'Rule of Law' in Transition:
The Chilean Judiciary, Globalized Norms, and the Repatriation of the Pinochet Case

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ABSTRACT

This paper examines the reform of the judiciary in Chile in three converging contexts: 1) an international context featuring a developing global 'epistemic community' (community of shared belief across borders) of legal theorists, practitioners, and international institutions promoting the idea of linking '*liberal* rule of law' with global norms of legitimate democratic governance; 2) a domestic context still feeling its way towards a revised understanding of justice, citizenship, and national identity under the 'rule of law' after dictatorship; and 3) an institutional-ideational context of the post-authoritarian judiciary itself, emphasizing the generational, ideational, pedagogical and philosophical shifts within a judiciary seeped in a positivist-legalist tradition that has been implicated in the legal legitimation of that dictatorship. These cross-cutting forces shaping the understanding of 'rule of law' and the judiciary's role in democratic transition and consolidation are then examined and evaluated to analyze the suprising advance and equally surprising denouement of the repatriation phase of the Pinochet Case (March 2000-July 2001).

When scholars of comparative democratization and their counterparts in the policy world speak of "democratic transition," there is a general, underlying consensus regarding what that terms means. There may be ongoing controversy regarding how, where and when it begins and, most notably, when it ends and moves on to "consolidation."[1] but for most, "transition" has come to mean (in the pre-Iraq era at least) a distinctive form of regime change: the gradual, actor-driven process leading from a less democratic regime towards a more democratic regime, measured in terms of liberalizing changes in state institutions, civil-military relations, and civil society's revival. This consensus view, in spite of its quasi-teleological overtones, clearly reflects a normative bias favoring liberal, electoral democracy over other regime types, tempered by the recognition that constructing a democracy takes specific political skills. Following on the textbook experiences of Southern Europe in the 1970s and building upon the patterns set in Latin America and other regions in the two subsequent decades, studies of "transition" quickly took on a distinctly didactic quality, forming a practically-oriented, "how-to" compendium of better and worse strategies that was designed to cut the learning curve for later democratizers, most notably the post-Communist countries of Central and Eastern Europe.[2]

Given the real human costs of authoritarianism and the premium set on regime change without violence, this didacticism and lesson-based analysis seems well intentioned, if not well justified. However, in the 1990s, this earlier community of "transitologists" has since arguably spawned a veritable "transition industry," and as such has come in for criticism in recent years as purveyors of a "one-size-fits-all" approach that is vulnerable to easy solutions and buzzwords in place of complex recommendations

that take into consideration the great variety of cultural, historical, and institutional settings in which democratic transition takes place.[3] Among these buzzwords, "rule of law" has enjoyed a particular cachet, as it brings together the two competing paradigms of globalization – the corporate-led promotion of markets and the NGO-led promotion of human rights – under a single concept that both sides can agree is essential to the foundation and functioning of a new democracy. At the same time, following Ruti Teitel's groundbreaking work, what goes through "transition" is arguably not only the legal order and the institutions that uphold it, but also the very *meaning* of the law, the *identity* of who makes it and who is subject to it, and the *legitimacy* of the state based upon whether citizens trust the state to enforce it equitably.[4] Moreover, "rule of law" and its globalized meaning are being promoted from *outside* the domestic sphere at precisely the moment when political community is being reconstituted from *within*, and when civil society is debating its identification with a state which may or may not have seen a formal break with the authoritarian legal order.

From this perspective, far from being a neutral term invoking technical reform according to apolitical universal standards, "rule of law" in transition settings can easily become a highly-charged locus for political controversy over meaning, identity, and legitimate authority that reflects the very particular cultural and historical relationship between citizens and the law in a given national community. Making a transition in the three affective and epistemological areas of meaning, identity, and legitimacy regarding "rule of law" is equally important to democratization as are the design and functioning of concrete institutions like courts and normative frameworks such as legal codes. Not only

must "rule of law" be seen, it must be widely felt and believed in by members of the democratizing political community.

It is through this interpretive prism regarding "rule of law" that this paper examines the reform of the judiciary in Chile, the Latin American country perhaps most closely identified with both free markets, on the one hand, and authoritarian enclaves, on the other. I will present Chile's reforms in three converging contexts: 1) an international context featuring a developing global "epistemic community" (community of shared belief across borders) of legal theorists, practitioners, and international institutions promoting the idea of linking "*liberal* rule of law" with global norms of legitimate democratic governance; 2) a domestic context still feeling its way towards a revised understanding of justice, citizenship, and national identity under the "rule of law" after dictatorship; and 3) an institutional-ideational context of the post-authoritarian judiciary itself, emphasizing the generational, ideational, pedagogical and philosophical currents within a judiciary seeped in a positivist-legalist tradition that has been implicated in the legal legitimation of that dictatorship.

These cross-cutting forces shaping the understanding of "rule of law" and the judiciary's role in democratization are then examined and evaluated to analyze the surprising advance and equally surprising denouement of the repatriation phase of the Pinochet Case (March 2000-July 2001). Specifically, I argue that the corporate culture of the Chilean judiciary had been modified just enough from contacts with or influence of the global epistemic community on "liberal rule of law" and internal transformations in judicial ideas and norms to permit the case to go forward, but not enough for it to go to trial. At the same time, a similar incomplete transformation has taken place within the

state as successive Concertación governments navigate the "rule of law" controversy while weighing its international image against domestic stability concerns. The strategic maneuvering of the Lagos administration prior to and during the repatriation phase of the case reveals much about the democratic state and its vulnerability to the temptation to invoke "sovereignty" and "rule of law" as fundamental legitimating symbols in a country still divided over whether the law can and should apply equally to all. Its claims to neutrality notwithstanding, the government's overt gestures supporting judicial autonomy were highly political and deeply calculated to demonstrate to the world that Chile could try Pinochet at home while all the time counting on such an "independent" judiciary to act on its traditional conservative culture and its legalistic definition of "justice." While it may appear that, particularly in cases of legal systems entrenched with authoritarian beliefs and practices, judicial reform during democratization must come from "above" or from "outside," this case reveals the importance both of reform from the "inside" of the judiciary and its culture, and of the full commitment of the state to changing beliefs about the law and the substantive content of justice within its own ranks and within society as a whole. Far from being a simple matter of setting clear rules which automatically establish stable, equitable relations among citizens, promoting "rule of law" in a democratizing country invites controversy, conflict, and debate of the most necessary but most difficult kind regarding the meaning of citizenship and political community, and the role of the democratic state in providing that meaning and identity.

The International Context:

The Cosmopolitan-Liberal Consensus, Rule of Law and the "New Legal Orthodoxy"

In the 1990s, following the fall of the Berlin Wall and coinciding with the apogee of the "Washington Consensus" on neoliberal economic reform, "rule of law" became the watchword of Western governments, multinational corporations and investment firms, and international financial institutions, all of whom preached the gospel of free markets to democratizing countries as the correlate of, and precondition for, liberal political democracy. Specifically, "rule of law" – defined as the establishment of and widespread respect for a constitutionally-centered legal system based upon liberal principles of individual rights and an independent judiciary to enforce those laws equitably – would protect property rights and therefore guarantee economic activity independent of arbitrary control by the state, thus complementing other kinds of laws designed to free the individual from state domination.[5] There was, at the same time, a distinctly cosmopolitan edge to this set of liberal prescriptions, in that they implied that adopting universal practices in the legal as well as political and economic policy spheres would yield material and symbolic benefits in the form of loans, investment, and international prestige. Conversely, they also implied a coercive element as well, as failure to bring one's country up to the liberal "rule of law" standards expected by key transnational economic actors the could result in regime-threatening economic pain via the denial of loans or the diversion of key direct and indirect foreign investments.

At the same time, this was only half of what I have described elsewhere as the "cosmopolitan-liberal consensus" that coalesced in the globalizing international context of the past decade, and only half of the quasi-coercive pressure regarding "rule of law"

standards faced by states undergoing democratic transition.[6] The other half, both fittingly and ironically, was comprised of non-governmental organizations, international institutions, and other transnational actors advocating a universal concept of human rights and a new concept of sovereignty which placed individual rights over the state's right to non-intervention. While ostensibly opposing one another in the broader globalization debate, both sides of this liberal coin conceived of "rule of law" as universal enforcement of laws protecting individuals from arbitrary state action, and both acted transnationally to change state behavior in line with such universal standards.[7] NGOs such as Amnesty International, Human Rights Watch, and the Lawyers' Committee for Human Rights, together with their local allies, have made headlines around the world and have been instrumental in the campaign to shame and persuade governments to confront human rights abuses in areas such as indigenous rights, child labor, and political detentions;[8] prominent legal scholars fashioned theoretical arguments for a "right to democratic governance" in international law;[9] judges from varied nations begin to meet and cite one another's' decisions to support the internalization of international law and regulatory norms into often intransigent domestic contexts;[10] and UN Secretary General Kofi Annan went as far as to proclaim that states that mistreated their citizens could no longer count on the international community to support their right to "self-determination," but rather would face ostracism and perhaps even military action. [11]

Moreover, this variation on "liberal rule of law" also looked for specific uses of the law during transition, most notably the rejection of impunity in what Teitel has called "historical justice."[12] Truth and Reconciliation commissions and trials of prominent regime leaders were favored over negotiated or blanket amnesties.[13] Similarly, in the

absence of action by domestic courts and to shame newly democratic governments, these groups and their domestic allies pushed claims to universal jurisdiction for crimes against humanity perpetrated by pre-transition authoritarian regimes, as seen in their support for the attempt to extradite Pinochet to London, the near-successful attempt to try Habré in Sénégal, and the successful extradition of Milosevic to the Hague.

In an odd way, while the neoliberal branch of the cosmopolitan-liberal consensus viewed "rule of law" as an inherent stabilizer for transition settings and as such the key to successful democratization, their counterparts in the human rights community have used "rule of law" to purposefully and strategically de-stabilize pacts made with exiting authoritarians. In both cases, however, what is shared is the belief that it is both morally and ideologically indicated that newly democratizing governments and societies be held to "higher" universal standards, and that it is legitimate for external or transnational actors to advance these standards within domestic contexts previously shielded by the traditional norm of state sovereignty. It is for this reason that Dezalay and Garth speak critically of a "new legal orthodoxy" that is adding yet another layer of unrealistic expectations on states whose politically and economically divided societies are both hungry for quick fixes and yet dangerously vulnerable to such single-minded approaches to their complex problems.[14]

This orthodoxy, like the fiscal prescriptions of the Chicago Boys in Pinochet's Chile or the free-trade project of the technocratic elite in Salinas-era Mexico, has authoritarian overtones, despite its liberal philosophical roots. First, it seems to imply that there is a caste of enlightened specialists in "rule of law" who can reshape societies from the top-down (or outside-inside) according to a "civilizing mission." In the

literature on the transnational diffusion of ideas and knowledge, most of the images employed are those stressing horizontal or quasi-egalitarian configurations, most notably "advocacy networks" connecting like-minded members of global civil society,[15] and "epistemic communities" joining those sharing beliefs in communities based upon mutual respect and expertise that reach across the state-society borders.[16] It must also be recognized, however, that the actions of such transnational idea advocates can be perceived within the domestic context as a force for domination, not liberation, much as the "law and development" movement and the Alliance for Progress were viewed in the 1960s in Latin America.[17] Similarly, many of those advocating particular forms of "rule of law" reform in the last decade have come in for criticism from within domestic recipient contexts, most notably those who championed the "truth and reconciliation commission" model as the universal answer to divided societies[18] and those who trumpeted pre-Enron U.S. accounting standards as the answer to guaranteeing financial probity in "emerging market" economies. Because of the potential for economic coercion and the implication of dependency, the involvement of major international financial institutions such as the World Bank and Inter-American Development Bank in "rule of law" funding as part of an agenda to support "good governance"[19] also may have a double edge within democratizing domestic contexts. Government officials implicated in an ostensible "rule of law community" with IFIs are easily perceived by their opponents – and potentially by an insecure general public – as enforcing an externally-imposed orthodoxy and, by extension, as tools of a conspiracy rather than equal members of said "community."

Second, the "new legal orthodoxy" appears to rest on the assumption that courts can and should be counted on to override decisions made by other branches of government. This assumption, in turn, is based upon a further assumption that the aim of democratization is to decrease the power of the state by empowering both those institutions designed to rein in the executive and civil society as a counterbalance to what had been overweening authoritarian state power. For this reason, "rule of law" reform has had as one of its central elements reform of the judiciary, which is to be independent of pressure from political parties in the legislature and the executive, and accessible to citizens seeking redress against other citizens as well as the state itself, all equally subject to the law. The cosmopolitan-liberal preference for strong legal protection of property rights, on the one hand, and legalized processes of transitional justice, on the other, both speak to the distrust of post-authoritarian politics and the relatively greater trust in – ostensibly apolitical – post-authoritarian judiciaries. Interestingly, this distrust of democratic institutions at their birth is replicated in studies of the "judicialization of politics" seen in more mature democracies, where the judiciary comes to represent the citizens' best chance of shaping policy in a context of entrenched, unresponsive, and bought-off political parties and politicians.[20]

At the same time, because of these assumptions, such judicialization in transition settings is not necessarily without its risks and potentially illiberal outcomes. First, focusing on "rule of law" reform via the judiciary may have unintended consequences similar to the enthusiastic support of "civil society" and NGOs in democratizing contexts: that of weakening the traditional institutions of representation (such as political parties) just as they need to be made more, not less, relevant.[21] If local actors see that their

interests are best advanced by seeking transnationally-connected allies (i.e., NGOs) and taking their cases to court rather than finding domestic allies in political parties and taking their claims to the legislature, then those who make the laws become less relevant than those who interpret it. If this is so, what is the value of "rule of law," if the lawmaking process is merely a way-station towards where the decisions affecting the political community are really made? Though some in the transnational "rule of law" community do stress the balance of power between branches of government as a necessary part of democratic process, the tendency has been to gloss over the weakness of political parties and to instead celebrate the checks placed upon politicians, who themselves cannot and should not be trusted to practice, let alone stand as symbolic champions of, "rule of law." Instead, it is a more discrete and manageable job to overhaul the judiciary: purge older generations, reinvent the law school curriculum, revamp specialized training in line with international norms, reform the process of promotion and career advancement, and encourage participation in the broader community of national judges through conferences and other intellectual exchanges. However, this formulaic approach has its dangers, not least in resistance within the judiciary itself to an externally-imposed set of norms and the mobilization of allies capable of obstructing this and other avenues of democratic change.

To summarize, the emergence of a "new legal orthodoxy" has its roots in the two contrasting yet complementary sides of the cosmopolitan-liberal consensus of the 1990s: the neoliberal view of "rule of law" as central to universalizing protection of the private sphere and property rights, and the human rights view of "rule of law" as central to universalizing the protection of basic rights of individuals against arbitrary state power.

According to this orthodoxy, the *meaning* of "rule of law" lies in the struggle to reassert the primacy of the individual as an equal legal subject under liberal principles against that of the state, which, under authoritarian rule, operated above the law. The *identity* of citizens is thus defined within the private sphere, conceived of as the sphere of freedom, while the public sphere is limited to providing the laws that protect private behavior (economic and political), belief, and cultural/ethnic/gender identification. Finally, state *legitimacy* is linked to rule of law via the state's compliance with these minimizing expectations, and its adherence to universal standards of behavior that could, potentially, be enforced by external actors through quasi-coercive measures. In the next section, I will examine the convergence of this international context with two dimensions of the domestic context in Chile, which underwent its transition to democracy precisely at the moment of greatest currency of these ideas: the "protected" transition and the judicial culture's resistance to change. What we see is that, despite of and possibly because of the transnationalized nature of the spread of "rule of law" ideas in the past decade, Chile has only partially conformed to this orthodoxy in line with domestic obstacles that are both institutional and ideational.

International Context Meets Domestic Context:

Chile's 'Protected' Transition and its Old Legal Orthodoxy

On a number of measures, one might have expected Chile to have been ideally receptive to liberal rule of law reform during its first decade of democratic transition and

consolidation. First, the transition virtually coincided with the world events that launched "market democracy" as the model for simultaneous economic and political transformation within so-called "emerging market" countries. Likewise, by this time Chile had already undergone a transformation of its economy along neoliberal lines, and the center-left Concertación government which governed during the transition and for the decade following resisted the temptation to return to a more statist model and instead opted for the economic stability and the promotion of foreign investment associated with maintaining pro-market rules.[22] Historically, Chile has also been among the Latin American countries most open to, and positively inclined towards, the adoption of foreign models and the influence of foreign ideas. Both the military – historically in the influence of the Prussians and under Pinochet in its absorption of the imported "Doctrine of National Security[23] – and the opposition to Pinochet – with its extensive contacts with and support from Western European political parties[24] – saw little or no contradiction between their strong sense of national identity and their openness to ideas from abroad.

Finally, the newly democratizing Chilean state was being shaped from the top by a group of elites which were members of, or closely associated with, a globalized "epistemic community" whose shared beliefs included liberal rule of law. Many of the prominent leaders of Concertación, including cabinet ministers and high-ranking officials, were academics or highly trained social scientists, either with degrees from foreign universities or socialized to keep in contact with international flows of ideas in their respective fields.[25] Chances were very good that these elites, who had either returned from exile or had experienced repression by the Pinochet regime while still in Chile, had consulted the work of "transitologists" like Linz, Stepan, O'Donnell, and

Valenzuela, and were conscious of the "best practices" recommended.[26] Similarly, younger generations of this same elite were socialized to head towards the private sector, and those that entered government were equally imbued with the expectations of international markets for "good behavior." Together, these policy elites translated and shaped ideas from abroad to fit the national context, and it stands to reason that their respective concerns for establishing Chile's reputation within these globalized circles led them to privilege reforms that would speak to its embracing of liberal democratic values, among them the rule of law.

The result was the privileging of judicial reform among the key reforms of the first decade of post-Pinochet democratization. As William Prillaman notes, once in office following the elections of 1990, President Aylwin's government quickly embarked on an ambitious reform of the courts which, Prillaman argues, has had greater success and coherence than similar experiments in many other Latin American countries.[27] The Chilean reforms have targeted not only institutional independence and accountability, but also access and efficiency with an eye to building trust between citizens and the state via their experience with the judicial system.[28] Another key dimension of the reform has been breaking the institutional power of the Supreme Court over lower courts, giving the latter greater leeway in pursuing human rights cases that the highly conservative upper court had historically squelched.[29] Moreover, over the course of the 1990s under the Aylwin and Frei governments, the composition of the Supreme Court itself began to change due to deaths, retirements, some high-profile resignations linked to corruption scandals, and the ensuing key appointments made by the newly democratized executive. By the end of the decade its Criminal Bench came out strongly in defense of

investigations into individual responsibility for human rights violations. Governmental efforts towards judicial reform were also supported within the legal community itself, with legal experts and lawyers weighing in with concrete suggestions for how to confront the moral and institutional "crisis" of the judiciary.[30] In particular, there was enthusiasm for Aylwin's initiative to establish a national judicial academy, which was viewed as one step in a process to overhaul how Chilean judges are trained, chosen, and advanced professionally in line with quasi-universalized standards of ethical probity and democratic vocation.[31] This combination of attention to concrete and symbolic measures appeared eminently designed to leverage renewed (or brand-new) faith in the democratic judiciary with legitimacy of the new democracy.

Despite these auspicious signs, judicial reform in Chile has not been the unmitigated success story that might have been anticipated a decade ago. As the attempt to extradite Pinochet to London demonstrated quite starkly, there was still a strong perception on the part of both those party to human rights lawsuits and the public at large that the judicial system in Chile was both unable and unwilling to challenge the impunity that shielded past regime members from legal responsibility for their actions. What these perceptions highlight is the continuity of the legal order from the authoritarian era to the new democracy. While constitutional reform was an important part of the implicit pact between the incoming Concertación and Pinochet, those reforms did nothing to address the 1978 Amnesty and the provisions of the 1980 Constitution – hand-crafted by Pinochet and the junta – which ensured that such legal protections would survive any transition to democratic rule. The continuity of the legal order was but one of a number of "authoritarian enclaves" which were designed to protect Pinochet and the military,

individually and collectively, and thus protect the transition from getting out of the control of the outgoing regime.[32]

However, for the purposes of understanding the position of the judiciary and judicial reform in Chile's democratization, legal continuity had a profound impact not only on the concrete matter of legalizing state terror ex post facto and limiting the kinds of cases that would prosper, but also the symbolic matter of the moral weight of the law and the equality of legal subjects under the law. Citizens want to believe in democracy, but they also have been forced to accept that there will be limits that are meant to protect them from the violent breakdown of civil order experienced in 1973. As Alexander Wilde has argued in his essay on historical memory in Chile, post-Pinochet Chilean society has embraced a limited form of democracy that makes it feel safe from those past demons, and because of that choice, the pursuit of human rights cases has led to "irruptions of memory" that reignite suppressed and unresolved polarization.[33] In other words, a good proportion of Chileans continue to look to their courts not to dig up the truth, but to protect the society from such excavations based upon the comforting if not liberating reasoning of the law. By not challenging the legal order inherited from the dictatorship, Chile's pacting elites gained the transition and the ensuing period of stability, but at the price of not fully making the *symbolic* transition in which citizens come to accept a new, liberal meaning of "rule of law" that does not favor any one group over the individual. Because of this, even while judicial reform went forward and made some significant strides in the first decade of democratization, Chilean courts continued to enjoy certain powers of censorship and discretion that were consistent with a less-than-liberal ethos, reflecting the society's fears of itself.

In addition to these domestic obstacles, the globalized "new legal orthodoxy" advanced by Chile's ruling elite also came up against what might be called Chile's "old legal orthodoxy": a judicial culture seeped in a legalist, positivist tradition and reinforced through its own traumatic experience during the years of breakdown and dictatorship. In general, "judicial culture" can be defined as "the compendium of values and attitudes related to law and the law that are dominant in a juridical community," where the "values and attitudes" refer to "concepts, beliefs,...,modes of thinking and of feeling, including prejudices and work habits broadly shared across time" by those in the profession.[34] Just as "political culture" has been employed as a lens through which we can understand the shape of state institutions and state-society relations, so "judicial culture" can serve as a window to understand the Chilean judiciary, its peculiar evolution, and its resistance to change.

In Chile, three interrelated elements make up the traditional judicial culture, each based on the historical experience of the country and of the institution of the judiciary. The first element is **legalism**, understood as the idea that the law itself is the highest moral norm and that conforming behavior to that norm represents not only a social but a moral good. Philosophically, as described by Judith Shklar, this is "the ethical attitude that holds moral conduct to be a matter of *rule following*, and moral relationships to consist of duties and rights determined by rules."[35] For judges, however, this translates into a number of operational codes for their professional conduct: that the law itself – not jurisprudence, custom, or interpretation – is the ultimate rule to be followed, that only a new law can supplant a previous law, and that judges make decisions based on how the law is, not how they think it should be understood.[36] Moreover, this implies an ethos of

administration that absolves judges of passing judgment on the content of laws; rather, abiding by a strict separation from and subordination to the lawmaking powers of the legislative and executive branches, the judiciary is charged with applying the law based upon "a logical and mechanistic conception of [the law]" and upon "abstract and general norms."[37] In the immortal words of Andrés Bello, the intellectual father of the Chilean legal tradition, "the judge is the slave of the law."[38]

More than simply a product of Chile's proud civil law tradition which limits the legislative role of courts,[39] the legalism of its judges reflects a profound identification of the judiciary with state power and a quasi-religious calling on the part of judges to uphold order and reason in the face of the chaos of politics.[40] Herein lies a second element of Chile's judicial culture which shaped the understanding of "rule of law," what I will call its **elitist transcendentalism**. Much as the military did, the judiciary identified itself historically as a corporate entity that served the nation by transcending the petty and divisive conflicts of politics, and by standing above the fray as the arbiter of what was legal and, therefore, right, just, and in the nation's best interest. There was also a military-like discipline instilled within its ranks, clearly associated with the self-perception of the institution as a bulwark against disorder. This sense of superiority and mission was most visibly embodied in the institutional power and prestige of the Supreme Court. Seventeen judges serving for life and enjoying unrivalled prestige in a society imbued with pride in and deference to the legal profession, the Supreme Court stood at the pinnacle of this hierarchical power structure and enforced the corporate ethos down through the local and appeals courts.[41] Thus, to understand just how profoundly threatened and offended judges, especially those on the Supreme Court, were by the

overtly transformational approach to law adopted by Allende and the Unidad Popular, one must appreciate both the judiciary's sense of superiority/transcendence of politics and its self-perception as the guardians of reason that complemented its corporate ideological commitment to legalism.

It was also the Supreme Court and its docile acquiescence to – and benefiting from – authoritarian rule which led the way towards inculcating a third dimension of judicial culture that undermined citizen faith in the much-vaunted civilizing mission of the courts: what I will call **institutional survivalism**. Closely related to elitist transcendentalism and relying upon the ideology of legalism as its justificatory fig leaf, institutional survivalism refers to a corporate culture that values insularity and accepts moral compromise in order to salvage the prestige and operating autonomy of the institution. Under Pinochet, this insularity was projected as a virtue, both by the courts themselves and by the regime, which assiduously respected the "independence" of the judiciary in exchange for its willingness to apply *their* law (most notably the 1978 amnesty) with no questions asked. Over time, however, this insularity and survivalism had a corrupting influence on the judiciary, even as it claimed to have fulfilled its mission of bringing order and reason through the peaceful return of democracy via the stipulations of Pinochet's 1980 Constitution. As reported by Alejandra Matus in her 1999 exposé on the Chilean judiciary, insularity and lack of accountability led to an expectation of impunity by judges which persisted into the transition and beyond. Strenuous resistance to accepting moral responsibility for their actions during the dictatorship (as publicly stated by the report of the Truth and Reconciliation Commission and championed by President Aylwin) was matched by resistance to giving up

prerogatives of office, both symbolic and material, that led Matus to refer to the judiciary as "the degraded power."[42] Moreover, the judiciary could count on its allies in the military, who shared an interest in maintaining their institutional privileges, to remind vulnerable civilian authorities that the legal foundation of the new democracy remained that which legitimated the past regime, and that that legal foundation protected their prerogatives.

These three elements of judicial culture – legalism, elitist transcendentalism, and institutional survivalism – boded poorly for the cross-border diffusion of the "new legal orthodoxy" as part of the democratic transition, despite the internalization of that orthodoxy within state elite circles. The judiciary was socialized to administer the law in a rigid manner that brooked no new meanings to accommodate liberal ideas of individual rights, and it continued to see itself as a guardian of society and of its own survival even as the society elected a government promising a change in paternalistic state-society relations that would require courts to service the public rather than some higher (or lower) appeal to their priestlike monopoly on reason and order. Stated plainly, if the judiciary would not accept new ideas from within the state, or within its own ranks, it seems unlikely for that institution to change rapidly and voluntarily through the adoption of outside ideas. More likely would be a slow evolution, since it would involve a transformation in judicial culture, not only the imposition of new institutional designs and constraints.

Similarly, the expectation that economic opening would advance an analogous "liberalization" within state institutions and, in particular, in guiding ideas about "rule of law" has not been borne out in the Chilean case, mainly because of this intransigent

judicial culture. In Mexico, for example, the opening of the economy came about through the rise to political power of a technocratic elite of foreign-trained economists which had as its counterpart in the legal community foreign-trained liberal-minded lawyers who entered the state and supplanted nationally-trained lawyers in a double-pronged attack on entrenched nationalistic institutional cultures.[43] In Chile, by contrast, the economic opening and the "marketization of the rule of law" lamented by critics of the transition have led a whole generation of young lawyers to the law schools of private universities and, from there, to careers in the private sector, leaving the economically disadvantaged without equal access to the legal system and leaving the state to face a judiciary that has not yet been fully transformed through generational change.[44] Indeed, it is perhaps Chile's earlier economic transformation and its lack of need for loans from the IDB and the World Bank that has helped its judiciary escape from the full ideational impact of the "new legal orthodoxy," even as the neoliberal side of the cosmopolitan-liberal consensus continues to shape societal norms in its image. Instead, Chile's relationship with the idea and practice of "rule of law" has remained very much constrained by domestic historical, institutional, and normative patterns that have proven surprisingly resistant to external influence from globalized flows of liberal ideas, despite the country's integration into the globalized economy and its position on the forefront of the post-Cold War "wave" of democratization.

"Rule of Law" and the Repatriation of the Pinochet Case:

Tracing Meaning, Identity, and Legitimacy through the Two Competing Orthodoxies

In March 2000, British Home Secretary Jack Straw announced that his government was returning former Chilean leader Augusto Pinochet to Chile, refusing to grant the request of Spanish judge Baltasar Garzón to extradite him to Spain to stand trial for crimes against humanity, and cited as his reason the General's advanced age and physical infirmities. Pinochet's departure was a relief to all the governments involved, not least the Chilean government, whose sense of embarrassment had deepened over the course of the nearly two years it took for the repatriation to vindicate their defense of Chile's sovereign right to determine its own formula for transitional justice. However, when the plane landed in Santiago and the aged former dictator rose, Lazarus-like, from his wheelchair to triumphantly greet his supporters, these arguments rang hollow, for it seemed more than likely that Chilean courts would continue to shield Pinochet from prosecution, and Chilean claims to democratic consolidation would be belied by its acquiescent judiciary.

What happened instead was almost as unexpected as the original arrest warrant issued by Judge Garzón in October 1998: Chile's courts, including the notoriously conservative Supreme Court, moved forward with alacrity, voting for and upholding Pinochet's loss of senatorial immunity from prosecution and, by the end of that same year, his arrest and indictment in the infamous *Caravana de la muerte* case.[45] Then, an equally dramatic reversal occurred when Pinochet's lawyers succeeded in having the charges lowered from "autor" to "encubridor"[46] and their client evaluated for mental incompetence (associated with aging), and the controversial results of the medical examination – which are still being challenged by families of the victims – were cited by

an appeals court in July 2001 as sufficient evidence to set aside the indictment indefinitely.[47] How are we to understand these surprising events, and what can they tell us about the way ideas about "rule of law" are or are not changing within the Chilean judiciary?

Surprise # 1: The Case Goes Ahead

The fact that the case went forward, and particularly that it was not stopped cold by the Supreme Court at the sensitive moment of deciding upon Pinochet's immunity from prosecution, does indicate that there has been some transformation in the *meaning* of "rule of law" as understood and acted upon by the upper levels of the judiciary. It is possible that, despite protestations to the contrary on the part of the government,[48] the extradition attempt and the legal arguments made by Spain's Judge Garzón as part of that effort influenced some in the judiciary to view the advancement of the case as consistent with their legalistic obligation to the "rule of law." Garzón's arguments positioned the imperative to prosecute in the context of Chile's international legal obligations as signatory to conventions against torture, thus presenting a legal instrument that could be applied in a straight-forward manner without undue interpretation. At the same time, there had to be a case to begin with, and this cannot be attributed to the diffusion of ideas from the outside. Rather, more liberal ideas about the meaning of "rule of law" had already been developing over time within pockets of the judiciary, and while the rare judges who advanced these alternative ideas were often censured or ostracized,[49] by the mid-1990s there were a handful of veterans who, along with younger colleagues, were investigating cases brought by families of the disappeared or victims of human rights

violations.[50] One such veteran judge, Juan Guzmán Tapia, advanced the Caravana case, bringing him laurels from the domestic and international human rights community and harsh criticism from conservative sectors of society who viewed Guzmán as a harbinger of disorder and judicial grandstanding.

While many of these cases did not advance beyond the lower levels of the courts, the act of investigating and the evidence unearthed (often literally) by judges (who, in Chile's system, investigate crimes and determine whether there is enough evidence to go to trial) served a deeper symbolic purpose by reinforcing the *identity* of the plaintiffs as legal subjects and victims of state violence, rather than subversives denied the legal and moral standing of citizens under dictatorship. Here, the major breakthrough is seen in the shift in the relationship between individuals and the courts, with plaintiffs breaking through the wall of solidarity and elite transcendentalism which insulated judges from the public. Granted that these plaintiffs often had the backing of transnational human rights groups and that they were therefore better equipped to navigate the legal system than average citizens, it is still noteworthy that they did not respect the sacrosanct boundaries set by the old legal orthodoxy, instead bringing their cases directly to judges viewed as open to more liberal views of "rule of law." And while their attempt to seek externalized venues for justice may be interpreted as an embracing of a wholly *globalized* identity, the victims who launched the action against Pinochet in Madrid were doing so with one eye clearly focused on the domestic context, which was always their preferred legal venue given their goal of regaining full membership in their *home political community* through the inclusion of their testimony into the national narrative, and which was the venue to which they expectantly returned.[51]

Finally, the advancement of the *Caravana* case owes much to the actions, or more precisely the studied non-action of the Lagos government. As the first Socialist president since Allende and as the successor to the generally more stable Frei government, Lagos was under intense scrutiny both at home and abroad for signs of leftward movement that would destabilize the successful Chilean political and economic transformation. Much as he and many of his colleagues in the Concertación would have personally preferred to have seen Pinochet prosecuted, they were also painfully aware of the societal polarization brought on by the general's arrest in London, and of the unforgiving nature of international investment, which could easily 'punish' the government for not reining in this instability. Instead, Lagos opted for a shrewd strategy of maximum distance from the judiciary, thus demonstrating to both domestic and foreign audiences his democratic credentials through respect for judicial "independence." In doing so, Lagos risked the wrath of the armed forces, which flexed its muscles publicly in early January 2001 by pressuring the president to call a meeting of the National Security Council. As such, one could argue that his actions suggested the start of placing liberal rule of law at the center of a strategy of state *legitimation*, replacing the morally compromised pact and its basis in the old legal orthodoxy as the symbolic source of legitimate authority for Chile's democratic government.

Surprise # 2: The Case is Indefinitely Halted

The sense of relief on part of Pinochet's supporters was matched only by the sense of disillusionment on the part of those supporting the legal action; taken together, these reactions to the appeals court's decision in July 2001 to set aside the indictment

against Pinochet demonstrate the continued profound divide within Chilean society regarding the *meaning* of "rule of law." Similarly, the decision recalled the divisions still existing within the judiciary, and the contingent nature of the advancement of human rights cases depending upon the involvement of specific judges. Legalism returned with a vengeance, as the defense latched onto the one legal way to stop the trial (i.e., by proving mental incompetence); at the same time, despite concerns that the final determination of the medical report was revised by defense-associated doctors after the return of a prosecution-linked doctor to the United States, the appeals court judges based their decision strictly on what was written down, not what was possibly "just" or "unjust." Furthermore, in this final twist, it was the *identity* of the defendant which was given unequal and superior status vis à vis the law, thus violating the central premise of liberal rule of law. Once again, falling back on their traditional judicial culture, the courts proved themselves unwilling and unable to treat Pinochet as just another citizen facing the legal consequences of his actions.

Meanwhile, the Lagos government maintained its stance of non-intervention, much to the consternation of pro-prosecution groups both inside and outside of the country. What, then, happened to the indications that liberal rule of law was supplanting the pact as the moral center of state legitimation? What seems most likely is a combination of short-term and long-term calculation that allowed the government to burnish its democratic credentials as far as the prosecution prospered, while it satisfied its pragmatic interest in stability merely by waiting until the judiciary eventually and predictably found a way to invoke legal principles and thereby stop the prosecution in the interest of order and reason. Such a strategy, while ostensibly successful in the broad

sense, has the danger of sending decidedly mixed signals to the population regarding the government's commitment to rule of law reform. Far from being a mere technical matter of giving the judiciary administrative independence, the position taken was anything but neutral in the sense that it left the judiciary to its own devices knowing full well that its traditional culture was still operational. In their efforts to balance the exigencies of domestic stability and international reputation, it appears that Chile's state elites are still not entirely ready to trust society to cope with the full implications of a liberal order, and until they are, the protective ethos of the courts can serve well as a buffer and a gauge of how much liberal rule of law is tolerable at any given time.

Conclusion

In this paper, I have argued that democratization is a process that is best understood not only through an empirical accounting of institutional redesign but also through an interpretive assessment of how democratic institutions and the norms that support them are understood and valued. As such, studies of judicial reform in democratizing contexts should look beyond the classic empirical markers of constitutional separation of powers, codified independence and accountability, and expanded access to the population towards the *meaning* of "rule of law," the *identity* of citizens as subject of the rule of law, and how democratic state *legitimacy* is forged through the reinterpretation of these meanings and identities. Furthermore, I argue that such ideational changes are, in the international context of economic, political and social globalization, potentially influenced by both externally- and internally-located sources of

ideas regarding rule of law. The challenge is to identify these overlapping and intertwining sets of ideas and to determine to what extent each has an impact on the process of judicial reform. In this paper, I put forward such an analysis of judicial reform in Chile during the first decade after democratization, locating it within not only these two contexts (international and domestic) but also a third: internal judicial culture.

I begin my analysis from the outside by describing a "cosmopolitan-liberal consensus" bringing together neoliberal economic ideas with liberal-progressive ideas about human rights into a consensus on "liberal rule of law" that privileges the individual over the state, views the law as designating the private sphere as the sphere of freedom from state domination, and sets citizens and state officials on an equal footing subject to the law. I then contrast this conceptualization of "liberal rule of law" – one which has diffused across borders via "epistemic communities" of shared belief which have included NGOs, IFIs, MNCs, government officials, scholars, and international lawyers – with the evolution of "rule of law" ideas within Chile before, during, and after the Pinochet regime. While there are a number of indicators pointing towards the success of liberal rule of law reform in post-Pinochet Chile – among them the tradition of openness to foreign models, the participation of Chile's new state elites in epistemic communities sharing ideas across borders, and the influence of the globalized "rules of the game" of international trade and investment in Chile's open economy – the experience of dictatorship and the legal continuity with that dictatorship which formed the basis of the pacted transition have created a number of obstacles to those efforts. Furthermore, I outline three elements of Chile's judicial culture – legalism, elite transcendentalism, and institutional survivalism – which have contributed their own obstacles to reform as well

as their own imprint upon the low expectations of society and the risk-averse strategies of the state, even after formal democracy returned in 1990. I conclude from this portion of the analysis that Chile's judicial reform has not been as receptive to international norms of "liberal rule of law" as might have been expected, and that there has simultaneously been only a limited amount of self-generated internal norm transformation to match the arguably impressive set of technical and institutional reforms of the judiciary embarked upon by the Concertación government in the past decade. Traditional legalistic and conservative judicial culture still dominates the meaning of "rule of law"; citizens still have the tendency to look to the judiciary to protect them from political controversy rather than to equalize them before the law; and the democratic state is not yet ready to embrace a fully liberal concept of rule of law if it threatens to unleash domestic forces it cannot control.

The final section of the paper looks at the repatriation phase of the Pinochet Case (March 2000-July 2001) as a window onto these international-domestic-institutional dynamics. Contrary to my pessimistic conclusions, and to those of many other observers at the time, the Chilean judicial system appeared willing and able to advance the case against Pinochet for the *Caravana de la muerte* including his loss of senatorial immunity and his indictment and arrest. This first phase showed a limited but possibly significant degree of influence of the transnational flow of ideas, as well as some indication that pockets of the Chilean judiciary were not only open to those globalized ideas, but also had developed liberal concepts of rule of law on their own. This, in turn, has led human rights groups and victims' relatives to seek these judges out, thus setting a precedent for the transformation of the relationship between citizens and the judiciary from one of

asymmetry and subordination to one of trust, accountability, and mutual respect. The democratic state also gave the impression that it, too, was ready for a new, more liberal approach to the rule of law. The Lagos government maintained a posture of non-intervention, risking the anger of the armed forces by refusing to interfere with the judiciary.

These rosy predictions of transformation soon faded, however, as the second phase of the repatriation played itself out in the Chilean summer of 2001. The appeals court decision to set aside the indictment indefinitely due to Pinochet's compromised mental state reasserted the traditional judicial culture of legalism (by accepting unquestioningly the veracity of the controversial medical report), elitist transcendentalism (by looking to the law for a clear-cut means for restoring order through reason), and institutional survivalism (by aborting the one case that might have undermined the legal edifice of impunity upon which the judiciary built its institutional survival strategy during the dictatorship). Citizens were once again given the message that the courts were a dead-end for seeking historical justice, and that the identity of the defendant mattered more than that of the victim-as-citizen. Meanwhile, the government stood by, calling into question the sincerity of its earlier stance of neutrality and belying a shrewd political calculus that anticipated the inability and unwillingness of the judiciary to bring about another round of societal upheaval through this particular trial.

In sum, there appears to be still more work to be done within the Chilean domestic context if judicial reform is to embody and institutionalize ideas associated with "liberal rule of law." By this I do not mean that it is necessary merely to open channels to external influence, though there are those who would take from this experience the

lesson that judicial reform in polarized or culturally intransigent contexts must be imposed from the "outside." Rather, I would argue that only when these ideas become fully internalized – both in the domestic political context via changes in the identity of citizens and their identification with the legitimate authority of the democratic state, and inside the judiciary through changes in legal education and the socialization of judges to new norms and practices – can they challenge and possibly supplant the ideas that remain entrenched and keep one foot of the country in its authoritarian past. Judicial reform cannot be viewed as merely a technical matter, just as democratization is about more than running clean elections and opening a free press. Along with these necessary changes there must be a change in the mentality and normative orientation of the judges themselves, which together can change the expectations of citizens and public officials regarding their mutual and equal accountability to the law. Finally, this combination of tangible and intangible changes can transform the basis of the political community as it feels its way from its authoritarian past to its democratic future. With this transformation citizens can reaffirm the legitimacy of the democratic state not as a compendium of institutions that bring democracy by fiat, but rather as a set of practices and identities that, in Rousseau's famous phrase, defines the political community of equals who live according to the law we give ourselves.

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[1] This debate is presented in Andreas Schedler, "What is Democratic Consolidation?" Journal of Democracy Vol. 9, No. 2 (1998), pp. 91-107.

[2] On the lesson-building approach, see Guillermo O'Donnell and Philippe C. Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies (Baltimore and London: Johns Hopkins University Press, 1986), pp. 3-5; P. Nikiforos Diamandouros and Richard Gunther, "Preface," in The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective, ed. Richard Gunther, P. Nikiforos Diamandouros and Hans-Jürgen Puhle (Baltimore and London: Johns Hopkins University Press, 1995), p. ix.; Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman: University of Oklahoma Press, 1991), esp. chapter 3, pp. 109-63; and Giuseppe Di Palma, To Craft Democracy: An Essay on Democratic Transitions (Berkeley, Los Angeles and Oxford: University of California Press, 1990). Further lessons are derived and tested in Juan J. Linz

and Alfred Stepan, Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe (Baltimore and London: Johns Hopkins University Press, 1996).

[3] Howard J. Wiarda, "Southern Europe, Eastern Europe, and Comparative Politics: 'Transitology' and the Need for New Theory," East European Politics and Societies vol. 15, no. 3 (2001): 485-501.

[4] See Ruti Teitel, Transitional Justice (New York: Oxford University Press, 2000).

[5] The liberal version of rule of law ideas, and the debate over their necessary connection with democracy, are discussed and critiqued in Jurgen Habermas, "The Rule of Law and Democracy," in James P. Sterba (ed.), Justice: Alternative Political Perspectives 4th ed. (Thomson Wadsworth, 2003), pp. 156-162; and Allan C. Hutchinson and Patrick Monahan, "Democracy and the Rule of Law," in Hutchinson and Monahan (eds.) The Rule of Law: Ideal or Ideology (Toronto: Carswell, 1987), pp. 99-100.

[6] See Stephanie R. Golob, "Forced to be Free: Globalized Justice, Pacted Democracy, and the Pinochet Case," Democratization vol. 9, no. 2 (Summer 2002): 21-42.

[7] On these networks as "norm entrepreneurs" on behalf of international legal norms, see Kathryn Sikkink, "Transnational Advocacy Networks and the Social Construction of Legal Rules," in Yves Dezalay and Bryant G. Garth (eds.), Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy (Ann Arbor: University of Michigan Press, 2002), pp. 37-64.

[8] According to Keck and Sikkink's analysis of "advocacy networks," this is often accomplished through the "boomerang pattern," whereby blockage at the domestic level leads domestic NGOs to seek redress abroad, through either international institutions or foreign NGOs that have greater resources and access to pressure national governments. See Margaret E. Keck and Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (Ithaca and London: Cornell University Press, 1998), Figure 1, p. 13. For an analysis emphasizing the importance of domestic partners for transnational NGO effectiveness in changing state behavior, see Susan D. Burgerman, "Mobilizing Principles: The Role of Transnational Activists in Promoting Human Rights Principles," Human Rights Quarterly Vol. 20, No. 4 (1998): 905-23.

[9] See Thomas M. Franck, "The Emerging Right to Democratic Governance," American Journal of International Law Vol. 86, No. 1 (1992), esp. p. 46. Ironically, given its history as a region of countries whose foreign policies jealously guarded sovereignty against international intervention, the Americas has emerged at the forefront of efforts to regionally enforce democratic principles, though with decidedly mixed results on implementation. On the theory, see Heraldo Muñóz and Mary D'Leon, "The Right to Democracy in the Americas," Journal of Interamerican Studies and World Affairs Vol. 40, No. 1 (1998), esp. p. 1. On the practice, see Domingo E. Acevedo and Claudio Grossman, "The Organization of American States and the Promotion of Democracy," in Tom Farer (ed.) Beyond Sovereignty: Collectively Defending Democracy in the Americas (Baltimore and London: Johns Hopkins University Press, 1996), esp. pp. 137-45.

[10] Anne-Marie Slaughter, "Government Networks: The Heart of the Liberal Democratic Order," in Gregory H. Fox and Brad R. Roth (eds.), Democratic Governance and International Law (Cambridge: Cambridge University Press, 2000), pp. 204-220.

[11] Kofi Annan, "Two Concepts of Sovereignty," Economist (September 18, 1999): 49-50.

[12] Teitel, Transitional Justice, Chapter 3, pp. 69-117.

[13] See Priscilla B. Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (New York and London: Routledge, 2000).

[14] These authors draw the parallel to the international lending community, referring to the members of the orthodoxy as "missionaries" and "rule doctors." See Yves Dezalay and Bryant G. Garth, "Introduction," in Dezalay and Garth, Global Prescriptions, pp. 1-3. Thomas Carothers offers a contrasting critique which contests the idea of "orthodoxy" but then identifies the problems arising from too many actors laying claims to advancing "rule of law," which "means different things to different people." See Carothers, "The Many Agendas of Rule of Law Reform in Latin America," in Pilar Domingo and Rachel Sieder (eds.), Rule of Law in Latin America: The International Promotion of Judicial Reform (London: Institute of Latin American Studies/University of London, 2001), pp. 4-16.

[15] See Keck and Sikkink, Activists across Borders; Ronnie D. Lipschutz, "Reconstructing World Politics: The Emergence of Global Civil Society," Millennium Vol. 21 (Winter 1992): 389-420; Paul Wapner, "Politics Beyond the State: Environmental Activism and World Civic Politics," World Politics Vol. 47, No. 3 (1995), pp. 311-40; and, for a more pessimistic view of the power asymmetries facing these egalitarian networks in international politics, Ann-Marie Clark, Elisabeth J. Friedman, and Kathryn Hochstetler, "The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women," World Politics Vol. 51, No. 1 (1998), pp. 1-35.

[16] Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination." in Haas (ed.) Knowledge, Power and International Policy Coordination, special issue of International Organization vol. 46, no. 2 (Winter 1992): 1-36.

[17] For a critical analysis of the "law and development" movement, its basis in the idea of "legal transfer" and the superiority of U.S. legal models, and its ultimate downfall, see James A. Gardner, Legal

Imperialism: American Lawyers and Foreign Aid in Latin America (Madison: University of Wisconsin Press, 1980), esp. pp. 239-290.

[18] See Brandon Hamber, "Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence," in Nigel Biggar (ed.), Burying the Past: Making Peace and Doing Justice after Civil Conflict (Washington, D.C.: Georgetown University Press, 2001), pp. 131-148. Hayner, while coming down decisively in favor of the importation of truth commissions as a way of cutting the learning curve, also stresses in her conclusion that "there is no one model of how to do this right; creativity and sensitivity to national needs may be the most important ingredients for setting up successful endeavors." See Hayner, Unspeakable Truths, p. 252.

[19] For the perspective of the lending institutions, see Christina Biebensheimer, "Justice Reform in Latin America and the Caribbean: The IDB Perspective," in Domingo and Sieder, Rule of Law in Latin America, pp. 99-141; and World Bank, Legal Vice Presidency, Initiatives in Legal and Judicial Reform. Washington, D.C.: The International Bank for Reconstruction and Development/The World Bank, 2001).

[20] See C. Neal Tate and Torbjörn Vallinder, "The Global Expansion of Judicial Power: The Judicialization of Politics," in Tate and Vallinder (eds.), The Global Expansion of Judicial Power (New York and London: NYU Press, 1995), pp. 1-10. A similar dynamic seems to be underway in the European Union, where the European Court is viewed as a key player in bridging the so-called "democratic deficit."

[21] Matt Dippell, "Strengthening Political Parties in the Americas: The Role of International Non-Governmental Organizations," presentation to the International Congress of the Latin American Studies Association, Miami, March 2000.

[22] There is a vast literature exploring the relationship between neoliberalism and democratization in Chile; some authors identify the continuity of the free market policies implemented under Pinochet as an "authoritarian legacy" while others credit economic stability with stabilizing politics. For a comprehensive overview, see Gerardo L. Munck, "Authoritarianism, Modernization, and Democracy in Chile," Latin American Research Review Vol. 29, No. 2, pp. 188-211. Critics of this aspect of the transition have also connected neoliberalism with the imposition of 'obligatory amnesia,' claiming that 'whitewashing' the past was part and parcel of creating 'the New Chile' for foreign consumption which required forgetting that neoliberalism was a continuation of *pinochetismo*. See Tomás Moulián, "A Time of Forgetting: The Myths of the Chilean Transition," NACLA Report on the Americas Vol. 32, No. 2 (1998), pp. 16-23, esp. pp. 18 and 22.

[23] See Felipe Agüero, Democracy and the Future of Civil-Military Relations in Chile: An Exercise in Historical Comparison, The Dante B. Fascell North-South Center Working Paper Series, no. 6 (May 2002), pp. 4-6.

[24] Alicia Frohmann, "Chile: External Actors and the Transition to Democracy," in Farer, Beyond Sovereignty, esp. pp. 248-56.

[25] See Jeanne Kinney Giraldo, "Development and Democracy in Chile: Finance Minister Alejandro Foxley and the Concertación's Project for the 1990s," in Jorge I. Domínguez (ed.) Technopols: Freeing Politics and Markets in Latin America in the 1990s (University Park: Penn State University Press, 1997), pp. 229-75.

[26] When asked directly in a public forum, Chile's UN Ambassador Juan Gabriel Valdés acknowledged these intellectual influences on himself and others in the Concertación government. Juan Gabriel Valdés, "Globalization and Democracy: The Case of Chile," Bildner Center for Western Hemisphere Studies, Graduate Center of the City University of New York, (New York, February 22, 2001).

[27] William C. Prillaman, The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law (Westport and London: Praeger, 2000), Chapter 6, 'Chile's Coherent Approach to Judicial Reform,' pp. 137-61.

[28] Ibid., pp. 146-7.

[29] Jorge Correa Sutil, "The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy," in Irwin P. Stotzky (ed.) Transition to Democracy in Latin America: The Role of the Judiciary (Boulder: Westview Press, 1993), p. 101.

[30] See, for example, Comisión de Estudios del Sistema Judicial Chileno, "Informe Final sobre Reformas al Sistema Judicial Chileno," in Eugenio Valenzuela S. (ed.), Proposiciones para la Reforma Judicial (Santiago: Centro de Estudios Públicos, 1991), pp. 15-130.

[31] President Aylwin, speaking to a conference of judges in early 1990, called for the establishment of such a school, which would "strengthen the sense of ethical and social responsibility of [judges'] delicate mission, and train and inculcate the expertise and abilities belonging to the professionals of the judicial branch." See Patricio Aylwin, statement to the Convention of Judges of Pucón (March 30, 1990), cited in Hernán Correa de la Cerda, "Proposiciones para una Escuela Judicial," in Valenzuela S., (ed.), Proposiciones, p. 296, translation mine. See also Ibid., p. 138.

[32] Alfred Stepan, Rethinking Military Politics: Brazil and the Southern Cone (Princeton: Princeton University Press, 1988), esp. Chapter 7, pp. 93-127; Felipe Agüero, "Legacies of Transitions: Institutionalization, the Military, and Democracy in South America," Mershon International Studies Review Vol. 42 (1998), pp. 383-404.

[33] Alexander Wilde, "Irruptions of Memory: Expressive Politics in Chile's Transition to Democracy," Journal of Latin American Studies Vol 31, Part 2 (1999): 473-500. The deep roots of conflict over historical memory and their overt and repressed manifestations in today's Chile can be seen literally and visually in Patricio Guzmán's documentary, Chile: Obstinate Memory (1997).
[34] Agustín Squella, "Documento base del Seminario sobre la cultura jurídica chilena: La cultura jurídica chilena," in Agustín Squella (ed.), La cultura jurídica chilena (Santiago: Corporación de Promoción Universitaria, 1988), pp. 30; 32. Squella here defines "juridical culture" to include the entire legal profession, including lawyers, and he distinguishes between "internal" and "external" juridical culture, the former being the definition I have adopted and limited to the judicial profession, while the latter is more akin to the discussion above of the expectations of the citizenry of the legal system and legal professions.
[35] Judith N. Shklar, Legalism (Cambridge: Harvard University Press, 1964), p. 1, emphasis mine.
[36] Squella, pp. 34-5.
[37] Ibid., pp. 41-2.
[38] Quoted in Ibid., pp. 42.
[39] On the contrast between the role of judges in civil vs. common law systems, see John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, 2nd edition (Stanford: Stanford University Press, 1985), Chapter 6, "Judges," pp. 34-8.
[40] On the belief in "law as written reason," see Correa Sutil, pp. 93-9.
[41] On the Supreme Court, see Pamela Constable and Arturo Valenzuela, A Nation of Enemies: Chile under Pinochet (New York: W.W. Norton, 1991), pp. 130-2; Correa Sutil pp. 93-101.
[42] See Alejandra Matus, El libro negro de la justicia chilena (Santiago: Planeta, 1999), p. 15. On the conflict with Aylwin over human rights prosecutions and the Rettig report, see pp. 54-61. This book caused a sensation when it was published, leading to its effective censorship and the need for Matus, an investigative journalist, to leave the country, this nearly a decade after the transition.
[43] On the economic technocracy, see Miguel Angel Centeno, Democracy Within Reason: Technocratic Revolution in Mexico 2nd ed.(University Park, Penn., Penn State University Press, 1997). On the parallel and related transformation of the 'legal elite,' see Larissa Adler Lomnitz and Rodrigo Salazar, "Cultural Elements in the Practice of Law in Mexico: Informal Networks in a Formal System," in Dezalay and Garth (eds.), Global Prescriptions, pp. 240-3.
[44] On the "marketization of the rule of law" and the access issue, see Philip Oxhorn, "When Democracy Isn't All That Democratic: Social Exclusion and the Limits of the Public Sphere in Latin America," North-South Agenda no. 44 (April 2001).
[45] The Supreme Court vote of 14-6 to strip Pinochet of his immunity from prosecution was particularly decisive, and surprising to observers. Indeed, novelist Ariel Dorfman describes this outcome as "impossible...improbable...[and] entirely unbelievable." See Ariel Dorfman, "Increíble pero cierto," El País (August 3, 2000), p. 11, translation mine. On the Appeals Court vote, see Clifford Krauss, "Chile Strips Pinochet of Immunity, Lifting One Barrier to Trial," New York Times (May 25, 2000), http://www.nytimes.com/library/world/americas/052500chile-pinochet.html, accessed May 25, 2000. On the subsequent Supreme Court decision, seeManuel Délano, 'El Supremo de Chile retira la inmunidad a Pinochet por un estrecho margen de votos: Once jueces contra nueve deciden procesar al exdictador por la "caravana de la muerte,"' El País (August 2, 2000), http://www.elpais.es/p/d/temas/pinoch2/8pin2a.htm, accessed September 8, 2000. Two weeks later, Pinochet officially lost his Senate vote and the legal protection that came with it. See Manuel Délano, "La Cámara alta suspende a Pinochet como senador y le retira la protección jurídica," El País (August 15, 2000), http://www.elpais.es/p/d/temas/pinoch2/8pin15.htm, accessed September 8, 2000.
[46] The Chilean legal terms are *autor* – giving orders or directly committing the crime – and *encubridor* – having knowledge of the crime after the fact and then covering it up to protect the perpetrators. See Manuel Délano, 'La Corte de Apelaciones de Chile confirma que Pinochet será procesado,' El País (9 March 2001), http://www.elpais.es/articulo.html?xref=20010309elpepiint_1&anchor=elpepiint&type=Tes&d_date=20010309, accessed 14 June 2001.
[47] The Sixth Part of the Chilean Court of Appeals ruled 2-1 on 9 July 2001 that Pinochet was mentally unfit to stand trial due to 'light to moderate' senile dementia reported by doctors who examined him for a court-ordered medical examination earlier in the year. For a summary of the 'sobreseimiento,' or setting aside of the indictment, see "Pinochet queda fuera del caso Caravana de la Muerte," La Tercera Digital, Casos: Sobreseimiento, at http://www.tercera.cl/casos/pinochet/sobreseimiento/sobreseimiento02.html, accessed 28 September 2001. The complete text of the decision was posted in Spanish at http://www.elmostrador.cl/casos/c_pais/sobreseimiento.htm, accessed 28 September 2001.
[48] In an interview with the Spanish daily El País, Chile's interior minister, José Miguel Insulza, rejected the notion that his country should thank Garzón: 'If I am attacked, and I react well, I do not need to thank the attacker, even if I am proud of how I reacted.' See 'No creo que los militares vayan a involcrarse en el proceso' [interview with José Miguel Insulza] El País (10 August 2000), p. 3.

[49] Matus relates the experience of one such judge, Carlos Cerda, who attempted as early as 1976 to prosecute military officers and government officials for violent offenses against regime opponents. See Matus, El libro negro, pp. 47-54.

[50] See Concha Monserrat, 'J. Guzmán, Juez: "Nosotros empezamos el proceso a Pinochet antes que Garzón,"' El País (26 April 2001), http://www.elpais.es/articulo.html?xref=20010426 elpepiint_3&anchor=elpepiint&type=Tes&d_date=20010426, accessed 14 June 2001.

[51] I develop this argument at length elsewhere. See Stephanie R. Golob, "The Pinochet Case: Forced to be Free, Abroad and at Home," Democratization, vol. 9, no. 4 (Winter 2002): 25-57. On constitutive narratives, see Rogers M. Smith, "Citizenship and the Politics of People-Building," Citizenship Studies Vol. 5, No. 1 (2001), pp. 73-96.