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Domestic Rule of Law Gaps and the Uses of International Human Rights Law in Post-Atrocity Prosecutions: Argentina, Brazil, and Chile Transitional Justice Experiences

*Marcelo Torelly**

Abstract

This paper aims to identify and compare how international law has been mobilized to fill domestic rule of law gaps regarding the individual accountability for gross human rights violations in post-authoritarian transitions in Argentina, Brazil, and Chile. Mapping how courts —especially supreme courts— mobilize historical narratives to deal with the past, it argues that not only the institutional architecture but also its combination with a substantive historical understanding of the nature of the previous regime is important for accountability to happen. It explores the argument that in the aftermath of authoritarian rule, broader social support of the former regime influences judicial historical interpretation in favor of continuity between the authoritarian and democratic legal orders (promoting a sense of authoritarian legality adequacy). In the opposite way, broader knowledge of human rights violations and political pressure for accountability tend to decrease social support for authoritarian provisions, stimulating a perception of legal inadequacy that makes rule of law gaps explicit, which favors the use of international law as a subsidiary source that provides formal and legitimate legal criteria to address past wrongdoing. The wider the recognition of authoritarian rule as an unlawful regime, the better the chances that a global norm of individual accountability will make its way into domestic courts.

Keywords: Transitional Justice. Rule of Law. Argentina. Brazil. Chile.

1. Introduction

This paper aims to identify and compare how international law has been mobilized to fill domestic rule of law gaps regarding the individual accountability for gross human rights violations in post-authoritarian transitions in Argentina, Brazil, and Chile. Mapping how courts —especially supreme courts— mobilize historical narratives to deal with the past, it argues that not only the institutional architecture but also its combination with a substantive historical understanding of the nature of the previous regime is important for accountability to happen. It explores the argument that in the aftermath of authoritarian rule, broader social support of the former regime influences judicial historical interpretation in favor

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of continuity between the authoritarian and democratic legal orders (promoting a sense of authoritarian legality adequacy). In the opposite way, broader knowledge of human rights violations and political pressure for accountability tend to decrease social support for authoritarian provisions, stimulating a perception of legal inadequacy that makes rule of law gaps explicit, which favors the use of international law as a subsidiary source that provides formal and legitimate legal criteria to address past wrongdoing. The wider the recognition of authoritarian rule as an unlawful regime, the better the chances that a global norm of individual accountability will make its way into domestic courts[1].

2. The Use of International Law to Fill Rule of Law Gaps When Dealing with Gross Human Rights Violations

Constitutionalism, as viewed in liberal tradition, attributes the role to mediate relations between law and politics to domestic constitutions. In this way, law is able to regulate politics, while regulated politics is the channel to legal innovation. From an idealistic point of view, this distinction between law and politics is the cornerstone of electoral democracies limited by human rights. The idea of a constitution allows the democratic rule of law «paradox», where the popular will legitimize governance while it is simultaneously limited by counter-majoritarian human rights[2]. In this ideal rule of law architecture, «legality» means both «rule-by-law», *i. e.,* the predictability of formal law, and some sort of legitimation derived from «we the people», *i. e.,* substantive political legitimacy.

Authoritarianism produces a radical disruption in this relation. «Authoritarian legality»[3] may neither relate to the popular will nor be limited by counter-majoritarian rights. The distinction between law and power crumbles, but institutional tools of law making and enforcement may keep operating inside a formal framework that emulates the predictability of democratic law (the law's consistency) without its substantive legitimacy (the law's adequacy). Extreme experiences such as Nazism, where the majoritarian will is unlimited, or elite dictatorships, where both the popular will and counter-majoritarian tools are missing, produce a distressing situation in post-authoritarian democracies that aim to enforce a constitutional rule of law: how does democratic law relate to the legacies of a previous regime based on authoritarian legality?

When looking forward for individual accountability for gross human rights violations, a double-edged legal problem arises. On one hand, the use of formal but illegitimate rules may lead to injustice; on the other, legal solutions disregarding formal positive law may violate one of the foundations of democratic rule of law: no one can be convicted under *ex post facto* legal provisions[4].

The law's social adequacy is always imperfect and contingent. Democratic societies live with high levels of structural dissent stabilized by formal rule of

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[1] See also: Torelly, 2016.
[2] Habermas, 2001.
[3] As first introduced by Anthony Pereira, 2005.
[4] Neumann, Prittwitz, Abrão, Joppert Swensson Jr., Torelly, 2013.

law institutions that provide predictability. Looking for accountability to crimes perpetrated under the imprimatur of a different legal order may lead to what Jon Elster defines as a contradiction between forms of legal justice (or, in our terms, consistent rules) and «political justice»[5] based on substantive legal criteria (that try to recover the law's adequacy).

A *transitional* rule of law approach is demanded to balance the needs of the law's adequacy and consistency. In Teitel's words: «Whereas the conventional understanding of the conception of tyranny is the lack of the rule of law as arbitrariness, the transitional rule of law in the modern cases illuminates a distinctive normative response to contemporary tyranny. From its inception in the ancient understanding term "isonomy", the ideal of the rule of law emerges in response to tyranny. In ancient times, isonomy is forged in response to tyranny understood as arbitrary and partial enforcement of law. Because prior tyranny associated with lawmaking that is both arbitrary and unequal, the ancient understanding of the rule of law comprehended both values of security in the law and equal enforceability of the law. [...] Where persecution is systematically perpetuated under legal imprimatur, where tyranny is systematic persecution, the transitional legal response is the attempt to undo these abuses under the law»[6].

In this sense, a transitional rule of law approach, to be applied when authoritarian legality damages equality before the law and counter-majoritarian rights make legal rules socially inadequate, relies on substantive considerations regarding the legal framework of the previous regime (or what systems theory scholars call a «second level dissension»)[7]. Authoritarian legality relies on formal rules that are mostly illegitimate and used to promote or to hide human rights violations. Amnesty laws may both be used to legitimate peace-making purposes or prevent accountability[8].

Substantive analyses on the context and scope of law are fundamental to set democratic boundaries for amnesty processes, but this substantive analysis relies on substantive understandings of the nature of the past regime that are deeply connected to the social perception regarding political violence. In other words, a political judgment is necessary. The only way to identify a rule of law gap is to recognize some sort of substantive unlawfulness in the formal legal order of the previous regime. However, how can this political evaluation of social adequacy be legally constrained?

Looking back to transitional justice genealogy[9], one may argue that in its first moment, associated with the Nuremberg and Tokyo trials, international law tended to perform as the only rule of law criteria to confront past wrongdoing. In theoretical terms, this was only possible because of the very nature of totalitarianism: social order in both legal and moral terms was so disorganized that a huge perception of inadequacy consolidated, opening avenues to fully disregard

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[5] Elster, 2006: 104-105.
[6] Teitel, 2002.
[7] Neves, 2013: 25-26.
[8] AAVV, 2014.
[9] As first thought in Teitel, 2013.

a regime's formal law. In addition, in practical terms, the victor's justice was possible because of Germany's full defeat in the war.

In less extreme transitional rule of law scenarios, such as those of South America's 1980s and 1990s transitions, when democratic legal institutions had to deal with authoritarian legality, two radically distinctive features arose. First, transitions were not led by external powers after a massive defeat (Elster's idea of «double-endogenous transition» where disruption and remedy are domestic processes)[10]. Second, domestic institutions were more able to set up legal criteria with some social adequacy (and maybe even democratic legitimacy). Hence, international law appears not as the first or the only but as an alternative legal source in decision-making processes regarding transitional issues, offering formal and legitimate rule of law criteria to be applied when domestic courts identify rule of law gaps, which are understood as severe dysfunctions in the law's social and democratic adequacy.

As domestic courts primarily apply domestic legal provisions, international law is mainly mobilized when those courts identify problems in their own legal order and have an institutional tool to incorporate non-domestic legal criteria into their rationale or normative framework. Thus, a perception of the law's social inadequacy together with available institutional ways of domestic-international interaction favors the use of international law as legal criteria in domestic courts.

When rules «by law» lack rule «of law» legitimacy, one may use international law to find formal and legitimate legal criteria to be applied in contentious situations, recognizing and filling rule of law gaps and improving the social adequacy of domestic law under the boundaries and constriction of positive international law.

3. Making Authoritarian Legality Work

Broader or narrower judicial will to challenge previous authoritarian rule may relate to how a justice system operated in the former regime. How was authoritarian legality implemented? Pereira's comparative study illuminates key features regarding the justice systems in Argentina, Brazil, and Chile during military rule and democratization[11]. While Argentina's military junta expelled innumerable judges and prosecutors in order to enforce its rule, the justice systems in Brazil and Chile supported the military coup and its legality, and limited purges happen, evincing higher levels of consent between military rulers and legal elites.

The use of military courts to prosecute civilians is another important feature to be compared. In Brazil and Chile, military courts have tried civilians accused of illegal activities against the regimes. Exclusively military personnel composed Chilean courts, while in Brazil, a hybrid model emerged, with courts comprising both military and civil judges and with civil courts reporting to military ones and

[10] Elster, 2006: 93.
[11] Pereira, 2005.

vice versa. In Argentina, by its terms, the justice system was mostly set aside by the regime's repressive strategies. It comes as no surprise that while Brazil had a more «legalized» dictatorship (a «rule by law», not a «rule of law»), Argentina became known by its «clandestine» practices, such as kidnappings and forced disappearances, with Chile standing in between. A more legalized regime —a regime where courts enforce authoritarian legality— brings at least two sets of consequences.

Immediately, the availability of the justice system to prosecute political opponents affects the use of clandestine repressive strategies and the number of capital victims. The possibility to prosecute opposition members under the primacy of laws of exception that allow retrieving political rights, imprisonment and banishment creates a highly effective institutional tool for controlling and repressing society. On the other hand, when the justice system declines to apply exceptional measures standing for fundamental rights, the repressive apparatus operates in clandestine ways (in other words, under no formal legality or any «rule by law» at all). If a political prisoner is arrested and officially put in the State's custody, the chance of murder or disappearance is lower, as someone will be liable for those acts. If someone is kidnapped in a clandestine operation, public authorities can simply deny any connection to illegal repression.

The number of capital victims (of murdered or forced disappearances) in the three countries compared support this hypothesis. While official data for Argentina refer to about 30 thousand capital victims[12], Chile reports about three to nine thousand[13], and Brazil, less than 500[14]. This does not mean that there was less repression in Brazil or in Chile. Rather, the authoritarian governments just used different repressive policies, as the justice system was willing to cooperate or not.

However, the long-term consequences are far more severe. Highly institutionalized authoritarian legality is a byproduct of cooperation between the dictatorship leaders and the justice system. Thus, authoritarian legality was institutionalized not only among military and police personnel but also amid judges and prosecutors. This leads to a prevalent culture that justifies authoritarianism and its human rights violations as a historical contingency, not as an illegal attempt against democracy and the rule of law. In other words, it justifies authoritarian rule as adequate (or, at least, acceptable) to a specific historical context.

Authoritarian legality unbalances the law's social adequacy, becoming a preeminent problem for emerging democracies looking to establish a constitutional rule of law. Formal legality constitutes a set of consistent rules that are potentially incompatible with democratic principles. Transitional rule of law must rebalance the law's adequacy and consistence, and few situations are more challenging than those regarding amnesties and immunities granted by a former regime to its members. In the so-called «age of human rights accountability»[15], those legal

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[12] Comisión Nacional sobre la Desaparición de Personas, Argentina, 2003.

[13] Collins, 2011.

[14] Brasil, 2007.

[15] According to Lessa and Payne «the age of accountability has meant that amnesties laws around the world have face challenges from domestic, regional, and international courts [...] this tremendous

provisions became highly controversial, creating considerable political tension in the courts in charge of handling fundamental rights problems, especially constitutional courts[16]. To evaluate and rebalance the law's social adequacy, courts equalized political claims in a historical narrative that articulated the authoritarian past within democratic future expectations.

4. Argentina: *Breaking with Authoritarian Legality*

Argentina illustrates a case of radical rupture with authoritarian legality represented by impunity measures. The country was the first in the region to put on trial gross human rights violations from military rule, and at first, it used only domestic law provisions to do so[17]. Just after the end of military rule, in 1983, impunity measures were revoked, and the military junta that had ruled the country was prosecuted and convicted. Following this moment of justice, new laws were approved in 1986 and 1987, and a number of presidential acts, in 1989 and 1990, have in practical terms re-established amnesty to state personnel involved with the repression[18]. A new constitution was then enacted in 1994, breaking with the authoritarian legal order and leveraging the struggle for accountability.

All impunity measures were revoked in 2003, when anti-impunity Law 25.779 was approved. However, «doubts were expressed [...] concerning the validity of the Legislative decision, questioning whether parliament actually had the power to terminate a law with retroactive effect»[19]. These doubts relate to a wider contentious legal debate on the lawfulness of amnesties to gross human rights violations where international law plays a key role. Before and after the passing of the anti-impunity law, district and appeal courts around Argentina have used international law to argue against amnesty. Before, its scope was limited, and thus, it excluded gross human rights violations. Afterward, they withdrew domestic statutes of limitation, arguing that certain crimes were not subject to any statute of limitation under international law, and claimed that Law 25.779 did not criminalise new facts in a retroactive way, as international law had already typified both the specific criminal acts and the «crime against humanity» qualification decades before[20].

Yet, in 2001, two years prior to the legislative revocation of the impunity measures, in the *Poblete/Simon* case, a district court declared all impunity measures that reach crimes against humanity as «legally null and void». The Supreme Court confirmed this ruling in 2005[21]. To do so, it explicitly used international law and quoted the Inter-American Court of Human Rights ruling in *Velazquez*

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and unprecedented global progress suggest that we live in an age of accountability in which governments and international institutions are expected to hold perpetrators of atrocity legally responsible for their acts» (Lessa, Payne, 2012: *Introduction*).

[16] In line with Gerard Neumann, human rights at the international order and constitutional rights at domestic order both refer to the same kind of rights: fundamental rights. Neuman, 2013.

[17] Sikkink, 2011: 60-85.

[18] See Engstrom, Pereira, 2012.

[19] Bakker, 2005.

[20] Parenti, 2010: 3, 9-41.

[21] Corte Suprema de Justiça da Nação Argentina, 2005.

Rodrigues vs. Honduras that recognized the so-called «global norm of individual accountability», asserting the state duty to investigate and prosecute gross human rights violations. Argentinean courts used international law to emphasize that as the amnesty provisions were illegal under international law; the anti-impunity law was neither typifying «new» crimes with retroactive effects, as those crimes previously existed, nor retroacting *in pejus*, as the original benefice was unlawful.

Argentinean case law illustrates a tendency of convergence between domestic and international human rights law with constitutional law. According to Jackson, convergence happens when domestic courts see themselves as places for the implementation of international norms[22]. The Argentinean 1994 constitution has an explicit provision for convergence. In article 75, it states that international human rights treaties such as the American Convention on Human Rights have constitutional rank. Thus, when a judicial controversy regarding amnesty legality arises, courts were able to mobilize international law as a constitutional-level tool to improve the law's adequacy in reshaping the scope of the state duty to investigate and prosecute a special set of crimes: those «against humanity». *Velazquez Rodriguez v. Honduras* was not mandatory to apply to Argentina. The international ruling binds only Honduras. However, the Supreme Court has used case law of the Inter-American Human Rights Court to support its normative argument for the illegality of the amnesty provisions.

Nonetheless, Argentina's institutional architecture only partially explains the convergence of constitutional norms. Some sort of openness to international law is necessary but not sufficient for the enforcement of international norms. In Argentina, international law was used to make judges' arguments regarding the illegal nature of the dictatorship more explicit and to demonstrate the existence of positive legal boundaries that limit the possible scope of statutes of limitation under exceptional circumstances, as the illegal regime had practiced crimes against humanity.

Argentinean courts clearly state that what happened in the country was a dictatorship where the rule of law was fully missing and that the former regime used the state apparatus to systematically perpetrate gross human violations that are not justifiable under any circumstances. Courts historical interpretation of the nature of the previous regime (and consequentially, of the substantive quality of its formal law) leads to the identification of rule of law gaps that must be filled. Despite contextual similarities, this substantive historical interpretation of the nature of the regime is radically divergent from those found in Chile and Brazil.

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[22] In Jackson's typology convergence is «a posture that might view domestic constitutions a site for the implementation of international legal norms or, alternatively, as a participant in a decentralized but normatively progressive process of transnational norm convergence. [...] such a posture of *convergence* might be based on a universalist view of rights or on a positivist commitment to universalist values of international law set fourth in founding national documents; alternatively, instrumental, institutionalist concerns that "checks" on government from outside the polity are necessary to subserve domestic legal values may support a posture of convergence. Convergence might have weaker and stronger versions, entailing different forms of presumption. Scholars have made arguments for cosmopolitan approaches to the interpretation of basic rights, and some national constitutions manifest this posture incorporating specific international human rights instruments into their constitutions or treating them as of constitutional stature» (Jackson, 2010: 8-9).

Here, international law has been used to reinforce a black-or-white distinction between authoritarianism and democracy.

Besides explicitly qualifying the military rule as a «dictatorship», courts in Argentina also use the expression «state terrorism» to qualify what has happened in the country between 1976 and 1983, incorporating the narrative established by the National Commission on the Disappearance of Persons (also known by the Spanish acronym Conadep; the first truth commission ever)[23] to judicial rulings. The choice of words reveals the explicit antagonism that courts established between authoritarian and democratic rule, and it of course has practical implications. While prosecutions in Argentina frame human rights violations as «crimes against humanity» perpetrated by an illegitimate government, courts in Chile classify a very similar set of acts as «clandestine practices» that were mostly disconnected with the broader political structure of governance, incorporating Pinochet's authoritarian amnesty into democracy.

5. Chile: *Continuous Authoritarian Legality with Disruptions*

Although Chile has also implemented the global norm of individual accountability, including quantitatively prosecuting more dictatorship criminals than Argentina[24], the legal path to accountability has been substantively different. There are at least three distinctive features. First, while impunity measures were approved under democratic rule in Argentina, Chile's amnesty law dates back to 1978, in the midst of Pinochet's military regime (1973-1990). Second, in Argentina, both the courts and the parliament have been successfully mobilized against the amnesty law, which led not only to a declaration of unconstitutionality but also to the derogation of the law, whereas amnesty is still valid in Chile. Third, Argentina has converged with international law without any ruling against it. Chile, on the other hand, was convicted in the 2006 Inter-American Court of Human Rights *Almonacid Arellano* ruling, with which it has never fully complied.

These specific features together set in a broader contrasting picture: while the Argentinean dictatorship, facing high rates of disapproval, collapsed in 1983 after military defeat in the Falklands/Malvinas war, Pinochet's regime ended in 1990, one year after being defeated in a national referendum where 43% of the population supported him for a new eight-year term and 55% wanted open elections. This divisive scenario was never truly resolved, as shown by the yearly conflicts in the streets of Santiago de Chile on every anniversary of the coup d'état. If the Argentinean pathway can be seen as one of rupture, the Chilean one seems more like one of continuity with disruptions and evolutions.

In 1990, Chilean amnesty law faced a judicial challenge in the Supreme Court. Victims and relatives claimed that the law was not to be compatible with the new democratic rule, but the Supreme Court rejected this argument. Meanwhile, in

[23] Hayner, 2010: 7-18.
[24] See Balardini, 2013.

the very same year, a national truth commission was established. The so-called *Rettig report* from the commission would be launch in 1991, recognizing that at least 2,279 persons were killed for political reasons[25] and increasing public pressure against impunity.

Some progress regarding accountability happened in the following years when civil society organizations explored loopholes in the 1978 law's text, initiating prosecutions for crimes not explicitly covered by the amnesty[26]. Thus, how did Chilean courts use international law and the global norm of individual accountability? In 1998, when ruling the *Pedro Poblete Cordoba* case, the Chilean Supreme Court encompassed two key concepts from international law in an interpretation of domestic amnesty[27]. First, it introduced the prohibition of «blanket amnesties» under international law, stating that all alleged violations must be investigated, clarified and prosecuted prior to being amnestied. Second, it ruled that as Chile had declared a «state of war» during military rule, the provisions from the Geneva Conventions must applied to prisoners under state custody. Some rule of law gaps were recognized, with international law helping to limit impunity, but the courts have never fully recognized the regime's illegality.

In contrast to what happened in Argentina, at this point, international law was not mobilized to set up legal/illegal differentiations challenging domestic legal provisions. Rather, it was used to improve interpretations of domestic law. Courts started to build a set of arguments where some crimes, such as forced disappearances, were framed as kidnappings associated with inhumane treatment. Under the argument that kidnapping was already a crime according to Chilean law in the 1970s, that inhumane treatment during the state of war violates the Geneva Conventions, and that the prisoners had not been released and their remains had not been found, courts found legal bases for prosecution not by challenging the amnesty law as illegal but by circumventing it.

In Chile's constitution, human rights are recognized as «a limitation to state sovereignty»[28], but they do not have any special constitutional rank. Therefore, the Supreme Court may refer to international law for interpretative or subsidiary criteria but not as a binding normative source with a hierarchical prerogative over domestic statutes. Even without an institutional architecture as favorable as that in Argentina, Chilean courts were able to start prosecuting human rights crimes by creating legal exceptions in the authoritarian legality framework. Social pressure for accountability grew strong as former dictator Augusto Pinochet was arrested in London, in October 1998[29], and with the launch of the *Valech report*, from the second Chilean national truth commission, in November 2004. All these elements combined with the Inter-American ruling against Chilean amnesty law in 2006[30], pushing courts toward a broader recognition of some of the repressive actions of Pinochet's regime as unlawful.

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[25] Comisión Nacional de Verdad y Reconciliación Chile, 2013.
[26] Collins, 2010.
[27] Chile, 1998.
[28] Chile, *Constitución Política de Chile*, article 5th.
[29] See Roht-Arriaza, 2005.
[30] Inter-American Human Rights Court, 2006.

Chile's answer to the *Almonacid Arellano* ruling clearly illustrates a practice of constitutional engagement[31]. The Inter-American Court determined that the Chilean State must «ensure that Decree Law No. 2.191 does not continue to hinder further investigation [...] as well as the identification and, if applicable, punishment of those responsible» for «the extra-legal execution of Mr. Almonacid-Arellano» as well as for «those responsible for similar violations in Chile»[32].

Chile has never fully complied, but just a few weeks after the international ruling, the Supreme Court introduced its rationale into domestic law interpretation, noting for the first time the «*imprescritibilidad*» of crimes against humanity (*i. e.,* they are not subject to statutes of limitation) and quoting the Inter-American Court decision in order to strengthen its general argument on this prohibition from international law[33].

Even though it has not been fully complied with, the Inter-American Court ruling has been mobilized in several other cases[34] to produce constitutional engagement enforcing human rights boundaries to domestic amnesty. Distinctively from Argentina, where international law was introduced in the transitional rule of law scenario both as a positive legal provision preventing the application of statutes of limitation and as an argument against impunity measure's legality, in Chile, it has worked only as a *limitation* to an amnesty provision considered valid and legal. The amnesty law in Chile was not derogated. However, international law arguments have thickened the spectrum of prosecutorial possibilities, where loopholes in the amnesty law have been used, and limitations from international law have been applied to allow broader accountability.

In this more divisive social environment, it comes as no surprise that Chilean courts did not embrace a historical interpretation that treats the military rule as an unlawful dictatorship. While in the Argentinean case, legal terms such as «dictatorship» and «state terrorism» were incorporated into the legal rulings, in Chile, the prevalent trend is to refer to a social conflict where a «state of war» was declared. Legal rulings did not engage against authoritarian legality: they focused on situations where no legality at all was followed, such as forced disappearances and illegal detentions, excluding amnesty on a concrete basis. In the Chilean judicial narrative of the military regime, the rule of law gap seems smaller than that in the Argentinean account.

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[31] In Jackson's typology constitutional engagement is «founded on commitments to judicial deliberation and open to the possibilities of either harmony or dissonance between national self-understandings and transnational norms. [...] a posture of engagement might assume simple that interpretation of national fundamental law can be improved by engagement with transnational norms, on those occasions where lawyers or jurists have some relevant knowledge and where issues are relatively "open" within the domestic discourse. Alternatively, an engagement posture might proceed on the idea that the concept of domestic constitutional law itself must now be understood in relation to transnational norms, an assumption that might argue for engagement with the transnational across a wider range of cases and issues» (Jackson, 2010*:* 09).

[32] Inter-American Human Rights Court, 2006: ruling section, para. 5-6.

[33] Corte Suprema de Chile, 2006.

[34] *E. g.:* Corte Suprema de Chile. Segunda Sala Criminal. Rol núm. 3125-04, 13 January, 2007; Corte Suprema de Chile. Segunda Sala Criminal. Rol núm. 3452-06, 10 May, 2007.

Chilean application of the global norm of individual accountability mixes some enforcement of international human rights law with the preservation of the 1978 amnesty law inside the framework of 1980s Pinochet Constitution (still in force). When convictions happen, a gradual (or «half») prescription is applied, limiting the terms of imprisonment[35]. In contrast to Argentina, where international law was mobilized to fully disregard the military rule, in divisive Chile, its use is limited to the recognition of certain kinds of severe violations as excluded from amnesty.

6. Brazil: *Identity and Continuity Between Authoritarian and Democratic Legal Orders*

As Chile did in 1978, the Brazilian dictatorship approved an amnesty law in 1979. Between 1974 and 1979, Brazilian Civil Society advocated for «broad, general and unrestricted» amnesty for all political prisoners and regime opponents, including those in armed resistance, but the regime ultimately approved a limited amnesty provision excluding armed resistance members, that courts interpret as «bilateral amnesty», where they extend its effects to military personnel involved in human rights violations[36]. In addition, as Chileans did in the 1990s, Brazilians went to the Supreme Court in 2008 to challenge impunity, claiming that the new democratic constitution from 1988 was incompatible with impunity for gross human rights violations and that amnesty should be granted only to those who opposed the military rule. However, in 2010, the Court upheld the legal interpretation, assuring bilateral and unlimited effects[37].

The very same year, the Inter-American Court on Human Rights issued a decision against Brazil declaring that «the provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil»[38]. However, in contrast to Chile and Argentina, Brazil has neither engaged nor converged

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[35] According to Roht-Arriaza, «From 2007 on, that court [Chile's Supreme Court] has employed a device known as "gradual (or half) prescription" to reduce the sentences of convicted members of the security forces. "Gradual prescription", according to section 103 of the criminal procedure code, allows a judge to reduce the sentence based on the amount of time between the commission of the crime and the moment when the defendant was charged; if more than half the applicable statute of limitations had run at that point, gradual prescription requires that two mitigating circumstances and no aggravating circumstances be added to the range of permissible sentencing options. Gradual prescription, because it is based on the passage of time and not the nature of the crime, according to a Supreme Court majority applies even in cases of international crimes where no statute of limitations can apply» (Roht-Arriaza, 2015: 378).

[36] Abrão, Torelly, 2012.

[37] For broader analysis on the topic, see Torelly, 2012: 299-352.

[38] Inter-American Human Rights Courts, 2010: paragraph 325(3).

with the international ruling. Courts keep resisting international law and mostly ignore the Inter-American ruling.

Why does Brazil resist the global norm of individual accountability? Two interconnected features help to answer this question. First, the way domestic institutions deal with international human rights norms. Second, the way the democratic judiciary relates current legal order to dictatorship authoritarian legality.

Concerning institutional architecture, Brazil stands in between the Argentinean and Chilean models. Until a decade ago, the new democratic constitution had very similar provisions to those found in Chile, stating that «Brazil's international relations should be governed» taking into account «the prevalence of human rights»[39]. No special rank was granted to international human rights norms, which leads to a general judicial interpretation that international human rights norms have a status similar to ordinary legal provisions.

After Constitutional Amendment 45, in 2004, all human rights norms ratified by a qualified majority in the National Congress were granted constitutional rank[40]. Constitutional reform aimed to make clear that human rights norms have constitutional status in the domestic legal system, replicating the Argentinean institutional design but adding the need to have qualified majority approval. Notwithstanding, a judicial controversy was established regarding the legal rank of those international treaties ratified before the constitutional reform, including the American Convention on Human Rights and the Rome Statute of the International Criminal Court. Ruling over the controversy, the Supreme Court understood that those norms now have neither ordinary rank (as in Chile) nor constitutional rank (as in Argentina). Rather, they have a «supra legal» status[41], standing above ordinary rules but below constitutional norms.

This institutional architecture is more favorable to international human rights than the Chilean one, as the only occasion in which the enforcement of human rights norms is prevented is when a collision with constitutional norms occurs. This leads us to the second feature explaining resistance to the global norm of individual accountability in Brazil: the Supreme Court's interpretation of the amnesty law and the dictatorship's authoritarian legality.

When ruling on the claim against amnesty for gross human rights violations, the Supreme Court has argued that the 1979 amnesty law was Brazil's inaugural step toward democracy and was «constitutionalized». Brazil's new democratic constitution was written in a Constitutional Assembly convened by an amendment to the old military rule constitution of 1967-1969[42]. This amendment, reiterates the text of the 1979 amnesty law, which has led some radical Supreme Court members, such as justice Gilmar Mendes, to understand the «bilateral»

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[39] Brazil's Federal Republic Constitution, article 4(II).
[40] Brazil's Federal Republic Constitution, article 5 (para. 03).
[41] Piovesan, 2008.
[42] Brazil. *Constitutional Amendment n.º 26/1985* (to 1967-69 Constitution).

amnesty as a pre-constitutional commitment limiting the scope of the national constitutional assembly[43] and the more moderate majority to rule that the constitutional content of the amnesty prevents judicial review of this piece of law. According to the Court, only the National Congress has the prerogative to change the amnesty law, with no regard to eventual problems concerning *retroatio in pejus* to which this decision would lead.

In this sense, the Supreme Court's historical narrative does not reject the military rule and its amnesty as incompatible with the rule of law. Rather, it actually establishes a legal continuity between authoritarian and democratic rule by applying Carl Schmitt's *Verfassungslehre* idea of constitutional identity and continuity[44].

The Inter-American ruling took place after the Supreme Court upheld the law, so the amnesty controversy will be back on the Court's agenda in the coming years. Meanwhile, something has changed: regardless of the Supreme Court's decision, considering the *Gomes Lund* ruling, federal prosecutors have opened 190 investigations and initiated prosecutions against at least 10 former state officials engaged in repression[45]. The key argument is that regardless of the Supreme Court's recognition of a general amnesty provision, international law establishes some legal exceptions[46]. In a legal context where courts decline to establish a stronger distinction between authoritarian and democratic rule, rather the opposite occurs, where legal continuity and constitutional pre-commitments are affirmed by the Supreme Court. This way of argumentation uses a similar approach to the one that succeeded in Chile, as it poses limits to amnesty without questioning the regime's authoritarian legality.

Regardless of the broader institutional openness, the bigger the social division regarding the historical understanding of the conflict, the smaller the scope of the application of international law as a subsidiary source of law. While Chile has had two truth commissions investigating and recognizing violations, pushing society (and courts) toward a more critical approach to the military rule, Brazilian armed forces still deny that human rights violations occurred during military rule. The smaller historical accountability is reflected in courts understanding of the law's adequacy in the previous regime, with judges repeating the regime's historical narrative of a conflict where both sides exceeded the limits and adopting a bilateral amnesty that brings peace. Without strong public recognition of human rights violations, courts' historical narrative perpetrates what Cohen describes as a «state of denial» regarding human rights violations, preventing the incorporation of legal tools from international law regarding crimes against humanity[47].

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[43] Torelly, 2013, 55.

[44] Justice Mendes actually quotes the Spanish translation of Schmitt's *Verfassungslehre* to justify that the 1987-1988 Constitutional Assembly that wrote Brazilian democratic constitution could not change the «bilateral» amnesty clause (page 08 of his individual vote).

[45] See Ministério Publico Federal (Brazil). Grupo de Trabalho Justiça de Transição, 2014.

[46] Ministério Publico Federal (Brazil). 2.ª Câmara de Coordenação e Revisão, 2011.

[47] Cohen, 2013.

Table 01 summarizes some comparative features regarding transitional justice and accountability in Argentina, Brazil, and Chile.

Table 01. Amnesty and Fundamental Rights: Argentina, Brazil, and Chile

	Argentina	*Brazil*	*Chile*
Military Rule	1976-1983	1964-1985	1973-1990
Main Repressive Practices	Clandestine	Authoritarian Legality	Clandestine and Authoritarian Legality
Amnesties (and impunity decrees)	1983, 1986, 1987, 1989, 1990	1979	1978
New Constitution After Military Rule	1994	1988	No
Amnesty Derogation	2003	No	No
Amnesty Judicial Review	Yes	No	No
Truth Commission Reports	1984	2014	1991, 2004/2011*
Criminal Convictions	Yes	No	Yes
Inter-American HR Court Conviction	No	2010	2006
International HR Norms Domestic Status	Constitutional	Supra Legal	Ordinary
Reaction to International Law (regarding impunity)	Convergence	Resistance	Engagement
Judicial Definition of the Dictatorship	Dictatorship; State Terrorism	Military Rule; Revolution	State of War
Relationship with Previous Legal Order (regarding impunity)	Rupture	Continuity	Continuity with Disruptions

* Original report/Second report.

7. Tentative Conclusions: *A Problem of Adequacy*

Strictly focusing on institutional architecture, one may argue that Argentina's tendency for constitutional convergence regarding the global norm of individual accountability derives from the rank granted to human rights norms in the 1994 constitutional reform. With no disregard to this argument, examples from Brazil and Chile bring some doubts to this assumption. While international law in Brazil has a superior rank to that in Chile, the latter has moved into an engagement

model, while the former has resisted implementing international law as a relevant criterion when addressing gross human rights violations of the past regime. Even the Argentinean case may relativize this argument, as accountability, with its ebbs and flows, began even before the constitutional reform.

A well-accepted argument in political science regarding legal change and accountability focuses on the political level. Kathryn Sikkink argues that «political opportunities [for accountability] don't exist in the abstract but need to be perceived and constructed» further noting that «political actors in Argentina face a more conductive context for their demands after the transition to democracy, yet these groups were also more likely than some of their counterparts in other countries to perceive and create political opportunities»[48]. Translating this argument from political science to legal theory, one may say that when social actors increase political tension, they challenge pre-established patterns regarding the law's social adequacy.

Transitional rule of law problems challenge law's consistency, showing that stable rules from authoritarianism are socially inadequate for democratic constitutional governance (*i. e.,* majoritarian governance limited by human rights). A rule of law gap is mainly a problem regarding the democratic adequacy of formal rules in the previous regime. When deciding transitional rule of law cases, courts embrace a historical narrative about the previous regime. The more this historical narrative emphasize the previous legal order's unlawfulness, the greater the chances for international law to be called into action in helping reestablish the law's consistency on a more adequate level to fill rule of law gaps.

Historical narratives are built mainly outside the legal system. Thus, both judgments regarding the social legitimacy of previous regimes and the amount of knowledge concerning human rights violations play a role. In Argentina and Chile, broader knowledge of human rights violations increased the pressure for courts to react to the law's inadequacy. In the first case, courts have incorporated the narrative regarding «state terrorism» to justify the application of the most severe criminal law tools available in both domestic and international legal orders. In the second and more divisive social scenario, courts do not classify the previous regime as illegal. The word «dictatorship» is missing, but the truth-seeking process introduced a narrative on gross human rights violations that allows a limited use of international law concepts together with domestic provisions, as those crimes were not admitted even under authoritarian legality.

Social perceptions regarding the previous regime help explain why Argentina was better able to enforce international human rights law regardless of having never been ruled against by the regional human rights court. Chile was able to partially implement *Almonacid Arellano* and promote some accountability insofar the social perception of Pinochet's regime started to change. This culminated in an apology by the judges for its omission during military rule[49] and the declaration by President Bachelet that the derogation of amnesty law will be a priority

[48] Sikkink, 2011: 82.
[49] BBC, 2013.

in her new term in office[50]. Brazilian resistance to the global norm of individual accountability regardless of its more open institutional architecture illustrates the key argument stated here: legal change at the consistency level only occurs after broader change in the perception of the law's adequacy. Institutional architecture favoring the incorporation of international law fails to succeed when courts do not recognize gaps of any kind in domestic rule of law, and this recognition demands a historical narrative connected to a substantive view of the past regime.

Bibliography

AAVV (2014). *The Belfast Guidelines for Amnesty and Accountability,* University of Ulster, Transitional Justice institute.

Abrão, P., Torelly, M. (2012). *Resistance to change: Brazil's persistent amnesty and its alternatives for truth and justice,* in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, New York, Cambridge University Press, 152-181.

Bakker, C. A. E. (2005). *A Full Stop to Amnesty in Argentina The Simón Case,* «Journal of International Criminal Justice», 03, 05, 1107.

Balardini, L. (2013). *América Latina en búsqueda de memoria, verdades y Justicia por crímenes de lesa humanidad. Una mirada en clave regional,* in CELS, *Derechos Humanos en Argentina - Informe 2013*, Buenos Aires, Siglo XXI, 51-131.

BBC (2013). *Chile's judges apologize for their actions after coups*. September 4th, available at: *http://www.bbc.com/news/world-latin-america-23967816.*

Brasil (2007). *Direito à Memória e à Verdade*, Brasília, Secretaria Especial de Direitos Humanos da Presidência da República.

Cohen, S. (2013). *States of denial: Knowing about atrocities and suffering*, London, John Wiley & Sons.

Collins, C. (2010). *Human Rights Trials in Chile during and after the «Pinochet Years»,* «International Journal of Transitional Justice», 04, 01, 67-86.

— (2011). *Post-transitional justice: Human rights trials in Chile and El Salvador*, Philadelphia, Penn State Press.

Comisión Nacional de Verdad y Reconciliación, Chile (2013). *Report of the Chilean National Commission on Truth and Reconciliation*, Ithaca, University of Notre Dame Press.

Comisión Nacional sobre la Desaparición de Personas, Argentina (2003). *Nunca Más*, Buenos Aires, Eudeba, Eight Edition.

Corte Suprema de Chile (1998). *Segunda Sala Criminal. Rol núm. 469-98, «Pedro Poblete», Judgement of September 9th.*

— (2006). *Segunda Sala Criminal. Rol núm. 559-04, Hugo Vásquez Martínez and Mario Superby Jeldres case. December 13th.*

Corte Suprema de Justiça da Nação Argentina (2005). *Causa 17.768, «Poblete/Simon» Judgment of June 14th.*

Elster, J. (2006). *Rendición de Cuentas. La Justicia Transicional en Perspectiva Histórica*, Buenos Aires, Katz.

Engstrom, P., Pereira, G. (2012). *From Amnesty to Accountability: The Ebbs and Flows in the Search for Justice in Argentina,* in F. Lessa, L. A. Payne (eds.) (2012), *Amnesty in*

[50] MercoPress, 2014.

the Age of Human Rights Accountability: Comparative and International Perspectives, New York, Cambridge University Press, 97-122.
Habermas, J. (2001). *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, «Political Theory», 29, 06, 766-781.
Hayner, P. (2010). *Unspeakable Truths*, London, Routledge.
Inter-American Human Rights Court (2006). *Almonacid Arellano vs. Chile. Judgement of September 26th.*
— (2010). *Julia Gomes Lund and others vs. Brazil. Judgment of November 24th.*
Jackson, V. (2010). *Constitutional Engagement in a Transnational Era*, New York, Oxford.
Lessa, F., Payne, L. A. (eds.) (2012). *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, New York, Cambridge University Press.
MercoPress (2014). *Bachelet government seek to repeal dictator Pinochet's Amnesty Law.* September 13th, available at: *http://en.mercopress.com/2014/09/13/bachelet-government-seek-to-repeal-dictator-pinochet-s-amnesty-law.*
Ministério Publico Federal (Brazil). Grupo de Trabalho Justiça de Transição (2014). *Actividades de Persecução Penal Desenvolvidas pelo Ministério Público 2011-2013,* Brasília.
Ministério Publico Federal (Brazil). 2.ª Câmara de Coordenação e Revisão (2011). *Documento n.º 02/2011,* in «Revista Amnistia Política e Justiça de Transição», 6, 358-371.
Neuman, G. L. (2013). *Human Rights and Constitutional Rights: Harmony and Dissonance*, «Stanford Law Review», 55, 5, 1863-1900.
Neumann, U.; Prittwitz, C.; Abrão, P.; Joppert Swensson Jr., L., and Torelly, M. D. (eds.) (2013). *Transitional Justice - Das Problem gerechter strafrechtlicher Vergangenheitsbewältigung*, Frankfurt, Peter Lang.
Neves, M. (2013). *Transconstitucionalism,* Oxford, Hart Publishing.
Parenti, P. (2010). *A Aplicação do Direito Internacional no Julgamento do Terrorismo de Estado na Argentina,* «Revista Amnistia Política e Justiça de Transição», 04, 39-41.
Pereira, A. W. (2005). *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*, Pittsburgh, University of Pittsburgh Press.
Piovesan, F. (2008). *Hierarquia dos tratados internacionais de protecção dos direitos humanos: jurisprudência do STF*, «Revista do Instituto de Hermenêutica Jurídica», 06, 105-130.
Roht-Arriaza, N. (2005). *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, Philadelphia, University of Pennsylvania Press.
— (2015). *After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity,* «Human Rights Quarterly», 37.
Sikkink, K. (2011). *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, New York, WW Norton & Company, 60-85.
Teitel, R. (2002). *Transitional Justice,* New York, Oxford University Press.
— (2013). *Transitional Justice Genealogy*, «Harvard Human Rights Journal», 16, 69-94.
Torelly, M. (2012). *Justiça de transição e estado constitucional de direito: perspectiva teórico-comparativa e análise do caso brasileiro,* Belo Horizonte, Fórum, 299-352.
— (2013). *Historische Deutungen und Transitionale Gerechtigkeit: Anmerkungen für eine vergleichende Debatte,* in Neumann, U. *et al.* (eds.), *Transitional Justice - Das Problem gerechter strafrechtlicher Vergangenheitsbewältigung*, Frankfurt, Peter Lang.
— (2016). *Governança Transversal dos Direitos Fundamentais*, Rio de Janeiro, Lumen Juris.