

Dear Protest and Politics people,

Please find here the introduction to my dissertation. The day after the workshop I will actually defend my dissertation, so, if all goes well, what I am looking for is not only input for dissertation-purposes. Instead, I would like to see if I can turn my dissertation into a book. And I am looking for suggestions as to how to rewrite my dissertation for that purpose, starting with the introduction.

What should I do in order to improve this?

I hope you can give me advice, tips and suggestions regarding writing style, structure, possibly changes in the design and everything else that I should keep in mind once I start a revision.

Also suggestions for a book proposal are very welcome, as such a proposal would probably be based largely on what is presented in this introduction as well.

I look forward to the workshop!

Carolijn

This is a draft version – Please do not cite

Introduction: What Story Do You Tell, Mr. Prosecutor?

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“Learned Hand [...] feared a lawsuit more than death or taxes. Criminal cases are the most frightening of all, and they are also the most fascinating for the public” (Dworkin 1986:1).

October 1997, United States: six raids in the Midwest just before the pelting season: between 8,000 and 12,000 minks released, two fur farms out of business. Opposing interpretations either emphasized the tragedy of enormous economic losses for these farming families or joy that many animals escaped death for profit.

October 1999, Chile: a forestry plantation was set on fire in the south of Chile. The plantation belonged to a large forestry company owning currently 391,000 ha of plantations, while an adjacent indigenous Mapuche community claimed historical right to the land. Opposing interpretations either indicated anger about the economic loss for the forestry company or happiness to see the invasion of imported water-consuming trees turned into ashes.

March 1992, Spain: three Molotov cocktails set the offices of the national train company in Bilbao on fire. Opposing interpretations either claimed this was terrorism and related to the armed organization ETA or viewed it as the angry expression of some youth because of police violence during a demonstration earlier that day.

Each of these incidents formed the material for “frightening” and “fascinating” criminal prosecutions. Peter Young, who released the minks, spent two years in jail. José Nain, who always denied responsibility for the arson in the plantation, was convicted to five years and one day. At the same time, the Mapuche community where he was living ultimately received the disputed land. Julen Larrinaga, member of a left-nationalist Basque youth group, was convicted under terrorism laws to ten years in prison. Each of these events was subject of a struggle of interpretation and the criminal proceedings were as much a site for this struggle as a significant contributor to it. The story that the prosecutor chooses to tell in the courtroom reinforces one version of the truth about the political contention and institutionalizes this truth in the form of legal documents if the judges ratify that interpretation. Further, the story chosen by the prosecutor blames some as “perpetrators” whereas others are labeled “victims” and thus enables the punishment and incarceration of some individuals and not of others.

Each of the events took place in the context of “streams of contention”, a concept that I borrow from Tilly (2007:211) which refers to “connected moments of collective claim making that observers single out for explanation”. Within these streams of contention, I am concerned with a process that I call contentious criminalization. This name is a playful variation on the terminology coined by Charles Tilly (in collaboration with Sid Tarrow and Doug McAdam) visible in concepts like contentious politics, contentious episodes and contentious performances. Other scholars have adopted and made variations on this theme, such as for example Auyero in his book *Contentious Lives* (2003). While Tilly c.s. have not explicitly entered the terrain of criminal justice and the specific processes and mechanisms pertaining to it, I draw upon some of their concepts and insights to examine this arena.

Introduction

I have selected three “streams of contention” as the context for my inquiry about processes of criminalization. In the US, eco-activists challenge the current use of animals and the earth for human purposes and therefore demand the closure of animal testing companies, the end of experimentation with animals, defense of the earth against infrastructural projects, and restrictions on logging companies. In Chile, Mapuche activists reclaim the lands that they have lost since their reduction in reservations in 1881. In Spain, Basque left-nationalists fight for an independent and socialist Basque Country. For analytical purposes, these streams of contention can be broken down into separate contentious episodes (Tilly 2007:213). Thus, whereas the Chilean-Mapuche territorial conflict is a “stream of contention” that has been running ever since the Chilean army fought against Mapuche communities and subsequently moved them to reservations, I have chosen to limit my inquiry to the “contentious episode” since 1990 when a democratic government was installed after the referendum that rejected the Pinochet regime. In each of these ongoing conflicts many incidents have occurred that came to the attention of the government with a claim to criminal investigation and prosecution.

In this book, I am concerned with the challenges and difficulties the criminal justice system faces in dealing with these conflicts and any harm that constitutes them. The general inadequacy of criminal justice systems to *solve* conflicts has been pointed out by many scholars, who point out for example the one-sided focus on perpetrators and the frequent exclusion of victims from criminal justice proceedings. Crimes further often have their origin in social problems like unemployment or psychological disorders. Locking up perpetrators does not address these underlying factors. Some critics go as far as to abolish the notion of punishment (e.g. Hulsman 1986). Without disputing the need to punish or deal coercively with those that use “violence”¹ to achieve some moral cause, I want to explore how this fundamental problem of western democracies and their criminal justice systems plays out in the setting of actual conflicts.

Criticisms on the rule of law

There is a need for new thinking about the nature of criminal prosecutions in relation to political struggles. Political protest can range from harmless social movement activity to deadly

¹ The concept “violence” is itself wrought with interpretation and the attribution of malicious intent. The dentist that hurts you with the intention to cure you is not generally thought of as violent. Indeed, it is one of my objectives in this book to trace the different definitions of protest activity and the development in which these contentious and often disruptive actions become increasingly defined as illegitimate and violent. Indeed, the very meaning of “violence” is contested, not only in its application but also in theory as some advocate the position that violence can only be inflicted on human beings (or animals), whereas others include the destruction of property in definitions of violence (I refer interested readers to a discussion on this topic by Morreall, 2002). Violence is often defined as intentionally causing harm to life or property. This presupposes that the definition of “harm” is unproblematic, which however, as we will see in the various cases, is equally contested. In my writing it would be good to use quotation marks every time that I use the concept “violence”, to indicate that its use inevitably refers to the labelling as violence by particular actors. I have, however, chosen not to do so, and remain with the explanation in this footnote.

attacks. The distinctions between actions on this continuum between these two poles are not only inevitably blurred, but also heavily contested, as is illustrated in the brief examples above. The translation of such actions into “crimes” is thus inherently contentious. The framework of the rule of law claims to be unaffected by this contestation as it sticks to parameters of due process and the strict application of the letter of the law.² A de-contextualized criminal justice approach simply emphasizes obedience to the law and relegates political claims to the political arena.

The rule of law framework is, however, subject to challenges from different sides. Two distinct criticisms of the rule of law were dominant in my country studies and reflect voices all over the world. A first criticism emphasizes that the rule of law obliges the state to protect victims. This is a demand for security. The 9/11 attacks in New York have led people to question the suitability of criminal prosecutions to deal with such threats. Many countries have enabled stronger incursions on the rights of suspects, leading to longer periods of preventive detention and broader investigative authorities for police and intelligence agencies. While this perspective addresses the fact that the rule of law is not capable of creating a harm-free society, it ignores the rights of defendants, or criticizes such rights as an “obstacle” in the fight against terrorism. Advocates of harsher treatment of terrorist suspects often seem to take for granted that the suspects are factually guilty. The lamentable death of Brazilian Jean Charles de Menezes in 2005 in the London subway after the police decided to shoot-to-kill is only one extreme example of the tragedies that can arise when rule of law guarantees are loosened. Further, the focus on preventing supposed terrorist attacks can overshadow or thwart efforts to address and solve underlying societal problems.

A second criticism claims that social protest is “criminalized” which points to the numerous incidents in which states use the rule of law to repress political opponents (e.g. CIDSE 2009; OCMAL 2009).³ Mugabe’s labeling of humanitarian food assistance as “terrorism” is just one example of the potential abuses of anti-terrorism laws (Cortright 2008:9). Social and political activists are indeed hampered in their work when they are the target of various prosecutions and investigations, especially when they face long preventive detentions and disproportional charges. Compliance with due process requirements and eventual acquittals may be hailed as “justice” within the logic of the rule of law, but do not take away this burden on social

² In this book, I will use the terms “rule of law” and “rechtsstaat” interchangeably. While they largely refer to the same concept, they originate in different legal traditions. This has been discussed for example by Anne Marie Bos, *Geregeld recht. Een rechtspositivistische analyse van de rechtsstaat* diss. UvA, Nijmegen 2001, pp.27-28 (cited in: Veraart 2005:22, footnote 59).

I use *rechtsstaat* as the German concept without translation, just like the translator of Habermas chose to do in “Between facts and norms” (1998:xxxv).

Veraart points out that any conception of the *rechtsstaat* always comes as not just a description, but also a set of requirements vis-à-vis the government (2005:22, footnote 60). Similarly, Abel asserts that “[l]aw is intrinsically normative; its prescriptions embody societal ideals” (2010:19). In chapter 1 I return more fully to my conceptualization of the *rechtsstaat*.

³ There is even a Facebook page devoted to the issue of criminalization of social protest:

<http://www.facebook.com/pages/NO-A-LA-CRIMINALIZACION-DE-LA-PROTESTA-SOCIAL/204679125172> [Accessed 25 January 2011].

movements. People accusing the government of “perverse” criminalization, however, often fail to address or recognize the existence or threat of actual harm due to law breaking.⁴ In later chapters, we will observe that protesters sometimes ignore or dismiss the grievances of victims of sabotage, vandalism or even murder, which is felt to be especially disparaging when those victims are unrelated to the political demands.

While these criticisms thus do address some of the fundamental flaws or downsides of the rule of law framework of criminal prosecutions, they are problematic in so far as they tend to simplify what is at stake and fail to take important concerns or complexities into account.

In this book I deal exclusively with episodes where criminal prosecutions are the chosen framework. It is important to note, however, that approaches that dismiss prosecution and opt for example for amnesty do not escape the blurring and defining of crime and politics. An example here is the frustration of South Africans who were robbed, or raped, or whose relatives were killed, and the Truth and Reconciliation Commission gave the perpetrators amnesty because their actions were considered part of a political struggle.

Despite these challenges, prosecutors stick to the rule of law framework when they assert their independence and the mandate to “simply” enforce the law. In this book I will focus on these challenges to the rule of law as I describe the gradual politicization of the criminal justice arena when opposing actors implicated in the political struggle move into the criminal justice arena and make it subject to and the space of claim-making. I understand “politicization” as bringing issues into the arena of “the political” and making it subject to contestation (Mouffe 1993). Thus, the political is opposed to the “pre-political” which is assumed and taken for granted. As we will see, the prosecutorial narrative is not immune for contesting claims and discourses, and over time engages with them, for example explicitly rejecting one discourse and adopting (parts of) another discourse, sometimes leading to a radical discursive shift. The fact that I view the choices and representation of the prosecutor as a narrative does not mean that it is not the truth. The point is that any event can be represented in multiple truthful ways by selecting certain elements and ignoring others.⁵ Specifically, the prosecutor can be observed to depart from a de-contextualized and de-politicized representation in favor of re-contextualizing the events subject to criminalization. While the re-contextualization serves to expand criminal liability and thus respond to victim demands for justice and order, it also propels a new basis for continued contestation.

I have reached this conclusion based upon in-depth research into the processes of criminalization in the Chilean-Mapuche territorial conflict, the Spanish-Basque separatist conflict, and the conflict about the use of animals and the earth in the US (henceforth eco-conflict). Each of these episodes represents a liberal democracy afflicted by political struggle where political and legal collective actions are accompanied by illegal and underground activity ostensibly aiming to achieve political demands by extra-legal means. Each of the conflicts

⁴ For the use of the term “perverse” criminalization, see van der Borgh and Terwindt (2011).

⁵ I return to the conceptualization of the prosecutorial narrative as a social construction of reality in Chapter 1.

represents a threat to the government that is not existential, but also not insignificant. The cases tell us how prosecutors respond to that challenge.

The question

What do criminal prosecutions in streams of contention look like? Such contention can become a problem of national proportion and concern, such as the Basque conflict in Spain or the Mapuche conflict in Chile. Newspapers frequently or even daily report on events related to the conflict and descriptions of the occurrence and impact of violent or illegal events regularly fill the pages. While prosecutors prepare the cases against the suspected perpetrators of those crimes, they are aware of the context within which the crime and the trial take place. As a Chilean prosecutor put it, he knows that a Mapuche activist burning down a plantation is not the same as a random pyromaniac. He claims, however, that this does not in any way affect his job (Interview C-12). Of course, prosecutors are not supposed to get involved in politics. According to the logic of liberal legalism they are not responsible for solving political conflicts.⁶ Their task is just to execute the law and prosecute the crimes as they are defined in the criminal law. The setting or context of those crimes should not affect their work.

However, setting and context do matter. In three country-studies we learn whether, when and how prosecutors take the context of a crime into account as they are investigating and prosecuting crimes. The results of my research clearly show, that context *is* deemed important and is not always ignored and excluded from prosecutorial narratives. We will see, moreover, how the interpretation of the context affects the definition of the crime and the identification and prosecution of perpetrators.

These difficulties are not the exclusive terrain of criminal prosecutions in contentious episodes. One can think of other areas, such as the prosecution of gang violence or the prosecution of politically prominent persons. One could even argue that every criminal case might display some of the dynamics that I outline here. Often prosecutors mentioned in their interviews that the “conflict”-cases were not so different from ordinary cases. Indeed, I do not claim that the processes described here are particularly unique. I do argue that they may be more visible and sustained over a longer period of time, creating feedback loops that should be taken into account when trying to understand both the conflict dynamic and the nature of the criminal prosecutions.

This question (how are criminal prosecutions conducted in a situation of conflict?) can be situated in the longstanding academic debate about the relation between law and politics. Put simply, some have argued that law is separate from politics, whereas others have asserted that there is no separation at all, i.e. law is just another way of doing politics and securing the interests of the powerful. Many academics have tried to reconcile these opposing positions by formulating ways in which law and politics are separate but interdependent (Abel and Marsh

⁶ “Liberal legalism” is the ideology which places criminal proceedings firmly within the tradition of the rule of law and cherishes liberal notions such as individual responsibility and formal equality. In chapter 1 I will get back to this concept.

1994). My project should be placed within this tradition of Law and Society research, which views law as a socially embedded phenomenon and “is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking.”⁷ The separation between law and politics, however, is more than just one academic theory among many, it is the foundational fiction and normative ideal upon which lawyers work and have constructed the legal system (this is described for example by Nonet and Selznick 1978). The rule of law in that sense is and has to be opposed to the rule by men.

Liberalism advocates a specific way of dealing with conflicts. Western criminal justice systems are based in a liberal ideology. It asserts formal equality of autonomous individuals and a separation between fair proceedings and substantive justice. Political issues are excluded from criminal justice questions as political goals are to be dealt with by dialogue and political lobbying. This system separates ends and means, leaving ends entirely free while prosecuting all illegal means. Thus, a US prosecutor insisted in the courtroom that “this [case] is not about animal rights.” Indeed, he even acknowledged privately that the defendants’ allegations of animal abuse in the animal testing company may be true. “But then they have to go to Congress,” he noted, confirming his commitment to the formal proceedings (Interview US-13). In each of the episodes, we can observe the prosecutors sticking to this formal rhetoric. This separates the defendants on trial from the larger group that may share their ideology and material grievances. “Real Mapuches are peaceful,” argued the Chilean prosecutor (Interview C-10). “Peaceful animal rights activists have nothing to fear for,” asserted the US prosecutor (Interview US-13). Of course, the separation between defendants and the rest of the movement is a slightly bigger challenge once there are 62 defendants, such as in one of the macro-trial in Spain, or when entire organizations in which many Basque volunteers are active are judged to be terrorist organizations.

Prosecutors cannot all be put in one box. It is not my concern here, however, to focus on the dynamics within prosecutorial offices or engage with the personal considerations of individual prosecutors. Rather than placing attention on the person of prosecutors, I have studied the act of criminal prosecutions and the decisions and arguments voiced by prosecutors as representatives of the state and the rule of law. The state is not a monolithic enterprise either. Prosecutors may act in contradiction to other state actors, such as judges or politicians. Migdal suggests to conceptualize the state as a “field of power marked by the use and threat of violence” and shaped by a combination of (1) an image of a “coherent, controlling organization in a territory, which is a representation of the people bounded by that territory”, and (2) the “actual practices of its multiple parts” (2001:16). I study the practices of prosecutors as state actors that draw upon, defend or reproduce the image of the state.

Here it is important that while there are personal differences between individual prosecutors and approaches in prosecutions have changed over time, all prosecutors have publicly maintained their commitment to the basic tenets of the rule of law. This does not mean that

⁷ From the “Law and Society”-publication series of British Columbia University Press, http://www.ubcpres.ca/books/series_law.html [accessed 6 May 2011]

prosecutors do not reflect on these cases or are not aware of the fact that political factors or motives are involved. On the contrary, all prosecutors were fully aware that politics played a role. Precisely therefore it is noteworthy that they kept committed to their task to extract the “criminal” from the “political” and engage in this act of boundary drawing. It is this boundary drawing and the multiple and changing ways in which it is done, interpreted and contested that is the object of this study.

Criminal law is understood to be conceived ideologically for a society in consensus, with shared crime definitions and a clear-cut public interest.⁸ In addition, the criminal law assumes an abstract individual as the agent of equal rights and responsibilities. Under those circumstances, the formal rationality of criminal law (separating fair proceedings from substantive justice) would be the fair and legitimate way to deal with “crimes” regardless of the substantive nature of problems. These assumptions of consensus and abstract individualism are challenged during contentious episodes where a society gets polarized and actors engage in collective action to contest the status quo.

This book is about the fine line that prosecutors are treading as they are staying away from politics but taking into account the context in which crimes occur. This balancing act is studied in an analysis of the “battle of interpretation” that is part of any criminal trial, but in situations of conflict the battle of interpretation or “meta-conflict” has significance and participating voices that go beyond the particular trial at hand. The meta-conflict – the interpretive battle *about* the conflict, its nature, causes and the narrative of the unfolding of its events (Horowitz 1991:2) – can be viewed as an ongoing debate in which different frameworks and definitions of the situation compete for dominance.

One of the central issues in this debate, for example, has to do with the relevant identities of groups and subjects. Prosecutors can choose to emphasize or ignore certain identities or impose others. One US prosecutor effectively ignored the environmentalist credentials and motives of a defendant, while emphasizing his anarchist affiliations, thus setting the criminal case clearly in the center of a dangerous tradition of anarchist extremism and distancing it from mainstream environmentalism. In Chile, Mapuche activists adhering to a nationalist ideology conceive of the conflict in terms of the Chilean state that rejects the Mapuche people as a nation, instead imposing upon them the forced status of “Chilean” citizen or at best “indigenous” people. “They want us to be *their* indigenous people,” said a young Mapuche leader, a position which he regards as subordinate instead of equal (Interview C-68). When a Chilean prosecutor announced at the start of the trial that he was prosecuting the defendants “as Chileans” and accused the defendants of “abusing the Mapuche identity,” he was participating in the meta-conflict, responding to certain arguments and definitions while proposing his own (Case Lonkos of Traiguén). Prosecutors are not outside of the meta-conflict.

⁸ This does not mean that in any of the countries the criminal codes or the justice system were devised in a society in consensus. It refers to the Enlightenment ideology which inspired the current principles of criminal law. I will come back to this point in Chapter 1.

Their interpretations are constructed in the context of this battle, and in turn contribute to the battle. We can observe this interaction most clearly when prosecutors make a discursive shift.

Contentious criminalization

I present the results of my research into the process of contentious criminalization in three highly distinct contexts of political struggle. Contentious criminalization is the process in which criminal prosecutions in a contentious episode transform into a site of contestation. This contestation may lead to significant discursive shifts in the prosecutorial narrative, with real penal consequences. Despite the differences between the conflicts, their actors, and the political issues at stake, I have found striking commonalities once we focus our attention on the criminal justice system and the contested way it has processed events related to the political struggle while law enforcers claim continued commitment to democracy and the rule of law. In each country-study one can observe the following features and mechanisms:

1. Political opponents all perceive the criminal justice system to be unjust or failing in some respect. Critics on both sides argue that the system is failing to provide sufficient protection, motivated by political considerations, meting out disproportionately high sentences or sentences that are considered to be too low, or failing to prosecute crimes.⁹
2. Different actors mobilize to make claims regarding general criminal policy and specific prosecutions, employing the identifications relevant to the criminal justice logic: “victim” mobilization and “prisoner” support mobilization.
3. Throughout the contentious episode, the prosecutorial narrative moves from a de-contextualized representation of the events towards a re-contextualized representation of those events and the implicated actors.
4. The re-contextualized representation generally serves to expand criminal liability, either by criminalizing more kinds of conduct, or by increasing the severity and thus the sentence for already criminalized conduct.
5. The re-contextualized representation becomes a new basis for continued contestation and mobilization.

These loops of contestation and mobilization may even lead to violent escalation, but that is not necessarily so.¹⁰ Further inquiry into the relation between these phenomena, however, falls outside the scope of my research as I focus on the events within the criminal justice arena.

⁹ One can be forgiven for assuming that when both sides of a conflict are dissatisfied with the performance of the criminal justice system and its proceedings, the system is actually doing quite OK. I would argue that the opposite is true. It is failing both sides, which is not the same as seeking a correct middle ground. Demands and images of justice on both sides regarding criminal justice are not necessarily mutually exclusive. For example, heightened protection of potential victims is not necessarily a trade off with correct due process for a defendant. Criminal justice proceedings can very well be both needlessly oppressive and ineffective in satisfying victims.

¹⁰ Indeed, my observation of the Chilean case had led me to speculate that this was a probable outcome. However, for example the Basque case shows that violent escalation is not necessarily the consequence of contentious criminalization. While there are multiple connections between these two phenomena, it is impossible to draw any straightforward conclusion about their causal relation.

I made in-depth case-studies of a process that I have called contentious criminalization. This occurs within the context of contentious episodes when the prosecutorial narrative is highly contested. In three distinct episodes, I explored the alternative narratives that contest it and traced the development of the prosecutorial narrative. In the analysis of the prosecutorial narrative I have asked, for example, the following questions: Which charge has been chosen? Are defendants prosecuted individually or as a group? What is chosen as the defining element of the group? What, if any, motive is discussed? How is the defendant depicted? How is the criminal act framed? Which legal terminology is chosen to frame the criminal act? On which available interpretations in society does the prosecutor draw to construct this reality? Which interpretations are ignored? I have documented “discursive shifts” in the development of criminal prosecutions. A discursive shift constitutes and is constituted by legal decisions, for example by changing the affected legal interest from the protection of “property” to the protection of the “democracy.” I draw upon some of the insights developed in the field of discourse analysis and semiotics to study the construction of meaning in the prosecutorial narrative.

Criminalization in daily speech often has a meaning that is almost interchangeable with “demonization” or “stigmatization” thus referring to a broad process in which actors or actions are labeled and treated as ‘criminal’ in political speech, media, in confrontations with the police and in general communication in public places, including the courtroom. In this book I take a more technical approach to the process of criminalization, which I view as the legal steps taken by the state to define actions as criminal and prosecute specific actions as crimes. In this process the state draws the boundaries between the political and the criminal justice arena. This juridical process can of course have demonizing or stigmatizing effects or, as we will see at various points in the country studies, be preceded by conscious efforts of “criminal stigmatization” of specific groups, individuals or actions.¹¹ This process of boundary-drawing can be fundamentally contested. For analytical purposes, I find it important to distinguish between these very different kinds of criminalization and prefer to reserve the term “criminalization” for the judicial trajectory. Indeed, I think that part of the problem in many of the current analyses of “criminalization” is the conflation of various elements of the use of state force, criminal law application and public speech. While these elements are indeed often related, it is unhelpful to lump them together in one term as this impedes our ability to question the exact relations between them and distinguish between the different actors involved at different stages.

I describe three ethnographies of contentious criminalization. I say “ethnographies” as I will emphasize the on-the-ground perspectives of the different actors as they participate in the process of labeling actions, defining crimes and mobilizing in favor or against the government response. My description of the criminalization process is often based on detailed material on specific criminal cases that were ongoing at the time of my fieldwork where I had the opportunity to observe and sit in the courtroom as well as interview the people involved in the case each from their own position and vantage-point. Being a “multi-sited ethnography” not

¹¹ For a similar usage of the term “criminal stigmatization” see van der Borgh and Terwindt (2011).

only because of my three country-studies, but also because of my interest in various actors and a temporal development over some decades, my research was, however, based less on participant observation and more on “polymorphous engagement,” which Gusterson described as “interacting with informants across a number of dispersed sites, not just in local communities, and sometimes in virtual form, [...] collecting data eclectically from a disparate array of sources in many different ways” (1997:116). The conducted fieldwork in Chile, the US, and Spain has consisted of participant observation during various criminal trials, protest actions and political meetings; more than hundred interviews with activists, victims on different sides, prosecutors, lawyers, and defendants¹²; the collection of trial transcripts in numerous criminal cases such as indictments, opening statements, jury instructions, verdicts, prosecutorial conclusions, trial minutes, motions, documentary evidence, and dossiers from investigative judges; and the collection of written documents such as public declarations, press releases, legal statutes, websites, and other documents from various political actors, activists, supporters, victim organizations, and government institutions.

I am trained both as a lawyer and an anthropologist and as a consequence never fully identified as one or the other. While I did learn how to do the necessary operations on legal provisions to “solve” cases, I suspect, however, that I failed to properly internalize the legal training to Think Like A Lawyer (Mertz 2007). There is a common joke about economists where a physicist, chemist and economist are on an island in the Pacific with just one can of beans. While the physicist and the chemist attempt to leverage their backgrounds in order to open the can calculating the heat needed to explode it and the distance where the individual beans would fall, all the economist can say is: “let’s assume we have a can opener...” I have often felt lawyers reason in a similar way: “let’s assume we have a liberal democracy...” While this does not mean that they assume the rule of law always works perfectly, they do assume that the rule of law can work and that by making it work, it can solve everything.

Questioning the very things that lawyers often take for granted, this research is far more anthropological than it is legal. It does, however, engage closely with the very criminal law doctrine and legal documents that are often shunned by anthropologists as such texts are assumed to be too impenetrable for outsiders. I have attempted to write in a style that is accessible to all, in order to circumvent that convenient myth that law should be left to the lawyers. Further, I have chosen to study a problem that specifically qualifies as “western” and my concern with the prosecutorial production of reality reflects an interest in describing powerful elites as much as marginalized “others”. At the same time, the anthropological approach should not make it less relevant to lawyers, legal scholars and particularly prosecutors. I believe that the findings in this study pertain directly to their daily practice and understanding of the way the law works.

¹² I have chosen not to interview any judges as I have limited my inquiry to the process of prosecutorial qualification. It is evident though that the prosecutorial narrative is influenced by the subsequent rejections or ratifications by judges. Due to the prosecutorial system in Spain I have interviewed an investigative judge there.

Research design

The idea for this research emerged when I attended a trial against three Mapuche activists in Chile in April 2003 (Case Lonkos of Traiguén). In his opening statement, the prosecutor did not focus narrowly on the three defendants and the criminal actions that were imputed. Instead, he went back to the end of the 19th century to recall the war after which Mapuche indigenous people were put in reservations. His account of the relations between the Chilean state and the Mapuche people was complemented by an analysis of the way in which the defendants “abused” their Mapuche identity. His emphasis on context surprised me. In chapter 5, I will discuss that trial in more detail. This trial and the centrality of criminal justice proceedings within the dynamics of the “Mapuche conflict” sparked my interest in processes of criminalization in conflict situations. Many people, however, dismissed the relevance of my observations as they held Chile to be a third-world country where it would be obvious that criminal proceedings are just an instrument in the hands of the elite. This viewpoint, however, both underestimates the Chilean criminal justice system and overestimates the criminal justice systems in developed western countries. Indeed, far from dismissing contentious criminalization and discursive shifts in the prosecutorial narrative as a Chilean or third-world phenomenon, my assumption was that my observations were related to the inherent dilemmas that a liberal democracy faces when it is challenged by large scale disruptive mobilizations and political demands. The problem is then understood not as a malfunctioning of the rule of law due to human error or corruption, but as inherent to the rule of law itself. This interest to explore the universality of shifts in the prosecutorial narrative in response to discursive mobilization in the criminal justice arena tempted me to go beyond the in-depth study of one case.

Choice of country studies

Multiple case-studies do not necessarily make a comparative study. The choice of contentious episodes may seem an odd constellation for a comparative research. Whereas their differences are glaring, the similarities may not be so obvious. I argue that it is useful to look at these three highly different cases through the same analytical lens. I am not comparing the three conflicts, which admittedly have highly distinct features. Instead, I am comparing the criminalization processes in three liberal democracies that are challenged by major contention. The rule of law in democracies is generally imagined to have universal features. “It is our job to just apply the law,” is what all the prosecutors have told me. This made me decide to look at this “applying the law” in liberal democracies that all strive to solve their political disagreements within the boundaries, framework and promises of the rule of law.

“Research design is always a matter of informed compromise” (Bechhofer and Paterson 2000 in: Ritchie and Lewis 2003:47). The choice of my country studies similarly reflects such compromise, balancing the need for in-depth qualitative research with the aim to portray a process found in many different forms and contexts. On purpose, I have chosen hard cases, as I studied the often unpopular and “violent” marginal parts of social movements in liberal democracies. That makes this book very different from analyses of legal repression in outlaw

areas like Guantánamo Bay or Zimbabwe. To explore the mechanisms of criminal proceedings in liberal democracies afflicted by conflict, I limited my population of cases to those countries that receive the highest ratings in political science measures such as Freedom House and Polity IV, which comes down to western Europe, US, Canada, Australia, New Zealand and Chile.¹³ In addition, I limited my choice to those countries where I would be able to speak the language. Further, whereas the challenge posed by the conflict did not have to be existential, it did have to be significant involving the use of violence or the fear of escalation.

There are thus many cases that I could have included in this research such as the Corsican nationalist struggle in France, the Northern Ireland troubles, “homegrown” Muslim and immigration contention in Britain or the Netherlands, animal rights activism in Britain, neo-Nazi mobilization in Belgium, or indigenous activism in Canada. Given my choice for in-depth ethnographic research, I decided to limit myself to three in-depth case studies. This research is a qualitative research focusing on in-depth analysis of a small set of cases to generate deep case studies.

The nature of this research has been exploratory and focused on theory building by “looking for similarities in unexpected places” (Ragin 1994:85). I was therefore interested in choosing cases that would enable me to study the processes of criminalization at the fullest. I followed Becker’s advice to look “for cases that may upset your thinking” (1998:87). I have chosen for a far-out comparison aiming to explore three highly different instances of the same phenomenon. I was more interested in “finding the full range of cases” (ibid. 1998:87, 112) than zooming in on assumed similarities among cases that are usually pre-conceived as categories, such as the oft-compared cases of the conflicts in the Basque Country and Northern Ireland (a comparison that because of its premise of comparability turns out to be strongly resented by some actors in Spain while favored by others. No comparison is thus politically neutral).

Because of my first observations in Chile and in-depth knowledge of the “Mapuche conflict”, I decided to keep that case and complement it with useful comparative cases. This led me to include a deadly conflict (the Spanish-Basque conflict), where I expected the process of criminalization to be more visible, severe, or further developed. Indeed, the open defiance of the state monopoly of force turned out to be more present in the Basque country than in Chile, where the use of violence is hardly accepted in public discourse, even among activists. Also, I suspected that the pressure on the government to stop killings in a lethal conflict might be much higher than the pressure that was leveled in the Chilean episode. In addition, the length of the Basque episode made it a good case to study possible trajectories in the prosecutorial

¹³ In many different judgments the three states that are chosen (US, Spain, Chile) are currently considered to be well established democracies. See for example <http://www.worldaudit.org/democracy.htm> Accessed June 1, 2007 (I only accepted division 1); Polity IV Project, <http://www.cidcm.umd.edu/polity/> accessed June 30th, 2007 (I only accepted level 9/10); <http://www.freedomhouse.org/uploads/fiw/FIWAAllScores.xls> accessed 4 November 2009 (I only accepted level 1/2).

Various other contentious episodes were excluded, such as autonomous struggles in Bolivia and Mexico, as the states did not fall in the required category of high capacity democracies.

approach in criminal prosecutions. It turned out to be a fruitful choice, as indeed there had been significant changes in the prosecutorial approach throughout the years.

In addition to the Spanish-Basque case, I chose to include a conflict that was not truncated by a military dictatorship, enabling me to more accurately trace the beginning of the contention and the subsequent criminalization. This led me to include the US eco-conflict. This case gives an additionally interesting possibility to study an episode where the activists are not an ethnic minority, and where the political issue is not related to nationalism.¹⁴

I wrote that I have chosen conflicts that constitute a significant challenge to the state. Without a doubt the “Basque conflict” has been a major challenge for more than three decades now and also the “Mapuche conflict” can easily be called a huge domestic concern. People may wonder about the challenge that mobilization in the US episode poses to the government. Here I rely on the assessment of the Federal Bureau of Investigation (FBI) itself, which in 2005 publicly called the animal rights movement and “eco-terrorism” the number 1 domestic terrorism threat (Frieden 2005)¹⁵ and continues to list a fugitive animal rights activist on their list of “most wanted terrorists” (FBI 2011).¹⁶

I have thus looked at the following contentious episodes: (1) Chilean-Mapuche land conflict from 1990 – 2010; (2) the Spanish-Basque separatist conflict from 1978 – 2010; and (3) extremist environmental protest in the US from 1980 – 2010.¹⁷ In this book I explore the existence of a pattern, similar mechanisms, comparable processes or variations on the same process in the course of criminal prosecutions in conflict situations. As such the goal of my comparison resembles mostly what Tilly called “process generalization” in which analysts concentrate on the process itself, “asking in general how it arises and what effects it produces under different conditions” (2007:208).

My emphasis on mechanisms and processes shows that I am indebted to Tilly in this view on social science and specifically theory building in social science (2007). I have been inspired by what Tilly calls the “*mechanism-process approach* to explaining contentious politics” (2007:206). Tilly defined mechanisms as “events that produce the same immediate effects over a wide range of circumstances”. On a higher level of observation, “processes assemble mechanisms into combinations and sequences that produce larger-scale effects than any particular mechanism causes by itself” (2007:214). As Tilly points out, within mechanisms it will

¹⁴ Christenson (1999) asserts that trials involving nationalists are different from trials involving dissenters because of the different challenge to the state, and also Beetham (1991) describes how rebels attacking the constitution of the state attack the legitimacy of the state in a much more fundamental way than one-issue rebels do.

¹⁵ This claim was and is contested, also within the government (Department of Homeland Security 2008). This, however, does not take away the fact that the public image of a highly dangerous group was projected in media. For more information on the various definitions of the situation, see Chapter 6.

¹⁶ Daniel Andreas San Diego is listed here on number three (FBI 2011). He is wanted for the bombing of two unoccupied office buildings. No one was injured.

¹⁷ The time frames in the Basque case and the Chilean case are chosen according to the return to democracy in both countries. The starting point of my US research is chosen according to the first documented attack in the name of animal rights.

always be possible to identify micro-mechanisms again. Thus, whether we call a specific chain of events a “mechanism” or a “process” depends on our level of observation. While I am committed to understanding events in their particular historical and spatial context, my effort supersedes the single case method in the search for patterns that may give us clues for shared processes and mechanisms, thus contributing to the development of a theory that can be applicable to similar situations in other liberal democracies. Thus, while my description of the process of contentious criminalization is informed by the three episodes that I have chosen, and the outcome and specific characteristics of this process will be different in every liberal democracy, I do propose that the broad outline of the process, challenges, dilemmas and characteristics of contentious criminalization as described here can be found in all liberal democracies afflicted by major contention.

In each of the chosen contentious episodes the challengers of the status quo strongly oppose the economic system. Mapuche activists challenge transnational corporations, infrastructural projects and the neoliberal conception of ‘progress.’ Basque left-nationalists specifically claim that they struggle for a free and *socialist* Basque Country, thus proposing a different economic system. Environmentalists in the United States oppose the profit-driven logic of capitalism that perceives animals and the earth as instrumental to satisfy human needs. Discontent with the economy can indeed lead to a strong challenge to the legitimacy of the government (Beetham 1991:163).¹⁸ Whereas the challenge to capitalism has not been one of the variables on which I selected the episodes,¹⁹ still, that shared feature may not be coincidental. Various scholars have indicated that formal rationality is specific to capitalist democracies, or even specifically neoliberal democracies (Weber 1978; Balbus 1973; Mansell et al 2004; Wacquant 2009). Mansell et al, for example, argue that the rule of law is essential to liberal capitalism, as its focus on individual, formal equality and freedom in the political sense opens the possibility for widespread economic inequality (2004:15). This might mean that the challenges and dilemmas faced by prosecutors who attempt to reconcile contentious prosecutions with the rule of law framework may be specific to these cases where the capitalist model is at stake. While this is a possibility, such speculations fall outside of the scope of my project and my research design is not suitable to answer such questions.

There are of course many differences between the conflicts, contexts and legal systems of my cases, but this is a book about their similarities. The presence of striking features in one episode has opened my eyes to a similar presence or absence of those features in the other cases. I have maximized the possibilities for this feedback-loop by visiting my fieldwork sites twice, enabling the chance to return with renewed questions and concepts based on the observations in the other countries. For example, to explore the phenomenon of prisoner support mobilization in each of the three episodes, I used the differences and similarities

¹⁸ According to Beetham, often changes or problems in the economy are beyond the control of particular governments. Therefore discontent with the economy will lead to discontent with the political system, not only discontent with a particular government. He therefore argues that a challenge to the economic system is simultaneously a strong challenge to the political legitimacy of the government

¹⁹ Indeed, before starting my research in the Basque Country I was unaware that the struggle is partly a leftist enterprise.

between the cases to understand better what prisoner support looks like in each of these countries. Ultimately, the three different expressions of prisoner support enhanced my understanding of what prisoner support mobilization is about and how it relates to the larger process of contentious criminalization.²⁰

The three cases thus exemplify the same phenomenon of contentious criminalization in different forms. Of course, as I mentioned before, these processes are set in highly different institutional and cultural contexts. I will point out some of the most important differences. Firstly, the political issue is different in each of the episodes, involving therefore different actors (such as politicians, companies, scientists, or landowners), regions, political arguments and relevant circumstances. For example, while poverty and socio-economic inequality is one of the (important) factors in the Chilean episode, in both the Basque case and the US case this is not an issue. Indeed, the Basque Country area is richer than the rest of Spain. Secondly, the role of the state differs significantly in the different episodes. The Basque struggle is explicitly against the Spanish state as a direct opponent, whereas in the Mapuche conflict and in the US eco-struggle, the state often plays the role of third actor. Thirdly, the levels of violence vary greatly, where the Spanish-Basque conflict has seen more than 800 deaths, the Chilean-Mapuche conflict 3 killings, and in the US eco-conflict no deaths have been recorded.²¹ Fourthly, whereas the legal systems of Spain and Chile are highly similar as both are based on German criminal law, the US has a common law system instead of continental law. Other analysts of comparative criminal law, however, have emphasized similarities more than differences between common law and continental law (Fletcher 2007; Vercher 1991:14). Without denying the existence of many differences between the legal systems, relevant for my conception of contentious criminalization is the shared basis of the Enlightenment values and the philosophy of liberal legalism that underlies these criminal justice systems (cf. Vercher 1991:278). For the specific choices I have made to deal with these legal differences in terms of data collection and analysis, I refer the reader to the methodological appendix.

²⁰ The goal and design of the research was not to explain *why* prisoner support mobilization is expressed differently in one case or in the other, and why in that form.

²¹ The Spanish-Basque case clearly involves the highest levels of direct violence. In the beginning of the 1980s ETA killed about 100 persons a year. Since 1992 there have been consistently less than 25 deaths by ETA. The last years this number has been less than 10 per year. ETA has been viewed to be in its last moments for a long time now. State violence has led to a Dirty War in the 1980s involving about 30 deaths and some high profile cases of torture. The Mapuche struggle was escalating in terms of methods and demands throughout the nineties, and the general perception was that things could get severely worse, with politicians fearing a Chilean Chiapas. Actions in the Chilean-Mapuche territorial conflict consists mainly of theft, land takeovers, threats, harassment, and arson. So far there have been three deaths of young Mapuche activists after confrontations with the police. Actions in the animal rights-environmentalist contention in the US consist of harassment, vandalism, threats, and several bombings. Perceptions in the US of eco-violence have been that it easily can become worse, with prosecutors fearing actual deaths as a (intended or unintended) consequence of activist's actions. I have excluded Ted Kazcynski, alias the Unabomber, from this count.

Data collection

My research question was straightforward: will a shift in the prosecutorial narrative occur, if so, when (as a result of which processes and factors?) how (what changes in criminal doctrinal devices constitute that change?), and which narrative does the prosecutor then choose? The focus therefore is on the courtroom as research setting. I have combined ethnographic methods with discourse analysis. As data, I have collected meanings defined as “the linguistic categories that make up the participants’ view of reality and with which they define their own and others’ actions” (Lofland and Lofland 1984:71). Of course, studying three episodes over a longer period of time necessarily means that much could not be covered and I have had to make many choices about what to select. My country studies do not aim to tell a complete or exhaustive story of either the conflicts or the criminal proceedings. Further, rather than focusing upon what is somehow representative, my interest has mostly been to select those examples that illustrate best how the rule of law is challenged, criticized, called upon, defended, interpreted, imagined, and how the prosecutorial narrative is adapted accordingly. In short, I selected those examples that best show that there is a whole process of interpretive battle that goes into “just applying the law.” And what that process looks like in practice.

On the one hand, I have compiled data to construct the prosecutorial narrative as it has developed during the contentious episode in various criminal proceedings. Therefore, I have collected trial transcripts (indictments, press releases, opening statements, closing arguments, and verdicts), information from government websites and official statements, and I have interviewed prosecutors.

On the other hand, I have collected data in order to construct the competing discourses that constitute the meta-conflict and the battle for interpretation in the criminal justice arena. To construe and analyze these competing discourses I have taken both a macro and a micro approach. For the macro-approach, I have collected data in order to describe the broad oppositions, competing logics and arguments of the actors challenging and defending the status quo. Therefore, I have attended meetings and events and interviewed with various actors from diverse positions (reformist and radical) on the side of both the challengers and the defenders of the status quo. In addition, I have collected books, websites, political declarations and various other materials that express the vision, values and classificatory schemes of the opposing parties.

For the micro-approach, I have made a detailed analysis of several criminal cases and the competing narratives about the background of the specific events that led to the criminal case, the allegations, indictment, theories-of-the-case and the identities of the involved actors. Therefore, I have selected several criminal cases (maximum fifteen per country study) and interviewed the defendants and affected parties, complainants and prosecutors, collected the relevant trial transcripts and (in one or two criminal cases) observed during trial-proceedings. The combination of interviews, participant observation, and extensive document analysis has ensured data and method triangulation. Due to the particularities of each country, in each country I have made different decisions regarding the exact data that I have used, the criminal cases that were selected and the people that were interviewed. For a more detailed

description of my choices regarding data collection and data analysis in each of the country studies, I refer the reader to the methodology appendix.

I want to mention briefly the special challenges of doing research in these highly sensitive conflict areas. Sociologist Howard Becker has written an article “Whose side are we on?” in which he argues that neutral positions are not possible for sociologists (1967). He describes that when scholars understand, defend, or explain the position of the underdog, they are less likely to be perceived as credible by the community of scholars and the larger public. This point applies heavily in situations of conflict where both challengers of the status quo as well as defenders of the status quo can have the position of the underdog, dependent on power relations. In my research I have attempted to collect faithfully the information that reveals the points of view of the different actors in conflicts. I have attempted to be critical towards all sides, making sure to question the information that each shared. This can be personally challenging. How do you balance the feelings of empathy with a person claiming victimhood and on the other hand maintain healthy criticism as you probe into the story they are telling you?

Also, activists and their targets everywhere have a tendency to be paranoid about their security and the identity of people they interact with. This paranoia can be contagious and twice I was sure to identify an overeager new activist as an undercover FBI informant, though I will never know whether that was indeed the case. Urban Mapuche activists often warned me because of militarization in the rural communities. They argued that the state would follow me and that I risked being expelled from the country.

Trials are nerve-racking happenings. The presence of opposing parties, the potential impact of a sentence that can land someone in jail for many years, the lack of certainty about the truth... it all comes together to make a criminal trial as a whole a tense event. The moment that the verdict is given is the heaviest of all. As I attended these politically charged trials, often I had no neutral place to sit, as the benches on the left were the province of prisoner supporters and the right occupied by victim supporters. The visual orchestration of the courtroom becomes “iconic” of the polarization process and the identification split in the broader contention enacted in the mutually exclusive roles of victim and defendant. Maintaining a distance while at the same time approaching people for interviews, put me in a constantly difficult position.

More difficult than doing the research, however, was to write everything down. Given the contentious nature of the topic, I am certain that much of what I have written does not satisfy everyone. More likely, it may upset one side or the other, or both. I hope people will recognize my work for what it is: less an attempt to describe in-depth the different conflicts and their criminal prosecutions, than to tease out a common process of social, political and sometimes violent challenges to the legal system and the way in which criminal law gets interpreted, used, challenged, twisted and defended. To do so, I have attempted to do justice to the existing different viewpoints. My writing has developed in a continuous internal dialogue with all of my informants who shared their point of view with me and kept me sharp while developing my sentences. I am aware, however, that my choices of representation and the inevitable selection

that I had to make, will not do justice to the injustices experienced by the various actors involved.

What is to come

Conflicts tend to be hard to sort out, especially if they are protracted, involving many actors, and if violence has been used. What started out with a relatively straightforward political claim, becomes hidden behind additional claims about past injustices, broken promises, and violence. During my interview in 2003 with Ms. Vidal, the regional prosecutor in the south of Chile, she emphasized that her job was just to “apply the democratic mandate of the law” (Interview C-10). Her references to the law as the basis and final arbiter of her job supposedly closed the discussion about the choices she made and the way she conducted the criminal proceedings. ‘Just applying the law’ can be more complicated than it sounds. This book focuses on what that complicated process looks like in situations of conflict, and how it contributes to making those conflicts so hard to sort out. This book is a lengthy response to Ms. Vidal arguing that “just applying the law” is where the discussion is just beginning.

I am by no means the first to observe that the rule of law ideology makes promises that it does not always fulfill in practice. It is not my aim in this book to rehearse any of these critical observations that are by now commonly accepted. My particular objective is to describe how this ideology and its framework of rules and institutions work at the moment that it is challenged by the discursive action and mobilization that characterize contentious episodes. In that sense, it goes beyond stating a “gap” between ideal and practice and shows how the ideal itself is interpreted in competing ways or even contested as such. In other words, the gap is not incidental, due to a mistake, open to be repaired in the future. The contentious processes described here are built in the very functioning of the rule of law.

This book presents an in-depth study set in and around the courtrooms of liberal democracies. It is about legitimacy and legitimization, the construction of crimes, and categorization in the criminal law framework. It is about how the state and different non-state actors continue to build and challenge the edifice of liberal democracy and its institutions. We will observe actors talk about the rule of law, claim the rule of law, defend the rule of law and challenge the rule of law. There have been many books that have taken the law and the courtroom as a discursive arena and I build upon that approach (Silbey and Ewick 1998; Foucault 2001). Discourse analysis is about unpacking all the assumptions that go into criminal justice categories and their application. Specifically, this analysis looks at how these categories are explicitly challenged in the course of contentious episodes. It thus analyzes the drawing of lines between good and bad, which I show to be continuously negotiated products. I explore the consequences of language and show that discursive shifts from de-contextualization to re-contextualization that we identify in the country-studies have real penal consequences (i.e. who gets in jail for how long). Law is a system of signification, and I study the meta-conflict in that process of signification, focusing specifically on the voice of the prosecutor. Law, supposed to be authoritative in categorizing, becomes one of the multiple speakers on the subject, and is not regarded anymore as necessarily authoritative by all speakers and listeners.

I thus describe the common process of contentious criminalization in which the political conflict transfers to the criminal justice arena where people choose sides as victims mobilize and prisoner supporters challenge the state's definitions and authority. I will point out the commonalities in the dilemmas and challenges that prosecutors face and the solutions they form as they work within the linguistic and logical framework of liberal legalism and try to fit in the criminal cases while they juggle the challenges of competing discourses that question and attack the prosecutorial actions, decisions, definitions and arguments. I describe the similarities in the ways in which criminal cases become re-contextualized as they are classified for example as "Mapuche-conflict"-cases and I explore the ways in which this shift is discursively constituted and reinforced in doctrinal moves.

I make two specific claims about the prosecutorial narrative in these country-studies that should be falsifiable:

1. The prosecutor changes the modality of the charging narrative without claiming a change in the facts of the events "on the ground", that is, it is a purely interpretive turn. For example, the Spanish prosecutorial narrative about Basque street violence has changed without claiming that there is a change in the actual events of "street violence".
2. The change in the prosecutorial narrative has consequences outside of the courtroom, that is, of course there are penal consequence such as who gets charged for what, but it also changes the way people understand the legal system and what is going on in the courtroom.

In the next chapter I set out my analytical framework, where I discuss more in-depth the contestation of the prosecutorial narrative and the nature of potential discursive shifts and their expression in legal choices. Then follow the country-studies, each divided in a chapter in which I outline the competing discourses in the meta-conflict and a chapter with an analysis of the development and discursive shifts in the prosecutorial narrative. I conclude the book with a short comparison of the different episodes and a conclusion in which I discuss the value of the concepts of contentious criminalization, the discursive shift and the distinction between de-contextualization and re-contextualization.

In this book I will hardly address the policy question what prosecutors *should* do, i.e. when and how they should take the context of events into account. While obviously an important issue, it is outside the scope of this book. I will only say two things about it. Firstly, while departing from strict liberal legalist prescription, addressing context is not necessarily "bad" and should not be categorically rejected. For example, the literature on hate crime has abundantly addressed the reasons why context should sometimes be taken into account as well as the specific pitfalls when that is done. Secondly, as this book attempts to show, "the" context can itself be subject to contestation, making general prescriptions particularly difficult and probably not desirable.

While in each of the episodes the meta-conflict transfers into the criminal justice arena in a highly comparable process, the development of the prosecutorial narrative, the discursive shifts

and the penal consequences are very different. In the case of the Spanish-Basque separatist conflict, we find that the prosecutorial narrative makes a strong discursive shift throughout the 1990s as it develops the concept of the “ETA-network” and starts macro-trials as a logical consequence of that interpretation of ETA. Similar discursive shifts in relation to street violence and speech and expressions result in an expansion of the people and actions that come under the purview of the criminalization. The criminal justice arena is expanding its reach to cover many of the activities that were previously deemed to belong in the political arena.

In the case of the Chilean-Mapuche territorial conflict, we will observe how the prosecutorial narrative reflects the ambivalence of the state, as it recognizes the political conflict on the one hand, while using anti-terrorist legislation and attempting to criminalize Mapuche organizations on the other hand. The ambivalence is visible in the constant re-drawing of the lines about what exactly belongs in the criminal justice arena and what belongs in the political arena. The prosecutorial narrative creates the contested image of the “true” Mapuche, which is the subject in the political arena, and the image of the “radical activist that abuses the Mapuche identity” as the target of criminal prosecutions.

In the case of the US eco-conflict, we see how the concept of “eco-terrorism” is developed and increasingly applied to a select number of high-profile activists resulting in high sentences. The prosecutorial narrative shifts from reacting to past harm to anticipating future crime. The FBI is an important actor in co-creating this narrative. In addition, some important cases mark an increased attention to aboveground activists allegedly inciting or coordinating underground crimes.

The description of the different kinds of criminalization as expansive, ambivalent or marginalizing refers to the way in which the prosecutorial narrative proceeds to mark the boundary between the political arena and the criminal justice arena. The expansive discourse in Spain has enabled a criminalization of activities that previously were treated according to the logic of the political arena, thus expanding the criminal justice arena while encroaching upon the political arena. The ambivalent discourse in Chile shows a constant back and forth in which what was considered criminal ten years ago is now firmly treated as political, whereas what was merely criminal yesterday suddenly turns out to be terrorism today and is subjected to political negotiation tomorrow. The marginalizing discourse in the United States creates a specific pocket of what is considered to be criminal or more specifically “eco-terrorism”. Once you are perceived to cross that line you fall deep into the tentacles of criminal justice proceedings. You are turned into a legitimate target of harsh prosecution and it will be difficult to crawl back towards the identity of a subject in the political arena.

Throughout the book I will refer to many different criminal cases, the defendants and the events that led to the criminal investigation. This can be confusing for the reader. At the end of the book, therefore, the reader can find a brief synopsis of the criminal cases that have the most relevance throughout the analysis. I hope this solution is more practical than repeating the details of every case throughout the text.

My conclusion is that these three country cases represent instances of the tragedy of liberal legalism, where the state is unable to deliver (substantive) justice and the rule of law becomes the target and sometimes victim of continued contestation. The goal of this book is not to point out the particular shortcomings of liberal legalism and its constitutive fictions about society. Many scholars have done that before me. I build upon their insights to describe and understand how criminal proceedings that take place within the framework of this system play out in the challenging context of major conflicts. This book thus contributes to the current literature as it provides new understanding of both protracted conflicts that have moved into the criminal justice arena as well as the rule of law as it is exposed by the challenges of these conflicts. Because crime is not a pre-given category and because liberal legalism is not necessarily able to provide substantive justice, the criminal proceedings create or become the arena in which the conflict dynamics (collective claim-making, polarization and escalation) are transferred sparking a potentially infinite re-framing of events and “innovating” of criminal vocabulary. In three in-depth case-studies, this book describes what that process and the concomitant criminal proceedings can look like.

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