

Review -- The Justice Cascade

Written by Peter Brett

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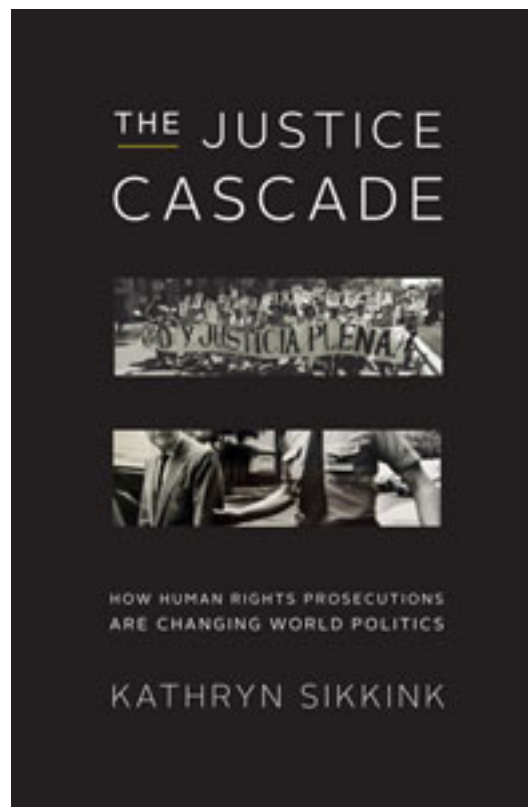
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PETER BRETT, JUN 15 2012

The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics

By: Kathryn Sikkink

New York: W.W. Norton and Company, 2011



For two decades now Kathryn Sikkink has been a leading scholar of human rights in world politics. *The Justice Cascade* is perhaps her most ambitious work to date. Extending many of the positions developed in her academic publications, it also seeks to communicate the interest and importance of these ideas to the non-academic reader. Faced with this notoriously difficult dual mandate, Sikkink succeeds admirably, combining accessible prose with uncommon levels of conceptual clarity. The achievement is all the more remarkable for the relative lack of descriptive detail included with the case studies (normally of greater interest to the general public than social scientist). Indeed in Sikkink's hands even the coding of data is made to sound a rather thrilling affair (pp.135-8). *The Justice Cascade* is excellent public relations for the academy. Ultimately, nevertheless, if this important book succeeds resoundingly in making its first of its key argument – a rejection of (realist) scepticism towards international law's effects – it fails (nobly) to establish its second – an explanation of how 'justice' entered world politics.

1. The emergence of the justice norm.

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Many 'realists' of course, both academic and otherwise, continue to believe that talk of human rights and international law is merely a plaything of the powerful, or a kind of froth floating above the real world of competing interests. *The Justice Cascade* confronts such readers with convincing evidence and powerful argument to the contrary. In the early 1970s, it points out, neither authoritarian leaders in Latin America nor their most determined domestic opponents ever even contemplated the possibility that state officials, including heads of state, might one day be tried for crimes committed in office (pp.2-3). Yet thirty years later such trials have become a commonplace, even integral feature of the global political landscape (ch.4). The International Criminal Court (ICC), for example, was created to do this (amongst other things), despite determined opposition to it at one stage from every permanent member of the UN Security Council (p.199). Such developments defy realist expectations: why would states, apparently *en masse*, have allowed this eclipse of the doctrine of sovereign immunity?

Providing, incidentally, a welcome public justification for the relevance of political theory, Sikkink shows how political leaders influenced by these mistaken ideas have been caught similarly flat-footed (p.222). The Bush administration, notably, advised by a number of realists (p.132), produced its infamous 'torture memos' in response to genuine fears of future prosecution (p.192); a possibility whose costs they, like governments elsewhere, have constantly underestimated (pp.218-220). The example is well-chosen as an antidote to the common idea that Great Powers like the United States, for all their hypocrisy and double standards (pp.217, 233), can remain 'immune' to norm shifts in international law (ch.7). IR, as Sikkink points out with the example of the end of the Cold War, is notoriously bad at prediction (p.20). If she proves rather ambivalent about whether her alternative approach is intended to fare any better (pp.221-222, 262), readers are clearly invited to participate in an intriguing wager. What chances, within the next few decades, of jail terms for those involved in sanctioning torture during the War on Terror?

2. Its sources

Summarised thus, the *Justice Cascade* may appear as an exercise in ethereal, or even naïve idealism, abstracted from any concrete questions of power and influence. In fact, however, Sikkink is extremely careful to accord such factors their proper weight, and delimit their explanatory scope. (She associates herself explicitly here with the 'eclectic theorising' approach recently advocated by Peter Katzenstein (p.306, n.45).) For 'early adopters' of trials in the 1970s and 1980s, she makes it clear, trials were only possible after 'ruptured transitions'. That is, only where military elites were no longer political forces after democratisation could such processes safely take place. Thus trials could take place in Greece, Portugal and Argentina where military disasters in Cyprus, Angola, Mozambique, and the Falkland Islands had severely discredited those parts of the *ancien régime* (pp. 35-6, 51, 69). But they remained impossible, despite often comparatively greater levels of official brutality, in Spain, Uruguay and Brazil, because these countries had experienced 'pacted transitions' where former (military) elites retained influence (pp. 56, 81). Realist considerations therefore dominate the early case studies.

Nonetheless, as Sikkink writes, 'by the 1990s, a ruptured transition was no longer a precondition for prosecutions [emphasis in original]' (p.83). Even Uruguay, along with Chile, Guatemala, and other countries with 'pacted transitions', were, eventually, to hold trials – in stark contrast to the predictions of Samuel Huntington and others that such demands would fade over time (pp.129-130). Sikkink explains this spread and globalisation of transitional justice mechanisms by diffusion effects governed by the 'logic of appropriateness' (pp.11-12, 247). Such practices, in other words, had become part of legitimate Latin American statehood. After their import to South Africa via Argentina, moreover, they subsequently became part of legitimate African statehood (pp. 94, 248). Sikkink suggests we can identify 'tipping points' marking the outbreak of 'norm cascades', and there substitute realist frames for constructivist ones. This is an impressively performed manoeuvre with implications not only for brands of realism but also for studies of policy diffusion and institutional transfer. These too often neglect the human agency and power games that serve, in the first place, to legitimate what were once considered eccentric practices (pp.23-4, 249-252).

These latter approaches are also found guilty of neglecting how agents can connect different cascades and diffusion trends, in a manner that increases their power. Aryeh Neier, for instance, a key figure in the emergence of Human Rights Watch, is credited 'more than any other individual' with associating human rights law with a strand of humanitarian law dating back to Geneva Conventions and earlier (p.106). By framing violations of humanitarian law as human rights abuse, Neier was able to help extend criminal accountability to wartime acts (p.198). *The Justice*

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Cascade, like Benjamin Schiff's recent study of the ICC, captures this phenomenon with the metaphor of various normative 'streams' joining to become a river (note strong implication of irreversibility)[1].

The last piece of Sikkink's explanatory puzzle is the question of why it was the Argentinian trials, rather than, say, their largely forgotten Portuguese and Greek predecessors, which were to form the template for the global 'justice norm'. Half the answer, perhaps most obviously, lies in their coming after those in southern Europe. By 1985, when the trials of Argentina's leaders began, 'the global human rights movement was gaining in strength and stability' (p.89). Analytically speaking, the 'justice norm' of individual criminal accountability for state officials was thus 'nested' in a broader 'human rights revolution' in world politics beginning in the mid-1970s (p.16, see also section 4 below). The other half of the answer, in Sikkink's view, must be revealed through examination of the transnational networks available to norm entrepreneurs seeking to profit from these new conditions. She stresses the significance of the close links – forged before, during and after exile – between Argentine activists and key figures in (especially) American legal and human rights circles (pp.7-9, 90-95; section 4 below). These connections were crucial in transforming the justice norm from national phenomenon to global cascade. Throughout, however, emphasis is placed on the politically creative capacity of the individuals embedded in these networks; an 'agentic constructivist' perspective intended to explain change better than its 'structural constructivist' counterpart (p.237).

3. Its effects

Two final empirical chapters seek not to explain, but rather describe the effects of this new norm on Latin American and world politics (chs 5-6). Whilst still strong, they are, to my mind at least, somewhat weaker than the rest. The centrepiece is a 'Transitional Trial Dataset' produced by Sikkink and her research team, which classifies the types and numbers of years in which human rights prosecutions have been held in countries, regions and international courts worldwide (p.138). Sikkink is a strong supporter of such trials, and presents this research as empirical support for their effectiveness (pp.229-230). She even suggests they may be 'cost-effective alternatives to military intervention' (p.226). The data is thus deployed to refute a number of common sceptical charges: that 'peace' is to be preferred to justice, and truth commissions to trials (the two typically come together and work well in tandem); that amnesties help effect peaceful transitions of democracy (such laws are increasingly being repealed and/or ruled illegal); and that prosecutions may in fact contribute to increase repression, endanger democracy, prolong internal conflict, and contribute to a breakdown in the rule of the law (in every case the effect observed is either neutral, or in fact of the opposite kind) (pp.143-156, 180-186).

Perhaps inevitably, sceptics are likely to remain unconvinced. To anticipate just two possible objections, it might perhaps have been preferable to ask not only whether trials prolong internal conflicts, but also if they delay 'pacted transitions'. The threat of trials may well weigh on the minds of leaders faced with peace treaties, but so will a host of other more short-term considerations. In protracted negotiations over a possible exit, by contrast, such threats are surely likely to become of paramount importance (cf. Zimbabwe today). It might also be objected that the increasing vulnerability of amnesty laws that Sikkink observes may have an independent effect on these same calculations, in a way she does not appear to have tested. The willingness of leaders to sign treaties and negotiate exits from power, that is, may well be expected to reduce as amnesties and immunity provisions lose credibility (cf. some African leaders' reactions to the fate of Charles Taylor).

Maybe the most interesting passage contained within these chapters, however, is an attempt to specify the mechanisms accounting for apparent effectiveness of prosecutions. Sikkink makes (brief) efforts to apply insights from criminological studies of domestic crime prevention to the international arena, concluding that trials have both deterrent and socialising functions (p.169). Not only may leaders choose not to repress through fear of the consequences, but the pedagogical function of courtroom drama may influence 'collective memory' in ways that entrench new norms into national societies (pp.173-4). Although I – like most IR scholars I suspect – am unable to comment on the use of criminology in this context, its deployment is certainly striking in the context of theoretical debates surrounding transitional justice (largely absent from *The Justice Cascade*). Whilst others have also suggested that trials should be used to establish a memorial record of the past that would help socialise citizens into non-violent and cosmopolitan behaviours, this idea stands in some tension with the Arendtian notion that the first purpose of justice should be truth-telling, not social engineering and/or nation-building[2]. Of course these two goals

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may be thought wholly compatible, as some (ambitiously) claimed for the South African Truth and Reconciliation Commission, but Sikkink does not appear prepared to confirm or reject this[3]. Her account does appear to contain a rejection of Arendt's thesis, but this could certainly be made more explicit (p.74). This is important, since the question of the actual objectives of transitional justice is surely central to its normative assessment.

4. Its sources revisited

a) Power/knowledge

The Justice Cascade, then, provides a compelling argument for the importance of human rights prosecutions in world politics (if not necessarily for their undiluted benefits), and argues impressively for the necessity of combining realist and constructivist approaches to explaining their emergence. Those, however, who have questioned the suppositions of Sikkink's work from critical perspectives will not have their concerns allayed. Scholars inspired by Pierre Bourdieu have been particularly critical of a lack of sociological scrutiny applied to 'networks', an apparent lack of curiosity into the (suspect) origins of some key concepts, and overall lack of concern with some cosy fits between conclusions and wider political agendas[4]. For instance, advocates of these approaches have, like Sikkink, stressed the significance of connections between Argentinian and American legal circles[5]. But their suggestion is that capturing these links as 'networks' obfuscates unequal power relations within them, most importantly by obscuring how 'voices from the South' were only supported when they chimed with U.S. foreign policy interests – expressed by the Carter administration in the language of human rights[6]. Sikkink has previously argued that this change in foreign policy was itself the product of creative agency by human rights activists; an implicit inversion of this inequality in relations[7]. Readers are likely to assess the inherent plausibility of such assertions based on their own disciplinary suppositions.

The alleged underplaying of any *directive* influence by the Carter administration on the Latin American politics of human rights does, however, clearly connect with a second Bourdieuan charge: that global human rights discourse is to a large extent determined by the vagaries of domestic contests over American state power. Thus, it is claimed, they were promoted by academic idealists, activists, and 'doves' in Congress to discredit the *Realpolitik* of the Nixon/Kissinger era, and subsequently used by Human Rights Watch and others against the Reagan government for similarly parochial reasons[8]. Sikkink herself, in typically candid fashion, confirms the potential salience of such interpretations. She writes of how, from 1979, she was herself engaged in facilitating contacts between key protagonists in the book and U.S. policy circles. She hardly conceals the disappointment she felt with the election of Reagan in 1980, and connects this 'personal and scholarly journey' with her hopes that Americans may now 'grapple with whether and how to hold individuals accountable for torture and cruel and degrading treatment during the administration of George W. Bush' (pp.7-9).

A final, related point is that Sikkink, despite her constructivist leanings, is perhaps guilty at times of treating human rights rather too much like natural objects, when considerations of power (see above) and ideational context (see below) in fact do much to govern their perception. Her quantitative chapters, for instance, score repression according to U.S. State Department human rights reports. These were first produced in the mid-1970s after 'a dramatic set of legislative initiatives' by Congress that 'first incorporated human rights concerns into U.S. foreign policy' (p.134). Her measures thus form part of the phenomena she attempts to explain. Whilst, furthermore, it is at times made clear that human rights is being used narrowly as a synonym of 'physical integrity rights' – principally freedom from torture, disappearances, and summary executions (pp. 16, 180-181) – at other times it is deployed in an unhelpfully general sense. The reader is informed, for example, that 'during the 1980s and 1990s ... it began to appear that human rights violations were getting worse, not better' (p.14). It is unclear here both how such an assertion relates to 'physical integrity', and how any such evaluation can be disassociated from the strategic construction of the world that Sikkink herself describes. Perceptions of violations 'getting worse' are surely above all symptoms of their rising prominence.

b) Levels of analysis

Such oddities in an otherwise very carefully constructed book indicate ethical dilemmas integral to the enterprise of explaining human rights' entry into politics. These can be rather simply stated. If indeed fully universal, and present in

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all times and places, then where rights come from is no longer a meaningful question. If, by contrast, their emergence can be connected with political and persuasive activity of historically specifiable groups, then their transcendence is in doubt. These issues have been debated exhaustively within political and post-colonial theory[9]. Political science, though, has thus far largely refused to engage on this tricky terrain, and it is good fortune that so lucid a scholar as Sikkink has now done so. Her oscillation between naturalist and constructivist definitions of rights nevertheless suggests that she retains some fundamental uncertainties.

This impression is confirmed by the last chapter of *The Justice Cascade*, which contains an absorbing attempt to square ethical universalism with an analytic focus on the specific agents responsible for promoting it. Sikkink rightly observes that, for all the creative and persuasive power of her protagonists, certain conditions will always be necessary for norms to become embedded in given contexts. Implicitly, five kinds of conditions are distinguished. 1) At the highest level of abstraction, 'deeper ideational instincts in the human brain' are held to explain, with the help of psychologist Stephen Pinker, why it is that 'the idea of basic 'fairness' exists in a wide range of cultures and societies'. This universal, an antipode to the self-interest of *homo economicus*, creates 'an initial receptivity to demands for justice' (pp. 255, 261). 2) At a somewhat lower, but still massive level of generality, Sikkink points towards 'liberal ideas about human rights, due process, and, in particular, individual responsibility for human rights violations ... associated with liberalism and the West, but ... not in any way limited to it'. Especially unlimited are 'issues involving bodily harm ... [which] resonate across cultures and societies' (p.255). In the 1970s, 'unique background conditions' focused these deep instincts into specific cultural phenomena (p.231). These conditions came in two varieties: 3) the geo-political, such as end of the Cold War, which allowed for the global diffusion of norms and policies (p.21), and 4) the ideational, such as the contemporaneous rise of new human rights movements (without which 'new practices of accountability would have emerged (p.20)). Developments such as the 'third-wave of democracy' arguably straddle both categories. 5) The final condition relates to local political culture. All countries had analogues for these new international orthodoxies in their domestic judicial systems (e.g. p.17). And if Greece was the first country to adopt human rights prosecutions, this was large part because of a 'long history of political trials', which made such a response (if not its specific procedures) a 'common sense' reaction to the end of dictatorship (p.46).

By distinguishing between these various levels of analysis, Sikkink has performed a useful service for others who will tackle similar problems. In conclusion, however, I will argue that there are both significant problems with her treatment of particular levels, and a broader problem with their collective labelling as 'conditions'. Most obviously controversial, and indeed problematic, are her references to basic facts of human psychology. These are clearly intended to ground a view of the justice norm as latent in all human cultures; it has 'intrinsic power' (p.231) and is 'inherently appealing to a broad range of individuals' (p.230). At times she does not even appear to accept that her 'conditions' are in fact sufficient explanations. Thus, in answer to the obvious question of why latent demands for 'justice' only manifested themselves in Latin America in the 1970s, she states that 'power, in both its coercive and structural forms, is the most important explanation for why accountability was kept off the agenda for so many years'. The idea that something so enormous has simply come and gone from the (four-hundred, three-thousand year-old?) history of the state is, though, straightforwardly improbable. It is, furthermore, just false to claim that "people have long believed that everyone, including state officials, deserved punishments when they broke moral and legal rules' (p.255). Recent world history is littered with polities which not known any such belief. According to such ideas, moreover, phenomena such as the proliferation absolutist states in early modern Europe, or Marxist-Leninist vanguards in the twentieth century, would only be comprehensible as mafia-like enterprises. By contrast, the notion that an aversion to bodily harm provides a culturally (as opposed to psychological) universal basis for 'justice' is, on the face of it, somewhat more plausible (p.255). In the years since it was first advanced, however, important historical work has argued that the origins of human rights can be traced precisely to a specifically Western concern with bodily integrity.[10]

At lower levels of abstraction, Sikkink's points about geo-political shifts and local cultural templates are important and well-taken. Nonetheless, her suggestion that the global human rights movement provides just another 'condition' for the justice norm is much more difficult to accept. Norms, as other constructivists have often conceded, are only understandable within wider interpretive frameworks[11]. To explain the practice of human rights prosecutions we require some understanding of how broader human rights ideas entered world politics[12]. *Contra* Sikkink, the 'liberal

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tradition' cannot provide this. As Sam Moyn has demonstrated, modern liberalism had in fact long equated the rights of man with the rights of the citizen[13]. *Human* rights advocacy in the post-war period was for the most part the province of Christian thinkers seeking to circumscribe the authority of the state[14]. The liberal turn to human rights can be dated with some precision to the Carter administration and the mid-1970s period that Sikkink documents[15]. What seems to be required here, in other words, is an additional mid-level of analysis, charting the rise of new interpretive frameworks, and connecting (ahistorical) 'traditions' with particular norms and practices.

If Sikkink ultimately fails to join these particular dots, her failure, however, is absolutely of the best kind; that to which we should all aspire. *The Justice Cascade* has shone a light and all subsequent work in this area will be richer for her efforts.

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- [1] Benjamin Schiff, *Building the International Criminal Court*, (Cambridge: Cambridge University Press, 2008).
- [2] E.g. David Hirsh, *Law Against Genocide: Cosmopolitan Trials*, (London: Routledge, 2003), p.139 and Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York: Penguin, 1963).
- [3] For a representative critique of these South African views, Deborah Posel, 'The TRC Report: What Kind of History? What Kind of Truth?', in D. Posel and G. Simpson eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, (Johannesburg: Witwatersrand University Press, 2002), 147-72.
- [4] Yves Dezalay, 'Les courtiers de l'international', *Actes de la recherche en sciences sociales*, 151-152, (2004), pp. 5-35, Bryant Garth and Yves Dezalay, 'Legitimizing the New Legal Orthodoxy', in Idem eds., *Global Prescriptions. The Production, Exportation and Importation of a New Legal Orthodoxy*, (Ann Arbor: University of Michigan Press, 2002), pp. 317-8.
- [5] Virginia Vecchioli, "Human Rights and the Rule of Law in Argentina. Transnational advocacy networks and the transformation of the national legal field", In Y. Dezalay and B.G. Garth (eds.), *Lawyers and the rule of law in an era of globalization*, (New York: Routledge, 2011), pp. 93-111.
- [6] See also, for Chile, Yves Dezalay and Bryant Garth, 'From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights', *Annual Review of Law and Social Science*, 2, (2006), pp. 241-3.
- [7] Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America*, (Ithaca: Cornell University Press, 2004).
- [8] Dezalay and Garth, 'From the Cold War to Kosovo'.
- [9] E.g. Jack Donnelly, 'Human Rights: A New Standard of Civilization?', *International Affairs*, 74:1, (1998), pp.1-23, Idem., 'The Relative *Universality of Human Rights*', *Human Rights Quarterly*, 29:2, (2007), pp. 281-306, Michael Goodhardt, 'Neither relative nor universal: A response to Donnelly', *Human Rights Quarterly* 30, 2008, pp. 183-193, and Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance*, (Cambridge: Cambridge University Press, 2003), ch.7.
- [10] Margaret Keck. et Kathryn Sikkink, *Activists beyond Borders : Advocacy Networks in International Politics*, (Ithaca: Cornell University Press, 1998), Lynn Hunt, *Inventing human rights: a history*, (New York: W. W. Norton & Company, 2007).

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[11] E.g. Martha Finnemore, 'Constructing Norms of Humanitarian Intervention', in Peter Katzenstein ed. *The Culture of National Security: Norms and Identity in World Politics*, (New York: Columbia University Press, 1996), p.161.

[12] See Mark Bevir, 'How Narratives Explain', in D. Yanow and P. Schwartz-shea, ed., *Interpretation and Method: Empirical Research Methods and the Interpretive Turn*, (New York: M.E. Sharpe, 2006), pp.281-290.

[13] Samuel Moyn, *The last utopia : human rights in history*. (Cambridge: Harvard University Press, 2010).

[14] Idem., 'The First Historian of Human Rights', *The American Historical Review*, 116:1, (2011), pp. 58-79.

[15] Idem., *The last utopia*.

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