Judicial Reform and Changes in Human Rights Policies in Chile and Argentina

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ABSTRACT
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 the recent efforts of democratic executives to formally strengthen the courts and make them more independent have enabled justices to reinterpret existing amnesty laws and take on human rights cases they would have rejected earlier. In addition to an increase in judicial independence, two more factors are necessary, though not sufficient conditions, for trials to take place: (1) a reduction in military threat and (2) a persistent demand for justice. To support my argument, I carry out an in-depth qualitative study of two 'success stories', Argentina and Chile. Both countries have had extensive judicial reforms and trials in recent years.

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 these two Latin American countries should be of more general interest to scholars of both political science and law.

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.[1] 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 Menem, who pardoned the lot when he was ushered into power in 1990, 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 different crimes: that of making thousands of people 'disappear' during the rule of the juntas. Similar events are taking place in Chile, where the institutional legacies of Pinochet's authoritarian government were expected to safeguard the military against any future prosecution. The question that begs answer, then, is, why has this issue, seemingly all of a sudden, become hot again? And why only in come countries, while countries that had equal or worse human rights violations to those of Argentina and Chile, such as Guatemala or El Salvador, have let the matter rest?

Scholars of democratic transitions argued that human rights policies at the time of transition was a product of elite negotiations, where the relative strength of the military would largely determine what policies the executive could reasonably opt for.[2] A newer group of scholars 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.[3] 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 the sweeping judicial reforms that have taken place in a series of Latin American countries since the beginning of the 1990s have allowed the judiciary to take on an increasingly more assertive role, I challenge the conventional wisdom of the executive as the sole policy maker in the field of human rights. At the end of 1999, 15 out of 19 Latin American countries have carried out from minor reforms to virtually revamping their judiciaries.[4] Some of these reforms have formally increased the independence of the judiciary vis-à-vis the executive.

The initial failure to successfully 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 the recent efforts of democratic executives to formally

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[1] See for example. Huntington 1991; Mainwaring, O'Donnell, and Valenzuela 1992; Malamud-Goti, Jaime. 1990; McAdams 1997; Pion-Berlin 1994; Zalaquett 1992.
[2] See for example Karl and Schmitter 1991.
[3] See for example Hunter 1997, 1998; Pion-Berlin and Arceneaux 1998.
[4] See for example Buscalgia, Dakolias and Ratcliff 1995; Dakolias 1995; Frühling 1998; Garro 1993; Pilar 1999.

strengthen the courts and make them more independent have enabled justices to re-interpret existing amnesty laws (designed to protect the military) and take on cases of serious human rights violations they would have rejected earlier. I propose that two pre-conditions must be met in order for reversals in human rights policies to take place years after the transition to democratic rule: (1) a weakened military and (2) a persistent demand for justice.

Structure of paper: 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 is crucial to understanding changes in policy outcomes over time and develop an explanatory model. 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 pointers as to where future research may be directed. 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 dealing with the legacies of their authoritarian pasts, the testable propositions applied to Chile and Argentina in this paper should be of more general interest.

II Why changes in human rights policy over time? Competing views

Under what circumstances is it possible to put on trial military officers responsible for gross human rights violations (here narrowly defined as deaths and disappearances) committed during military rule?[5] There are, in essence, three main bodies of literature concerned with the issue of human rights in democratic transition. They all share a legitimate concern with civil-military relations – either for political or for moral-philosophical reasons. First, the literature inspired by the Latin American transitions in the early 1980s argued that elite negotiations determined the relative 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.[6] A specific claim coming out 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.[7] 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.[8] 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

[5] 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.

[6] 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.

[7] See, for example, Huntington 1991, Sutil 1997, and Zalaquett 1992.

[8] See Skaar 1999 for an analysis of 30 countries worldwide undergoing transition and dealing with legacies of gross human rights violations.

relations may change over time and how new institutional set-ups may alter the behaviour of key political players who influence policy outcomes.[9] These scholars provide insightful arguments that greatly improve over the transition literature. Yet, also they fail to predict the extensive changes in human rights policies that are currently unfolding principally because of an undue concern with the executive's continued power over determining policy outcomes. It is this literature that I wish to expand on in my analysis.

A second body of literature, commonly referred to as transitional justice, stresses the duty of new democratic governments to their citizens in dealing with past brutalities by mapping the truth of the abuses and bringing the guilty to court.[10] It deals predominantly with the policy options available to democratic governments in a 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 much in terms of analytical explanations for different policy choices and outcomes.

Finally, legal scholars working on the issue of international law have pointed to the remarkable changes in human rights law and the increased international concern with human rights abuse in the past decade. The globalisation in communications, they argue, has made it increasingly difficult for nations to commit human rights abuses with impunity.[11] Scholars of international law also point to the importance of the diffusion 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. Part of the reason is probably that judiciaries of many developing countries (particularly in Latin America) were know to be subservient to executive will and therefore did not have an independent function at the time of transition. With the recent advent of widespread judicial reform, we can no longer assume the judiciary to be merely a passive actor who is led and influenced by the executive. Justices who now feel secure in their offices and wish to implement the rule of law could indeed be expected to take on cases of human rights violations that are brought before them. Building on the budding literature on the role of courts in transitions to democracy[12] and the new literature on dynamic civil-military relationships[13], I will in my analysis show how the changing role of the judiciary is key to understanding recent unexpected outcomes in human rights policies.

III Judicial independence: A necessary condition for trials of human rights violators?

A. The argument

Further to the above discussion, I propose the following main working hypothesis:

[9] For excellent treatment of these points, see Hunter 1998 and Pion-Berlin and Argeneaux 1998.
[10] See for example McAdams 1997, Walsh 1996, Panizza 1995, Pion-Berlin 1994, Kritz 1995, Malmud-Goti 1990.
[11] The establishment of war crimes tribunals for Yugoslavia and Rwanda in 1994 illustrates this. So does the Permanent Court of Justice in Hague, effectively established in 1998, fifty years after the initial discussion of setting up such a tribunal took place.
[12] See for example Hammergren 1998, Schedler et al 1999.
[13] Hunter 1997, 1998; Pion-Berlin and Arceneaux's 1998

H: Given a reduction in military threat and given sustained pressure for justice from the human rights sector, reversals in human rights polices after transition to democracy are likely to take place *only in countries where the judiciary is independent*.

If my hypothesis were correct, we would expect to see more trials and more verdicts against human rights perpetrators in countries and in years where there is more judicial independence. If not true, countries that have not undertaken judicial reform should be as likely to hold trials as those that have. 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 is:

AH: Policy making on human rights issues is an executive decision.

Political leaders in democratic systems are expected to respond to pressures and challenges to their survival from various societal forces. The pressures and challenges of relevance with regard to human rights are:

- *military* pressure for immunity and no-prosecution;
- *domestic* pressure for justice (from the human rights sector, other specific interest organizations, and possibly also part of the public); and
- *international* pressure to respect human rights and comply with good governance procedures.

Democratic transition literature 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 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. 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 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

		Judiciary	
		Dependent	Independent
Executive policy position	Pro-human rights	Trials	Trials[14]
	Anti-human rights	No trials	**Trials**

When is the judiciary independent?

[14] 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.

In the narrowest sense, judicial independence means judges' freedom from political influence.[15] In a broader sense, most scholars seem to agree that there are three types of independence: (1) from other judges, (2) from pressure groups, such as political parties, and (3) from executive influence or the other government branches (so-called structural independence).[16] The first two types refer to the individual independence of the judges and the third type to the collective independence of the judicial branch as an entity. Because I am (partly) concerned with formal increases in judicial independence in this paper, I have singled out four factors typically mentioned in the literature as central indicators of structural independence:[17] (i) appointment procedures,[18] (ii) length of tenure for supreme court justices,[19] (iii) judicial councils,[20] and (iv) measures to increase the judicial review powers of the supreme court, through the creation of constitutional courts or by other means[21].

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.[22] Moreover, constitutional reforms affect only the power balance between the executive and the judiciary. In Latin America, the judiciary (like the executive) has also been vulnerable to military threat. Justices would frequently 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. 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:

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[15] 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.

[16] See for example Dakolias (1995: 172-76), Fiss (1993: 55-56), Becker (1970), Domingo (1999: 153-55), Rosenn (1987), Larkins (1996).

[17] See for example Domingo 1999; Hammergren 1998; Larkins 1996; and Widner 1999.

[18] Supreme Court justices (in particular) should not be hired and fired at the whim of the executive and hence be politically dependent on their appointer.

[19] 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. 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.

[20] The councils are generally, though not always, composed of representatives from several public and private institutions. Their main purpose is to select Supreme Court justices (possibly also come with recommendations for appellate court justices and lower court judges). By removing from the executive the power to appoint justices the councils help ensure less partisan courts. Very occasionally (Colombia, Mexico, and Bolivia) the councils also control judicial budgets and administrative systems (Hammergren 1998: 12-13).

[21] 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 a brief history of the function of judicial review, see Schwartz 1999 and Domingo 1999.

[22] See for example Dakolias 1996; Domingo 1999; Hammergren 1998; and Vaughn 1993.

H1a: The absence of credible military threat is necessary for the judiciary to operate independently.

The failure to prosecute human rights violations immediately after the transition may be attributed to credible military threats to destabilise new democracies. Those threats have now subsided.[23] If this were correct, we would expect the likelihood of trials against old or retired military personnel to increase where there is a decreased influence of the military in politics. Though many Latin American judiciaries in the past were frequently 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 measure '*reduced military threat'* or military safety by counting the number of years since the year of transition, or the last attempted military intervention, until present.[24] Alternatively, 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.

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 polices on their own account. This gives a second testable claim:

H1b: 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 NGOs, 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 that do not.[25] Pressure from these various sectors could be measured

[23] 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.

[24] 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 been 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. the threat of a coup is not imminent. Exceptions are Ecuador, as demonstrated in the unexpected coup on January 29, 2000, perhaps Venezuela, and Chile 5-6 years ago. Ultimately, all countries with non-partisan judiciaries should want to punish the military as a way of enforcing the rule of law.

[25] 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 makes 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, who is susceptible to public pressure because of his elected position, and who also wields power over the judiciary.

through opinion polls, newspaper reports on demonstrations, the number of cases of human rights violations brought to court etc.

Finally, international pressure has arguably also played a role in pushing national judiciaries to agree to reopen cases of human rights violations or 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. In my analysis 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.

B. Analytical framework

In this section, I develop an analytical framework for how to test the two competing hypotheses presented above 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* (italics mine).[26] 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 less actors that have to be consulted), the easier it is to get policy outcomes in congruence with stated policy preference of the executive.[27] 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* (italics mine).

I suggest a different perspective. Rather than view an independent judiciary as a possible obstacle for the executive to push her policy preference through because the number of veto players is increased, I argue instead that an independent may *replace* the executive as the principal veto player in human rights policy making. As I will show in the empirical section, the judiciary has been key in pushing for trials – irrespective of executive preference – in several Latin American countries.

The autonomy-authority dimension employed by Pion-Berlin and Arceneaux to evaluate the executive's chance of success in determining policy outcomes may be usefully applied to the judiciary. If we interpret judicial 'autonomy' as independence from other government structures and from the military, and judicial 'authority' as both power and ability to rule on a wide range of issues, we would expect the chances of trials to increase with increases in both judicial autonomy and authority, other things remaining unchanged. Table 2 demonstrates that the likelihood of trials is highest when the judiciary has a high degree of both autonomy and authority and lowest when it scores low on both dimensions. [28]

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[26] See Pion-Berlin and Arceneaux (1998: 633).
[27] For a basis explanation of the veto players' argument, see Tsebelis 1990.
[28] Note that these are continuous rather than dichotomous variables. Where any particular case might fall is therefore ultimately a judgement call.

Table 2: Judicial autonomy and judicial authority

		Decision making authority	
		L	H
Decision making autonomy	L	Outcome depends on Executive	Outcome depends on executive?
	H	Outcome depends on executive?	Outcome depends on JUDICIARY

Autonomy from executive influence may be formally measured by recording constitutional changes that have strengthened the judiciaries' position vis-à-vis the executive (see section III A). *Autonomy from military influence* will depend on the presence of absence of perceived military threat of retaliation in case of unpopular decision-making on part of the judiciary. To capture varying degrees of *judicial authority*, we may record whether the judiciary has been granted constitutional power to rule on the constitutionality of a law. The presence of military threat will presumably also influence the judiciary's effective use of authority, such as when interpreting amnesty laws. Since effective judicial autonomy and authority both depend on a combination of formal extension of constitutional powers and a reduction in military threat, we would expect trials only where formal judicial independence is high and military threat is low:

Table 3: Judicial autonomy and judicial authority

		Formal judicial independence	
		L	H
Military threat	L	No trials	**Trials**
	H	No trials	No trials

I have now developed a theoretical argument for when we expect to see trials in a post-transitional setting. The following section traces empirical changes in judicial autonomy and authority over time with respect to both (a) formal increases in judicial independence due to constitutional changes and (b) changes in civil-military relations for Chile and Argentina.

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 its own populations. Only one country – Argentina – successfully put a handful of its generals on trial at the time of 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 and where the military is considered (relatively) safely back in the barracks. Table 4 provides a sketchy overview of

evidence from Latin America with regard to changes in judicial independence due to constitutional reforms. 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 gross human rights violations (this excludes the Dominican Republic, Brazil, and Panama).

Table 4: Military threat and judicial independence

		Judicial independence after constitutional reforms[29]	
		Low	**High**
Military threat after transition to democracy[30]	**Low**	**No trials** Nicaragua Uruguay Honduras Peru[31]	**Trials** *Argentina* *Bolivia* *Chile*
	High	**No trials** Ecuador	**No trials** El Salvador Guatemala Paraguay

The table predicts trials for Argentina, Bolivia, and Chile. Indeed, these are the only Latin American countries in which trials have taken place in a post-transitional setting. For the remaining part of this analysis, I investigate in more detail the political processes that have led to trials in Chile and Argentina. These two countries constitute an excellent pair for testing the hypotheses mapped out in the previous section for several reasons. First, because they went through very different kinds of transitions (by collapse in Argentina and by ballot in Chile) where the military played diametrical opposite roles, the two countries started of with very different institutional

[29] Note that for practical purposes, the measures of constitutional independence along the two dimensions of judicial authority and judicial autonomy are conflated in this table. 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. If constitutional changes along the four dimensions specified according to my selection criteria between the date of transition for each country and December 1999 have received a score of 0-2, I have recorded judicial independence as 'low'. A score of 3-4 is recorded as 'high'. Consult section III A for operationalisation of the variable and see Appendix 1 for coding.

[30] 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); El Salvador (repeated threats against justices who take on human rights cases); Guatemala (threats against human rights initiatives – bishop Gerardi killed after release of human rights report in 1998); and Paraguay (Stroessner dictatorship overthrown in 1993. It's arguably too soon to tell if regime is stable or not).

[31] 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.

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.

D. Does judicial independence matter for trials of military personnel? An empirical test for Chile and Argentina

Following the analytical framework developed in section C, I focus on the changing autonomy and authority of the judiciaries in Chile and Argentina since the transition from authoritarian rule to the present. I look specifically at (a) constitutional reforms affecting judicial independence and (b) alteration in military power (i.e. 'threat'), and pay close attention to how these changes may have affected outcomes in human rights policies.

For sake of clarity, I trace these changes separately for the two countries and divide the analysis into three time periods: (i) immediately after the transition to democracy, (ii) five years after the transition, and (iii) the period from 1998 to date. As will become clear, the Argentine judiciary has gone from being relatively independent, to being overruled by executive preference, to gradually regaining its independence. In Chile, the process has been much more linear: from virtual judiciary non-independence at the time of the transition, to a relatively 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 give these cursory attention only and focus instead on the most recent trials.

Argentina – from trials to pardon to trials
Phase I: Transition and trials[32]

The Argentine military were forced out of power after losing both face and legitimacy in the failed battle over the Malvinas against Britain in 1982. The new incoming government, headed by President Raúl Alfonsín, took swift action on the human rights issue. Alfonsín ordered a truth commission (CONADEP), used presidential decree to undo the existing amnesty law self-imposed by the military before they lost 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 1994, a civilian appellate court assumed jurisdiction over the prosecutions. The trial in 1985 resulted in the conviction 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 staged an unsuccessful revolt against the Alfonsín's government. Alfonsín responded hurriedly by passing the law of 'due obedience' in 1986, which severely limited the scope of the prosecution

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[32] Much of the information from this section is taken from Garro 1993.

against military personnel. When this proved ineffective, he pushed the 'full stop' law through Congress after the so-called Easter Uprising in 1987. The 'full stop' law in essence set a final date for which all evidence against military personnel must have been gathered. Because of these two laws, the courts were forced to drop many of the cases brought before them. This is a clear example of executive and congressional encroachment on the constitutional powers of the judiciary. The Supreme Court, for a complex set of reasons, decided not to rule the 'due obedience' law unconstitutional.

Phase II: Undoing of the trials[33]

When Carlos Menem prematurely took over the presidency after Alfonsín in 1989, one of his first political moves was to issue sweeping presidential pardons. It set free the five imprisoned generals, as well pardoned 220 soldiers facing charges of human rights violations.[34] Again, the executive used his political powers to override the court's decisions and interfere with court proceedings. To secure control over the Supreme Court, Menem had packed the Court in 1990 by extending its number of justices from five to nine. He also succeeded in getting two additional justices to resign, removed by degree the Attorney General, and, finally, implemented a series of judicial reforms expanding the number of vacancies particularly in the lower criminal court.[35] Not surprisingly, therefore, the Supreme Court upheld the constitutionality of Menem's pardon.

In sum, the Argentine situation five 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, notably the Mothers of the Plaza de Mayo and the Grandmothers, 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.

Phase III: Trials

Years later, the human rights abuses of the past were again brought up in Argentina and placed firmly on the political agenda. The trigger for this was the voluntary, repentant confession in 1995 of retired navy officer Adolfo Scilingo on involvement in the 'disappearance' of a number of people in the period 1976-1978. This was a first-ever confession in Argentina.[36] Shortly after, the chief of staff of the Argentine army, Lieutenant-General Martín Balza, gave a public statement where he acknowledged and apologised for military involvement in killings and disappearances.[37] A year later, navy officer Alfredo Astiz proudly acknowledged involvement in the same crimes, though defending the military position. By 1998, eight military persons had given secret accounts about their involvement in killings

[33] 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.
[34] RS-97-10, (16 December 1997: 8).
[35] Helmke (1999: 24-25). Helmke also notes that following the initial court-packing and resignations, three more justices have resigned and one has retired.
[36] RS-95-03, (20 April 1995: 3).
[37] RS-95-04, (1 June 1995: 6).

and disappearances.[38] These confessions aptly illustrate an increasingly visible internal split within the military apparatus over guilt connected with these crimes. This split, I argue, signalled a weakness that the courts picked up on.

Parallel to this gradual change in civil-military relations, the courts had been strengthened through constitutional reforms passed by Congress in 1994. 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.[39] Whatever the true intention behind the reforms, the constitutional increases in judicial independence combined with a reduction in military threat offers a plausible explanation for why the courts gradually took on a more active role in human rights issues.

In November 1996, a court ordered that about 7,000 families of people who disappeared during the military dictatorship of 1976-83 were to receive US$200,000 each in compensation from the government.[40] Notably, the disappearance of children given birth to by mothers while detained in prison was the only crime not exempted by the two laws passed by the Alfonsín government in 1986 and 1987 respectively. In March 1998, the opposition in Congress repealed the laws protecting the military from prosecution,[41] supported by 80% of Argentineans.[42] Though mostly a symbolic gesture (as the measure was not retroactive), the repeal nevertheless encouraged the courts to take a new interest in cases they had consistently been ignoring for years.

Federal judge Roberto Marquevich set off a chain reaction when he ordered the detention of Videla (military president from 1976-81) on 9 June 1998 on charges related to the alleged abduction of children during his military regime. 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 opposition, nevertheless, successfully argued that the military had never been formally charged with the crime of abduction and illegal adoption of children of detainees, and the proceedings continued.[43] The media reported in 1998 that a military rebellion in response to prosecuting of military officers for human rights violations 'seems highly unlikely'.[44]

A few months after the detention of Videla, on 10 November 1998, another federal judge, Adolfo Bagnasco, ordered Emilio Massera (junta member in 1970) to give evidence about alleged kidnapping of 15 babies born by mothers held captive in ESMA (the navy school).[45] On 22 January 1999, judge Bagnasco brought formal charges against seven former senior officers.[46] On 10 December 1998, Congress voted to set up *Fondo de Reparacion Historica* to provide money for the search and rescue operations of the Grandmothers.[47] That meant that the government was forced to take

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[38] RS-98-01, (3 February 1998: 2-3).
[39] Finkel 1999.
[40] RS-96-09, (21 November 1996: 8).
[41] RS-98-03, (21 April 1998: 6).
[42] Public opinion poll taken in 1998. RS-98-02, (10 March 1998: 2).
[43] RS-98-05, (30 June 1998: 3).
[44] RS-98-01, (3 February 1998: 2).
[45] RS-98-09, (17 November 1998: 8).
[46] These are: Admirals Emilio Massera, Rubén Franco and Antonio Vañek, Generals Reynaldo Bignone and Cristino Nicolaides, and naval captains Jorge Acosta and Héctor Febres. RS-99-01, (2 February 1999: 3).
[47] RS-98-10, (22 December 1998: 3).

some action, in spite of Menem publicly denouncing the activity of the courts. Federal judge Adolfo Bagnasco brought formal charges against seven former senior officers on 22 January 1999. The cases involve the disappearance of 194 babies.[48] It is pertinent to mention that General Nicolais, who was army commander towards the end of military regime, accepted the civilian court's rights to investigate the matters of child kidnapping.

These events were possibly sped up by the impact of the Pinochet arrest in London in October 1998. However, as the chronological account above has clearly demonstrated, the trials of Videla and Massera were well underway in the courts before Pinochet's arrest. Menem, not surprisingly, strongly criticised the arrest of Pinochet, afraid that this would further encourage the court's activities in human rights issues. He was right in his fears.

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.[49] Massera is still under charges of involvement in the disappearance of children. The other cases are also still pending.

In sum, the Argentine courts have clearly taken on a more active position on human rights issues in the last couple of years. Menem's initial protests against reopening the human rights issue has not been effective. The judges who were appointed by him and expected to follow executive policy lines have turned on him and acted independently. 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 point of departure, but has ended up with strikingly similar policy results.

Chile – from amnesty to trials
Phase I: Transition and amnesty

Unlike Argentina's transition by collapse in 1984, Chile's transfer to democratic rule in 1990 after 17 years of military dictatorship was one of careful elite negotiations and bargaining. Though Pinochet unexpectedly lost the elections staged by himself, the military was still strong and succeeded to largely dictate matters on human rights issues: no prosecution. 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.

The institutional legacies of the Pinochet regime are well known. In brief, the 1980 Constitution, passed by Pinochet, guaranteed the military continued power or influence over such government institutions as the senate (9 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

[48] RS-99-01, (2 February 1999: 3). The Grandmothers claim that as many as 500 babies disappeared. 230 of these are documented cases and 60 young people were identified and located in 1998.
[49] RS-99-07, (7 September 1999: 8).

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.

Phase II: Two trials

The first two trials came on 30 May 1995, when The Supreme Court's final ruling condemned two ex-military generals, Contreras and Espinoza, to prison for the murder of Chilean foreign minister Orlando Letelier and his secretary Roni Moffit in Washington in 1976. It 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.[50] Second, the fact that the military, though it grumbled, did not take to arms over the issue in support of the two ex-generals signalled that the military would be less willing than earlier to pose a threat to democratic procedures and the rule of law.[51] 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'.[52] 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 trials.[53] By contrast, in support of the military, five of the 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 the suggested Argentine-style 'punto final' law. Consequently, the 600 or so cases that were pending in Chilean courts against military personnel, remained in progress.

The courts 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. The strengthening of the courts through judicial reform was on its way as several reform proposals had been introduced to Congress, though the Supreme Court was still dominated by Pinochet friendly judges.

There have been two major points of resistance to judicial reform. First, the right-wingers (notably the designated senators) succeeded in voting down legislation of judicial reform 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.[54] 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

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[50] Note, however, that the Supreme Court was still not committed to the human rights issue. 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).

[51] 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.

[52] RS-95-05, (6 July 1995: 1). See also Hunter 1998.

[53] RS-95-06, (10 August 1995:1).

[54] RS-97-05, (24 June 1997:7).

making appointments to, the Supreme Court, increasing the number of members, and setting a compulsory retirement age of 75.[55] Congress finally adopted the so-called 'Supreme Court Reform Bill' in 1997.[56] Other reforms were passed in 1999.

Phase III: Trials

Recently, Chilean national as well as international media has been flooded with reports of Spanish judge Garzon Baltazar's accusations of genocide against Pinochet after his arrest in London in October 1998. 60 cases have also been raised in Chile against Pinochet for murder and disappearances carried out on Chilean soil. The charges have been brought to court by non-governmental human rights organisations the Communist Party, and private individuals. Although one judge, Juan Guzmán, has taken on most of the cases, there are currently 27 judges in Chile working on charges against Pinochet. The ageing ex-general risks prosecution upon return to Chile, which is expected any time soon after British doctors found him too ill to be extradited to Spain for trial. Perhaps more importantly, more than forty other retired military officers, including three generals, have been detained and charged with offences including murder, kidnapping, and torture. [57]

Although the arrest of Pinochet may very well have had a catalytic function on charges brought against other military officers, it is important to note that the process of trials were well underway *before* his arrest. I therefore suggest that the importance of his arrest lie in the military's reaction – or absence thereof. That the military has not taken to the street in defence of Pinochet seems to suggest that the former-commander-in-chief and former head-of-state no longer plays a political role in Chilean politics, in spite of his current status as senator-for-life.[58] Notably, most of the recent arrests are said to arise from a new interpretation by the Supreme Court of the 1978 amnesty law, which lays down that it cannot be applied in cases where no body has been found. According to the new interpretation, the courts now see the victims as kidnapped and remaining in the hands of the kidnappers. Hence the cases may be pursued.

In sum, I would argue that two parallel trends have contributed to the Chilean courts' increased activism in human rights issues: (1) judicial reform passed since 1994, which has changed the composition of the court and made it less dependent on the executive, and, more importantly, less dependent on the military, and (2) a visible reduction in what I have called 'military threat', which has allowed the courts to operate more independently. There are three empirical examples of reduced military threat in Chile. First, the military's reaction to the Contreras and Espinoza trials in 1996 was less harsh than expected. Second, the military's passive acceptance of Pinochet's arrest and the charges raised against both Pinochet and a number of other generals is the final 'proof' that they have accepted civilian dominance in political

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[55] RS-97-06, (29 July 1996:2).
[56] See Bickford 1998: 17, footnote 17 for detail on the reforms.
[57] RS-99-08, (12 October 1999: 3).
[58] This view was confirmed by the Chilean Ambassador to the US, Mario Artaza (former Ambassador to the UK), in an informal interview after a public meeting at UCLA in Los Angeles, 10 February, 2000. The Ambassador thinks that the charges against Pinochet might actually be pushed trough. Because of the slow bureaucratic proceedings of trials, it is expected that the lengthy trial process will not be completed before Pinochet dies.

matters and are willing to face the past.[59] Finally, 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, signals a new course in military politics. Izurieta is regarded as 'free of the burdens of past crimes associated with the Pinochet generation'.[60]

Table 5 sums up the relative position of Argentine and Chilean judiciaries' independence along the dimensions of decision-making autonomy and authority for the years of transition as well as for subsequent selected years when there has been a reversal in human rights polices:

Table 5: Changes in judicial autonomy and judicial authority over time

		Decision making ***authority***	
		Low	**High**
		Chile 1990	
Decision	**Low**	Argentina 1990	
making		Argentina 1986-87	Argentina 1983
autonomy	**High**	Chile 1996	
			Argentina 1999
			Chile 1999

The Argentine judiciary went from having a medium degree of both authority and autonomy at the time of transition. Both were severely curbed, first by Alfonsín in 1986 and 1987, and then by Menem in 1990. After judicial reforms in 1994 and 1996, the judiciary has displayed a relatively high degree of both authority and autonomy. The Chilean judiciary, by contrast, has gone through a much more linear development. From having hardly any autonomy and authority due to military direct and indirect influence at the transition in 1990, it progressed to showing medium levels of independence in 1996. The judicial reforms passed in 1998, combined with a further reduction in military threat, have enabled the courts to act more independently in 1998-1999 than any scholar would have predicted ten years earlier.

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 refuted 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 argued, occur when policy-making authority is *centred in a few hands* and where

[59] 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.
[60] RS-97-09, (11 November 1997:2).

the president can use institutional channels suitably closed to military influence (italics are mine). I have shown that their assumption that the executive favours an active human rights policy cannot be taken for granted.[61] Second, my empirical analysis of Chile and Argentina has demonstrated that an independent judiciary free to exercise the rule of law without deferring to executive preference or military threats/pressures may be equally influential in determining policy outcomes as an all-powerful executive.

If my argument holds true more generally, we would expect in the future to see more trials of (ex) military officers for gross human 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 positively extending the power of the courts vis-à-vis the executive. But as long as the military remains a strong force in politics, the exercise of judicial authority and autonomy will be restricted.

A fourth case where we might expect trials of military officers in the future is Uruguay, where the 'disappeared' are still an issue.[62] 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, President Sanguinetti, who has openly been in favour of forgetting the matters of the past and a judiciary dependent on the executive accounts for this inaction. The military has posed no visible 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 of military presence in political matters, 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 an independent judiciary on the political scene obviously influences the balance of power within government

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[61] President Sanguenetti in Uruguay's position on the human rights issue is a good example. As late as in 1998, he reassured the military that the issue of the 'disappeared' was closed (RS-98-01, 3 February 1998: 1).

[62] 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 in Uruguay, 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 make to locate burial places said 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. Sanguenetti 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 the Montevideo judge Reyes only two months later, hence upholding the prerogatives of the amnesty law (RS-97-05, 24 June 1997: 3).

institutions, which, in turn, may have a direct impact on policy outcomes, such as human rights matters.

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Appendix 1

Constitutional reforms affecting judicial autonomy and authority

Country	*Transition*	*Constitutional Reform Judicial independence*	*Rating of Constitutional Reforms*
Argentina	1983	1994, 1996	3
Belize	1981	1988	0.5
Bolivia	1982	1994	3
Brazil	1989	1998	1
Chile	1990	1997, 1999	3.5
Colombia	1958	1991, 1997	4
Costa Rica	None	None	0
Dominican Rep.	1966	1995	2
Ecuador	1978	1986, 1993, 1996, 1997	2
El Salvador	1984	1994, 1996	3
Guatemala	1985	1993	3
Honduras	1981	None	0
Mexico	None	1994	4
Nicaragua	1985	1995	1.5
Panama	1993	None	0
Paraguay	1993	1992	3
Peru	1980	1993	4
Uruguay	1984	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. 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.