Dealing with a Repressive Past- the Unsettled Story of Transitional Justice in Chile and Argentina

Has the Scope of Truth and Justice Policies Widened in Any of the Cases?

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Abstract

Transitional justice inevitably means striking a balance between justice and peace. The purpose of this paper is to examine and analyze how policies of truth and justice have fared over time and continue to hold momentum in the case of Chile and Argentina. I will carry out this aim through a comparative study guided essentially by two theoretical approaches of transitional justice - legalism and pragmatism. I argue that while the pragmatic position might be the only feasible option in a short term perspective it appear it does not remain a forceful option in the long-term. The continuing search for truth and justice, and recurrent challenges made over time to amnesties by political actors, civil society, as well as international human rights regimes and the sometimes ambiguous role played by the judiciary will be considered. Furthermore the balance of power between key actors, as well as preference of these actors and the civil-military question will be explored. Findings in both cases suggest that the scope of transitional justice policies has widened and that the balance between stability and justice can post-transition be struck in a more nuanced way.

*Key words*: transitional justice, civil-military relations, human rights, South America, democratic transitions
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1 Introduction

Most if not all, societies emerging from authoritarian rule to democracy or from civil war to peace will, at some point, have to deal with the same question; how to reckon with the legacy of widespread and systematic human rights abuse? Should one seek to forgive and forget or refuse to forget and search for punitive retribution? Clearly coming to terms with a violent past is a recurrent theme in the literature, throughout history, a seemingly never-ending tale. Throughout Latin America, new democratic or post-war governments have faced demands for transitional justice. This was the case in Argentina in 1983 and at a slightly later stage in Chile, in 1990 as the two countries re-embarked on the path of democratization. However, the past may not be so easily buried at times and might make political calls for national reconciliation hard to ensure. The purpose of this paper is thus broadly speaking to explore the delicate balance between peace on the one hand and stability on the other.

Next I will in brief outline the main disposition of this paper. Commencing naturally, with an introductory chapter (1.1.2.3) where I present the overall aims with and the research question of my study as well as method and assessment of material. Chapter two (2.2.3.1) provides the reader with the “theory” of transitional justice, outlining major themes and debates in the literature, where the principal one is the peace vs. justice dilemma. I also illuminate the problems of democratic consolidation, and the military question accordingly. Subsequent chapters, i.e. number three and four present an empirically based analysis of how the process of transitional justice has fared over time till present date. I have preferred to divide them into two independent parts essentially with my reader’s attention at heart. Lastly in chapter five (5.), I will outline and discuss my result and conclusions.

1.1 Statement of Purpose

The chief purpose of this paper is to compare what strategies have been sought in relation to a repressive past in the case of Chile and Argentina, seeking to determine possible factors that have influenced and framed the issue of transitional justice over time. Moreover seeking to understand why it still holds momentum some twenty years later. To be able to do this I need firstly identify
the sets of constraints of each case. Because only after considering these constitutional, institutional and political factors, may I hypothetically pose the question in sight: if a new more nuanced balance can be struck between justice and peace in due time? More specifically seeking to find out if the scope of truth and justice policies widened in any of the cases? Thus in some sense establish what factors make accountability more or less feasible in the cases examined.

1.2 Method

1.2.1 Comparative Study

I have opted for a qualitative comparative study based on the premise that while the two cases are quite similar, they do differ in some, possibly substantial ways. The intensity and scope of violations was larger in Argentina for instance, while on the other hand the duration of authoritarian rule was indeed longer in Chile. Yet Argentina experienced a temporarily weakened position of the military, in both cases the military as an institution remained a significant political actor during the transitory period, although to a varying degree. Similarly in both cases civil society and human rights network is well organized and influential. However my key motivation for choosing to analyze the two cases is the presumed difference in strategy and possibly also outcome over time (Essaiasson et al. 2003: 118-135). Broadly speaking I believe this method will grant for a deeper understanding of what factors and variables ultimately has framed the process in the case of Chile and Argentina respectively. More specifically seeking to determine whether the scope and feasibility of truth and justice policies has widened over time and in more recent years- if so how can this be explained? I will conduct an empirical analysis guided by a theoretical framework outlined in following section 2. - 2.3.1 of this paper. While recognizing the limits of deriving general lessons from a strictly qualitative study my ambition is nevertheless to contribute by some means (albeit petite) to a gap in the offered literature on transitional justice by adding a long- term perspective.

1.2.2 Methodological Considerations

Before commencing this study there are of course some methodological dilemmas to consider. Firstly the theoretical framework guiding the analysis is not, strictly speaking, made up by a fully fledged theory. This could be perceived as delimiting. However let’s consider the argument put forward by Lennart Lundquist; that all empirical as well as normative theory lacks a rock-solid foundation. Indeed he argues that eventually all theorizing eventually ends up as
metaphysical assumptions impossible to verify in any “real sense of the word.” (Lundquist 1993:81) While I do not utterly concur with this argument; the scholarly literature on transitional justice in particular is to some extent based on assumptions. Secondly, my dialectic and non-linear understanding of the role of law, and more broadly of democratic consolidation clearly poses some difficulties seeking to identify causal links. However this is not my ambition (see 1.1) as I put forward an understanding of stability and justice, as mutually entwined and enhancing, co-existing rather than staunchly opposed. Lastly it should be noted that my intention is not to engage in normative research or theorizing. Naturally there might be some minor normative elements, in particular when seeking to contribute to the peace vs. justice debate. Nonetheless my chief aim is to understand and explain a certain “reality” or phenomenon rather than suggesting how things ought to be or should be. The underlying notion being though, that our understanding of this reality is dependent upon our interpretation of it. While my analysis is essentially guided by balance of power between key actors, it also considers the role of law, and effects of institutional structures among other things.

1.2.3 A Note on the Material

The material used in this study is largely made up by the work of endorsed scholars in the field of political science and law. The literature is mainly in the form of books, and scientific articles, a few scientific reviews, and a minimum of internet resources. While the material at hand does not consist of primary sources it does overall and evenly hold a high scholarly quality. Nevertheless the literature on transitional justice often entails some normative elements, why I have sought to present the two main theoretical approaches to transitional justice-pragmatism and legalism in an objective manner.
2 Theoretical Framework

Before outlining my theoretical framework I will just briefly motivate why I have chosen the term transitional justice rather than retrospective or retroactive justice. There are two compelling reasons for this. Firstly there is a vast and motivated scholarly literature ranging from the field of legalist theory to political theory that all use the same terminology although not reaching a satisfactory consensus on its meaning. (for a full discussion see Roht-Arriaza et al 1998, McAdams 2001, Barsalou 2005) Secondly while recognizing that the second part of this paper seeks to analyze the continuing story of transitional justice in the two cases examined I will thus use this term so as to evade any misunderstanding, and essentially because I view transitional justice seeking efforts as being part of both backward and forward looking process, at least in theory. This is not to suggest these countries are still in transition, although the level of democratic consolidation\(^1\) has been questioned by some (Taylor 2002:167-169). Considering the political battles evolving around transitional justice have largely taken place somewhere in between politics and law my theoretical approach to transitional justice will focus chiefly on these two main approaches in the literature: pragmatism, and legalism. Attempt to bridge the gap between them and seeking to go beyond and contribute to the often dichotomous scholarly debate.

2.1 Transitional Justice

Transitional or retroactive justice strictly speaking refers to the new or renewed democracies decisions to prosecute, bring to trial and eventually punish leaders of previous authoritarian regimes responsible for egregious, systematic human rights violations. It also includes the term of retributive justice meaning official recognition of crimes, rehabilitation of victims and or economic compensation. (Elster 2006: 1-14) In the last decade and particularly within the field of political science, there has been a push to also include the idea of restorative justice. Hence emphasizing the benefit and need for truth telling and forgiveness rather than trials as a way of healing broke relationships and ultimately national reconciliation (Rocher 2001). Main focus thus being on truth commissions as a

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\(^1\) This is yet no scholarly consensus regarding the term which is often contingent of a minimalist or maxima-list approach of democracy. For a full discussion see Aguero and Stark 1998 or O’Donnell, Schmitter, and Whitehead 1986
preferred political tool of achieving this. While the normative debate is still highly vivid and contentious among scholars, (for a full discussion see Rotberg and Thompson 2000 or Dimitrijevic 2006) my aim is not to engage in a moral evaluation of the transitional justice mechanisms, but rather to outline the main scholarly debates or understandings on this theme. In the literature two strands of arguments or divergent theoretical perspectives can be identified: pragmatism and legalism. The latter referring to those who argue that past human rights violations must be punished are often concerned with the value of retribution, legal and moral obligations and deterrence. Conversely those who argue for amnesty, pragmatics, argue for the need of national reconciliation or political forgiveness and social peace (Amstutz 2005: 17-40). Generally speaking political elites and policymakers position themselves towards a more pragmatic understanding, ultimately guided by logic of consequences. While this might be the only viable strategy in the immediate transitory period, it does not fully account for the role of the law.

2.1.1 Beyond the Peace vs. Justice Discourse

One of the most important debates on transitional justice has discussed the trade-off between democratic stability and justice in particular. This debate is generally framed by a rather dichotomous understanding of the Peace vs. Justice Dilemma (for a rich comparison see Sriram 2004, Mc Adams 1997, de Brito 2001). While recognizing there is tension between the two goods, particularly in times of transition, does not denote they are staunchly opposed ad infinitum. A common assumption is that in order to ensure stability, and national reconciliation the transitional regime is forced to leave out, or heavily limit the pursuing of truth and justice. Wile this is an accurate observation in a short term perspective I consider it too simplistic when applying a long-term perspective.

Within the field of political science many scholars adopt a more pragmatic perspective guided essentially by the logic of consequences (Huntington 1993:211-231). Thus in order to neutralize the opposition of those actors formerly connected to an authoritarian regime, it is necessary to diminish the uncertainty that the democratic opening implies for them (Acuna & Smulovitz 1997: 95). Consequently suggesting that if one’s key priority is to ensure democratic stability then one should not seek bringing the military to judgment for its past human rights violations. In the evaluation of outcomes, therefore some argue that “the consequences of trials for the consolidation of peace and democracy trump the goal of justice per se, since the future prospects for justice depend on the establishment of social peace and unshakeable democratic institutions” (Vinjamuri & Snyder 2004:353). Yet if no justice is pursued some argue the line between the old regime and the new democratic government is to some extent blurred and the latter risks loosing legitimacy. (Elster 2006: 317-326) Hence legalist scholars argue that strengthening the rule of law, makes out the essential basis in a liberal democracy, where legal accountability is deemed a
necessity in differentiating the new democratic rule from its previous authoritarian regime. Strictly speaking a legalistic understanding of transitional justice suggests that accountability can only be achieved through criminal justice, be it under international or national law (Van Zyl & Freeman 2001). Thus offering an alternative view of reconciliation for instance, suggesting this can only be achieved post justice not before. Conversely Huntington argue that if one does not accept, and “acknowledge the value and gains of respecting amnesties then one is also rejecting the most prevalent form of transformation”. Prescriptively therefore Huntington argues that any moral gains of prosecuting will inevitably be outweighed by political costs. The failure of the Alfonsin strategy of simultaneously seeking justice and stability could be understood in this light. However that analysis fails to entail how that strategy has fared over time.

The arguments put forward by scholars like Chandra Lekkha Sriram suggests that this problematic can be interpreted in a more nuanced way. While acknowledging that the balance of power clearly limits the pursuing of justice in some cases and facilitates it in others, she carries the argument one step further. The balance of power should she argues, be understood as a dynamic process, where the short term goal of limited justice as well as limited stability will eventually lead to a more stable and just democracy. The dilemma is not merely an either or choice, consisting simply of punishment or pardon, but in fact there are a range of policies available to the new regime in dealing with a repressive past (Sriram 2004:202-206). Given that stability and justice are not necessarily opposed but rather serve to enhance the other in this context, post transitory periods would then arguably grant for a more comprehensive justice.

2.1.2 Truth vs. Justice?

Another more recent scholarly debate on transitional justice emerging in relation to the peace vs. justice debate is the assumed tension between truth and justice. Truth commissions, as a favored tool of transitional justice offer a novel approach to accountability in that they expand the notion of Justice as to include Truth and recognition as a form of Justice. They have been defined as bodies set up to investigate a past history of violations of human rights in a particular country- which can include violations by the military or other government forces or by armed opposition forces. (Hayner 2001) While this definition explains the main purpose of the truth commissions it does not account for their other various functions and goals. They are quasi-judicial, truth seeking bodies, designed to uncover some sort of collective (official) truth and memory with the long term goal of national reconciliation. Although recommendations from truth commissions are not legally binding, generally speaking, they do in some cases lead to criminal prosecutions of the worst offenders as happened in Argentina for instance.

The ongoing normative debate among scholars is whether this expansion is morally adequate and justifiable. Simply put, can truth serve as a complement, replacement or neither in relation to transitional justice? Scholars with a more
legalistic view such as Jon Elster and Neil Kritz for instance, assume a more narrow definition where criminal justice is the only viable justice, thus meaning that criminal prosecutions be it international or domestic make the basis for transitional justice. They argue that building respect for the rule of law, civic trust in the institutions is essential in building a strong democracy. Seeking accountability for a repressive past is therefore crucial also as a way of differentiating the new regime from the old. (see Kritz 1995 or Elster 2006:1-3) This is not to say that legalist scholars in general do not recognize or add any value to truth seeking efforts, but for them it is mainly as a mechanism that enables and facilitates “real” justice. (I.e. criminal justice)

In a similar vein Pricilla Hayner argue that truth seeking alone is not enough to do justice, but they do provide an important tool in simultaneously addressing victims needs and the need for some sort of national reconciliation. In fact case studies illustrate the complex interaction between truth seeking and criminal prosecution; in that clearly truth commissions in many cases have contributed to legal justice. (Zwanenburg 2003: 125-131) Truth seeking can thus they argue, serve as a form of justice particularly in societies where a culture of denial has prevailed during the old regime, clearly the case in Argentina as well as Chile, where systems of repression were designed explicitly to hide the facts. (Neier 1999: 39-53, Kritz 1995: 232) Even so truths commissions will in many cases exchange some criminal prosecution for revealing the “truth” and instead name the perpetrators of these crimes. (Quinn & Freeman 2003) Finally the scholarly debate is contentious as whether to include truth as a form of justice, complement to justice or neither.

2.2 Conceptions of Justice and the Role of Law in Times of Transition

As mentioned before the prevailing pragmatic approach to transitional justice yields little positive accounts for the significance of justice in times of transition. The search for justice and the prospect of attaining this objective is largely explained in terms of balance of power. While the balance of power hold some (potentially large) explanatory force it runs the risk of leaving little room for law as having any independent significance in times of transition. Prominent legal scholar Ruti Teitel offers a more nuanced in my view compelling account of the relationship between politics and law. While highlighting the shortcomings of pragmatism she also critiques the idealist perspective. Rather than perceiving law as either entirely independent force, or utterly contingent of politics, Teitel suggests an interactive, dialectic understanding of law. Given the nearly impossible task of formulating a theory on transitional justice, she nevertheless elaborates and presents her theory of “transitional jurisprudence” (Teitel 1997). Simply put her theoretical approach is situated in my view, amid pragmatic realism and legalistic idealism. Ultimately seeking to bridge the theoretical gap
between idealistic conceptions of the rule of law and of political ends on the other hand. (Teitel 2000: 213-214) She rejects the idealist conception of justice as universal and original, independent from culture and politics. Instead the conception of justice that emerges is contextual: what is deemed just is contingent on prior injustice. While transitional jurisprudence has its starting point in times of transitions it arguably has bearing beyond periods of political flux, primarily in relation to human rights law. The role of law in this context then illustrates continuity and change concurrently. (Teitel 1997: 2014)

As argued by Nino” some measures of retroactive justice helps protect democratic values, counteract a tendency towards unlawfulness, negate the impression that some people are above the law and consolidate the rule of law.” Indeed Teitel highlights the fact that law reconstructs individual status, rights and responsibilities, mediating a shift in power relations.

However, it is necessary to distinguish between political will and interest in punishing and political ability to do the same. Argentina for instance prosecuted the military at the moment of their lowest legitimacy, following the defeat in the Falklands war. However the relationship between legal accountability and the military’s power is reflected in the timing of the Full Stop Obedience laws immediately following confrontations with the military. Similarly the timing of successor president Menem’s pardoning at a later stage also points to efforts to appease and reassure the military (compare Teitel 1995: 150, to Huntington 1993: 214- 220). Yet even when the pardoning was a fact, the judiciary found loopholes around in some cases and continued investigating even if no punishment could be met out. Nevertheless pragmatics like Huntington for instance sustain that; “in actual practice what happened was little affected by moral and legal considerations. It was shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transition (Huntington 1993:215).”

As to the goal of legitimizing new institutions, while it is true that punishment is an effective means to demonstrate a functioning executive and judiciary it is not the only means. There are other ways to improve institutions in renewed democracies than through confrontations with the military, arguably this is the most difficult. I will give a more in-depth account of this problematic in subchapter 2.2.1. Any concern with democracy would seem to require the removal of murderers and torturers from positions of power. This could then serve as an alternative, as a second best option going someway to restore the balance of power between victims and criminals. Nonetheless the judiciary is one of the three pillars of democracy, meant to be separate and independent from the other powers of state and with the ability to check on their abuses. Consolidating the rule of law is important to resurrect citizens’ trust in justice and the legal system, and required institutional reforms may take the form of rejuvenation for instance. (Cesarini 2004: 169). Finally in relation to the peace vs. justice debate she suggests the function and strength of law during transition, is that it both stabilizes and destabilizes. (Teitel 2000: 220) I will use parts of transitional jurisprudence as guiding my analysis of the somewhat different role played by the judiciary in both cases, and its implications.
Clearly the concept of transitional justice emerges in times of transition. Intimately connected to transitory studies is also the question of democratic consolidation why it merits some further discussion. However I do not wish to reside chiefly into this issue. Much scholarly attention have already notably accounted for this (see Linz & Stepan 1996, O’Donnell et al 1986) Yet there is an interesting assumed link between settling the account with the past or simply burying the past and democratization that merits some discussion. As the number of countries embarking on democratization increased, political science scholars progressively shifted their interest toward democratic consolidation. More recently scholars have come to recognize that “democratization in many countries involves contradictory or arrhythmic patterns” (Aguero & Stark in Cesarini 2004: 159)

According to Juan J. Linz and Alfred Stepan “the type of prior government that can impose most constraints on a transition is one in which the non-democratic regime’s base is a hierarchical military that is united and has strong civilian allies.” (Linz & Stepan 1996: 211) Consequently they argue the post- transition situation of Chile is more constrained than in other Southern Cone cases. In addition the least democratic constitution making process is one where the new democratic government has to agree to play along the rules of the constitution written by the previous authoritarian military regime. In addition they argue that in Chile, the persistence of military prerogatives and the limits imposed on human rights-related trials are unfinished parts of the process of democratization. (Linz & Stepan 1996: 225) This is not to say however, that official policies to deal with a repressive past are, in and of themselves, necessary to ensure democratic consolidation. Naturally democratization depends upon “a wider process, involving the constitution of effective citizenship through the elimination of authoritarian legacies that both precede and were consolidated by military rule.” (de Brito 2001:151) This in turn requires more wide-ranging policies of institutional reforms, which transcend the scope and effect of backward looking accountability per se, although the pursuit of truth and justice policies may be relevant and contribute to, the process of democratization, as a part of these reforms. In Chile for instance, when it occurred, “linkage” actually helped to slow down the resolution of important issues; the attempt to release political prisoners with wider judicial reform made both processes more difficult. The fact that neither Chile, nor Argentina was initially able undertake or sustain, wide-ranging policies of accountability indicates according to some that democracy was not consolidated at the time (de Brito 1996: 253). It is precisely the ability to try the powerful without provoking a fall down of political regime that strongly indicates that a democracy is strongly rooted according to de Brito. While there are countless often forceful moral and legal reasons for dealing with the past there is one key argument favoring this, and that is politically motivated answer. Simply put it makes good political sense in the transition from dictatorship to democracy as a way of differentiating us from them. As legalist scholar Mendez argue, that
the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, on the rule of law, and the respect for the dignity and worth of each human being. (Mendez in Mc Adams)” Yet there are political risks attached to this that might jeopardize the transition towards democracy in the first place. Another argument is put forward by Paola Cesarini, that coming to terms with the past is beneficial to democracy because it “off-sets undemocratic regime’s strenuous, conscious and well-organized efforts to mold state-society relations according to their needs” (Cesarini 2004:166).

2.3.1 The Praetorian Problem

The difficulty in dealing with a repressive past and particularly with the issue of holding those responsible for grave and systematic human rights violations accountable is contingent and overlaps with a broader question confronting new or renewed democracies: the need to curb the political power and influence of the military as an institution. Referred to by, prominent political science scholar Alfred Stepan, as “military prerogatives that must be reduced by the new democratic government.” (Linz & Stepan 1996:210) Another well-known scholar, Samuel P. Huntington, on the other hand refers to this dilemma as the “praetorian problem.” The problems facing the new regime depends he argues on the type of authoritarian regime, the power of the military establishment, and the nature of the transition process (Huntington 1993: 231). Where the transition process itself in some sense took place due to the authoritarian regime, as was the case in Chile as well as in Argentina, the new democratic leaders consequently face a rather constrained situation. Subsequently an important question arises; can a new often fragile democracy afford not to guard the armed guardians? From a strictly pragmatic perspective the answer would must certainly be no, as stability is seen as the number one priority. Huntington concurs with this view although not entirely precluding the possibility of bringing the military to justice given the new democratic regime is powerful enough to do so, and acts swiftly enough (ibid. 222-231). As for the risk of military uprisings Huntington distinguishes between two types of coups d’états, those that are “reactions to the perceived failures of a democratic system, and those that are reactions to the prospective success of democratization” (ibid. 233). In Argentina several military uprisings took place during the presidency of Alfonsin as well as Menêm (Sriram 2004: 106-26, Hunter 1999). While all of these attempts failed in overthrowing the democratic governments, they did achieve in reaching some major goals. Thus following the Easter week Rebellion of April 1987 the governments enacted the due obedience laws, which precluded further prosecutions of active duty officers for human rights violations (Huntington 1993: ).

Prescriptively Huntington argues that it is essential for the new democracies to replace the often highly political nature of the armed forces, with a more professional sense of ethics, and redirect its attention to external threats and purely military questions (ibid. 235-245). In order to keep the military “happy”
the new democratic governments may provide them with new and fancy equipment such as planes and tanks for instance. The overriding essential aim, however, being to establish effective control of the military (ibid. 252, Aguero 2004).
3 Dealing with a Repressive Past in Chile and Argentina

3.1 Nature and Scope of Repression- a Brief History

In order to understand how the process of transitional justice has fared over time it is necessary to go back in time, if only briefly. The military dictatorships established in Chile and Argentina in the early and mid 1970s had one key aim in common: to eliminate internal left-wing subversion and re-establish order. All those opposed to military rule were enemies of the state, to be physically eliminated or politically and socially isolated or silenced by imprisonment, torture, enforced disappearances, or exile (de Brito 2001:119). After long-standing stability of the political regime, Chile suffered on September 11, 1973, the breakdown of its democracy. General Augusto Pinochet, head of the army, staged a successful military coup that would last eighteen years. The congress was dissolved, all political activity forbidden, and censorship was imposed (Kritz:1995:453).

Only a few years later in March 1976 the Argentine military led a military coup, launching the Proceso de Reorganizacion Nacional, commonly referred to as the dirty war ostensibly in response to terrorism and subversion but with a repressive reach far beyond the relatively small numbers of rebels. Tens of thousands of people disappeared and almost 10,000 more were held as political prisoners by the military dictatorship (Sriram 2004: 106-110). The repression was in both cases “based on the systematic violations of rights, covered by a protective mantle of official denial and impunity, and facilitated by the subjugation of judicial institutions and manipulation of constitutional legality” (de Brito 2001: 119). The nature of repression was strikingly similar in the case of Chile, however not reaching the same level in scope as in Argentina. Yet, the longevity of authoritarian rule was longer in Chile and the Argentine military handed over political power in a much less influential position than its Chilean counterparts.

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2 The Under-secretariat of Human Rights confirmed an estimation of 12,000 “disappeared”, while Amnesty International and other HRO’s estimates the number to be around 30,000 victims (Acuna: 209) to be comrade with an estimated 3,000 disappearances and deaths in Chile.
3.2 Dealing with the Past in Negotiated Transitions; Political, Constitutional and Institutional Constraints

As mentioned earlier in cases of transitions initiated through negotiations and reforms, rather than clear cut breaks (ruptura) or military defeat of the old regime, the new democratic government is often weak and perceives itself with little room to manoeuvre. On the other hand where the new government has achieved a complete military victory over the old regime, there may be no political constraints on their policies. In these cases the new government’s power to deal justice will be largely unchecked (Zalaquett 1995: 3-31). In other cases the military forces of the old regime remain strong and in control. The military has thus agreed to negotiate a transition to civilian government, but controls the terms of negotiation. This chapter will thus give a more in-depth account of these political, constitutional and institutional constraints.

As pointed out by Alfred Stepan, democratization initiated from within the authoritarian regime generally follows three constraints and considerations. Firstly they will initiate the process of democratization only if the costs or not doing so overrides the cost of continuing repression. Secondly the power-holders can construct formal and informal rules of the game that guarantee their core interests even in the context of the successor democratic regime, and thus yield only a limited democracy. Third and equally important the military as an institution from the authoritarian regime can attempt to preserve its prerogatives intact (O’Donnell et al. 1986: 72). Argentina and indeed Chile falls within this category. In these cases the military generally refuses to acknowledge or remedy its human rights abuses. While they usually, successfully manage to do so, this might be less feasible post transition as suggested by more recent developments in both Chile and Argentina (see Acuña 2006). In some sense, amnesty laws in both countries symbolized the balance of forces between democrats and authoritarians. More specifically according to some scholars, the Chilean government’s upholding of the military-imposed Amnesty Law of 1978 reflected the Concertación’s calculation that it did not posses the force in government to confront those responsible for gross human rights violations (Aguilar&Hite 2004: 191-393).

In Argentina prior to transferring authority to the new civilian regime military rulers took three actions to limit legal accountability for its human rights violations during the dirty war. First, the junta issued an official report Documento Final (Final Document), on the anti-subversion campaign, admitting that human rights violation had occurred but claiming they were only the inevitable by-product of revolutionary insurgency. The military also declared that persons who had disappeared should be considered dead. Secondly, the military junta enacted the Ley de Pacificacion Nacional (Law of National Pacification), which granted immunity from prosecution to all alleged terrorists and all state personnel, armed forces and police forces for crimes committed from May 25, 1973, to May 25, 1982 (Garro & Dahl 1995: 325-326). Lastly, they issued a decree calling for the destruction of all public documents relating to the states anti-subversive
campaign. These actions served to undermine subsequent efforts of to uncover the truth about the Dirty war and seeking legal accountability (Amstutz 2005:120).

Nevertheless in comparison the continuing military influence, and institutional as well as constitutional benefits granted the military in Chile was more unyielding than in Argentina (Aguero 2004: 240-241). In an attempt to institutionalize and legitimize military rule the Pinochet regime elaborated a new constitution in 1980. Although the constitution contemplated a return to open elections in 1989, it also established a mechanism for succession that ensured the continuity in power of the military leaders, of the judiciary and of the commander in chief of the army until 1997. In essence; the democratic government was able to displace Pinochet from the presidency in 1989 at the cost of reducing its future scope of action (Rindefjäll 2005: 83-94). Some scholars refer to this as the institutionalization of “authoritarian enclaves”, yet others label it military constitutionalism (Linz & Stepan 1996: 211, Acuña 2006: 224). In relation to the future of the military, one key point was agreed upon; the Organic Law of the Armed Forces. More specifically to maintain the budgetary autonomy of the military; guaranteeing it could not fall below its level of 1989, and additionally that the military would receive 10 per cent through the copper exports. Thus in contrast to the situation in Argentina, where crises of the state significantly affected the military budget, the Chilean armed forces were able to isolate themselves from fluctuations of the national economy and to guarantee a budget ensuring operational autonomy and high salaries for their officers (Huntington 1993).

In addition to the above mentioned constraints, new governments may face other practical or institutional constraints on their ability to pursue justice. Generally speaking the nature and scope of violation may make investigation, prosecution and reparations rather difficult. The courts may be underdeveloped, understaffed, or dominated by the old regime. While the neither the Argentinean nor the Chilean courts were underdeveloped nor understaffed, they were in some sense dominated by the old regime. Clearly in Chile the latter would pose a significant constraint during most of the transitory period (de Brito 2001: 148-149). In Argentina autonomous courts on the other hand initiated a process beyond political considerations and control.

3.2.1 Initial Strategies of Truth and Justice

Out of the two, Argentina was the first one to undergo a transition to democracy in 1983, and in the Southern Cone the one to undertake the most wide-ranging official policies of truth and justice. The first measure adopted by newly elected President Raul Alfonsin was to release political prisoners, and by the end of his mandate all political detainees had been released. In December 1983 the government also set up the National Commission on the Disappearance of people.
to investigate the truth about the repression during the Dirty War. After nine months it published its findings in the report *Nunca Más* also known as “Argentina Never Again” (Kritz 1995: 327). It confirmed the disappearance of 8,963 people, acknowledged the existence of 340 clandestine torture centres, and listed the names of 1,135 people including doctors, judges, journalists, bishops, and priests, who had co-operated with repression” (de Brito 2001:121).

With the Decree Law 158 of December 1983, the government annulled the military’s self-amnesty National Pacification Law of April 1983 and provided for the prosecution of the commanders-in-chief of the armed forces and heads of the military juntas by the Supreme Council of the Armed Forces (CSFA) Thus giving the military justice system a “first shot” at judging its peers. The government also stipulated that those who had obeyed orders would not be liable to prosecution, thus hoping to limit the trials to the commanders of repression (Garro & Dahl 1995: 327-329). However this was not to be. Instead a senatorial amendment to the law enabled the civilian courts to step in, in the case of delay or negligence by the military courts. Moreover it excluded “atrocious and abhorrent acts” thus creating a legal “loophole”. As it was justice then fell in the hands of the civilian courts and in April 1985 Judge Strassera of the Federal court of Appeals initiated proceedings against the leaders of the juntas. The so-called “trial of the century” thus sentenced General Videla and Admiral Massera to life-long imprisonment, General Viola to seventeen years, Admiral Lambruschini to seven years, and Brigadier Agosti to four and a half years (de Brito 2001:122). While the governments had sought this symbolic and exemplary trial as justice measure to settle the account with the repressive past, what followed was quite the opposite.

The government instead faced a process of calling to account that it could not control or limit, so in April 1985 it tried for the first time to restrict prosecutions, with marginal success and then again effectively in 1986 by passing the law of Statue of Limitations. However this was met with wide public outrage and some 60,000 people took to the streets to protest. Yet, this legislation did not bring military restiveness to an end. Two more rebellions took place allegedly to restore the “dignity of the armed forces” (ibid.123-30). How can success of this initial strategy be accounted for then, and what made it less feasible, even impossible for the government to uphold?

With the hind-sight of the Argentine account, Chile opted for a restorative and reparation strategy focusing rhetorically on the need for truth and reconciliation in particular. No punitive justice was to be sought largely because of the highly constrained terms of transition. As in Argentina a truth and reconciliation commission (CNRV) was set up to investigate violations resulting in death or disappearance over 1973-1990, of which it confirmed over 3,000 cases. Contrary to the Argentinean case however, the political right and the military did not

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3 Since the CONADEP report the SDH has confirmed about 3,000 new cases bringing the official number up to 12,000. Amnesty International have made estimates as high as 30,000.

apologize for the crimes, but as a result of the report, for the first time since 1973, they were unable to deny that repression had taken place (de Brito 2001:131). Thus providing some sense of recognition for the suffering of victims and relatives. In compliance with recommendations of the report the government of Patricio Aylwin, passed a Reparations Law to benefit about 7,000 people. Unlike in Argentina were people who had been held under state of siege and tortured received compensation, only relatives of disappeared were to be included. Nonetheless by June 1999 an estimated 95 million$^5$ had been paid out to the families and direct victims in pensions and education as well as health benefits (Quiroga 1995:502-503). However when it came to seeking legal accountability and wider institutional and constitutional reforms the situation was arguably more difficult in the Chilean context. Simply put any attempts to amend the 1980s constitution seemed bleak (Hite&Cesarini 2004).

Overall the difference in the initial strategies in the two cases consists, generally speaking of a restorative and a retributive. Clearly the strategies sought revealed a different perception of what was ultimately feasible, in terms of balance of power between the new democratic government and the military in particular. In Argentina a retributive strategy had unexpected consequences although, initially successful in bringing the leaders of the junta to trial.

### 3.2.2 Human rights networks

The repression experienced during the authoritarian past, also initiated a significant counter reaction in the shape of a human rights network established in both countries. It is commonly acknowledged that civil society actors were an important factor in the opposition to and overthrow of the military regime, albeit not being the exclusive nor key factor. Nonetheless these human rights groups and networks have found numerous strong allies in domestic as well as international political and judicial arenas (Sikkink et al. 2002). The most notable group pressing for human rights reform was (and is) in the Argentine case the Madres de la Plaza de Mayo$^6$, essentially mothers of disappeared Argentines. This group along with others pressed for the accountability for past human rights violations, in particular demanding that the truth be publicly known and that there be no impunity (i.e. no amnesty) for the perpetrators (Sriram 2004: 108-112). Nonetheless democratization has been hampered by several constraints, which inevitably limited the government’s ability to respond to their demands of the human rights movements, their demands were (or not) translated into government policies in the face of a strong military.

While acknowledging that civil society contributed to the re-democratization process does not denote it initiated it. Nonetheless in Argentina and Chile alike,

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$^5$ This figure is to be compared with the US$900 million paid out to victims by the Argentine State (de Brito 2001:132)

$^6$ [www.madres.org.ar](http://www.madres.org.ar) (madres de la plaza de mayo)
the human rights groups grew into a politically influential network. An interesting question thus arises; was the human rights movement better organized, more vocal, and more persuasive in Argentina than in Chile? Some might argue that it was. Yet, one essential difference between the two cases is the relationship it established with political parties. In Chile arguably due to historical and institutional reasons opting for a more co-operative line and emphasizing the need for reconciliation rather than punishment. (de Brito et al. 2004:15)

Another important factor framing the Chilean transitional- as well as post transitional - period was the personalization of power by General Pinochet. Some scholars argue that “there was no greater symbolic authoritarian legacy than Pinochet himself”. This can be explained by the fact that Pinochet continued as the commander in chief of the army during the prolonged transitory period and thereafter as self-appointed senator for life until 2000. Given that there is still no consensus in Chile regarding the meaning of the 17 year of dictatorship, the notion of a collective memory of the past has proved elusive and remote. The public space granted forces demanding truth and accountability was, due to various reasons rather limited. Firstly the social and economic powers of supporters of the former dictatorship, combined with the great concentration of ownership of media by such actors have all contributed to a notable asymmetry (Aguilar&Hite 2005:195).

In sum international and regional human rights obligations, as well as international diplomatic and regional legal pressures and trans- national prosecution efforts, have given impetus to the work of domestic human rights networks (Sikkink et al. 2002). Thus offering part of the answer to, why transitional justice still holds momentum in Chile and Argentina even twenty years after repression.
3.3 The Military as Political Actors in Chile and Argentina

While some of the political science scholarship downplays the importance or advisability of holding the military accountable, in the face of other priorities namely stability; it precludes the long term gains of decisively subordinating the military to civilian authority. (Acuna & Smulovitz 1997: 93-119) Unlike the Chilean experience where with the exception of the seventeen year of authoritarian rule under Pinochet, Argentina had a tumultuous past even before the dirty war, and political violence and arbitrary state conduct were long-standing features of the Argentine political system. (Hunter 1999: 206) The military thus had an entrenched role as a major political actor, although this influence was temporarily weakened after the defeat suffered on the Falklands, it was still significant during the transitory period under. However after a turbulent period of adjustment the military was eventually forced to accept civilian authority (Hunter 1999:210). From an ethical perspective Malamud-Goti, argues that the problem in Argentina is inaccurately conceived as the “military question”. Thus he argues the trials conducted during the Alfonsín presidency were misguided since they focused solely on the military. The selective justice being sought thus implicitly meant that other important actors, including the Catholic Church, right-wing vigilante groups, the Peronist Alianza Argentina Anti-comunista, the Monteneros, and the ERP, easily circumvented assuming any sort of responsibility for atrocities committed during the Dirty War. Herein lay an obvious ethical dilemma of individual responsibility for state crimes (Hesse & Post 1999). More importantly it served to divide the country into friend and foe, hence having a destabilizing effect as well as working against the establishment of a democratic political culture he argues.

When comparing the institutional role of the military in Chile and Argentina some similarities as well as dissimilarities can be identified. In Argentina the power and the institutional nature of the armed forces has shifted significantly to the role and status they have retained in Chile throughout the 1990s well into the early 2000s. The present situation of the Argentinean armed forces depends naturally not only on the dynamics characterizing the process of transitional justice. Indeed the clandestine nature of repression had various objectives. Among these the junta hope to delay international pressures, to prevent possible checks and controls of military power, and to paralyze popular reactions through terror. However this concealed nature of repression also entailed some risks. Corruption and breaches of command would eventually prove to be problematic (Acuña & Smulovitz 1997:99). Evidently the armed forces, confronted one of the worst possible scenarios: the trials and the convictions of their leaders for their responsibility in the repression during the military dictatorship (Acuña 2006: 206-238). Intra-military tensions were also growing, at some points escalating into smaller albeit failed military coups. The political costs for the army also increased as a result of the conflict between the general staff and the carapintadas. Even if
the general staff succeeded in gaining the benefit of the pardon and was victorious over carapintadas, “it could not neutralize the profound re-definition of its relative position before civil society that the trials generated, nor has it been able to eliminate the costs and risks resulting from the politicization of military institutions” (Sriram 2004: 111). However it did achieve one key goal, limiting the scope of trials against its members (Acuña 2006:221).

In a similar vein the significance of this ongoing military power upon the ability to punish was reflected in President Aylwin’s pre-election statements that he intended to “reconcile the virtue of justice with the virtue of prudence, because we know the subject touches the sensibilities of very powerful sectors of the armed forces” (Teitel 1995:151). Virtually all authoritarian regimes enacted amnesties to guarantee them immunity from the most heinous human rights violations. In the case of Chile the authoritarian regime not only had the power to enact it but more importantly to uphold it as pointed out by Huntington (Huntington 1993: 216).

The Chilean military is strictly hierarchical in structure. As suggested by Katherine Hite and Paloma Aguilar; a good deal of the influence Pinochet enjoyed in the post authoritarian years stemmed from his ability to maintain absolute unity within the military as an institution, and support by important segments of the population (Aguilar & Hite 2004: 212). In Argentina on the other hand military leadership has publicly on several occasions, recognized and apologised for the illegitimate character of repression and systematic human rights violations it committed during the military dictatorship. Worth noting this is believed to be the only case of military official apology throughout Latin America (Acuña 2006: 207).

A survey undertaken by Latino Barometro in 1995, show that fewer citizens than in any other country in the Southern Cone believe that the military is still powerful. Perhaps even more interesting is that the least wanted and trusted military is in Argentina. This indicates a clear decline in power of the Argentinean military as an autonomous political actor In Chile the opposite can be said as data reveal that more Chileans by far perceive the military as the most powerful group in the country. In stark contrast to Argentina, Chilean military supporters and military opponents alike, state that the military is still obviously a major political actor (Linz&Stepan 1996:224 ff.). Clearly in Chile a powerful military establishment continued to hold powers and prerogatives that are usually perceived as abnormal in a constitutional democracy. First it insisted that special provisions be included in the constitutional framework assigning to the military responsibility to provide for law and order, and national security, and to guarantee the institutional order of the republic. These provisions were thus intended to provide military leaders the possibility of “if needed” intervening in politics. (Huntington 1991: 238) Nevertheless power relations are never completely static, thus the relative power of the democratic government vis à vis the military began to grow successively.
4 The Ongoing Search for Truth and Justice

4.1 The role played by International and Domestic Courts

As pointed out by de Brito as a result of the constraints posed by what was essentially negotiated transitions, the nature of decisions adopted by the executive in both cases, as well as the specificity of the political struggles that evolved over truth and justice in particular, were limited. Thus, the relatives of the victims of repression and human rights activists have continued to seek avenues to vindicate their claims. They have found allies in domestic as well as international NGO’s, political parties, the judiciary to name but a few (de Brito 2001: 136).

Despite decisions to curtail prosecutions and release those convicted, the issue of the past did not disappear in Argentina. Argentine civil society has refused to forgive or forget the atrocities committed during military rule, and attempts to promote officers linked to the dirty war have been met with a public outcry (Popkin&Bhuta 1999: 109). As mentioned earlier the human rights issue has generally speaking had a low priority or visibility in the public debate in Chile during the first decade of renewed democracy. The institutional nature of the courts and large-scale prerogatives afforded the military goes some way in explaining this (de Brito et al. 2004). Furthermore I have suggested the importance an independent judiciary in the case of Argentina can play in the process. Nonetheless downplaying the importance of constitutional legacies of authoritarian rule has played particularly in the case of Chile.

From 1997-98 onwards, the jurisprudence of the Supreme Court began show the first signs of cracking in favour of human rights. In Chile eventually in 1999 under President Eduardo Frei, the courts handed out prison sentences to the former head of the DINA, the dictatorship’s secret police, and to other military and police officers involved in the repression. More importantly in July 1999 Chile’s Supreme Court confirmed the indictment of high-ranking officers on the grounds that when victim’s bodies could not be found the crimes involved were “permanent and not subject to limitation” and therefore not covered by the amnesty law (de Brito 2004, Aguilar&Hite 2004).

Encouraged by the work of Spanish prosecutors in January 1998 a Court of Appeals judge accepted a criminal complaint of genocide against Pinochet by the Communist Party. This was the first time that a domestic court accepted direct
charges against the General. By the end of 1999 there were forty-three such suits against Pinochet in Chile (de Brito 2004:150).

4.1.1 The International Variable

By the beginning of 1998, it seemed the Chilean human rights issue was no longer alive. Indeed some saw that an unnatural silence prevailed. In contrast with Argentina where an active press reported on every progress made in court, in Chile silence reigns until a verdict is reached. Censorship was still strong and since 1990 an estimated fifteen journalists and eight politicians had been charged under Article 6 b of that law. Nevertheless and unexpectedly on the 16th of October 1998, General Pinochet was arrested in London, after Judge Garzon of the National Audience (AN) the highest court in Spain, issued an arrest warrant on the General, and on 10 December 1998 Pinochet was indicted for genocide, terrorism and torture (Aguilar& Hite 2004, de Brito 2004). This investigation was eventually joined by with those pending against Argentine military personnel. However the British government ultimately decided that the General should not be extradited because of illness and old age, and therefore be sent back to Chile for humanitarian reasons.

Because of this international dimension to the issue of human rights the struggle for accountability had in both cases now been moved beyond the realms of the nation state. And perhaps not unpredictably both Chilean and Argentinean politicians and citizens alike have reacted with uneasiness to this phenomenon.

Clearly external judicial rulings have been taken that contradict domestic political arrangements and rulings, that in the short-term might serve to destabilize political order. What is more as pointed out by Carlos Acuña, “external judicial rulings question not only the limits of national sovereignty but also the limits of popular sovereignty. Indeed, the assumption behind international law is that it supersedes the majoritarian preferences of a given policy at a given time” (Acuña 2006: 238).

4.2 Re-striking the Balance between Stability and Justice? Recent Developments in both Cases

Contrary to the argument put forward by Huntington; “that in new democracies, justice comes quickly or it does not come at all” (Huntington 1991:) it seems at least in the case of Argentina and possibly in the case of Chile, that justice might come at a later stage, and is perhaps more liable to do so. It should be noted however that the scope and extent of transitional justice policies generally
speaking, have arguably been wider in scope and extent in the case of Argentina. I have in previous chapters discussed some of the explanatory factors that may account for this difference. Thus hypothetically if a more comprehensive strategy of justice is more feasible in due time, the subsequent challenge would be to explain why a certain policy is feasible at a particular juncture? Since my aim has been to analyze how these policies have fared over time, this chapter will examine this phenomenon through the period of 2000 to 2006.

Over the past six years Chilean important public space has opened in the media in relation to the human rights issue, and the judiciary is now showing much more interest and willingness to investigate past violations. Throughout the 1990s, there was no apparent political will or interest in the issue, to be compared with the electoral campaign in 2000, where it became a key issue. Once considered absolutely immune from prosecution Pinochet faced the possibility he would be held responsible for covering up criminal acts on Chilean soil (Aguilar & Hite 2004, de Brito 2004). Although his recent death in December 2006 effectively excluded this possibility. Nevertheless the General lost his parliamentary immunity in 2000, although only after the Congress had strengthened his personal immunity as a former president. Nonetheless “It did not take long for at the time president Lagos to propose a constitutional reform aimed at the possibility of presidential removal of the military chiefs and the modification of a series of functions of the National Security Council and the Constitutional Tribunal, as well as the derogation of the system of appointed senators.” (Acuña 2006:233)

In Argentina an economic crises that started in the late 1990s and reached its peak in December 2001 drew focus away from, but did not end, transitional justice initiatives. Responding to criminal charges brought forth by Centro de Estudios Legales y Sociales (CELS), in March of 2001 Federal Judge Gabriel Cavallo revoked as unconstitutional the two amnesty laws protecting junior and mid-level officers from prosecution. Judge Cavallo’s landmark ruling was the first to declare the amnesty laws invalid, arguing that the violations committed during the dirty war, were of “sufficient gravity and scale” to be exempt of the statues of limitations. (di Paolantonio 2004) Since Nestor Kirchner was elected president in 2003 he has been committed to addressing the issue of justice for violations committed more than twenty-five years ago. First he actively ordered cooperation with extradition requests for those who were not facing charges in Argentina. Next he formally ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which prohibits statues of limitations for crimes against humanity, and asked Congress to give the treaty provisions precedence over national law. Subsequently in 2005 the Argentine Supreme Court resolves that the due obedience and full stop laws are unconstitutional, thus agreeing with Judge Cavallo’s 2001 decision, ultimately
paving the way for more wide-ranging efforts of transitional justice. (www.ictj.org)

So what can the Argentinean case tell us about the role of the judiciary and its relationship to the dilemmas faced by new democracies? When democratic politicians face the challenge of human rights violators who still legally bear arms, they tend to perceive in the autonomy of the judiciary, a potential source of danger. No doubt an independent judiciary entails some potentially large political risks. However the judiciary is an integral part of democracy and plays the role of legal authority and conflict resolution. As pointed out by Przeworski; the stability of rules creates uncertainty of the outcome, a feature inherent in the democratic struggle.”(Acuña 2006:236) Thus to prioritize the achievement of an outcome over the stability of the rules and over the freedom of action of the judiciary opposes the democratic nature of the regime. In relation to the scholarly peace vs. justice discourse, it clearly illuminates the potential danger an autonomous judiciary might pose to a newly democratic regime and its successors. Yet it was the fact that arrests were made and democracy was not threatened that allowed Menèm to eventually shift position and to confirm that there would be no more pardons, and that the judiciary should proceed autonomously during the remainders of his presidential period (Acuna & Smulovitz 1997: 117) Over time it thus challenged the assumption that stability precludes justice. More importantly it suggests that a more nuanced balance between the two can be struck. As I have mentioned the role played by the judiciary in Argentina diverges from action characterized by their Chilean counter parts.

7 “Accountability in Argentina 20 years later Transitional Justice Maintains Momentum” report 2005.
5 Conclusions

This paper has attempted to assess the issue of transitional justice from a legal, institutional and political angle, considering the key actors in this process and the shifting balance of power between them. Considering more specifically how policies of truth and justice have fared over time. I have sought to illuminate that the feasibility of a certain policy is shaped, intertwined and contingent in some sense on the mode of transition, and the legacy of authoritarian rule among other things. More specifically these policies are framed by political, institutional and legal factors, that condition not only the immediate transitory but also post-transitory period. In the case of Chile the inherited 1980s constitution has proved difficult to amend. Indeed having effects transcending the question here at stake. Nonetheless it has guaranteed substantial military prerogatives, and made actual indictment of Pinochet impossible and legal accountability in general difficult.

I also consider the presence and strength of civil society and human rights-network in particular, chiefly the relationship between political parties and human rights organizations. In Argentina for instance human rights groups have found strong political allies. Notwithstanding a strong human rights network in Chile, the relationship has been more co-operative with the state and government forces and leading to a policy initially emphasizing reconciliation above punishment. Partly because of this before the London arrest of General Pinochet, the issue had become almost invisible.

Another significant factor in this context is undoubtedly the executive’s and political parties will and of course ability to implement policies of truth and justice in relation to the military as an institution. Also, perhaps equally important is the role played by the judiciary; whether it acts autonomously of or in compliance with authoritarian interests. Clearly the relationship between law and politics is complicated and in some sense intimately intertwined. However as is evident by this study, law does sometimes represent an independent force, beyond the control of politics.

While the ongoing story of transitional justice generally speaking can be explained by societal demands for truth and justice, and loopholes in official policies it is also considerably attributable to the increase in power of transnational, domestic and international human rights regimes. While initially Chile and Argentina were only able to conduct limited efforts of truth and justice, it seems the scope for trials and truth has widened over the last decade. In contrast with the transitional period, in the post-transitional context the pursuing of truth and justice policies may be relevant for democratization, at least if applying a maximalist democracy approach. Thus forming part of wider efforts for a more effective citizenship and holding institutions accountable, as a way of eliminating authoritarian enclaves.
Worth noting however that without wider institutional reforms selective human rights trials do not in themselves further or contribute to democratization. The importance of political will and determination should also be considered as having some possibly large impact on what strategies have been and are being sought. Especially in highly presidential democracies as is the case in Chile and Argentina. The case of Argentina proves this point in case, whereby president Kirchner formally ratified the UN Convention on the Non-Applicability of Statuary Limitations to War Crimes and Crimes against Humanity, which prohibits statues of limitations for crimes against humanity, and asked Congress to give the treaty provisions precedence over national law.

Finally to be sure there is no easy answer to the range of dilemmas facing transitory regimes seeking to settle the account with a repressive past. But clearly the strength of authoritarian legacies is one key variable determining the feasibility of a certain policy in time. In relation to the peace versus justice dilemma, I have sought to illustrate that while there are trade offs to be made they need not be perceived as staunchly opposed. As both cases clearly indicate the two can co-exist.
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