementation status of a specific reparation order e.g., the progress of a certain investigation. Thus, implementation problems cannot easily be attributed to a generic missing political will and state reports are little helpful to understand elements to implementation problems. Burden shifting can also show between the international and the national level:

> "It is also a cheap alibi to say that since the [international] Court exists I will resolve myself of the responsibility to issue a judgment in a specific case and then later on not comply anyways [with the international judgment]." (Interview #10, own translation)

The implementation structure set up by the Bank seems to leave less room for such maneuvering of shifting burdens. However, since the structure of the executing committees oftentimes exclude actors from the table where implementation is negotiated and planned, the failure to include those actors a priori plays a role in implementation problems. In these cases, burden shifting takes place more in relation to claiming that a fulfilment of the terms agreed upon in the loan agreement was not possible because the process was blocked elsewhere by other actors outside the scope of the project itself.

*Dealing with political volatility*

I argued earlier that implementation is not only dependent the framing of political wills and the structure of coordination mechanisms but embedded in larger political processes and personnel restructuring. I use the term political volatility to describe frequent changes in political personnel that are oftentimes coupled with changing political agendas and policy preferences and imply changing counterparts for international actors.[262] Political volatility, especially a frequent change in high ranking government positions e.g., frequent changes of presidents and

[262] The change can be caused by the use of violence and unconstitutional means to overthrow a government as well as by change through democratic means, such as elections and votes of no confidence in the legislature. The World Bank uses the term "Political volatility" in governance indicators as opposed to political stability. I suggest that political volatility is part of political processes.

the supporting administrative staff, is not only a challenge to implementation it is also often a legitimation for activities in the first place, as interview partners sustained that interventions can provide coherency in light of political instability (Interview #1, #3, #20). Political volatility can also make states more prone to large-scale interventions[263], invoking the supposed absence of national leadership, knowledge and structure.

> "Because the World Bank creates environments. The World Bank and the IDB, those multilateral actors, international, they offer a dose of seriousness." (Interview #20, own translation)

The interview partner working in government institutions in Peru issuing this statement, supported the idea the Bank would not only create and secure a safe environment in times of political volatility but also at the same time providing a pool of expertise, absent at national level. Interview partner also specifically stressed the importance of the Bank as an honest broker in the aftermath of the Fujimori regime that was characterized by high political volatility and institutional restructuring. In their view, the intervention did not only serve to providing a stable and knowledgeable framework for reform but also granted legitimacy to the country, helping to rebuild credibility internationally (Interview #14; Interview #23).[264]

> "The Bank represents the idea of an impartial third party [...]." (Interview #23, own translation)

However, political changes are not necessarily instable, nor should political volatility easily be labeled as the exception in political settings, to be only found in countries of the global South. Political volatility can be a symptom and means for elite struggle to reshuffle power in high-ranking government positions, but it can also be part of political processes and redistribution of power in institutions after political shocks such as autocratic regimes or economic crisis. This said, frequent changes in political personnel, policies and counterparts for implementing reforms and judgments are challenges in implementation processes. The involvement of global governance actors in rule of law supporting activities can contribute to coherency and possibly reduce credible commitment problems among the parties involved in reform processes or transitional justice. However, they cannot replace national structures or control institutional dynamics. Furthermore, the aspect political volatility also applies to the global governance actors: The jurisprudence of the Court changes depending on its composition and throughout time. Depending on the department is in charge in the Bank, the approach to judicial reforms might also change. Individual aspiration for career and the necessity to close a loan might

[263] The opposite is also true: situation and countries ranked as "too volatile" and "too instable" often prevent international engagement in the first place.
[264] Single investments of the Bank but also more generally the ranking in the Doing business report are hoped to have this signaling effect that attracts investors and removes the country from the international 'black list'.

similarly influence the "will" to reform, in analogy to national actors seeking prestige and gaining political currency in conducting reforms.

In sum, the selection of stakeholders and counterparts of global governance actors in rule of law supporting activities and structure and the set-up of coordinating mechanisms can place burdens on actors, provide political leverage and impact institutional dynamics. Aiming to strengthen or to build institutions, the global rule of law supporting activities theoretically bear the potential to challenge the status quo and to change the institutional fabric. However, the activities also bear the potential of deepening already existing tensions among branches and national government actors. Activities might also challenge the position of one branch *vis à vis* other branches, aim at defending the independency of a branch of government, or introduce changes that potentially endanger workplaces or posts of state official. On a conceptual level, coordination during implementation is troubled by a mismatch between the logic of transformation focusing on the judiciary and the structure of intervention stipulating a need to cooperate with the executive as the counterpart of global governance actors.

### 5.3.6 Coordination and implementation in Peru

This section turns to the analysis of the dimension coordination and problems during the implementation of reforms and judgments in Peru. The factor coordination problems relate to the selection of stakeholders and the structure for coordination. This structure can either haven been especially established for the sake of implementing a specific measure or be sustained by already existing national structures, both are embedded into a larger institutional fabric and organizational dynamics.

#### *Bank*

##### *Selection of stakeholders and national political dynamics*

The selection of stakeholders for Bank projects in the judicial sector after the end of the Fujimori regime built on ties established during the era of Fujimori's autocratic regime. The Fujimori era was characterized, and institutions were sustained by technocrats throughout the state apparatus. Attempting to (re)establish independency, the judiciary was undergoing a gradual reform, which stipulated the leave of several people. Thus, the political climate was also volatile and highly polarized. Interview partners affiliated with the Bank oftentimes stressed how not only questions of expertise but also political strategy questions played into the selection of stakeholders in reform initiatives:

> "I think in Peru you have a serious body of people who are interested in trying to do reform, but you also have a lot of people who are not interested in reforms. I think we are dealing with the right people, but frequently that can also change. [...] First of all, you can't be absolutely sure about the stakeholders. Secondly, what would you do if you have somebody who says they really want to reform, but you know, you not really feel sure about this? You do not say "Sorry, we've looked at you, but we don't think you're good enough". You cannot do that, politically you cannot do that. Because then, you would have eroded a relationship and what may happen?" (Interview #5)

Thus, the selection process is based on strategic questions of satisfying previous partners of the Bank, maintaining good diplomatic ties and driven by identifying "reform willing" partner at national level. Selection of stakeholders is also bound to identifying government official and state agents, as this is provided by the structure for implementation of the actors Bank and Court described in chapter four of this study. Thus, the selection does not necessarily reflect the actors at national level necessary for implementing the reform – that may be state branches, administrative organs and other state agents but also the counterparts the structure stipulates. This mismatch is at the core of the element stakeholder – counterpart – selection.[265] "Dealing with the right people" thus is determined by a mixture of political, strategic questions intertwined with historic personal ties and diplomatic questions. It is not necessarily the "right people" to implement, sitting at the negotiating table and in the executing committees. Since the scope of the Justice I reform project was relatively wide and addressed several sectors from a comprehensive reform angle, the Bank also had to cast a wide net of actors. The Loan Agreement reads:

> "In the past, differences of opinion among sector institutions have been common. Some preferred to develop their separate strategies and expected the donors' support for isolated interventions. The donors have agreed to reject such a piecemeal approach and have stressed the need for an effective coordination mechanism for assistance programs to be fully consistent." (Justice Service Improvement I Loan Agreement 2004: 22)

The Bank decided to set up a coordination committee for the implementation of the judicial reform to smoothen the coordination. In the first Justice Sector Improvement Reform, high-ranking officials formed part of the committee, being able to take top-down decisions and to communicate them within their institutions (Interview #14). However, as interview partners also stressed, including politically high-ranking officials also lead to more political rivalries in the committee itself and less technical discussion. Eventually, interview partners felt, this contributed to politicizing the reform (Interview #14; #19). The organ provided an additional forum for political discussions, however, the format for negotiations was determined by the established structure and not necessarily democratically accountable and happened behind closed doors. Interview partners involved in the Judicial Reform Project I of the Bank stressed

[265] I decided to use the term stakeholders because it carries the notion of political agency, will and interest that is discussed in this dimension.

the symbolic effect of including representatives of a wide array of institutions (Interview #3). Interview partners also emphasized that power plays continued even after the closing of the loan, within the small circle of selected actors included in the executing committees during implementation.

> "In the designing phase, we are all happy, taking the photograph, but in the moment when they give the money to the other one, this is where the fight begins." (Interview # 23, own translation)

What this interview partner stressed is the strong political dimension of taking credit for having closed a loan, on the one hand, and the troublesome and often politically less interesting (at least in representative aspects) implementation period. Questions of reputation vanish in the background and more technical fights about the distribution of money that characterize this phase. While the interview partner acknowledged that implementation is a messy period troublesome period regarding coordination, it did not reflect on the power in the act of intervening into the already existing power dynamics and the potential to fuel conflicts. Interviews and analysis of primary documents similarly showed that struggles for coordination are oftentimes unreflectively stated and portrayed as being independent from the intervention in the first place or are not mentioned at all.

Selecting the actors in charge and setting up the structure attributed financial, political and symbolic power to actors at national level in Peru. As outlined above, "getting the context right" is critical for the selection of stakeholders at national level and the Bank is in a powerful position to determine this context and the right actors for the purposed reform. One interview partner involved in the Judicial Reform I project of the Bank stated about the Banks assessment of the context and the balance of power after the Fujimori regime:

> "There was a lot of scuffling, a lot of fighting, a lot of discussion where to put the executing unit. Because if you have four, five different institutions you can't have an executing unit in each one. You need an economy of scale to manage the money. So, I insisted, because the biggest animal receiving the biggest chunk of money was going to be the judiciary that it really needed to be the judiciary. |… | The power play was definitely that the executive still had the intention that only the executive could change the judiciary. |… | And that they were doing a great favour to the judiciary by taking a loan from the Bank. And that they ought to be damn grateful that they were doing this for them. Whereas the judges weren't grateful at all. (Interview #3)

The quote highlights different reactions and positions of the branches of government towards the intervention. It also highlights that Bank officials were aware of the power struggles at national level and their intervention into it. Regardless of whether the Banks analysis of the distribution of power was right or not, the quote reveals how much leverage potentially enters the national political bargaining with Bank intervention. The selection of stakeholders is one crucial step in this process. Thus, the decision where to place the executing agency is inherently

a political decision, potentially shaking up dynamics among branches. The interviewee continued:

> "They saw it as, you know, if we are going to have a judicial reform and we are going to get support from the World Bank we want to be able to determine what we are using it for and how and when and under what circumstances and what those areas of focus will be. It will not be determined by the executive and I was with them [the judiciary]." (Interview #3)

Bank projects are not possible without a minimal cooperation of the executive since it ultimately signs the agreement. Nevertheless, in Peru it was not the executive that was benefitting financially and politically in Bank projects but the judiciary. Setting up the executing committee in this branch of government provided it with financial leverage and political currency. If the Bank attempted to counterbalance a system marked by hyper-presidentialism by this move, is beyond the realm of my investigation. The intervention, however, happened in a climate of already unbalanced power among branches, thus context analysis and careful design was crucial. In addition, the selection of the judiciary as counterpart, surely retrospectively, but also potentially at the time of the decision, was problematic given that parts of the branch were and are largely involved in corruption scandals.

*Court*

Turning to the Court: the capacity of this international actor to select stakeholder is limited. The Court cannot "select" entities and set up implementation structures itself, the parties before the Court are previously defined: the state represented through the executive, the representatives of the victims, and the Commission. Nevertheless, in a more subtle, less formal manner, the Court can search for allies in the state apparatus for securing smoother cooperation during the implementation of measures e.g., during *visita in situ*. In a similar way like the projects of the Bank, however, during implementation larger political agendas and smaller institutional micro-struggles influence the process. One interview partner the National Prosecutors Office for International Affairs in Peru stressed

> "It [the implementation] depends a lot on the civil servant. In Peru we have a lack of institutionality. Every civil servant, every government, which is on top instable, have a different position, in accordance with what benefits them politically [...]." (Interview #17, own translation)

The same interviewee also suggested that the overall disposition to reform of a branch of government also influences implementation.

> "There are exceptional cases where one could argue about why they take so long in implementing or complying with a judgment. But in the majority of cases, there exists a disposition in the judicial branch to comply. So, not in the congress, but in the executive. And I would even say that this has grown in the last years." (Interview #17, own translation)

In resolutions of supervision concerning cases in Peru, actors are sometimes directly addressed for assuming the duty to implement. As the following quote highlights, the Court might also ask the state which entity is in charge for implementation. It did in relation to one case in Peru. The resolution of supervision from 2017 in the Case Penal Castro Castro reads

> "In consequence, the Court requires from the state to present without delay updated information about i) the reasons that hindered the implementation of the reparation, ii) the national entity in charge of executing the measure." (Resolution of Supervision Penal Castro Castro 2017: para 24)

While this underlines the problems the Court has when dealing with non-compliant state organs, directly requesting information about the coordination was the exception in the supervision procedures of the Court in Peruvian cases. More often, the Court did not differentiate between actors and continued to approach the state as a monolithic block.

*Burden shifting and accountability*

The Court is politically more at a distance and hence cannot influence agency in implementation in the same manner as the Bank does in the stakeholder selection process. However, during implementation of reparation order there is always branch having more power than others: the executive has a strong gatekeeping position. Given pronounced rivalries between the judiciary and the executive, power dynamics were apparent in almost all cases at different level in Peru, from macro struggles concerning the independency of the Supreme Court, to micro struggles concerning the responsibilities of single state agents and administrative staff. The implementation process, thus, was characterized by tensions and the need to coordinate. The national prosecutor's office in Peru, while not in charge of the follow up of implementation, still requires a plan of action from the entities involved in the reparation orders after the judgment has been issued:

> "When a judgment has been issued what we immediately do is to notify the responsible sector in the state entity which has generated the violation and the other entities involved, asking them to provide us with a plan of action indication how they are going to comply with the reparation order of the Court." (Interview #17, own translation)

However, there is neither a national for follow-up nor an international structure that could address the different entities at state level and hold them accountable for implementation. Burden shifting for the duty to implement reparation orders among national actors played a role during implementation processes of judgments in Peru.

> "Of course, because it seems like the Public Prosecutors Office for international affairs [procuraduria pública especializada supranacional] what it does in reality, it only serves as the vocal before the international instances. And then it receives and distributes the information according to responsibility. For example, in a lot of correspondence [the state omits to the Court during the implementation], the supranational prosecutor presents information about the measure A but not about the measure D, C and Z. We ask for more information and they do not comply with." (Interview #12, own translation)

Burden shifting is not only possible due to missing coordination structure at national level, but it is also simultaneously enabled through the structure of the state reporting procedures for compliance with judgments, as it provides loopholes and possibilities to omit information or shift the burdens.

> "The twenty-one reports presented by the State, between March 2010 and 2017 in relation to the compliance with the judgment in Barrios Altos and La Cantuta. With respect to the totality of the reparations dictated as outlined in the previous Court communication, the State informed in its report from August 2015 only to five of them [...] without providing precise information that Court had already deemed necessary in previous resolutions." "(Resolution of Supervision Barrios Altos y la Cantuta 2018: par. 4, own translation)

Burden shifting among branches at national level claiming the information had not been reported to the executive for then being included in the mandatory state report to the Court was a common phenomenon in the reporting procedure in Peru. When information is missing, the IACtHR can ask the state to indicate the entity in charge of implementation. It did so for example in the Case Penal Castro Castro:

> "We have the example of the case Penal Miguel Castro Castro where we have the position of the executive – and more concretely the Ministry of Justice – articulated by the Supranational Prosecutor Office, which is following up on all of this. So they said in relation to the reparations measure dictating payments that they could not follow up on this one because it was still being processed before national courts. Here the court is applying Article 69(2) [Rules of Procedure of the IACtHR] and asks for information directly from the judge [...]. [T]he judge presents information stating 'I issued all the decisions [...] and this is not my problem, the executive can start make the payments automatically to XYZ.' So the judge starts to demystify what the Ministry of Justice is saying in this moment. This is absurd. Therefore, I am telling you that in the resolution of supervision of compliance the judge keeps saying he is doing everything possible for the state to pay and the state keeps saying this is not the case." (Interview #12, own translation)

In a politically volatile context, marked by quick changes in government, burden shifting becomes even more of a problem, and refers to shifting of burden between current and previous governments.

> "The judicial branch said 'this is not my place, it is the duty of the legislative branch' so they say 'I am not incomplying because I do not want to but it is simply not within my competence.' So, they do their interpretation, the legislative branch had its head in the clouds and in the executive the government changed. Then they say, for the compliance we will take certain steps and change for example at the people [...]." (Interview #12, own translation)

The logic in international law of holding states accountable as a monolithic block- not governments, not individuals or single actors – irrespectively of the government, is contradicted by the loopholes the procedures provide during implementation.

In sum, the Court was trapped in its reaction to implementation processes between the traditional approach in international human rights law to holding the state accountable and more nuanced approaches, negotiating with different branches of government at national level. The way burden shifting took place in Bank projects in Peru was not as apparent as it presented in

the implementation processes of Court orders. The burden that was shifted was not a duty of the state to comply with certain responsibilities but referred to the responsibility to implement parts of the reform. By claiming that the postponement of enacting the new criminal code in Lima and Callao lead to an insufficient implementation caused by the executive lead to a delay in the Justice Sector Improvement II project responsibility to implemented was shifted to the executive. However, the executive was not part of the coordination committee in the first place. Official documents of the Bank still reported the counterparts had fulfilled the indicators to the highest standards. Thereby official documents again omitted or ignored intra-institutional dynamics, only referring to the counterparts included in the process and ignoring external obstacles that hindered the implementation or simply shaping the assessment in a way favorable to the Bank. In the judicial reform projects of the Bank, cooperation problems within the executing agencies seems to have been less of an issue, since power was attributed mainly to the judiciary and its powerful opponent, the executive, was excluded from the beginning. Having said this, smooth implementation and cooperation might lead to compliance with judgments and success of reforms, but not necessarily to institutional strengthening or overall rule of law support. Including a limited array of actors, stipulating sectoral changes requires less coordination that large-scale projects. Powerful actors outside negotiations have the potential to block the process altogether. Top-down decisions to allocate money and power or responsibility for implementation therefore is always connected to previous assessments of context and design.

Overall, coordination problems at national level played a role in implementation processes of Bank reforms and Court judgments in Peru alike. Despite mechanisms set up to streamline coordination, or the intervention of national structures for channeling the work, the global governance rule of law supporting activities were still mostly insensitive for national dynamics during implementation. Official reports were not apt for capturing the dynamics, the structures set up were easily hijacked for an array of political purposes, and not easily changeable once installed. Thus, rule of law activities provided additional platforms and reasons for political struggle and burden shifting. As such, implementation processes in Peru were marked by potentially constitutive moments for rule of law development where questions of distribution of power among branches and checks and balances were at the table but limited by procedures during the implementation processes.

# Chapter 6 Implementation and rule of law support in Argentina

In this chapter, I turn to the analysis of implementation processes concerning judicial reforms by the Bank and of judgments of the IACtHR in Argentina. On the outset, the processes in the two case studies seem opposed: different to Peru, the intervention of the Bank in Argentina was smaller in volume and scope, whereas the implementation processes of the judgments of the Court seemingly went rather smooth over a long period. Taking a closer critical look in the analysis along the dimensions of context, design and coordination, reveals a more nuanced picture. The analysis points out similarities and differences between implementation processes in Peru and in Argentina and thus helps to refine the exploration of the elements and the reconceptualization of the problems in the exploratory approach to implementation problems.

Mirroring the structure of chapter five, the first section gives an overview of features of the political and institutional landscape in Argentina to outline the context before which the implementation processes unfold. The section pays special attention to the executive-judiciary relationship and provides historical background information for the process tracing (6.1). The next section outlines the main lines of action of the judicial reforms the World Bank conducted and the reparation orders in the judgments of the Court under consideration in Argentina (6.2). The introductory and background sections are followed by an in-depth study of the empirical material (6.3). The analysis is structured around the three dimensions of context insensitivity (6.3.1 and 6.3.2), design of reforms and judgments (6.3.3 and 6.3.4) and coordination (6.3.5 and 6.3.6). The last section (6.4) provides a brief overview of the elements to implementation problems in Peru and Argentina.

## 6.1 Features of the institutional and political landscape in Argentina

Similar to the situation in Peru, structural economic and political conditions were not favorable for institutional reforms in Argentina. Economic shocks and political turmoil marked the timespan between 2000 and 2018. The military dictatorship from 1976 until 1983 embracing a neoliberal experiment and the legacy of Peronism strongly marked the political and institutional landscape in Argentina and continue to characterize party politics. The organization of the state in Argentina continues to be characterized by institutional structures and administrative units imposed during colonial as well as by the political and clientelist style of governance. Left over

structures of colonial state organization,[266] the geographic shape and the federal organization and political management of the 23 provinces also continue to influence political dynamics. Being a federally organized state, Argentina's institutional set up is also marked by struggles over central and federal competences and oftentimes federal and national structures, legal frameworks and procedures are mismatching. Like in Peru, society and civil organization in Argentina also long resisted autocratic rulers and military dictatorships and formed stable organizations. The organization of civil society in Argentina and national transitional justice activities differ from those in Peru in their degree of institutionalization, the relationship with the state and their embeddedness in the international human rights community. Strong civil society groups pressured early for institutional changes that eventually manifested and national trials took place. In 2001, Argentina went into a severe economic crisis and political crisis. The financial turmoil caused severe inequality and economic hardship among the population and was accompanied by massive street protests that left two protesters dead. The protests were calling into question the legitimacy and the capacity of the political establishment to govern while Argentina was on the edge of state bankruptcy.

The following section will draw attention to features of the institutional and political landscape in Argentina.

### 6.1.1 Hyper-presidentialism, "Corralito" and Kirchnerismo

From 1976 until 1983, a military junta lead by Jorge Rafael Videla governed Argentina. Estimations count 10.000 and 30.000 deaths and forced disappearances during the military dictatorship (CONADEP 1984; HRW 2007; Skaar et al. 2016:17).[267] Repression by the regime, was systematic, widespread and heavily targeted the left-wing armed groups *Montoneros*[268] and the *Ejército Revolucionario del Pueblo*[269], as well as left intellectuals, students, workers and other persons considered political opposition. Most cases of torture, kidnapping, and forced disappearance were committed by the state (Balardini 2016a: 51). To organize these crimes, uphold systematic measures of repression and run the country, the junta replaced the entire

[266] For an introduction into the colonial legacy of *cabildos*, *caudillismo* and state organization and the rivalry between Buenos Aires and the Provinces see e.g., Shumway (1991) or Ayrolo and Míguez (2012). For an introduction into post-colonial entanglements and state transformation, see e.g., Kaltmeier, Tittor and Hawkins (Eds) (2020), describing the longue durée of colonial structures as well as the ruptures and the resistance.

[267] According to Human Rights Watch the government kidnapped, imprisoned, tortured, and executed at least 14,000 alleged leftist rebels. The Argentine truth commission CONADEP documented nine thousand deaths and disappearances in Argentina during the period 1975–83 (CONADEP 1984).

[268] For a study on the Montonero guerilla group (*Movimiento Peronista Montonero-MPM)* active during the 1960s and 1970s and heavily fought in the Dirty War in Argentina see e.g., the work of Richard Gillespies (2011).

[269] The ERP was the military branch of the Partido Revolucionario de los Trabajadores (PRT), the communist workers party of Argentina active in the 1960s and 1970. For a study on Argentina guerilla groups see e.g., Pablo A. Pozzi (2016).

government and centralized the power in the military. After the end of the military regime, several high-ranking officials in the military and other state structures that collaborated with the military regime remained in place. Their presence and influence in the institutions constituted a constant threat to democracy while their judicial and political impunity became an obstacle for national reconciliation (Morales 2011; Sikkink 2008: 6-7).

In 1983, Raúl Alfonsín became the first elected president after the military dictatorship. During the Alfonsín government (1983–1989), the Truth Commission CONADEP (by its Spanish acronym for *Comisión Nacional sobre la Desaparición de Personas*) was established. Already in 1984, the Commission issued the report *Nunca Más,* documenting and denouncing the massive human rights violation during military rule. With the trials of the junta in 1985, first national criminal proceedings took place. The trials attracted attention internationally and early on heightened visibility of the crimes committed and set standards for the institutional legal treatment of the perpetrators. Institutional innovations for the supervision of human rights policies, like the Subsecretariat of Human Rights in the Ministry of Interiors were established.[270] However, in 1986 and 1987, when sections of the military carried out a number of coups attempting to overthrow the democratic regime, the Alfonsín government rolled back and passed two laws that granted amnesty (*Punto Final* [271]and *Obedencia Debida*[272]). President Alfonsín was followed by the ultra-liberal President Carlos Menem, who was in office until 1999. Menem introduced more restrictive human rights policies, pardoned formerly convicted generals[273] and introduced institutional changes that limited judicial independency (Ferreira Rubio and Goretti 1996; also interview #31). Ferreira Rubio and Goretti affirm a concentration of power in the executive[274] during Menem, in a system already being prone to a misbalance between branches (1996: 443-444). Changes in the institutional set-up of the country

[270] The Sub-secretariat of Human Rights was in established to supervise human rights policy and to manage the CONADEP files.
[271] Law No. 23.492, the Final Point law, setting stop to opening new prosecutions against human rights perpetrators was passed by the National Congress of Argentina in 1986.
[272] Law No. 23.521, the "due obedience" Law was passed by the National Congress of Argentina in 1987, granting automatic immunity from prosecution to all members of the military except top commanders. The two laws were declared unconstitutional by the Argentina Supreme Court in 2005, drawing on the ruling of the IACtHR in the Barrios Altos case of 2001. In August 2003 the Argentine Congress had already passed a law in which the two amnesty laws had been annulled.
[273] In 1990, Menem pardoned the convicted military officers in the junta trials, including Videla. In July 2007, the Supreme Court declared one of the pardons unconstitutional.
[274] The governmental structure in Argentina is a semi-presidential system, having both a president and a head of government, however, de facto the president a powerful figure whose competences exceed most of the competences of the head of government leading, see also Linz and Valenzuela (1994).

culminated in a constitutional amendment in 1994.[275] While the amendment allowed a court packing in the Supreme Court, favoring the Menem administration, it also gave international human rights treaty law constitutional status. The implementation of judgments of the Inter-American Court of Human Rights was, at least on paper, constitutionally relatively easy (see the *Fontevecchia case* calling this into question).

The neoliberal presidency of Menem was followed by the presidency of Fernando de la Rúa from 1999 until 2001. In 2001, Argentina went into a severe financial, institutional, and economic crisis, the so-called "Corralito"[276]. The crisis resulted in the resignation of de la Rúa and a period of political uncertainty with four interim presidents between 2001 and 2003. The entanglement of international creditors, especially the IMF, in the crisis and their role in the aftermath (see Hernandez 2019) caused a strong opposition in the population against international financial actors continuing until today. Opposition against international financial intervention was also an important pillar in politics in the subsequent era of the Kirchner presidencies (Etchemendy and Garay 2011: 289). The economic collapse in 2001 was accompanied by a partial political collapse and a fragmentation of the old party system. Non-Peronist opposition until today remains weak[277] and presidential elections are characterized by personalized structures, newly formed alliances and fractions of parties that support one candidate. Alongside the economic problems, the crisis led to a deep distrust in the political elite and in all branches of government (Levitsky and Murillo 2008).[278] In this climate of political uncertainty and fragmentation, the Peronist Nestor Kirchner (*Justicialist Party*) won the election in 2003. In 2007, he chose not to run for second term and Senator Christina Kirchner, his wife, ran in his place and won the election. The *Frente para la Victoria* (FPV or FV), a mid-left alliance within the *Justicialist Party*, marked politics in the period from 2003 until 2015, a period known as *Kirchnerismo.* However, institutional dynamics and misbalances

[275]For an English version of the 1994 Constitutional Amendment see https://aceproject.org/ero-en/regions/americas/AR/argentina-constitution-as-amended-to-1994-english/view, last visit: 21.12.2020.

[276] The crisis is known as the "Corralito". Heading towards the crisis, expecting capital flights and a devaluation of the peso, Minister of Economy Domingo Cavallo introduced economic measures in order to stop a bank run. The measure froze bank accounts, also impeding withdrawals of dollars, furthering economic hardship of the population even more.

[277] Levitsky and Murillo describe in their article "From Kirchner to Kirchner" (2008) the party decomposition and especially the collapse of the UCR (Unión Cívica Radica), the oldest still existing party in Argentina.

[278] The slogan of the 2001 and 2002 protest was "Que se vayan todos – They should all leave", addressing the entire political elite, which led the country into crisis resulting in economic hardship for a the majority of the population with unemployment rates rising up to 25%, Outlining the public mistrust in the partisan Supreme Court Daniel Brinks reiterates: "On the heels of this collapse, groups of protesters gathered every Thursday before the steps of the Supreme Court building in Buenos Aires demanding the resignation of the entire Supreme Court." (Brinks 2004: 608)

inherited from previous governments were not addressed but instead pronounced. Levitsky and Murillo confirm: "Nestor Kirchner's presidency was characterized by a significant concentration of executive power. Like Carlos Menem during his first presidential term (1989–95), Kirchner governed at the margins of congress and other institutions of horizontal accountability" (2008: 19). Accountability of the executive remained low, making it prone to corruption and other forms of abuse of power (Levitsky and Murillo 2008: 24)[279].[280]

The country recovered economically under Nestor Kirchner. The economy grew nine per cent per year between 2003 and 2007 and unemployment was diminished considerably (Etchemendy and Garay 2011: 290). The economic recovery together with Kirchner's approach to public policy, e.g., introducing a new social security reform, secured the government a stronger support in the population than previous governments had (Murillo 2015:57; Etchemendy and Garay 2011: 295–296). Some limited judicial reforms also took place, granting more power to this branch of government, among them reducing the numbers of the sitting judges in the Supreme Court (Levitsky and Murillo 2008:17). However, Kirchner also attacked judicial independency in 2006 when he pushed a reform of the Council of Magistracy of the Nation [281] – an organ in charge of appointing and dismissing judges – through congress that would reduce the number of members of the Council but allowed the executive to block a quorum (Levitsky 2008: 118). At the same time, the Kirchners strongly engaged in human rights policies, making it a topic a currency in political debate – their human rights policy was being criticized and politicized in the presidential election campaign, making it also a focal point for national debate. In 2015, the neoliberal conservative Mauricio Macri (*Propuesta Republicana* – PRO) won the presidential election. Macri's government reversed many of the reforms initiated in the politics of the Kirchners and concentrated especially on attracting foreign investment.

> "The present government is not interested in human rights. They think it is a job, a business, but not one of the businesses they are interests in. They cannot make money offshore or something like that." (Interview # 27) [282]

[279] Levitsky and Murillo suggest the legislative and judicial branch in Argentina are underdeveloped and offer an explanation with regard to the legislative: "Legislative ineffectiveness is rooted in several factors, including the military's repeated closure of the Congress between 1930 and 1976." (2008: 26).

[280] One of the interview partners stated in this regard: "We are coming out of 12 years of absolute executive-power, trying to crush the other branches. Luckily there has been resistance in the other powers and in society, and that is why there was a change of government (Interview, #26, own translation)

[281] The Council of Magistracy of the Nation (Spanish *Consejo de la Magistratura de la Nación*) is an organ of the Judicial Branch founded in 1994 and originally composed by 20 members, in 2006 the number was reduced from 20 to 13 members turning it into a more political body with five members of the Justicialist Party sitting in the organ. The organ was reformed again in 2013. The reform of 2013 was declared unconstitutional the same year; the reform of 2006 was declared unconstitutional in 2021 by the Supreme Court. See e.g., https://www.infobae.com/politica/2022/02/06/que-es-el-consejo-de-la-magistratura/,last accessed: 02.06.2022, see also section above on the judicial institutional fabric in Argentina.

[282] Another interview partner found in relation to a changing paradigm in human rights politics: *"Well, and then with Macri, there is a lot of criticism of this whole human rights policy. Two new judges come in, Rosenkranz and*

The strong neoliberal approach to economies pursued by the ruling elite soon met increasing resistance in the population. Macri also took a step back in human rights policies and engaged in a new round of nominating judges to the Supreme Court bench.

### 6.1.2 The judiciary in Argentina

A former member of the Argentine Supreme Court and now judge at the IACtHR Eugenio Raúl Zaffaroni explains the judicial dynamic in Argentina in the following words:

> "Our Supreme Court, okay, let us take a closer look. For a long time we could observe the phenomenon that the Supreme Court in general was seen in a good light and the judicial branch generally a very bad one. The confidence in the judicial representatives was low, and the confidence in the Supreme Court was high. This changed with the present Court, especially the 2x1 [judgment][283] had caused a tremendous discredit, departing from some inexplicable activities of some of the members." (Interview #8, own translation)

The composition and political infringement therein matter as a hard criterion in decisions but also in relation to the prestige and the legitimacy of the Court. While the trust in the judiciary in general in Argentina has remained low (24% according to the Latinobarometro 2018)[284], recourse to judicial means is high.

In the past, the judiciary in Argentina has been under constant threat of infringement from other branches and is subject of increased politicization (Brinks and Blass 2013; Castagnola 2017; Finkel 2008). Analyzing the submission of the Supreme Court to the executive, Christopher Larkins (1998) considers this a strong feature of "delegative" democracy in Argentina. Following O'Donnell, he claims the lack of impartiality of most judges, along with the broad institutional scope of their authority are characteristics of such type of presidential regime. During the military dictatorship, the sovereignty was severely limited and in subsequent democratic governments, the branch continued to fight executive encroachment. In addition to threats stemming from political infringement, Christopher Walker underlines problems deriving from the gap between formal rights and rules and the legal and political practice:

---

*Rosatti, they had already found that the inter-American System was too open... The criticism came more from the side of not seeing the jurisprudence of the Inter-American Court as automatically applicable to Argentina than from the fact that the remedies ordered in particular cases were not respected in Argentina... But it was already a more critical position in relation to opening up to the inter-American system.*" (Interview #35, own translation).

[283] 2x1 (dos por uno – two for one) is the colloquial name for a judicial interpretation of criminal law applied between 1994 and 2001, related to amnesty laws, and invoked again in a very disputed judicial decision issued the 3 of May 2017 of the Supreme Court in relation to the Bignone Case ("Bignone Reynaldo Benito Antonio y otro s/ recurso extraordinario" (CSJ 1574/2014/RH1) granted for Luis Muiña). In this decision the Court established that the criminals convicted of crimes against humanity can count the time twice they had been detained before having a firm sentence, starting from two years preventive prison onwards. The conservative judicial decision heavily criticized by human rights organizations seeing it as a new form of impunity close to the amnesties laws that had been declared void. In 2018, the Supreme Court in the same composition of judges reverted their decision from 2017. Preventive prison time also directly relates to problems concerning delays in the judicial system. Preventive prison time is also a disputed topic in relation to Fujimoris daughter and other criminals in Peru.

[284] In comparison, only 16% of the citizens in Peru confirmed having trust in the judiciary.

"Argentina has formally maintained a version of American constitutionalism since 1853, what is on paper has seldom been implemented, as intended, in practice" (2008: 95).[285] Gretchen Helmkes (2010, 2017) extensive studies on inter-branch crisis in Argentina, also confirms a particularly wide gap between formal and informal institution in Argentina. This finding – to a varying degree not surprising in any part of the world – has implications for judicial reform design.

Argentina has a two-tier criminal justice system. Each one of the 23 provinces having its own justice system dealing with regular crimes. The highest organ is the national Supreme Court (*Corte Suprema de Justicia*). Seventeen federal judicial courts are ruling upon matters in the provinces. At national level, a federal justice system deals with major crimes among them human rights violations. The 1991-reformed criminal code foresees a mixed system, including written and oral procedures. Provincial administration, political organization and legal procedures might differ considerably from national ones.[286]

In the 1990s, the governments of Argentina introduced smaller-scale judicial reforms such as an increase of the federal and provincial officers and augmenting the judiciaries' budgets. On a larger institutional level, the Menem administration modified the number of judges in the Supreme Court from five to nine, engaging in Court packing, and giving the executive more control (e.g., ruling by executive decrees).

> "We passed from five to nine [judges in the Supreme Court] without any justification. It was very grotesque: the people that entered and how they tried to remove judges... The way they approved the packing of the court was also very obscure [...] In a very pathetic way this materialized what we have seen coming. What happens with Macri in 2015 is that the society rebutted his attempt [to Court packing], he rolls back, but he did it anyway. And this is them having a lot of rhetoric about 'the judiciary has to be independent, we cannot intervene...' but this was the first signal he gave."[287] (Interview #31, own translation)

[285] Walker divides Argentina's constitutional history into 5 stages: "(1) Argentina's constitutional foundation, 1853-1930; (2) the rise of authoritarian regimes, ultra-presidentialism, and judicial dependence,1930-1983; (3) Alfonsin's re-democratization and empowerment of the judiciary, 1983-1989; (4) Menem's delegative democracy, 1989-1998; and (5) Argentina's twenty-first-century economic crisis and presidential revolving door." (2008: 96).

[286] The World Banks assessment of the judicial sector summarizes: "The organization of the federal judicial system also applies to the ordinary or local courts of the city of Buenos Aires. The organizing statutes divides by subject matter both systems, federal and ordinary, into two levels-first and second instance-with the Supreme Court as a last and somewhat extraordinary resort. Federal jurisdiction is granted according to subject matter and personal jurisdiction. Subject matter federal jurisdiction is granted in constitutional matters, treaties with foreign nations, admiralty, and maritime jurisdiction. Federal courts are also competent to hear cases dealing with ambassadors, public ministers, foreign consuls, the nation, and to hear cases with two or more provinces or among the provinces or citizens of different provinces. [...] The Supreme Court has, in addition to its jurisdictional functions, the superintendence over the lower courts of the judicial system." (2001: 5)

[287] Court packing was also exercised under Mauricio Macri, leading led to resistance and large scale debate on the composition of the Supreme Court in 2018, and finally revoking the imposition of judges by executive decree in 2020, see Página/12 (2020b), discussing the consequences of the selection procedure.

During Menem and again during the Macri administration, the judiciary became the arm of the executive to implement policies and market-oriented economic reforms. Securing a majority in the Supreme Court was an important part of it:

> "What Menem was interested in, was the incorporation of the reelection [of the president], but what the opposition was interested in, was to limit the power of the president in a number of areas, including its power in the judiciary. It is because of that they created the Consejo de la Magistratura [...] This is where a lot of friction in the judiciary and the Supreme Court was generated [...] It's interesting how they ended up creating a highly politicized organ with a completely different aim in mind." (Interview # 31, own translation)

The Council of Magistracy of the Nation (*Consejo de la Magistratura*) was created in 1994,[288] with the aim to reduce corruption and to depoliticize the appointment procedure of judges. However, the opposite was the outcome. Starting to work in 1998, it was responsible for the appointment and removal of federal judges. Soon, the Supreme Court and the Council entered conflict due to overlapping competences and mandates. Upon his election, Nestor Kirchner promised to address the lack of judicial independency[289] and support judicial reform. However, Kirchner never fully embarked on this reform and concentration of power in the executive remained strong. Like the previous administrations, Kirchner infringed with judicial independency enhancing control over the Council of Magistracy (Levitsky and Murillo 2008: 19). He also encouraged the congress to impeach six of the nine Menemist Supreme Court judges. Albeit the action was formally legal, it still reinforced the pattern of executive encroachment of the judiciary (Levitsky and Murillo 2008: 25).[290] Winning the election in 2015 by accusing these abusive practices of the previous government, Mauricio Macri followed in the same vein and unilaterally filled two positions for Supreme Court judges. Like his predecessors, Macri also promised justice sector as well as economic reforms.[291] In 2017, a reform project named "Justicia 2020" was announced that only partially materialized.

An overall loss of legitimacy and the formal lack of independence of the national and provincial judiciaries resulted in problems to produce transparent investigations and issue credible decisions. This also included highly politicized trials against high-ranking ex-militaries that committed human rights violations. In addition, both, cases of systematic corruption in the

[288] Congress passed the law in 1997 and the Council began working in 1998.

[289] For an interesting study on judicial independency and behavior of judges see Gargarella (2003) focusing on Argentina between 1983 and 2002 in order to claim that more attention should be drawn to "constitutional means" and "personal motives" when aiming to develop a comprehensive approach to judicial reform that is not solely focusing on the politically dependent character of judges.

[290] Providing a more detailed view, Daniel Brinks underlines that Kirchner also attempted to make the nomination process more transparent, public and deliberative, by signing a decree, which limits his power in the judicial nomination process (2004: 608-610).

[291] During his presidency, Argentina also pressed for quick accession to the OECD. This process and the rule of law mainstreaming has possible implications for future judicial reforms.

judiciary,[292] and allegations of political corruption treated in the courts also increased in number (Página/12: 2020b; Interview #31) and gained prominence in the public debate after the 2001 crisis. Beyond that politically sensitive and complex scenario, judicial reform attempts were largely frustrated over a long period.

Looking more deeply into the judicial structures, practitioner literature and interviewees pointed out three main areas for reform: corruption, selection procedures of judges, and management of courts (Acuña 2002; Hammergren 2002; Interview # 28; #32, #33, #31). Interviewees from the Argentine judiciary underlined a high workload of judges as problems and stressed that poor documentation and loose files exacerbates speedy proceedings (Interviews #32, #29).[293] Problems also relate to institutional design, structure of laws, personnel restrains and poor infrastructure (#33). However, little systematized research exists as about what kind of problem the different courts at federal and provincial level in Argentina have.

### 6.1.3 Human rights and transitional justice in Argentina

> "The important thing is that Argentina has a strong human rights movement, very strong human rights defenders. A lot of associations, the vast majority, was founded for fighting against the dictatorship, composed of families of the victims." (Interview #27, own translation)

In the aftermath of the military dictatorship, several mechanisms to address human rights violations were set up in Argentina. Important institutional mechanisms were a truth commission (CONADEP), "truth" trials, the establishment of national offices for documentation and for national reconciliation and importantly national criminal proceedings.[294] The countries approach in transitional justice has been widely discussed by scholars (e.g., Acuña and Smulovitz 1997; Acuña 2006; Sikkink 2011; Engstrom and Pereira 2012; Balardini 2016a, 2016b) in majority described as "exemplary" e.g., for having prosecuted military high

[292] For corruption scandals dealt with legally and in the judiciary in Argentina and the special role of the federal courts known as "Comodoro Py" investigation corruption see e.g., Mariano Borinsky from the Universidad Torcuato di Tella at infobae, available at: https://www.utdt.edu/ver_nota_prensa.php?id_nota_prensa=19226&id_item_menu=6.,las accessed 02.06.2022.

[293] In a 2002 study conducted for the World Bank carried out in the provinces Buenos Aires and Santa Fe Linn Hammergren confirms that both districts show great numbers of abandoned (unresolved) cases. She also finds that the median time to resolution (judgement, dismissal or mediated resolution) varied between civil, labour and criminal cases and differed between the jurisdictions but "|d|elays where nowhere as excessive as judges and lawyers often portray them" (2002: 1). Abandoned cases refer for example to criminal cases in which investigations were stuck, or parties reached a compromise without the case being formally closed ever. Those abandoned cases, thereby, potentially hamper the statistics for delays in proceedings and courts effectiveness. Hammergren also underlines that few records existed for the execution of judgements, outlining that judgements are of little value when not executed and arguing for a focus of reforms also on the pre-trial (e.g., alternative dispute resolution mechanisms) and post-trial stage (2002: 2, 4). The study indicates the connection between economic development and legal security is at best shaky. It also shows scarce knowledge about the judicial sector in general, making pitfalls in design likely while dismantling conventional wisdom on how institutions should or should not work.

[294] National trials of high-ranking officials in the aftermath of the dictatorship and lustration also count into the variety of transitional justice mechanisms used in Argentina. For a comprehensive study see e.g., Lessa (2013).

commanders early in the transition (Balardini 2016a: 60-61; Balardini 2016b: 234). Kathryn Sikkink (2008) even points out the potential of Argentina as a "global human rights protagonist".[295] Sikkink's research affirms a high number of national trials and foreign trials[296] in Argentina in relation to human rights abuses. Lorena Balardini (2016b) affirms how the experience in documenting human rights violations and the large and continued mobilization of civil society provided a strong base for the human rights movement in Argentina to demand state action (see also Engstrom and Pereira 2012). The Argentine human rights movement also built internal networks and alliances. Sikkink affirms with regard: "The Argentine human rights organizations, the truth commission, and the trials of the juntas trained a generation of activists and Human Rights professionals"[297] (2008: 15).[298] Unlike in Peru, the human rights movement in Argentina thus early on became highly institutionalized and consistently and powerfully voiced demands in public debates.

The repertoire of human rights activist at national level in Argentina was vast, using different types of trials for strategic litigation as well as the use of media and massive mobilization for national and international pressure. Striking down the amnesty laws that were declared unconstitutional first in a landmark ruling in 2001 and then confirmed to be unconstitutional in 2003 was an important step for opening the legal way of prosecuting crimes, Balardini stresses with regard:

> "The combination of political and legal strategizing pursued by HROs both nationally and internationally, plus clear political will in the various branches of the state, led eventually to a full reopening of trials against perpetrators" (2016a: 60)

However, prosecuting crimes is only part of justice efforts and political mobilization; the implementation of the verdict is another one.

## 6.2 Judicial reforms of the Bank and judgments of the Court

> "The reforms in Argentina go one step forward and two step back. One has to understand the relationship with the president. In other countries, you have to look at the composition of the congress and the way the congress is relating itself to the judicial branch. In Argentina, in contrast, the form to understand what is going on is by looking at the president and the Supreme Court" (Interview #31)

Judicial reform was never comprehensively addressed or stagnated during past administrations in Argentina. Transitional justice efforts and strategic litigation in human rights, on the other

[295] Sikkink argues: Argentine human rights activists were not just passive recipients of this justice cascade but instigators of multiple new human Rights tactics and transitional justice mechanisms, including the trials of the juntas and the 1984 truth commission." (2008: 1).
[296] Plaintiffs with dual citizenship bringing cases before foreign courts.
[297] Argentine human rights activists were involved in the Inter-American Commission on Human Rights (IACHR) in large number in the aftermath of the dictatorship und during the military rule, providing a rich source of legal background to civil society organizations and being well-informed staff in the IO.
[298] See also the seminal work of Keck and Sikkink (1998) on international human rights advocacy networks.

hand, have been part of political debates and particularly strong advocated for by civil society in Argentina. Against this backdrop and institutional features outlined above, the interventions of the World Bank and the Inter-American Court of Human Rights took place.

Argentina has a long history with international creditors.[299] World Bank's intervention in the reform of the judicial system thus carry that notion of the previous engagement of the Bank in other sectors and opposition against the financial institution in some sectors of society and government branches. Simultaneously, the relationship among branches at national level, continued to be troublesome. In addition, reform proposals both nationally supported ones and those supported by international creditors were facing a lack of reliable data on the problems in the judicial sector (Interviews #4, #31).

In relation to human rights litigation and implementation of judgments, the Supreme Court of Argentina showed a progressive approach toward the incorporation of international law into national legislation in relying on a monist style of adoption for international law. This included the interpretation of the obligation to implement judgments from regional and international courts. In 2017, however, the Argentinian Supreme Court imposed limitations on the jurisdiction of the IACtHR, rejecting the request to heed the Court's ruling in the Fontevecchia case. Some commentators found this new development "unlatched" Argentina from regional Human Rights System and could mark a change in political and legal reasoning towards the Inter-American Court (e.g., Soley and Steiniger 2018; also Interview# 35).

[299] Before and during the crisis the Bank conducted projects for monetary stabilization in Argentina. The IMF and the Bank have some particular fame in this country and their popularity, at least among the population and lower administrative staff is not good as underlined by frequent demonstrations. While during the 1990s the Bank was very active in engaging in cooperation with international development organizations, the tide turned when Nestor Kirchner took over the government. However, the justice sector engagement was never abandoned entirely. Throughout the Kirchner era, the Bank continued to engage in smaller administrative projects and planned to get involved in the *Justicia 2020* project in case the Macri government would have signaled interest. In 2018 when then President Mauricio Macri called upon the IMF for another loan, protest started again in front of the Supreme Court of the Nation building, the organ who had to confirm the executive action. Pointing out dangers of international investment and financial action in a broader perspective, one interviewee referred to the situation under Macri as a criminal act: *"Argentina in this moment is a victim of a macro crime of the whole Macri administration. If I had to qualify it, I would say it is not a problem between right or left, I think what we are seeing is a problem of sovereignty and colonialism in a context of corporative financial totalitarianism." (Interview#8, own translation*)

Thereby marking a strong opposition against international financial intervention and a corrupt elite siding with international business while outlining that the differences in the country are not differences concerning political spectrum debates but an alienation of the government from politics altogether.

### 6.2.1 Judicial reforms of the Bank – goals, implementation and obstacles

The World Bank started negotiations with Argentina for judicial reform projects in early 1992.[300] Between 1993 and 1995 the Bank conducted a judicial sector review financed by a World Bank *Institutional Development Fund Grant* (IDF Grant). The team was composed of Argentine lawyers, selected by the Bank, and international experts.[301] The research was undertaken on the request of the Ministry of Justice and led by Maria Dakolias, the subsequent task manager in the Bank for the judicial reform project. After finishing the sector study, the government expressed interest in further assistance from the Bank in judicial reform. In 1997, the Bank and Argentina started new negotiations and a *Project Preparation Facility* (PPF),[302] a special funding to conduct research and prepare the planned project, was approved to assist the government in the preparation. Later in 1997, the Bank and the government agreed to collaborate in the preparation of a reform program and identified the three broad pillars: improving access to judicial services, the cost-effectiveness of those services and the enhancing quality of judicial outcomes. Despite the installation and the work of the PPF, consensus building about what the focus of reform should be continued to be troublesome, eventually leading to an approach that was focusing on small-scale intervention with a relatively small budget in comparison to other judicial reform projects in the region.

*The Model Court Project: PROJUM (1998–2006)*

In 1998, the Model Court Program (*Programa Juzgado Modelo*, PROJUM) was launched by the Bank and parts of the executive of Argentina as the lead actors. The Bank's first judicial reform project in Argentina included a *Learning and Innovation Loan* (LIL) and was a first small-scale intervention that should eventually be expanded to work towards the overall goals of reforming the judiciary in Argentina (World Bank 2001: 83).[303] The Bank wanted to get a foot in the door.

[300] The other big project of the Bank in Argentina was the support to the Anti-Corruption Office in Argentina (P065302) from 2000 to 2004.

[301] The NGO *Poder Cuidadano* was involved in preceding background analysis of the judicial system before loan negotiations (Riggirozzi 2005: 157) However, this background information was ignored. Other NGOs important for the sector assessment were Libra Foundation (Fundación Libra), Fundación de Investigación Económica Latinoamericana Latin-American Economic Research Foundation (FIEL); Instituto para el Desarrollo Empresario en la Argentina IDEA, Junta federal de Cortes y Superiores Trubunales JUFEJUS, Bar Associations, ARGENJUS.

[302] "The PPF is an important funding vehicle supporting the preparation of individual projects under investment project financing (IPF), and programs to be supported by Program-for-Results (PforR) financing and development policy financing (DPF). Preparation advances (PAs) from the PPF are used to provide technical assistance for successful project design and implementation start-up, institutional strengthening, and incremental operating support." (World Bank 2016: 1).

[303] Simultaneously an IDB project was implemented focusing on: A small project of 10.5 million US Dollar for strengthening of National Treasury Prosecutor's Office, Public Prosecutor's Office and Public Defender's Office

The components of PROJUM were: 1. Court management, including better communication between Supreme Court, courts of appeals and trial judges, 2. Training for judges, 3. Evaluation and dissemination of best practices. The project was established in twelve first instance courts in the provinces. The plan was that these courts should develop and implement strategies for enhancing courts administration, reducing case backlog (e.g., by identifying suspended cases) and ensuring faster and more efficient proceedings.[304] By separating administrative work from judicial work, the project aimed at "freeing time for the judges for their primary duties, create teams of judicial employees, decentralize functions and establish reliable statistics in order to track performance and manage resource allocation" (PAD 1998: 2). The subcomponents included court organization, case management and delay reduction program, records management, and archive system. The Bank wanted to test the new management system and subsequently expand them for stimulating judicial modernization throughout the judiciary.[305] The main goal was to design and development of a plan for court management for making courts more efficient and to transfer it to other courts. Capacity building plans to improve courts staff management skills and physical court infrastructure improvement were also part of the project. With regard the central aim of transferability, the Project Appraisal Document (PAD) reads:

> "The model courts would provide significant benefit through the careful study and evaluation of methodologies for the effective and efficient resolution of disputes nation-wide. The model court studies and results should result in actions and programs, which will be transferable. The beneficiaries of these reforms include the judiciary itself, the executive branch, and the general public. It is expected that with improved court and case management and training that the time it takes for cases to go through the system would decrease, percentage of cases disposed as a proportion of the number of filings in each court would increase and the cost to process each case would decrease. With these reforms it is also expected that the incentives for greater efficiency and effectiveness would be increased." (PAD 1998:8)

A transfer of the model court system never took place. Early on during implementation, World Bank documents stress the lack of a clear commitment from key actors on the nature, scope, or timing of more substantive reform of the system (The World Bank 2001).[306] Yet the project still

---

with a focus on administrative and case management, evaluation of mediation program, development of crime prevention policies, computerization of the penitentiary system, creation of the Institute for the Improvement of Provincial Justice and consolidating all current national legislation. Approved Dec. 1997. "(PAD 1998: 9). The World Bank engaged simultaneously to the PROJUM project in an anti-corruption project in Argentina (*Support to the Anti-Corruption Office of Argentina, P065302).* See also Riggirozzi (2005).

[304] In a clear connection to the law and development approach of the Bank, the PAD indicates that the project concentrated on tax cases: "Preliminary estimates indicate that improvements to the handling of tax cases has an extremely high rate of return. Methods will be developed under the model court project to assess the returns of other types of cases." (PAD 1998: 11).

[305] Dakolias and Said find: "The model court project will emphasize decentralization and stakeholder participation. Seminars will be held and working groups will be formed to review the design of the model courts, the different stages of progress, and the results. Surveys will be used to evaluate the model courts. It is hoped that this project can lead to results which can be adapted elsewhere in Argentina." (2000:112)

[306] On the problem of commitment, the 2006 Implementation Completion report of the Bank retrospectively finds:

went ahead. Underlining the rivalry between executive and judiciary over the leadership in the process and questions in relation to judicial independence a 2001 Bank report states:

> [D]espite efforts to bring the stakeholders together, no consensus has yet emerged in the content and specifics of judicial reform. At that time, the MoJ's [Ministry of Justice] dominance in the process appeared to shift the focus from the measures, which were deemed by the Bank and the legal profession at large to be critically necessary to affect a full-scale legal and judicial reform project. The MoJ's primary focus, however, was to reform the registries under its jurisdiction. As a result, the Bank has adopted an approach focusing on small-scale interventions, such as the Model Court Development project, and possible support for building capacity in the Federal Judicial Council and supporting various provincial programs for improving the delivery of judicial services at that level [...]." (The World Bank 2001: 84).

The Bank project focused on technical issues addressing court management and was not addressing judicial independency or a more comprehensive approach taking the dynamics between branches into account. Recommendations from assessment included administrative centralization, support to the statistics office, the widespread use of information systems in the judiciary (e-governance), and improvement of the organizational structure of courts (The World Bank 2001: 31, 36-37). In relation to the management of the project, the establishment of an independent commission was suggested. Given problems of independency and rivalries between branches, the commission should comprise members of the Judicial Council, the Supreme Court and the Advisory Committee for the implementation. However, this suggestion went unheard and the Bank placed the executing agency in the executive and the Supreme Court, strengthening thereby the concentration of power in the executive (see also Riggirozzi 2005: 1929). Originally envisaged for an implementation period of three years that lasted until 2001, the project was extended until 2006. The Implementation Completion Report rates the overall performance of the Bank and the one of the borrower Argentina as unsatisfactory; similarly, it evaluates the outcome as unsatisfactory, and the sustainability as unlikely. Only the institutional development impact was rated as moderate (ICRR 2006:1).[307]

### 6.2.2 IACtHR cases – reparations orders, compliance with judgments

Most studies point out the pro-active human rights policies in Argentina in the aftermath of the dictatorship both nationally and with regard to responding to international demands and judgments (e.g., Sikkink 2008; Hillebrecht 2012, 2014a). However, as stated earlier, official policies are not necessarily translating into smooth implementation processes. At the end of

"However, there was thus considerable general support for expanding judicial independence and justice services - but also equivalent disagreement as to how to realize them." (ICR 2006: 2).

[307] With regard to the supervision during the implementation period, the ICR states: "it is puzzling to note the almost consistently "Satisfactory" ratings of implementation progress in the PSRs (Project Status Reports). By comparison, the "DO" ratings were more often "Unsatisfactory." In this connection, the Bank should have paid greater attention to the situation, perhaps through a "QAG-type" implementation review early on, or intervened otherwise more forcefully to address the lack of progress and recurrent setbacks." (ICR 2006: 14).

2018, eleven Argentinean cases were at the supervision stage before the Court. As in most other countries in the Inter-American Human Rights System compliance is especially low with regard to the reparation orders being typified as measures obliging the state to investigate and punish those responsible for the human rights violations (Gonzales-Salzberg 2010: 115, Hunneeus 2011: 511).[308] However, overall studies find a high compliance rate with judgments in Argentina (Cavallaro and Brewer 2008) and less time until implementation in comparison to other countries in the region (Perez-Liñan 2019).[309] Argentina accepted the contentious jurisdiction of the Inter-American Court of Human Rights in September 1984. Since the constitutional amendment in 1994 the state incorporated IACtHR jurisprudence in an almost monist style into national law, meaning that the human rights norms became recognized as norms of highest rank even when the case did not concern the country.[310]

In 2001, the IACtHR declared amnesties invalid in the *Barrios Altos Case,* dealing with human rights violations in Peru. The decision had huge impact in the region, also influencing the prosecution in Argentina by making the *Final Point Law* of 1986 and the *Due Obedience Law* of 1987 void. The international prohibition trickled down to national level. Drawing on international jurisprudence, the Argentine Supreme Court declared amnesties unconstitutional in the final decision in 2005 in the *Simón Case*[311] filed by the *Center for Legal and Social Studies* (CELS by its Spanish acronym)[312] and the Grandmothers of the Plaza de Mayo[313]. The way for national prosecution was again open.

---

[308] There are only a few systematic studies on compliance rates with IACtHR judgements; the latest large-n data set was developed by Naurin et al. (2020). To my knowledge, the latest study focusing purely on Argentina in the one by Gonzales-Salzberg cited here.

[309] Also in unpublished document summarizing findings for conference at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg in 2018.

[310] Sabrina Vanuccini points out how this style in Argentina provides an example of a peculiar style of adoption (together with the style established by the Supreme Court in Colombia, stating in footnote 2 : "The courts of Argentina and Colombia have routinely applied the IACtHR's judicial decisions - even when these countries have not been involved in the particular disputes in respect of which the IACtHR's case law was established - and have recognized the constitutional hierarchy of these decisions" (2014: 226).

[311] Case Number No 17.768, S. 1767. XXXVIII, 14 June 2005, Corte Suprema de Justicia de la Nación. In the Simón case the Supreme Court dealt with the combination of forced disappearance of parents, child abduction and adoption of the child by persons loyal to the junta. In the ruling, the Supreme Court amongst other decided that the crime of disappearance was a crime against humanity for which no statutes of limitations applied. The effect of the court`s decision was to permit the reopening of hundreds of human rights cases that had been closed for the past 15 years (see Sikkink 2008: 14). By 2006, more than five-hundred former military and police officers had been brought up on charges.

[312] *El Centro de Estudios Legales y Sociales* [Center for Legal and Social Studies] (CELS) was created in mid-1979 by a group of parents of disappeared people. CELS is one of the major litigants before the Inter-American Court representing victims in human rights cases concerning Argentina.

[313] *Abuelas de la Plaza de Mayo* and *Madres de Plaza de Mayo* are among the most famous Human Rights Organization in Argentina which also gained international popularity. Founded in 1977 by 12 women, they gathered every Thursday in front of the presidential palace, *la casa rosada*, on the plaza de mayo with posters showing pictures of disappeared. One of the major work of the *Abuelas* consisted searching for children who were born in captivity that have been given military loyal families and brought up there without having knowledge of the forceful adoption. By 2014, 116 of estimated 400 grandchildren have been found (Balardini 2016a:71).

At national level, institutionalized structures dealing with domestic human rights trials comprise the *Ombudsperson* (*Defensor del Pueblo*)[314] established in 1994 and the *Prosecution Office for Crimes against Humanity (Procuraduria de Crímenes contra la Humanidad*,) a specialized unit under the Attorney General's Office, which was created in 2007. Itis in charge of coordinating the strategic work of the prosecution on human rights violations trial in the country. In 2009, the Supreme Court created an inter-branch commission, consisting of representatives of the executive, the legislative branch and the prosecutor's officeto smoothen communication while working on national trials.

However, in relation to the implementation of international verdicts, Argentina has no structure – like the *Procuraduría Pública Especializada Supranacional* in Peru – that is specifically dealing with human rights litigation before the Inter-American Human Rights System. Instead, the work is split up between two organs. The *Cancilleria*, a subdivision of the *Direccion General de Derechos Humanos*, is in charge for the representation and the litigation before international courts. The *Subsecretariat de Derechos Humanos y Sociales,* under the Ministry of Interior is the execution organ for some of the orders dictated in reparation orders. Under the Kirchner administration, many friendly settlements were reached in the Inter-American Human Rights System (Interview #27; see also Ziccardi et al. 2019).[315] While friendly settlements are a sign of pro-active human rights policies and a cooperative style of litigation, research that is more detailed has to be conducted with regard to how the terms reached in the friendly settlements are implemented.[316] In sum, the existence of an institutional structure, high societal pressure, local NGO activities, media coverage and international pressure have contributed to a positive environment for human rights activities in Argentina. However, government official policies preferences might have influenced the implementation of international and national verdicts both positively and negatively as human rights activism and policies became a political

[314] The *Defensor del Pueblo* is in charge of protecting human rights and other constitutionally recognized rights when violated by the public administration. However, it has no supervisory authority over the judicial branch and is not part of the judiciary. The defensor can litigate in furtherance of the rights it protects and represents the citizens whose rights have been violated.

[315] Ziccardi and colleagues provide a study on friendly settlements reached in the Inter-American Human Rights System in the period 2001- 2011, listing Argentina with 24 settlements among the countries that have made most use of it between 1985 and 2014, see chart 3.3. (2019:71).

[316] The chapter of Ziccardi and colleagues (2019) provides a good first overview of the impact of friendly settlements, indicating that the potential benefit of being a faster procedural mechanism than judgements has yet to be materialized since the settlements are lengthy procedures (2019:71). However, a detailed process tracing of settlements practices has yet to be conducted. As with regard to effectiveness, the data showed that a third of the settlements have been implemented entirely chart 3.4, (2019:73-74). It would be interesting to see whether they create similar or different problems during the process like the judgments of the IACtHR.

currency in the years since 2001.[317] The political climate and the legal structure and interpretation were favorable for pro-active human rights policies during the Kirchner administration. Courtney Hillebrecht affirms how in Argentina, both the Néstor and Cristina Fernández Kirchner administrations had political incentives to comply with the IACtHR rulings to support their postulated "new" Argentine human rights policies. As Hillbrecht argues, the other branches "were willing to follow suit" (2012: 973).[318] The administration of Mauricio Macri, however, seemed to have introduced a new style with respect to human rights. In addition, the majority in the Supreme Court changed to a more conservative composition. Despite an overall favorable climate for respect for human rights in society, and mechanisms established to denounce and prosecute abuses, the implementation of judgments of the IACtHR was troublesome. As outlined previously, not all the judgments of the IACtHR deal with human rights violations during past dictatorships, but also address current and systematic human rights violations in the democratic era. In respect, one interview partner working in a legal NGO in Argentina that also represents victims in cases before the IACtHR, suggested that because dealing with the past in Argentina is positively connoted and activities widespread and well-established, this potentially covers that current human rights policies have been neglected (Interview #34; CELS 2012).[319]

The following section provides a summary of the Argentine cases and the reparation orders dictated by the Court whose implementation processes will be discussed in the analysis.

*The Bulacio Case*

The Bulacio case (*Bulacio v. Argentina*), in which the Court rendered a judgment in September 2003, shows implementation problems regarding the duty of the state to fully investigate and sanction the perpetrators and to ensure that the types of violations committed in the case will not be repeated. The background to the case is the detention of over 80 people in Buenos Aires on April 19, 1991, in a "razzia" near the venue of a rock concert. Amongst the detainees was 17-year-old Walter David Bulacio. He was beaten at the police station, suffered a cranial

[317] For a detailed case study on intra-branch dynamics and HHRR policies of the Kirchner administration see Courtney Hillebrecht (2012: 947 ff).

[318] In August 2003, the Argentine Congress, with the support of the Néstor Kirchner administration, passed a law that declared the amnesty laws (*Obediencia Debida* and *Punto Final,* see above*)* null and void. International pressure and the landmark decision of the Supreme Court in Simón in 2005 were accompanied by a pro-active human rights policy by the Kirchner administration.

[319] This argument was also brought by Argentine sociologist Enrique Peruzzotti in an article in the newspaper La Nación 2006 available at: https://www.lanacion.com.ar/politica/enrique-peruzzotti-el-gobierno-actua-sin-el-debido-control-nid838966/, last accessed 02.06.2022.

trauma, and was subsequently transferred to hospitals where he reported his injuries. The Juvenile Criminal Trial Court took record of his injuries and opened an investigation. Walter David Bulacio died on April 26, 1991. The circumstances leading to the death of Bulacio were dealt with in several lawsuits before different courts and appellate bodies, however, without the persons responsible being identified or the judicial bodies investigating fully the circumstances of his death. The IACtHR found a violation of the right to life (Art. 4), the right to personal integrity (Art. 5), the right to personal freedom (Art. 7), the right to judicial guarantees (Art. 8), the rights of children (Art. 19) and the right to judicial protection (Art. 25). In 2003 the IACtHR issued its judgment and the state of Argentina accepted full responsibility. However, Argentina did not comply with the reparation order to continue to investigation of the crimes and to punish the perpetrators, giving the family full access to all information gathered and ensuring that all courts and instances available will hear the case. It also did not comply with the Court order to guarantee by legal or any other means that the crimes committed cannot be repeated, including legislative change and structural change to ensure the effectiveness of the international norms. It complied with the orders demanding to publish parts of the judgment in a nationwide newspaper and with the Court order dictating pecuniary compensations. The IACtHR issued resolutions of supervision in 2004 and 2008 claiming the states duty to adopt measures for judicial guarantees in relation to the detention of children and the conditions for their detainment.

*Bueno Alves Case*

The Bueno Alves case (*Bueno Alves v. Argentina*) deals with human rights violations that occurred in the context of the detainment of Mr. Bueno Alves in 1988. While at the police station, Mr. Alves was tortured and forced to declare against himself. The torture resulted in a hearing impairment and the loss of his balance function. The criminal complaint that reported the torture was closed without identifying or punishing the responsible. The Court found in its judgment of May 11, 2007, the state of Argentina had violated the right to personal integrity (Art. 5), the right to personal liberty (Art. 7), the right to fair trial (Art. 8) and judicial protection (Art. 25) (similarly the Court found Argentina guilty of violating Art. 1). The Argentine government claimed it would undertake full responsibility in the case. The Court issued resolutions of supervisions in 2011 and in 2018. In the resolution of supervision of the case from May 30, 2018, the Court declared Argentina had complied with the reparation to publish the judgment in a nation-wide newspaper, it declared partially complied the reparation of paying the amount of money established in the judgment to the family of Mr. Bueno-Alves. The

reparation not complied with is the one to immediately investigate and punish the perpetrators of the crime.

*Fontevecchia and D'Amico*

The case Fontevecchia and D'Amico (*Fontevecchia and D'Amico v. Argentina)* has evolved into the most controversial case of Argentina before the IACtHR (see e.g., Abrahmovic 2017; Hitters 2017). The case deals with the publication of two articles in an Argentinian newspaper in 1995, in which the then President of Argentina Carlos Menem was reported to have a son, unknown to him. Jorge Fontevecchia and Hector D'Amico were journalists editing the newspaper. Carlos Menem sued the journalists for monetary compensation for violating his right to privacy; after being appealed the judgment dictating the payment of compensation by Fontevecchia and D'Amico was confirmed by the Supreme Court in 2001. Having exhausted the measures at national level, the case was notified to the Inter-American Commission in 2001 claiming the right to freedom of expression of the two journalists (Art. 13) among others. The IACtHR issued a judgment in the case on November 29, 2011. In this judgment the IACtHR held that the state should undo the judgments against the two journalists.[320] The judgments only started to being publicly discussed when the Supreme Court turned against the regional Court in 2017 and declared the competence of the regional human rights organ void. Thereby the Supreme Court of Argentina altered the previously applied doctrine that was confining an obligatory character to the adoption of international judgments of the IACtHR applied since 1994 in Argentina. A public audience was held in August of the same year.[321] The IACtHR issued resolutions of supervision in 2015, 2016 and 2017.[322]

*Argüelles and others*

The case Argüelles and others (*Argüelles and others v. Argentina)* deals with human rights violations in relation to judicial guarantees of 20 Argentinean military officials in the internal process alleged against them because of fraud against the Air Force and touches the topics legal guarantees, military jurisdiction and the interpretation of (retrospective) jurisdiction of the IACtHR. The Inter-American Court issued a judgment on November 20, 2014. The Court

[320] The Court issued a reparation order dictating to annul [dejar sin efecto in the Spanish original] the civil sentence: "The State must annul the civil conviction imposed on Jorge Fontevecchia and Hector D'Amico and all its consequences, within one year of notification of the Judgment on the Merits, Reparations and Costs". (IACtHR 2017; para. 103).

[321] Footage of this audience available at: https://vimeo.com/showcase/1686347, last accessed 02.06.2022

[322] The latest one being issued on March 11, 2020, finding that the reparation ordering to revoke the sentence is still pending.

underlined the declaration of temporal competence (*competencia temporal*) and declared it respected the prohibition of retrospectivity. However, in the present case it would judge upon the permanent violation (*violación permanente*)[323] committed after Argentina had accepted the competences of the international Court.[324] Argentina did not accept international responsibility. The Court found the state guilty of having violated the right to personal freedom, the right to judicial guarantees in relation to reasonable timespan for initiating the proceedings and ordered the reparation to publish the judgment in a nationwide newspaper and to pay the established amount of money into the Fund for Legal Assistance for Victims (*Fondo de Asistencia Legal de Víctimas),* which have been complied with. Argentina partially complied with the reparation order to pay the amount of money established in the judgment to the victims for immaterial damage and the reimbursement of expenses. The IACtHR issued resolutions of supervision in 2016 and 2018 and in 2019.

*Provisional Measure granted in favour of Milagro Salas*

Milagro Salas is an indigenous leader of the movement *Organización Barrial Tupác Amaru*, in which function she advocated for the families that have been evicted in a poor area, "Alto Comedero", in the province of Jujuy in northern Argentina. Milagros Salas was detained in 2016, accusing her of various criminal acts and since then has been victim to a smear campaign while she was hold in preventative prison. In a resolution of November 23rd, 2017, the IACtHR granted provisional measures in favor of Milagro Salas for her immediate release from prison.[325] The Court dictated that Milagro Salas had to be transferred to house arrest and granted psychological and medical assistance; furthermore, the IACtHR ordered the parties had to provide information on the procedures and the national trials. In August 2018, the Supreme Court of Argentina urged the judiciary of Jujuy to adopt the measured needed to safeguard the life, personal integrity and health of Milagros Salas as ordered by the IACtHR (CELS 2018).

[323] The Court used this judicial figure also in cases of permanent violation of a right in cases of forced disappearance, in which the violation is not a single act in time but extends during time amounting to continued violation of the American Convention of Human Rights.

[324] Similarly, the Court partially accepted the preliminary objections of Argentina in relation to competence ratione materiae and turned down the objection in relation to the exhaustion of domestic remedies.

[325] Albeit there is no pending case or case in the stage of supervision in the Court with regard to Milagro Salas, the Court declared in accordance with the ACHR its duty to grant provisional measures in cases of imminent danger of human rights violations (Art. 63.2), para. 5 claiming that the provisional measures do not only have a "precautionary" (cautelar) but also a "tutelary" (tutelary) character.

*Iván Torres Case (Torres Millacura and others)*

The case *Torres Millacura and others v. Argentina* relates to the forced disappearance of 26-year-old Iván Eladio Torres Millacura who was detained by police agents in the Argentine province Chubut on October 2nd, 2003, and has since then disappeared. The Court issued a judgment on November 29th, 2011. Declaring the state culpable of violating among other right the right to personal freedom and personal integrity (Art. 5). A resolution of supervision of compliance was issued on January 26th, 2015.[326] The reparation measures relating the search for Iván Eladio Torres Millacura, the investigations to determine the persons responsible for his forced disappearance, as well as the initiation of a human rights education program for police officers in the region Chubut and the pecuniary compensation were not complied with, as of December 2020.

Summarizing the picture for implementation of judicial reforms and international verdicts in Argentina before proceeding to the in-depth analysis: In Argentina, the Bank played an important role in providing leverage for the formulation and financial realization of a judicial reform supported in the agenda of the executive. The implementation of Court judgments happened in a time of a strong politicization of human rights policies and political divide. Institutions as representative organs went into crisis at least from 2001 onwards, and rivalries between the executive and parts of the judiciary were particularly pronounced. The Model Court project was rated even in self-assessment as a failure. Subsequent smaller interventions did not address re-organization of the judiciary again.

Implementation of judgments provides a mixed picture. Throughout time, government policies regarding human rights changed. Overall, however, the necessity for implementing judgments of the IACtHR over a long period was accepted, problems emerged mostly in relation to reparation orders dictating the investigation of crimes. However, in 2017, political dynamics changed, and the Supreme Court in Argentina turned against the IACtHR. From 2018 onwards, a growing number of judgments in relation to Argentine cases was issued by the IACtHR[327]. However, this is not an indicator for a worsened climate for human rights protection in the present, since violations oftentimes date back many years, implementation and compliance are activities of the current administrations.

[326] And subsequently July 21 of 2020 in which the Court claimed that no progress has been made with regard to the search and the investigations.

[327] From the End of 2018 until the End of 2020, 11 new judgements were issued, making it in total 22 judgements, 5 pending cases and 20 provisional measures as of December 2020), for an overview see list provided by the IACtHR, available at: https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm?lang=en.,last accessed 02.06.2022.

## 6.3 Analysis of the dimensions of context, design and coordination during implementation

The following sections analyses the implementation process of the judicial reform project supported by the Bank and the implementation of the judgments at supervision stage. The section is structured around the three analytical dimensions introduced in the previous chapters. Differences and similarities between the elements of implementation problems in Peru and Argentina help to refine approaches to alternative explanations for implementation problems. The following sections turn to exploring further the dimensions of context, design and coordination based on elements described in chapter five and then discusses implementation problems in Argentina with a view to answering the research question of how global governance rule of law supporting activities are implemented at national level.

### 6.3.1 Exploring the context dimension

The analysis of the context dimension in implementation processes in Argentina reaffirmed poor context assessment of the political dynamics and institutional country particularities as problematic elements during implementation. Exploring the dimension context in the analysis of empirical material for judicial reforms in Argentina revealed an additional central element to this dimension that is generation of knowledge by the Bank and subsequent disregard for the very findings in the design of reforms in Argentina.

*Bank*

*Understanding the context – producing hierarchical knowledge*

The Bank conducted exhaustive prior studies for the project in Argentina guided by its interest and the selecting of contracted consultants. The scope of assessment of context (e.g., balance between overall political climate and specific judicial sector problems) is determined by the global governance actor and limited by the already anticipated project focus. Therefore, feasibility studies are not neutral context assessment, but rather consulted and interest led reports. The lenses through which the assessment takes place is determined by the funding, even if the research is carried out by independent researchers. In relation to judicial projects under the auspice of the Inter-American Development Bank, one interview partner, academic and consultant in development projects from Argentina suggested:

> "[…] So, from Washington they issue directives and they tell you that these are the areas you have to investigate and where you have to put major emphasis is the laboratories for open governance, which is not priority here, we don't have such a laboratory here [in Argentina]. So we talk to the people in the IDB and tell them 'You are asking us to make a report on this when in reality I would have to investigate something else, something very particular about what is happening in Argentina and where we could really see an impact of assessment.'

> So, very often the interests of the headquarters differ from the interests at national level and creates short circuits |… |. So if the person from here wants to have the money, he*she has to do what they ask him*her to but after this he*she can do something else, if they continue funding.
> So what happens is that there must be a line from Washington, because if every country does what they are interested in |… |. What is needed is something amorphous, disarticulating what is generated from above and then handed down." (Interview #31)

The quote exemplifies the level of ignorance for context on the Bank side: financed research ought to be looking at a judicial mechanism that was not even existing in Argentina. The Bank necessarily assesses context led by economic interests. However, a purely technical or economic approach to development especially in rule of law supporting activities potentially blurs an assessment of elements in the legal sector. Knowledge is also produced hierarchically as it is consulted, the contract made with investigators that have to fulfil previously agreed terms of reference (TORs) knowledge is generated for the purpose to subsequently conduct the Bank project. When contracted consultants deviate and start using the funding for other research purposes, this potentially represents a creative form of benefiting from the narrow and flawed structure for context assessment dictated by the global governance actor.

In another vein, paying tribute to the gap between formal and informal institutions, context assessment is highly dependent on the generation of new and updated knowledge. Context assessment done in desk-studies must necessarily replicate "conventional wisdom" (Hammergren 2003) and contribute even more to blueprint solutions in reforms.

Understanding the context also relates to a more specific assessment of challenges in the judicial sector, characterized by the framing of the assessment and the actors chosen to carry out the studies. In Argentina, the assessment was approached on a technical level. Including problems such as case backlog, different management systems on federal and national level. This approach left political issues aside and missed to recognize how strong the opposition in parts of the judiciary was. Additionally, the assessment of context was not coherent and led to contradictory operationalization. The studies (carried out with a special loan of the Bank) indicated different structures leading to different work habits and logics in courts throughout the country. Nevertheless, a design based on "model courts" was developed for the judicial reform project, with the aim of subsequently establishing a unified management system. Attempts and interest to homogenize the judicial system standing in contrast with national structures established over years in the federal system.

*Limiting context in reports – contradictory and incomplete information*

Coming to a second element of the dimension context also visible in Argentine implementation processes that relates to inflexible reporting structures. In a rare expression of dissent, the

Argentine government formally contested the narrative established by the Bank about the failure of the Model Court project in a letter send to the Bank. The letter was included in the ICRR report. This said, in most cases official documentation is still providing little room for differing views on the process. Reports remain documents by and for the Bank. Reporting is limited in structure to the views of actors officially included in the reform process on the Bank side. Views of other actors that were part of the project or affected by the reform but not included in the executing committees, e.g., other state actors, NGOs, Court staff, civil society organizations and legal experts are not reflected in this document. Official documentation thus can hardly reflect problems during the implementation process in a balanced or neutral way and thus run the risk to reinforce conventional interpretations of problems such as generic lacking political will. Importantly, reports oftentimes have no real consequences, given the politics of approval in the Bank. They seek to provide transparency but are not binding or unleashing consequences for future investment. In a similar vein, this applies to feasibility studies conducted before a project starts. Different to feasibility studies in projects concerning land use, natural resources and even economic measures, feasibility studies for legal reforms have no strict binding effect, as findings indicating a potential negative impact on the judicial sector are not a hard criterion and impact in rule of law overall is complicated to measure. Summing up, official reports are not neutral, the content is limited by previously defined structure of reporting, the technical language limits the accessibility, and the usefulness of the official documents is questionable when findings can be disrespected.

Subsequent document, e.g., Bank implementation completion reports serve to legitimate retrospectively the reform. Instead of ensuring accountability, they often bear little consequences. In addition, complicated reporting structures run the risk of placing additional burdens on state actors and international actors alike.

*Court*

*Understanding contexts – coping with mismatching information in reports*

Previous chapter outlined how the Court in its context assessment relies on information issued by the parties to the case, expert witnesses and on own staff assessment.

The IACtHR can also carry out country visits, to assess the status of implementation e.g., in joint supervisions of cases in one country. The Court did not conduct country visits in Argentina in der timespan under consideration. The resolution of supervision that summarize the outcome of the reporting procedure during the implementation process are legal documents issued by the Court. In the resolutions of supervision, which are legal documents, determining the status of

implementation the Court summarizes the positions of the parties to the case as presented in their reports. Thus, relying on the information provided by the actors, the IACtHR interprets the law and the compliance with the reparation orders. In the report issued by the state, information provided by actors involved in the implementation - e.g., a special police department involved in investigations - sometimes appear in the state reports unconnectedly, oftentimes, the report also omits to provide information on the status of implementation of a specific reparation order. For example, states are asked to provide information on a reparation order dictating the investigation of the bodily remains of a missed person forcibly disappeared. In the report the state issues information on legal changes made to establish a search unit for missed persons but omits information on the actual search process of the alleged victim in the case – thus the reparation order as such is not addressed. As outlined, the monopoly to decide which information flows lies with the executive as this actor hands over the state report to the IACtHR. Also, in oral communication in public hearing, the position of the state is represented by the litigation team before the Court composed of members of the executive. The information is oftentimes incoherent e.g., directly citing reports of different departments without having processed the information previously, mismatching e.g., contradictory as concerning the progress in investigating certain crimes and characterized by the above-mentioned types of omissions. The structure of reports does not provide for a rigorous format for the parties to the case to give information on the implementation orders separately. Thus, reporting on one reparation order can miss, for example, in cases relating to the search for missing persons the police department in charge of the search reports on human bodies found in a certain area of the state but the information in relation to the identification of these bodies is missing. However, it is not possible for the IACtHR if the identification is not determined yet or simply not reported.

In sum, official documentation is structured by limited agency and technical language. The Court needs to process state reports that provide differing positions on implementation for assessing the context or visit the countries and schedule special meetings with national actors.

*Timing the intervention – changing partners and contexts*

The context assessment also relates to the facts of the case and the context in which the judgment ought to be implemented and the implementation period. The lengthy times between the issuing of a judgment and the steps for compliance initiated under several administrations, is an additional argument for the need for more flexibility at the supervision stage. Assessing context relates to political dynamics throughout time, rather than to political wills of certain

actors at the time of issuing the judgment. The same argument holds true when looking at the assessment of the context for the long-term change the Court seeks to create through judgments. Adhering to a conservative position regarding the role of the IACtHR one interview partner and judge in the Supreme Court in Argentina suggested:

> "You have to know the judicial order of the country in question in the ruling to see what you can ask for, because if not, it will create a friction." (Interview #25, own translation)

Frictions are not per se problematic as the IACtHR mandate is to issue judgments that are not necessarily in line with national politics and the judicial order. However, the way the Court approaches the partly unforeseen and newly emerging political disputes and frictions, becomes even more crucial. Rejecting the idea that the Court can and should serve as a direct correction for national legislation and processes, and hence claiming it had lost sight of its original purpose, another interview partner and judge in a federal court in Argentina suggested:

> "I don't think they should intervene directly. The international organs issue directives or point out ways in their judgments [...] but they can act as mediators or correcting tendencies at national level, which is the idea of transnational governance...which is also part of the separation of powers [...] harmonization is always welcomed in Argentina but not that a Court of Human Rights imposes something on us." (Interview #29, own translation)

Rejecting too invasive activities, agenda setting and attempts to change the context, the interview partner stressed in this quote the IACtHR should rather serve as a "correction to" national issues and a "mediator" for national processes.

### 6.3.2 Context insensitivity and implementation in Argentina

*Bank*
*Context and agenda setting*
Sometimes it is an agenda to suggest that there exists awareness for a reform need. [328]

> "There is a growing awareness in Argentina of the need for judicial reform. This project responds to such need" (PAD 1998: 12)

Whose awareness serves as legitimation for the need to reform in this World Bank quote from the Project Appraisal Document of the Model Courts Project is not clear. Judicial reforms in Argentina have been on the table for some time, with varying degrees of salience in national politics and different sector pushing for reform. National plans to reform the judiciary in Argentina were popular during the 1990s when the Bank engaged in assessments of the judicial sector.

[328] Affirming a convergence of interests of political elite and Bank, Tuozzo, researching WBG institutional reforms in Argentina in the early 2000s confirms: *"international and domestic imperatives for institutional reform converged strongly during the 1990s, pushing the agenda of reform to the forefront" (2009: 467).*

"Because sometimes the problems of the regional organs are that they do not understand internal questions, and where to start and where not to start, and that actions can generate more... let's call it negative help." (#27 Interview)

Before engaging in a judicial reform project, back then a new sector the Bank was eager to explore in line with the good governance approach, the Bank conducted a great amount of background research in Argentina. However, assessment of the context was limited by agency and in scope. Findings from previous studies indicating problems in judicial independency and political rivalries were ignored, and ultimately the Model Court project addressed technical issues of Court administration (see again section 6.2.1 and PAD 1998*)*. Despite the previous studies commissioned by the Bank, indicated complex political dynamics, the Bank decided to engage in this tense climate, and excluded important actors in the judicial branch. The Bank team largely ignored the results of the studies for the project design and for the selection of counterparts. Research indicated a lack of independence in the judiciary, delays in trials and corruption as the most pressing problems. In the same vein, the research paper financed by the Bank identified judges, court officers and government officials as the main obstacles to change (1998: 3).[329] Ignoring its own findings, the Bank underestimated or ignored the political dimension framing the intervention mostly technical and addressed inefficient court management. Possible opposition to reform from within government branches or from civil society, diverging interests within branches, and other political obstacles like funding and economic hardship were ignored. Despite the time and money spent to assess the context, the gap between findings and operationalization remained wide, as one interviewee confirmed:

"Thanks to the Bank everything was diagnosed. The problem of the international organisms is that they remain stuck in the diagnostics or that they have a great difficulty to pass on to financing concrete projects and execution of the measures." (Interview#26)[330]

The same year of the launch of PROJUM, a National Plan for Judicial Reform (*Plan Nacional de Reforma Judicial*) announced by the Ministry of Justice in December 1998 was presented to the executive. In comparison to the proposal worked out by Bank and executive, the plan outlined the need for a more comprehensive reform program that addressed administrative areas and human resources, as well as access to justice, transparency and modernization. The national reform plan, however, was never implemented due to lacking political support by the executive and a lack of funding. The reform proposal of the Bank, on the other hand, resonated in the

[329] An earlier World Bank publication (1996) identified similar obstacles while also pointing out complicated political dynamics for reform attempts.

[330] After pointing out problems with regard to operationalization of the research, the same interviewee continues claiming also the weaknesses of the diagnostics itself. The interview partners criticizes that the economic actor Bank was lending money to Argentina when an economic crisis was already visible: *"There were so many diagnostics that one lost count and the diagnostics did not foresee the "coletazos" [political and financial crisis] in 2001." (Interview #26 )*

executive. The agenda of the executive corresponded with interests to close a loan in the Bank, however, I did not mirror national debate. While the ICR acknowledges that, it fails it pointing out the strong agenda setting by the Bank:

> "It was apparent that the Government's national judicial reform program was inadequately developed, and its intentions were too complex. At least in part, that was because improving the justice system then as now was a hotly contested subject. A number of parties wished to have the reforms focused on their differing preferences. So, even before this activity began, it was clear that there would have to be wide consensus reached before any scheme could be properly implemented. Thus, while the definition of the project's objectives and content was well formulated, it did not reflect an adequate and broadly agreed framework" (ICR 2006: 3)

Despite no national consensus existed, the Bank approved the project. Negotiations were undermined by narrow selection of stakeholders and a composition of the implementation team that would not dispute the proposed project plans. Due to court packing under his administration and the constitutional reform, President Menem had strong allies in the executive and the Supreme Court. The Bank for taking the lead in the project chose these two actors. A former World Bank consultant retrospectively located lacking political will in the Supreme Court and the executive alike; thereby the very selection of the stakeholders contradicted the aim of initiating changes to strengthen the rule of law (Interview #4). Diverging interests among the actors that were important for the reform process were clear from the beginning. During the process, the rivalries soon accelerated. When problems emerged, the Bank rolled back, and affirmed in official documentation a general lack of political will to change the status quo (ICR 2006: 13). The interview partner familiar with the Bank project and involved in previous assessment of the contexts for judicial reform, stressed how this reaction potentially served to cover the Banks own misinterpretation of the context and mistakes in the selection of stakeholders (Interview #4). Interview partners previously contracted as consultants by the Bank confirmed that parts of the judiciary that were not involved in project design, blocked PROJUM during the implementation phase (Interview #28). Resistance in the Courts, together with the resistance in the congress and public distrust in the project and in the international actor hampered the project implementation and even more so the planned replication of the management system in other courts. After a period in which the project was criticized within the judiciary and among people working on judicial reform, the 2001 crisis shifted attention to problematic intervention of financial development actors in Argentina more in general including the judicial reform project (Interview #28). Criticism focused on the top-down style

of implementation and the financial debt but also the design that did not address corruption and transparency issues.[331]

*Political crisis, volatility and opposition*

Thus, by default, the judicial reform intervention by the Bank during a severe economic crisis sparked discussions on the relationship among branches and the relationship with the international creditor, potentially constitutive moments for rule of law developments. However, the within the PROJUM project, these processes were approached as problems to implementation of the rule of law reform activity.

Especially in the aftermath of the crisis, institutional reform became a priority, and NGOs were increasingly more important and included in the reform design.[332] However, that process went alongside and unconnected to the initiated Bank reform. While opposition against the program grew and the failure of the measures became apparent, PROJUM continued. It was never entirely rejected on grounds of national sovereignty despite the government changed to the Kirchner administration and the climate for international interventions began to become more hostile.[333] The Bank, on the other hand, portrayed the problems that were related to changing contexts and counterparts, the political crisis, and the dynamics among branches as deficits of the state (ICR 2006:13).[334] Remaining in the narrative portraying the Bank as the savior and a guarantor for stability, the political climate during and in the aftermath of the economic and political crisis is described in official documents as both a window of opportunity for policy change:

---

[331] Riggirozzi describes how the 2001 crisis led to a more open style of rejection of the PROJUM project from civil society: *"Questions of legitimacy in the judiciary were at the top of the civic agenda and with them the legitimacy of the World Bank-supported reform project, PROJUM. […]. […] World Bank's action in judicial reform was publicly rejected as PROJUM was targeted by some groups that, in a public demonstration, distributed pamphlets with the slogan 'PROJUM is Corruption'"* (2005: 200).

[332] E.g., the launch of the *Mesa de dialogo* (Argentine Dialogue Roundtable) under Nestor Kirchner, a nation-wide consensus-building initiative aimed at advancing economic and institutional reforms. The initiative was funded by the UNDP and launched in 2001, the Bank did not participate. The Mesa de diálogo led to the nationally based judicial reform programme, the Integral Program of Judicial Reform (Programa Integral de Reforma Judicial, PREJUD), drafted within the Ministry of Justice in July 2000 (see Riggirozzi 2005:203).

[333] Being the successor of the previous governments' international obligations, including contracts with international financial development actors, stopping the project was not easy. Given the volume and other more pressing problems, a cancellation might also not have been priority.

[334] The ICR reads with regard: *"The Bank sought to meet Argentina's judicial system requirements under very daunting conditions. These included a complex institutional setting, a perhaps excessive number of interested parties from both the executive and judicial branches along with civil organizations, disparate visions and expectations, and pressures for early improvements to try to mitigate public discontent. […] For the aforementioned reasons, the Bank's lending intentions are considered to have been well motivated. In addition, the Bank played the key role in helping the Government define and examine its requirements, identify sundry action proposals, sort out its priorities and obtain a consensus among the several interest groups, which were not easy." (ICR 2006: 13)*

> "Currently, there is momentum in Argentina for making changes to the judicial system. The crisis of the judiciary, coupled with public dissatisfaction with the judicial system, creates incentives for reform. At the same time, the establishment of the Judicial Council has created high expectations about its role in judicial reform. The factors are in place to begin the reform process." (World Bank 2001: 82)

And as an obstacle to reform because of high political volatility:

> "[T]he economic crisis which began in 2000 adversely affected Project progress. One effect was the departure of the project director and the PCU's international expert, along with changes in the political appointees. The new country conditions also obstructed the bidding for the projected contract for the model courts' technical assistance provider. "(ICR 2006: 11)

Instead of abandoning the project when the implementation process clearly stagnated, the Bank extended the program. An analysis of the official documents demonstrates how shortcomings on the side of the Banks are rushed over, downplayed or ignored. Given that the ICR can also serve for generating knowledge for future engagement, learning from the failed project was almost impossible.

In sum, the main problem in Argentina was not a lack of information about the context, but a lack to build on the prior assessment and an interest-led operationalization. While the Bank paid lip service to the necessity of previous assessment and provided funds for it, the results of the study were not included into the projects design. The mismatch between the long preparation period, the local experts selected by the Bank and the technical and limited project design that was not addressing the most crucial areas of reform, might have alienated national actors even more. Once more, pointing out the dangers of outside actors assessing the context and easily assuming the transferability of processes and knowledge one interview partner and judge in a federal court in Argentina critically finds:

> "It's hard to foresee things. For example, the model courts that were supported by the World Bank did not work because the pilot courts were abandoned. I think one has to think very carefully about how to ask for support... because it is very complicated to understand the idiosyncrasy of Argentina, everything is different here." (Interview #29)

In a self-reflective approach, the interviewee in the quote suggests being careful in asking for support of the World Bank, since the "idiosyncrasy of Argentina" is not easy to understand. International support is rendered a dangerous business. Struggles over what constitutes context and who is in charge of assessing it, as well as mismatches between the previously conducted studies and the design of the rule of law supporting activity can bear constitutive moments for rule of law development. Struggles can reveal dynamics in the relationships and conflicts of interests over what kind of reform is needed and apt.

*IACtHR*

*National courts, political dynamics and implementation*

Elements within the contextual dimension to implementation were overall largely favorable for the implementation process of Court judgments in Argentina. Pressure from civil society and government human rights policies provided a strong base both at national level and before the international organ for implementation. Structurally the monist style of adoption of international law into national law secured a strong constitutional base. However, the interpretation of this doctrine is also influenced by political factors. The composition of the highest organ legal organ, the Supreme Court, and political dynamics among branches of government also were a challenge. Policies of the executive are not directly determining implementation. First, because, they are not necessarily trickling down to lower administration, resolving institutional dynamics and blockades, and secondly, because other branches of government might oppose the process. Interview partners stressed the importance of the position of the Argentine Supreme Court for the implementation of judgments of the IACtHR as an important contextual factor (Interview #8, #25; #31). The Supreme Court of Argentina was prominently involved through its decision in the implementation of the cases *Bulacio* and *Bueno Alves* (see Gonzales-Salzberg 2011: 122ff)[335] and *Fontevecchia and D'Amico.* In the *Bulacio* case, the problem evolved around the reparation measure dictating the investigation and sanctioning of the perpetrators. The IACtHR had emphasized in its judgments that the statute of limitations that had been issued by a lower national court were impermissible. In 2004, the Supreme Court dealt with the complaint against one of the accused and confirmed the decision of the IACtHR that the statute of limitations had not expired. Despite demonstrating dissent to the legal argumentation in the regional organ, the Supreme Court of Argentina followed the doctrine of the direct execution of judgments, thereby subordinating its decision to international law and accepting the binding nature of the IACtHR rulings (Espósito, Miguel Ángel, 2004b).[336]

> "The argument was, okay, our constitution says that here we have certain problems but the international Court says that it is an international obligation of the state to advance with these cases and we cannot hide behind domestic law [… ] So you do what the IACtHR said. This was a very strong position of subordination. And the position was "we are going to follow what the Court said, because it is right" but it was "We are going to follow the Court because they have more authority." (Interview #35, own translation)

[335] Damien González-Salzberg (2011) analyzes the implementation of the judgements of the IACtHR in light of "judicial swings" of the Supreme Court, thereby paying attention to the majorities and legal interpretations of the highest organ and thus policies rather than structure.

[336] Corte Suprema deJusticia de la Nación 23/ 12/2004, "Esp6sito, Miguel Angel s/incidente de prescripci6n de la acci6n penal promovido por su defensa," La Ley [L.L.] (2004-E-224) (Arg.).

In the *Bueno Alves* case the Supreme Court took another path. Only two months after the verdict of the IACtHR the Supreme Court of Argentina rejected the reparation order to investigate the alleged human rights violations and confirmed that the statute of limitations had run for the primary defendant in the case since the crime was not a crime against humanity. In November 2011, however, the Argentine Supreme Court revoked its earlier judgment and reopened the case.[337]

> "We litigated the Bulacio case in which the Court [Supreme Court of Argentina] had built certain resistance, especially with regard to the reopening of the case […] But in Bulacio there was no resistance to a discussion with the IACtHR or objection of the competence. In Fontevecchia the step it makes [the Supreme Court] is to question directly the competence of the IACtHR, in that sense that it says that the Highest Court of the Nation should interpret the international law of human rights. This is a massive debate pointing inwards to national level about the source of law… The definition the [Supreme] Court brought up in Fontevecchia were about the principles of public order which cannot be modified by international law, something the Supreme Court had already resolved in a good way with us [the organization litigating in favour of the victims]. Now we have to see whether this was only a point in this debate or of the jurisprudence follows this line." (Interview #34, own translation)

By triggering resistance in the highest Court of Argentina, the IACtHR intervention possibly interfered with favorable human rights policies and interpretation of laws established in previous national negotiation cycles.

In its ruling of 2017, the Supreme Court openly turned against the IACtHR judgment in *Fontevecchia and D'Amico* and declared it would not follow the reparation order to revoke a national verdict sentencing the journalist for the breach of privacy. The Fontevecchia case led to a backlash against the IACtHR in the sense of questioning its authority (Interview #25; #34; #35). This said, the implementation process triggered debate, but not regarding the concerned reparation order, the separation of powers, or the politicization of the Supreme Court. Debate generated about the relationship between national law and international law and sovereignty.[338] Interpreting the constitutional clauses differently, however, the Supreme Court did not order to stop implementation because of the infringement of sovereignty by the IACtHR was already a debate at national level, but it triggered this debate. Regarding the larger debate about the interpretation of norms, one interview partner suggested:

> "It is also a debate in the region, not only a debate in Argentina […] In Argentina we had discussions about how to interpret the [international] standards but there was no discussion about whether or not comply in whatever way with the judgments of the Inter-American Court in relation to Argentina. And what happened in

---

[337] 2011 Recurso de Hecho, Derecho, René Jesús s/ incidente de prescripción de la acción penal —causa n° 24.079, availableat: http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-derecho-rene-jesus-incidente-prescripcion-accion-penal-causa-n-24079-fa11000166-2011-11-29/123456789-661-0001-1ots-eupmocsollaf, last accessed 02.06.2022. See also Gonzales-Salzberg (2011:23).

[338] This debate concerning infringed sovereignty by IACtHR tied into debates surrounding the *Gelman* case in Uruguay (see e.g.,Gargarella 2015a).

> Fontevecchia is that the Court rightly [??] said: 'Okay, and here despite this is a case on Argentina, this has to be questioned in relation to the rules of the constitutional order of the state.' – Rules that we are also not absolutely sure about – and this then challenges the obligatory nature of complying the judgments of the IACtHR. Because the IACtHR exceeded its competences, the national organ starts to interpret the competence of the supranational organ which leads to questioning the competence of the supranational organ altogether." (Interview #34, own translation)

The interview partner indicated that albeit debate was ongoing about the interpretation of norms, it never amounted to a large debate in society about the relationship with the IACtHR and the necessity to comply with judgments altogether. However, a changing majority in the Supreme Court and different interpretations of constitutional obligations to incorporate and implement international law, lead to widespread debates about the relationship with the regional human rights organ and about the relationship among branches, the function of the Supreme Court and distribution of power, the status of constitutional law, and hierarchy of norms altogether. Thus, albeit seen critically and potentially as a breaking point regarding a good relationship among the IACtHR and national implementing actors in Argentina, Fontevecchia and the changing positions of the Supreme Court in previous cases triggered debate within Argentina and in the international community of scholars and practitioners. The debate touched upon vertical and horizontal accountability, norm interpretation and distribution of power - all topics being important aspects of rule of law and potentially constitutive moments for the development and reordering of structures and the interpretation of norms. The constitutive moments do not necessarily have a connotation of strengthening institutions, relationships, norm, interpretation or application in the sense of a liberal rule of law but can also constitute a conservative rollback and a rejection of authority of global governance actors.

*Rejecting the authority of the international actor*

Authority of the IACtHR also began to shake in a regional Latin American perspective.[339] National context for implementation is embedded in an assessment of this regional context. Having said that questions of national sovereignty evolve around judgments of the IACtHR, resistance against a specific ruling are not necessarily an expression of resistance against the IACtHR, or an indicator for a fighting national branch, but can also indicate inconsistencies in the broader human rights policy of the present administration or distract from other policy debates

> "If you have a government blocking discussions about the validity of human rights at national level and boycotting the competence of the Inter-American system, in reality what this is obscuring is that it is a government which is not willing to open up a discussion about the protection of rights. So then you have the

[339] The discussion about whether this climate was created by actions of the Court or by more populist styles of governments and autocratic leadership, changing majorities indicating a conservative turn or other regional factors exceeds the scope of this thesis, see e.g., Soley and Steiniger (2018).

judicial branch as your card to play in this discussion – with all the problems judicial branches have in Latin-American countries. The ultimate safeguard, oftentimes, is the court, but if one does not find remedy there, one jumps to the next. So the position of Victor Abrahmovic [ex-director of CELS and human rights activist and scholar] is that moving on to the Inter-American system is expression of a very strong deficiency in the national judicial systems. This is also debilitating the political system. What kind of remedy for protection of rights have you left if the judicial branch has a structural deficit to give you an answer? The discussions about sovereignty seem superficial to me." (Interview #34, own translation)

Reasons as infringement into national sovereignty or pronounced misbalances among national branches have been invoked in discussions on implementation problems. However, implementation of human rights verdicts is also part of larger policies and political strategies. The Kirchner administration strongly stressed a reading of the constitutions and the doctrine of direct incorporation of international law because it fitted the pro human rights agenda of the administration. The Macri administration proactively stressed a different approach to human rights and invoked sovereignty facing the intervention of the IACtHR. Thus, the IACtHR is both: a player in national politics, and a subject to national politics. Interview partners continuously stressed, the rejection of to the Court was an expression of national politics in Argentina. In relation to the sovereignty claim, one interview partner academic and former staff of the government prosecutors' office in Argentina stressed:

"They only recall the independency, the autonomy and the sovereignty when it is about rejecting the intervention of the universal systems or the Inter-American system for the protection of human rights, other than that they forget it." (Interview #27, own translation)

To disentangle national political reasons and from reasons concerning the verdict itself in rejections of the IACtHR is a complex activity in context analysis. It is also an ongoing task; the regional organ might not be able to conduct even with more personnel. In addition, a rejection of the authority of the IACtHR resulting in problems of implementation might not be a coordinated and conclusive position of the states. An interview partner affiliated with the NGO *Centro de Estudios Legales y Sociales* (CELS) an NGO representing victims in cases before the IACtHR suggested the decision in Fontevecchia is not necessarily coordinated with the executive.

"It was a change of paradigm with regard to the value and the power of the decision of the IACtHR. The critique of the executive towards the IACtHR is that in its decisions it is also making a judgment about the value of the Inter-American System itself, the Argentine process and the way to incorporate international treaties into national law. Argentina was a pioneer in this, in the way they interpreted international law. But there was a change in the position now, a position that is shared by many people in the executive. So, agreement to change the doctrine was there, but I cannot tell if there existed an agreement or a coordination because I cannot prove it." (Interview #34, own translation)

The way the judgment became a focal point for national political maneuvering was hard to foresee. Ever more important is the ongoing context assessment and flexible reaction towards implementation processes that become politicized. Implementation problems only started six

years after the IACtHR issued the judgment in Fontevecchia. One interview partner and judge in the Supreme Court of Argentina suggested:

> "Fontevecchia is the Court [Supreme Court of Argentina] since… The judgment of the Inter-American Court was in 2012 [sic!] so you can't really judge a lot according to this because within 5 years in Argentina we had 2 economic crises, the [Supreme] Court changed 3 times. So, one has to be responsible with what you are doing because you do not know when it will be addressed and get resolved [the judgment]." (Interview #35, own translation)

The quote also underlines high political volatility in Argentina during the implementation process of judgments. Ascribing implementation problems generically to lacking political will is, firstly, problematic because it neglects institutional intra-branch dynamics and economic and other intervening factors and, secondly, it disregards the factors time and the procedural character of rule of law development.

*Assessment of context and institutional capacity*

Assessment of context also extends to determining whether national remedies were exhausted. In the provisional measure granted in favour of Milagro Salas, the IACtHR found firstly, a pending or contentious case in the IACtHR is not a necessary requirement for it to intervene and, secondly, exhaustion of national remedies is not a necessary requirement when the human rights violation is imminent. While civil society largely welcomed the intervention of the IACtHR, it was also rejected at national level finding the Court had not respected the principle of subsidiarity (Interview #25).[340] Objecting the intervention of the Court and sustaining the argument Argentina had a functional national system that corrects its own decisions when necessary, an interview partner and judge at the Supreme Court of Argentina stressed:

> "We want to take very seriously the judicial decisions of the provinces. Later on, they could be corrected at national level with recourse to the extraordinary appeals. But I think it is a prejudice to think that the international jurisdiction is always more protective [garantista] in guaranteeing human rights than the national jurisdiction" (Interview #25, own translation)

Overall, rejection of the Court on grounds of sovereignty infringement was particularly strong in the cases analyzed in the processes tracing analysis. This finding relates to the position of different actors involved in implementation across the political spectrum. Poor context assessment as an element in implementation problems played a major role during the implementation processes of judgments of the IACtHR. However, the stances differed from

[340] Drawing a clear line for the competences of the Court one interviewee found that the Court has exceeded its competences in granting a provisional measure for protection granted in favour of Milagro Salas: *"In this context the international jurisdiction comes in. In some cases we have seen, that directly from a provincial jurisdiction the issue jumps to the international jurisdiction without the exhaustion of national remedies. Sometimes even in the context of a provisional measure that does not even have a definitive sentence [referring to the measure granted for Milagro Salsas]. The Argentine stance has been to comply the orders of the IACtHR when our state is party to a concrete case before the Court […]." (Interview #25, own translation)*

"the Court has no saying in national matters" to "it should exercise its functions more discretely". Disregard of context by the IACtHR was more relevant in relation to the overall political climate than in relation to specific legal provisions or to the background of the cases itself. The exhaustion of national remedies was less an element that created tensions in the cases of implementation in Argentina, than it was in Peru. Overall, the IACtHR interpreted the capacities of the national judicial system in Argentina as effective. Different to Peru, the IACtHR did not intervene in large scale into matters of judicial independence or subject matters fiercely debated at national level (such as death penalty, amnesties, and anti-terrorist laws).

### 6.3.3 Exploring the design dimension

Regarding the dimension design the analysis of the implementation processes in Argentina reaffirmed blueprint solutions and inflexible interpretation of implementation procedures as problematic elements during implementation.

*Bank*

*Defending blueprint solutions*

The Bank in the PROJUM project relied on previously designed management systems for Courts. The name of the project – Model Courts - indicates the intended harmonizing effect. In Argentina, the Bank was focusing on the technical, economic and managerial dimension of development while neglecting the political dimension. Interview partners stressed the project in Argentina was strongly influenced by the "governance and knowledge management agenda" under Wolfenson in the Bank (Interview #26; #29) focusing on transfer of knowledge and replicability of court management system. Albeit initiated slightly later, the judicial project in Peru Justice Reform I initially did not reflect that paradigm shift. It continued to apply blueprint solutions to judicial reforms showing strong institutionalist perspectives on law. Justice reform projects in Peru and Argentina alike remained limited to the state centric approaches to rule of law promotion and were not considerably adapted during the implementation except regarding the timespan for implementation. The aspect of harmonization of systems across the region as a rationale for applying blueprint solutions and preexisting elements in judicial reform projects of the Bank also came up during fieldwork. One interview partner previously involved in Bank projects suggested that even if there existed an interest of the Bank to harmonize the regional judicial system, the means of the Bank to do so would be limited (Interview #26). Another interview partners spoke on a similar issue and stressed lacking knowledge about how to bring

about change in rule of law reforms as a major problem in the design, this can refer to the logic of transformation itself as well as to the specific design in particular countries:

> "For a long time, I saw there existed an interest [...] in harmonizing the judicial system at regional level. But it is interesting because I will never be able to tell if this is really the case and with what goal in mind the Bank and other organisms want to implement it. [...] the consent that exist of a few about the form of the rule of law. However, another important aspect is the limited resources, there exists a lack of knowledge, this is a limitation in the system itself, the interests are not the limitation." (Interview #31)

Albeit clearly underlining an interesting perspective on the lack of knowledge in international organisms, an aspect not mentioned in this quote is how interests influence the resources to create knowledge (see also discussion in the previous chapter on generation of knowledge for the Bank reform). Thus, knowledge production, limited context assessment of selected sectors and the design and operationalization of the logic of change are strongly intertwined.

*IACtHR*

In Argentina, cases of the IACtHR concerned a variety of different aspects of rule of law. The Court issued reparation orders in relation to the violation of specific rights like the freedom of expression, forced disappearance, but also addressed broader structural problems concerning judicial guarantees and national proceedings. Not all of the cases related to human rights violations during the past military dictatorship, but cases also concerned current administrations. While the IACtHR was largely inflexible in design and interpretation of compliance with the reparation orders, the reparations were not incompatible with national legislation or demanded fundamental changes of institutional structures. Previous chapter outlined how Argentina has a long and strong history in national trials. Other human rights mechanisms were also developed and institutionalized. Nevertheless, the IACtHR did not follow a more lenient approach granting larger margins of appreciation but reacted in an inflexible way to partial implementation and implementation problems. Defending strict reparation orders in a context insensitive manner during supervision, was more of a problem than issuing context insensitive reparation orders in the first place. Previous sections pointed out that structurally the amendment of judgments is not possible once the verdict is issued, the interpretation of compliance during supervision is.

While all elements of the design dimension – inflexibility of design, blueprint solutions, inflexible timespans and incompatibility with national legislation – also showed to be problematic in implementation processes in Argentina, they did so to a different degree than in Peruvian processes I analyzed. The following section turns to the analysis of the inflexible design and implementation in Argentina.

### 6.3.4 Inflexible design and implementation in Argentina

*Bank*

*Flawed design – blueprint solutions and legal transfer*

Acknowledging the importance of the preparation and design, the Project Appraisal Document for the PROJUM judicial project in Argentina reads the "[p]roject performance can be greatly improved through adequate funding of project preparation, and design, through adequate testing and refinement of concepts and methodologies to be used in the implementation of the national program." (PAD 1998: 10).[341] However, the project design in Argentina largely failed to include findings from the previous research on the sector and ignored that consent on judicial reforms was not reached at national level. Project implementation was problematic in the initial phase in the development of administrative models in the model court and failed in the subsequent transfer phase, where the management system should be expanded to other courts. The second phase also met considerable political resistance along the implementation process also partly caused by the ill-suited design and the disregard of federal system particularities and political rivalries between the executive and the judiciary and reluctance of judges of the Supreme Court to challenge the status quo (Interview# 28; #31). The PAD argues, the model character was chosen not because the Bank experts were unsure about how to approach a reform in Argentina but because "the judiciary has had little experience with implementing projects and since it was important to learn what will and will not work, it was agreed that a model court approach would allow a learning process for both issues." (PAD 1998: 8). Thereby, the official document portrayed the knowledge of the partner as inferior and deficient, while at the same time it attributed the responsibility for the success or the failure of the project to national level. All three components of PROJUM – court management, training for judges, and evaluation and dissemination – largely failed or were only implemented during a limited amount of time. The courts selected by the Bank were not apt for generating transferable management system and providing "models" for other Courts throughout the country to replicate the system. The Bank largely ignored the position of the selected courts within the judiciary as well as the position of the judiciary *vis à vis* the other branches as the courts that were chosen for the model management system were not those suggested by national experts but those prioritized by the task manager and the Bank team (Interview #7), instead courts were chosen "which have demonstrated commitment to undertaking the reforms and which demonstrate an array of court

[341] With regard to the added value of the Banks support, the PAD finds "The Bank's participation is critical in initiating and supporting a complex modernization effort involving wide-ranging organizational and procedural changes, institutional building, management skills and tools, and administrative training." (1998: 10).

functions." (PAD 1998: 5) The Bank also based its decision on the willingness of the court staff to implement the measures as "agents of change" (Interview #32) while other sectors and actors in the judiciary whose stance towards updated management system was more opposed, and who had the potential to block the process, were not included in design or coordinating efforts (Interview #32).

The Bank also largely failed in levelling grounds for money disbursement in the second project and a subsequent loan of 10 Mio USD. The Banks approach in PROJUM that excluded stakeholders in the judiciary, neglected inter-institutional dynamics at large scale between executive and judiciary and inner-institutional dynamics and actors in administration important for implementation, thus also had negative impact on the Banks subsequent loan spending opportunities. Interviewees confirmed that the PROJUM project was largely a ready-made project that was "sold" to the government (Interview #32; #28).

The Bank transferred a model for Courts that was problematic because the design was ill suited for the federal system and the degree of autonomy of the Courts in the provinces. The project agreed upon between Bank and executive sidelined other national plans planning a more comprehensive approach to reform judicial administration and political aspects such as judicial independency and corruption, instead on focusing solely on court administration. Interview partners underlined that negotiations between Bank and the Argentine government took place to determine in which courts to implement and how to assess the sector (findings subsequently ignored) but less so regarding the subsequent design (Interviews #32; #28). Baseline studies conducted by Bank consultants were largely ignored in the design and money spent for the loan to explore the context and the design of the judicial reform project itself were mostly unconnected. Once the project started, the few results obtained from the model courts for the design of new management system were simply not transferable from one court to another, as interview partner recalled (Interview #28; #32). About the problems in connection to transferring judicial trends from other regions of the world, one interview partner academic and former consultant to Bank projects found:

> "The consent today is the focus on Open Common Data… which is nothing bad but the things that are happening in Europe and in other more developed countries with regard to Open Government is not necessary what is going on here and what could bring about change. I don't know if it will work because copying the Constitution of the United States and installing it in Argentina will not necessarily bring about the same changes and the same results." (Interview #31)

Outlining the common practice of the Bank of legal transfer and the application of blueprint solutions amounting, the interview partner also highlighted an important distinction between results and expected changes. Meaning even if projects are implemented successfully, the expected change – a strengthened rule of law – is not necessarily happening. The two things are

connected but the logic of change is rarely spelt specifically in Bank documents or evaluated after the project ended. What is evaluated is indicator fulfilment. In the project in Argentina, the Bank planned to support transformation by judicial sector reform for ultimately achieving legal security and rule of law. Following this logic of transformation, institutional development and better court administration was expected to lead to more legal security and better economic performance, which is within the definition of the Bank per se development (Interview #32).

The ICR admits that the Bank initiated reforms despite having little experience in judicial reform and acknowledges the problematic project design of PROJUM finding "[i]ts handling of project preparation was flawed **by acceptance** [bold added] of an inadequate design and unrealistic implementation schedule, given the capacity of the judiciary"(ICR 2006: 14–15). Resolving the Bank from accountability for misled design and instead claiming the deficits at national level, the quote also obscures the fact that the Bank team took great part in the design of the project. The Bank continuously stressed the need for smaller scale-technical interventions (The World Bank 2001: 84), therewith continuing to neglect both the overall judicial structure and the political dimension of the reform process. The implementation of the project was not difficult *because* it addressed structural problems, but because it did not. It is beyond this research to assess whether a different kind of Bank project in that time would have been implemented more successfully. Interview partners confirmed that some of the structural problems identified in the research carried out in the 1990s hamper the system until today (Interview #29; #31; #32).

Regarding the intervention into the legal structure, changing national legislation for the Model Court Bank projects was not necessary, because the project was designed technically. It did not address transparency, independency and accountability issues, access to courts or major changes in legislation.

Despite the bumpy implementation process and an accelerated overall political and economic crisis, the closing date of the project was extended in Argentina. However, in contrast to Peru, where the Bank agreed to postpone the closing date on several occasions, in the Argentinian case the Bank did not grant the last extension requested by the government. After 2006, the Bank did not engage in further judicial sector reform programs.

> "The Amendment, which also shifted implementation responsibilities to the Council, facilitated the Bank's agreement to extend the original Closing Date [capitals in original] for an additional year until November 2002. This was the first of a series of such extensions, which themselves became a problem. Later, the Government requested an additional two-year extension in order to proceed with a contract for implementing the model court design, which had fallen behind schedule. Partly because of that slippage, the Bank solely agreed then to a one year extension. Then in late 2003, a new Closing Date of November 2004 was set after there was evidence of better adherence to project schedules, and an additional limited extension was approved afterwards. Subsequently though, the Bank rejected the request for a still further extension until November 2005, fixing the Closing Date at September 30, 2005." (ICR 2006: 11–12)

To sum up, the Bank tried to transfer in the PROJUM project blueprints and ready-made policy solutions, overlooking existing local initiatives and knowledge. By the time of the design, the global governance actor admittedly had little experience with judicial reform. Nevertheless the Bank did not take into account the findings from research carried out by consultants contracted and financed by the Bank among them studies by Edgardo Buscaglia and Maria Dakolias and indicating intra-branch rivalries, corruption and lack of independence, delays in trials and judgments and widespread corruption (Buscaglia and Dakolias 2006) and studies by Linn Hammergren contracted research indicating differences on closing times for cases between courts in the capital (Buenos Aires) and the provinces (Santa Fé) (see Hammergren 2003: 10). The design was also not amended when problems during implementation became apparent. PROJUM focused on technical issues, leaving aside that the judiciary was highly politicized and political issues like independence; access and transparency have been named as priority by the local experts in the assessment. Furthermore, the design reflected a technocratic vision of transition through law, and harmonized systems throughout countries. Thus, a discussion and a design addressing problems in a politicized judiciary and the relationship with the executive in the realm of the judicial project PROJUM could have been a constitutive moment for rule of law development. Instead, the project design and implementation sidelined these fundamental questions by framing the intervention technical and establishing executing committees that in themselves were politicized.

*IACtHR*

Turning to designs of IACtHR measures in Argentina as problems in implementation. In implementation processes in Argentina, many cases before the IACtHR related to freedom of expression, forced disappearance, and judicial guarantees and national proceedings. A special type of structural obstacles for implementation, often not acknowledged in the reparation orders, and referred to in interviews was the federal structure of the state also largely affecting coordination during implementation. Other structural problems e.g., incompatibility with national laws or insufficient national funding to implement the orders[342] were not mentioned by the interview partners as problems during implementation processes.

[342] Acuña (2006) details out in relation to monetary compensation in Argentina human rights policies in general pointing out that the reparation represented a significant fiscal burden to the state (Acuña as cited in Sikkink 2008:20).

*Rigid design of judgments*

However, interview partners often pointed out the IACtHR orders were too specific. Thereby they would not provide any leeway for actors for finding national solutions to implementation of the judgments or to negotiate the road ahead to comply with the orders politically at state level (Interview #25; #27; #34; #35). Hence, the analysis of the empirical material revealed unrealistic rigid design and a structure that impeded subsequent negotiation of implementation interviews as major challenges to implementation. One interviewed partner working at national level in the implementation of the judgments criticized the very legalistic stance of the IACtHR that resulted in politically insensitive activities:

> "Sometimes it seems like the Court is very little concerned about his own power. For example, in the Fontevecchia case they got themselves in trouble. Why did they order to revoke the [national] sentence? They are provocateurs. A judgment going after the civil case is not necessary. The only thing that is necessary is that one party pays money to the other. Why revoking the sentence? It is an irresponsibility. |…| I understand it as a negotiation strategy: I say 10.000 and you say 5.000. If this is the strategy, it does not work |…| If you say for the coffee you are going to charge me 10.000, you seem like a fool to me, and I would not even sit down." (Interview #35, own translation)

Relating to the mixed picture in Argentina for compliance with court orders, another interview partner found:

> "We had positive experiences, we had non-compliance and then we have Fontevecchia" (Interview #34, own translation)

Suggesting that different factors contributed to non-compliance the interview partner who is working at the NGO CELS continued:

> "|…|But they never questioned that they had to comply. In Bulacio for example. Bulacio has not been complied with, so in no way someone could say that Argentina was an obedient complier of the Inter-American Court decisions. There was resistance, structural impossibilities for compliance, some points of the Court that were discussable, sometimes their civil servants did not what they had to do…but it was not of discussion whether or not the state of Argentina had to comply with the judgments of the IACtHR. It was more a case of going to the Court and justifying the things that had not been done because of hindrances, or in reality, saying that things had be done, but it was still no compliance. In Fontevecchia, the argumentation of the federal state changed completely. A paradigm changed happened with regard to the defense the national state launched before the Court, and the IACtHR called the public audience for discussing the compliance precisely after the Supreme Court of Justice issued the national judgment. One could see a very weak federal state in its defense." (Interview #34, own translation)

*National debates and authority of the IACtHR*

In the past, in Argentina the IACtHR was famously involved in triggering structural changes such as contributing to a changed legislation annulling amnesty laws and supporting fuel for human rights prosecution in Argentina. Argentina applied international law in a monist reading of the constitutional amendments of 1994. However, in *Fontevecchia* the Supreme Court departed from the reading of the Constitutional provisions in Argentina that demanded automatic application of the regional judgments, thereby breaking with the previous paradigm

of a quasi-monist style of adoption. Supporting a position against the automatic enforceability of the reparations, one interview partner and staff at the Supreme Court of Argentina stressed the importance of carrying out debates about substantive disagreements

> "Viviana Krsticevic [member of CEJIL, an organization representing individual petitioners before the IACtHR] has the position that the judgments of the Court should be automatically enforceable in the national judiciary. This is because she supports the reparations the Court is dictating. I think the reparations the Court is dictating are not that good. I do not trust those disagreements, which are almost all the time presented as institutional disagreements. They are almost all the time [...] substantive disagreements." (Interview #35, own translation)

In this quote, the interview partner suggests that invoking structural problems as hindrances for implementation can also mask a disagreement in relation to the substance of the reparation order. Because the negotiations about the substance of the rule is not possible, claiming structural problems for non-compliance is a road for national actors to reject the actor Court and the norm. Depending on the design of the reparation and the supervision procedure, the possibility for negotiating this substantive disagreement can be relatively narrow or broader. Referring to possible tensions between approaches to punitivist criminal law of the regional Court conflicting with national approaches, an interview partner suggested:

> "The Inter-American Court intervenes in cases of the obligation to investigate, punish and sanction the perpetrators, independent of the national provisions indicating that they have expired. So, I think the human rights movement, which is in general advocating the rights of the accused, in the cases of crimes against humanity they turn into being very positivist, and they use this very punitive supranational decision [...] which is indirectly looking for modifying the whole Argentinian penal process in these kinds of cases. On the other hand, there exists a lot of opposition, the obligation is to invest and sanction in conformity with what is foreseen in the procedural code of Argentina, not at any cost. This is where tensions could be generated [...]" (Interview #35, own translation)

Since the normative approach to righting wrongs by investigations and sanctions is beyond the realm of negotiation in IACtHR interventions, non-implementation is a way to object. Thus, approaches to norms and institutional capacities are intermingled, when the IACtHR is rejected. What the interviewee suggested is that legal arguments about a punitive stance of the IACtHR are shielded by the seemingly technical implementation, problems of implementation of the duty to investigate and sanction.

Like in cases in Peru, issuing very narrow reparation orders in Argentina led to problems in implementation and to a rejection of the authority of the Court altogether. Referring to Peru, one interview partner suggested that the dialogue between the state and the IACtHR had been more open in the *Penal Miguel Castro Castro/"Ojo que llora"* case, while the reaction of the Supreme Court towards very rigid IACtHR orders in Argentina had been particularly harsh:

> "There exists a case in Peru where there has been a similar discussion less problematic though. The Court dictated the executive power: 'Write down these names of the persons on the monument' and Peru says 'Look, there is a problem, we are not going to do this. we said something else' and the Court says 'Okay, if you have a good argument for this, instead accept something else [as a reparation] and this is it.' This is where we have a perfectly reasonable dialogue. But it is one thing in the case of Peru where the country says 'Okay, those are the arguments why the remedy won't repair the damage in this situation' and another thing when the (Supreme] Court in Argentina says, 'Nobody will revoke my sentence!'" (Interview #35, own translation)

And continued:

> "My personal position is that they [the Court] should be more open to dialogue, they should abandon this doctrine 'well this is international law [...] and should be more open to engage with the local positions. And the response to such a position is 'okay, but this jeopardizes the enforcement'. [...] "(Interview #35, own translation)

As a possible way of opening the dialogue about a reparation measure, the IACtHR can be asked by the parties to the case for a legal interpretation of the judgment.[343] A quest for specifying the judgment or the way to repair victims is sometimes directly referred to in official documentation. The judgment in Bueno Alves refers to such an instance and a dialogue about that has taken place during the preparatory work of the Commission, pointing out disagreements in relation to "the type, amount, and beneficiaries of the reparations" (Para 33, judgments 2007 Costs, Merits and Reparations). Hence, the judgment cannot only be too rigorous and too detailed, but it can also be unclear,[344] possibly provoking confusion at national level among the various actors involved in implementation.

Having outlined the problems in implementation due to too rigorous or unclear design, I would like to take a closer look at reparation orders in Argentina that required a change in legislation. In general, the legal framework for implementation at national level was apt, meaning that the IACtHR did not demand an action of the state only possible to comply with by previously changing legislation. The Court ordered the annulment of judgments (in Fontevecchia) and objected court rulings that found that the limitations had run (e.g., in Bulacio, Bueno Alves). The Court therewith addressed what the organ identified as structural problems, among them a possible bias and politicization in national courts and the reluctance of the state to prosecute crimes against humanity and human rights violations. The infringement into national judicial proceedings, possibly violated the principle of subsidiarity, despite the IACtHR reparation orders were not explicitly tackling judicial independency or questions of state ordering. Even if found judicially sound, the judgments were objected by national actors on a political level (Interview #34, #35). As previously outlined, a robust institutional structure for trials in relation to crimes against humanity and human rights violations exists in Argentina. However, obstacles to prosecution can exist on structural level – e.g., when judicial proceedings are delayed,

[343] Similarly, in the Argüelles case the parties asked for an interpretation of judgement in 2015, six month after the judgement was issued (Argüelles et al. interpretation of judgement 2015, serie 294).
[344] Murray and Sandoval make a similar point discussing the deliberate ambiguity in judgements (2020: 11).

perpetrators not prosecuted, or coordination is inefficient.[345] Simultaneously they can exist on political level.

Overall, interview partners claimed the IACtHR left little leeway to negotiate reparation orders. Inflexible reparation orders were claimed to be a problem by actors working on implementation, independently from if they advocated for more compliance of the state defending victims' rights or if they were members of the executive or other state institutions (Interview # 25; 34; #35). This rigidity of Court orders was described as both, an obstacle to a good relationship with the international Court and a limitation for national policies to unfold. However, the rejection of the IACtHR in Fontevecchia and discussions in relation to the Bulacio and Bueno Alves cases carry the potential to initiate debates about both, the international-national relationship and the substance of the norm, as thus potentially constitute moments where aspects of rule of law are discussed overlooked in current narrow assessments of compliance.

As a solution to overcoming the impasse and to foster dialogue within the narrow implementation procedures, interview partners suggested more flexibility in the interpretation of judgments during supervision stage. While not criticizing the universal applicability of the norm per se, actors claimed the insensitive form of supervision by the IACtHR during the implementation processes was an obstacle to implementation.

### 6.3.5 Exploring the coordination dimension

*Selecting stakeholders*

The analysis of the coordination dimension in implementation processes in Argentina reaffirmed stakeholder selection for coordinating mechanism in the implementation of judgments and reforms as crucial for implementation. Lacking context assessment of the institutional dynamics and fabric and poor design of coordinating mechanism and procedures or unclear provisions in reforms and judgments regarding the need to coordinate among branches were also problematic during implementation. Additionally, the phenomena of burden shifting among branches of government and national actors during implementation clearly also emerged in processes in Argentina as an important element to the dimension coordination.

*Setting up coordination committees*

Setting up coordination committees and placing executing agencies is determined by the Bank preference for counterparts but also by the design stipulating the kind of coordination that is

[345] One interview partner claimed that systematic violations occur in relation to the treatment of juveniles in the penitentiary system; however, they were not subject to cases before the regional court (Interview #34).

envisaged. In the Banks project in Argentina the executive and the Supreme Court were selected as executing agencies. One interview partner, judge and former staff in the judicial reform project of the Bank, elaborated more in general in her view on the importance of the separation of powers reflected in reform initiatives

> "No, I think that the reforms with regard to the separation of powers has to be carried out in each branch of government – of course there will always be an interaction of branches with regard to material resources. But I think the best the political branch can do for the judicial reform is backing up the needs of the judiciary – in terms of financing and in terms of respecting the inner-political decisions. Better than generating an agenda about what ought to be done. Similarly, the judicial branch is not trying to make the political system better." (Interview #32)

While approaching balance of power in very traditional way of, the interview partner nevertheless shifted attention to the importance of including the judiciary as the branch that is concerned by the reform in design and implementation. Problems of encroachment of judicial independence manifested in and around implementation processes in Peru and Argentina among them challenges during implementation direct intervention into judicial independency, changes in the structure as well as judicial infringement into the political branch.

*Burden shifting – cultivating a style of bypassing*

> "I could express my personal opinion here but this would exceed the limits of this audience. We could debate it in a different space, but I think within the structure of this audience. I think we don't have another opportunity." (Public audience Fontevecchia min. 1:10:44)

The implementation processes in Fontevecchia provides a good example for the element of burden shifting among national branches of government, already observed in Peruvian implementation processes. In a way, the IACtHR pushed the state against a wall. The state defense was hiding behind its internal organization. By invoking a legitimate exercise of checks and balances, the state neglected accountability (see analysis in next section).

The elements to the coordination dimension during implementation influenced the implementation processes in Argentina in a different way than they showed during the analysis of the processes in Peru. The element of burden shifting among the judiciary and the executive was more strongly pronounced, as it was Peru. In Peruvian implementation processes, misbalanced power among branches was fiercely debated and subject of intervention of the Court and Bank alike, while in Argentina, this aspect was largely ignored. The following section looks deeper into the analysis of coordination during implementation Argentina.

### 6.3.6 Coordination and implementation in Argentina

*Bank*

*Selecting stakeholders – missing stakes*

As outlined in the chapter on the implementation processes in Peru elements of the factor coordination are related to the initial selection of actors from the executive and the exclusion of actors from the judiciary. To coordinate the implementation of the project the Bank set up a project coordination unit (PCU) placed in the executing agency that was initially the Supreme Court of Argentina. The design of the Bank project and the hierarchical decision-making processes led by the Bank narrowed down the actors involved in the implementation to the selected federal courts. The selection of stakeholders for the executing agency exercised by the Bank left out important actors in the ordinary judiciary both a national as well as at provincial level, ready to block the entire process. The necessity of having the judiciary on board was largely ignored and the decisions regarding the executing agency supported a concentration of power in the executive, already pronounced in the institutional fabric of Argentina. Design and management structures disempowered actors contesting the status quo while enhancing the governments' agenda. Additionally, the project was hampered by coordination problems from within the set-up coordination structures. Structures for the implementation were highly politicized and subject to frequent change. The PAD provides the reasoning for a Bank friendly management structure in Argentina's judicial reform project:

> "The PCU [project coordination unit] will be headed by a project manager who is acceptable to the Bank. In order to ensure the success of the project it is preferable that this person has comparative knowledge of judicial administration systems and previous experience with international institutions. This will be important since the Supreme Court has limited institutional capacity and experience in implementation of projects." (PAD 1998: 11).

The composition of the PCU changed several times. Consistency in management and in communication with the actors addressed in the reform was low (Interview #28). The initial PCU was set up at the Supreme Court, assisted by a procurement agency. However, contrary to initial plans, the PCU then switched to the Ministry of Justice. This Ministry, however, also underwent frequent political changes. By 2002, the leadership and the implementation team had changed four times. Not only the selection of the actors involved changed throughout the process but also the personnel within those institutions, leading to little coherence and high transaction costs.[346]For policy guidance and oversight, a coordinating commission was installed

[346] The ICR reads: *"Throughout the Project's life, it suffered from inadequate continuity of both management as well as technical expertise. It took over four years for the newly created Council to develop its infrastructure, capabilities and procedures. The pace changed for the better but only slowly. Once it did so, though, it functioned*

that included representatives of the Supreme Court, the Ministry of Justice and the Chief of Cabinet (PAD 1998: 8). The Magistrate Council (also referred to as Judicial Council), by then recently created, was initially not included in the coordinating commission but included ex-post (see also quote below). While the project did not even include major actors that were addressed in reform, the inclusion of rivaling parties into the executive committee and a volatile management team contributed to major problems during implementation in the Banks judicial reform project in Argentina.

The project was implemented in first instance courts; nevertheless, it was the Supreme Court together with the Ministry of Justice that was chosen as the executing agencies, the agencies in lead for the disbursement of money. The bureaucratic and political distance between first instance courts and Supreme Court further complicated the process. The composition of the executing committee was a problem for implementation but more importantly, it was also an additional platform for power struggles. The Supreme Court of Justice and the Magistrate Council entered conflict, causing problems in the executing committee. By ignoring the tense situation that previously existed between different actors, PROJUM added additional potential for conflict and fueled rivalries (Interview #28). One interviewee suggests in connection to the conflict in and over leadership

> "A: So, this is the question. Did the Bank know about these conflicts before placing the executing agency in the Judicial Council?
> B: Do you know what happened? The Judicial Council [Magistrate Council] was incorporated ex-post. I was the director of the program from the date the Council was created onwards, but the program existed before that. The state agreed to the financing before the Council started working. So before that the pillars of the project were: Supreme Court of Justice, Jefatura del Gabinete – whose participation is mandatory when international financing is involved –, the Ministry of Justice and the Ministry of Economics. What happens is that in that timespan a law was passed that created the Judicial Council. And then they said: 'alright, this is responsibility of the Council' and the lead was designated directly to them." (Interview #32)

Fight over competences did not evolve around the substance of the reform, but instead concerned judicial independency, competences of the Magistrate Council and the Supreme Court in the selection and judges and allocation of money (Interview #32; #33; #28) – precisely the areas not addressed in the project.

Different to Peru, where political actors and representatives of process relevant state institutions in the process were included in the executing committee, in Argentina, the committee was not

---

*better. In early 2002, a supervision mission found progress in the consolidation of the new PCU and an improvement in the leadership of the operation by the new executive commission. These appeared to have facilitated advances in the Project's implementation. However, it was disturbing that the operation had no project manager—at the same time that it lacked a national director, who had to be a separate individual. This deficiency was important as there had already been 3 national directors and 3 project managers since the Loan became effective. Fortunately, the Council hired an experienced project manager with strong qualifications to head the PCU, who ably filled the void." (ICR 2006: 12)*

a forum for negotiating the reform, but instead the executing committee in Argentina fueled tensions and entered conflicts within the organ.

> "The Magistrate Council [Judicial Council] had a composition where those who revise the project had a lot of power, which was a problem from the beginning, and it was multiplicated in the previous government because it accentuated the political power. It has representatives of the executive and representatives of the congress and those liquidated the project which was of the judicial branch. They destroyed it ideologically." (Interview #26)

*Setting up coordination committees – getting wrong the locus of transformation*

In addition, the process of PROJUM initially steered attention and money away from the program National Plan for Judicial Reform (*Plan Nacional de Reforma Judicial*) which was developed in parallel (see section above outlining the more comprehensive approach including judicial indecency and intra-branch relationships).[347] Financial resources were scarce in the financially tense situation in Argentina. While having financial leverage due to the loan of the Bank, the executive soon lost political leverage over other branches, given that it was largely isolated and experiences a rejection from other actors involved in the project and later also from the public.

Judicial reform was already inherently a sensitive topic when the Bank approved a loan, and actors involved in the decision process at national level were divided. The executive was reluctant to change the status quo or to confront the Supreme Court judges blocking a comprehensive political process. Internal power plays were already at the table. Albeit the Bank acknowledged problems regarding judicial independency, it supported the agenda setting of the executive and strengthened it *vis à vis* the other actors. While the design of the project largely left the status quo about the balance of power untouched, project management structures fueled rivalries. Instead of admitting a problematic selection of stakeholders and the establishment of politically insensitive management structures, the Bank attributed the coordination problems to lacking political will and political volatility. In a government statement included in the ICR, the government rejected the narrative of the Bank.

> "From 1998 to 2002, UCP [PCU] did not have a plausible performance. Because of that, the authorities of the Bank proposed the transfer of the UCP to the Consejo de la Magistratura, where the continuity or cancellation of the Project was debated. [...] Regrettably, too, the inter-organizational differences were allowed to persist for some time, fortunately, albeit belatedly, this situation was improved by the Government's decision to place the oversight of project implementation in the hands of a new executive committee. This remedial action was endorsed by a Loan Amendment [...] "The above litany raises some questions about the Project design, especially for a first-time client in the sector." (ICR 2006: 19)

[347] See also above section design referring to the launch of the *Mesa de dialogo* Argentine Dialogue Roundtable) funded by the UNDP and launched in 2001, leading to the judicial reform programme, the Integral Program of Judicial Reform (Programa Integral de Reforma Judicial, PREJUD), drafted within the Ministry of Justice in July 2000.

All elements of the factor coordination were problematic in Argentina. Overall, the project created a window of opportunity for power struggles to manifest and sidelined important actors. This eventually led to a parallel structure of reform initiative.

*IACtHR*

*Shifting burdens and separation of powers*

Turning to implementation problems and coordination in relation to IACtHR reparation orders and implementation processes. In Argentina, institutions and inter-institutional coordination mechanism exist in Argentina regarding national human rights trials. However, no similar coordinating mechanisms are in established for the implementation of international human rights judgments. Like in Peru and in most other countries in Latin America, the subdivision in charge of litigation before the IACtHR is not in charge for following up on the subsequent implementation or has the power and resources to coordinate activities among branches.

> "A: The Cancilleria |…| works a little bit like a post-mail. The notifications [of the IACtHR] arrive there and they distribute them to the ministries. The ministries then give their input. |…| In some cases of less importance, they have more autonomy.
> B: And the Secretariat?
> A: I do not know how they have distributed the competences between the Ministry of Justice and the National Treasury Procurer [Procuración de Tesoro]. I think the National Treasury Procurer represents the state in cases of international arbitration |…| but the IACtHR rests with the Ministry." (Interview #35, own translation)

On concrete institutional level, branches of government and actors must coordinate for the concrete implementation of the judgments. The structure in Argentina foresees a division of labor between *Cancilleria* and *Secretariat*. However, competences are not clearly determined, and responsibilities for implementation might be shifted during the process. On the other hand, having this dual structure also offers more possibilities in search for allies for implementation both at national level and for the Inter-American Court, as one interview partner suggested:

> "In Argentina we do not have a legal definition. We do have some resolutions ordering the processes. And what we saw in the last couple of years was a strong competence between Cancillería and Secretariat for Human Rights. Since the last government, there exists a clinch with regard to who is having the political lead in the definition about the compliance. It is not only the Secretariat for human rights and it is not the Cancillería. The intervene and the coincide in some of the aspects, but the political leadership in determining the compliance with the decisions has the Secretariat, being the more political organ, and the Cancillería is in charge of the more technical part |…| In determining the compliance, without any doubts the Cancillería has very little saying in this. They are dedicated to formal things trying to forward them and to advance some processes." (Interview #34, own translation)

The interview partner from the Argentina NGO CELS continued in pointing out how this separation offer opportunities to advocate for changes:

> "This is giving a message about the type of compliance we are looking at and the modus of interpreting the incorporation of international human rights pacts. After this, the political will of some of the state agencies plays a role, for example those of the Cancillería or the Secretariat for HHRR, to grant importance to the international system in order to mark its authority in front of the national structures that are more resistant. Because the Cancillería and the Secretariat of HHRR are not the actors that generated the violation, very

clearly, it is the state as a whole, but in terms of agencies and offices…So, if you have allies in those two agencies, this is playing a huge role in the political will to comply and to move ahead the wheels. Having a judgment of the IACtHR is not solving structural problems, that needs years of work, but at an intermediate level you have the chance that some of the actors that are part in the decision validate the decision and that the [national] system loses weight." (Interview #34, own translation)

As international human rights law is theoretically building and seeking to sustain the separation of powers the representation of the states in international affairs and continues to be the executive. The public audience in Fontevecchia in 2017 was a good example for the kind problems emerging from this monolithic conception of the state. The interpretation of the political maneuvering in the public audience by the interview partners varied. Positions were split between interview partners sustaining Argentina had exercised sovereignty upholding the separation of powers doctrine and those underlining the instance would be an example for the loopholes and problems in international adjudication. One interview partner and judge at the Supreme Court of Argentina found:

"I have to tell you that in the Fontevecchia case, in the decision of 2017 [decision of the Supreme Court not to comply] there was no type of previous consultation with the executive. The executive knew about the judgment when it was issued. When the IACtHR asked the executive if it coincided with the Supreme Court, the executive said 'We do not have to coincide; we have a separation of power. This is the position of the Argentine state' and this was a response coordinated with the [Supreme] Court. The internal topics are not projected to the international sphere, each actor does what it has been mandated to and this is the position of the Argentine state." (Interview #25, own translation)

Other interview partners stressed inconsistencies in the litigation strategies, suggesting that neither the executive nor the litigation team before the Court representing the state had not developed a coherent position but were caught by surprise by the Supreme Court ruling (Interview #35).[348] The implementation process became part of political power plays. Pointing out the politicization of the Supreme Court, another interview partner found:

"What had changed was not the chip, what had changed was the members of the Supreme Court." (Interview #27, own translation)

A member of the IACtHR recalls that the Court was caught by surprise by the reaction of the state in the public audience:

"Something worse was happening. They came here and the logic was that the Argentine state would say 'look this is what my Court said, but we will pay anyways and hence we are complying'. But instead, in response to the very concrete question, if the position of the Argentine state was that of the [Supreme] Court, they replied yes." (Interview #8, own translation)

Seemingly, the defense before the IACtHR was not coordinated. The Supreme Court issued a judgment and the team in charge for litigation before the Court had to sustain this argument. In

[348] In a similar vein, the interview partner found: *"It was a mess nobody understood anything. The CELS [representation of the victims] did not know what they wanted and were defending a reparation that they did not interest at all; nobody knew what they wanted […]."" (Interview #35, own translation)*

the audience the defense of the team representing the state consisted in blaming different actors at national level for non-compliance (video footage 2017: min. 36ff) while at the same time upholding the exclusive power of the Supreme Court to rule on the reparation order. The team put forward the argument that the Supreme Court *is* the state and responsible to decide on the implementation of the reparation order, hence, respecting the separation of powers, the executive could not intervene (min 1:07:00ff, defense of the state). It is worth quoting the intervention of Judge Vio Grossi of the IACtHR, since it pinpoints the core of this implementation problem:

> "We as the IACtHR have a problem: the state is one, independent of its internal organization. It is one. And it assumes the responsibility as one state. For us it is not the Supreme Court that is responsible, or the executive, or the parliament. The responsible is the state, internationally: this is what I am saying. [...] So I understand that the voice of the state in this case is the Supreme Court [...]. And the executive will do nothing more to comply with the sentence?!" (public audience 2017: min 1:09:00)

While this legal explanation was sound, the quote is clearly outlining the problem of international human rights law: it cannot reach beyond the state. The structure that seeks to hold states accountable is offering the loopholes for avoiding accountability. The defense team of the state replied:

> "It is not a question of political will, if the executive wants to continue complying. There are no opportunities to do something else. (min 1:10.27).

While the IACtHR remains in the narrative of the single "political will" of the state that is tied to the single accountability for human rights abuses, this quote is dismantling the flaws in the narrative of a monolithic political will of the state uphold and reaffirmed in global governance.

More often, burden shifting is not as visible as in this public audience. Reasons for non-compliance vanish in the midst of coordination behind nation state wall or in the communications in reporting procedures. Doing the work of singling out the information provided by the different state actors in those state reports where states oftentimes shift burdens (Interview #12) also becomes a problem for the Court in terms of the resources in the supervision procedures. The impasse becoming very apparent in this short interrogation, I argue, is not specific to the Fontevecchia case but it is systematic and deeply rooted in the international legal governance structure that treats the state as a monolithic block. Whether the Court could have avoided the impasse with a more context sensitive approach has been discussed above. The structural problem, which relies on the executive as the representation before the Court thus, offers the loophole for this kind of evasive behavior will remain.

Burden shifting has not only taken place between branches of government but also between provincial and national level. In the case of the precautionary measure granted in favour of Milagro Salas debate generated around how the provincial level in the federally organized judicial system would react in light of the order:

> "The case of Milagro Salas, were recommendations from the regional level and from the universal level. This matter concerns the judiciary in the province of Tucuman, it is a federal system. The international responsibility is always one of the federal state before the international community. [...] About this we sometimes had discussions with the provincial level. We handed in a complaint about the prisons in the Mendoza province. In the first meeting we had with the Ministry of Security of the Province they told us that they had not signed the Pacto de San José de Costa Rica [American Convention for Human Rights] and therefore it would not be applicable in the Province. After which we reminded them that Mendoza is still a province of Argentina." (Interview #27, own translation).

The provincial-federal divide led to problems in relation to accepting the legitimacy of the jurisdiction Court; it also contributed to problems in coordination. An interview partner formerly being part of previous litigation teams recalls the federal-provincial structure and coordination problems in the case of the disappearance of Ivan Torres as follows:

> "The provinces claimed that we had taken over the responsibilities and said: 'By assuming the responsibility you are judging us [...] So in the Ivan Torres case [...] it was a forced disappearance, even though there was no systematic practice. But it was still a forced disappearance, so we accepted the international responsibility of the state... and so we ended up paying the reparation. It is bizarre, because at the provincial level they had offered the family an amount of money that was higher than what the Inter-American Court ordered as payment, if they had not taken the case further. But the family continued with the case and so we assumed the responsibility. Sometimes it is difficult to explain even to the parties of the case what the state can and cannot do, what it cannot do is bypassing the provincial level but it still had to accept international responsibility. Nevertheless, it cannot oblige the provincial level to do things they could not do." (Interview #27, own translation)

In this struggle over competences, the federal level was the entity assuming responsibility, and ultimately complying with the reparation order of pecuniary compensation, while simultaneously the provinces initiated action. The reparation order to investigate the circumstance of the disappearance that must be carried out at provincial level is pending.

In sum, in Argentina in the period under supervisions coordination problems generated less than in Peru over the Court siding with one branch of government or with actors at national level, thereby granting leverage to them. Problems in and of coordination and burden shifting were major problems in Argentina. Scholarly literature has pointed out how judgments can provide anchor points for national politics to evolve (see also Hillebrecht 2014a). Whereas, broadly speaking, in Peru, the politicization of implementation processes happened along traditional lines of an antagonist-protagonist schema (Executive v. Constitutional Tribunal); in Argentina, the political dynamics were more fluid. The IACtHR thus acted in a political climate characterized by changing politicization and strong juridification without clear lines of alliances.

"I don't think the Inter-American Court is always right, nor that its remedies are particularly well designed." (Interview #35, own translation)

This quote in which the interview partner questioned the IACtHR and more in particular addressed the design of reparation orders sums up the main findings from process tracing in the Argentinean activities accompanying the implementation of judgments: a critical stance towards the IACtHR, challenging its judgments but not necessarily its authority (depending on the actors at national level) and a more focused critique concerning rigid reparation orders.

The analysis of the implementation processes helped to the reveal the inherent contradiction between the rational of holding the state accountable that is central to judgments of the IACtHR and the procedures applied resulted in the opposite and allowed burden shifting. In Argentina, the IACtHR leveled the ground for the Supreme Court of Argentina to resist on grounds of national sovereignty, by forcing the state to obey narrow reparation orders. Subsequent negotiations in the IACtHR with the executive responding in public hearings revealed how the branch of government was hiding behind the judicial decision. The national and the regional court had maneuvered in a dead-end situation.

## 6.4 Summary of the analysis of implementation in Peru and Argentina

The last chapter provided an analysis of implementation and rule of law supporting activities of the two global governance actors World Bank and Inter-American Court of Human Rights in Peru and Argentina in the period 1998 until 2018. The analysis was structured along the dimensions of context, design and coordination and revealed additional elements to these dimensions during the process tracing exercise. The exploration was guided by post-colonial and critical theoretical premises and epistemological approaches that build on critical pragmatism. The comparative and temporal aspects of the study, looking at implementation problems in rule of law supporting activities of Bank and Court two institutional settings and dynamic processes and changing actor constellation throughout time, helped to explore the elements and to reveal more nuances to the dimensions.

The following table summarizes the findings in relation to the first outcome of the process tracing exercise: the exploration of the different dimensions of implementation problems and the analysis of the concrete processes in Peru and Argentina.

Table 1: Dimensions of implementation problems: exploration and analysis

| **Exploration** | **Analysis** |
|---|---|
| **Context** | |
| Negating the political nature of context | *Poor context assessment and political maneuvering* |
| Understanding contexts | *Context and opposition* |
| Hierarchical knowledge production, disregard for results | *Context and agenda setting* |
| Limiting context in reports – contradictory and incomplete information | *Context and positioning* |
| Changing partners and contexts | *Context and intervention* |
| Dealing with political volatility | *Context, ntional courts and political dynamics* |
| Timing the intervention – changing partners and contexts | *Anticipating effects and timing* |
| **Design** | |
| Applying blueprint solutions | *Blueprint solutions and coherency, flawed design and legal transfer* |
| Paternalizing national actors | *Partial implementation and defection,* |
| Rigid design of content and procedures | *National debates and authority of the IACtHR* |
| Issuing inflexible timespans for implementation | *Delays in implementation and postponement of closing dates* |
| Providing security by inflexible design | *Coherency and inflexible design* |
| Ignoring incompatibility with national legislation | |
| **Coordination** | |
| Selecting stakeholders | *Selection of stakeholders and national political actors* |
| Determining political wills | *Selecting stakeholder, missing stakes* |
| Setting up coordination committees | *Setting up coordination committees, getting wrong the locus of transformation* |
| Burden shifting in implementation | *Burden shifting and accountability* |

Source: Own illustration

The analysis of the empirical material concerning implementation processes in the two countries guided by exploratory process tracing revealed insights into implementation problems and paved the way for the reconceptualization in the next chapter.

*Constitutive moments and rule of law development*

In both countries, implementation processes were characterized by poor context analysis, inflexible design and supervisions procedures, and problematic and troublesome coordination

among actors at national level. Problems emerging throughout the time of implementation and in connection to the rule of law supporting activities, also led to debates about crucial aspects to the rule of law such as separation of powers at national level, judicial independency, and the relationship with regional and international actors, the interpretation of norms and accountability - I call these moments constitutive moments.

This said constitutive moments do not necessarily translate to transformation in the sense of strengthening rule of law as foreseen in development paradigms. However, problems during the implementation can represent constitutive moments for rule of law development as they lay open governance structures, actor constellation, misbalances in institutions and institutional dynamics. As discussed previously, successful implementation of reforms and judgments is not the only way to altering balance of power among branches. In the processes, analyzed "unsuccessful" or partial implementation also affected national debates concerning the reparation order, for example in the debate on terrorism and compensation of victims in Peru, and on the institutional imbalances between the executive and the judiciary in Argentina. Transformations and dynamics among branches are neither one-directional nor possible to control. Thus, global rule of law support is not only dealing with a huge attribution gap in relation to the link between intervention and rule of law strengthening, but also possibly has negative or uncontrollable effects, side-effects and long-term consequences. In fact, rule of law development might have nothing to do with the supporting activities themselves but relate more to the implementation processes and problems. I therefore suggest to reconceptualize implementation problems in global rule of law support to, firstly, reveal better the mismatches between the logic of transformation and the operationalization of global rule of law supporting activities and to, secondly, level the ground for different points of departure in research on compliance and implementation in development and human rights activities.

The next chapter is dedicated to the second aim of this study: the attempt to rethink implementation problems and suggest ways to flexibilize procedures of the Bank and the IACtHR during implementation processes.

# Chapter 7 Implementation problems, failure and non-compliance – discussing problems in implementation

Attesting failure and non-compliance in rule of law supporting activities is connected to a particular way of framing implementation problems. The connection between implementation problems and rule of law development is rarely addressed and is attached to logics of change. I approached this puzzle in this study. I suggest that implementation problems are not necessarily bad or good per se but can be constitutive moments for rule of law development.

In this study, I draw conclusions on the findings from the empirical chapter; firstly, to reconceptualize the implementation problems during rule of law supporting activities of global governance actors, and secondly, to suggest ways how to flexibilize the procedures Bank and Court during the implementation processes. The second set of conclusions is based on the first set. The analysis of implementation processes in the empirical chapters, helped to explore elements to dimensions of context, design and coordination, and to develop alternative explanations for implementation problems. One major finding from the analysis is the way global governance actors possibly trigger rule of law development by default; I called this constitutive moments emerging during the implementation processes.
In this chapter I recall and rebut conventional explanations in scholarly research for explaining failure and non-compliance (7.1), suggest alternative readings of implementation problems (7.2) offering findings and reconceptualization in the dimension of context (7.2.1), design (7.2.2) and coordination (7.2.3) and summarize my argument on the relationship between implementation problems and constitutive moments (7.2.4). Lastly, I outline the limitations and possibilities the two global governance actors Bank and Court have for flexibilizing procedures during implementation (7.3).

## 7.1 Conventional explanations

Already in 1974 Trubek and Galanter pointed out the lacking theoretical and empirical basis for projects of the Bank engaging in rule of law supporting activities later also being discussed in light of changing development paradigms and waves of global constitutionalism, global rule of law support and the failure thereof is still a topic of concern in scholarly research (Carothers 2010; Rodríguez-Garavito 2011; Dezalay and Garth 2011; Hoffmann 2018).

Similarly, partial or lacking implementation of international human rights judgments has been a concern in scholarly literature (e.g., Helfer and Slaughter 1997; Chayes et al. 1998). In relation

to the regional Court IACtHR, most studies focus on compliance (Basch et al. 2010), impact and effectiveness (Helfer 2014; Shany 2014; Engstrom 2019) or more dynamic approaches (Murray and Sandoval 2020; Murray and de Vos 2020).

While literature claims implementation problems as reasons for failure of Bank reforms and non-compliance with international judgments, little empirical research has systematically addressed the dimensions to these problems. Especially, little systematic research on political aspects during implementation, the elements of the implementation process and the connection to rule of law development exists. Authors continue to claim this lacking knowledge on the "how" in implementation processes of judicial reforms (Desai and Woolcock 2012, 2015) and the lack of empirical studies on national politics and implementation of judgments (Kapiszewski and Taylor 2008).

Conventional explanations in scholarly literature usually ascribe failure of reforms and non-compliance with judgments to implementation problems. I suggest that the problems are defined in relation to the proposed goal – rule of law strengthening – which is conceptually narrowly framed. In addition, explanations put forward in literature often single out particular aspects without addressing the procedural character of rule of law development or discussing the complex political climate, policies and institutional architecture. The analysis of the empirical material helped to uncover where conventional explanations fall short: oftentimes the elements that form part of implementation processes are neither approaches in conjunction, nor are the elements themselves described in detail based on empirical studies. This study contributes to the critical body of literature on global rule of law support and discovers elements to the implementation processes backed up by a detailed empirical analysis of secondary literature, primary documents and in-depth interviews with stakeholders.

Literature points out three sets of explanations for failure of Bank led judicial reforms: The first set stresses a lack of knowledge and organizational particularities (e.g., Carothers 1998; Santos 2006). While I draw on some elements identified in this research, I am questioning the explanatory usefulness of factors that rely too much on the organizational structure and forms of knowledge production in the Bank (Riggirozzi 2005). Research that seeks to outline these limitations is valuable to understand the shortcoming in the organizational structure of this international actor, but not helpful for drawing more nuanced pictures of how this inflicts with national politics of implementation. The analysis of the empirical material showed that lacking knowledge and organizations structure is helpful to understand poor reform design e.g., in relation to the Model Court project in Argentina, informed by development paradigms focusing

on the judiciary and windows of opportunity for engagement e.g., after the Fujimori regime in Peru when political institutions were weakly institutionalized. However, the dimensions are only useful for explanation when assessed in conjunction with a critical reading of what kind of knowledge is gathered by the Bank in the first place, by whom (e.g., the lawyer consulted for the PROJUM project in Argentina) and how the design ends up being narrowly defined.

A second set of explanations refers to project design and the structure of cooperation (Trubek and Santos 2006; Kleinfeld 2010; Hammergren 2003, 2015). Especially Linn Hammergren's work is providing useful insights into practicability of means and organizational shortcoming. The analysis of the empirical material helped to reveal how a design singling judicial institutions and the structure of cooperation focusing on the executive branch prove to be contradictory, thereby fueling implementation problems. Addressing this contradiction in this study already at the conceptual level of logics of change, helped to unmask ends-based approaches focusing on strengthening judicial institutions, while neglecting procedures of implementation, as problematic. The design of the judicial reform project II in Peru singled out the judiciary as a counterpart to the powerful executive, however, on operational level, the implementation was blocked by the executive withholding the enactment of a new criminal code for Lima.

The last set of explanations focus on implementation problems at national level and a lack of political will (Garth 2002; Riggirozzi 2005; Tuozzo 2009). Little scholarship has explored and unpacked the political will at national level and looked deeper into how coordination during reforms takes place with a view to struggles of power during procedures. Correlations between reforms and institutional instability have been researched for example by Castagnola and Pérez-Liñan (2016) and Brinks and Blass (2013, 2018), pointing out complicated interaction between branches of governments during judicial reform attempts in Latin America, yet without these analyzing this in relation to judicial reforms of the Bank.

The analysis of the implementation processes provided a clearer picture of the politics surrounding the judicial reform projects e.g., the central cleavage between the judiciary and the executive branch in Peru and a powerful Supreme Court acting in Argentina in the midst of political maneuvering and changing policies of right-wing and left-wing administrations and a federal judicial system. Hybrid outcomes, political struggles and unfinished processes extend the judicial reforms projects financed by the Bank; they are embedded in larger political struggles. However, the reforms address certain areas of policies, thereby narrowing the content of reforms, and the Bank selects counterparts to implement the proposed reform. Recalling a quote about the political struggles in relation to the judicial reform project in Peru:

> "There was a lot of scuffling, a lot of fighting, a lot of discussion where to put the executing unit. |… | The power play was definitely that the executive still had the intention that only the executive could change the judiciary. |… | And that they were doing a great favor to the judiciary by taking a loan from the Bank. |… | Whereas the judges weren't grateful at all. (Interview #3)

Whereas another interview partner pointed out how bad the Bank is in understanding the political struggles it is engaging in:

> "We certainly can't do politics. Half the time we are completely defueled by what is really going on in the country." (Interview #4)

A central contribution of this study is the description of the abundant examples of political struggles, and political maneuvering during judicial reforms and implementation processes of judgements. I build on elements identified in scholarly research but depart from conventional readings of implementation problems suggesting that dimension of the problems – context, design and coordination – must be analyzed together to gain a more comprehensive picture of national political processes and lastly, rule of law development. My contribution to the body of literature on judicial reform project of the Bank is a close analysis and critical reading of the elements to the dimensions in conjunction. Attempts to reconceptualize the problems will be offered in the next section.

*IACtHR*

In research on implementation and IACtHR judgments scholars have focused on exploring international factors concerning authority of Courts and backlash against them (Alter et al. 2018; Soley and Steiniger 2018). The empirical analysis revealed that what seemed backlash against the IACtHR in Peru and Argentina can be related to the content of the international judgments concerning ongoing debates about how to deal with persons convicted of terrorism like in examples of Peru or a debate on the source of law and the relationship with the IACtHR, like suggested by one interview partner:

> "This is a massive debate pointing inwards to national level about the source of law… The definition the [Supreme] Court brought up in Fontevecchia were about the principles of public order which cannot be modified by international law |… | (Interview #34, own translation)

However, backlash can also be a signal inward, relating to national political debates not connected to the judgment, like one interview partner emphasized in connection to the Peruvian backlash against the Court in 2018:

> "The backlash has been caused more due to the dichotomy liberal-conservative in Peru, than by the state feeling it was infringed in its sovereignty." (Interview #18, own translation)

What the analysis contributed to the existing body of literature on the reasons for backlash is not this twofold approach of reading backslashes as rejection of authority of the Court or as embedded in national political debate (this has been suggested by Soley and Steininger 2018

and Hillebrecht 2014a), but to read them differently as both relating to reordering the positions of actors in the state regarding rule of law.

Conventional literature also pointed out factors in relation to rigid design and measurement problems (Hawkins and Jacoby 2010; Helfer 2015; Engstrom 2019) and the structure of adjudication and supervision (Gamboa 2014; Perez 2018; Saavedra Alessandri 2020). Findings from the empirical analysis helped to reveal design sometimes was too rigid to be implemented successfully in accordance with the measurement of the Court, e.g., changes in legislation needing larger timespans to be approved or rigid design stipulating the inclusion of specific in memory ceremonies. However, effectiveness of rule of law and enforcement of judgments are not necessarily overlapping. Thus, the description of the implementation processes ties into the discussion on the ongoing debate on effectiveness, impact and compliance (Staton and Romero 2019; Stiansen et al. 2020; Donald et al. 2020; Murray and Sandoval 2020). However, I suggest the impact is neither purely positive, nor is it monocausal. Structural and contextual factor intervene in large scale, interrupting and running counter to the logic of change applied by the Court.

Lastly, authors described national political factors and the coordination of branches as important in implementation problems (Gonzales-Salzberg 2010; Hunneeus 2012; Vanuccini 2014; Hillebrecht 2012, 2014a). All camps also take political factors to a varying degree into account. Nevertheless, when referring to political factors and the lack of political will, the literature is often paying little attention to how the structure of cooperation interacts and contradicts the negotiation of competing interests and wills at nation state level.

Hillebrecht suggests that Courts' authority be rejected as an international signal and as a signal inward directed at national policy (2014a) and stresses that executive constraints correlate positively with compliance. The empirical material sustained the finding that powerful executives, political infringement into judicial independency and the relationship between executive and judiciary were key in the implementation processes analyzed in this study.

Following up on this argument, I suggest that a denial to implement Court order is part of national politics than must not necessarily relate to the specific case but can as well be an expression of national inter-branch crisis or a demonstration of power in relation to other political struggles. Hillebrecht's study is valuable for differentiating between the actors at national level drawing attention to their different policies. Taking up the important aspects of agenda setting and coordination she stresses in her work, in this study I explored the processes in a more open-ended manner, shifting attention to problems in the dynamics and the interaction

with the structure of cooperation. Judgments also provide focal points for manifesting power without mobilization in relation to the specific rule of law change stipulated in the judgment. Additionally, the gatekeeping position of the executive has been stressed as important element to implementation (e.g., Garcia-Sanchez 2017).

Studying the processes in Peru and Argentina showed that coordination among branches of government is indeed a crucial aspect during implementation of judgments. However, explanations that focus too much on the power of the executive fall short in acknowledging it institutional interplay, findings indicated is not always the executive in position to withholding support for compliance, but the implementation processes I studied show more complex picture regarding the interaction between the branches of government during implementation.

In sum, I suggest, that conventional explanations fall short in focusing on how the implementation process becomes part of national politics and maneuvering. Furthermore, conventional approaches focus on the problems not in relation to a more open-ended process of implementation where full-compliance and full-implementation is not necessarily the outcome. I add to the critical literature on global rule of law support and rebut conventional explanations for failure of reforms and non-compliance with judgment by taking the analysis one step further and discussing the findings in connection to potential for rule of law development as such not in relation to implementation problems defined from a perspective of the global governance actors Bank and Court. Problems in implementation are broader than failure of reform and non-compliance with judgments. At the same time, failure and non-compliance are more nuanced than captured by monitoring procedures and evaluation reports and as scholarly research has postulated. I suggested in the beginning of this study that narrowly assessing non-compliance and failure of reforms as problem of implementation helps little to understand dynamics among branches of government and potential for rule of law development. I put forward the arguments that firstly, logics of change in Bank and Court underestimate that state ordering and rule of law development are conflictive processes, secondly, current ways of practically assessing and academically discussing failure and non-compliance are attached to eurocentric perspectives on institutional effectiveness and lastly, I suggest national politics in implementation are largely important to implementation processes and indeed necessary for rule of law development. The following section develops my arguments on how to rethink implementation problems.

## 7.2 Alternative readings of implementation problems – constitutive moments for rule of law development

Problems of implementation are often read as being different to problems in politics. Scholarly discussions have been overlooking politics and power struggles during implementation processes by focusing on questions of compliance, effectiveness and impact. This section develops on why problematizing failure and non-compliance is necessary for approaching problems differently.

I suggested in the previous section rule of law development is different to compliance or success of reforms. It can be inasmuch the process of implementation as the outcome thereof. Current approaches to rule of law promotion in global governance neglect the process. I put forward the argument that attention must shift back to the procedural character of rule of law development. Problematic conceptualizations narrowing down rule of law to adherence and law enforcement trickle down to operationalization and limit the possibilities for applying different procedures. Process tracing revealed how this narrow understanding of rule of law lead to problematic operationalization in the first place: applying context-insensitive reforms and judgments and top-down procedures during implementation. Additionally, debates about the content of reforms and reparation orders oftentimes vanished behind struggles for power in and beyond implementation. I argue, the current procedures in rule of law support oftentimes stands at odds with rule of law development.

In process tracing, I approached the problems during implementation along the dimensions of context, design and coordination. Different rounds of coding of the material helped to reveal additional elements and to build clusters among these elements. Political maneuvering and micro-power struggles manifested in all of them. Those struggles or politics oftentimes did not only concern the content of the proposed changes or procedures of implementation as such, but the relationship between the national and the international actors and among the national actors. Defining and reordering these relationships and state organization is part of rule of law development. Looking from an exploratory approach at the elements and analyzing the processes with a critical view to the underlying claims in the approaches of Bank and Court allowed me to discover dynamics and problems that were covered by simple readings of failure and non-compliance. Procedures were too rigid to accommodate processes of defining and reordering, albeit the measures sometimes stipulated it. Instead, rigid formats for

implementation resulted in burden shifting, lacking accountability and waste of money and time.

### 7.2.1 Context

Albeit often invoked as important prerequisite in development projects and international arbitration, context analysis remains a vague category in implementation cycles and judicial procedures. Context can be assessed in relation to the content of intervention – the reform and the judgments – and in relation to the context of intervention. Political and economic crisis and problems of coordination form part of this context, as well as previously existing and new emerging rivalries and changing power constellations among the institutions involved in the implementation. The specific national institutional setting, legal frameworks and political procedures also form part of context assessment. A central finding from the analysis of the processes is that Bank and Court oftentimes neglected comprehensive context assessment, negated the political nature of context, or ignored findings from previous research.

Context in this work relates to historical embeddedness of institutions, the specific institutional interplay and the problems addressed in the judicial sector in reforms and judgments. To explore the factor "context", therefore a first step was to differentiate between fractions and actors at national level and dynamics among them and to look into how the global governance actors assessed the context or neglect to do so. I developed the dimensions along the lines emerging from the coding process: negating the political nature of context, understanding the context, changing partners and context, ignoring results of previous research and narrow reporting structures. The exploration and analysis of the context dimension during implementation processes revealed poor context assessment and political maneuvering, political crisis, volatility and opposition, intervention and agenda setting, timing, national courts and institutional capacities and reporting procedures as important problematic aspects in these dimensions.

*Poor context assessment and political maneuvering*

The global governance actors either deliberately or unknowingly partly neglected context assessment. Context is more than knowing the counterparts and the content of reforms and judgments. Reducing it to a standard checklist, as for example in risks analysis before Bank projects does, is neglecting this complexity of institutional settings. Sticking to a judicial analysis of the merits in cases before the Court and interpreting the compliance in purely

technical judicial terms of the political circumstances of implementation, also reduces the complexity of intervention and interaction in human rights verdicts.

In a first step, process tracing helped to reveal the elements of the broader institutional setting in which interventions took place and some central dynamics among branches. I focused mostly on political factors while briefly also taking economic circumstances into consideration to understand scarceness/availability of financial resources and the history of engagement of financial development actors. Exploring the institutional structure and the actors involved in the process helped to understand that Bank projects national inner circle and the litigation teams representing the state before the Court are often merely a fraction of the multitude of actors involved in implementation. Among the excluded actors are state agents and representatives of branches of government not included in organs set up for project executing (e.g., executing agencies), administrative staff (e.g., Court staff administrating cases) and state agents (e.g., police officers and prosecutors in charge of investigations). I outlined in chapter two how the structure of international relations determines counterparts in implementation, focusing on the executive and relies on a logic of separated powers and mediation through the state. Counterparts in the processes are limited and hierarchically determined. The narrow selection of the actors involved in implementation in the projects and the reparation orders early on introduced flaws into the support activities that later manifested in problems during implementation. Context assessment and the selection of counterparts within this process is not neutral but is structurally predefined. In addition, hierarchical knowledge production is building the base for design and the coordination stage and setting the frame for the subsequent interpretation of indicator fulfilment and compliance.

*Context and positioning – negating the political nature of context and opposition*

Understanding the dynamics among branches and the relationships with global governance actor is part of context assessment.

In Argentina, the political nature of the intervention of the IACtHR was not negated altogether as the historic role the regional human rights system played in the country in transitional and human rights efforts was continuously stressed. The infringement of the Court was rejected on grounds of sovereignty infringement. At least during the time span under consideration in this study the relationship between the executive and the Supreme Court were key to an assessment of the institutional context in Argentina for the IACtHR. The analysis showed that the Argentine Supreme Court cannot *per se* be described as an antagonist of international Courts. Similarly, it would be premature to describe the Peruvian Highest Court as a natural ally of the IACtHR.

The analysis of the implementation processes of judgments in Peru and Argentina indicated that in the specific institutional dynamics in Peru the national Court was more prone to push through implementation orders of the regional court while also being considerably infringed in its judicial independence. The Supreme Court in Argentina took stronger position against the regional Court rejecting invasive reparation design and playing out power against other branches at national level to check implementation. This said context assessment and assessing changing majorities and political dynamics in supreme courts in the countries is ever more important. Admittedly, assessing the political context for the Court at contentious stage and monitoring stage is difficult given the length of time passing from issuing the judgments to steps taken by national actors for compliance. However, in relation to the controversial Fontevecchia case, the Court showed little context sensitivity with regard to timing and reactions during the public audiences. Procedures remained legalistic leading to a dead end where implementation of reparation orders could not be negotiated any longer.

Excluding actors or siding with powerful actors is one way of impeding negation about content; another way is a technical apolitical framing of the processes itself. Reducing questions about rule of law to technocratic administration (E-Governance, availability of a search unit for forcibly disappeared persons) and judicial neutrality is not only taking the support activities out of the realm of negotiable policy changes or changes in organizing the state apparatus, but it is also shielding Bank and Court from accusations they had infringed the political process. Yet, interventions of Bank and Court were openly aiming at changing political structures and were political in nature. However, the means stipulating that change were rigid and oftentimes little negotiable. A member of an association representing victims before the Court stresses the degree of intervention by the IACtHR into national politics:

> "I do not know if the word is self-restraint, I think they should refine their types of remedies. And this I am directing towards the IACtHR and the petitioners that should work with more precisions and should be more precise in what they ask for, there should be a dialogue. It would not be bad to lift up the level of demands in the litigation. It seems to me that the Inter-American System has an interesting particularity in comparison to the European system, which is a procedure very much attached to the contentious stage and more traditional during that contentious stage. Where the important thing is if the Tribunal ruled that there had been a violation or that there had not, if you won the case or if you did not, very much like in the internal tribunals. We were very much supporters that the Inter-American system upholds that other posture, focusing on the supervision of the region and the promotion of certain politics. This continuous to be, for us, the most important aspect. Because winning the case is not enough. |…| What happens is that the legitimacy of the European system is also based in its precision and in the possibility of judicial arguments, and this is what falls short oftentimes in our cases. A bit conservative in its interpretations. The institutional and political changes for us are what is most important for the nation state level and for the petitioners that seek a way to promote internal changes." (Interview #34, own translation)

This interview partners confirms the political nature of the intervention and suggests that decisions that trigger deeper structural changes are important for actors at national level to anchor policies. However, the critique expressed in this quote is at the level of design and

procedure, pointing to the narrow room for judicial arguments during implementation and lacking precision of the Court and the petitioners alike in the formulation of reparations. In the logic of the Court, spending less attention on whether the case had been won or not, and focusing on negotiations during implementation would acknowledge the political dimension of the judgments. However, this would still have depoliticising effects, as I will discuss below.

*Context and intervention – agenda-setting and selection of national counterparts*

On a practical level, including and negotiating with actors *ex ante* in charge for implementation and affected by it later is not always possible. I described how the current implementation structure confirms the gatekeeping position of the executive. The selection of counterparts in the implementation processes analyzed additionally possibly fueled conflicts of intra-branch dynamics e.g., by including the Supreme Court and the Magistrate Council into the executing committee in Argentina or by supporting the position of the judiciary *vis à vis* the executive in bank reforms in Peru. Previous interpretations of implementation problems pointed out lacking political will as reason for failures in implement. I suggest, invoking lacking political will is a fig leave for global governance actors' poor context assessment before intervention and continued failure to react to context during implementation.

In Argentina, it was a conflict at high level between branches of government that influenced a change in politics towards the Court. Coordination of lower-level administrative actors also play a major role in the implementation process. However, blocking implementation at the highest instance also weakened arguments for actors in those lower levels of administration for compliance. Given the time that passes between judgment and implementation, foreseeing the changing majorities is difficult. "Swinging" (see Gonzales-Salzberg 2011) with the Supreme Court's position is neither practicable nor would the IACtHR fulfil its mandate when it anticipates rejection and softens its stance in the reparation orders. Without advocating for the Court to become a political actor that adapts to political maneuvering and rhetoric, I argue for the Court to develop a more nuanced approach to reflecting on its position in the political climate, both regionally and nationally. This means not that judgments should be more political, but implementation stage should be more politically sensitive with a Court acknowledging its political role as a legal actor. Context insensitivity applies more to the process of supervision than to issuing the judgment. Supervision is political, and the IACtHR applying only a judicial approach is severely limiting in reacting to context and dynamics.

*Flawed context assessment – reporting structure contradictory and incomplete information*

Process tracing also helped to shed light on the lack of consideration for previous research studies including studies financed by the Bank itself in Argentina. Additionally, problematic official reporting structures obfuscating dynamics and rivalries during implementation rather than reporting them were key to understand poor context assessment. Rigid schemes for assessment and the scope of consulted research thus contributed to a narrow context assessment largely blinded for or ignoring political dynamics. Taking particularities of federal state organization, regional competences and political dynamics between the levels of administration into account was also partly ignored in the rule of law support approaches. Given that the Bank has extra budget to assess the context, it could potentially address better or address beforehand problematic issues. The Court in turn, relies on internal judicial coordination and reports. Both global governance actors failed to consider sufficiently political dynamics between the regions and different administrative systems as factors for implementation. Especially the Bank lost sight in its Model Court approach of the overall state structure and selected the actors and the regions on a superficial basis, extending particular findings of one administrative system to other systems, and seeking to apply blueprint solutions in Court management. Different to Peru, in Argentina the reform intervention of the Bank did not seek to intervene in the status quo. In the reform agenda, the Bank sided with the executive and did not challenge the status quo in the judiciary nor the separation of power between Supreme Court, ordinary judiciary and executive power but aimed at securing the power of the executive. The Bank ignored other national reforms plan as well as the civic protest after the 2001 crisis. The Bank financed a large amount of background research beforehand and contracted national experts, chances for understanding the context were relatively good. Only the Bank chose not to respect those previous studies outlining but ignored its own findings indicating the risk of political infringement of the judiciary and particular problems within that branch even when published by its own research department (see Hammergren 2002, 2003).

Contradictory evidence for elements during coding was that a simple reduction of relational ties – Bank sides with the executive branch and the Court sides with the judiciary branch – was not possible. The picture was more nuanced and blurred and positioning changed over time.

Reading implementation problems in the dimension context differently would allow to recognize different aspects of context such as institutional fabric, historical relationships, and political dynamics among branches of government and between national and international level. It contributes to reconceptualize implementation problems in connection to lacking political

will in a way that power dynamics among branches enter context assessment. Thus, will can be differentiated between actors and in relation to the subject at hand as opposed to conventional readings of implementation problems in the dimension contexts as lacking political will, narrowly and technical defined in legal or economic terms. In addition, reconceptualizing problems in the dimension context differently can contribute to lessen problems emerging from hierarchical knowledge production and instead reveal the necessity for assessing and including informal rules and procedures in institutions in design and coordination procedures and open up assessment and reporting structures.

### 7.2.2 Design

Bank and Court claim development projects and reparation orders in the legal judgments are designed in accordance with national contexts. However, the logic of development projects also carries a notion of replicability and aspects of transfer, and judgments need to meet criteria of coherency with previous and international jurisprudence.

A central finding from the analysis is that the Bank applies blueprint solutions to previously defined problems and the design of the reparation orders of the IACtHR sometimes favor coherency over national contexts. The Court also reacted in inflexibly during supervisions when the problems became apparent.

A first step to approach design differently was to define what can be designed, to reveal moments when design can be amended or changed and ways how this can be done. Design in this study relates to the concrete measures and reparation orders as well as to the structure for implementation set up by the Bank and the procedures during the supervisions stage in the IACtHR. Project design in Bank reforms could be amended during implementation while initial judgments cannot be changed; interpreting the compliance with the reparation order is the flexible factor. I developed the dimensions along the lines emerging from the coding process: blueprint solutions, paternalism and design, coherency in design, inflexible timespans for implementation, providing security by inflexible design and incompatibility with national legislation. The exploration and analysis of the design dimension during implementation processes revealed rigid design and procedures, blueprint solutions, flawed design, coherency and legal transfer, partial implementation and defection, delays in implementation and postponement of closing dates and debates on the authority of Court as important aspects to the dimensions.

*Blueprint solutions – rigid design and procedures*

Bank and Court rule of law supporting activities in Argentina and Peru touched upon politically sensitive topics, intervened in national political dynamics and tackled and tried to transform institutional particularities. Reparation orders addressed topics such as the investigation of mass atrocities and human rights violations and informal arrangements like the institutional agreements for the payment of pecuniary reparation orders between the ministries in Peru. Judicial reforms were applied in political sensitive context such as a blocked congress in Peru and engaged in the reform of Court management systems in a federal system like Argentina. However, the design of reforms and judgments often proved to be insensitive to these contexts. Additionally, little use was made of procedures to amend or change design and to flexibly react during the supervision stage of judgments. Flawed context assessment and ignorance for the informal arrangements in combination with a technocratic approach, stipulated rigid design in Bank projects in Argentina and Peru. In Peru, the Justice Sector I project largely cut out the necessity of executive approval, in Argentina the PROJUM project ignored previous findings from research indicating political rivalries that later became problems during implementation. More specifically, national legislation was not always apt for implementation in short periods, and the interpretation of constitutional norms and institutional capacities and independency largely changed over the time. Applying blueprint solutions to previously identified problems, and not reacting flexibly during the implementation period became a problem for Bank.

The problems in relation to the design of PROJUM in Argentina were manifold: the results of the pilots were too particular and not apt for being expanded to other Courts, the reform was not backed up by important actors, among them large parts of the judiciary. Contextual and institutional knowledge and operationalization was lacking. The Bank reacted with a prolongation of the timespan for implementation of the projects without changing the content of the design itself. The composition of the organs in charge of the implementation of the Model Courts program was changed several times, however, without adapting the content of the reform or resolving the problem of politicized structures in the Bank proceedings.

The IACtHR issued reparation orders directly touching politically highly debated subjects (e.g., in relation to state-terrorism in Peru, in Argentina the relationship between the Supreme Court and the executive). The Court granted in some cases large margin for national actors to implement (e.g., in Barrios Altos/La Cantuta regarding the national proceedings for assessing the legality of the humanitarian pardon).

However, in other cases, the IACtHR also proved to react inflexibly to changes during the implementation period. For example, it was caught by surprise e.g., in the Fontevecchia case in

Argentina by the changing position of the Supreme Court of Argentina regarding automatic implementation and did not react flexibly to this new development during supervision. Instead, a rigid design, demanding the state to revoke a law, caused widespread rejection of the IACtHR. Rigid design of reforms and reparation orders coupled with inflexible reactions during implementation processes.

*Blueprint solutions and coherency, flawed design and legal transfer*

Thus, the room foreseen for national translations of reforms and judgments in the design and during the procedures of implementation was limited. Interview partners currently or formerly working with the Bank stressed approaches in the Bank suggesting to having superior knowledge for reforms over national knowledge and portrayed the Bank as a "repertoire of ideas" for judicial reforms.

Legalistic approaches to human rights and attempts to harmonize judicial procedures with disregard of special requirements of the federal system in Argentina and requirements of executive approval for the new criminal code in Peru, troubled implementation.

National translations do not only refer to parliamentary procedures and legislative requirements, necessary for reforms and judgments to become effective but also to long-term policies stipulated in reforms and judgments. Interview partners working with the IACtHR recognized these longer-term changes often exceed one administrative period and are time-sensitive issues are often not reflected in design. Flexible timespans and flexible supervision are important to not trouble the implementation further. For example, the IACtHR finds a violation of a certain right and rules in accordance with the American Convention dictating a certain public policy to avoid future violation. While the state agrees the violation had happened, it might disagree with the type of public policy change the Court dictated. While the reconciliation of diverging interest is theoretically a goal in judicial proceedings, a hierarchical style of the IACtHR in dictating the reparation orders, proved to be difficult especially because the required change oftentimes relates to political and longer-terms transitions.

In a similar vein, the logic of change in judicial reforms supported by the Bank relies on long-term goals, design however was oftentimes shorthanded in Peruvian and Argentinian projects, even if planned for longer periods (e.g., Argentina before starting the PROJUM project in 1998).

*Issues of timing and changing responsibility*

Issues of timing during implementation were also problematic during implementing judgments and reforms in Peru and Argentina. Like in the Peruvian case, the Bank project in Argentina was prolonged grant more flexibility in times of political turmoil. In this regard, the Bank reacted to the economic and political crisis in 2001. However, the prolongation was not accompanied by a re-negotiation of the project design. Implementation problems manifested early on, worsened over time with changing political circumstances and frequent changes in the Executing committees.

It is a challenge for the IACtHR to design judgments in a way states have the possibility to execute them. Practical and well-grounded reasons for noncompliance and politically motivated ones brought forward during the supervision procedures might not be easy to tell apart as states might use the "unable" argument to avoid political and legal responsibilities. In contrast to the Bank, the Court cannot conduct feasibility studies for the implementation of judgments beforehand. It is this tension between bearing in mind political and structural factor in reparations with reasonable chances of success for implementation and the exercise of a purely legal function that makes the work of the IACtHR deeply political.

Aspects of problematic timing (e.g., also in relation to changing context, political turmoil and changing legislative terms and personnel) are reflected in the analysis of the case study. The rule of law support activities depart from a logic of representation through the government. Central to this logic is the continued accountability and duty of states to fulfil international contractual obligations over various periods of governance and legislative terms. In implementation the state is represented through the government and different branches of government. The executive, as the administrative face, is accountable for previous violations, current contracts and future depts and liabilities. It is this mismatch between the actors involved in negotiations and implementation as well as the shifting priorities in policies that make the assessment of time interesting. While actors during implementations might change, the reference frame for negotiations remains the same. Even within one legislative term, temporality plays an important role concerning the different paces in branches of government. Almost all implementation processes analyzed in this thesis span over several legislative terms. The conflation of state and government in global governance is problematic for negotiations as it affects agency. A rigid structure in design clashed even more with aspects of political volatility and the risk that accountability in implementation might be shifted or rejected altogether.

*Rejection of the authority of the IACtHR*

Rejections of the authority of the global governance actor was more pronounced in relation to the IACtHR. Albeit the Argentine government under Kirchner was not friendly towards international development and other financial creditors after the 2001 *Corralito*, the PROJUM project continued. Similarly, the Bank activities in Peru were never rejected as a whole but by fractions and branches of government. More general rejections to implement reparations order emerged in Peru and in Argentina in relation to IACtHR orders. Arguments invoked during these problematic implementation processes were not only based on specific norms or too rigid design but often based on general political disagreements (nationally and internationally), in relation to e.g., national sovereignty and political infringement. Reading this implementation problem differently as part of political maneuvering would allow to tell apart, rejection of the substance of the required change, and a rejection of the authority of the IACtHR and the Bank in general. At the same time reading the dimension design critically as characterized by hierarchical knowledge production and rigid interpretations and implementations can help to reconceptualize these dimensions as crucial for the development of national plans for reform processes, national translations of orders and reforms stipulated by global governance activities and the development and design of national procedures for implementation.

Contradictory evidence for elements during coding were implementation problems not in relation to too rigid design but in connection to very loose design. I included and discussed this finding under the heading coherency and security. Thus, blueprint solutions and coherently applied law might not clash with national translations or legislative requirements but provide clear guidance for implementation instead of opening room for political maneuvering.

This said, most implementation processes showed problems in relation to too rigid design and mismatching reform proposals to support rule of law. Reading implementation problems in the dimension design not as institutional incapacities to adopt more developed standards and imposed versions of law and judicial systems, but as intents to approach the reparation orders in national translations and adopt parts of reform proposals, would help to understand the implementation process in its procedural character. Reconceptualizing problems emerging in the dimension such as partial implementation and defection to implement as procedural implementation can also help to acknowledging that hybrid outcomes are the nature of reforms and the norm rather than the exception.

### 7.2.3 Coordination

Coordination among national actors to implement the judicial reforms and reparation orders as well as during larger policy processes is crucial. Bank and Court approach the necessity of coordination during implementation differently: the Bank often sets up special coordination structures for the development projects, while the IACtHR leaves the internal coordination to implement the reparation orders largely to national actors, the executive branch represents the state in official procedures before the court and in questions concerning reporting. In both cases, it is only the executive branch ultimately responsible to the global governance actors.

I analyzed in this study how the structure of global governance often focusing on single branches of government possibly conflict with more comprehensive approaches to rule of law development and institutional strengthening.

A central finding from the analysis is that the Bank largely missed to understand dynamics of actors at national level or was guided by political reasoning in including actors important for coordination into executing committees. In relation to coordination aspects in implementation processes of IACtHR judgments interview partners from national branches of government and staff working at the Court repeatedly pointed out coordination was crucial for implementation especially because many reparation orders require such coordination. However, the IACtHR rarely reached beyond the executive in procedures to holding the state accountable.

A first step for better understanding how projects and reparation orders are implemented was to focus on dynamics and coordination among actors involved in the processes. Coordination in this study relates to the interaction of branches of governments, institutions involved in the implementation. such as the Supreme Court of the Nation in Argentina, the Constitutional Court in Peru, the judiciary, the Justice Ministry, the Ministry of Finance and other Ministries involved in reform processes, the Magistrate Councils in Peru and Argentina, national Courts and the international coordination with the Bank and the IACtHR.

I developed the dimensions along the lines emerging from the coding process: Selection of stakeholders, political dynamics and political will, setting up coordination committees, burden shifting and political volatility. The exploration and analysis of the design during implementation processes revealed flawed and political selection of stakeholders, burden shifting and bypassing of branches of government, and questions of separation of powers and accountability as problematic in the dimension coordination.

*Selecting stakeholders and setting up executing committees*

The Bank sets up coordination committees for coordinating and implementing reforms projects. The coordination procedures in Bank projects are characterized but not limited to these management structures set up for implementation depending also on the initial selection of stakeholders. Implementation might require coordination with additional actors, such as with the executive during the Justice Sector I project in Peru, or with sectors of the judiciary in the PROJUM project in Argentina. Coordination in the processes was problematic because the Bank missed to include actors into the coordination committees. Executive committees that were set up in Peru and Argentina also became politicized during the process or were politicized to start with, the complicated processes from within the structure. Sometimes the structure built on previous national structures or included newly created organs like the highly politicized Magistrate Council in Argentina; sometimes it was built up from the ground including high-ranking staff from all branches of government and provided some sort of forum for negotiation, like in Peru. In the implementation process in Peru, the structure persisted after the project ended, enhancing chances for longer-term coordination. However, both fora showed little flexibility for amending content and procedures when political dynamics came into play in the projects in Peru and Argentina. Moreover, the composition of the committees largely escaped public scrutiny and possibilities for correction. The coordination committee set up by the Bank was hampered by corruption and political power struggles over competences. Instead of providing a forum for the implementing actors to discuss problems, the organ was politicized and fueled conflicts.

The implementation completion report of the Bank for Argentina recalls:

> "First, the Coordination Unit (UCP) functioned within the Ministry of Justice and Human Rights, headed by the National Direction. In 2002, as requested by the Bank, the UCP was transferred to the Consejo de la Magistratura, the president of the Administrative and Financial Commission was appointed National Director. Consequently, the responsibility laid with one of the Counsel Judges. During 2003, the UCP functioned under the National Director and during 2004 and 2005, under another Director." (ICR 2006: 19)

Self-critically assessing a problematic choice of actors, however not questioning the intervention altogether, of mismatches in means and procedures, the ICR also reads:

> "Might it not have been better, therefore, to defer the Loan pending the effective instrumentation of a competent entity for directing the project's activities---rather than entering into an insubstantial arrangement at the start?" (ICR 2006: 5)

In contrast to the Bank's implementation structure, the implementation of judgments of the IACtHR relies largely on preexisting national structures for coordination. The IACtHR leaves the coordination for implementation to national actors. The state level is in charge of setting up

structures or mechanisms enabling coordination between branches addressed in the reparation orders. Process tracing showed that many reparation orders require such a coordination, but coordination often failed. Peru and Argentina have no standing organs coordinating the implementation of judgments. Instead, the teams in charge for litigation before the Court are channeling resolutions of supervisions and the written proceedings commenting on the implementation status between nation-state level and international level.

The analysis of the implementation processes in Peru and Argentina showed how much the stakeholder selection process for setting up executing committees and parties that participate in the Courts supervisions process bears conflict. As the selection is guided by the approaches of Bank and Court to rule of law as law enforcement, the global governance actors are not only excluding actors but also missing stakes altogether. Blinded by narrow conceptualizations, the selection process thus potentially conflicts with institutional dynamics instead of strengthening institutional development.

*Selecting actors and shifting burdens*

During implementation, the intervention of Bank and Court represents different kinds of anchoring points for national actors and policies. The selection of counterparts provides leverage to the selected national actors and determines accountability. The selection process thus is a political process. The coordination can also become politicized as implementation procedures provide platforms for national power struggles to manifest, as such the rule of law supporting activities can provide anchor points for national political maneuvering. Ongoing context assessment is crucial for this selection process; however, design of reforms and judgments also predetermine the necessity of coordination among actors, and the structure of international governance limits the possible counterparts.

The neoliberal administrations of Menem in Argentina and Fujimori in Peru welcomed the intervention of the Bank and provided a window of opportunity for the closure of a loan. In Peru, the Bank intervened in a post-dictatorship scenario and institutional structures still hollowed out by the autocratic style of governance, largely overruling democratic attempts for reform. Political volatility was high, and the congress blocked. The relationship between congress and judicial branch was troublesome. The Bank placed the executing unit in the judicial branch, granting leverage *vis à vis* the blocked congress and the powerless executive.

In Argentina, the intervention took place in a climate of political distrust among the institutions, marked by an economic shock and the executive trying to secure the control over the judicial

branch while the Supreme Court and other sectors of the judiciary, including the autonomous Magistrate Council entered conflict. In Argentina, the Bank decided to place the executing unit in the executive and supported the government's reform plans.

However, looking at parliaments and the judicial branch as opposed to Bank projects and checking the Court decisions also falls short in explanation. The analysis in the empirical chapters provided a more nuanced picture of power imbalances during implementation. Looking at parliaments and judiciaries as natural allies to the Court is not only empirically not sustainable but it is also problematic on practical grounds. Engaging with the judiciary means looking at how the judiciary sits within the institutional fabrics. Rule of law support has neglected this aspect, as it singles out the importance of the judiciary for law enforcement instead of analyzing power dynamics. Depending on the position of the judiciary *vis à vis* the executive in the institutional fabric, implementation was influenced by national power struggles (Argentina) or political infringement by the executive (Peru). This said, a reductionist simple reading of the Bank siding with the executive and the Court being an antagonist of this branch of power also falls short.

Judiciaries also opposed reforms and judgments that were constraining their structural power structurally or introduced reform of internal procedures. Singling out other branches in reparation orders circumventing the gatekeeping position of the executive also makes the processes prone to politicization. Without denying dangers in the direct involvement with judiciaries and other actors e.g., police officers and administrative staff, reaching beyond the executive remains nonetheless important – it is a question of *how*, not *if*.

*Separation of powers and accountability*

Reparation orders of the Court conflict with national law when the Court issues a change of a legal provision (e.g., regarding due process rights) but also when the Court challenges a national verdict (like in the Fontevecchia case) or dictates the annulment of a law (e.g., amnesty provisions) or the reopening of a case (like in the Bulacio case). The encounter of international law and national law, or more precise the interpretation thereof, can be an anchor point for national actors to initiate debate and to manifest power. During the implementation processes problematic situations often arose in relation to parts of the processes when internal state ordering, the relationship with the international actors, issues of separation of powers and accountability emerged. International human rights adjudication thus can check state power; however, this often happens at cost of imposing global governance in undermining national checks and balances.

Process tracing showed how the teams representing the state sometimes served as straw man for other branches that shifted the implementation burdens amongst each other. Coming back to a key quote already presented in the empirical chapter:

> "We as the IACtHR have a problem: the state is one, independent of its internal organization. It is one. And it assumes the responsibility as one state. For us it is not the Supreme Court that is responsible, or the executive, or the parliament. The responsible is the state, internationally: this is what I am saying. |...| So I understand that the voice of the state in this case is the Supreme Court |...|. And the executive will do nothing more to comply with the sentence?!" (Fonteveccchia public audience IACtHR 2017: min 1:09:00)

While this legal explanation is sound, the quote is clearly outlining the problem of international human rights law: the centrality of the state. The structure that seeks to hold states accountable is offering the very loopholes for avoiding accountability. This tension has been part of international human rights law both in idea and in structure. In litigation before the IACtHR and in the communications, the executive is representation of the state and gatekeeper. In accordance with international law, the state as a whole is being hold accountable for the alleged violations. This construct, however, can produce the absurd effects observable in the burden shifting in this audience.

In Peru, the intervention of the IACtHR intended to secure checks and balances, siding with the Constitutional Tribunal (in the precautionary measure), leading to a discussion about the separation of power at national level and a rejection of the IACtHR. In Argentina, the decisions of the Supreme Court triggered debate about the relationship with the IACtHR, less so however, a debate about the separation of powers at national level.

The exploration of the dimension coordination during implementation processes in Peru and Argentina has also shown how unclear or rigid coordination procedures can level the ground for burden shifting, leading to avoidance of accountability and non-implementation. I describe burden shifting as being different from exercising checks and balances but a manifestation of power struggles. The state and especially executive-centric approach to rule of law in global governance can contribute to renewing structure that undermine both horizontal and vertical accountability in the state. Similarly, in excluding important actors from reform, the Bank can cultivate a style of bypassing. Empirical chapters showed that responsibility for the failure of coordination was oftentimes attributed to the national level, like observable in official Bank reports and emphasized by interview partners. This shifting of burdens can not only hamper institutional dynamics in the short term, I argue, but can lastly contribute to dislocating accountability altogether.

Not necessarily contradictory to the general tenor of argument for conceptualizing the problems in this dimension, but surprisingly, I found a large awareness of interview partners both in Bank and Court, as well as evidence in primary sources existed about the importance of coordination. Process tracing also showed that attempts existed to adapt to changing necessities of coordination and political turmoil e.g., in Argentina changing leads in the executing committees in PROJUM. Thus, the inflexibility was not connected to ignorance for the necessity of coordination and political maneuvering but to mismatching logics of interventions and procedures. Approaching coordination problems differently helps to dismantle the narrative of "lacking institutional capacities" and helps to bring political reasons to the forefront. Burden shifting or rejection of the authority of the global governance actors might not always have to do with the intervention itself but can be attached more closely to national power dynamics. It also allows to question the mismatch between the postulated goal of the intervention that is strengthening accountability and the procedures applied during implementation that provide room for avoiding accountability.

The analysis of the empirical chapters showed how ascribing problems in implementation to lacking political will is problematic and how it is deeply intertwined with the selection of the counterparts, the procedures for implementation and the adaption of the processes and interpretation of compliance. Reading implementation problems in the dimension coordination differently would allow recognizing the importance of the interplay of branches of government in negotiating rule of law development and negotiating processes of implementation. It would also centrally allow to conceptualize tensions in implementation and reform processes and negotiations among branches and actors not as problematic to rule of law but as part of rule of law development.

### 7.2.4 Departing from conventional readings and recognizing constitutive moments

I suggest problems in implementation can be constitutive moments for rule of law development. These moments can be moments where dynamics among branches of government troubled implementation; the separation of power was invoked as a reason halting implementation, and accountability to implement was neglected. Constitutive moments can also be moments when the authority of global organs was rejected as these moments define a place when state ordering is at question. In this argumentation I build on the importance of rule of law as a mediating and power controlling model as put forward by Brinks (2009) and on the work of O'Donnell (1998; 2007) stressing power imbalances among branches of government in Latin American states and post-colonial versions of rule of law. Constitutive moments can affirm power or can misbalance

power. I discussed in chapter two how current approaches global rule of law support neglect the power-affirming aspects (Buckel and Fischer-Lescano 2007; Anghie 2008a, Pahuja 2011; Chimni 2017). Constitutive moments are not necessarily strengthening rule of law in the sense of a teleological approach to development applied by the Bank and the Court. Furthermore, other logics on institutional functioning non-eurocentric logics can potentially enter the debate (e.g., a different understanding on the hierarchy of norms and different norms e.g., de Sousa Santos 2014). I discussed in chapter two how underlying claims about the rule of law centrally stress eurocentric approaches to institutional efficacy. Even if remaining in traditional approaches to rule of law development, to understand implementation problems as constitutive moments, aspects in liberal understandings of rule of law such as the relationship among branches and accountability as central elements to rule of law development must enter logics of change again. As current conceptualizations and implementation procedures bear little potential for recognizing these central aspects, I called the logics of change flawed and described the mismatch between the conceptualization of rule of law in Bank and IACtHR and the operational level during implementation.

I argued earlier that interventions of Bank and Court might trigger in rule of law development by default. During implementation processes, questions in relation to separation of powers and the organization of states at both national level and concerning the relationship with the global actors emerge. Smaller-scale negotiation processes among administrative bodies, institutional rivalries and questions of vertical and horizontal accountability emerge along the line of implementation. Crisis and misbalanced power, tensions and fight over competences emerge but are currently not processed, transformed or even acknowledged by the procedures during interventions of the global actors. Reconceptualizing problems in implementation not purely as problems in a conventional reading as enforcement problems in international human rights litigation or implementation failure in judicial development reforms, but as constitutive moments, helps to establish a more procedural reading of rule of law development acknowledging its conflictive and interest mediating aspects.

The act of reconceptualization concerns firstly, a more open approach to concepts of rule of law, including e.g. indigenous legal approaches, secondly, a reconceptualization of activities and content in rule of law support, identifying neuralgic points for changing procedures, and thirdly, a different form of negotiating rule of law support and reporting on the outcome of these

activities. I suggest that these aspects of reconceptualization crystallize in recognizing constitutive moments during implementation.

I described constitutive moments in the empirical chapters, explored and analyzed how they are intertwined with problematic structures and procedures. Constitutive moments can be moments in which national branches of government argue over competences in judicial reform processes, judicial independency is at risk, separation of powers is debated in national fora, courts and media national actors question the authority of global governance actors, judicial independency is at risk and separation of powers are debated in national fora, courts and media. These moments can be constitutive for rule of law development; however, they are also severely limited by procedures of the current rule of law supporting activities or simply not recognized as constitutive moments but framed as problems in intervention.

I suggest that implementation problems can be constitutive moments which can materialize and be frustrated.

Constitutive moments materialized in the politicization of the executing unit in the Model courts project in Argentina and later reform of the Consejo de la Magistratura. Another constitutive moment during implementation was the societal debate about the instalment of the monument "Ojo que llore", concerning who is considered a victim of the internal conflict in Peru. Even the case Fontevecchia which only years after the judgement was issued led to a conflict between the Supreme Court of Argentina and the IACtHR.

Constitutive moments were frustrated during implementation in relation to the lack of using information on the Argentine justice system for reform and the parallel development of national reform plans while the Bank closed a loan with a selection of actors. Another missed constitutional moments was the lacking coordination between the judiciary and the executive during the Judicial Reform Project I in Peru, leading to a hindrance to enact the penal code. A last example for a frustrated moment is the monolithic vision of the state stipulated by the IACtHR in the Fonteveccia case, where the relationship between national and international organ was debated while the underlying conflict among national branches of government was not coming to the surface.

The normative yardstick applied to distinguish manifest and possible constitutive moments I the degree of deliberation and contestation during implementation as well as self-determination and representation on processes. I argue that procedures can be flexibilized to heighten this degree.The following chapter suggests ways to do so.

## 7.3 Alternative ways to deal with implementation problems – limitations and possibilities of global governance actors

Reading implementation problems differently can be the basis for dealing differently with implementation problems. Instead of avoiding tensions or limiting coordination attempts, procedures of the global governance actors Bank and Court can be flexibilized to better focus on rule of laws procedural character.

Adopting a critical pragmatist approach, I combine radical and critical elements and a reform impetus; I criticize the form and content of global rule of law support and reveal possibilities for flexibilizing the procedures. I discussed in chapter one and two how structures in global governance emerged from and remain rooted in unequal distributions of power. While stringent post-colonial approaches would say there is little use in making recommendations for global governance actors embedded in such a structure, that depend on a renew a system based on nation-states, I took a pragmatic stance. Following my research interest and strategy that focused on implementation processes of nation state actors and international actors and structures and concepts of global governance, I decided to draw attention to the factors that are flexible *within* the structure *despite* the severe limitations.

While conceptual flaws and structural limitations originating from the global governance level largely affect the implementation, they are not strictly determining the procedures applied. I argued earlier that Bank and Court have leeway within the already existing repertoire to adapt their procedures as well as their interpretation and reactions in implementation processes.

This subchapter will discuss the limitations and the possibilities in the activities of the two international actors in rule of law promotion. The possibilities to flexibilize the procedures refer to the room for maneuvering of the Bank and the Court. Maneuvering during implementation of national actors, has been described in the empirical chapters.

The dissertation analyses how rule of law projects by the World Bank and judgments of the Inter-American Court of Human rights *are implemented*. This section discusses how they *could be implemented differently*. In the empirical chapters, I explored context, design, and coordination as dimensions of implementation problems. This chapter brings together the findings from the empirical analysis and suggests ways for the Bank and the Court to flexibilize rule of law supporting activities in relation to:

1) Who is implementing, referring to the selection of stakeholders and context analysis
2) What is implemented, referring to framing of the content of reform and judgments

3) How implementation takes place, referring to procedures during implementation.

### 7.3.1 Implementing with whom? – differentiating political wills, reaching beyond single branches of government

I pointed out how explanations put forward in official documents and during interviews with World Bank staff and members of the IACtHR attributed the failure and non-compliance to lacking political will. In a first step, political wills at national level must be differentiated. Bank projects inner circle and the litigation teams representing the state before the Court only represent a small number of actors. Reaching out and negotiating with actors *in charge* for implementation and *affected* by it, hence, becomes a major task of the global governance actors. Current patterns that strengthen the gatekeeping position of the executive run the risk of contributing to maintain the status quo. On the other hand, directly engaging with other actors, such as national parliaments and judiciaries or NGOs, implies the risk of bypassing the structural counterpart for global governance actors. The way this reaching out is designed and the structure that frames the negotiation are important.

One interview partner stressed how looking beyond the state, presently constructed monolithically, can help to address changes that are more specific and mitigate burden shifting:

> "Okay, but you have to differentiate that the political will oftentimes is not a political will that rejects the IACtHR but a political will that is rejecting to make changes internally. For example, if you have to reform the prison system, or the police or the judicial branch. So the civil servants will tell you 'I do not have anything against the IACtHR but I cannot change the police'. (Interview #34, own translation)

Findings indicate how the rationale of holding the state accountable as a whole in the judgments of the IACtHR showed adverse effects of burden shifting. The way the reparations are framed, oftentimes disable parliaments and national debate while granting leverage and placing duties for implementation on the executive. In Argentina, the IACtHR leveled the ground for the Supreme Court to resist, by forcing it to obey narrow reparation orders. Subsequent negotiations in the IACtHR with the executive responding in public hearings revealed the dead-end situation and the problematic logic of accountability. Not respecting parliamentary decisions and procedures have played a role in both countries. Bank projects were cancelled or delayed because legislation was blocked. Pushing through reforms without previous consultation and approval however can hardly strengthen rule of law, despite a blocked congress. Looking at parliaments as natural allies to the Court in implementation or designing precautionary measures that seek to protect the judiciary from infringement, as in Peru, is also risky. The analysis in the empirical chapter showed that judiciaries are not the natural allies in judicial reforms and implementation of judgments. Depending on their position *vis à vis* the executive, implementation was influenced by national power struggles (Argentina) or political

infringement by the executive (Peru). Judiciaries also opposed reforms and judgments that were constraining their power structurally or aimed at reforming internal procedures. Singling out other branches in reparation orders circumventing the gatekeeping position of the executive makes the implementation processes prone to politicization, while at the same time it shrinks the space for political dissent and discourse. In Peru, discussion in relation of a precautionary measure granted in favor of the Supreme Court to secure its independency spiraled out of control and led to a rejection of the Court and political turmoil in the Supreme Court. Having said this, reaching beyond the executive both in design and implementation procedures remains nonetheless important because other actors are affected and can possibly affect implementation by counterbalancing other branches e.g., in systems marked by strong presidential power.

### 7.3.2 Implementing what? – self-restrain and refinement of procedures during implementation

In a second step, the "political will" needs to be disentangled from the will(s) of the global governance actors, meaning that design of reforms and judgments must not by defined by Bank and Court. Findings showed that design of reforms and reparation often inflicted with national processes of rule of law development. For example, artificially converging the interests at international and national level in alliances between the executive in Argentina and the Bank resulted in the PROJUM Bank project that never took hold. The critique thus relates to problems if universalism in human rights and development cooperation and yet applies to a more pragmatic level. The critique I seek to put forward in relation to universal design relates less to values, norms and rights as such (e.g., Zimmermann 2017; Mende 2022), but more to universalized and homogenized vision of state institutions and state ordering necessary for law enforcement. In this logic, strengthening the judiciary and enforce law brings about the application and institutionalization of values, norms and rights. The universalism underlying the logic of change that seeks to strengthen the judiciary for fostering better rule of law performance is problematic. Applying blueprint solutions to strengthen rule of law, is not only problematic because of this inherent imposition of state ordering concepts, but it is even more so potentially harmful for fueling already existing national power imbalances.

Claiming political neutrality and designing technical measures is another way to narrowing the possibilities for national actors to influence the design of reforms and judgments. It is also shielding the Bank and the Court from accusations of political infringement. Yet, interventions of Bank and Court were openly aiming for changes in politically relevant structures and were

political in nature.[349] Judicial decisions have political implications, especially when jurisdictions overlap and national and international levels are included. Reparation orders were often dealing with politically sensitive content. Political dynamics, such as a blocked congress in Peru, the particularities of national institutional settings, such as federal differences in the Court management systems in Argentina and informal arrangements, for example institutional agreements for the payment of pecuniary reparation orders between the ministries in Peru, fall short in rigid design of reforms and reparation orders. Universalistic approaches to rule of law promotion and rigid design strip away possibilities of national translations and the potential to formulate alternative solutions. Transformative potential vanished behind legalistic approaches and attempts to harmonize judicial procedures. In the current approach to reforms and reparations the interest of the governments is rendered equal to the interest of the global governance actors, which is the interest of the "reform willing" parts of the state. Disentangling the false union of interest between the global level and the national level must be the starting point for debate.

Judgments issued by the Court and reform designed by the Bank undermine the potential for rule of law development in several ways. Narrow selection of stakeholders is one problem in the impasse created between international imposition and national resistance described in the analysis, a rigid and depoliticized design is another. Rule of law development exceeds legal aspects and the functioning of the judiciary. Design of reparation orders and reforms remain trapped in paths of legalistic and functional framing of law and state ordering. This said, Court and Bank built their own institutional and conceptual boundaries for engaging in designs that are more comprehensive. Hence, flexible implementation and amendments of design in dialogue with national actors are a possible way ahead.

[349] International law draws circles of competences defined as jurisdictions. In respect of the subsidiarity clause, the IACtHR would breach national jurisdiction only when national remedies are exhausted. Discussion and tensions about overlapping competences emerged in all implementation processes. In financial development action, the state never ceases to have competence over internal affairs, since it never granted the right to permanent infringement. The degree of infringement is determined by the particular loan, not by a general treaty of submission to the global governance actors. However, power asymmetries in global governance and political economic structures can have similarly strict effects as binding legal agreements. Hence, financial development promotion infringes with national politics in large scale not only in providing resources but also in binding them to the content of reforms.

### 7.3.3 Implementing how? – enhancing coordination in implementation

Rule of law promotion by Bank and Court addresses and tries to reduce a lack of accountability, mainly of horizontal accountability between branches of government.[350] Judgments of the IACtHR go beyond a notion of justice that relies on punitive measures but also address legislative changes e.g., in relation to custody of juveniles in Argentina and structural changes relating to public policies and memory policies in Peru. The goal of implementation is not only punishing the perpetrators of human rights violations but also to initiate structural changes that ensure non-repetition of the violation. Consequently, non-implementation is not only human rights perpetrators go unpunished for their crimes but carries a broader notion of impunity. Non-implementation implies a spectrum of lacking accountability: ranging from individual accountability e.g., judges refraining from revoking rulings or initiating investigations to the state, which is not correcting institutional deficits to redress ongoing or future violations. The analysis showed that horizontal accountability is oftentimes not enhanced but instead disabled, by IACtHR procedures accepting burden shifting in written communications and public hearings. Coordination between branches of government is always complicated yet a procedure offering additional possibilities to circumvent it before international organs remains in the same patterns of impunity it seeks to change.

While the Bank has no legal mandate to address impunity, judicial projects always depart from an assumed deficit in accountability as the reason for intervention. However, the process tracing showed how the requirement of intra-branch coordination is oftentimes undermined by narrow design and exclusive management structures, enabling to further an existing lack of accountability instead of strengthening mechanisms that foster coordination. In addition, vertical accountability in Bank projects was rarely addressed, for example in more participatory approaches.[351] Hence, coordination at national level is limited by procedures stipulated by Bank and Court during implementation such as coordination committees, public hearings. Instead of providing incentives and leeway to expand or initiate the debate at national level, the procedures determining the dialogue between national and international actors that relies on national coordination, remain narrow, focused on fulfilling indicators and reparation orders.

[350] See chapter 1, discussing Guillermo O'Donnells conceptualization of horizontal and vertical accountability as elements of rule of law in a Latin American perspective. See also this chapter addressing a main caveat of this work not including civil society and media as the "fourth state" in rule of law promotion strategies. Other research discussed their role extensively (see e.g., Keck and Sikkink 1998; Risse-Kappen et. al.1999; Cavallaro and Brewer 2008; Cavallaro et al. 2019).

[351] Similarly, the international actors show low levels of accountability for their own activities, see e.g., debate on who guards the guardian and IEG.

When executive organs were set up, they often became politicized. Project coordination procedures at national level in Bank projects are largely determined by the management structures set up for implementation and the initial selection of stakeholders. The composition of the committees largely escapes public scrutiny and possibilities for correction. Findings indicate that negotiations for judicial reform took place in Argentina in parallel structures. The coordination committee set up by the Bank, however, was hampered by corruption and political power struggles over competences. Instead of providing a forum for the implementing actors to discuss problems, the organ was highly politicized and fueled conflict.

The implementation of judgments of the Court relies largely on preexisting national structures. For implementation of judgments of the IACtHR, the state level is in charge of setting up structures or mechanisms enabling coordination between branches addressed in the reparation orders. Many reparation orders require such a coordination. Coordination between branches of government during implementation of judgments sometimes failed, by default (e.g., one branch rejecting the authority of the Court and the other branches hiding behind that decision) or through miscommunication (e.g., between federal and state level within one branch of government). In Peru and Argentina coordination between branches for the implementation of judgments was also blocked at national level due to political dissent (e.g., supposed infringement into judicial independency by the executive triggering a precautionary measure of the IACtHR in Peru) or because of management problems. Negotiations about questions of larger political ordering (e.g., the relationship between international law and national law in Argentina, the relationship between judiciary and executive and discussions about impunity for crimes against humanity in Peru) triggered by or directly addressed in Court judgments often expanded beyond the case and affected the implementation.

### 7.3.4 Flexibilizing approaches of Bank and Court

The next section will draw attention to (1) possibilities for flexibilizing approaches by disentangling political wills and looking beyond the monolithic construction of the state, (2) possibilities for self-restraint and the refinement of measures to lessen the tension between politicization and technical approaches to rule of law and (3) possibilities to foster coordination in implementation processes by opening sites for negotiations and including actors.

*(1) possibilities for flexibilizing approaches by disentangling political will and looking beyond the monolithic construction of the state*

Rule of law promotion in judicial reforms of the Bank, and reparation orders cannot only be negotiated with the executive but must instead include judiciaries as important actors and acknowledge the importance of parliamentary involvement.

Albeit the global governance actors are bound to approach "natural counterparts" (Ministry of Finance for the Bank and Defense team representing the state before the Court) for signing the loan and representing the state before the Court, other branches of government, state actors, administrative Court staff and experts can be included in different ways at implementation level. The Bank has larger leeway in the selection of stakeholders in comparison to the Court. This refers to the selection of stakeholders for feasibility studies influencing the design, the selection of the actors addressed in judicial reforms and the composition of the executing committees, in charge of implementing reform. The Bank could envisage a more active role of the judiciaries in negotiating reforms and implementing them. Design and timetables must also reflect increasing awareness for previous parliamentary debate as necessary steps for changing legislation. Having said this, the Bank and their "natural" counterpart, the Ministry of Finances and the executive negotiating the overall Country Partnership Framework usually have better personnel ties. Purposely counterbalancing this executive overhang, including the judiciary and granting more leeway to national experts during implementation for amendments of management structures and for identifying stakeholders could lessen this problem.

The Court is more restricted when trying to reach beyond the executive in the official judicial proceedings before the Court during merits stage. In jurisdiction and decision power, the mandate of the Court does not reach beyond the executive as the actor in charge for enforcement. Nevertheless, the accountability structure during implementation is more diffuse and also open to be amended. As discussed, reparation orders can be directed specifically to one branch of government. However, Art. 58 of the Rules of Procedures includes the possibility of hearing judiciaries as expert witnesses in cases. As will be discussed in the last section, supervision stage offers larger possibilities to develop new patterns and has already established mechanisms to include other actors beyond the executive as the gatekeeper that represents the state in official procedures before the Court.

*(2) Possibilities for self-restraint, accepting the overlap of competences, embracing national translations*

During design phase, implementation problems can be diminished by including national suggestions early. Additionally, implementation stage can show more flexibility in including

national translations and amending the reparation orders and the design. In addition, measures to assess the implementation can be amended. By embracing hybrid outcomes and incomplete implementation, instead of rushing over tensions, national translations can be embedded more easily, feeding also back into possibilities for discussing the content in political process at national level.

The Bank needs not only to include socio-legal consultants into the design phase, instead of economic experts but also to respect the findings. Discussing their findings with a broader audience *before* closing the loan and amending the design *during* implementation would show such respect instead of using consultations as fig leaves for supporting previously designed projects. This may result in changes of the content as well as in changes in the management team of the project. Conventional critique towards amending projects throughout implementation is this would hamper reliability and continuance of the inter-personnel and intra-branch relations, lowers coherence and heightens chances for corruption and interference. However, projects largely missing to address the important stakeholder and content of reforms, like in the Model Courts Project in Argentina or the projects impacted by severe power-struggles in Peru also showed problems of coherence and political interference. A continuation of projects despite manifest problems only contributes to the country's foreign depth and possibly enhance existing or newborn rivalries over resources instead of supporting reforms. The Bank must also cancel projects more often or refrain from engagement altogether when power centers are shifting and problems of coordination become apparent, respecting that not every problem is a problem that can be solved by amendment of management or design.

Formulating Courts reparation orders less strictly leaves more national leeway for implementation. If parties before the Court (including representatives of the victims) indicate a reparation order cannot be implemented or is no longer offering remedy to the parties, amendments and assessment of compliance can be negotiated for example in public hearings and country visits (see next section). Unclear provisions also caused problems during implementation. The Court can lessen problems originating from technocratic and legalistic language through issuing subsequent clarifications. Refraining from intervention when national deliberation is underway or flexibilizing time spans for supervision are also options for the Court it could use, without neglecting its judicial mandate.

*(3) Possibilities to foster coordination in implementation processes, amending management structures, flexibilizing the supervision stage*

During supervision stage, the Court has more leeway than during merits stage to act as a political actor and to ensure better coordination. Nevertheless, the Court remains in a difficult position, being both the organ issuing the judgment and supervising it. Embracing the political character without losing legal authority is a challenge that will remain.

By contrast, the Bank has less leeway during that stage and more early on when selecting stakeholder and designing the project. Implementation is shaped by the structure set up and narrowly defined by fulfilling the indicators and executing the previously agreed terms. When the flexibility of the Court starts, the flexibility of the Bank largely ends.

Nevertheless, flexibilizing the reporting structure could be a useful tool for the Bank to enable learning within the IO and to assess coordination problems. Current reporting structure provides little insights into coordination efforts but as interviewers pointed out, is oftentimes an exercise of copy and paste. Introducing reporting structures that include other approaches to measure indicator fulfilment (e.g., qualitative interviews) could spell out implementation problems in a better way. On the other hand, loosen up the structure of reporting also contains the risk of contributing to less accountability. The current reporting system seeks to provide accountability mainly for supervision within the Bank. The purpose of reports is thus directed inwards into the Bank. Reports are little helpful tool for communicating coordination problems during implementation, since actors involved in the coordination rarely provide their view.

The Court has especially large leeway to foster coordination among national actors and to dialogue with national level during supervision stage. While the merits stage might be technical and has less leeway for political considerations, the supervision stage is political regarding timing, the procedures invoked, and the actors involved in the process. During supervision, the Court has ample competences[352] to interact with, to retract from or to dialogue with national actors. I will focus on three of the procedures that allow more flexibility: country visits, public hearings, including the joint supervision of reparation measures, and written proceedings.[353]

[352] Art 58. Rules of Procedures allows the Court to ask the national level which is the competent organ for implementation and then directly engage in dialogue. The Court did that for example in the case Molina Theissen (case concerning Guatemala). The participation of civil society can also be heightened by amicus curiae briefs informing also hearings at the Court and/or signing of agreements with national Human Rights Institutions.

[353] Other measures that can be enhanced for more dialogue and more context sensitive interventions are: an enhanced use of (1) advisory opinions, (2) precautionary measures and (3) special session in one country being member of the Court. (1). While not falling into the contentious jurisdiction of the Court, more use of advisory opinions can also enhance rule of law promotion outside the patterns described in this research, offering more

In the **country visits (visita in situ/visita in loco)**[354], Commission and Court can travel to countries and visit sites to meet parties involved and affected by the alleged violation. This travel enables the encounter of a variety of actors, which do not only consist of parties having standing status before the Court (representation of the victims, Inter-American Commission and state), but may include NGOs, lower administrative levels, indigenous communities and other actors. This bears potential for clarifying the local context of violations and for negotiating possibilities for remedies as well as problems during implementation.

In Argentina, the visits of the Commission in the beginning of the 90s played an important role for the human rights movement, stressing that the regional body was following the transition process in Argentina closely and symbolizing that the international community had an eye on the country. One interview partner that represented the state before the Court stressed the importance of such encounters for moving ahead current human rights policies and pushing for implementation of Court judgments:

> "In Argentina, despite not stopping all the cruelties of the dictatorship, it helped saving lives and it was important for us in that sense. In 2009, the executive decided to honoring the Commission and to invite them to Argentina to carry out a public honoring. So they came, the members of the epoch then and the current members and the Commissioner for the freedom of expression also came, Catalina Botero, a woman from Colombia. And it seemed to me that it would be a great time for complying with the Kimel decision and to reach out to the executive for acceptance of the project they had elaborated which was in reality always one of social analysis of the association that defended Kimel before the Court [...] I called them and they finally they decriminalized the injury of defamation in cases of public interest." (Interview #27, own translation)

Thus, visits in situ are tools at the disposal of the Court that can be flexibilized for entering dialogue with actors at state level. They are also encounters of symbolic importance where both Court and national actors can make use of political leverage, enhancing debate and push for reforms. However, visits are time-insensitive and costly. Given the IACtHR already has strict financial constraints, and the Secretariat is personally not well equipped, visits are a recommendable but not always a feasible measure.[355]

**Public hearings**[356] bear potential for better dialogue. They can be invoked to jointly supervise the implementation of reparation orders in several cases (e.g., public policy change and change

---

leeway for national translation practices while still offering anchor point for transformative action to evolve National parliaments as the bodies to include new legislation in relation to the opinion issued, hence, could be strengthened and national debate fostered. Precautionary measures have also been used to directly engage with national actors when implementation problems emerge (see chapter especially chapter 4.2. on precautionary measures in Peru). Another example of flexible mechanism at disposal in the Rules of Procedure of the Court are special sessions in one country (e.g., 62nd period of special session held in Colombia from August 26-28 2019. The sessions provide room for direct engagement with national actors concerning joint supervision of cases.

[354] In Argentina, the Court and the Commission realized visits in the years May 2013 (Lhaka Honhat), 2011, 2010. The OAS bodies visited Peru in 1991, 1993, 1998.

[355] Usually, the state that receives the court pays the costs.

[356] Note also that the Court held private hearings offering large leeway for negotiation behind closed doors, oftentimes with the Court acting as a mediator for the conflicting parties. Hence, the court can act less judicially,

in legislation for the crime of forced disappearances in Argentina). The format of the hearings remains deeply hierarchical, enacting a legal setting and requiring legal language. However, the parties heard before the Court can be diversified including e.g., expert witnesses relating about implementation problems. Similarly, the resolutions of supervision issued after the hearings must ensure to respect the allegations of the parties before the Court to find less strict measures and to respect national translations of reparation orders. The Rules of Procedure of the IACtHR provide flexibility regarding the timing of hearings. Parties can call for hearings, like they did in the case of the pardon granted to Fujimori in Peru, but it is the regional Court that decides on holding them or not. Holding public hearings in a context and time sensitive manner can ensure transparency, enable better and close supervision and provide a forum to expressing positions, clarifying problems and voicing demands (also for publicly "blaming and shaming").

The **written proceedings** (*escritos de contestación*)[357] can be flexibilized regarding timing, format and public availability.[358] While not offering room for dialogue, the written proceedings can lessen the lack of knowledge of the Court about the implementation stage and contributing to breaking up power hierarchies in knowledge production and dissemination. However, the Court remains the interpreter of the compliance process and problems that are outlined by the different parties in the written communications.

The following table summarizes the factors described in this chapter and can be a starting point for further recommendations and research.

Table 2: Institutional boundaries/implementation structure of Bank and Court

| **World Bank** | **IACtHR** |
|---|---|
| **Mandate** | |
| Financial development mandate (formally prohibiting interference with national politics, see also chapter one and four) | Legal mandate (including contentious jurisdiction, advisory opinions, see also chapter one and four) |
| National counterparts for signing loans: Ministry of Finances | National counterparts in the proceedings before the Court representing the state: usually executive |

depart from narrow interpretations of compliance and work towards consensus. While possibly positively contributing to compliance, this mechanism is not apt for heightening transparency and enabling larger political debate but rather exclusionary and behind closed doors diplomacy.

[357] Handling the reports is also a question of resources. For example, during 2017, the Court received 280 state reports and 330 written observations (Saavedra Alessandri 2020: 180).

[358] The Court started to make reports of the parties available on the Courts homepage in late 2019. Participatory observation in the supervision team at the Court revealed how the state reports are oftentimes mirroring the burden shifting at national level, providing incomplete information about national actor's proceedings, reflecting mis-communication and mis-coordination. Public availability could contribute to better country reports and more engagement with the content of the reports.

| | |
|---|---|
| | Jurisdiction over nation states and only in human rights cases, not over individual state actor |
| **Design** | |
| Technical financial development approach, focused on good governance and on creating an investor friendly legal environment | Judicial approach to rule of law, focused on enforcement of laws, legal security and coherent design of reparations |
| Economic analysis, neoliberal model for administrative and policy reform,[359] oftentimes mirrored in economic expertise within the Bank | Legal analysis and design of reparations,[360] judicial expertise in the IACtHR, limited by personnel restrictions |
| **Coordination** | |
| Country Partnership Framework signed with the executive agreement guiding overall activities | Existence/non-existence of national management structure for implementation (e.g., Paraguay) |
| | Severe financial and personal restraints (depending on funding by the members states) |
| Implementation Completion and Results Report (ICR) and Implementation Completion and Results Report Review (ICRR) produced rating the performance of the World Bank | Written reporting structure during supervision stage (reports submitted by Inter-American Commission of Human Rights, the state, representatives of the victims) |

Flexible factors Bank and Court

| **World Bank** | **IACtHR** |
|---|---|
| **Context** | |
| Large leeway for selection of stakeholders to include in proposed reform projects | Certain leeway during supervision procedure to also request written information from national actors, not parties before the Court (including judiciaries, expert witnesses) |
| Invitation of socio-legal experts and political scientist as consultants for context assessments instead of economic experts | Context assessment through invitation of actors to participate in national visits and hearings |
| | Public hearings, including expert testimonies, oral information e.g., relating to implementation and coordination problems |

[359] In theory, what I name constraining factors at conceptual level, like the neoliberal approach to rule of law in the Bank, are also negotiable if the Bank ceases to operate under the current Rules of Procedures, changes its management structure and undergoes a drastic paradigm shift.

| **Design** | |
|---|---|
| Amendment of style and impact of context assessment (e.g., binding nature of feasibility studies, mandatory public discussions) | More frequent use of advisory opinions and feedback into national debates, leverage for national actors to initiate broader structural changes |
| Inclusion of various branches and lower administrative units in the design of the reforms | Use of political and procedural leeway in the interpretation of compliance in resolutions of supervision |
| Use of leeway for timing for payment of financial tranches (amending the duration of the project) | Use of procedural leeway for timing of issuing resolutions of supervision, timing of public hearings, country visits, large margin for the Court to react context sensitive |
| **Coordination** | |
| Placement of executing unit and management structure in accordance with context assessment, correction of the placement throughout the process | Amendment of reporting structure (e.g., unified format for written communications to avoid burden shifting), more active request of information of other parties (e.g., judiciaries, police officers in charge of investigation) |
| Less top-down evaluation procedure, including voices from the partner government and other lower scale actors (qualitative interviews) | Joint supervision of reparation measures (measures of non-repetition, public policies), strengthening possibilities of coordination of actors at national level |

Source: Own Illustration

Post-judgment phases and post-loan agreements phases are part of larger politics of implementation and politics during implementation. Intervening in complex institutional settings means coping with political dynamics and possibly unleashing tensions. A plea for paying tribute to tensions as necessary elements in rule of law development and amending procedures to the political dimensions of legal and development interventions is therefore at the core of my argumentation.

Interview partners in Argentina and Peru demanded more and more diverse involvement of different actors at national level. Including more actors and including them differently is not necessarily leading to more compliance or better levels of indicator fulfilment. Debates and negotiations can result in failure and non-compliance but can strengthen rule of law. Compliance is not necessarily offering a positive outcome, nor does failure always imply a negative one. To be sure, implementation problems are not per se an expression of rule of law development. Politics during implementation and implementation politics also bear the potential of power abuse, as process tracing underlined. Current rule of law promotion approaches lead to processes with dead ends, commonly described as failures, non-compliance

or rejection of the international actor. They also showed adverse effects of fueling national power struggles and maintaining abusive state practice. Changing procedures and making use of flexible factors within the institutional framework might allow for lessen this problem. I argued that a normative yardstick for identifying constitutive moments can be the degree of deliberation, self-determination and representation of different groups. Now, what is normatively desirable is not necessarily empirically successful. More participation for example can also shake up institutional structure. It is beyond this study to determine what a "successful rule of law development" is. However, I argue that more and good deliberation leads to potentially better and democratic results. A deliberative process could for example lead to a recognition of indigenous justice, however, not measurable in terms of quota for closing of judicial cases. The other way round I question that projects and cases that are little deliberative, like in implementation processes studied in this thesis, can lead to sustainable outcomes even if implemented successful and according to the stipulated indicators.

This section outlined possible implications for the global governance actors. Implementation processes largely escape the influence of the global governance actors. Hence, flexibilizing the approaches and procedures might have limited impact. Flaws at conceptual level influence the suggestions made in this chapter. To reconceptualize limits and possibilities of global rule of law promotion more comprehensively, the connection between rule of law and the state in a context of institutional crisis and international intervention needs need to be studied differently. Departing from implementation level can be one way to do so. I suggest in this study the interplay between national and international actors in rule of law promotion should be structured differently and must be repolitized. Global governance actors can give input technical questions, provide resources and platforms to negotiate the content of reforms and institutional restructuring. However, reforms and judgements should refrain from imposing predefined solutions for rule of law development and the sovereignty of implementation and interpretation should rest with national actors. This requires a repolitization of accountability, with the people being the sovereign instead of the international organization.

# Conclusions

A great deal of controversy exists about what the rule of law as a state ordering concept and a morally guiding principle for governance comprises. Even more so, global activities for supporting rule of law are debated. In this study, I turn to implementation problems in two kinds of global rule of law support, financial development projects of the World Bank and human rights judgements of the Inter-American Court of Human Rights, and pose the question:
"*How are World Bank supported judicial reform projects and judgments of the Inter-American Court of Human implemented by national actors in Peru and Argentina?"*

What or who is failing when financial judicial development reform and international human rights judgments fail to be implemented? Ideals of neoliberal rule of law? Approaches to good governance and human rights support of global governance actors? Or states failing to live up to global governance standards of institutional efficiency and rights guarantees?
I suggest all of it and none. This study reveals problems in implementation in relation to flawed context assessment, eurocentric and rigid design of measures and interpretation of implementation status and emerging and not captured problems of coordination. Instead of only framing tensions and political maneuvering of national actors as problems to implementation, I argue that conflictive processes and processes relating to reordering the separation of powers among branches can bear constitutive moments for rule of law development.
I describe neoliberal elements in global rule of law support and reveal contradictions in logics of change and procedures applied by Bank and Court. Rule of law support activities by global governance actors fail in acknowledging the procedural character of the rule of law as they cut out mediation of interests from the equation. Questioning binary categories of success and failure helps to reconceptualize implementation problems.
My interest in implementation problems in rule of law support emerged from an irritation about scholarly literature attesting failure of judicial reforms and non-compliance with judgments but neglecting to address mismatches within logics of change of Bank and Court and between the logics of change and the procedures during implementation.

I develop the concept of constitutive moments for transformation in this study and suggest the degree of deliberation, self-determination and representation as a framework for assessment. I argue processes need to be repoliticized to allow a new conceptualization of rule of law. I discuss outcomes for the interplay between national and international level constating in the

flexibilization of the activities and a change in the evaluation of the implementation processes. Design of reforms and judgements could be more cautious and non-state actors should be included in the implementation process.

Interestingly, power struggles were not necessarily fierce when the intervention was large scale or concerned politically especially sensible topics – instead problems manifested in different cases, sometimes years after issuing the judgement, and in moments of reforms with minor depth of infringement. I interpreted this finding as a signal for the importance for the recognition of national politics during the implementation processes and the room for these national politics to be discussed. I do not wish to stipulate the view that all factors for implementation problems have been discussed in this study. Indeed, it would be interesting to trace processes in other regions of the world and other historical and institutional settings, to develop and test the argument on the importance of national political dynamics.

Conventional explanations often ascribe implementation problems to lacking political will, resistance against global governance actors, and lacking national institutional capacity and coordination problems. However, explanations often lack a more comprehensive and empirical analysis of political factors, politics of implementation, and politics during implementation.

In this study, I bring together different strands of literature including development studies and studies on compliance with international human rights judgements. Several scholars engaged in discussion of implementation problems in financial development reform of the World Bank in the judicial realm (e.g., Carothers 2001, 2010; Domingo and Sieder 2001; Trubek 2005, Trubek and Santos 2006; Hammergren 2003, 2015), also including critical perspectives (Garth and Dezalay 2002; Kennedy 2003, 2006; Pahuja 2011; Humphreys 2012) pointing out flaws and problems in global prescriptions for rule of law strengthening. Finding low rates of compliance with judgements, scholars also discussed enforcement problems in judgements of the IACtHR (e.g., Basch et al. 2010; Brewer and Cavarallo 2008, Staton and Romero 2019; Naurin; Donald et al. 2020). However, scholars rarely engaged in empirical studies of problems during implementation from critical perspectives.

I approach problems in global rule of law support first at a conceptual level discussing arguments in development critique (Esteva and Prakash 2010; Escobar 2012; Ziai 2015) and critique on international law and human rights law (Chibundu 1999; Chakrabarty 2000; Pahuja 2011). I build on the critique formulated in post-development studies and critical approaches to international law and human rights law in particular but instead of stopping with critique at conceptual level, I turn to the implementation level for my analysis. While scholars like Pia

Riggirrozi (2005) and Maria Tuozzo (2004, 2009) in their studies on judicial reforms in Argentina provided useful insight insights into deficits of the Bank, and Courtney Hillebrecht (2014a, 2014b) and Alexandra Huneeus (2011, 2012) stressed institutional interplays and political aspects during implementation of judgements of the IACtHR, the studies rarely turn to describing the elements to the problems in depth or engage with discussions on how the problems might run counter to the postulated goal: rule of law development. This work seeks to partly fill this gap.

In this study, I provide a conceptual and pragmatic critique on the activities of two distinct global governance actors. I combine critical theoretical elements with a pragmatic approach, dismantle problematic descriptions of causes for failure and non-compliance and suggest the flexibilization of procedures during rule of law supporting activities. I offer a discussion on mismatching logics of change at conceptual level and an in-depth empirical analysis of contradictions in procedures during rule of law support at the implementation level.
By studying implementation processes in two countries and the involvement of two global governance actors, I reveal empirical examples for constitutive moments for rule of law development and demonstrate how procedures are limiting implementation. Exploring the processes empirically laid the ground for reconceptualizing failure and non-compliance. At a conceptual level, others have explored and described these problems. Few scholars looked empirically at how implementation problems manifest and how global governance actors and national actors reacted to them. Studying these contradictions and their relationship to implementation problems is at the heart of this study.
In the analysis, I reveal how global rule of law support activities – both at conceptual and at operational level – neglect the interest mediating a power balancing aspects and the procedural character of rule of law development. The comparison of the problems in activities of two global governance actors and their logics of change help to formulate a broader structural critique. I sustain the critique of global governance rule of law support through this twofold approach that combines exploration and reconceptualization.

I **explore** the context dimension during implementation processes and reveal the elements of poor context assessment and political maneuvering, political crisis, volatility and opposition, intervention and agenda setting, timing, national courts and institutional capacities and reporting procedures as elements in this dimension. In the analysis, I show how that Bank and

Court oftentimes neglected comprehensive context assessment, approached context in limited ways, negated the political nature of context, or ignored findings from previous research.

The exploration of the design dimension contributes to better describe the elements of rigid design and procedures, blueprint solutions, mismatches between design and national legislation, partial implementation and defection, delays in implementation and postponement of closing dates, and debates on the authority of the Court. While the Bank often applied blueprint solutions to previously defined problems in the judicial sector, the IACtHR was more concerned with coherency in jurisprudence, therewith partly disregarding national contexts or overruling national democratic requirements for implementation. Process tracing also reveals how both actors, Bank and Court, reacted inflexibly during implementation when amendment of the design of reform initiatives or a more lenient interpretation of the supervision were at stake.

Lastly, exploring the coordination dimension I find flawed and politically motivated selection of stakeholders, burden shifting to implement among branches and bypassing of branches of government, and limited possibilities to discuss questions of separation of powers and accountability as problematic elements during the processes. As central findings from the process tracing, the analysis reveals how the Bank either intentionally or by default set up structures – e.g., the executing committee in Argentina in the PROJUM project – in which political rivalries manifested and complicated implementation rather than smoothening the processes in judicial reforms. The aspect coordination among branches also proved to be crucial during the implementation of judgements of the IACtHR, yet legal procedures during supervision of judgements showed little flexibility to acknowledge and process explanations put forward for non-implementation by different branches of government e.g., in public audiences or in written reporting procedures. However, I also describe limitations in Court for selection of stakeholders at operational level and connected to its traditional approach to rights enforcement.

I argue during the first chapters that global rule of law supporting activities have focused on establishing laws, legal institutions and the enforcement of laws. Therewith, the approaches rely on logics singling out law enforcement as being central for accountability and legal security. The analyses in the empirical chapters reveal contradictions within these logics and between logics of change and implementation processes. Accountability is oftentimes not enhanced but reduced through procedures, bearing the risk of burden shifting during the implementation processes. Furthermore, logic of change singling out the judiciaries as levers for change and a narrow coordination structure contradict the goal of reaching an equilibrium at a horizontal and vertical level. Thus, rule of law mediating aspect and political dimension is

undermined by narrow selection of stakeholders and rigid formats for coordination during the implementation. However, questions in relation to dynamics among branches, the separation of power, sovereignty, hierarchy of norms and the relationship with the global governance level still emerged – I called these constitutive moments. The implementation of projects and judgments did not simply fail entirely but was accompanied by conflictive processes, tensions, rivalries, political maneuvering, and crisis. As constitutive moments I describe moments where relationships among branches of governments are conflictive and principles of state organization, institutional particularities, hierarchy of norms, and the relationship with global governance actors might be discussed. These moments can also be power affirmative, deepen institutional imbalances, or fuel conflicts among branches. As such, the developments stipulated in the processes are open ended.

Building on this exploration of different elements to the dimensions of implementation problems, I suggest ways to **reconceptualize** conventional explanations for implementation problems. I stress the importance of differentiating political wills at national level, to better grasp power asymmetries and political dynamics. I also argue for distinguishing better between approach to rule of law support applied by the global governance actors and approaches and proposals of different national actors and suggest refining the procedures during implementation, design of reforms, and interpretation of the status of implementation of judgments. Lastly, I make a plea for enhancing coordination among branches during implementation rather than restricting it in procedures, since empirical analyses revealed how limiting procedures bear the risk of burden shifting, ultimately reducing horizontal accountability. Adhering to a pragmatic stance, I offer ways to flexibilize the procedures of Bank and Court based on the findings from analyses suggesting the Court could e.g., lessen rigid interpretation schemes for compliance, make more use of provisional measures, and establish joint supervision possibilities. The IACtHR could also make use of the possibility to ask the national level which is the competent organ for implementation and then directly engage in dialogue, as these procedures bear potential for clarifying the local context of violations and for negotiating possibilities for remedies as well as acknowledging problems during implementation at more nuanced levels (e.g., administrative unites). I also suggest the Bank could amend the style and nature of context assessment measures and invite socio-legal experts and political scientist as consultants for context assessments instead of economic experts, use the leeway for the timing for payment of financial tranches during the project, and amend the choice of stakeholders in coordination mechanism throughout the implementation.

In sum, I show how problems emerge in implementation processes and how actors reacted to them. I discuss how financial development rule of law support and human rights arbitration seek to influencing the substance of policies as much as ways of state organization, while neglecting the political dimension in the activities. I develop the argumentation that implementation of judicial reforms and compliance with judgments is procedural as it is necessarily always conflictive. Building on the findings, I therefore suggest to reconceptualize implementation problems in global rule of law supporting activities not only as problems of lacking political will, national institutional incapacity, or rejection of the authority of global governance actors on part of national elites but also as part of rule of law development

*Beyond implementation problems – alternative versions of rule of law development*

I stated throughout this thesis that human rights adjudication and rule of law support form part of a political project of modernity. I described problems in the approaches rule of law support by Bank and Court as being problematic centering on law enforcement while cutting out more dynamic, context sensitive, and process-oriented approaches to rule of law. I argue, furthermore, that rule of law dynamics are not only better addressed in more procedural approaches – as suggested in the last part of chapter seven turning to the flexibilization of procedures – but escape rigid formats of state ordering enshrined in development paradigms. Developing alternatives to rule of law as currently attached to neoliberal modus operandi in states starts with looking beyond the paradigms in the approaches of the global governance actors.

> "The struggle of those who are managed must lie in refusing to be the grass when elephants fights and in [...]hijacking the arena for an alternative vision of democracy, the state and the law"(Baxi 1987: 81)[361]

This research reveals problems in cooperation and accountability during current implementation processes and impossibilities of contestation from within these processes. Analyzing implementation processes focusing on problems helps to reveal inter and intra-institutional global and national struggles for power. Knowing more about these kinds of struggles can inform social actors about where to best anchor counter-hegemonic critique. It can also help to identify entry points for countering the activities from within this system. Thus, constitutive moments can also be moments when criticality enters rule of law development.

I discuss how global rule of law support is starting from a vantage point of already unbalanced power and exclusionary governance. It is deeply intertwined with ideas of the meaning of law, power and separation thereof, ideas about duties and obedience, who is granting rights to whom

[361] Baxi made this argument in relation to Indian democracy.

or securing them, which kind of rights and who needs protection. I outline how critical legal scholars have continuously stressed the oppressive character of law and legal institutions (Buckel and Fischer-Lescano 2007; Anghie 2007, Chimni 2017).[362] Conventional readings of rule and activities in the support thereof thus run the risk reinforcing the dichotomy between oppressors and oppressed.

Leaving these logics of change in neoliberal rule of law promotion, I would therefore like to turn to emancipatory potential and utopian visions of the rule of law. Authors in critical post-colonial and post-development scholarship argue that global governance supporting strategies do not tame the repressive state but instead enforce unequal distributed power among branches while leaving the monopoly of power untouched (e.g., Baxi 2015; Mieville 2005 in relation to international law). How institutions enforce law, the design legal of procedures and the content of law cannot be negotiated in the backyard of global institutions or in executing committees. Instead, we could conceive of rule of law that is not based on monopolies of power but is rooted in egalitarian and communal structures.[363] This entails deconstructing the fortress of sovereignty that is shielding the state and global governance actors from critique and thinking sovereignty anew (see e.g. Chatterjee 2020).[364] In this, global governance rule of law support plays a marginal role precisely because the structure of rule of law remains attached to nation states. Now, which kind of rule of law can we conceive which is not at the same time strengthening neoliberal state institutions and oppressive structures? What kind of organization or institutional set-up can check power, support economic justice and social development as well as secure individual and collective rights? I suggest that in problems during implementation processes, situations can emerge that lead to questioning the neoliberal rule of law and develop alternative versions of rule of law. As I have argued, this kind of transformation cannot be initiated, supported, or captured by global rule of law support activities that I

[362] In his seminal work "From Apology to Utopia" Marti Koskenniemi (2005) discusses elements of the argumentative practice of using international law either to depolitizize or to repolitizize global governance and international relations. Despite the power affirming aspect of law, the critical legal scholar movement (CLS) has underlined the transformative potential of law. Marxists have criticized this approach as being too naïve and contradictory. Prominently, China Miéville finds that this instrumentalist view is contradictory to the schools own agenda (2005: 6) and stresses: "The international rule of law is not counterposed to force and imperialism: it is an expression of it." (2005:8).

[363] Post-colonial scholars hint at some ways for decoupling the guaranteeing of rights and accountability from states (Examples include utopias of a feminist rule of law that deconstruct the patriarchal state ordering concept (Segato 2007, 2013), notions of indigenous rule of law (e.g. de Sousa Santos 2002) and decolonial state theory (Mignolo 2009, Mignolo and Walsh 2018, see also Baxi 1987, 2000, 2007).

[364] Partha Chatterjee (2022) builds on Foucault and Gramsci in his theorizing on popular sovereignty, describes the suppression of violence in nation-states. He also develops on dispersion of sovereignty e.g. when sovereignty is territorially dispersed and recalls moments where anticolonial nationalism has innovated new structures and practices of sovereignty referring to India.

problematize in this work. Thus, using leeway within the processes for compliance and implementation is different to exploring utopia. Current implementation activities largely remain sites for the manifestation of hegemonic power as sustained by law.

However, building on the findings from analysis I suggest, by default, global governance support activities could serve as a platform for such developments. Rule of law support activities can be captured, sidelined, and become sites where alternatives are discussed. Constitutive moments are not critical themselves but can be moments where criticality can anchor and counter-agendas can develop and be exercised, precisely because they reveal the flaws in neoliberal rule of law and global rule of law support.

Studying how rule of law support is implemented helps to reveal moments where the flaws in rule of law support and the system maintaining these features become apparent. Nevertheless, if accountability is attached to the monopoly of power of the state in global governance approaches to the rule of law, these flaws will likely remain. As described earlier, Bank and Court as international actors depart from an individualized notion of rights; however, rights are mediated through states and enforced by the government. Developing different approaches to law and development implies thinking differently about the relationship between the state and the individual, legal duties, and accountability. A universal notion of rule of law must not necessarily be at odds with emancipatory potential of the concept, a modus of state organization, a code of conduct in institutions, and a nucleus for societal mobilization. This means to also acknowledge in practice the inherent political dimension of rule of law. As Walter Mignolo stresses that repoliticization must also be coupled with decolonization:

> "diversality, a project that is an alternative to universality and offers the possibilities of a network of planetary confrontations with globalization in the name of justice, equity, human rights, and epistemic diversality. The geopolitics of knowledge shows us the limits of any abstract universal, even from the left, be it the planetarization of the social sciences or a new planetarization of a European fundamental legacy in the name of democracy and repoliticization."(Mignolo 2002: 90)

Constitutive moments are thus to be found inside the implementation processes but reach beyond them. On theoretical level, however, there is no inside or outside to rule of law development but processes converge. Hence, a first suggestion is to concentrate research efforts to other entities and structures, both globally and locally, not trapped in the nation state logic and renewed through and in global governance. Questions of social and economic justice extend beyond a version of rule of law as supported Bank and Court. Thus, the emancipatory potential of the rule of law must be sought in national policies and the pressure to transform institutions from below and transversal solidarity. Holding states accountable is also a political struggle different to the implementation of laws and human rights judgements, as it is a struggle for a different kind of global ruling and a different form of state ordering. Politicization, instead of

technocratic approaches and juridification, is a starting point for this. These political struggles *against* abusive state behavior and, importantly, *for* alternative understandings of securing rights and practicing the rule of law already exist.[365] Examples of the everyday struggles rooted in alternative utopian visions of the rule of law are practiced in feminist movements questioning the state and its patriarchic power structures in legislation and law enforcement. The movement *Marea verde* (green wave) won a battle in Argentina in 2020 when the senate passed a law granting legal and free abortion; other groups have been mobilizing against sexual harassment, feminicide, and equal pay in various Latin American countries. Finally, indigenous movements advocate for different approaches to rights, including collective rights, the inclusion of the rights of nature and to nature. All of these are examples of how both, rule and law, can be envisioned differently and more justly.

As I have sustained, the law can provide tools for these struggles but is also part of the struggle itself and is transformed through the struggle. Without acknowledging this character of a double or multi-edged sword change trough law, change by law and change of law cannot contribute to alternate legalities and ultimately alternative forms of rule of law.

In the study, I discuss implementation problems as entry points for rethinking global governances' logic of change and the procedures applied in international rule of law support. Studying the processes Bank and Court engaged in, I find that financial development rule of law promotion and human rights arbitration addressed the substance of policies as much as ways of state organization. However, neoliberal approaches to rule of law neglect the political dimension as thus contribute to reducing human rights and state order to the legal sphere and judicial institutions. Process tracing reveals how questions in relation to state ordering, hierarchy of norms, the relationship among actors at national level and with the global actor arose during implementation but were little acknowledged, sidelined, or suppressed. The procedures during implementation were limited in ways to deal with the tensions, which were instead framed as problems to implementation.

[365] One prominent example of a different form of organizing governance are the juntas in the Zapatista movement in Chiapas. The Zapatista movement became known after the EZLN uprising of 1994 in Mexico, Chiapas, but forms of organization trace back to the 1980s. In addition to fighting against unjust government practices of the state, the Zapatistas redefine and develop different ordering principles such as participation, order and law, and their relationship to each other. The movement maintains relations and exchange with other autonomous regions across the world.

A central contribution of this study is to connect the analysis of implementation problems to conceptual critique in narrow definitions of rule of law. The empirical analysis shows how an impoverished, legalistic, and enforcement-oriented definition of the rule of law conflicts with implementation processes and rule of law development. I argue that the neoliberal reading of rule of law in the development paradigm shrinks ordering to securing individual property rights and private contracting through markets, while human rights ordering largely focusses on law enforcement and legal security in a state-centric model. During implementation procedures applied in rule of law activities by Bank and Court limited possibilities for re-ordering of state structures, the negotiation of interests and enabled the shifting of accountabilities. Reconceptualizing problems not as problems of implementation or enforcement problems but as conflictive and constitutive moments for questioning state ordering can help to stipulate debates about what rule of law is currently developed and what might be alternative to it.

This study comes with limitations. I have focused on the analysis of a few implementation processes of Bank supported judicial reforms and implementation of IACtHR judgments. There may have been other regions and examples when rule of law support focusing on the judiciary went smoothly, and international human rights judgements were fully implemented. I addressed the puzzle of failed reforms and non-complied judgements focusing on two Latin American countries as examples of institutional settings and outlined hyper-presidentialism and parallel juridification of politics as prevailing characteristics of the settings. Thus, this might have influenced the emergence of implementation problems in rule of law supporting activities operating on logics of change that focus on the judiciary. The generalizability of the findings is limited, as I suggest that national politics of implementation, particular institutional settings and structures and procedures in global governance interact strongly. Global rule of law supporting activities by other actors come with different limitations and the procedures might act out differently in other institutional settings and interact in other ways with national politics of implementation.

However, there also exist possibilities of further studies for improvement and refinement of the elements described in this thesis. Parallels from this study could be drawn to rule of law supporting activities within the European Union framework, e.g. in relation to Poland (especially in relation to the independence of the judiciary) and Hungary and discussion on the place of the UK in the European Human Rights System. Compliance with rule of law criteria

(e.g. as adopted by the Venice Commission)[366] have also played a role in talks about EU accession with Eastern European countries.

How to develop these lines of thought and explorations further? Studies could apply suggested reconceptualization in the study of implementation problems to other global governance rule of law supporting processes e.g. in EU-enlargement policies (albeit the logics of change bearing strong particularities), regional governance in ASEAN, in the African region and in other regional contexts. Furthermore, research could also focus on processes of "successful implementation" in other regions of the world and analyze whether the logics applied differently, if design was less controversial and coordination approached in other ways. Single elements to problems that emerged in the analysis could also be explored further e.g. the relational aspect in implementing is connected to the question of timing. Temporality and sequencing as an important aspect in global rule of law support is underexplored. In more general terms, framing the relationship between state and accountability can be an angle explored in further studies. They could explore how splitting up duties and accountabilities to implement Court judgements changes coordination during implementation. This goes down the line of flexibilizing approaches of the Bank and the Court. Further studies could also explore how other forms of accountability, beyond definitions of accountability prevailing in human rights attributing responsibility for implementation to monolithically constructed entities in states, interact with demands for justice of persons and families whose rights have been violated. This would entail addressing and adopting an individual-centered perspective on accountability.

Concluding this study and outlook by ways of recalling my motivation to study implementation problems.

I argue in this thesis that tensions are part of rule of law development and yet, current approaches to rule of law support in global governance interpret and act on these tensions as problems. Compliance with judgements and implementation of reforms is not the international equivalent to accountability. Rather can moments of non-implementation, partial implementation, the rejection of authority global governance organs, problems of checks and balances at national level – what I explored as problems during implementation in this study – be constitutive moments for rule of law development. Global rule of law activities are shielded

[366] See e.g. the report on the rule of law by the Venice Commission (2011), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e, or the Venice Principles (2017), a rule of law "checklist" developed by the organ of the Council of Europe, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, both last accessed 24.04.2022.

from politicization – however, politicization is an unavoidable and necessary element of rule of law development. I address this contradiction in my study as the initial irritation and puzzle and put forward the argument that failed rule of law reforms and non-compliance with international judgements can be part of rule of law development and an opportunity to study the relationship between judiciary and executive and global governance activities. Discussing the conflictive and unfinished character of rule of law by empirically looking at the constitutive moments in the processes can be the starting point for further analyses as here lies a fertile ground for constructive criticism of implementation problems in global rule of law support.

Bibliography

Abramovich, V. (2006): Los estándares interamericanos de derechos humanos como marco para la formulación y el control de las políticas sociales. *Anuario de Derechos Humanos*, 13–51.

Abramovich, V. (2009): From massive violations to structural patterns: new approaches and classic tensions in the Inter-American Human Rights System. *SUR-Int'l J. on Hum Rts.* 11 (7) 6-39.

Abramovich, V. (2017): Comentarios sobre 'Fontevecchia', la autoridad de las sentencias de la Corte Interamericana y los principios de derecho público argentino. *Pensar en Derecho, Universidad de Buenos Aires* 10, 9–25.

Acharya, A. (2004): How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism. *International Organizations* 58 (02), 239-275.

Ackerman, B. (2000): The new separation of powers. *Harvard law review*, 113 (3)633-729.

Acosta, A. (2012): Buen Vivir Sumak Kawsay. Una oportunidad para imaginar otros mundos: Editorial Abya - Yala.

Acuña, C. (2014): La dinámica político-institucional de la reforma judicial en Argentina. Available at biblioteca.cejamericas.org., last accessed 05.06.2022.

Acuña, C.; Catalina Smulovitz (1997): Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering Courts. In J. A. McAdams (Ed.): Transitional Justice and the Rule of Law in New Democracies: University of Notre Dame Press, 93–122.

Adelman, J.; Centeno, M. A. (2002): Between liberalism and neoliberalism: Law's dilemma in Latin America. In Y. Dezalay, B. Garth (Eds.): Global prescriptions. The production, exportation, and importation of a new legal orthodoxy. University of Michigan Press, 139–161.

Alejandro, A. (2021): Reflexive discourse analysis: A methodology for the practice of reflexivity. *European Journal of International Relations* 27 (1), 150–174.

Alexander, G. (2002): Institutionalized uncertainty, the rule of law, and the sources of democratic stability. *Comparative Political Studies* 35 (10), 1145–1170.

Alfonsín, M. L., and Salerno, L. (2019): La independencia judicial en el Perú en crisis según los estándares del Sistema Interamericano de Derechos Humanos. *LEX* 16 (21), 79–90.

Alter, K. J. (2008): Agents or trustees? International courts in their political context. *European Journal of International Relations* 14 (1), 33–63.

Alter, K. J. (2012): The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review (Faculty Working Paper, 212). Available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1211&context=facultyworkingpapers, last accessed 05.06.2022.

Alter, K. J. (2014): The new terrain of international law: Courts, politics, rights. Princeton University Press.

Alter, K. J.; Helfer, L. R. (2017): Transplanting international courts. The law and politics of the Andean Tribunal of Justice. Oxford University Press.

Alter, K. J.; Helfer, L. R.; Madsen, M. R. (2016): How context shapes the authority of international courts. *Law & Contemp. Probs.,* 79 (1) 9-12

Alter, K., Helfer, L. R.; Madsen, M. R. (2018): International Court authority. Oxford University Press.

Alvarez, I.; Ayala, C.; Baluarte, D.; Del Campo, A.; Canton, S. A. (2007): Conference: Reparations in the Inter-American System: A Comparative Approach Conference. *American University Law Review* 56 (6), 1375–1468.

Anghie, A. (1999): Time present and time past: globalization, international financial institutions, and the third world. *NYUJ Int'l L. & Pol* (32)243

Anghie, A. (2008a): Imperialism, sovereignty and the making of international law. Cambridge University Press

Anghie, A. (2008b): TWAIL: Past and future. *Int'l Comm. L. Rev.* (10), 479.

Anja, J.; Liese, A. (2013): The Power of Human Rights a Decade After: From Euphoria to Contestation?. In Risse,T.; Ropp S. C.; Sikkink, K. (Eds.): The Persistent power of human rights : from commitment to compliance. Cambridge University Press, 26 – 42.

Anzola, S. I.;Sánchez, B. E.; Urueña, R. (2015): Después del fallo: el cumplimiento de las decisiones del Sistema Interamericano de Derechos Humanos. Una propuesta de metodología. *Colección*, 121-167.

Asociación Pro Derechos Humanos (APRODEH) (2018) La situación de los derechos humanos en el Perú. Balances y perspectivasdesde el mecanismo del Examen Periódico Universal 2017.

Asociación Pro Derechos Humanos (APRODEH) (2019): Indígnate: suspenden por quinta vez inicio de juicio oral por conflicto las bambas. Pubslished (8/13/2019), available at aprodeh.org.pe. last accessed: 05.06.2022.

Astete, J. (2015): Estandares De La Corte Interamericana De Derechos Humanos Para La Reparacion Del Derecho A La Verdad En El Peru Del Posconflicto. *American University International Law Review,* 32 (2), 437-468.

Ayrolo, V.; Míguez, E. (2012): Reconstruction of the Socio-Political Order after Independence in Latin America. A Reconsideration of Caudillo Politics in the River Plate. *Jahrbuch für Geschichte Lateinamerikas - Anuario de Historia de America Latina* 49 (1), 107–132.

Bailliet, C. M. (2013): Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America. *Nordic Journal of Human Rights* 31 (4), 477–495.

Balardini, L. (2016a): Argentina: Regional protagonist of transitional justice. In E. Skaar, J. García-Godos, C. Collins (Eds.): Transitional justice in Latin America. The uneven road from impunity towards accountability. Routledge, 50–76.

Balardini, L. (2016b): Monitoring Human Rights Trials: Information Strategies Developed in Argentina's Transitional Justice Process. Monitoring Human Rights Trials: Information Strategies Developed in Argentina's Transitional Justice Process. *Transitional Justice Review* 1 (4), 233–261.

Baluarte, D. C. (2012): Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives. *Am. U. Int'l L. Rev., (*27) 263.

Barron, G. (2005): The World Bank and rule of law reforms. No. 05-70 (Development Studies Institute, LSE, Working Paper Series). Available at https://www.files.ethz.ch/isn/137920/WP70.pdf, last accessed: 05.06.2022.

Basabe-Serrano, S. (2012): Las distintas dimensiones de la independencia judicial: Comparando las cortes de justicia de Chile, Perú y Ecuador. *Ruptura (*56) 239.

Basch, F.; Filippini, L.; Laya, A.; Nino, M.; Rossi, F; Schreiber, B. (2010): The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions. *Sur: International Journal on Human Rights* 7 (12), 9–37.

Baur, N., and Blasius, J. (Ed.) (2014): Handbuch Methoden der empirischen Sozialforschung: Springer.

Baxi, U. (1987): Law, democracy and human rights. *Lokayan Bulletin* (4/5), 75–91.

Baxi, U. (2015): Remaking Progressive Global Governance: Some Reflections with Reference to the Judiciary and the Rule of Law. In Stephen Gill (Ed.): Critical Perspectives on the Crisis of Global Governance: Palgrave Macmillan, 162–180.

Bazán, V.; Fuchs, M.-C. (Eds.) (2018): Justicia y pollítica en América Latina: Konrad-Adenauer-Stiftung; Fundació Konrad Adenauer (Justicia Constitucional y Derechos Fundamentales).

Beach, D.; Pedersen, R. B. (2013): Process-tracing methods. Foundations and guidelines: University of Michigan Press.

Behr, H.; Williams, M. C. (2017): Interlocuting classical realism and critical theory: Negotiating 'divides' in international relations theory. *Journal of International Political Theory* 13 (1), 3–17.

Bellamy, R. (2017): The Rule of Law and the Separation of Powers. Routledge.

Bengtsson, B.; Ruonavaara, H. (2017): Comparative Process Tracing. *Philosophy of the Social Sciences* 47 (1), 44–66.

Bennett, A. (2008): Process tracing. A Bayesian perspective. In Box-Steffensmeier, J. M.; Brady,H. M.; Collier, D. (Eds.): The Oxford handbooks of political science. Oxford University Press, 702–721.

Bennett, A.; Checkel, J. T. (2014): Process tracing. From metaphor to analytic tool. Cambridge University Press.

Bennett, A.; Elman, C. (2016): Case Study Methods in the International Relations Subfield. *Comparative Political Studies* 40 (2), 170–195.

Bernard, H. R.; Ryan, G. W. (2010): Analyzing qualitative data: Systematic approaches. Sage.

Bhabha, H. (2012): The location of culture. Routledge.

Bhambra, G. K. (2010): Sociology after Postcolonialism: Provincialized Cosmopolitanism and Connected Sociologies. In Boatcă, M.; Costa, S.; Gutiérrez-Rodríguez, E. (Eds.): Decolonizing European Sociology: Trans-disciplinary Approaches. Ashgate, 33–47.

Bianchi, A. (2016): International law theories. An inquiry into different ways of thinking. Oxford University Press.

Biebricher, T. (2012): Neoliberalismus zur Einführung. Junius.

Biebricher, T. (2021): Die politische Theorie des Neoliberalismus. Suhrkamp Verlag.

Bieling, H.-J. (2007). Die Konstitutionalisierung der Weltwirtschaft als Prozess hegemonialer Verstaatlichung–Staatstheoretische Reflexionen aus der Perspektive einer neo-gramscianischen Internationalen Politischen Ökonomie. In Buckel, S.; Fischer-Lescano, A. (Eds.): Hegemonie gepanzert mit Zwang. Zivilgesellschaft und Politik im Staatsverständnis Antonio Gramscis. Nomos, 141–161.

Binder, C. (2012): The prohibition of amnesties by the Inter-American Court of Human Rights. In International Judicial Lawmaking. In von Bogdandy, A..; Venzke, I. (Eds.): International

judicial lawmaking: on public authority and democratic legitimation in global governance: Springer, 295–328.

Bogner, A.; Littig, B.; Menz, W. (Eds.) (2009): Interviewing experts: Palgrave Macmillan.

Boos, T.; Brand, U. (Eds.): The Routledge Handbook to the Political Economy and Governance of the Americas. Routledge.

Brinks, D. (2004): Judicial reform and independence in Brazil and Argentina: the beginning of a new millennium. *Tex. Int'l Law Journal* (40), 595.

Brinks, D. M. (2009): From legal poverty to legal agency: establishing the rule of law in Latin America. (University of Texas). Available at: https://repositories.lib.utexas.edu/bitstream/handle/2152/22487/Brinks%20-%20From%20Legal%20Poverty%20to%20Legal%20Agency.pdf;sequence=3, last accessed: 05.06.2022.

Brinks, D. M. (2013): A Tale of Two Cities": The Judiciary and the Rule of Law in Latin America. In Kingstone, P.; Yashar, D. J. (Eds.): Routledge handbook of Latin American politics. Routledge, 92–106.

Brinks, D.; Blass, A. (2013): 'Beyond the Façade: Institutional Engineering and Potemkin Courts in Latin America, 1975-2009 (University of Chicago Working Paper).

Brinks, D. M.; Blass, A. (2018): The DNA of constitutional justice in Latin America: Politics, governance, and judicial design. Cambridge University Press.

Brown, W. E.; Jacobson, H. K. (Eds.) (1998): Engaging countries: Strengthening compliance with international environmental accords: MIT Press.

Bryant, R. (2016): On Critical Times: Return, Repetition, and the Uncanny Present. *History and Anthropology* 27 (1), 19–31.

Bryman, A.; Burgess, B (Eds.) (2002): Analyzing qualitative data. Routledge.

Buckel, S.; Fischer-Lescano, A. (2007): Hegemonie im globalen Recht – Zur Aktualität der Gramscianischen Rechtstheorie. In Buckel, S.; Fischer-Lescano, A. (Eds.): Hegemonie gepanzert mit Zwang. Zivilgesellschaft und Politik im Staatsverständnis Antonio Gramscis. Nomos, 84–105.

Bueno-Hansen, P. (2015): Feminist and human rights struggles in Peru. Decolonizing transitional justice: University of Illinois Press.

Burt, J. M.; Cagley, C. (2013): Access to information, access to justice: The challenges to accountability in Peru. *SUR-Int'l J. on Hum Rts. (*18) 75.

Buscaglia, E.; Dakolias, M. (1996): Judicial reform in Latin American courts: the experience in Argentina and Ecuador. Washington D.C. (World Bank Technical Paper, 350). Available at: https://digitallibrary.un.org/record/249611, last accessed: 05.06.2022.

Calderón Gamboa, J. (2014): Fortalecimiento del rol de la CIDH en el proceso de supervisión de cumplimiento de sentencias y planteamiento de reparaciones ante la Corte IDH. *Anuario de Derechos Humanos* 10, 105–116.

Cameron, M. A. (2019): From Oligarchic Domination to Neoliberal Governance: The Shining Path and the Transformation of Peru's Constitutional Order. In Soifer, H.; Vergara, A. (Eds.): Politics After Violence: Legacies of the Shining Path Conflict in Peru: University of Texas Press, 79-108.

Cameron, M. A. (2002): Democracy and the separation of powers: Threats, dilemmas, and opportunities in Latin America. *Canadian Journal of Latin American and Caribbean Studies* 27 (53), 133–159.

Cardenas, S. (2007): Conflict and compliance: State responses to international human rights pressure: University of Pennsylvania Press.

Cardoso, F. H.; Faletto, E. (1990): Dependencia y desarrollo en América Latina. Ensayo de interpretación sociológica. Siglo Veintiuno Ed (Sociología y política).

Carlos Santiso (2001): Good Governance and Aid Effectiveness: The World Bank and Conditionality. *The Georgetown public policy review* 7 (1) 1-22.

Carothers, T. (1998): The rule of law revival. *Foreign Affairs* (77), 95.

Carothers, T. (2001): The Many Agendas of Rule of Law Reforms in Latin America. In Domingo, Pilar, and Rachel Sieder (Ed.): Rule of law in Latin America: the international promotion of judicial reform: Brookings Institution Press.

Carothers, T. (Ed.) (2010): Promoting the rule of law abroad: in search of knowledge: Brookings Institution Press.

Carothers, T. (2010): Rule-of-law temptations. In Cabatingan,L.; Heckman, J.J.; Nelson,R.L. (Eds.): Global perspectives on the rule of law. Routledge, 33–43.

Carothers, T. (2011): Aiding democracy abroad: The learning curve. Carnegie Endowment.

Casagrande, A. E. (2018): The Concept of Estado de Derecho in the History of Argentinean Constitutionalism (1860-2015). *Quaderni fiorentini per la storia del pensiero giuridico moderno* 47 (1), 169–206.

Cassel, D. (2010): The Expanding Scope and Impact of the reparations awarded by the Interamerican Court of Humans Rights. *Revista do Instituto Brasileiro de Direitos Humanos* 7 (7), 91–107.

Castro Varela, M. d. M.; Dhawan, N. (2015): Postkoloniale Theorie. Eine kritische Einführung: transcript Verlag

Cavallaro, J. L.;Brewer, S. E. (2008): Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court. *American Journal of International Law* 102 (4), 768–827.

Cavallaro, J. L.; Schaffer, E. J. (2004): Less as More: Rethinking Supernational Litigation of Economic and Social Rights in the Americas. *Hastings Law Journal (*56), 217.

Cavallaro, J. L.; Vargas, C; and Bettinger-Lopez,C. (Eds.) (2019): Doctrine, Practice, and Advocacy in the Inter-American Human Rights System: Oxford University Press.

CELS (Centro de Estudios Legales y Sociales) (2018): Milagro Sala: Supreme Court ordered that Jujuy's judiciary comply with the Inter-American Court's provisional measures. CELS. Available at https://www.cels.org.ar/web/en/2018/08/milagro-sala-la-corte-suprema-le-ordeno-a-la-justicia-jujena-cumplir-con-las-medidas-provisionales-de-la-corte-idh/, last accessed: 05.06.2022.

Cerna, C. M. (1994): Universal democracy: an international legal right or the pipe dream of the West. *NYUJ int'l L. & pol. (*27), 289.

Cerna, C. M. (2016): Regional human rights systems. Routledge.

Chakrabarty, D. (2000): Provincializing Europe. Princeton University Press.

Chatterjee, P. (2019). *I am the people: Reflections on popular sovereignty today*. Columbia University Press.

Chatterjee, P. (2022). Nation and Sovereignty: A Response to Boyarin. *Cambridge Journal of Postcolonial Literary Inquiry*, *9*(1), 67-71.

Chayes, A.; Chayes, A. H. (1993): On compliance. *International Organization* 47 (2), 175–205.

Chayes, A.; Chayes, A. H. (1995): The new sovereignty compliance with international regulatory agreements: Harvard University Press.

Chayes, A.; Chayes, A. H.; Mitchell, R. B. (1998): Managing compliance: a comparative perspective. In Brown, W. E.; Jacobson, H. K. (Eds.): Engaging countries: Strengthening compliance with international environmental accords: MIT Press, 39–62.

Checkel, J. T. (2005): International Institutions and Socialization in Europe: Introduction and Framework. *International Organization* 59 (4), 801–826.

Checkel, J. T. (2008): Process Tracing. In Klotz, A.; Prakash, D. (Eds.): Qualitative Methods in International Relations: A Pluralist Guide: Palgrave Macmillan, 114–127.

Cheibub, J. A.,; Elkins, Z.; Ginsburg,T. (2011): Latin American presidentialism in comparative and historical perspective. *Texas Law Review (*89) 1707.

Chesterman, S. (2.) (2008): An international rule of law? *The American Journal of Comparative Law* 56 (2), 331–362.

Chibundu, M. O. (1997): Law in development: on tapping, gourding, and serving palm-wine. *Case W. Res. J. Int'l L., (*29), 167.

Chibundu, M. O. (1999): Globalizing the Rule of Law: Some Thoughts at and on Periphery. *Ind. J. Global Legal Stud.* (7), 79.

Chimni, B. S. (2006): A Just World Under Law: A View from the South. *Am. U. Int'l L. Rev.* (22), 199–220.

Chimni, B. S. (2017): International Law and World Order. A Critique of Contemporary Approaches: Cambridge University Press.

Cohen, J.; Easterly, W. (Eds.) (2010). What works in development?: Thinking big and thinking small. Brookings Institution Press.

Collier, R. B.; Collier, D. (1991), Critical Junctures and Historical Legacies. In Collier, R. B.; Collier, D. (Eds.) Shaping the political arena. Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America. Princeton University Press, pp. 27-39.

Collier, D. (1993): The comparative method. In Finifter, A. W. (Ed.): Political Science: The State of Discipline II: American Political Science Association, 105–119.

Collier, D. (2011): Understanding Process Tracing. *APSC* 44 (04), 823–830.

CONADEP (1984): Nunca mas. Report of the Argentine National Commission on the Disappeared. With assistance of Johannes Edfelt, Elias Canetti. Edited by Eudeba. Argentina.

Contesse, J. (2016): Contestation and deference in the Inter-American human rights system. *Law & Contemp. Probs.,* (79), 123.

Contesse, J. (2017a): The final word? Constitutional dialogue and the Inter-American Court of Human Rights: A rejoinder to Paolo Carozza and Pablo González Domínguez. *International Journal of Constitutional Law* 15 (2), 443–446.

Contesse, J. (2017b): The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine. *The International Journal of Human Rights*, 1–24.

Contesse, J. (2019): Resisting the Inter-American Human Rights System. *Yale J. Int'l L.,* (44) 179.

Contreras, P. (2014): Control de Convencionalidad, Deferencia Internacional y Discreción Nacional en la Jurisprudencia de la Corte Interamericana de Derechos Humanos. *Ius et Praxis* 20 (2), 235–274.

Correa, J. (1999): Judicial Reforms in Latin America: Good News for the Underprivileged? In Méndez, J. E., O'Donnell, G; Pinheiro, P. S. (Eds.): The (Un)Rule of Law and the Underprivileged in Latin America: Notre Dame University Press, 255–277.

Corte Suprema de la Nación Argentina (2007), Sentencia Rene Jesús s/ incidente de prescripción de la acción penal -causa N° 24.079, 11/07/2007

Corte Suprema de Justicia Peru (2009) , Sala Penal Especial, Sentencia Alberto Fujimo Fujimori of 4/7/2009, EX No. Av 19/2001/Accumulado.

Couso, J., Huneeus, A.; Sieder, R. (Eds.) (2010): Cultures of legality: judicialization and political activism in Latin America: Cambridge University Press.

Crouch, C. (2011): The strange non-death of neoliberalism: Polity Press.

Dakolias, M. (1995): A Stategy for Judicial Reform: The Experience in Latin America. *Va. J. Int'l L.,* (36), p. 167.

Dakolias, M. (1996): The Judicial Sector in Latin America and the Caribbean: Elements of Reform. Washington, D.C. (World Bank Technical Paper 319). Available at: https://documents1.worldbank.org/curated/en/427921468226755170/pdf/multi-page.pdf, last accessed: 05.06.2022.

Dakolias, M.; Said, J. (2000). Judicial reform: a process of change through pilot courts. *Eur. JL Reform*, 2(*1)*, 95.

Dann, P. (2006): Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight. *AVR* 44 (4) 381-404.

Dargent, E. (2011): Agents or actors?: Assessing the autonomy of economic technocrats in Colombia and Peru. *Comparative Politics* 43 (3), 313–332.

Davis, K. E.; Trebilcock, M. J. (2001). Legal reforms and development. *Third World Quarterly*, *22*(1), 21-36.

Davis, K. E.; Trebilcock, M. J. (2008): The relationship between law and development: optimists versus skeptics. *The American Journal of Comparative Law* 56 (4), 895–946.

de Araúja Calabria, C. R. (2018): The Efficacy of the Inter-American Court of Human Rights: a socio-legal study based on the Jurisprudence of the Inter-American Court of Human Rights concerning Amnesty laws, Indigenous Rights and Rights of Detainees,. Thesis, University of Manchester.

de Sousa Santos B (2002): Toward a new legal common sense: law, globalization, and emancipation. Butterworths.

de Sousa Santos, B. (2014). Más allá del pensamiento abismal: de las líneas globales a una ecología de saberes. In De Sousa Santos, B.; Meneses, M. P. (2014). *Epistemologías del sur*. Ediciones Akal, 31-66.

de Sousa Santos, B.; Rodríguez-Garavito, C. A. (Eds.). (2005). *Law and globalization from below: Towards a cosmopolitan legality*. Cambridge University Press.

Della Porta, D. (2008): Comparative analysis: case-oriented versus variable-oriented research. In Della Porta, D.; Keating, M. (Eds.): Approaches and methodologies in the social sciences: A pluralist perspective: Cambridge University Press, 198-222.

Desai, D. (2018): Power rules: The World Bank, rule of law reform, and the World. In May, C.; Winchester, A. (Eds.): Handbook on the rule of law. Edward Elgar Publishing, 217–234.

Desai, D.; Woolcock, M. (2012): The politics of rule of law systems in developmental states: 'Political settlements' as a basis for promoting effective justice institutions for marginalized groups (Effective States and Inclusive Development (ESID) Working Paper), July 2012, Available at: https://www.effective-states.org/wp-content/uploads/working_papers/final-pdfs/esid_wp_08_desai-woolcock.pdf, last accessed: 05.06.2022.

Desai, D.; Woolcock, M. (2014): The Politics - and Process - of Rule of Law Systems in Developmental States. In Hickey, S.; Sen, K.; Bukenya,B. (Eds.): The Politics of Inclusive Development, Oxford University Press, 175–194.

Desai, D.; Woolcock, M. (2015): Experimental Justice Reform: Lessons from the World Bank and Beyond. *Annu. Rev. Law. Soc. Sci.* 11 (1), 155–174.

Dezalay, Y.; Garth, B. (2002a): The internationalization of palace wars. Lawyer, Economists, and the Contest to Transform Latin American States. University of Chicago Press.

Dezalay, Y.; Garth, B. (Eds.) (2002b): Global prescriptions. The production, exportation, and importation of a new legal orthodoxy: University of Michigan Press.

Dezalay, Y.; Garth, B. G. (Eds.) (2011). Lawyers and the Rule of Law in an Era of Globalization. Routledge.

Dhawan, N. (2009): Zwischen Empire und Empower: Dekolonisierung und Demokratisierung. *Femina Politica* 2, 52–63.

Dhawan, N. (2012): Postkoloniale Staaten, Zivilgesellschaft und Subalternität. *APUZ (Aus Politik und Zeitgeschichte): Kolonialismus*, 44–45.

Dhawan, N.; Fink, E.; Leinius, J.; Mageza-Barthel, R. (Eds.) (2016): Negotiating normativity. Postcolonial appropriations, contestations, and transformations. Springer.

Garth, B. (2002b): Legitimizing the New Legal Orthodoxy. In Y. Dezalay, B. Garth (Eds.): Global prescriptions. The production, exportation, and importation of a new legal orthodoxy. Ann Arbor, Mich.: University of Michigan Press, 306–334.

Diamond, L. (1999): Developing democracy: Toward consolidation: John Hopkins University Press.

Dicey, A. V. (2013): The Constitution of Law. Oxford University Press.

Domingo, P.; Sieder, R. (Eds.) (2001): Rule of law in Latin America: the international promotion of judicial reform. Brookings Institution Press.

Donald, A.; Long, D.; Speck, A.-K. (2020): Identifying and Assessing the Implementation of Human Rights Decisions. *Journal of Human Rights Practice* 12 (1), 125–148.

Downs, G. W.; Rocke, D. M.; Barsoom, P.N. (1996): Is the good news about compliance good news about cooperation? *International Organizations* 50 (3), 379–406.

Eisenstadt, S. N. (2003): Comparative civilizations and multiple modernities. Brill.

Eisenstadt, S. N. (2006): Theorie und Moderne: Soziologische Essays. VS Verlag für Sozialwissenschaften.

Eisenstadt, S. N. (Ed.) (2017): Multiple modernities: Routledge.

El Comercio (2018): Rodríguez: El Estado tiene que acatar decisión de la Corte IDH. Published: 1/8/2018. Available at: https://elcomercio.pe/politica/duberli-rodriguez-indulto-alberto-fujimori-acatar-decision-corte-idh-noticia-487291-noticia/, last accessed: 05.06.2022.

El Comercio (2018): Tudela: "No creo que la Corte IDH pueda revocar el indulto." Published: 1/9/2018. Available at: https://elcomercio.pe/politica/francisco-tudela-creo-corte-idh-pueda-revocar-indulto-noticia-487197-noticia/, last accessed: 05.06.2022.

El Comercio (2018): Velásquez plantea que abogado represente al Congreso ante Corte IDH. *El Comerico*, 1/24/2018. Available at: https://elcomercio.pe/politica/velasquez-plantea-abogado-represente-congreso-corte-idh-noticia-491788-noticia/, last accessed: 05.06.2022.

Engstrom, P. (Ed.) (2019): The Inter-American Human Rights System: Impact Beyond Compliance. Palgrave Macmillan.

Engstrom, P.; Hurrel, A. (2010) Why the Human Rights Regime in the Americas Matter. In Serrano, M.; Popovski,V. The Human Rights Regime in the Americas: Theory and Reality United Nations University Press, 29-55.

Engstrom, P.; Pereira, G. (2012): From amnesty to accountability: The ebbs and flows in the search for justice in Argentina. In Lessa, F.; Payne, L. A. (Eds.): Amnesty in the age of human rights accountability. Comparative and international perspectives. Cambridge University Press, 97–122.

Escobar, A. (2010): Latin America at a Crossroads. *Cultural Studies* 24 (1), 1–65.

Escobar, A. (2011). Encountering development. Princeton University Press.

Escobar, A. (2018): The Making of Social Movements in Latin America. Identity, Strategy, and Democracy. Routledge.

Esteva, G.; Escobar, A. (2017): Post-Development @ 25. On 'being stuck' and moving forward, sideways, backward and otherwise. *Third World Quarterly* 38 (12), 2559–2572.

Esteva, G.; Prakash, M. S. (1998): Beyond development, what? *Development in Practice* 8 (3), 280–296.

Esteva, G.; Prakash, M. S. (2014). Grassroots postmodernism: Remaking the soil of cultures: Zed Books Ltd.

Etchemendy, S.; Garay,C. (2011): Argentina: Left populism in comparative perspective, 2003-2009. In S. Levitsky, K. M. Roberts (Eds.): The resurgence of the Latin American left. Johns Hopkins University Press, 283–305.

Fabry, M. (2009): The Inter-American Democratic Charter and Governmental Legitimacy in the International Relations of the Western Hemisphere. *Diplomacy & Statecraft* 20 (1), 107–135.

Faundez, J. (2000): Legal reform in developing and transition countries: Making haste slowly. *Law, Social Justice and Global Development (LGD)*.

Faundez, J. (2005): Community justice institutions and judicialization: Lessons from rural Peru. In Sieder, R., Schjolden, L., & Angell, A. (Eds.). (Ed.): The judicialization of politics in Latin America: Springer, 187–209.

Faundez, J. (2009) Rule of law or Washington Consensus: the evolution of the World Bank's approach to legal and judicial reform. In Parry-Kessaris, A.: Law in the Pursuit of Development: principles into practice, 180-202.

Faundez, J. (2011a) Law and development lives on. *Warwick School of Law Research Paper*, (2011/12). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950125, last accessed 05.06.2022.

Faundez, J. (2011b). Legal Pluralism and International Development Agencies: State Building or Legal Reform?. *Hague Journal on the Rule of Law*, *3*(1), 18-38.

Faundez, J. (2016): Douglass North's Theory of Institutions: Lessons for Law and Development. *Hague J Rule Law* 8 (2), 373–419.

Fearon, J. D. (1998): Bargaining, enforcement, and international cooperation. *International Organization* 52 (2), 269–305.

Ferguson, J. (1994): The anti-politics machine. "development", depoliticization and bureaucratic power in Lesotho. University of Minnesota Press.

Ferguson, J.; Gupta, A. (2002): Spatializing States: Toward an Ethnography of Neoliberal Governmentality. *American Ethnologist* 29 (4), 981–1002.

Fielding, N. (2012): Triangulation and mixed methods designs: Data integration with new research technologies. *Journal of Mixed Methods Research* 6 (2), 124–136.

Fielding, N.; Lee, R.M. (1998): Computer analysis and qualitative research. Sage.

Finkel, J. (2008): Judicial reform as political insurance: Argentina. Peru, and Mexico in the 1990s. University of Notre Dame Press.

Finnemore, M.; Sikkink, K. (1998): International Norm Dynamics and Political Change. *Int Org* 52 (4), 887–917.

Føllesdal, A. (2016): Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights-Or Neither. *Law & Contemp. Probs.* 79, p. 147.

Føllesdal, A. (2017): Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights. *International Journal of Constitutional Law* 15 (2), 359–371.

Fontana, A.; Frey, J. H. (2005): The Interview: From Neutral Stance to Political Involvement. In Denzin, N. K.; Lincoln, Y. S. (Eds.): The Sage handbook of qualitative research: Sage, 695–727.

Forester, J. (1999): The deliberative practitioner. Encouraging participatory planning processes. MIT Press.

Frankenberg, G. (2010): Constitutional transfer: The IKEA theory revisited. *Int J Const Law* 8 (3), 563–579.

Frankenberg, G. (2013): Order from transfer. Comparative constitutional design and legal culture. Edward Elgar

Fuller, L. L. (1964): The Morality of Law. Yale University Press.

Gamboa, J. (2014): Fortalecimiento del rol de la CIDH en el proceso de supervisión de cumplimiento de sentencias y planteamiento de reparaciones ante la Corte IDH. *Anuario de Derechos Humanos* 10, 105–116.

Gargarella, R. (2003): In search of a democratic justice – what courts should not do: Argentina, 1983–2002. *Democratization* 10 (4), 181–197.

Gargarella, R. (2015a): Democracy and Rights in Gelman v. Uruguay. *AJIL Unbound* 109, 115–119.

Gargarella, R. (2015b): La sala de máquinas de la Constitución: dos siglos de constitucionalismo en América Latina (1810-2010). 3089 volumes.

Gargarella, R.; Gloppen, S.; Skaar, E. (2004): Democratization and the judiciary: the accountability function of courts in new democracies: Routledge.

Gargarella, R.; Roux, T.; Domingo, P. (2017). *Courts and Social Transformation in New Democracies: an institutional voice for the poor?*. Routledge.

Garth, B. (2002): Building Strong and Independent Judiciaries. Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results. *DePaul L. Rev.* 52, p. 383.

George, A.; Bennett, A. (2005): Case studies and theory development in the social sciences: The MIT Press

Gerring, J. (2007): Case study research. Principles and practices: Cambridge University Press.

Gerring, J. (2008): Case selection for case-study analysis: Qualitative and quantitative techniques. In Box-Steffensmeier, J. M.; Brady,H. M.; Collier, D. (Eds.): The Oxford handbooks of political science. Oxford University Press.

Gill, S. (Ed.) (2011): Global Crises and the Crisis of Global Leadership. Cambridge University Press.

Gillespie, R. (2011): Soldados de Perón: historia crítica sobre los Montoneros: Sudamericana.

Ginsburg, T. (2014) "Political constraints on international courts. In Romano, C.; Alter, K. J.; Shany, Y. (Eds)

The Oxford handbook of international adjudication. Oxford University Press, 483-502.

Gonzáles-Domínguez, P. (2018): The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System: Law and Cosmopolitan Values. Intersentia.

González-Salzberg, D. A. (2010): The effectiveness of the Inter-american Human Rights System: a Study of the American States' Compliance with the Judgements of the Inter-american Court of Human Rights. *International Law* 16, 115–142.

González-Salzberg, D. A. (2011): The Implementation of Decisions from the Inter-American Court of Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court. *SUR-Int'l J. on Hum Rts.* 15, 113–129.

Gonzalez-Salzberg, D. A. (2013): Do States Comply with the Compulsory Judgments of the Inter-American Court of Human Rights? An Empirical Study of the Compliance with 330 Measures of Reparations. *Revisto do Instituto Brasileiro de Direitos Humanos* 13 (13), 93–114.

Gowan, P.; Panitch, L.; Shaw, M. (2001): The state, globalisation and the new imperialism: a roundtable discussion. *Historical Materialism* 9 (1), 3–38.

Gramsci, A. (2007): Selections from the Prison Notebooks. In Lawrence, B; Karim, A. On Violence: Duke University Press, 158–179.

Grävingholt, J.; Leininger, J.; Schlumberger, O. (2009): The three Cs of democracy promotion policy: context, consistency and credibility. Bonn: Deutsches Institut für Entwicklungspolitik (DIE) (Briefing Paper, 1/2009).

Grugel, J.; Peruzzotti, E. (2012): The Domestic Politics of International Human Rights Law: Implementing the Convention on the Rights of the Child in Ecuador, Chile, and Argentina. *Human Rights Quarterly* 34 (1), 178–198.

Gupta, A.; Ferguson, J. (1997): Culture, Power, Place. Explorations in Critical Anthropology. Duke University Press.

Hamati-Ataya, I. (2020): Reflexivity and International Relations: Oxford University Press.

Hammergren, L. (2002): Reforming the Courts: The Role of Empirical Research. PREM Notes; No. 65. The World Bank. Available at openknowledge.worldbank.org., last accessed: 05.06.2022.

Hammergren, L. (2003): Uses of empirical research in refocusing judicial reforms: lessons from five countries. The World Bank. Available at biblioteca.cejamericas.org., last accessed: 05.06.2022.

Hammergren, L. (2008): Twenty-five years of Latin American judicial reforms: achievements, disappointments, and emerging issues. *Whitehead J. Dipl. & Int'l Rel.* 9, p. 89.

Hammergren, L. (2015): Justice Reform and Development: Rethinking Donor Assistance to Developing and Transitional Countries: Routledge.

Hantrais, L. (2008): International comparative research: Theory, methods and practice: Palgrave Macmillan.

Hardt, M.; Negri, A. (2003): Empire. Die neue Weltordnung. Campus Verlag.

Hatchard, J.; Perry-Kesaris, A. (Eds.) (2003): Law and Development: facing complexity in the 21st century: Taylor and Francis.

Hathaway, O. A. (2007): Why Do Countries Commit to Human Rights Treaties? *Journal of Conflict Resolution* 51 (4), 588–621.

Hawkins, D.; Jacoby, W. (2010): Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights. *Journal of international Law and International Relations* (6), 35-85.

Hayek, F. A. (1973/2012): Law, Legislation and Liberty, Rules and Order. Rules and Order: University of Chicago Press.

Heldt, E. C. (2018): Lost in internal evaluation? Accountability and insulation at the World Bank. *Contemporary Politics* 24 (5), 568–587.

Helfer, L. R. (1999): Forum shopping for human rights. *University of Pennsylvania Law Review* 148 (2), 285–400.

Helfer, L. R. (2008): Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *Eur J Int Law* 19 (1), 125–159.

Helfer, L. R. (2014). The effectiveness of international adjudicators. In Romano, C.; Alter, K. J.; Shany, Y. (Eds) The Oxford handbook of international adjudication. Oxford University Press, 464-482.

Helfer, L. R.; Alter, K. (2013): Legitimacy and lawmaking: a tale of three international courts. Theoretical Inquiries in Law 14 (2), 479–504.

Helfer, L.R..; Slaughter, A.M. (1997): Toward a theory of effective supranational adjudication. *Yale Law Journal* 107, p. 273.

Helmke, G. (2010): The origins of institutional crises in Latin America. *American Journal of Political Science* 54 (3), 737–750.

Helmke, G. (2017): Institutions on the edge. The origins and consequences of inter-branch crises in Latin America. Cambridge University Press.

Helmke, G; Levitsky, S. (Eds.) (2006): Informal institutions and democracy: Lessons from Latin America: Johns Hopkins University Press.

Helmke, G.; Ríos-Figueroa, J. (Eds.) (2011): Courts in Latin America: Cambridge University Press.

Hernandez, C. (2019): Globalization, the IMF, and International Banks in Argentina: The model economic crisis: Rowman & Littlefield.

Hickey, S; Sen, K.; Bukenya,B. (Eds.) (2014): The Politics of Inclusive Development. Oxford University Press.

Hickman, L. A. (2019): Beyond the Epistemology Industry. In L. A. Hickman (Ed.): Pragmatism as Post-Postmodernism. Lessons from John Dewey. Fordham University Press, 206–230.

Hillebrecht, C. (2012): The domestic mechanisms of compliance with international human rights law: Case studies from the Inter-American human rights system". *Human Rights Quarterly* 34 (4), 959–985.

Hillebrecht, C. (2014a): Domestic Politics and International Human Rights Tribunals: The Problem of Compliance. Cambridge University Press.

Hillebrecht, C. (2014b): The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change. *European Journal of International Relations* 20 (4), 1100–1123.

Hillebrecht, C. (2019): The Inter-American Court of Human Rights and the Effects of Overlapping Institutions: A Preliminary Study. In Engstrom, P. (Ed.): The Inter-American Human Rights System: Impact Beyond Compliance. Springer, 273–302.

Hirschl, R. (2009): Towards juristocracy: the origins and consequences of the new constitutionalism. Harvard University Press.

Hite, K. (2007): The Eye that cries': the Politics of representing Victims in contemporary Peru. *A Contracorriente: una revista de estudios latinoamericanos* 5 (1), 108-134.

Hitters, J. C. (2017): Control de Convencionalidad? Puede la Corte Interamericana de Derechos Humanos dejar sin efecto fallos de los tribunales superiores de los países?(El caso Fontevecchia vs. Argentina. *Estudios constitucionales* 15 (2), 533–568.

Hitzler, R.; Honer, A.; Maeder, C. (1994): Expertenwissen: Opladen, Westdeutscher Verlag.

Huddart, D. (2007): Hybridity and cultural rights: Inventing global citizenship. In J. Kuortti, J.; Nyman, J. (Eds.): Reconstructing hybridity. Post-colonial studies in transition. Rodopi, pp. 19–41.

Humphreys, S. (2012): Theatre of the rule of law. Transnational legal intervention in theory and practice. Cambridge University Press.

Huneeus, A. (2011): Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights. *Cornell Int'l LJ* 44, p. 93.

Huneeus, A. (2015): Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts. *Yale J. Int'l L.* (40), 1.

Huneeus, A. (2016): Constitutional Lawyers and the Inter-American Court's Varies Authority". *Law & Contemp. Probs. (*79) 179.

Hurd, I. (2015): The international rule of law and the domestic analogy". *Global Constitutionalism* 4 (3), 365–395.

Hurd, I. (2018): The Empire of International Legalism. *Ethics & International Affairs* (3), 265–278.

Inter-American Commission on Human Rights (1997) Walter Humberto Vásquez v. Peru, Report of Case 11.166, No. 46

Inter-American Commission on Human Rights (2000): State Report Peru. Chapter 3, International Obligations, Peru and the Inter-American Human Rights System. OEA/Ser.L/V/II.106.

Inter-American Court on Human Rights, Durand y Ugarte v. Peru, Judgement (Merits) of 2000, 16 August, *Inter-Am. Ct. H.R. (ser. C)* No. 89.

Inter-American Court of Human Rights, Barrios Altos v. Peru, Judgements (Merits) of 2001, 14 March

Inter-American Court of Human Rights, Barrios Altos v. Peru, Judgement (Reparations and Costs) of 2001, 30 November, *Inter-Am. Ct. H.R. (ser. C)* No. 87.

Inter-American Court of Human Rights, Durand y Ugarte v. Peru, Judgement (Reparations and Costs) of 2001, 3 December, *Inter-Am. Ct. H.R. (ser. C)* No 89.

Inter-American Court of Human Rights, Constitutional Court v. Peru, Judgement (Merits, Reparations, and Costs) of 2001, 31 January, *Inter-Am. Ct. H.R. (ser. C)* No.71, para. 56(30).

Inter-American Court of Human Rights, Bulacio v. Argentina, Judgement (Merits, Reparations and Costs) of 2003, 18 September, *Inter-Am. Ct. H.R. (ser. C)* No. 100.

Inter-American Court of Human Rights, Penal Miguel Castro Castro v. Peru, Judgement (Merits, Reparations and Costs) of 2006, 25 November, *Inter-Am. Ct. H.R. (ser. C)* No. 160.

Inter-American Court of Human Rights, La Cantuta v. Peru, Judgement (Merits, Reparations and Costs) of 2006, 29 November, *Inter-Am. Ct. H.R. (ser. C)* No. 162.

Inter-American Court of Human Rights, Bueno Alves v. Argentina, Judgement (Merits, Reparations and Costs) of 5/11/2007, *Inter-Am. Ct. H.R. (ser. C)* No. 164.

Inter-American Court of Human Rights, Durand y Ugarte v. Peru, Resolution of Supervision of Compliance of 2008, 5 August.

Inter-American Court of Human Rights, Bulacio v. Argentina, Resolution of Supervision of Compliance of 2008, 26 November

Inter-American Court of Human Rights, Penal Miguel Castro Castro v. Peru, Interpretation of the Judgment (Merits, Reparations, and Costs) of 2008, 2 April

Inter-American Court of Human Rights, La Cantuta v. Peru, Resolution of Supervision of Compliance of 2009, 20 November

Inter-American Court of Human Rights, Penal Miguel Castro Castro v. Peru, Resolution of Supervision of Compliance of 2009, 28 April

Inter-American Court of Human Rights, Case of Torres Millacura and others V. Peru, Judgement (Merits, Reparations and Costs) of 2011, 26 August, *Inter-Am. Ct. H.R. (ser. C)* No. 229.

Inter-American Court of Human Rights, Fontevecchia and D'Amico v. Argentina, Judgement (Merits, Reparations, and Costs) of 2011, 29 November, *Inter-Am. Ct. H.R. (ser. C)* No. 238

Inter-American Court of Human Rights, Argüelles et. al. v. Argentina, Preliminary Objections, Reparations and Costs of 2014, 20 November, *Inter-Am. Ct. H.R. (ser. C)* No. 288.

Inter-American Court of Human Rights, Case of Torres Millacura and others V. Argentina, Resolution of Supervision of Compliance of 2015, 26 January.

Inter-American Court of Human Rights, Argüelles and others V. Argentina, Interpretation of Judgements (Preliminary Objections, Merits, Reparations and Costs) of 2015, 23 June, *Inter-Am. Ct. H.R. (ser. C)* No. 294

Inter-American Court of Human Rights, Fontevecchia and D'Amico v. Argentina, Resolution of Supervision of Compliance of 2015, 1 September

Inter-American Court of Human Rights, Fontevecchia and D'Amico v. Argentina, Resolution Supervision of Compliance of 2016, 22 September

Inter-American Court of Human Rights, Argüells and others V. Argentina, Resolution Supervision of Compliance of 2016, 11 November

Inter-American Court of Human Rights, Penal Miguel Castro Castro v. Peru, Resolution Supervision of Compliance of 2017, 9 February.

Inter-American Court of Human Rights, Fonteveccia D'Amico v. Argentina, Public hearing, of 2017, 21 August

Inter-American Court of Human Rights, Fontevecchia and D'Amico v. Argentina, Resolution Supervision of Compliance of 2017, 18 October.

Inter-American Court of Human Rights, Milagro Salas, Provisional Measure of 2017, 23 November.

Inter-American Court of Human Rights, Barrios Altos/La Catuta v. Peru, Public Audience, Joint Monitoring of Compliance with Judgements of 2018, 2 February.

Inter-American Court of Human Rights, Barrios Altos y La Cantuta, Resolution Supervision of Compliance of 2019, 30 May.

Inter-American Court of Human Rights, Durand y Ugarte v. Peru, Resolution for Provisional Measures of 2018, 8 February.

Inter-American Court of Human Rights, Penal Miguel Castro Castro v. Peru, Resolution for Provisional Measures of 2018, 5 February.

Inter-American Court of Human Rights, Penal Miguel Castro Castro v. Peru, Resolution of Provisional Measure of 2018, 18 February.

Inter-American Court of Human Rights, Durand y Ugarte v. Peru, Resolution for Provisional Measures of 2018, 30 May.

Inter-American Court of Human Rights, La Cantuta v. Peru, Resolution Supervision of Compliance of 2018, 30 May.

Inter-American Court of Human Rights, Argüelles and Others V. Argentina, Resolution Supervision of Compliance of 2018, 30 May.

Inter-American Court of Human Rights, Bueno Alves v. Argentina, Resolution of Supervision of 2018, 30 May.

Kaltmeier, O.; Tittor, A.; Hawkins, D. (Eds.) (2020): The Routledge handbook to the political economy and governance of the Americas: Routledge.

Kapiszewski, D.; MacLean, L. M.; Read, B. L. (2015): Field Research in Political Science. Practices and Principles. Cambridge University Press.

Kapiszewski, D.; Taylor, M. M. (2008): Doing courts justice? Studying judicial politics in Latin America. *Perspectives on Politics* 6 (4), 741–767.

Kapiszewski, D.; Taylor, M. M. (2013): Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings. *Law soc. inq.* 38 (04), 803–835.

Kapur, D.; Lewis, J. P.; Webb, R. C. (2011): The World Bank. Its First Half Century. Brookings Institution Press.

Keck, M. E.; Sikkink, K. (1998): Activists beyond Borders. Advocacy Networks in International Politics. Cornell University Press.

Kennedy, D. (2002): Two Globalization of Law & (and) Legal Thought: 1850-1968. *Suffolk UL Rev.* (36) 631.

Kennedy, D. (2003): Laws and Developments. In Hatchard,J; Perry-Kesaris, A. (Eds.): Law and Development: facing complexity in the 21st century: Taylor and Francis, 17–26.

Kennedy, D. (2006): Rule of Law," Political Choices, and Development Common Sense. In Trubek, D. M.; Santos, A. (Eds.): The new law and economic development: a critical appraisal. Cambridge University Press, 95–173.

Kennedy, D. (2018): A world of struggle: How power, law, and expertise shape global political economy. Princeton University Press.

King, N., Horrocks, C., and Brooks, J. (2018): Interviews in qualitative research. Sage.

Kingstone, P.; Yashar, D. J. (Eds.) (2013): Routledge handbook of Latin American politics: Routledge.

Kleinfeld, R. (2010): Competing definitions of the rule of law. In Carothers, T. (Ed.): Promoting the rule of law abroad: in search of knowledge: Brookings Institution Press, 31–74.

Klotz, A.; Prakash, D. (Eds.) (2008): Qualitative Methods in International Relations: A Pluralist Guide: Palgrave Macmillan.

Koskenniemi, M. (2005): From apology to utopia. The structure of international legal argument: Cambridge University Press.

Kößler, R. (2016): Kapitalismus und Moderne. *Peripherie – Politik, Ökonomie, Kultur (*33) 130.

Kunz, R. (2020): Richter über internationale Gerichte? Die Rolle innerstaatlicher Gerichte bei der Umsetzung der Entscheidungen von EGMR und IAGMR.: Springer.

La Nación (2006): Enrique Peruzzotti: "El Gobierno actúa sin el debido control" Según el sociólogo, Kirchner se ocupa mucho del pasado, pero no del presente. Published: 9/9/2006. Available at: https://www.lanacion.com.ar/politica/enrique-peruzzotti-el-gobierno-actua-sin-el-debido-control-nid838966/, last accessed: 05.06.2022.

La Nación (2016): Condenaron a Milagro Sala por el acampe en Jujuy. Published: 12/29/2016. Available at https://www.lanacion.com.ar/politica/condenaron-a-milagro-sala-por-el-acampe-en-jujuy-nid1971606/, last accessed: 05.06.2022.

La Serna, M. (2012): The Corner of the Living: Ayacucho on the Eve of the Shining Path insurgency: University of North Carolina Press.

Landa, C. (2018): Justicia y Política en Perú. In V. Bazán, M.-C. Fuchs (Eds.): Justicia y pollítica en América Latina. Konrad-Adenauer-Stiftung, 212–232.

Landman, T. (2002): Issues and methods in comparative politics: an introduction: Routledge.

Lang, A. F.; Wiener, Antje (Eds.) (2017): Handbook on global constitutionalism: Edward Elgar Publishing.

Laplante, L. J. (2007-2008): The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition. *Am. U. Int'l L. Rev. (*22), p. 86.

Latinobarómetro (2018): Informe, Opinió Pública Latinoamericana Latinobarómetro. Available at: https://www.latinobarometro.org/latdocs/INFORME_2018_LATINOBAROMETRO.pdf, last accessed: 05.06.2022.

Lawyers Committee for Human Rights (1996): Halfway to reform: the World Bank and the Venezuelan justice system. Lawyers Committee for Human Rights. New York.

Lawyers Committee for Human Rights (2000): Building on Quicksand: The Collapse of the World Bank's Judicial Reform Project in Peru. Edited by Lawyers Committee for Human Rights. New York.

Legrand, P. (1997): The Impossibility of 'Legal Transplants'. *Maastricht Journal of European and Comparative Law* 4 (2), 111–124.

Lessa, F. (2013): Memory and Transitional Justice in Argentina and Uruguay: Against Impunity: Springer.

Lessa, F.; Payne, L. A. (Eds.) (2012): Amnesty in the age of human rights accountability. Comparative and international perspectives. Cambridge University Press.

Levitsky, S. (1999): Fujimori and Post-Party Politics in Peru. *Journal of Democracy* 10 (3), 78–92.

Levitsky, S. (2008): Argentina: Democracy and Institutional Weakness. In Domínguez, Jorge I. and Shifter, Michael (Ed.): Constructing democratic governance in Latin America. 3rd ed. Baltimore: Johns Hopkins University Press (An Inter-American Dialogue book), 99–123.

Levitsky, S.; Roberts, K. M. (Eds.) (2011): The resurgence of the Latin American left: Johns Hopkins University Press.

Levitsky, S.; Murillo, M. V. (2008): Argentina. From Kirchner to Kirchner. *Journal of Democracy* 19 (2), 16–30.

Levitsky, S.; Murillo, M. V. (2013): Lessons from Latin America: building institutions on weak foundations. *Journal of Democracy* 24 (2), 93–107.

Levitsky, S.; Cameron, M. A. (2003): Democracy without parties? Political parties and regime change in Fujimori's Peru. *Latin American politics and society* 45 (3), 1–33.

Linz, J. J.; Valenzuela, A. (1994): The failure of presidential democracy. Johns Hopkins University Press.

Linz, J. J. (2000): Totalitarian and authoritarian regimes: Lynne Rienner Publishers.

Mahoney, J. (2000): Path dependence in historical sociology. "Path dependence in historical sociology. *Theory and society* 29 (4), 507-548.

Mahoney, J. (2012): The Logic of Process Tracing Tests in the Social Sciences. *Sociological Methods & Research* 41 (4), 570–597.

Mainwaring, S. (1990): Presidentialism in Latin America. *Latin American Research Review* 25 (1), 157–179.

Mainwaring, S.; Pérez-Liñán, A. (2005): The third wave of democratization in Latin America. Advances and setbacks. 1. publ: Cambridge University Press.

Mainwaring, S.; Pérez-Liñán, A. (2013): Democracies and dictatorships in Latin America: Emergence, survival, and fall: Cambridge University Press.

Mainwaring, S.; Shugart, M. S.; Lange, P. (Ed.) (1997): Presidentialism and democracy in Latin America: Cambridge University Press.

Malamud, A. (2001): Presidentialism in the southern cone. A framework for analysis (EUI Working Paper Series). Available at: https://cadmus.eui.eu/handle/1814/314, last accessed: 05.06.2022.

Mariátegui, J. C. (1928/1979): 7 ensayos de interpretación de la realidad peruana: Biblioteca Ayacucho.

Martin-Prével, A.; Kim, N. (2015): Peru, the poster child for the World Bank in Latin America. Edited by The Oakland Institute. Available at:

https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_Peru_World_Bank.pdf, last accessed 05.06.2022.

Mayring, P.,; Fenzl, T. (2019). (2014): Qualitative inhaltsanalyse. In Baur, N.; Blasius, J. (Eds.): Handbuch Methoden der empirischen Sozialforschung: Springer, 633–648.

McNulty, S. (2018): Peru's Struggle with the Fujimori Legacy. *Current History*, 56–61.

Medina, C. (1990): The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture. *Human Rights Quarterly* 12 (4), p. 439.

Méndez, J. E.; O'Donnell, G.; Pinheiro, P. S. (Eds.) (1999): The (Un)Rule of Law and the Underprivileged in Latin America. Notre Dame University Press.

Merry, S. E.; Davis, K. E.; Kingsbury (Eds.) (2015): The Quiet Power of Indicators. Measuring Governance, Corruption, and Rule of Law: Cambridge University Press.

Meuser, M.; Nagel, U. (2009a): Das Experteninterview - konzeptionelle Grundlagen und methodische Anlage. In Meuser, M; Nagel, U. (Eds.): Methoden der vergleichenden Politik- und Sozialwissenschaften: VS Verlag für Sozialwissenschaften, 465–479.

Meuser, M., and Nagel, U. (2009b): The expert interview and changes in knowledge production. In Bogner, A., Littig, B.; Menz, W. (Ed.): Interviewing experts: Palgrave Macmillan, 17–42.

Miéville, C. (2005): Between Equal Rights: A Marxist Theory of International Law. Brill.

Mignolo, W. D. (2002): The geopolitics of knowledge and the colonial difference, *South Atlantic Quarterly*, 101 (1) 57-96.

Mignolo, W. D. (2009): Epistemic Disobedience, Independent Thought and Decolonial Freedom. *Theory, Culture & Society* 26 (7-8), 159–181.

Mignolo, W. D.; Walsh, C. (Eds.) (2018): On Decoloniality. Duke University Press.

Moeller, J.; Skaaning, S.E. (2012): Systematizing Thin and Thick Conceptions of the Rule of Law. *Justice System Journal* 33 (2), 136–153.

Montesquieu, C. de (1989): The Spirit of the Laws: Cambridge University Press.

Morehouse, R. E.; Maykut, P. (2002): Beginning qualitative research: A philosophical and practical guide: Routledge.

Moyn, S. (2018): Not enough: Human rights in an unequal world. Harvard University Press.

Murillo, M. V. (2015): Curtains for Argentina's Kirchner Era. *Current History* 114 (769), 56–61.

Murray, R. (2020): Addressing the Implementation Crisis: Securing Reparation and Righting Wrongs. *Journal of Human Rights Practice* 12 (1), 1–21.

Murray, R.; Sandoval, C. (2020): Balancing Specificity of Reparation Measures and States' Discretion to Enhance Implementation. *Journal of Human Rights Practice* 12 (1), 101–124.

Murray, R.; de Vos, C. (2020): Behind the State: Domestic Mechanisms and Procedures for the Implementation of Human Rights Judgments and Decisions. *Journal of Human Rights Practice* 12 (1), 22–47.

Natalia Volosin (2022): ¿Qué es el Consejo de la Magistratura? Infobae, publishing date: 6.02.2022, availbale at: https://www.infobae.com/politica/2022/02/06/que-es-el-consejo-de-la-magistratura/,last accessed: 05.06.2022.

Navarro, G. C. B. (2021): The Struggle after the Victory: Non-compliance in the Inter-American Court of Human Rights' Jurisprudence on Indigenous Territorial Rights. *J Int Disp Settlement* 12 (2), 223–249.

Negretto, G. L. (2003): Diseño constitucional y separación de poderes en América Latina. *Revista Mexicana de Sociología* 65 (1), 41–75.

Negretto, G. L. (2013): Making constitutions: presidents, parties, and institutional choice in Latin America: Cambridge University Press.

North, D. C. (1986): The new institutional economics. The new institutional economics. *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* 142 (1), 230–237.

North, D. C. (1992). Institutions and economic theory. *The american economist*, *36 (1), 3-6.*

North, D. C., Wallies, J. J.; Webb, S. B.; Weingast B. R. (2007). *Limited access orders in the developing world: A new approach to the problems of development* (Vol. 4359). World Bank Publications.

O'Donnell, G. (1993): On the state, democratization and some conceptual problems: A Latin American view with glances at some postcommunist countries. *World Development* 21 (8), 1355–1369.

O'Donnell, G. (1994): Delegative democracy. *Journal of Democracy* 5 (1), 55–69.

O'Donnell, G. A. (1996): Illusions About Consolidation. *Journal of Democracy* 7 (2), 34–51.

O'Donnell, G. (1998): Horizontal Accountability in New Democracies. *Journal of Democracy* 9 (3), 112–126.

O'Donnell, G. (2004). The quality of democracy: Why the rule of law matters. *Journal of democracy*, *15*(4), 32-46.

O'Donnell, G. (2007): Dissonances: University of Notre Dame Press.

Organization of American States (1969): American Convention of Human Rights, 1969, 22 November

Organization of American States (2009): Rules of Procedure of the Inter-American Court of Human Rights. 2009, 16 November

Página/12 (2017a): Zaffaroni: "La detención de Sala es arbitraria", published: 22/02/2017. Available at https://www.pagina12.com.ar/14223-zaffaroni-la-detencion-de-sala-es-arbitraria, last accessed: 05.06.2022.

Página/12 (2017b): Un año sin Milagro, published: 22/2/2017, available at: https://www.pagina12.com.ar/14438-un-ano-sin-milagro, last accessed: 05.06.2022.

Página/12 (2020a): Argentina admitió responsabilidad y pidió disculpas. Adriana Mayer, published: 12/03/2020. available at: https://www.pagina12.com.ar/252382-argentina-admitio-responsabilidad-y-pidio-disculpas,last accessed: 05.06.2022.

Página/12 (2020b): "El fallo indicaría que pueden ocupar los cargos sólo hasta que se concursen nuevos titulares Tres jueces de la Corte se pusieron de acuerdo sobre los jueces nombrados a dedo.", Irina Hauser, published: 11/3/2020. Available at: https://www.pagina12.com.ar/303397-tres-jueces-de-la-corte-se-pusieron-de-acuerdo-sobre-los-jue, last accessed: 05.06.2022.

Panizza, F. (2013): Contemporary Latin America: development and democracy beyond the Washington consensus: Zed Books Ltd.

Pásara, L. (2012): International support for justice reform in Latin America: worthwhile or worthless. Washington: Woodrow Wilson Center, available at:

https://www.wilsoncenter.org/sites/default/files/media/documents/publication/Jutice%20Reform%20in%20LATAM.pdf,last accessed: 05.06.2022.

Pásara, L. (2019): Reforma judicial. balances y perspectivas reales de cambio. *Revista Argumentos* 13 (1), 18–23.

Pasqualucci, J. M. (2012): The practice and procedure of the Inter-American Court of Human Rights: Cambridge University Press.

Pérez-Liñán, A.; Castagnola, A. (2009): Presidential control of high courts in Latin America: A long-term view (1904-2006). *Journal of Politics in Latin America* (2), 87–114.

Pérez-Liñán, A.; Castagnola, A. (2016): Judicial instability and endogenous constitutional change: Lessons from Latin America. *British Journal of Political Science* 46 (2), 395–416.

Pérez Liñán, A.; Schenoni, L.; Morrison, K. (2019): Time and Compliance with International Rulings: The Case of the Inter-American Court of Human Rights (Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper) (17).

Pérez, E. J. (2018): La supervisión del cumplimiento de sentencias por parte de la Corte Interamericana de Derechos Humanos y algunos aportes para jurisdicciones nacionales. *Anuario de Derecho Constitucional Latinoamericano*, 337–362.

Perry-Kesaris, A. (2003): Law & Development. Facing Complexity In The 21st Century: Routledge.

Peruzzotti, E.; Smulovitz, C. (Ed.) (2006): Enforcing the rule of law: social accountability in the new Latin American democracies: University of Pittsburgh Press.

Peters, A. (2009): The merits of global constitutionalism. *Ind. J. Global Legal Stud.,* (16), p. 397.

Pfadenhauer, M. (2009): At eye level: the expert interview—a talk between expert and quasi-expert. In Bogner, A., Littig, B.; Menz, W. (Eds.): Interviewing experts. Palgrave, 81–97.

Pistor, K. (2019): The Code of Capital. Oxford University Press.

Plehwe, D.; Slobodian, Q.; Mirowski, P. (2020): Nine lives of neoliberalism: Verso.

Polidano, C.; Hulme, D. (1999): Public Management Reform Im Developing Countries. *Public Management: An International Journal of Research and Theory* 1 (1), 121–132.

Poppe, A. E.; Wolff, J. (2013). The normative challenge of interaction: Justice conflicts in democracy promotion. *Global Constitutionalism*, *2*(3), 373-406.

Poppe, A. E.; Leininger, J.; Wolff, J. (2019): Beyond contestation: conceptualizing negotiation in democracy promotion. *Democratization* 26 (5), 777–795.

Poppe, A. E.; Leininger, J.; Wolff, J. (2019): Introduction: negotiating the promotion of democracy. *Democratization* 26 (5), 759–776.

Posner, E.A.; Yoo,J. C. (2005): Judicial independence in international tribunals. *Calif. L. Rev.* 93 (1).

Pozzi, P. A. (2016): The Argentine guerrilla and the masses: the ERP and its insertion. *Rev. Temp. e Argum.* 7 (16), 401–420.

Pritchett, L.; Woolcock, M.; Andrews, M. (2010): Capability Traps? The Mechanisms of Persistent Implementation Failure, Center for Global Development, Working paper 234, available at: https://www.cgdev.org/sites/default/files/1424651_file_Pritchett_Capability_FINAL.pdf, last accessed: 05.06.2022.

Ministerio de Justicia (2016) Peru, Procuraduría Pública Especializada Supranacional (2016) Informe Anual 2016, available at: https://www.minjus.gob.pe/wp-content/uploads/2017/10/Informe-Anual-2016-PP-SUPRANACIONAL.pdf, last accessed: 05.06.2022.

Quijano, A. (2000): Coloniality of Power and Eurocentrism in Latin America. *International Sociology* 15 (2), 215–232.

Quijano, A. (2002): El fujimorismo del gobierno Toledo. *Observatorio Social de América Latina* 3 (7).

Quijano, A. (2007): Coloniality and modernity/rationality. *Cultural Studies* 21 (2-3), 168–178.

Quijano, A. (2010): Die Paradoxien der eurozentrierten kolonialen Moderne. *PROKLA* 40 (158), 29–47.

Rajagopal, B. (2006): Counter-hegemonic international law: rethinking human rights and development as a Third World strategy. *Third World Quarterly* 27 (5), 767–783.

Raz, J. (2012): The authority of law. Essays on law and morality. 2 ed.: Oxford University Press.

Riggirozzi, M. P. (2005): The World Bank as a norm-broker: knowledge, funds and power in governance reforms in Argentina. Doctoral Dissertation. University of Warwick.

Ríos-Figueroa, J. (2012): Justice system institutions and corruption control: Evidence from Latin America. *Justice System Journal* 33 (2), 195–214.

Risse-Kappen, T.; Risse, T.; Ropp, S. C.; Sikkink, K. (Ed.) (1999): The power of human rights: International norms and domestic change. Cambridge University Press.

Rodríguez-Garavito, C. A. (2006): Globalización, reforma judicial y Estado de derecho en Colombia y América Latina: el regreso de los programas de derecho y desarrollo. *Revista IUSTA* 1 (24), p. 179.

Rodríguez-Garavito, C. A. (2011a): Toward a sociology of the global rule of law field: neoliberalism, neoconstitutionalism, and the contest over judicial reform in Latin America. In Dezalay, Y.; Garth, B. G. (Eds.) Lawyers and the Rule of Law in an Era of Globalization. Routledge, 164–190.

Rodríguez-Garavito, C. A. (Ed.) (2011b): Un nuevo mapa para el pensamiento jurídico latinoamericano. Siglo Veintiuno Ed (derecho y política).

Romano, S. (2020): Lawfare y neoliberalismo en América Latina: una aproximación. *Sudamérica: Revista de Ciencias Sociales* 13, 14–40.

Rubio, D. F.; Goretti, M. (1996): Cuando el presidente gobierna solo. Menem y los decretos de necesidad y urgencia hasta la reforma constitucional (1989 - 1994). *Desarrollo Económico* 36 (141), p. 443.

Saavedra Alessandri, P. (2020): The Role of the Inter-American Court of Human Rights in Monitoring Compliance with Judgments. *Journal of Human Rights Practice* 12 (1), 178–184.

Shany, Y. (2014) Assessing the effectiveness of international courts. Oxford University Press.

Saldaña, J. (2013): The coding manual for qualitative researchers: Sage Publications Ltd.

Sands, P.; Mackenzie, R.; Shany, Y. (Eds.) (1999): Manual on international courts and tribunals. Project on International Courts and Tribunals: Butterworths.

Santos, A. (2006): The World Bank's Uses of the "Rule of Law" Promise in Economic Development. In Trubek, D. M.; Santos, A. (Eds.): The new law and economic development: a critical appraisal. Cambridge University, 253–300.

Schabas, W. A. (2011): An Introduction to the International Criminal Court: Cambridge University Press.

Schilling-Vacaflor, A.; Nolte, D. (Eds.) (2016): New Constitutionalism in Latin America: Promises and Practices: Routlegde.

Scott, J. C. (Ed.) (2008): Seeing Like a State: Yale University Press.

Seawright, J. (2012): Party-system collapse. The roots of crisis in Peru and Venezuela: Stanford University Press.

Seawright, J.; Gerring, J. (2008): Case selection techniques in case study research: A menu of qualitative and quantitative options. *Political research quarterly* 61 (2), 294–308.

Segato, R. L. (2007): La nación y sus otros. Raza, etnicidad y diversidad religiosa en tiempos de políticas de la identidad. 1. ed.: Prometeo Libros.

Segato, R. L. (2013): La crítica de la colonialidad en ocho ensayos: y una antropología por demanda: Prometeo Libros.

Sen, A. (2009): The concept of development. In T. P. Schultz, J. Strauss (Eds.): Handbook of development economics. Elsevier North-Holland, 9–26.

Shihata, I. F. (Ed.) (1991): The World Bank in a Changing World. Vol I. Selected Essays and Lectures: Martinus Nijhoff Publishers.

Shihata, I. F. (Ed.) (1995): The World Bank in a Changing World. Vol II. Selected Essays and Lectures: Martinus Nijhoff Publishers.

Shihata, I. F., (Ed.) (2000) The World Bank in a changing world. Vol. III. Selected Essays and Lectures: Brill.

Shklar, J. N. (1987): Political theory and the rule of law. In Hutchinson, A.; Monahan,P. J. (Eds.): The rule of law: Ideal or ideology. Carswell, 1–16.

Shumway, N. (1991): The invention of Argentina: Univ of California Press.

Sieder, R.; Schjolden, L.; Angell, A. (Eds.) (2005): The judicialization of politics in Latin America: Springer.

Sikkink, K. (2008): From pariah state to global protagonist: Argentina and the struggle for international human rights. *Latin American politics and society* 50 (1), 1–29.

Sikkink, K. (2014): Latin American countries as norm protagonists of the idea of international human rights. *Global Governance*, 389–404.

Simmons, B. A. (2009): Mobilizing for human rights. International law in domestic politics. Cambridge University Press.

Skaar, E. (2003): Un análisis de las reformas judiciales de Argentina, Chile y Uruguay. *América Latina Hoy* (34), 147–186.

Skaar, E.; García-Godos, J.; Collins, C. (Eds.) (2016): Transitional justice in Latin America. The uneven road from impunity towards accountability. First issued in paperback: Routledge.

Slaughter, A. -M. (1995). International law in a world of liberal states. *European journal of international law*, *6*(3), 503-538.

Slaughter, A.-M.; Stone Sweet, A.; Weiler, J. (Eds.) (1998): The European Court and national courts - doctrine and jurisprudence. Legal change in its social context: Bloomsbury Publishing.

Slobodian, Q. (2018): Globalists: The end of empire and the birth of neoliberalism: Harvard University Press.

Slobodian, Q. (2021). The backlash against neoliberal globalization from above: Elite origins of the crisis of the new constitutionalism. *Theory, Culture & Society*, *38*(6), 51-69.

Sobota, K. (1997): Das Prinzip Rechtsstaat: verfassungs-und verwaltungsrechtliche Aspekte. Mohr Siebeck.

Soley, X. (2017): The transformative dimension of inter-American jurisprudence. In von Bogdandy, A., Mac-Gregor, E. F., Antoniazzi, M. M., Piovesan, F., and Soley, X. (Ed.): Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune. Oxford University Press.

Soley, X.; Steininger, S. (2018). Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights. *International Journal of Law in Context*, *14*(2), 237-257.

Staton, J. K.; Moore, W. H. (2011): Judicial power in domestic and international politics. *International Organization* 65 (3), 553–587.

Staton, J. K.; Romero, A. (2019): Rational remedies: the role of opinion clarity in the Inter-American Human Rights System. *International Studies Quarterly* 63 (3), 477–491.

Stiansen, Ø. ; Naurin, D.; Bøyum, L. S. (2020): Law and Politics in the Inter-American Court of Human Rights. *Journal of Law and Courts* 8 (2), 359–379.

Tamanaha, B. Z. (2004): On the rule of law. History, politics, theory: Cambridge University Press.

Tan, C. (2019): Beyond the 'Moments' of Law and Development: Critical Reflections on Law and Development Scholarship in a Globalized Economy. *Law and Development Review* 12 (2), 285–321.

Tate, C. N.;Vallinder, T. (Ed.) (1995): The global expansion of judicial power: NYU Press.

Tavory, I.; Timmermans, S. (2014): Abductive analysis. Theorizing qualitative research: The University of Chicago Press.

Teitel, R. G. (2000): Transitional justice: Oxford University Press.

The World Bank (1992) Governance and Development, available at: https://www.academia.edu/30400144/World_Bank_Governance_and_Development_1992, last accessed: 05.06.2022.

The World Bank (1997) Country Partnership Framework Argentina 1997 – 2000, 24 April 1997

The World Bank (1997) World Development Report: The State in a Changing World, Available at: https://openknowledge.worldbank.org/bitstream/handle/10986/5980/WDR%201997%20-%20English.pdf?sequence=3&isAllowed=y, last accessed: 05.06.2022.

The World Bank (1998) Model Courts Project, Argentina, Project Appraisal Document (PAD), Report No: 17459-A, 4 March 1998

The World Bank (2001) Argentina. Legal and Judicial Sector Assessment. Report 25081. With assistance of Dakolias, Maria; Sprovieri, Luis; De Michele, Robe available at: http://documents.worldbank.org/curated/en/315981468002087349/Argentina-Legal-and-judicial-sector-assessment, last accessed: 05.06.2022.

The World Bank (2004): "Initiatives in Legal and Judicial Reform". 2004 Edition, Available at: https://documents1.worldbank.org/curated/en/139831468778813637/pdf/250820040Edition.pdf, last accessed: 05.06.2022.

The World Bank (2004) Justice Service Improvement I, Peru, Project Appraisal Document (PAD)/Loan Agreement, 9 February 2004

The World Bank (2006) Country Partnership Strategy Peru 2007 – 2011, 19 December 2006

The World Bank (2006) Model Courts Project, Argentina, Implementation Completion Report (ICR), Report No: 35356, 15 March 2006

The World Bank (2007) Model Courts Project, Implementation Completion Report Review (ICRR), No. ICRR12463, 17 August 2006

The World Bank (2010) Justice Service Improvement II, Peru, Project Appraisal Document (PAD), 18 November 2010
The World Bank (2010) Justice Service Improvement I, Peru, Implementation Completion and Results Report (ICR), Report No: ICR00001204, 25 December 2010
The World Bank (2011) Justice Service Improvement I, Peru, Implementation Completion and Results Report Review (ICRR) P13606, 15 December 2011
The World Bank (2012) Initiatives in Justice Reform 1992-2012, Report 70729, available at: http://documents1.worldbank.org/curated/en/575811468175154113/pdf/707290WP0Full000Box370050B00PUBLIC0.pdf, last accessed: 05.06.2022.
The World Bank (2012) New Directions in Justice Reform, available at: https://documents1.worldbank.org/curated/en/928641468338516754/pdf/706400REPLACEM0Justice0Reform0Final.pdf, last accessed: 05.06.2022.
The World Bank (2012) Articles of Agreement, 2012, 27 June
The World Bank (2014): The World Bank Group Goals: End Extreme Poverty and Promote Shared Prosperity. World Bank. Available at: https://openknowledge.worldbank.org/handle/10986/20138, last accessed: 05.06.2022.
The World Bank (2016) The World Bank Group A-Z, available at: https://documents1.worldbank.org/curated/en/896931468189267370/pdf/The-World-Bank-Group-A-to-Z-2016.pdf, last accessed: 06.06.2022.
The World Bank (2016) Justice Service Improvement II, Peru, Implementation Completion and Results Report (ICR) P109073, Report No: ICR109073, 21 December 2016
The World Bank (2017) DRAFT Guidelines for Reviewing World Bank Implementation Completion and Results Reports a Manual for IEG ICR Reviewers, available at: https://ieg.worldbankgroup.org/sites/default/files/Data/More-on-IEG/icrr_evaluatormanual_august2018.pdf, last accessed: 05.06.2022.
The World Bank (2017) Justice Service Improvement II, Peru, Implementation Completion and Results Report Review (ICRR) Report No: ICRR0020612, The independent Evaluation Group (IEG), 7 September 2017
The World Bank (2017) World Development Report: Governance and the Law. The World Bank. Available at: https://www.worldbank.org/en/publication/wdr2017, last accessed: 02.06.2022
The World Bank (2019): Improving the Performance of Non-Criminal Justice Services Project, Peru, Project Appraisal Document (PAD), No. 2837.
Thiery, P. (2016): Das politische System: Verfassung, Staat und Demokratie. In Paap, I.; Schmidt-Welle, F. (Eds.): Peru heute: Politik, Wirtschaft, Kultur.: Vervuert, 143–177.

Timmermans, S.; Tavory, I. (2012): Theory Construction in Qualitative Research. *Sociological Theory* 30 (3), 167–186.

Tomesani, A. M. (2018): International Assistance and Security Sector Reform in Latin America: A Profile of Donors, Recipients and Programs. *Bras. Political Sci. Rev.* 12 (2).

Torres, G. R. (2005): Neoliberalism under Crossfire in Peru: Implementing the Washington Consensus. In Soederberg, S.; Menz, G.; Cerny, P. G. (Eds.). (Ed.): Internalizing globalization. Palgrave. 200–218.

Trebilcock, M. J.; Daniels, R. J. (2009): Rule of law reform and development: charting the fragile path of progress: Edward Elgar Publishing.

Trubek, D.; Santos, A. (Eds.) (2006): The new law and economic development: a critical appraisal. Cambridge University Press.

Trubek, D.; Galanter, M. (1974): Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States. *Wis. L. Rev.*, p. 1062.

Tshuma, L. (1999): The political economy of the World Bank's legal framework for economic development. *Social & Legal Studies* 8 (1), 75–96.

Tuozzo, M. F. (2004): World Bank, Governance Reforms and Democracy in Argentina. *Bull Latin American Research* 23 (1), 100–118.

Tuozzo, M. F. (2009): World Bank influence and institutional reform in Argentina. *Development and Change* 40 (3), 467–485.

Unger, R. M. (1983): The Critical Legal Studies Movement. *Harvard law review* 96 (3), p. 561.

Uprimny, R. (2011): Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos. In Rodríguez-Garavito, C. A. (Ed.): Un nuevo mapa para el pensamiento jurídico latinoamericano, Siglo Veintiuno Ed (derecho y política)., 109–137.

Urueña, R. (2014) Inidcators, International law and the emergene of new political participation settings in global governance. *International Law* 25, 543–584.

van Cott, D. L. (2010): From movements to parties in Latin America. The evolution of ethnic politics. Cambridge University Press.

van Evera, S. (Ed.) (2015): Guide to methods for students of political science. Cornell University Press.

Vannuccini, S. (2014): Member States' Compliance with the Inter-American Court of Human Rights' Judgments and Orders Requiring Non-Pecuniary Reparations. *Inter-Am. & Eur. Hum. Rts. Journal* 7, p. 225.

Vennesson, P. (2008): Case studies and process tracing: theories and practices. In Della Porta, D.; Keating, M. (Eds.): Approaches and methodologies in the social sciences: A pluralist perspective: Cambridge University Press, p. 223.

Vergara, A.; Watanabe, A. (2016): Delegative Democracy Revisited: Peru Since Fujimori. *Journal of Democracy* 27 (3), 148–157.

Kristicevic, V (2007) Doctrina y Comentarios. In Kristicevic, V.; Tojo, L. (Eds) (2007) "Implementación de las decisiones del sistema interamericano de derechos humanos. Jurisprudencia, normativa y experiencias nacionales. CEJIL. Available at availbale at: https://www.corteidh.or.cr/tablas/23679.pdf, accessed 05.06.2022., 15-112.

von Bogdandy, A..; Venzke, I. (Eds.): International judicial lawmaking: on public authority and democratic legitimation in global governance: Springer.

von Bogdandy, A. von; Ferrer Mac Gregor, E.; Morales Antoniazzi, M.; Piovesan, F.; Soley, X. (2016): Ius Constitutionale Commune En Ammrica Latina: A Regional Approach to Transformative Constitutionalism.

von Bogdandy, A., Mac-Gregor, E. F., Antoniazzi, M. M., Piovesan, F., and Soley, X. (Eds.) (2017): Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune.

von Bogdandy, A.; Ebert, F. C. (2018): El Banco Mundial frente al constitucionalismo transformador latinoamericano: panorama general y pasos concretos, In von Bogdandy (Ed) Transformaciones del derecho público. Fenómenos internacionales, supranacionales y nacionales. Colección IECEQ, 281- 330.

Waldron, J. (2002): Is the Rule of Law an Essentially Contested Concept (in Florida)? *Law and Philosophy* 21, p. 137.

Waldron, J. (2016): The rule of law. Stanford Encyclopedia of Philosophy. Available at plato.stanford.edu.

Wallerstein, I. M. (1974): The Modern World-System I Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century. New York Academic Press.

Warren, M. E., Mansbridge, J. (2013): Deliberative negotiation. In Negotiating agreement in politics. Mansbridge,J. Jo Marti, C. (Ds.) American Political Science Association, p. 86.

Watson, A. (1995): From Legal Transplants to Legal Formants. *The American Journal of Comparative Law* 43 (3), p. 469.

Weber, M. (1968): Economy and society. An Outline of Interpretive Sociology: Bedminster Press.

Wehr, I. (2014): Auf dem Weg zur großen Entwicklungstheorie 2.0? Multiple und verwobene Moderne und die Rückkehr der großen Fragestellungen. In Im Westen nichts Neues? In A. Ziai (Ed.): Im Westen nichts Neues? Stand und Perspektiven der Entwicklungstheorie: Nomos, 41–71.

Wesche, P.; Zilla, C. (2017): Korruption in Brasilien - ein Fass ohne Boden: der Lava-Jato-Fall, seine Aufklärung und die regionalen Implikationen. *1611-6364* 39/2017, p. 8.

Weston, C.; Gandell, T.; Beauchamp, J.; McAlpine, L.; Wiseman, C.; Beauchamp, C. (2001): Analyzing interview data: The development and evolution of a coding system. *Qualitative sociology* 24 (3), 381–400.

Whyte, J. (2018): Powerless companions or fellow travellers? : human rights and the neoliberal assault on post-colonial economic justice. *Radical Philosophy*, 13–29.

Whyte, J. (2019): The morals of the market. Human rights and the rise of neoliberalism: Verso.

Wiener, A. (2009): Enacting meaning-in-use: qualitative research on norms and international relations. *Review of International Studies* 35 (1), 175–193.

Wiener, A. (2014): A theory of contestation: Springer.

Yashar, D. J. (2005): Contesting Citizenship in Latin America. The Rise of Indigenous Movements and the Postliberal Challenge. Cambridge University Press.

Yupanqui, S. A.; de Belaunde, J.; de la Jara, E.; Pásara, L. (2003): Reforma del poder judicial: refundando el sistema de justicia del Perú. *THĒMIS-Revista de Derecho* 47, 297–306.

Ziai, A. (Ed.) (2014): Im Westen nichts Neues? Stand und Perspektiven der Entwicklungstheorie: Nomos

Ziai, A. (2016): Negotiating 'Development': Constitution, Appropriation and Contestation. In Dhawan, N.; Fink, E., Leinius, J.; and Mageza-Barthel, R. (Eds.): Negotiating normativity. Postcolonial appropriations, contestations, and transformations. Springer, 191–205.

Ziai, A. (2016): Postkoloniale Studien und Politikwissenschaft. Komplementäre Defizite und ein Forschungsprogramm. In A. Ziai (Ed.): Postkoloniale Politikwissenschaft. Theoretische und Empirische Zugänge: Transcript, 25–48.

Ziccardi, N. S.; Martínez, J. Á.; Castelán, B. R.; Valverde, M. J. U. (2019): Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope. In P. Engstrom (Ed.): The Inter-American Human Rights System: Impact Beyond Compliance. Cham: Springer International Publishing, 59–88.

Zimmermann, L. (2017): Global Norms with a Local Face. Rule-of-Law Promotion and Norm Translation: Cambridge University Press.

Zimmermann, B. (2018): From Critical Theory to Critical Pragmatism: Capability and the Assessment of Freedom. *Critical Sociology* 44 (6), 937–952.

# Annexes

## *Annex 1 List of interview partners*

The interviews listed below were conducted during the following research stays:

8 to 21 October 2017: Washington D.C., USA

4 January to 3 April 2018: San José, Costa Rica

3 to 30 April 2018: Lima, Perú

30 April to 31 May 2018: Buenos Aires, Argentina

Interviews were conducted in English (E), Spanish (S) and German (G) as indicated.

| **Washington D.C.** | | | | |
|---|---|---|---|---|
| **Interview Number** | **Date** | **Function** | **Place** | **Duration** |
| Int. #1 (Personal Interview) E | 10/10/2017 | Project Manager Peru, Public Sector Specialist, World Bank | Washington D.C. WB Headquarters | 48 min. |
| Int. #2 (Personal Interview) E | 11/10/2017 | Former Project Manager Argentina, Lead Public Sector Specialist, World Bank | Washington D.C. WB Headquarters | 46 min. |
| Int. #3 (Skype Interview) E | 13/10/2017 | Former Project Manager Peru, Governance and Ant-Corruption Advisor, World Bank | Skype | 56 min. |
| Int. #4 (Skype Interview) E | 16/10/2017 | Former IDB staff, former WBG staff (East Europe, Latin America), Consultant Justice Reform | Skype | 55 min. |
| Int. #5 (Personal Interview) E | 17/10/2016 | Former Project Manager Peru, Lead Public Sector Specialist, World Bank | Washington D.C. WB Headquarters | 63 min. |
| Int. #6 (Personal Interview) E | 17/10/2017 | Manager of Strategy and Operations, Development Economics, World Bank | Washington D.C. WB Headquarters | 46 min. |
| Int. #7 (Personal Interview) E | 18/10/2017 | Former Project Manager Argentina, Lead Counsel, World Bank | Washington D.C. WB Headquarters | 60 min. |
| **San José** | | | | |
| Int. #8 (Personal Interview) S | 15/03/2018 | Judge, IACtHR | San José, IACtHR | 48 min. |
| Int. #9 (Personal Interview) G | 15/03/2018 | Advisor Judicial Reforms Development Agencies | San José, IACtHR | approx. 30 min. |

| | | | | |
|---|---|---|---|---|
| Int. #10 (Personal Interview) S | 16/03/2018 | Former Judge IACtHR | San José, IACtHR | 33 min. |
| Int. #11 (Personal Interview) S | 20/03/2018 | Director Inter-american Institute for Human Rights | San José, Inter-american Institute for Human Rights | approx. 55 min. |
| Int. #12 (Personal Interview) S | 21/03/2018 | Two Staff Members IACtHR, Academics | San José, IACtHR | 55 min. |
| Int. #13 (Personal Interview) | 26/04/2016 | IACtHR Staff, Academic | San José, IACtHR | 50 min. |
| **Lima** | | | | |
| Int. #14 (Personal Interview) S | 11/04/2018 | Former Staff World Bank Project Peru, Anti-Corruption Agency Peru | Lima, Anti-Corruption Agency Peru | approx. 60 min. |
| Int. #15 (Personal Interview) S | 19/04/2018 | Lawyer, Academic, Pontífica Universidad Católica de Peru | Lima, Pontífica Universidad Católica de Peru | 52 min. |
| Int. #16 (Personal Interview) S | 20/04/2018 | Staff Constitutional Court Peru | Lima, Constitutional Court | 43 min. |
| Int. #17 (Personal Interview) S | 20/04/2018 | Staff Government Prosecutors Office for International Affairs, Procuraduría Supranacional Perú | Lima, Apartment | 83 min. |
| Int. #18 (Personal Interview) S | 23/04/2018 | Staff Constitutional Court Peru | Lima, Constitutional Court | 54 min. |
| Int. #19 (Personal Interview) G | 23/042018 | Judge, former KAS staff, former GIZ Judicial Reforms Peru | Lima, Hotel County Club | 102 min. |
| Int. #20 (Personal Interview) S | 24/04/2018 | Former World Bank Staff, Judicial Reforms Peru, Anti-corruption Specialist, Treasury Inspectors Office, Contraloría General de la Républica | Lima, Contraloría General de la Républica | 61 min. |
| Int. #21 (Personal Interview) S | 24/04/2018 | Judge Constitutional Court Peru | Lima, Constitutional Court | 22 min. |
| Int. #22 (Personal Interview) S | 25/04/2018 | Former Advisor World Bank Project Peru, Director of Planning and Development Ministry of Justice | Lima, Ministry of Justice | 89 min. |
| Int. #23 (Skype Interview) S | 25/04/2018 | Consultant WBG Judicial Reform Project Peru | Skype | 101 min. |

| | | | | |
|---|---|---|---|---|
| Int. #24 (Skype Interview) G | 13/04/2018 | KAS Judicial Program | Skype | 64 min. |
| **Buenos Aires** | | | | |
| Int. #25 (Personal Interview) S | 10/05/2018 | Judge Supreme Court of Argentina | Buenos Aires, Constitutional Court | 55 min. |
| Int. #26 (Personal Interview) S | 14/05/2018 | Academic Universidad de Buenos Aires (UBA), Consultant Judicial Reform | Buenos Aires, Universidad de Buenos Aires | 77 min. |
| Int. #27 (Personal Interview) S | 16/05/2018 | Academic, Former Staff Government Prosecutors Office | Buenos Aires, Universidad de Lanús | 74 min. |
| Int. #28 (Personal Interview) S | 21/05/2018 | Academic, Former Consultant WBG Judicial Reform Project Argentina | Buenos Aires, Universidad de Belgrano | approx. 60 min. |
| Int. #29 (Personal Interview) S | 22/05/2018 | Judge, Argentina | Buenos Aires, Federal Court | 50 min. |
| Int. #30 (Personal Interview) | 23/05/2018 | NGO Judicial Sector, Argentina | Buenis Aires, Asociación de Magistrados | 29 min. |
| Int. #31 (Personal Interview) S | 24/05/2018 | Academic, Consultant Judicial Reform Project World Bank Argentina | Buenos Aires, Café | 75 min. |
| Int. #32 (Personal Interview) | 24/05/2018 | Judge, Argentina, Former Staff Judicial Reform Project World Bank | Buenos Aires, Federal Court | 22 min. |
| Int. #33 (Personal Interview) S | 28/05/2018 | Consultant Judicial Reform Project Argentina, World Bank | Buenos Aires, Café | approx. 55 min. |
| Int. #34 (Personal Interview) S | 29/05/2018 | Staff Centro de Estudios Legales y Sociales (CELS), NGO, Judicial Sector, Victim Representation before International Courts | Buenos Aires, CELS | 42 min. |
| Int. #35 (Personal Interview) S | 03/06/2018 | Staff Supreme Court Argentina | Boston (USA), Café | 55 min. |

# *Annex 2 List of Project Documents, Judgments and Resolutions of Supervision*

| **Case Study on Peru World Bank Documents** | | | | |
|---|---|---|---|---|
| **Project Name** | **Time Frame/Date Issued** | **Loan** | **Implementing Agencies[367]** | **Documents** |
| **Judicial Reform Project (cancelled)** | 30 June 2000 | 22,5 Mio USD | | Project Completion Report, Report No. 20669 |
| **Justice Service Improvement I** | 2004 – 2011 | 12 Mio USD | Judiciary, Judicial Council (CNM), Judicial Academy (AMAG), Ministry of Justice (MINJUS) | |
| | 9 February 2004 | | | Project Appraisal Document/Loan Agreement |
| | 25 December 2010 | | | *Implementation Completion and Results Report* (ICR), Report No: ICR00001204 |
| | 15 December 2011 | | | *Implementation Completion and Results Report* Review (ICRR) P13606 |
| | | | | |
| **Justice Service Improvement II** | 2011 – 2016 | 20 Mio USD | Judiciary, Ministry of Justice (MINJUS), Judicial Academy (AMAG), Attorney General's Office, Judicial Council (MINJUS) | |
| | 18 November 2010 | | | Project Appraisal Document |
| | 21 December 2016 | | | Implementation Completion and Results Report (ICR) P109073, Report No: ICR109073 |
| | 7 September 2017 | | | Implementation Completion and Results Report Review (ICRR) Report Number : ICRR0020612 |
| **Improving the Performance of Non-Criminal Justice Services Project[368]** | 10 May 2019 | 85 Mio USD | | Project Appraisal Document/Loan Agreement |
| **Other World Bank Documents** | | | | |
| | 19 December 2006 | | | Country Partnership Framework 2007 - 2011 |

[367] As listed in the Project Appraisal Documents.

[368] This loan between the Bank and Peru was closed after the period analysed in this research. However, negotiations took place beforehand and were referred to in interviews. For reasons of completeness, the PAD is listed here, albeit it was not included in the corpus of coded material.

| IACtHR Documents | | | |
|---|---|---|---|
| **Case** | **Date Issued** | **Compliance[369]** | **Documents** |
| **Constitutional Court v. Peru** | 31 January 2001 | Partial compliance | Judgment (Merits, Reparations, and Costs) |
| **Barrios Altos v. Peru** | 14 March 2001 | Partial compliance | Judgment (Merits) |
| | 30 November 2001 | | Judgment (Reparations, and Costs) |
| | 4 August 2008 | | Resolution of Supervision[370] |
| | 7 December 2009 | | Resolution of Supervision |
| | 7 September 2012 | | Resolution of Supervision |
| | 2 February 2018 | | Public Audience[371] |
| | 30 May 2019 | | Resolution of Supervision |
| **Durand and Ugarte v. Peru** | 16 August 2000 | Partial Compliance | Judgment (Merits) |
| | 3 December 2001 | | Judgment (Reparations and Costs) |
| | 5 August 2008 | | Resolution of Supervision |
| | 27 November 2002 | | Resolution of Supervision |
| | 8 February 2018 | | Resolution for Provisional Measures |
| | 30 May 2018 | | Resolution for Provisional Measures |
| | 17 December 2017 | | Resolution for Urgent Measures |
| **Penal Miguel Castro Castro v. Peru** | 25 November 2006 | Partial Compliance | Judgment (Merits, Reparations and Costs) |
| | 2 August 2008 | | Interpretation of the Judgment on Merits, Reparations, and Costs |
| | 28 April 2009 | | Resolution of Supervision |
| | 5 February 2018 | | Resolution for Provisional Measures[372] |
| **La Cantuta v. Peru** | 29 November 2006 | | Judgment |
| | 30 May 2018 3 | | Resolution of Supervision |
| | 20 November 2009 | | Resolution of Supervision |
| | 2 February 2018 | | Public Audience |
| **Case of Torres Millacura and others v. Peru** | 26 August 2011 | | Judgment (Merits, Reparations and Costs) |
| | 2 June 2000 | | Country Report Peru OEA/Ser.L/V/II.106 Doc. 59 rev. |
| **Case Study on Argentina World Bank Documents** | | | |

[369] The categorization of compliance is based on the summary of the pending reparation orders (updated after resolutions of supervisions are issued) provided by the Court at its homepage.
[370] The list of the resolutions of supervision is not comprehensive.
[371] I also participated in person in this public audience during the research stay at the IACtHR. Footage of the Public Audience is available on vimeo https://vimeo.com/254021472
[372] The latest provisional measure was issued on March 23, 2021, see: https://www.corteidh.or.cr/docs/medidas/castro_se_05.pdf

| Project Name | Time Frame/Date Issued | Loan | Implementing Agencies | Documents |
|---|---|---|---|---|
| **Reform of Justice** | March 1999 | | | Reform of Justice Project Report, No. PID7140 |
| **Model Court Development Project/Pilot Courts** | 1998- 2006 | 5 Mio USD | Initially Supreme Court, Ministry of Justice, Chief of Cabinet; ex post Magistrate Council (Judicial Council) | |
| | 04 March 1998 | | | Project Appraisal Document, Report No: 17459-A |
| | 15 March 2006 | | | Implementation Completion Report (ICR), Report No: 35356 |
| | 17 August 2006 | | | Implementation Completion Report Review (ICRR), Report No. |
| **Other World Bank Documents** | | | | |
| | 24 April 1997 | | | Country Partnership Framework 1997 - 2000 |
| **Case Study on Argentina IACtHR Documents** | | | | |
| **Case** | **Date Issued** | **Compliance** | | **Documents** |
| **Bulacio v. Argentina** | 18 September 2003 | Partial compliance | | Judgment (Merits, Reparations and Costs) |
| | 26 November 2008 | | | Resolution of Supervision |
| **Bueno Alves v. Argentina** | 11 May 2007 | Partial compliance | | Judgment (Merits, Reparations and Costs) |
| | 30 March 2018 | | | Resolution of Supervision |
| **Fontevecchia and D`Amico v. Argentina** | 29 November 2011 | Partial compliance | | Judgment (Merits, Reparations and Costs) |
| | 1 September 2015 | | | Resolution of Supervision |
| | 22 September 2016 | | | Resolution of Supervision |
| | 18 October 2017 | | | Resolution of Supervision |
| | 21 August 2017 | | | Public Audience |
| **Argüelles and others v. Argentina** | 20 November 2014 | | | Judgment (Preliminary Objections, Merits, Reparations and Costs) |
| | 22 November 2016 | | | Resolution of Supervision |
| | 23 June 2015 | | | Interpretation of Judgment |
| | 30 May 2018 | | | Resolution of Supervision |
| **Milagro Salas** | 23 November of 2017 | | | Provisional Measure |

## *Annex 3 Guidelines for the semi-structured interviews*

The guidelines were adapted according to the interview situations and the interviewed person. In general the guidelines were comprising sections relating to the professional background of the interviewed person, specific questions relating to projects and judgments and more broad questions with regard to the institutional landscape and institutional dynamics

---

### 1st Example: guidelines in English, interviews at the World Bank, November 2017

**I. Ask for Permission for Recording the Interview**

**II. Personal Information and Research Area of the Interviewer**

[…]

**III. Personal Information about the Interviewee**

- Could you please briefly present yourself and describe your academic background
- For how long have you been working for the WB and in which projects, where did you previously work?
- (Disclaimer? Do you give interviews to Ph.D. students frequently?)

**Areas of Expertise**

- What are your areas of expertise?
- Do you currently work in any other contexts than the World Bank Group e.g., teaching at University, NGOs, think tanks?

**IV. Current Projects**

- Could you briefly outline your specific tasks in the current project you are working on in LAC?
- How long have you been working in these projects? For how long has the WB planned on these projects?
- Who initiated the talks about the projects?
- Who is your national counterpart?
- Within WB action, is this one of a more challenging projects? What is the timeframe for the implementation?
- How flexible is the implementation scheme of the WB?
- What are the key areas of reform? Could you prioritize them?

**Challenges in Projects**

- What are the current challenges in these projects?
- What could be legal obstacles to the project? From WB side and regarding the national legal system?
- What are political obstacles to the project?
- In what sense does the public perception of the World Bank or other international financial organizations matter?

**Negotiation/coordination in the Projects**

- How often are meetings with local counterparts taking place for designing these projects?
- In which language are the meetings taking place?
- Who is participating in the meetings? Are they any actors that signaled interest to participate in future meetings?
- Have you experienced case in which the government fails to demonstrate political will or interferes frequently with judicial independence?
- Have you experienced cases in which the judiciary oversteps its competences in a judicial reform project (judicial law making/ judicial politics)?

- What could be possible reactions of the WB to these kind of actions?

**Limits of WB Action**

- Is there something the WB would like to include into the projects but is not able to do so due to limitations of some type?
-

**V. Special Questions Concerning Current and Past Projects in Peru**

- Which project are you currently planning on in Peru?
- What are the main features of the project design?
- In relation to other projects, is this project ambitious, comprising many areas of activities and reform?
- Who is your national counterpart?
- Do you feel any kind of tensions among your national counterparts?
- How would you describe the judicial landscape in Peru with a special view to judicial independence?
- What did the WB learn from past projects in Peru?
- What could be learned from this project for future projects in the region?

**VI. Special Questions Concerning Past Projects in Argentina**

- What were the past WB projects in Argentina?
- What did the WB learn from past projects in Argentina?
- What could be learned from these project for future projects in the region?
- Is the WB planning on new projects in Argentina? If yes/no why so?
- How would you describe the judicial landscape in Argentina with a special view to judicial independence?

**VII. Special Questions about Knowledge Production in the World Bank**

1. How is knowledge concerning the needs for RoL reforms generated within the Bank?
2. How are the needs of the countries negotiated and channeled into the Bank?

**Rule of Law Approach in the World Bank Projects**

- How did the RoL Approach in the World Bank Change over time? Did it change at all? What were important turning point for definitions of Rol inside the Bank?
- How would you evaluate the overall importance of RoL in the portfolio of the WB-actions?

**Challenges Concerning RoL Approach in the Bank Projects**

- What are current challenges to RoL reform implementation in WB projects considering limitations caused by mandates, resources, political will?
- Any other limitation you want to add?

**VIII. Regional RoL Standard LA**

- To your opinion, is there any difference to other regions regarding the interpretation of Rule of Law in Latin America?
- How would you describe the importance of new Latin American Constitutions in this regard?
- Is, to your opinion, the WB contributing to the development of such standards? If so how?

**Current Challenges concerning RoL in LA**

- What are, to your opinion the biggest challenges to RoL reform in Latin America?
- What is the biggest Obstacles to RoL realization in LA?
- What are the biggest challenges for the WB in this context?

**IX. Exchange with other IOs in RoL Sector – UN System, Inter-American Human Rights System, OAS System**

- What does the Banks cooperation with the UN System and/or other IOs in the sector look like?
- Is there any institutionalized form of exchange e.g., meetings, calls, projects in place?
- How does the Bank interact with the OAS-System, especially with the Inter-American Human Rights System?

**X. Recommendations for future research**

- What could be of interest for me (Persons, Documents, Research Fields, WB reforms projects?)

**XI. Sharing of Information**

- Do you want me to share the results of my research in the aftermath? Would you be willing to keep in touch for further interviews for example after I visited the countries HQ?

**XII. Informed Consent**

**XIII. End of Interview**

## 2nd Example: guidelines in Spanish, interviews at the IACtHR, March 2018

**I. Informaciones sobre la situación y el marco de la entrevista**

**II. Informaciones sobre la investigadora y la investigación**

**III. Preguntas con relacion a la persona entrevistada [si no esta conocida]**

**IV. Preguntas en relación con las poíticas de la IACtHR**

- Como describiera usted las politicas de la Corte con respecto a la separación e poderes y el estado de derecho estos dos conceptos?
- Desde su punto de vista, cuales son las normas en que se basa la jurisdiccion de la Corte de pronunciarse sobre estos conceptos fundamentales?
- Como ve usted el rol de la Corte con respecto a asegurar estos conceptos frente al rol de la CIDH y la Asamblea General de la OEA?
- Con respecto a la separacion de poderes, puede usted dar ejemplos recientes donde la Corte se pronunció sobre estos temas en especifico? Y cuando entró en conflicto sobre estos conceptos con Estados partes?

**V. Preguntas con respecto a resistencia general frente actuaciones de la IACtHR**

- Cuales son las limites que pusieron los Estados al sistema interamericano?
- Cuales fueron momentos donde la Corte ejerciendo su jurisdiccion fue frenado por Estados bajo su jurisdiccion?
- Cuales fueron los razones por este freno?
- Cuales fueron los estandares a que la Corte volvió respectando este freno?
- Cual es el aprendizaje que se dió en este momento con respecto al margen de apreciacion de la Corte en la ejecucion de su jurisdiccion?

**VI. Preguntas con respecto a supuesta polizitación de la Corte**

- Hablando en terminos generales, no necesariamente con relación a aconteciminetos recientes, cuales son los momentos en que la Corte se vio enfrentado con una instrumentalizacion por parte de Estados?
- Como reaccionó la Corte con respceto a intentos o situaciones reales de politizacion?

**VII. Preguntas con respecto a relación de la Corte con Perú**

- Como ha cambiado el cumplimiento de las sentencias de Peru durante tiempo?
- Puede nombrar, momentos específicos cuando se dieron estos cambios?
- En términos generales cuales son los cambios estructurales que se necesita en Peru para un mejor cumplimiento de sentencias de la Corte?
- Efectos non-intendidos de setencias de la Corte observable en Peru?
- Cuales son los actores dentro de Peru que más apoyan o limitan el trabajo de la Corte?
- Por que razones, piensa usted apoyan o limitan estos actores el trabajo?

**VIII. Preguntas con respecto a relación de la Corte con Argentina**

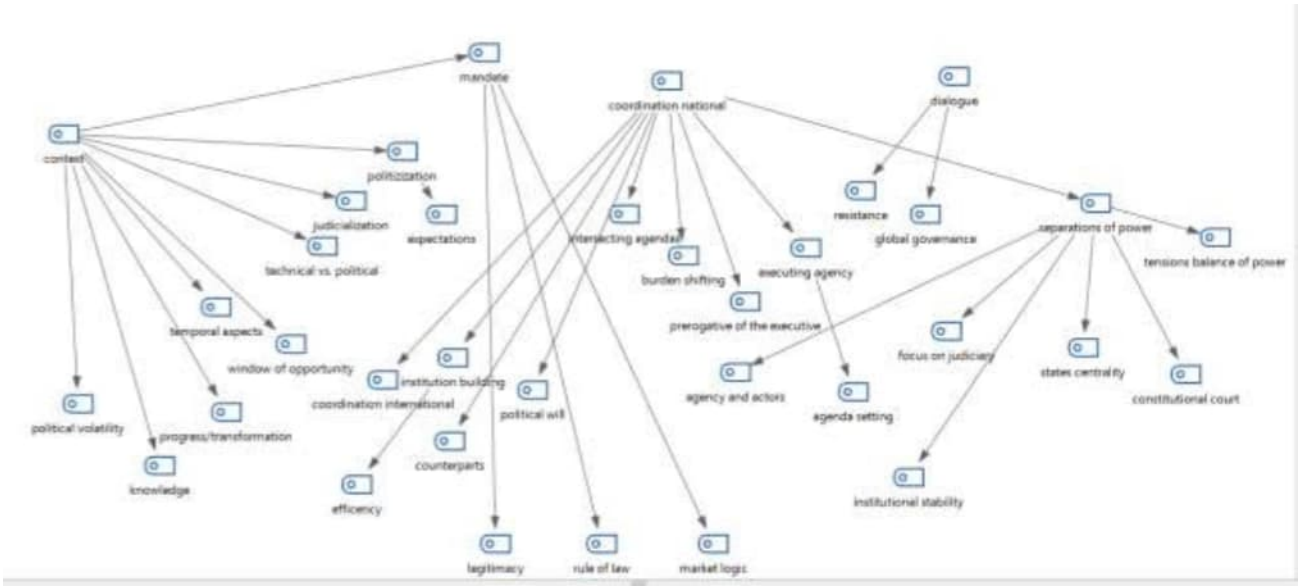
- Como ha cambiado el cumplimiento de las sentencias de Argentina durante tiempo?
- Puede nombrar, momentos específicos cuando se dieron estos cambios?
- En términos generales cuales son los cambios estructurales que se necesita en Peru para un mejor cumplimiento de sentencias de la Corte?
- Efectos non-intendidos de setencias de la Corte observable en Argentina?
- Cuales son los actores dentro de Argentina que más apoyan o limitan el trabajo de la Corte?
- Por que razones, piensa usted apoyan o limitan estos actores el trabajo?

**IX. Otras preguntas abiertas**

**X. Fin de la entrevista**

## *Annex 4 Examples of coding system*

Screenshot from MAXQDA: creative coding exploration of elements




Source: Own illustration, work in progress during coding

Screenshot from MAXQDA: creative coding Argentina background


Source: Own illustration, work in progress during coding