

# **Judicial independence and human rights policies in Argentina and Chile**

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**WP 2001: 15**

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## **I Introduction**

How to deal with the perpetrators of massive and systematic human rights violations after the transition from authoritarian to democratic rule? This question was considered one of the hottest issues on the political agendas of the newly elected democratic executives who came to power in Latin American countries in the 1980s.<sup>1</sup> Most executives carefully pushed the issue to the side, hoping that it would cool off over time. Indeed it did - at least in most cases. Out of the fifteen countries that underwent transition to democracy in this region, only Argentina took on the challenge of putting a careful selection of its military top brass on trial and imposing jail sentences upon them. The un-doing of the trials by the second democratically elected president, Carlos Saul Menem, who pardoned those convicted when he took power in 1989, is a well-known story. Less well-known, perhaps, is it that the courts in Argentina are now – ten years later – trying to corner some of the same generals for the kidnapping of hundreds of children during the rule of the juntas. Moreover, the Argentine federal courts are trying to force the military to provide information about the final destiny of the thousands of people who disappeared during the same period. Similar events are taking place in Chile, where the Supreme Court's stripping of Pinochet's senatorial immunity has mocked the institutional legacies of his authoritarian government, which were expected to safeguard the military against any future prosecution. The question that begs an answer, then, is why has the issue of human rights violations reappeared? And why only in some countries, while in other countries, such as Guatemala or El Salvador, whose human rights violations were equal to or worse than those of Argentina and Chile, successful prosecutions have not taken place?

Scholars of democratic transitions have argued that human rights policies at the time of transition were products of elite negotiations, where the relative strength of the military largely determined what policies the executive could reasonably opt for.<sup>2</sup> A newer group of scholars have improved on this static view of institutions by arguing that the shifting balance in civil-military relationships after transition must be taken into account when analysing human rights policies.<sup>3</sup> However, because these scholars continue to place their main focus on executive decision making, they do not sufficiently acknowledge the impact of a third political player that has gradually become more influential in policy making: the judiciary.

In this paper I intend to fill this gap. By arguing that certain constitutional reforms in a series of Latin American countries since the beginning of the 1990s have enabled the judiciary to take on an increasingly assertive role, I challenge the conventional wisdom that the executive is the sole policy maker in the field of human rights. At the end of 1999, 15 out of 19 Latin American countries had carried out judicial reforms, ranging from minor changes to virtually complete overhauls.<sup>4</sup> Some of these reforms have formally increased the independence of the judiciary vis-à-vis the executive.<sup>5</sup>

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<sup>1</sup> See for example. Huntington 1991; Mainwaring, O'Donnell and Valenzuela 1992; Malamud-Goti 1990; McAdams 1997; Pion-Berlin 1994; Zalaquett 1992.

<sup>2</sup> See for example Karl and Schmitter 1991.

<sup>3</sup> See for example Hunter 1997, 1998; Pion-Berlin and Arceneaux 1998.

<sup>4</sup> See for example Buscalgia, Dakolias and Ratcliff 1995; Dakolias 1995; Frühling 1998; Garro 1993; Pilar 1999.

<sup>5</sup> The reforms have mainly been undertaken in order to make the judicial systems more transparent and efficient, so as to better implement the rule of law. Some of the reforms have required constitutional changes, whereas others have not.

The initial failure to hold trials at the time of transition was principally because the judiciaries in most Latin American countries were weak and often partisan, favouring whoever was in power, including the military. This meant that the efforts of private civilians to seek justice in the region rarely succeeded at the time of transition. I argue that two factors have encouraged judges to take on a more activist approach in human rights matters: (1) certain constitutional reforms that have affected the composition and working of the courts and (2) a perceived reduction in military threat. These changes, I argue, have enabled judges to re-interpret existing amnesty laws (designed to protect the military) and accept cases of serious human rights violations that they would have rejected earlier. I also propose that a persistent demand for justice is a pre-condition that must be met in order for reversals in human rights policies to take place years after the transition to democratic rule, because judges can only rule on cases that are brought before them.

In the next section I outline the main literature on human rights issues in transition to democracy. I next detail my argument that variations in judicial independence are crucial to understanding changes in policy outcomes over time. To examine this argument in more detail, I carry out an in-depth analysis of Chile and Argentina in part four. Finally, I give some suggestions as to where future research may be directed. The propositions tested on Chile and Argentina in this paper should be of more general interest since many newly established democracies in various regions of the world are in the process of strengthening their institutions and democratic practices, and are also grappling with the legacies of their authoritarian pasts.

## **II Why do human rights policies change over time? Competing views**

Under what circumstances is it possible to put on trial military officers who committed serious human rights during military rule?<sup>6</sup> There are, in essence, three main bodies of literature concerned with the issue of human rights violations in democratic transition. All share a legitimate concern with civil-military relations – for political or moral-philosophical reasons.

First, the literature inspired by the Latin American transitions in the early 1980s argued that elite negotiations determined the power balance between the military and the new democratic government. The institutional legacies of the transition were believed to set the scope for executive action in the field of human rights.<sup>7</sup> A specific claim of this so-called mode-of-transition literature was that trials of alleged human rights perpetrators would not take place unless there had been a total regime collapse or the military had been defeated in a war.<sup>8</sup> This body of theory correctly explained that where the military remained a threat to the new regime, the democratic government would be cautious in its choice of human rights policy. At best, it would set up a truth commission, but more often than not, do nothing at all.<sup>9</sup>

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<sup>6</sup> I exclude from this analysis other human rights policies implemented to deal with abuses of past authoritarian regimes, such as truth commissions, reparation measures, and memorial projects. See Walsh 1996 for a good account of different policy options.

<sup>7</sup> There is an extensive literature on democratic transition and consolidation. For Latin America, see Diamond and Plattner 1993; O'Donnell, Schmitter, and Whitehead 1986; Huntington 1991; Karl and Schmitter 1991; Mainwaring, O'Donnell, and Valenzuela 1992. For an excellent account of the military's role, see Stepan 1989.

<sup>8</sup> See, for example, Huntington 1991, Sutil 1997, and Zalaquett 1992.

<sup>9</sup> See Skaar 1999 for an analysis of 30 countries worldwide undergoing transition and dealing with legacies of gross human rights violations.

However, because many of these scholars assumed that the balance of power between prominent political actors (specifically the military and the incoming government) was static, they failed to account for the reversals in human rights policies that we have been observing over the last few years.

In response to this obvious weakness of democratic transition theory, a small group of scholars have become increasingly concerned with how civil-military relations may change over time and how new institutional arrangements may alter the behaviour of key political players who influence policy outcomes.<sup>10</sup> These scholars provide insights that greatly improve the transition literature. Yet also they, principally because they overstate the executive's powers to determine policy outcomes, fail to predict the extensive changes in human rights policies that are currently unfolding. It is this literature that I wish to expand on in my analysis.

A third body of literature on the topic, commonly referred to as 'transitional justice' stresses new democratic governments' duty to their citizens to deal with past brutalities by uncovering the truth about the abuses and prosecute the guilty.<sup>11</sup> It deals mainly with the policy options available to democratic governments in the context of transition from authoritarian rule. This literature emphasises both the importance of military subordination to civilian rule and the role of civil society in demanding justice in the form of trials. However, because it is predominantly normative in character, it does not offer systematic analytical explanations for different policy choices and outcomes.

Finally, scholars of international law have pointed to the remarkable changes in human rights law and the increased international concern with human rights abuses in the past decade. The globalisation in communications, they argue, has made it increasingly difficult for governments to commit human rights abuses with impunity.<sup>12</sup> These scholars also point to the importance of the injection of new ideas into national legal cultures, which in turn affect national decision making in the field of human rights. However, they fail to specify exactly the kind of mechanisms that have to be in place for this to happen.

Few scholars have paid much attention to the judiciary's potential role in shaping human rights policies, or determining the outcome of particular cases. Part of the reason is probably that judiciaries of many developing countries (particularly in Latin America) were known to be subservient to executive will and therefore did not function independently at the time of transition. With the recent widespread judicial reforms, though, we can no longer assume that the judiciary is merely a passive actor who is directed by the executive. If the judicial reforms have in fact been implemented, we might expect judges who now feel secure in their offices and wish to implement the rule of law to take on cases of human rights violations that are brought to them. Building on the embryonic literature on the role of courts in transitions to democracy<sup>13</sup> and the new literature on dynamic civil-military

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<sup>10</sup> For excellent treatment of these points, see Hunter 1998 and Pion-Berlin and Argeneaux 1998.

<sup>11</sup> See for example McAdams 1997, Walsh 1996, Panizza 1995, Pion-Berlin 1994, Kritz 1995, Malamud-Goti 1990.

<sup>12</sup> The establishment of international criminal tribunals for Yugoslavia in 1993 and Rwanda in 1994 and the conclusion in 1998 of the Treaty of Rome setting up an International Criminal Court, 50 years after such an institution was first proposed, are commonly cited as evidence to support this view.

<sup>13</sup> See for example Hammergren 1998, Schedler et.al. 1999.

relationships<sup>14</sup>, I will show how the changing role of the judiciary is key to understanding recent unexpected changes in human rights policies, here narrowly defined as trials of (ex) military personnel. By ‘trials’ I here mean prosecution against military personnel.

### **III Judicial independence and trials of human rights violators**

#### **A. When may we expect trials?**

In this section, I develop an analytical framework for understanding the dynamics of policy making in the human rights field by building and expanding on an argument launched by Pion-Berlin and Arceneaux. In their well-placed criticism of the static view of institutions in transition literature, they argue that policy outcomes are inextricably tied to levels of institutional concentration and autonomy in the *executive branch*.<sup>15</sup> Specifically, they argue that policy making, particularly in the human rights sphere, could be seen as an elite bargaining situation where the outcome depends on (i) the authority of the decision makers (i.e. their power over the outcome) and (ii) their authority (absence of influence from other actors). The core of their argument is that the fewer veto players (i.e. the fewer actors who have to be consulted), the easier it is to get policy outcomes in congruence with stated policy preference of the executive.<sup>16</sup> They do mention that where the judiciary has an independent function (and thus constitutes an additional veto player to the executive-legislature-military structure), the possibility of reaching consensus on human rights issues *is reduced*.

I suggest a different perspective. Rather than view an independent judiciary as a possible obstacle for the executive to push his policy preference through because the number of veto players is increased, I argue instead that an independent judiciary may *replace* the executive as the veto player in human rights policy making. I propose the following main working hypothesis: Reversals in human rights policies after transitions to democracy are more likely to take place *in countries and during periods where the judiciary is more independent*. If my hypothesis is correct, we should expect to see more prosecutions of and verdicts against human rights perpetrators in countries and in periods where there is more judicial independence. If not true, countries that have not reformed their judiciaries should be as likely to hold trials as those countries that have, given that these reforms are actually implemented. We would also expect to see new interpretations of existing amnesty laws in countries and in years where there is more judicial independence. These reinterpretations should extend the scope of cases on which the judiciary can rule.

The main rival hypothesis coming out of the transition literature, as well as its critiques, is that the executive branch alone is responsible for policy making in human rights matters. Political leaders in democratic systems are expected to respond to pressures and challenges to their survival from various societal forces. The pressures and challenges relevant to human rights are (1) *military* pressure for immunity and against prosecution; (2) *domestic* pressure for ‘justice’ (from the human rights sector, other specific interest organizations, and possibly also part of the public); and (3) *international* pressure to respect human rights and comply with good governance procedures. Democratic transition literature thus attributed the absence of trials to the failure of executives to prosecute military officers immediately the transition because they perceived military demand for impunity to be stronger than public demand for

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<sup>14</sup> See Hunter 1997, 1998; Pion-Berlin and Arceneaux 1998.

<sup>15</sup> See Pion-Berlin and Arceneaux (1998: 633).

<sup>16</sup> For a basic explanation of the veto players’ argument, see Tsebelis 1990.

justice. Strong militaries could put force behind their words by staging a coup if they felt sufficiently threatened. Critiques of transition theory have correctly argued that shifts in civil-military relations have made policy changes in the human rights field possible, assuming that the policy outcome still depends on the executive.

In this paper I argue a different point, namely that policy outcomes on human rights issues are decided by executive preference only where the judiciary is dependent. *Where the judiciary is free to act more independently, executive preference should not matter for the policy outcome.* Table 1 sums up the logic of this argument.

**Table 1: Executive policy position and judicial independence**

	<i>Judiciary</i>		
		<b>More dependent</b>	<b>More independent</b>
<i>Executive policy position</i>	<b>Pro-human rights</b>	Trials	Trials
	<b>Anti-human rights</b>	No trials	<b>Trials</b>

Note that in the case of a pro-human rights executive and an independent judiciary, it would be hard to attribute the policy outcome of trials to the influence of one over the other. We could unveil the causal relationship through an in-depth study of the particular trial(s) in question. This is a problem I will discuss in more detail in the empirical section of this paper.

### **B. When is the judiciary more independent?**

The main argument made above is that trials of human rights perpetrators are more likely to take place where there is more judicial independence. When is the judiciary more independent? This is a conceptual as well as a methodological challenge, on which legal scholars disagree wildly. Judicial independence is necessarily a continuous rather than a dichotomous variable. In the narrowest sense, judicial independence means judges' freedom from political influence.<sup>17</sup> In a broader sense, most scholars seem to agree that there are three types of independence: (1) from executive influence or the other government branches (so-called structural independence), (2) from pressure groups, such as political parties, and (3) from other judges.<sup>18</sup> The first type refers to the collective independence of the judicial branch as an entity, and the second and third types to the individual independence of the judges.

Because I am concerned with the executive-judicial relationship in this paper, I shall give extra attention to structural independence. However, since very few – if any – judicial systems operate in a political vacuum, I shall also comment on other kinds of independence and how we may go about measuring them. One way of ensuring *structural independence* is through constitutional guarantees. For the

<sup>17</sup> See Domingo (1999: 153). Dakolias (1995: 7) calls this 'structural independence' and Fiss (1993) calls this 'political insularity'. Structural independence constitutionally defines the relationship between the three government branches and the relative autonomy of the judicial branch.

<sup>18</sup> See for example Dakolias (1995: 172-76), Fiss (1993: 55-56), Becker (1970), Domingo (1999: 153-55), Rosenn (1987), Larkins (1996).



purpose of this paper, I have singled out four factors typically mentioned in the literature as key indicators of *structural independence*:<sup>19</sup>

- (i) *appointment procedures*: judges in general, and Supreme Court justices in particular, should not be hired and fired at the whim of the executive;
- (ii) *length of tenure* for Supreme Court justices: The court composition should carry over from administration to administration with only minor adjustments. Life tenure is normally considered ideal because justices are less prone to political influence if they have secure tenure;<sup>20</sup>
- (iii) *judicial councils*, which are generally, though not always, composed of representatives from several public and private institutions. Their main purpose is to select Supreme Court justices, though some also make recommendations for appellate court and lower court judges. By removing from the executive the power to appoint justices, the councils help ensure less partisan courts,<sup>21</sup> and
- (iv) measures to increase the *judicial review powers* of the supreme court, through the creation of constitutional courts or by other means.<sup>22</sup>

However, as several scholars have pointed out, these structural mechanisms in Latin American constitutions have not guaranteed the courts' decision-making autonomy or so-called substantive independence; they merely create a framework for independent judicial action.<sup>23</sup> Courts in Latin America are widely believed to decide high profile cases in the way the executive wants, often following explicit orders – in spite of constitutional guarantees from executive interference. Yet, examining an increase in formal judicial independence might give an important starting point from which to assess changes in actual judicial independence.

Let us assume, for the sake of argument that constitutional increases in judicial independence translate into actual independence.<sup>24</sup> One could still object that constitutional reforms affect only the power balance between the executive and the judiciary. Another heavy-weight political actor in the Latin American context, who, to the best of my knowledge, has been utterly ignored in the theoretical literature on judicial independence, is the military. In Latin America, the judiciary, like the executive, has been vulnerable to military threat. Judges could find themselves out of a job if there was a military coup (in which case the entire court might be replaced) or if they took on unpopular court cases that threatened the integrity and reputation of the military during or after military rule. In an analysis of changing institutional arrangements and shifting civil-military relations in a post-transitional setting, it may

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<sup>19</sup> See for example Domingo 1999; Hammergren 1998; Larkins 1996; and Widner 1999. Note that other indicators, such as such as financial independence, could also have been included.

<sup>20</sup> However, as Helmke 1999 elegantly argues for the Argentine case, there are situations where *insecure* tenure might lead to increased independence if the justices are more eager to please future politicians than the sitting government.

<sup>21</sup> In a few countries (Colombia, Mexico, and Bolivia) the councils also control judicial budgets and administrative systems See Hammergren (1998: 12-13).

<sup>22</sup> Like the councils, the constitutional courts are patterned on earlier European experiences. Their main purpose is to provide a check on executive and legislative abuses. For brief histories of the function of judicial review, see Schwartz 1999 and Domingo 1999.

<sup>23</sup> See for example Dakolias 1996; Domingo 1999; Hammergren 1998; and Vaughn 1993.

<sup>24</sup> This can only be determined by empirical analysis.

therefore be reasonable to assess the presence of the military in politics. We might therefore expect a reformed judiciary to rule independently only where the military is considered to be safely in the barracks. We may reformulate this condition into a testable claim: The absence of credible military threat is necessary for the judiciary to operate independently.

The failure to prosecute human rights violations immediately after a transition could therefore be attributed to the existence of credible military threats to destabilise the new democracy rather than to executive dominance over the courts *per sé*. Threats may now have subsided.<sup>25</sup> If this were correct, we would expect judges to rule more independently, and hence expect the likelihood of trials against old or retired military personnel to increase, as the influence of the military in politics decreased. Though many Latin American judiciaries in the past were known to be conservative and supportive of military rule, it may be safe to assume that most judges in most countries now support democracy. If we further assume that preserving democracy is an overriding concern for the judiciary, then judges would be susceptible to military influence if they think that the decisions made by the courts may provoke a coup.

I propose to formally measure 'reduced credible military threat' or military safety by counting the number of years since the year of transition, or the last attempted military intervention, until present.<sup>26</sup> The underlying assumption would be that the propensity for the military to intervene in politics by force decreases as the length of uninterrupted democratic rule increases. In a more detailed empirical analysis we could also look for special situations (like the arrest of Pinochet or charging military officers with abuse or corruption) in which the military might have been expected to cause trouble, but did not. The absence of military action could be interpreted as 'signalling' non-threat.

Thirdly, one could argue that judges might also be prone to influence from other judges. Due to the hierarchical structure of the Latin American justice systems, it has frequently been argued that higher court judges exert undue influence over their subordinates in the form of controlling nomination, promotion, and removal procedures. Hence, we may expect changes in court composition or nomination procedures affecting the relationship between the various levels in the court systems to possibly increase the individual independence of judges. One way of formally measuring this would be examining legal or constitutional changes that remove or reduce the power of higher court judges over lower court judges.

In addition to the above factors affecting the individual and collective independence of the judiciary, international pressure has arguably also played a role in pushing national judiciaries to agree to reopen cases of human rights violations or

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<sup>25</sup> Note that this is the same argument that transition theory used to explain why executives failed to take action against alleged perpetrators at the time of transition.

<sup>26</sup> Reduced military threat may be a factor of time. One may assume that as old military generals retire and new officers received better training than their predecessors did, the military should gradually become less willing to interfere in domestic politics. In particular, those who could potentially be charged with human rights violations are increasingly less likely to be in power (and hence have a position to defend) as time goes by. Conventional wisdom has it that the military is (relatively) safely in the barracks in most Latin American countries, i.e. they are relatively unlikely to attempt coups. Exceptions are Ecuador, as demonstrated in the unexpected coup on January 29, 2000, perhaps Venezuela, and Chile in the mid-1990s. Ultimately, all non-partisan judiciaries should want to punish the military as a way of enforcing the rule of law. There is a large scholarly debate on the desirability of prosecution, which I choose not to enter here.

look for loopholes in existing legislation to redefine or reinterpret existing amnesty laws. The exact mechanisms for how changes in human rights norms and new international standards of human rights culture may have influenced the ideological position of justices are hard to get at and can only be determined by careful empirical analysis. For the section dealing with case selection, I shall therefore treat changing international norms as an enabling condition, rather than use it to specifically explain why some countries have done more than others in the field of human rights. However, in the empirical section I make some suggestions as to how international factors may have influenced national decision making in specific cases.

Finally, because of the way the justice systems in Latin America operate, judges can only rule on matters that are brought before them – they cannot initiate policies on their own account. This gives a second testable claim: A sustained demand for justice is necessary for an independent judiciary to take on cases of human rights violations. Assuming this is correct, we would expect judiciaries to take up human rights cases only when there is a sustained domestic demand for trials from sectors such as human rights non-governmental organisations, lawyers associations, and the public. That means that countries with a strong and active civil society should be more likely to have policy reversals in this field than those countries that do not.<sup>27</sup> Pressure from these various sectors could be measured through opinion polls, newspaper reports on demonstrations, and the number of cases of human rights violations brought to court.

To sum up, I have developed a theoretical argument for when we expect to see trials in a post-transitional setting now given a multi-dimensional working definition of judicial independence. There are at least three necessary, though not sufficient, conditions for initiating trials against military personnel for gross human rights violations committed during military rule, if the executive favours an anti-human rights policy: a judiciary independent from the executive, reduced military threat, and sustained pressure for justice from the human rights sector and its supporters.

## **C. Method**

### *Case selection*

About half of the fifteen countries in Latin America that have gone through transitions from authoritarian to democratic rule since the late 1970s had brutal military regimes that committed serious human rights violations against their own populations. Only one country – Argentina – successfully put a handful of its generals on trial during the transition. If my argument holds true, we would expect to see reversals in the initial policy outcome at the time of transition only in countries that later have strengthened their judiciaries through constitutional reform, where the military is considered (relatively) safely back in the barracks, and where there is a reasonably strong human rights sector demanding justice. As a first-cut approach to examining this argument, table 4 provides an overview of evidence from Latin America with regard to changes in formal judicial independence due to constitutional reforms and presence or absence

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<sup>27</sup> This argument raises the question why the judiciary should have to respond to public pressure at all. Strictly speaking, it should not since justices do not rely on public support for staying in office (indeed, this is one of the defining features that make the judiciary distinct from the executive and legislature). However, when the judiciary is not fully (personally and collectively) independent, public pressure could work on the judges in two ways: (1) directly through the number of cases presented by individual citizens and (2) indirectly, through the executive, which is susceptible to public pressure through electoral politics, and which also wields power over the judiciary.

of the military in politics. I have included only those countries that have both (i) undergone transition from authoritarian to democratic rule (this excludes Costa Rica, Colombia, Venezuela, and Mexico) and (ii) have had a past of serious human rights violations (this excludes the Dominican Republic, and Panama). I have, for the moment, excluded information about civil society's demand for justice.

**Table 2: Military threat and formal judicial independence**

		<i>Formal judicial independence after constitutional reforms</i> <sup>28</sup>	
		<b>Less</b>	<b>More</b>
<i>Military threat after transition to democracy</i> <sup>29</sup>	<b>Low</b>	<b>No trials</b> Nicaragua <sup>30</sup> Uruguay Honduras Brazil	<b>Trials</b> <i>Argentina</i> <i>Bolivia</i> <i>Chile</i>  <b>No trials</b> El Salvador Peru <sup>31</sup>
	<b>High</b>	<b>No trials</b> Ecuador	<b>No trials</b> Guatemala Paraguay

A rough first-cut analysis based primarily on formal measurement suggests trials for Argentina, Bolivia, Chile, El Salvador, and Peru in a post-transition setting. A closer look at El Salvador and Peru explains why no trials have been held. In El Salvador,

<sup>28</sup> As a preliminary step I have looked only at constitutional changes that affect the degree of judicial independence. I rely on my previous own (unpublished) work here. The four criteria used are appointment procedures, length of tenure for Supreme Court justices, establishment of judicial councils, and expansion of judicial review powers of the supreme court (consult section III A for details). If constitutional changes along these four dimensions between the date of transition for each country and December 1999 have received a score of 0-2, I have recorded judicial independence as 'less'. A score of 3-4 is recorded as 'more'. See Appendix 1 for coding.

<sup>29</sup> Placing countries along this dimension has been a judgement call, based on the length of the survival of democratic regimes and the presence/absence of concrete threats against the government in the form of coup attempts. I have recorded military threat 'high' for the following countries because the military arguably still plays a prominent role in politics: Ecuador (where the coup in January 2000 broke 22 years of civilian rule); Guatemala (threats against human rights initiatives – Bishop Gerardi killed after release of human rights report in 1998); and Paraguay (Stroessner dictatorship overthrown in 1993, but arguably too soon to tell if the regime is stable or not). By contrast, El Salvador and Chile have had only 8 and 10 years of democratic rule respectively, but scholars agree that the military are safely back in the barracks and that the probability of military intervention in politics today is very small.

<sup>30</sup> The transition referred to is the end of the Somoza regime.

<sup>31</sup> Incidentally, human rights violations in Peru have been worse after the return to civilian rule in 1980 than they were during the military dictatorship (1968-80). The numbers of dead and disappeared recorded from mid-1985 through 1987 under the government of Alan García dropped to one-third of the levels for the 1983-84 period under the Belaunde administration. See Hunter 1997 for details.

very few of the judicial reforms included in the 1983 Constitution and those passed in the 1990s have been implemented.<sup>32</sup> Moreover, the human rights movement in El Salvador after the end of civil war and the signed peace agreement in 1992 has been exceptionally weak and unable to forward strong claims of justice to the judicial apparatus.<sup>33</sup> Similarly, the judicial reforms in Peru carried out under President Fujimori in the 1990s have been more show cases than true reforms. Judges have been hired and fired at random and the judicial system is reported to be far from independent. In sum, it is not surprising that judges in these two countries are still refusing to take on cases of serious human rights violations.

A crucial point, therefore, is to assess whether constitutional changes have been implemented and have had any affects – or assess whether other factors may have played a significant role. For the remaining part of this analysis, I have singled out Argentina and Chile for a more detailed investigation the political processes that have led to trials. These two countries constitute an excellent pair for examining the hypotheses mapped out in the previous section for several reasons. First, because the two countries went through very different kinds of transitions (by collapse in Argentina and by ballot in Chile), they started off with very different institutional arrangements at the time of transition. Yet, over time they have converged in terms of institutional development. As a result, I argue, they have experienced remarkably similar policy developments in the human rights field. Second, their shared characteristics in terms of history, democratic institutions, levels of development, and geo-political position allow me to keep a number of intervening variables constant and thus focus on variance in institutions over time.

For an expanded analysis, it might be useful to include Uruguay and Bolivia as test cases. Bolivia has had the same development as Chile and Argentina in terms of judicial reform and initiation of prosecution of military personnel, but has a very different political, institutional and legal context. Uruguay is much more similar to Chile and Argentina in terms of contextual variables, but has had no reform of its judicial apparatus. However, due to limitations of space, the remaining part of this paper will focus on Argentina and Chile.

#### **IV Does judicial independence matter for trials of human rights violators? An analysis of Argentina and Chile**

The key argument I wish to pose here is that certain of the constitutional reforms enacted in Argentina and Chile have been crucial to the changes in human rights policy. In this section I set out to show two things: First, that an executive pro-human rights position is not necessary for trials to take place. Second, that the changes in degrees of judicial independence over time offer a better explanation for the observed changes in human rights policies. Using the analytical framework developed in section III A as a point of departure, I look specifically at (a) whether constitutional reforms affecting judicial independence have been implemented, (b) alterations in perceived military ‘threat’, and (c) the activity of the human rights sector, and evaluate how these changes may have affected prosecution of military perpetrators. I also offer brief suggestions as to how certain contextual factors, such as development in international human rights law, may have encouraged judges to take on a more activist role in human rights cases. For sake of clarity, I trace these changes separately for the two countries.

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<sup>32</sup> See Popkin 2000 for an excellent analysis of the judicial reform process in El Salvador.

<sup>33</sup> Popkin (2000: 161).

As will become clear, the Argentine judiciary has gone from being fairly independent, to being overruled by executive preference, to gradually regaining its independence. In Chile, the change has been much more steady: from virtual judicial non-independence at the time of the transition to a fairly high degree of independence today. Because earlier human rights polices have been given detailed treatment in existing literature on democratic transition and transitional justice, I will only summarise these before giving details on the less documented recent trials as well as the judicial reforms affecting the formal independence of the courts.

### **A. Argentina – from trials to pardon to trials**

*The Alfonsín government (1982-1989): Transition and trials*<sup>34</sup>

The Argentine military were forced out of power after losing both face and legitimacy in the failed battle over the Malvinas/Falkland Islands against Britain in 1982. The new government, headed by President Raúl Alfonsín, took swift action to address human rights violations committed by the military. Alfonsín, who had made human rights to one of his high-profile cases in his election campaign, established a truth commission (CONADEP – National Commission on Disappeared Persons), used a presidential decree to undo the existing amnesty law self-imposed by the military before they left power, and ordered prosecution of the former military commanders. The military was initially in no position to protect itself against prosecution. Although Alfonsín's government at first allowed the military courts to try the cases, the military tribunal declared its inability and unwillingness to complete the proceedings against the junta leaders. On 4 October 1984, a civilian appellate court therefore assumed jurisdiction over the prosecutions. The trial resulted in the conviction in 1985 of five military commanders who had governed Argentina in the period 1976-1979.

Thousands of new cases of human rights violations were brought before the Argentine courts, most of them by human rights organisations and individuals representing the victims and their families. Fearing prosecution of hundreds of its middle-ranking officers, the military closed ranks and officers staged several unsuccessful revolts against the Alfonsín's government. Alfonsín responded quickly by passing the so-called 'full stop' law (*Ley de Punto Final*) in 1986. The 'full stop' law in essence set a final date for which cases against military personnel for human rights violations during the dictatorship had to be filed. This proved ineffective as a number of judges worked around the clock to accept as many cases as possible within the time limit. The military, feeling threatened by the prospect of mass-prosecutions, staged the so-called Easter Uprising in 1987. In response, Alfonsín pushed the law of 'due obedience' (*Ley de Obediencia Debida*) through Congress, which severely limited the scope of the prosecution against military personnel. According to the 'due obedience' law, military personnel who acted on the orders of higher ranked officers could not be held responsible for their actions. Because of these two laws, the courts were forced to drop many of the cases brought before them.<sup>35</sup> This is a clear example of executive and congressional encroachment on the constitutional powers of the judiciary. Alfonsín's policy may be summed up as going from pro-human rights to taking a much more reserved stance on the issue, due to perceived military threat. The judiciary went from being more to less independent.

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<sup>34</sup> Much of the information from this section is taken from Garro 1993 and Roniger and Sznajder 1999.

<sup>35</sup> See Kritz 1995, Vol. I.

*The first Menem government (1989-1994): Undoing the trials*<sup>36</sup>

When Carlos Menem took over the presidency after Alfonsín in 1989, one of his first moves was to issue sweeping presidential pardons. These set free the five imprisoned generals as well as pardoned 220 soldiers facing charges of human rights violations.<sup>37</sup> Menem was clearly in favour of a forgive-and-forget policy rather than pressing for justice. Again, the executive used his political powers to override the courts' decisions and interfere with court proceedings. To secure control over the Supreme Court, Menem packed the Court in 1990 by increasing its number of justices from five to nine. He also succeeded in getting two additional justices to resign, removed by decree the Attorney General, and, finally, implemented a series of judicial reforms expanding the number of vacancies particularly in the lower criminal courts.<sup>38</sup> Not surprisingly, therefore, the Supreme Court upheld the constitutionality of Menem's pardon. Modifications of the justice system in this case can hardly be said to have contributed to the independence of the judiciary. If anything, Menem increased executive control of the courts, thus making them less independent.

In sum, the Argentine situation seven years after the transition to democracy was an executive who openly supported a 'forgive-and-forget' policy, and who wielded enough power over the courts to make the reversal in court proceedings started by Alfonsín complete. Local human rights organisations, such as the Mothers of the Plaza de Mayo, continued to put pressure on the government to acknowledge the crimes committed by the state and disclose the facts of the disappeared. Their claims were, for the time being, ignored, both by the government and the courts.

*The second Menem government (1994-2000) and De la Rúa (2000-): Trials*

Years later, the human rights abuses of the past were again brought up in Argentina and placed firmly on the political agenda in the form of two specific court cases: the kidnapping of children of the disappeared and the quest for truth about the final destiny of the disappeared. At the end of 1996, six women from the human rights organisation Grandmothers of the Plaza de Mayo presented a case of the systematic kidnapping of children of disappeared as a state-sponsored plan, involving 194 children.<sup>39</sup> Notably, the disappearance of children given birth to by mothers while detained in prison was the only crime not exempted by the *punto final* and the due obedience laws passed by the Alfonsín government in 1986 and 1987 respectively. However, since the generals had been tried for *direct* responsibility of the abduction of a small number of children in the 1985 trials, they could technically not be tried again.<sup>40</sup>

A combination of innovativeness on the part of the lawyers and the appellate court judges who worked on the case, allowed them to charge the military with

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<sup>36</sup> Information on the more recent trials is principally taken from various issues of the Southern Cone Report (RS) from 1995-1999. Specific references are noted in the text.

<sup>37</sup> RS-97-10, (16 December 1997: 8).

<sup>38</sup> Helmke (1999: 24-25). Helmke also notes that following the initial court-packing and resignations, three more justices have resigned and one has retired.

<sup>39</sup> The Grandmothers claim that as many as 500 babies disappeared and have documented 230 cases. 60 young people were identified and located in 1998.

<sup>40</sup> Note that in March 1998, the opposition in Congress repealed the 'punto final' and 'due obedience' laws protecting the military from prosecution (RS-98-03, 21 April 1998: 6). A public opinion poll taken in 1998 shows that this measure was supported by 80% of Argentineans (RS-98-02, 10 March 1998: 2). However, this was mostly a symbolic gesture as the measure was not retroactive. See CELS 1999 for a more detailed discussion.

*indirect* responsibility for the same crime. Investigating judge Roberto Marquevich ordered the detention of Videla (military president from 1976-79) on 9 June 1998 on charges related to the alleged abduction of children during his military regime.<sup>41</sup> State prosecutor Rita Moreno, openly backed by president Menem, argued ‘double jeopardy’, i.e. that the same person could not be tried for the same crime twice, and that the Videla case should be turned over to the military authorities for resolution. The prosecutors, nevertheless, successfully argued that the military had never been formally charged with the crime of abduction and illegal adoption of children of detainees as a systematic plan, and the proceedings continued.<sup>42</sup>

A few months after the detention of Videla, on 10 November 1998, another federal judge, Adolfo Bagnasco, ordered Emilio Massera (junta member in 1976) to give evidence about alleged kidnapping of 15 babies born by mothers held captive in ESMA (the navy school).<sup>43</sup> Two months later, on 22 January 1999, Bagnasco brought formal charges against seven other former senior officers<sup>44</sup> for the disappearance of 194 babies.<sup>45</sup> Not happy with the development, the highest military council, the Consufa (*Consejo Superior de las Fuerzas Armadas*) the following year tried to put pressure on the judges to have the case transferred to military courts. However, the Supreme Court ruled on 2 August that the case remained in civilian courts in the hands of Bagnasco.<sup>46</sup> As of mid-August 2000, this case was now about to enter the oral hearing stage.

The second case of human rights abuses involving a large number of both retired and currently active military personnel in Argentina is the demand for truth about the destiny of the detained disappeared. The so-called *juicio por la verdad* was presented in 1996 to the Federal Court of Buenos Aires by lawyer Alberto Pedronsini on behalf of families of the disappeared. Other lawyers have followed suit, presenting cases to other appellate courts in the country. Currently, the federal appellate courts of Buenos Aires, La Plata, Bahía Blanca, and Córdoba have ruled that the families of the disappeared and the society writ large have a right to know the facts about the final destiny of the around 30,000 people who ‘disappeared’ during the dictatorship. The Supreme Court in 1999 reluctantly upheld the decision of the right to truth in an agreement signed with the Inter-American Commission for Human Rights.<sup>47</sup>

At the outset, these *juicios por la verdad* do not have criminal conviction as a final aim, though many of the human rights organisations and their lawyers hope that once the truth has been established, this will open up for prosecution of the military.

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<sup>41</sup> See CELS (1998: 88-102).

<sup>42</sup> RS-98-05, (30 June 1998: 3).

<sup>43</sup> RS-98-09, (17 November 1998: 8); CELS (1998: 103).

<sup>44</sup> These are: Admirals Emilio Massera, Rubén Franco and Antonio Vañek, Generals Reynaldo Bignone and Cristino Nicolaidis, and naval captains Jorge Acosta and Héctor Febres. RS-99-01, (2 February 1999: 3).

<sup>45</sup> RS-99-01, (2 February 1999: 3). Later the same year, on 2 September 1999, the Supreme Court ruled that Admiral Emilio Massera should pay US \$ 120,000 to a man whose siblings and parents disappeared in July 1976. The courts also ordered that the state pay the same man US \$ 1 million in reparations RS-99-07, (7 September 1999: 8).

<sup>46</sup> Clarín, Thursday 3 August 2000, p. 6.

<sup>47</sup> See CELS 2000 for a discussion of the so-called Lapacó case. The Supreme Court in 1998 ruled that the claims of Lapacó were inadmissible. After an appeal to the Interamerican Commission for Human Rights, the Argentine Government accepted and guaranteed the right to truth and granted the federal Appellate Courts the right to investigate the cases of the final destiny of the disappeared.



Though the appellate courts have demanded that the military give information about the final destinies of the disappeared, so far, very few military officers have agreed to co-operate. As a result, the federal courts have been detaining officers for shorter time periods for the failure to comply with court orders, causing much stir within military ranks. The military tried to put pressure to have the *Cámara de Casación* (a judicial organ at the level of federal Appellate Courts charged with dealing with special cases) intervene, but were not successful.<sup>48</sup>

In sum, a large number of Argentinean generals are now facing the prospect of trials. The question then is, why have Argentinean judges decided to take on these cases and push for prosecution? The trigger for initiating new prosecutions against military personnel was the voluntary, repentant confession in 1995 by retired navy officer Adolfo Scilingo that he had participated in the ‘disappearance’ of a number of people between 1976 and 1978. This was a first-ever confession in Argentina.<sup>49</sup> Shortly after, the chief of staff of the Argentine army, Lieutenant-General Martín Balza, gave a public statement where he acknowledged and apologised for the army’s involvement in killings and disappearances.<sup>50</sup> A year later, navy officer Alfredo Astiz proudly acknowledged involvement in the same crimes, defending the military’s conduct. By 1998, eight military members had given accounts of their involvement in killings and disappearances.<sup>51</sup>

These confessions had two main effects. First, they signalled an increasingly visible internal split within the military apparatus over guilt connected with these crimes - a weakness that the courts picked up on. Second, Scilingo’s confession galvanised the human rights community into renewed action. Though human rights organisations had been presenting cases to the courts since the beginning of the dictatorship in 1976, there had been a period of low activity following Menem’s sweeping pardons of the generals in 1990. Scilingo’s confessions preceded another important event: the 20<sup>th</sup> anniversary of the coup. Human rights NGOs organised widespread rallies, conferences, and other activities, drawing a lot of public attention.<sup>52</sup> Parallel to a gradual change in civil-military relations and an increased pressure from the human rights sector, there have also been institutional changes. The constitutional reforms passed by the Argentine Congress in 1994<sup>53</sup> involved three changes that were directly relevant to the judicial apparatus: (1) the creation of a National Judicial Council (*Consejo de la Magistratura*); (2) the declaration of the Public Ministry as an independent organ; and (3) the installation of a *Jurado de Enjuiciamiento*, which is in charge of removing national judges, except for Supreme Court judges at the federal level.<sup>54</sup> Though these reforms formally increased the independence of the judiciary, it is, perhaps, too soon to evaluate to what extent these

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<sup>48</sup> *La Nación*, Wednesday 19 July, 2000, p. 5.

<sup>49</sup> RS-95-03, (20 April 1995: 3); CELS (1995: 123-145). The importance of Scilingo’s confession was repeatedly brought to my attention in a series of interviews carried out in Argentina in July-August 2000.

<sup>50</sup> RS-95-04, (1 June 1995: 6).

<sup>51</sup> RS-98-01, (3 February 1998: 2-3).

<sup>52</sup> See CELS 1996 for details.

<sup>53</sup> Scholars have suggested that Menem traded these reforms with the opposition in return for congressional backing for constitutional reforms that allowed him to run for a second term, the so-called Olivos Pact (Finkel 1999). This view is also supported by a number of legal experts I interviewed in Buenos Aires in July 2000.

<sup>54</sup> See CELS (1995: 79) for details.

formal changes have affected the actual independence of judges.<sup>55</sup> What I would argue, however, is that a fourth constitutional change has had a direct and profound impact on the behaviour of justices with respect to human rights cases: the incorporation of international human rights treaties as part of the Constitution, which has given international human rights law preference over national law.<sup>56</sup> Though most international conventions were adopted and signed at the beginning of Alfonsín's government shortly after the transition, judges had paid little heed to international human rights law. Once part of the Constitution, however, it has become increasingly difficult for judges to ignore the UN and Interamerican conventions of human rights as doing so would not only mean breaking the law but also violating the Constitution.<sup>57</sup> More specifically, the incorporation of international human rights law has allowed judges to classify the systematic kidnapping of as genocide, thus invoking the UN Convention against Genocide and Crimes against Humanity. Finally, it has obliged the Supreme Court to uphold the various Appellate Court rulings of the right to truth in accordance with the Interamerican Convention of Human Rights.

Argentine judges may also have been sensitised to the application of international human rights law by the new trend of judges in Germany, France, Italy and Spain to prosecute Latin American personnel, including several Argentinean retired generals, for crimes committed against their nationals on Latin American soil during the dictatorship. The arrest of Pinochet in London in 1998 and his later return to Chile where he is now facing the prospect of prosecution, have no doubt served as an eye opener for many Argentine judges.

The increased sensitivity of judges to international law combined with a reduction in military threat and renewed human rights activism together offer a plausible explanation for why the Argentine courts have gradually taken on a more active role in human rights issues after 1996, despite President Menem's protests. It is therefore clear that executive dominance cannot account for the recent policy outcomes on human rights issues in Argentina. As I will show in the next section, Chile had a very different starting point, but has ended up with strikingly similar policy results.

## **B. Chile – from amnesty to trials**

*The Aylwin government (1990-1994): Transition and amnesty*

Unlike Argentina's transition by collapse in 1984, Chile's move to democratic rule in 1990, after 17 years of military dictatorship, was one of careful elite negotiations and bargaining. Though Pinochet unexpectedly lost elections he himself staged, the military was still strong and succeeded largely in dictating matters on human rights issues: no prosecution would occur. Immunity was furthered guaranteed by the amnesty law passed by Pinochet by decree in 1978. The law barred prosecution for all human rights violations committed in the period 1973-78 – at the peak of repression. President Aylwin did, however, succeed in setting up a truth commission, *Comisión Rettig*, though it had no investigatory powers. Wise from the Argentinean experience, Aylwin made no attempt at pressing for prosecutions.

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<sup>55</sup> For example, the Judicial Council only became operative in 1998 and had in August 2000 only nominated one new judge to the more than 70 vacancies. Interviews with Council members as well as other judges and lawyers suggest that the workings of the Council have been far from satisfactory.

<sup>56</sup> See Sabsay and Onaindia 1998.

<sup>57</sup> This point was supported by a large number of lawyers, judges and law clerks I interviewed in Buenos Aires in July-August, 2000.

The institutional legacies of the Pinochet regime are well known. In brief, the 1980 Constitution, imposed by Pinochet, guaranteed the military continued power or influence over such government institutions as the senate (nine designated senators), the Supreme Court (which Pinochet packed just before leaving office by encouraging voluntary retirement and increasing the number of justices), the national Security Council, and the constitutional tribunal. Because the military was still strong, Pinochet continued as head of the armed forces, and the Supreme Court was largely Pinochet appointed, we get the expected outcome in human rights policies at the time of transition: no trials. If transition theory were correct, this would have been the end of the matter. It was not.

*The Frei government (1994-1998): Two trials*

President Frei never took an official stance for or against the human rights issue. Nevertheless, the first two trials finished on 30 May 1995, when the Supreme Court's final ruling condemned two ex-generals, Manuel Contreras and Pedro Espinoza, to prison for the murder of Chilean foreign minister Orlando Letelier and his secretary Roni Moffit in Washington in 1976.<sup>58</sup> This signalled important changes in civil-military relations. First, that the still Pinochet-friendly court was willing to push through such a case demonstrated a new sensitivity to human rights issues.<sup>59</sup> Second, the fact that the military, though it grumbled, did not take up arms over the issue in support of the two ex-generals suggested that the military was less willing than earlier to threaten democratic procedures and the rule of law.<sup>60</sup> The trials of Espinoza and Contreras have often been quoted in Chilean and international media as 'a test case of judicial independence' and 'a triumph for the rule of law'.<sup>61</sup> Yet, reactions to this case were strong and underlined deep divisions in Chilean society. A public opinion poll held on 20 July 1995 showed that 65.8% of Chileans were in agreement with the outcome of the trials.<sup>62</sup> By contrast, in support of the military, five right-wing senators presented a bill to Congress on 18 July calling for the 1978 amnesty law to close all cases pending against members of the armed forces. However, Congress never adopted this Argentine-style '*punto final*' law. Consequently, the 600 or so cases pending in Chilean courts against military personnel remained in progress.

It is pertinent to mention that the courts – and especially the Supreme Court – had been extremely pro-military during Pinochet's rule and had previously rejected thousands of cases of alleged human rights violations brought before them by non-governmental organisations and private individuals. Several reform proposals had been introduced to Congress during the Aylwin government. However, Congress never approved the reforms. There have been two major points of resistance to judicial reform. First, the right-wingers (notably the designated senators) succeeded in

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<sup>58</sup> The Letelier and Moffit case was the only case exempted from the amnesty law of 1978 for crimes committed outside Chile.

<sup>59</sup> Note, however, that the Supreme Court was still not committed to human rights trials. The internal split in the court over proceedings in human rights matters became obvious in a 1996 trial case where the Supreme Court granted amnesty to the military personnel charged with the killing of Spanish UN official Carmelo Soria in 1976 (RS-96-07, 12 September 1996: 8).

<sup>60</sup> This contrasts with military reaction provoked by a judge raising charges against Pinochet's son for corruption two years earlier. The military then took to the streets with tanks and armed personnel. The so-called *Tablada* reminded politicians that the military was still a force to be reckoned with.

<sup>61</sup> RS-95-05, (6 July 1995: 1). See also Hunter 1998.

<sup>62</sup> RS-95-06, (10 August 1995:1).

voting down judicial reform legislation introduced to the Senate in 1991. Second, at least eight of the 17 members of the Supreme Court were in 1997 known to be opposed to any reform that might simplify court proceedings, and even more opposed to changes in the rules for selecting judges.<sup>63</sup> In spite of this resistance, President Frei again proposed reforms to Congress in mid-July of 1997, including changes to the composition of, and rules for making appointments to, the Supreme Court, increasing the number of members, and setting a compulsory retirement age of 75.<sup>64</sup> Congress finally adopted the so-called 'Supreme Court Reform Bill' in 1997.<sup>65</sup>

*The Lagos government (1998-): Numerous trials*

Augusto Pinochet's arrest in London in October 1998 greatly troubled the new Lagos government and caught the attention of the world media. Pinochet's subsequent return to Chile in 1999 after heavy pressure from the Chilean government and the unexpected 16-4 vote of the Chilean Supreme Court on 8 August, 2000 in favour of upholding the Appellate Court's decision to strip Pinochet of his senatorial immunity have also made headline news.<sup>66</sup> The basis for the Appellate Court's decision was Pinochet's proved involvement in the so-called Death Caravan (*Caravana de la muerte*) where 19 people disappeared in October 1973. That Pinochet may now face trials for systematic human rights violations is a situation very few scholars - or Chilean citizens - imagined only weeks before the Appellate Court made its ruling known.<sup>67</sup> The ex-dictator is currently facing 175 charges, presented by non-governmental human rights organisations, the Communist Party, and private individuals.<sup>68</sup> Moreover, more than seventy other retired military officers, including three generals, have lately been detained and charged with offences including murder, kidnapping, and torture.

Although the arrest of Pinochet and his subsequent loss of senatorial immunity undoubtedly have catalysed charges against other military officers, it is important to note that the process of trials were well underway before his arrest. Lawyer Eduardo Contreras presented the first case against Pinochet in January 1998 on behalf of the leader of the Communist Party, Gladys Marin, whose husband is one of the disappeared in the Death Caravan. Three more cases were already under review in the Appellate Court when Pinochet was detained in London. Thus, I would argue, his arrest encouraged rather than caused the increase in activity of human rights activists, who had been steadily been presenting cases to the courts for the last twenty-five years – mostly in vain.

Second, I would argue that the military's reaction – or absence thereof – to Pinochet's arrest and subsequent events, is essential to understanding the charges

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<sup>63</sup> RS-97-05, (24 June 1997:7).

<sup>64</sup> RS-97-06, (29 July 1996:2).

<sup>65</sup> See Bickford 1998.

<sup>66</sup> Interestingly, some of the judges who voted in favour of stripping Pinochet of his immunity are Pinochet appointees.

<sup>67</sup> Very few of the about 40 people I interviewed in the period May-July, 2000, in Chile thought that the Appellate Court would strip Pinochet of his immunity. Even fewer thought that the Supreme Court would uphold such a decision. Virtually nobody thought that trials would be even a remote possibility.

<sup>68</sup> Figure from 15 November, 2000. The day the Supreme Court announced its verdict in the immunity case, Pinochet was facing 157 charges. Consult the web page of Chilean human rights organisation, FASIC, for a complete list over cases raised against Pinochet and other military personnel: [www.fasic.org](http://www.fasic.org).

raised against military personnel. The ‘grandfather’ (*tata*) of the country has lost his long-standing reputation as untouchable, naturally causing concern among the military. However, they have not taken to the streets in his defence, suggesting that the former-commander-in-chief and former head-of-state no longer plays a political role in Chilean politics. When Pinochet’s son faced charges of corruption in 1993, the military reacted with tanks in the streets (the charges were subsequently dropped). When the Appellate Court was about to launch its decision on Pinochet’s immunity in June 2000, the generals of the four military branches reacted by organising a ‘secret’ – but conveniently leaked to the press - lunch. We may thus conclude that the military is no longer willing to protect their ageing former chief at whatever price.<sup>69</sup> The military’s passive acceptance of Pinochet’s arrest and the recent charges raised against both Pinochet and a number of other generals suggests that they have accepted civilian dominance in political matters and are willing to face the past. The appointment of General Ricardo Izurieta as army commander on 31 October 1997, and his taking over the post after Pinochet stepped down in 1998, signalled a new course in military politics. Izurieta is reportedly regarded as ‘free of the burdens of past crimes associated with the Pinochet generation’.<sup>70</sup>

Another notable change in military behaviour has been their willingness to participate in roundtable talks on the issue of detained disappeared. After Pinochet’s arrest, a commission, the so-called *Mesa de Diálogo*, was established on the initiative of the Chilean Minister of Defense. The commission was composed of members from all four military branches, lawyers, human rights activists, politicians and various prestigious cultural celebrities. The commission concluded its work in June 2000, where the military agreed to provide information about the destiny of the detained disappeared. This is the first time in Chilean post-transitional history that the military officially has acknowledged participation in systematic human rights abuses and have publicly obliged themselves to help establish the truth about the destiny of the disappeared.<sup>71</sup>

In addition to a noticeably weakened military and an invigorated human rights sector, a couple of changes within the judiciary itself in recent years are crucial to explaining the *desafuero* of Pinochet and most of the recent arrests. A selection of judges have reinterpreted detained disappeared as a permanent delete (*secuestro permanente*), hence barring this particular type of crime from protection by the 1978 Amnesty Law. As long as the body has not been found, the case remains open. Anecdotal evidence suggests that Guzmán launched the interpretation of detained disappeared as a permanent delete when he took on the first case against Pinochet in January 1998.<sup>72</sup> Gradually, judges have arrived upon a consensus regarding this term.

The Supreme Court has upheld the Appellate Court’s interpretation. Important changes to the Court have arguably allowed this to happen. As mentioned, the

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<sup>69</sup> RS-97-09, (11 November 1997:2).

<sup>70</sup> Note that part of this may have to do with the fact that there has been a generational shift within the military. The officers who are currently being charged with crimes of human rights violations are retired or senior officers who no longer play a central role in the military apparatus.

<sup>71</sup> However, there is strong scepticism among some of the human rights organisations and human rights lawyers in Chile that the military will actually keep their promise and come up with new information about the disappeared. Information gathered through a large number of interviews carried out in Santiago in May-June 2000.

<sup>72</sup> Information conveyed in interviews with various Appellate Court and Supreme Court judges in July 2000.

Supreme Court Bill of 1997 increased the number of Supreme Court justices from 17 to 21 and introduced a forced retirement age of 75.<sup>73</sup> This brought new and younger judges on board, including five judges recruited outside the system, who are more sensitive to international human rights law. Changes in the composition of the Supreme Court have had important signal effects for the Appellate Court judges. Because of the hierarchical structure of the Chilean justice system and the career path culminating in the Supreme Court, Appellate Court judges known to look to the highest court.<sup>74</sup> Like their Argentinean counterparts, Chilean judges have also been influenced by the activity of European judges' use of international human rights law to prosecute Chilean and other Latin American nationals abroad. This has raised the issue of national sovereignty and questioned the competence of Latin American judges to prosecute their own criminals.<sup>75</sup>

In sum, I would argue that three parallel trends have contributed to the Chilean courts' increased activism in human rights issues: (1) changes in the composition of the Supreme Court after the reform passed in 1997; (2) the large number of cases and documentation brought to the courts by human rights organisations and their lawyers, and (3) a visible reduction in what I have called 'military threat', which has allowed the courts to operate more independently.

## Conclusions

In this paper I have argued that variation in judicial independence is crucial to understanding variation in human rights policies over time, here narrowly interpreted as the presence or absence of trials of (ex) military personnel for gross human rights violations they committed during military rule. I have challenged Pion-Berlin and Arceneaux's argument that policy outcomes are inextricably tied to levels of institutional concentration and autonomy in the executive branch. Human rights gains, they argue, occur when policy-making authority is centred in a few hands and where the president can use institutional channels suitably closed to military influence.

My empirical analysis of Chile and Argentina has suggested that an independent judiciary free to enforce the rule of law without deferring to executive preference or military threats/pressures may be significantly influential in determining policy outcomes. The Argentine judiciary demonstrated a rather high degree of independence at the time of transition. Its independence was severely curbed, first by Alfonsín in 1986 and 1987, and then further by Menem in 1990. After judicial reforms in 1994 and 1996, the judiciary seems to have regained some of its independence. This is seen in increased judicial activism in human rights cases involving the military. The Chilean judiciary, by contrast, has gone through a much more steady development. From having hardly any autonomy and authority due to military direct and indirect influence at the transition in 1990, judges progressed to showing somewhat more independence in 1996. The judicial reforms passed in 1998 and, combined with a further reduction in military threat, and a boost of activity in the

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<sup>73</sup> The reform also incorporated two-thirds senatorial approval in the nomination process of Supreme Court judges. See Bickford 1998: 17, footnote 17 for detail on the reforms.

<sup>74</sup> This differs from Argentina, where the Federal Appellate Courts are considered the highest judicial position a judge may hope for. Getting a post in the Argentine Supreme Court has been paralleled to winning the jack pot. Information from interviews with judges and court clerks in Buenos Aires, July-August, 2000.

<sup>75</sup> This was one of the central arguments in the Chilean government's campaign to have Pinochet returned to Chile rather than be extradited to Spain.

human rights sector have enabled the courts to act more independently since 1998 than any scholar would have predicted ten years earlier.

If my argument holds true more generally, we would expect in the future to see more trials of (ex) military officers for gross human rights violations in other Latin American countries that have carried out judicial reform during the last decade. This includes countries with high levels of human rights violations, such as Guatemala, El Salvador, and Paraguay. Executives in these countries have carried out substantial constitutional reforms expanding the autonomy of the courts from the executive. But as long as the military remains a strong force in politics, the exercise of judicial authority and autonomy may continue to be limited.

Another case where we might expect trials of military officers in the future is Uruguay, where the ‘disappeared’ are still an issue.<sup>76</sup> This small Southern Cone country, which became infamous for having the largest portion of its citizens imprisoned and tortured during the military dictatorship in the 1970s, has so far done nothing to prosecute its military. The combination of an executive, ex-President Sanguinetti, who was openly in favour of forgetting the matters of the past and a judiciary dependent on the executive may account for this inaction. The military has posed no apparent threat to civilian rule since return to democracy in 1984, and there has been a persistent demand for justice from the human rights sector, notably for recovery of disappeared children and grandchildren. Therefore, if constitutional judicial reforms were to be pushed through, we would expect trials.

The argument may, of course, also be extended beyond Latin America. Numerous African countries, for instance, have undergone both transitions to democracy and are currently revamping their judicial systems. As these new democracies become more solidified, we would expect courts to take on cases of human rights violations carried out by previous regimes. The theoretical implication of my argument is that with the events of judicial reform and a gradual retreat by the military from the political sphere, we may have to rethink the meaning of civil-military relations to systematically include a neglected third player – the judiciary – when analysing post-transitional politics. The entry of a more independent judiciary on the political scene obviously influences the balance of power within government institutions, which, in turn, may have a direct impact on policy outcomes, such as on human rights.

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<sup>76</sup> The issue of the ‘disappeared’ during the military regimes of the 1970s and 1980s was suddenly resurrected in 1997, 12 years after the return of civilian rule, and nine years after the adoption of a plebiscite that precluded further investigations into alleged human rights abuses. A civilian judge, Alberto Reyes, ruled on 14 April 1997 that efforts should be made to locate burial places reported to be concealed in two military installations. This provoked an outrage among the military and euphoria among human rights activists and relatives of the 32 disappeared. Then president Sanguinetti reluctantly gave permission for civilian magistrates to pursue their inquiries inside the military installations (RS-97-04, 20 May 1997: 7). However, an appeals court overruled the decision of judge Reyes only two months later, hence upholding the prerogatives of the amnesty law (RS-97-05, 24 June 1997: 3). The new president, Jorge Batlle, seems to have a different position on the human rights issue than did his predecessor.

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# Appendix 1

## Constitutional reforms affecting judicial independence

<i>Country</i>	<i>Transition</i>	<i>Number of Years after Transition</i>	<i>Constitutional Reforms affecting Judicial independence</i>	<i>Rating of Constitutional Reforms<sup>77</sup></i>
Argentina	1983	17	1994, 1996	3
Belize	1981	19	1988	0.5
Bolivia	1982	18	1994	3
Brazil	1985	15	1998	1
Chile	1990	10	1997, 1999	3
Colombia	1958	42	1991, 1997	4
Costa Rica	None		1989	2
Dominican Rep.	1966	34	1995	2
Ecuador	1978	22	1986, 1993, 1996, 1997	2
El Salvador	1992	8	1994, 1996	3
Guatemala	1996	4	1993	3
Honduras	1981	19	None	0
Mexico	None		1994	4
Nicaragua	1979	21	1995	1.5
Panama	1993	7	None	0
Paraguay	1993	7	1992	3
Peru	1980	20	1993	4
Uruguay	1984	16	None	0
Venezuela	None		None	0

*Sources:* English translation of most recent constitution for each country used to determine constitutional changes along variables 1-4 specified in section III C (see footnote below). Supplemented by information from *Freedom House Survey 1998*, and numerous secondary sources for individual countries to assess overall evaluation/extent of reform. See for example Bickford 1998, Dakolias 1996, García 1995, Hammergren 1998, Helmke 1999, and Sutil 1999.

<sup>77</sup> As explained in III C, I have singled out four variables as key indicators of structural independence: (i) *appointment procedures* of Supreme Court judges; (ii) *length of tenure* for Supreme Court judges; (iii) the establishment of *judicial councils*, and (iv) measures to increase the *judicial review powers* of the supreme court, through the creation of constitutional courts or by other means. Any change noted in the Constitution for each of these variables has been awarded one point, hence rating of reforms on a scale from 1 to 4.

# Summary

This paper is about how varying degrees of judicial independence may influence policy making in the field of human rights. I explore factors that may account for why some Latin American courts, years after the return to democratic rule, are currently prosecuting (ex) military officers for crimes they committed under authoritarianism, while other courts have chosen to ignore this politically explosive issue. I argue that certain constitutional changes undertaken in recent years coupled with a reduction in military threat have increased the propensity of judges to reinterpret existing amnesty laws and take on human rights cases they would have rejected earlier. At least one more factor is a necessary, though not sufficient, condition for trials to take place: a persistent demand for justice. To test my argument, I carry out an in-depth qualitative study of two 'success stories', Argentina and Chile. Because many newly established democracies in various regions of the world are in the process of strengthening their institutions and democratic practices, as well as trying to deal with the legacies of their authoritarian pasts, the lessons drawn from the Southern Cone should be of more general interest to scholars of both political science and law.

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