Political Trials
Leora Bilsky

Political Trials

The term 'political trial' is popularly associated with 'show trials' like the Moscow Purge trials conducted by Stalin during the 1930s. Such trials represent an extreme example of political repression and are viewed as sham legal proceedings designed by authorities to dramatize specific political campaigns and/or to eliminate prominent individuals. In this context the political trial is taken to be a 'show' in which politicians and not jurists pull the strings and determine the results of the trial in advance. This pejorative use of the term also helps designate regimes that resort to such techniques as the antithesis of liberal democracies. Yet, as Otto Kirchheimer observed, the most effective usage of political trials occurs precisely within liberal democracies, in societies committed to the rule of law. What can explain this gap between popular perceptions and the actual practice of political trials? Can we distinguish a political trial from a 'show trial'? Should we continue to view political trials as opposed to the very essence of liberal democracies, or should we accept them as part and parcel of this system, deserving a sustained theoretical elaboration?

In his seminal book *Political Justice* Kirchheimer defines political trials as instances in which 'court action is called upon to exert influence on the distribution of political power' (Kirchheimer 1961). This broad definition includes the use of the court by the ruling elites or by outgroups and dissenters to achieve political goals by judicial means. Many writers regard the central factor in such trials as the political motive behind them. The connecting thread between the trial of Socrates for corrupting the youth of Athens (399 BC), the trial of Jesus for blasphemy and sedition (AD 30), the trial of Joan of Arc (1431) for heresy and witchcraft, the trial of Thomas More (1534) for remaining silent when asked about Henry VIII's supremacy in religion, the trial of Galileo (1633) for heretically suggesting that the earth moved around the sun, and many other trials is that, in each case, men in power believed that the defendant was a threat to them (Becker 1971, Belknap 1981). For this reason the prototype of a political trial has been the criminal trial of a political adversary for political reasons. This broad definition encompasses trials in which the defendant has directly attacked the established order by acts such as treason or sedition, but also trials involving common crimes in which only the personality or the motive of the offender indicates their political nature. Other writers try to refine this definition by expanding its scope to legal proceedings other than criminal trials such as impeachment, congressional hearings, and truth commissions. It has also been suggested that the definition be extended to include trials involving larger group conflicts such as ethnic, race, or labor struggles. Some move the emphasis from the political motive of the authorities to the political identity of the defendant. Yet others conclude that the important factor that distinguishes such trials is not the motive but the competition of stories over the identity of the polity. Notwithstanding their differences, all writers on the subject agree that political trials are inevitable not only in authoritarian regimes but also in constitutional democracies, although this is generally denied, in particular by legal practitioners. Critical of such denials, these scholars set out to replace them with an honest recognition of the existence and function of political trials in both types of regimes.

Why should the term political trial cause such anxiety and widespread denial? Since law tends to stabilize the status quo, it is not surprising that there are always people who feel justified in ignoring the law in order to bring about drastic and necessary changes. This is especially true for powerless groups that are prevented from participating effectively in important institutional decisions affecting their lives (Hakman 1972, Fletcher 1995). When the authorities put on trial those who challenge the basic value distribution in society, especially those who are willing to disregard existing laws to this end, the result is a political trial. Despite this regular occurrence of political trials within democratic societies, the term is widely resisted because of its connotation with 'show trials' in which either the charge is a 'frame-up' to conceal the political motivation of the prosecution, or the hearing itself fails to meet minimum standards of judicial impartiality and independence. For this reason, writers attempt to distinguish among different types of political trials. One classification distinguishes among politically motivated trials, politically determined trials, and trials with substantial political consequences (Friedman 1970). Another differentiates between political 'trials' (abridgment of due process guarantees) the 'political' trial (camouflaged as a criminal trial) and the political trial (politically motivated) (Becker 1971). These efforts at classification have proved frustrating because of the immense historical variations and the widespread existence of political trials in very different regimes. Writers have identified a variety of characteristics of political trials but none has proved

to be a sufficient and necessary condition. This literature has largely been descriptive but has failed to assess the compatibility of political trials with liberal values and thus to overcome the negative connotations the term arouses. In order to address this question it is necessary to expose the hidden engine of political trials—their legitimizing function—and its relation to democracy.

The legal system offers a tempting opportunity for those in power to damage enemies, tarnish their image, and isolate them from potential allies by casting them as criminals. This temptation becomes especially strong in democracies that constrain the ruling elite from resorting to more direct devices of repression. What distinguishes political trials from other political devices is their legitimizing function, i.e., their ability to turn a political adversary into a criminal defendant and thereby reinforce the legitimacy of those in power. However, this function can be served only if the public perceives the trial as providing the defendant with a 'fighting chance.' In constitutional democracies this 'fighting chance' is generally assured by the relative autonomy of the judges and the constraining effects of the rule of law (Kirchheimer 1961). Moreover, these guarantees introduce an element of uncertainty into the trial, and encourage political defendants to use it to expose the illegitimacy of the policy or value system advanced by the authorities. Indeed, from Socrates's trial (399 BC) to the Chicago Conspiracy trial (1969), there have always been defendants who have exploited the limited forum that the political trial provided them to articulate their oppositional views. Some have adopted a defiant stance, proclaiming their right to commit the crime (Solomon Tellirian—as a protest against the Armenian massacre by the Turks in 1921; Dr Jack Kevorkian—advocating euthanasia in 1999), or refusing to respect traditional courtroom decorum altogether (Bobby Seale–Black Panthers in 1969; Klaus Barbie–Nazism and Vichy France in 1987); others have played by the rules in order to win an acquittal that would confirm their claim that they were being prosecuted for their political beliefs (Dr Spock–Vietnam War in 1968). Insight into this legitimizing function and the element of uncertainty that it introduces into political trials in democratic regimes exposes the tension between politics and justice inherent in them. This has made political trials a fascinating area for research since the 1960s.

1. Political Trials in the Transition to Democracy

Political trials are most salient in times of transition between regimes, especially when a new democratic regime confronts crimes of the old regime. Indeed, the first attempts to seriously consider the compatibility of political trials with liberal–democratic values appear in the literature on the transition to democracy. Unlike a military revolution that sustains its authority by brute force, democratic regimes are committed to the rule of law and are inclined to address the evils of the previous regime with the help of legal devices. However, the new regime's commitment to the rule of law also makes it aware of the dangers of using *ex post facto* laws and indulging in 'victor's justice.' At such times, the various expectations from the law—to punish the guilty, ascertain the truth about the old regime, and enhance reconciliation in society—seem to overwhelm the legal system and to push it in opposite directions. Moreover, the forward-looking direction of the architects of democracy who are concerned with the efficacy of the transition often conflicts with the backward-looking direction of legal proceedings and their narrow focus on individual guilt (Osiel 1997, Nino 1991, Teitel 1997). For these reasons trials of transition bring to the foreground the clash between politics and justice. Two main approaches to the problem have evolved since World War II: Exemplary Criminal Trials and Truth Commissions, both of which can be considered political trials of sorts and have received extensive theoretical elaboration.

At the end of World War II the Allies established an international military tribunal in Nuremberg (1945) to judge the leaders of the Nazi regime. This was the first time in history that the leaders of a defeated country had faced criminal prosecution for war crimes, crimes against the peace, and crimes against humanity by an international tribunal. The charge applied in the trial—conspiring to

wage an aggressive war—allowed the prosecution to tell a general historical narrative. Could the obvious political end of using the court to teach a history lesson (through *ex post facto* laws, and victors' judges) be reconciled with the demands of liberalism? Confronted with this dilemma, Judith Shklar made the first serious effort to reconcile the legacy of liberalism with political trials occurring in the transition to democracy (Shklar 1964). A legalistic understanding of liberalism, she argued, could justify the Nuremberg trials only at the high cost of denying their political nature altogether. In her view, procedural safeguards to defendants could only guarantee that the trial would not deteriorate into a show trial, but this in itself could not justify deviating from basic liberal demands such as an independent judiciary, established court, nonretroactive laws etc. Paradoxically, Shklar came to the conclusion that the political dictate of founding a democracy justified the divergence from strict legalism in the Nuremberg trials. In other words, it was only an honest recognition of the political aspects of the trials, their educational and symbolic contribution to the building of democracy in postwar Germany, that could justify them. Later writers accepted Shklar's consequentialist approach to transitional justice but limited its applicability to trials that guarantee the due-process rights of the defendants (Osiel 1997).

A very different attempt to address the crimes of the Nazi regime was made in the Eichmann trial (1961). This time it was not the international community but an Israeli court that undertook to judge one of the central figures in the massacre of the Jews. The political nature of the trial was evident, among other things, from its reliance on the particularistic law of 'crimes against the Jewish people.' Likewise the heavy reliance on victims' testimonies about their suffering (and through them the telling of the Jewish Holocaust) conflicted with the liberal demand that the trial concentrate on proving the deeds of the accused. Hannah Arendt and other writers criticized the Israeli prosecution for politicizing the trial in this way (Arendt 1963, Segev 1993, Lahav 1992). Others see the decision as stemming from the general dilemma of political trials of how to strike a balance between the need to establish the truth about an oppressive regime, the need to give voice to the victims, and the need to ascertain the guilt of the defendants (Bilsky 2004).

This dilemma is compounded when the former authoritarian regime retains enclaves of power and opposes any attempt to bring to justice the officials of the former regime. In South America, Argentina is one of the few nations to have prosecuted military officers in public trials for their role in repression carried out under the former regime. The political nature of these trials was evident in the decision to prosecute only the masterminds and the worst offenders, and in the greater priority given to the value of learning about the evils of the authoritarian past than to prosecuting every individual who was involved. Again, the justification for such selective prosecution is given in consequentialist terms—the extent to which the trial serves to strengthen the emerging democracy (Nino 1991). A central dilemma that emerges in transitional trials of this kind is the breakdown of common discourse which undermines the legitimacy of the trial for some segments of society. Thus, the Argentinian court's decision to limit the evidence to proving the deeds of the accused, without allowing them to be situated within the wider historical narrative about an alleged war of self-defense against attacks on the regime by guerrilla forces, was deemed political and undermined the legitimacy of the trial in the eyes of the military (Osiel 1997).

Alongside efforts to bring to trial leaders of former authoritarian regimes for gross violations of human rights developed the institution of truth commissions established by national or international organizations. Truth commissions reduce the tensions that arise in transitional trials by separating the various functions of learning the truth about the past, of ascertaining individual guilt, and of giving voice to victims. The Truth and Reconciliation Commission in South Africa, for example, was divided into a Committee on Human Rights Violations (victims' testimonies), a Committee on Amnesty (offender's testimonies), and a Committee on Reparation and Rehabilitation. In each committee different procedures were used (1995 Act). It further made the granting of individual amnesty conditional upon providing a full account of the offenses committed (Minow 1998). Truth commissions have proved to be far more effective than court proceedings in furnishing a dramatic medium for theatricalizing the new official history, since the narratives of victims are rarely interrupted by lawyers and there are incentives for offenders to relate their part in the repression. Indeed, in several countries the commission's proceedings have been broadcast daily, and in others the final report has become a best seller (Brazil, Argentina). Truth commissions present us with a kind of political trial in which the balance between politics and justice has been struck in ways more compatible with liberal concerns. However, the adoption of the discourse of healing by truth commissions has been sharply criticized for drawing attention away from the political context in which abuse is committed, as well as signaling that the commission of mass crimes does not carry serious consequences (Leebaw 2011).

2. Political Trials in Established Democracies

The political nature of transitional justice seems from the fact that there are no overarching legal norms that are accepted as legitimate by the two successive regimes. Moreover, in these cases the trials have overwhelmingly

been used to fulfill social and political functions other than ascertaining individual guilt. Liberal scholars, as we have seen, have been willing to recognize the political nature of such trials and to justify it, but have not extended their theories to trials in established democracies. The general view is that in normal times law should endeavor to keep politics out of the courtrooms so that every political trial is perceived as a corruption of the rule of law (which may be termed the pathology thesis). This distinction, however, fails to account for the striking similarities between transitional situations and periods in which there has been a significant increase in political trials in democratic societies.

In the United States political trials have occurred whenever the status quo has been challenged, generally during periods of social and political ferment unleashed by such forces as war, economic conflict, or racial discord (Belknap 1981). For example, the decade that began with the escalation of the Vietnam war in 1965 brought an epidemic of political trials culminating in the Chicago Conspiracy trial (1969–70). This case represents a microcosm of American political justice of the era, as it was directed against representatives of major antiwar groups, youth counterculture, and the Black Panther Party, who all believed that the war was illegal and sought to mobilize the public against it. Although the charges were clearly political (conspiracy to cross state lines with the intent to incite riot), the trial also demonstrated the ability of the defense to politicize the trial and turn it into a forum for social protest by flouting the norms of the courtroom and ridiculing the judge (Ely 1981). In such trials as the Chicago Conspiracy trial, the same breakdown of common discourse was manifested as in political trials during transitions to democracy.

The social turmoil and political trials of the late 1960s influenced the development of radical theories of law (Gordon 1982), as scholars in critical legal studies, critical race theory; and feminist legal studies began to question the plausibility of the liberal ideal of separating law from politics. For these scholars the very attempt to delimit the boundaries of the category 'political trials' obscures the way in which politics enters every trial and every field of law. They argue that the liberal reliance on a distinct category of political trials often serves to legitimize the status quo. Critical theory understands politics not in the narrow sense of the term (motive of authorities, identity of defendant, etc.) but as the hegemonic ideology that shapes the interpretation of law while presenting it as neutral. The main contribution of critical writings to understanding political trials has been their rejection of the 'pathology thesis' about the relation between law and politics and their systematic efforts to uncover the ideological structures that shape different areas of law (Kelman 1987, Kairys 1982). This broad definition of political trials, however, had its drawbacks because it no longer called for a systematic investigation of the unique features of classic political trials, and shifted the attention of scholars from the court drama and social reception of the trial to the appellate court interpretation of the law.

Other scholars, still committed to the liberal framework, have identified a new form of political trial that emerged during the 1980s and 1990s. While in the old political trial the ruling authorities selected certain individuals to stand for an opposition the state wanted to eliminate, in the new political trial a section of the public turns the trial into a political trial by identifying with the victims (who are not a formal party to the trial) or with the defendant. In these cases the state does not intend a political trial and has very little control over its politicization (Fletcher 1995). The people mobilized around these trials are usually outgroups protesting their marginalization by the legal and political institutions. Examples are famous rape trials and self-defense trials of battered women who killed their abusive spouses in which women's groups identify with the victim and politicize the trial. The Rodney King trial and O. J. Simpson trial likewise became political trials in which African– American groups were mobilized to protest against white justice in America. The study of these trials draws particular attention to the role of the media in these cases.

The focus on group conflict and on the narrative and rhetorical aspects of political trials in ongoing democracies provides scholars with the key to understanding their dynamics from a pluralistic perspective. The famous trials of Socrates, Jesus, Dreyfus, and others are examples of heroes unjustly prosecuted, but they can also be viewed as major junctions in the life of the republic where society's conflicting values are played out not only, and not even mainly, through the learned interpretation of the law but through the human drama in and around the courtroom. In these trials the social conflict is transformed into competing narratives that capture the public's attention and offer an opportunity for collective self-reflection. Through an examination of competing values and loyalties they bring together for public consideration society's basic contradictions (Christenson 1999). From this perspective we can see how political trials, while threatening the rule of law, at the same time may contribute to the development of a more critical and democratic society.

3. Political Trials in the Transnational Legal Order

As we saw, while the Nuremberg trials were condemned as victors' justice, the Eichmann trial was criticized as

victims' justice. Ironically, in the 1990s Nuremberg was invoked as the most important precedent for the establishment of ad hoc international criminal tribunals and a few years later the permanent International Criminal Court (ICC). The Eichmann trial became a precedent for the exercise of universal jurisdiction by domestic criminal courts. In both cases, the justification for turning to courts outside the national jurisdiction with closest links to the crimes was to end impunity, that is, to counter domestic politics' ability to obstruct the wheels of justice. This turn was accompanied by a growing reliance on a new legalism connected to the human rights discourse. At the center of these trials stood the new crimes of genocide and crimes against humanity, viewed as supra-national crimes exploding spatio-temporal legal coordinates by overcoming prescriptive periods and territorial limits to criminal jurisdiction (Douglas 2007).

Underlying these developments in international criminal law is an unarticulated assumption about political trials: if the danger of impunity came from too much proximity to domestic politics, a cure was to be found in distancing the tribunal from the influence of the political authorities. In other words, the turn to third party criminal courts and international tribunals was meant to ensure the triumph of the rule of law over political considerations. However, far from ending the debate about political trials, new criticism was raised by famous defendants, such as former Chilean dictator General Augusto Pinochet, former Yugoslav president Slobodan Milosevicz and former Israeli prime minister Ariel Sharon, who claimed to be the victims of a new form of show trial. International criminal law thus poses the following puzzle: are international tribunals and third party criminal courts the source of danger of the politicization of international law, or are they the best guarantee against "political justice," piercing the shield of sovereign immunity?

I explore this question by examining the new political trial in its three contemporary manifestations: third party domestic courts exercising universal criminal jurisdiction, international criminal tribunals, and transnational tort actions brought by victims in third party civil courts.

a. Universal Jurisdiction by Domestic Criminal Courts.

If the problem of political trials was attributed to too much proximity to the political authorities, can too much distance produce new dangers of politicization? During the 1990s, frustrated groups of victims discovered the tool of universal jurisdiction, first recognized by the Eichmann court, that had remained dormant throughout the Cold War, as a way to seek justice in foreign courts. Prosecutors further relied on legal doctrines such as crimes against humanity and genocide, which have been interpreted by some national courts as not being subject to statutes of limitation. However, this development created new dangers of politicization. The removal of territorial and temporal limitations on prosecution make the legal process vulnerable to political opportunism in the timing of the prosecution. For example, Ariel Sharon faced the possibility of trial in Belgian courts in connection with the 1982 Sabra and Shatila massacre in Lebanon, following complaints brought only after he was elected prime minister of Israel, twenty years after the massacre. Ordinary prescriptive periods force the prosecution to bring charges as soon as possible and to concentrate on the strength of the legal case, thus precluding political considerations of this kind. Yet understanding the significance of crimes of such magnitude may require the passage of long periods of time and the changing of generations, lending support to the relaxation of procedural constraints on prosecution.

Another sense of politicization that undermines more profoundly the integrity of the criminal process stems from the disjunction that universal jurisdiction creates between the judge and the relevant political community. This disjunction operates at two levels. First, critics worry that allowing foreign judges to adjudicate cases related to societies to whom they are largely unaccountable threatens the democratic foundations of criminal law (Orentlicher 2004). Second, since the courts exercising universal jurisdiction operate at a remote distance from the communities that are deeply affected by their judgment, the solidarity between judge and community is undermined, thus weakening in the eyes of the community the legitimacy of the judges who do not take the risk of living under the results of their judgments. This problem is exacerbated in cases in which the judge fails to appreciate the intricacies of the cultural, political and historical context of the case. We are used to thinking about the rule of law in terms of maintaining a distance between the court and the parties to the dispute, but at the same time the rule of law requires that a meaningful link be established between the court and the community injured by the deed. It seems that underlying this tension is a basic assumption that the criminal law belongs to a political community and is an exercise in self-governance.

In the eyes of supporters of universal jurisdiction, the dangers of unaccountable sovereign power seem to outweigh these new dangers of politicization. That position, however, takes for granted that the two alternatives are exhaustive. A middle ground can be found in the requirement of a meaningful link to the court, recently added by legislators and courts, in response to the political uses of universal jurisdiction made during the 1990s (Bilsky 2010). Similarly, the Princeton Principles on Universal Jurisdiction, a set of non-binding guidelines drafted by jurists in 2001, recommend that in case of competing national jurisdictions, weight be given to the place of the commission of the crime and the nationalities of the alleged perpetrator and victims, among other factors (Principle 8 of the Princeton Principles on Universal Jurisdiction).

b. Criminal Trials in International Criminal Courts

International criminal tribunals appear to enjoy more legitimacy than domestic criminal courts exercising universal jurisdiction, as they are the product of consent (where the country is a party to the treaty establishing the ICC, or the case is self-referred) or the will of the international community (where the case was referred by the U.N. Security Council). Yet the distance between judge and community raises some of the same problems as universal criminal jurisdiction, and therefore also calls for ways to reconnect the relevant community to the trial. We can view the principle of complementarity embedded in the Rome Statute establishing the ICC as aspiring to find a middle ground between universality and territoriality. By providing that a case is inadmissible before the ICC if it is being investigated or prosecuted by a state having jurisdiction over it, it gives priority to national courts in trying the case (Holmes 1999). When there is such an investigation or prosecution, the ICC can take up the case only when the state "is unwilling or unable genuinely to carry out the investigation or prosecution" (art. 17 of the Rome Statute). This mechanism provides strong incentives to states to prosecute crimes they would have preferred to ignore, nevertheless leaving the door open for the ICC to intervene in exceptional cases. The principle of complementarity therefore appears to address the problem of sovereign impunity while limiting the dangers of politicization that arise from the distance between the trial and the concerned community. However, a recent study of compliance and resistance to the Inter-American Court among domestic judges suggests that a referral system such as the one created by the European Court of Justice might lead to greater compliance (Huneeus 2011). Another middle ground is achieved in "mixed" or "hybrid" tribunals, staffed by both national and foreign judges and prosecutors, and likewise blending international and national criminal procedural law (Shraga 2009).

Is the ICC immune, then, to political uses? The U.N. Security Council's significant role in the establishment of international criminal tribunals (the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda) and its power to make referrals to the ICC certainly provide openings for political considerations in the choice of situations brought to justice. Critics point to the fact that, to date, the ICC has only investigated crimes committed by Africans. But it is not only powerful states that can draw political advantage from these trials. Domestic authorities too can use ICC proceedings for political purposes, even though they do not control the decision to prosecute (this decision is taken by the ICC's prosecution office). If Kirchheimer's classic definition of the political trial is the use of legal means for political ends, turning political adversaries into criminal defendants and thereby reinforcing the legitimacy of those in power, recent research on the local impact of ICC prosecutions related to Sudan and Uganda reveals the same dynamic (Nouwen and Werner 2012). According to that study, the Ugandan government referred rebel movements to the ICC as part of a military strategy, in the hope that the ICC could capture the rebel leaders. Moreover, the government successfully used the proceedings as part of an international reputation campaign in which rebels came to be branded as internationally wanted "criminals", while the Ugandan government could portray itself as a friend of mankind. While referral carried the risk identified by Kirchheimer that Ugandan government officials themselves be prosecuted, the government's reputation campaign succeeded in silencing criticism of its actions in the Congolese territory, which the ICC prosecutor has not investigated (Nouwen and Wouter 2012).

Thus, the question is not whether international criminal trials are political, but what are the specifics of the new political trial that emerges from the ICC. Nouwen and Werner have pointed to the fact that because the court is international and not controlled by domestic authorities, it provides new possibilities for political opponents to initiate the trial through referrals. Yet in their view this heightened risk to the government is balanced by the fact that international officials, not victims, control the proceedings, together with the Court's dependence to a large degree on the cooperation of the relevant national government for numerous procedures, including the enforcement of arrest warrants and the issuance of visas to ICC staff. The dependence on state cooperation may also lead ICC staff to play into the friend/enemy of mankind dichotomy used by national governments. This institutional interest in being in good relations with the authorities is exacerbated by the ICC's concern with establishing its own legitimacy as an international court. The fact that contrary to the tribunals established at Nuremberg, the ICC can adjudicate atrocities even as an armed conflict is ongoing further raises the political stakes of the ICC's interventions. These political aspects specific to international tribunals are obscured by the universalist vocabulary of crimes against humanity, which itself might intensify political struggles. In other words, although the dynamics of international political trials are analogous to those in the domestic sphere, the stakes are much higher as the ruling of an international court brands the defendant as an enemy of humanity, leaving little space for political contestation or deliberation.

The distance of the ICC from the relevant political community enables it, on the other hand, to attend to victim groups that are often excluded or persecuted by the political authorities. Thus, the Rome Statute has enshrined victims' rights to both protection and participation in the ICC's proceedings, through a range of procedural rules and mechanisms, and the creation of a special Victim and Witness Unit charged with coordinating protection measures. However, victim participation does not amount to control of the case, which remains in the hands of the prosecution. Moreover, since the ICC's legitimacy depends in part on the claim that it is acting on behalf of victims, proceedings tend to emphasize victims' innocence, obviating any discussion of "imperfect" victims who

collaborated with the regime. This leads to criticism that the ICC remains legalistic and fails to address the gray zone between perpetrators and victims that characterizes collective crimes (Leebaw 2011).

c. Transnational Tort Human Rights Litigation in Domestic Courts:

We have seen that much of the denial of the political nature of trials and the reemergence of legalism is connected to the form of the criminal trial. Can civil proceedings allow for a better legal treatment of mass violence? Can they end impunity by creating a direct channel for victims to bring charges against state officials without the filter of a public prosecutor? Since the 1980s, victims of grave human rights abuses have invoked the Alien Tort Statute of 1789, which grants U.S. federal courts "jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" (28 U.S.C. §1350). U.S. courts have generally interpreted this statute as enabling them to exercise a form of universal civil jurisdiction, by opening the door to cases unrelated to the United States. These claims filed by individuals as well as classes of victims have targeted both low-level state officials and prominent politicians (such as former Filipino dictator Ferdinand Marcos), sometimes in parallel to international criminal prosecutions. Thus, former Bosnian Serb leader Radovan Karadzic was sued under the Alien Tort Statute and later indicted by the International Criminal Tribunal for the Former Yugoslavia, in both cases for war crimes committed in Bosnia. They have also redirected attention to a new sort of defendant: the multinational corporation, accused of supporting or enabling atrocities committed by state authorities. This type of litigation therefore holds the promise of greatly reducing impunity, by not only distancing the legal process from the relevant political community as in universal criminal jurisdiction, but also by avoiding reliance on a public authority to bring a claim and targeting not only individuals but also the corporations that enable mass violence.

However, privatizing prosecution by granting full control of the litigation to victims creates new types of politicization. Organized groups of victims can dominate the proceedings at the expense of other victims. For example, in restitution cases brought against Swiss and German corporations for participation in the Nazi crimes, Jewish organizations tended to predominate over other victim groups (Adler and Zumbansen 2002). A different problem arises from the lack of screening by a public prosecutor, which shifts to the court all political discretion in allowing the case to proceed. While this has led many to condemn Alien Tort Statute litigation as court interference in foreign policy, others have countered that various legal doctrines reduce the possibility of a clash with U.S. foreign policy, and that in any event the strict conditions imposed by U.S. Supreme Court means that in practice very few cases succeed. Nevertheless, the very filing of a lawsuit by victims might paralyze the political process in cases of transition to democracy. Furthermore, damage awards to victims might conflict with the distributive plans of transitional governments. One such example is the class action against Marcos, where a U.S. jury granted a class of 10,000 victims of torture damages in excess of 2 billion dollars. Although legally a success, the victims have collected very little of the damage award, in part because of conflicting claims to the Marcos's fortune by the democratic government of the Philippines. Though some writers argue that the real contribution of the civil lawsuit is symbolic rather than material, even symbolic victories have political implications, potentially empowering victims but also enabling some victims to the exclusion of others to affect the domestic political agenda.

Unique to civil litigation is the possibility of settlement. The settlement of Holocaust-related claims by groups of victims against European corporations was criticized for undermining the normative functions of the court as well as the didactic functions of clarifying history and shaping collective memory (Marrus 2009). Moreover, observers unaccustomed to American class action practice perceived the negotiation process and the monetary settlements that followed as victories of political pressure over the rule of law (Marrus 2009). Others counter that it is precisely the American class action that gave victims the necessary leverage against giant corporations that had enjoyed de facto immunity for decades due to their political lobbying in Europe (Bilsky 2012a). Moreover, settlement provided the flexibility required for dealing with complex political issues and the admission of moral responsibility in situations of collaboration with authoritarian regimes. It also released the judge from the controversial role of creating official history by incentivizing private corporations to investigate their past and publish new histories (Bilsky 2012b). Yet this new power of corporations to create soft law and commission history raises new concerns about the political use of legal proceedings by corporate actors.

The possibility of suing corporations under the Alien Tort Statute is the subject of a heated debate in the United States, pending the forthcoming decision of the Supreme Court, which will also address the extraterritorial reach of the statute. However, even if the availability of the Alien Tort Statute is greatly restricted, it is now apparent that civil litigation is crucial for addressing the involvement of larger sections of society, including business entities, in collective crimes, and the creation of a globalized class action might be considered in parallel to the ICC.

4. Conclusion: Is the political trial still a relevant category?

If we accept, following Shklar, Douglas, Bilsky, Nouwen and Werner, and others, that trials, whether domestic, international, transnational, criminal or civil, inevitably have political consequences, the question of whether a trial is political obscures more than it reveals. Instead, we should ask what sort of politics each mechanism promotes, and what kind of procedures and legal doctrines are available to the court to balance the politics while fighting niches of immunity. "The question, in short, is not, "Is law political?" but "What sort of politics can law maintain and reflect?" (Shklar 1964, 144). It seems that trials addressing collective violence inevitably have substantial collective significance, and attention should therefore be turned to finding ways to harness the law so as to foster participatory democracy. Enhancing the participatory character of legal proceedings is particularly pressing at a time when the nation-state is weakened and new transnational political actors carve for themselves areas of power without corresponding responsibilities.

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L. Bilsky

Keywords: Otto Kirchheimer, Judith Shklar, political trials, trials, legalism, transitional justice, criminal law, truth commissions, international criminal law, universal jurisdiction, Nuremberg, Eichmann.

Abstract: This entry discusses the theory and practice of political trials in liberal democracies as distinct from “show trials”. It explores the dilemmas raised by such trials when they occur in transitions to democracy, within established democracies, and in international and transnational trials of atrocity, and explains scholars’ call to recognize the inevitably political character of legal proceedings.

Cross references: Globalization: Legal Aspects; Justice and Law; Law, Mobilization of; Offenses against the Laws of Humanity: International Action; Political Lawyering; War Crimes Tribunals