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**EVOLUTION OR
REVOLUTION?
TRANSITIONAL JUSTICE
CULTURE ACROSS BORDERS**

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EVOLUTION OR REVOLUTION? TRANSITIONAL JUSTICE CULTURE ACROSS BORDERS

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ABSTRACT

In recent years, both a theory and a practice of “transitional justice” have taken hold in democratizing contexts worldwide. As an organized and systematic set of beliefs and a way of ordering individual, group and state behavior according to those beliefs and practices, it can be characterized as a “culture,” one which has diffused transnationally via a variety of vectors, such as human rights NGOs, international lawyers, international criminal tribunals, and the media. This culture has been overtly didactic: it offers templates, normative guidance and a veritable database of national experiences to bolster the contention that transition to democracy requires a public accounting of the crimes of the past authoritarian regime. An interesting wrinkle in this story of one-way diffusion is provided by the experiences of countries which have defied or contradicted this master narrative, either by managing their democratic transitions and their consolidations through amnesties and pacts (Chile and Spain), or by reversing processes of transitional justice in response to untenable instability (Argentina). But the wrinkle deepens when we consider that all three of these countries have experienced, at different moments and to varying degrees, a return to transitional justice practices and debates at a later date, often years into consolidation. Was this the result of the increased projection of transnationalized “transitional justice culture,” responsible for a “revolution” in expectations underscored by the Pinochet arrest in 1998 and the Milosevic trials a few years later? Or are there more compelling “evolutionary” domestic-level explanations? This paper explores the competing hypotheses, analyzes the precepts and ideological contradictions of “transitional justice culture,” and contends that a key dyad connecting the revolutionary and evolutionary dynamics at work in the spread of anti-impunity norms across borders is formed by victims’ groups and national courts. Both have been the targeted reception sites for transnationalized norms, and they have served as potential nodes of transformation for their respective national legal cultures. By suggesting that universalizing revolution is channeled, tempered and ultimately transformed by particularized evolution, this paper argues for a more nuanced, multi-dimensional approach to transitional justice politics, at once highly globalized and yet not in the least homogeneous.

CONTENTS

1. INTRODUCTION: WHAT GOES AROUND..... 4

2. TRANSITIONAL JUSTICE CULTURE ACROSS BORDERS: EXPANDING THE MEANING OF “RULE OF LAW” INWARD AND OUTWARD 9

 Legalism.....14

 Transnationalism18

3. THE DYNAMIC DUO: NATIONAL HIGH COURTS AND CIVIL SOCIETY GROUPS 23

4. CONCLUSION: REVOLUTION AND EVOLUTION 29

1. INTRODUCTION: WHAT GOES AROUND...

In the fall of 2008, nearly a decade to the date that his spectacular international arrest warrant set off what came to be known as the Pinochet Case, Spanish judge Baltasar Garzón launched another legal salvo against impunity, this time in his home country.¹ Long celebrated as the paradigmatic “pacted” democracy, Spain’s transition had been “transacted” among elites who wagered that the future stability of the country was dependent upon overcoming a history of bitter division, replacing a political culture of zero-sum antagonism with one of consensus.² One of the key elements of this pact was a double amnesty, with both symbolic and concrete legal implications, freeing political prisoners of the left and legalizing the Communist party, on the one hand, and precluding the criminal responsibility of *franquista* regime and military figures, on the other. This “peace for justice” tradeoff arguably worked: rather than turning backward, and inward, after a brief period of readjustment and instability (punctuated by a failed military coup attempt in February 1981), Spain’s democratic institutions consolidated with a future, outward orientation, cementing a consensual political culture with that of a democratic Europe. It therefore came as a shock to many sectors of Spanish society – three decades after the transition -- when Judge Garzón announced that he was studying a potential investigation of cases of “disappearances” dating back to the Civil War and, most notably, the first postwar decade of Franco’s rule.³ Wasn’t this era supposed to be off-limits to legal action? Then, a second shock came the next month when Garzón issued an order (*auto*) claiming competence to pursue the case:⁴ in it, he argued that the crimes under investigation stemmed from the

1 This essay benefited from documentary and interview research during the authors’ residency at the Center for the Advanced Study of Social Sciences (CEACS) at the Juan March Institute, Madrid, between April and June 2009. The author gratefully acknowledges the Center’s director, Ignacio Sánchez-Cuenca, its research director, Andrew Richards, its librarian Paz Fernández, and its administrator, Magdalena Nebreda, as well as those individuals who agreed to confidential interviews for this project. The author also recognizes with gratitude the generous financial support of the PSC-CUNY Grant Program of the Research Foundation of CUNY. Additional thanks to Omar Encarnación and the participants on a panel he organized at the 2009 Annual Meeting of the American Political Science Association (Toronto, September 1-5, 2009), when a previous version of this article was presented; and to Jo Labanyi and participants in the colloquium on “The Politics of Memory in Contemporary Spain,” King Juan Carlos I Center, New York University (November 2006), who provided crucial insights and support at the very early stages of the project. Finally, many thanks to Carlos Closa for giving me this opportunity to present my work at the Institute of Public Goods and Policies, Center for Humanistic and Social Sciences of the CSIC.

2 For classic analyses in this vein, see Donald Share and Scott Mainwaring, “Transition Through Transaction: Democratization in Spain and Brazil,” in Wayne A. Selcher (ed.), *Political Liberalization in Brazil: Dynamics, Dilemmas, and Future Prospects* (Boulder, CO: Westview Press, 1986), pp. 175-215; and Richard Gunther, “Spain: The Very Model of a Modern Elite Settlement,” in John Higley and Richard Gunther (eds.), *Elites and Democratic Consolidation in Latin America and Southern Europe* (Cambridge: Cambridge University Press, 1992), pp. 38-80.

3 See Manuel Altozano, “Garzón lanza la mayor investigación sobre los desaparecidos del régimen de Franco,” *El País*, Print Edition, September 2, 2008. http://www.elpais.com/articulo/portada/Garzon/abre/mayor/investigacion/desaparecidos/Guerra/Civil/elpepipor/20080902elpepinac_1/Tes/, accessed September 3, 2008. As the article notes, Garzón first went public with the request (to archives, the Church, municipal governments, and private citizens and citizen groups) for names of the disappeared, which he considered crucial for his decision regarding whether he would investigate a suit brought by 13 associations on behalf of the families of the disappeared.

4 Baltasar Garzón, “Auto, Diligencias Previas Proc. Abreviado 399/2006, Juzgado Central de Instrucción

“illegal uprising” against a legitimately constituted democratic regime (the II Republic) – breaking a long-standing taboo which projected the Civil War as a war of “salvation” from red terror,⁵ while also establishing the jurisdiction of his court, the *Audencia Nacional*, which heard cases of crimes against government officials and the democratic order itself.⁶ And finally, the greatest shock of all, was the list of implicated suspects in the case: Generalissimo Francisco Franco Bahamonde, and the top officials of the Franco regime between 1936 and 1951, accused of political and legal responsibility for crimes against humanity which have no statutes of limitations and are not subject to amnesties.⁷

The outcry on the right was immediate and deprecatory: echoing the sarcastic “Saturday Night Live” routine of the late 1970s, many noted that Generalissimo Francisco Franco was still dead, and thus could not be held legally responsible for anything. Moreover, it was claimed, going back into the past with such a “vindictive” intent was only designed to “break Spain,” an accusation frequently leveled against the Socialist government of José Luis Rodríguez Zapatero for its “Law of Historical Memory” initiative the previous year.⁸ *El Mundo*, a daily known for its open dislike for the media-darling magistrate, published a series of editorials loudly criticizing this as the latest “*garzonada*”, defined as a media circus with the sole aim of drawing international attention to stoke Garzón’s outsized ego.⁹ The more center-left newspaper *El País*, sympathetic to the spirit of the investigation, then gave a rousing defense of the judge, decrying his “lynching” in the press and suggesting that the lack of civility on the right revealed a “democratic deficit” on that side of the Spanish body politic.¹⁰ Far from evincing a consensual,

No.005, *Audencia Nacional*, Madrid” (October 16, 2008), p. 6.

5 As Julius Ruiz’ excellent study demonstrates, from its very first days the Franco regime used propaganda as well as the assiduous construction of a parallel national legal system to substantiate its claims to be the “legitimate” government, while depicting the II Republic as an illegal government and an agent of foreign provocation. See Julius Ruiz, *Franco’s Justice: Repression in Madrid after the Spanish Civil War* (Oxford: Clarendon Press, 2005).

6 This is, in part, why the AN has jurisdiction over ETA, the Basque separatists, and why Garzón has handled the issue of making ETA-related parties and organizations, such as newspapers, illegal. The AN also handles transnational crime – such as terrorism that crosses borders, like ETA and the Islamic terror networks – which is also how it got jurisdiction over cases related to Operation Condor and, ultimately, crimes committed by the Argentine and Chilean military governments in the 1970s. For arguments regarding the uprising, see Garzón, *Auto*, pp. 49-51.

7 In his *auto*, after he gives a census of the disappeared by region – totaling 114,266 – Garzón identifies all of the *Movimiento Nacional* governments, starting with the *de facto junta directiva* that claimed sovereignty following the uprising of July 17, 1936, through the *de jure* governments through 1951 in order to implicate Franco and the rest of his top officials in the alleged crimes against humanity (pp. 24-28). While he does recognize that the perpetrators are all dead, he then insists that the official death certificates be produced in order for their legal responsibility to be extinguished. It was in this interregnum that investigations continued regarding the number of disappeared and the locations of the mass graves. See Garzón, *Auto*, pp. 51-52.

8 Mariano Rajoy, leader of the opposition center-right Popular Party, was best known for this rhetoric. See, for example, “Rajoy: ‘Abrir heridas del pasado no conduce a nada,’” *El País.com*, Electronic Edition, September 2, 2008 (accessed September 3, 2008).

9 See “Truculenta garzonada,” *El Mundo*, September 2, 2008, at <http://www.elmundo.es/elmundo/2008/09/02/espana/1220357527.html> (accessed September 3, 2008).

10 See “Franco en el banquillo,” *El País*, Print Edition, October 17, 2008 at http://www.elpais.com/articulo/opinion/Franco/banquillo/elpepiopi/20081017elpepiopi_2/Tes (accessed October 17, 2008).

peaceful realm of agreement, the somewhat disproportional reactions in Spain's public sphere reflected a society whose fissures may not be apparent, but have nonetheless remained under the surface. Strident voices claimed that Spain was still capable of "breaking" despite its fully consolidated democratic institutional structure, and fear of political and even societal disintegration into violence still resonated these seven decades after the end of the Civil War, simply because of a judge's contention that the Spanish state owed legal, moral and financial recognition of the victims of repression under the previous authoritarian regime.

What has come to be known as the *Caso Franquismo* was, and continues to be, a risky and ambitious legal gambit,¹¹ arguably an attempt by this particular judge to close the normative and procedural gap between Spain's domestic, consensus-based legal barriers to the examination of the past regime and its international legal obligations to recognize and investigate crimes of state terror, in this case torture and forced disappearance. And, notwithstanding the negative connotations given to his international profile in the Spanish press, Garzón's standing in the increasingly globalized community of lawyers, human rights NGOs, judges, politicians, academics, and associations of victims and their families – what might be called the transnational anti-impunity movement – gives added weight to his arguments. They form a "full circle" that started with the Pinochet Case – based on claims of universal jurisdiction over crimes committed elsewhere -- and now has come back around as an argument for domestic jurisdiction for crimes committed at home, backed by the same globalized norms of imprescriptibility across time and space, and those of democratic state responsibility to take legal action to challenge impunity.

Spain's "full circle" is not only a historical coincidence or curiosity; it is also an indication that transnational flows of anti-impunity ideas and norms emanating from the Pinochet case have yet again taken root and transformed a domestic political and legal environment. A scholarly and popular post-Pinochet literature¹² has discussed the impact of that case on what has come

11 On November 18, 2008, Garzón withdrew his office from the case, following a decision by the full Criminal Division of the AN to freeze the exhumations pending a decision on a complaint lodged by the State Prosecutor's office, challenging Garzón's jurisdictional competence. However, this did not stop the case from making some very intriguing progress. Garzón did not close the case, but rather claimed that it was the provincial courts – where the mass graves were located – which had jurisdiction. Since November 2008, some municipal judges have moved forward with their own investigations and opening of graves; one judge in Granada, however, sent the case back to Garzón, claiming that the AN had jurisdiction. Such a conflict would then be decided by the Supreme Court – which has it in its power to return the case to Garzón. However, it was reported this summer that the Zapatero government would ask Garzón to deposit the documentation (i.e., the census of the disappeared) from his investigation – once it is officially closed – in the Historical Memory Documentation Center (formerly known as the General Archive of the Civil War) in Salamanca. See "El Gobierno pedirá a Garzón los documentos sobre el franquismo," *El País*, August 24, 2009, p. 11. Meanwhile, the right-wing group Manos Limpias has launched a suit against Garzón in the Supreme Court for *prevaricación* – knowingly abusing his judicial authority to advance a case he knew from the start was legally implausible – for attempting to put the Franco regime on trial. See Julio M. Lázaro, "El PP ensalza al Supremo por abrir una causa contra Garzón por prevaricación: El tribunal admite una querrela del sindicato ultraderechista Manos Limpias," *El País*, Print Edition, May 28, 2009, at http://www.elpais.com/articulo/portada/Supremo/actua/Garzon/causa/abierta/franquismo/elpepipor/20090528elpepinac_3/Tes/ (accessed June 4, 2009).

12 See, for example, Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in an Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005); Roger Burbach, *The Pinochet Affair: State*

to be known as “the globalization of justice,” as seen in the pursuit of former dictators across borders (Hebré in Senegal, Fujimori – unsuccessfully in Japan and then successfully in Chile) as well as at home (the Khmer Rouge trials in Cambodia), both through the activism of national judiciaries in applying international legal obligations under treaties, or via the empowerment of international institutions such as the UN and the new International Criminal Court. Of course, the Pinochet case alone cannot be credited for such a broad impact; without the last half-century of international human rights jurisprudence, and the state and non-state actors working to develop it, Garzón would not have had the legal arguments, or the cross-border police cooperation, to have pulled off the arrest, let alone to win the day with the Law Lords regarding the immunity of former heads of state. At the same time, I will argue that it is useful to see the Pinochet case, and other precedents in the application of international legal norms across borders, in the context of a broader global phenomenon: the spread of the theory and practice of “transitional justice” as near-requisite for democratizing countries. The message of the Pinochet case to former dictators - “nowhere to run, nowhere to hide” – was also (if less overtly) broadcast to those democracies whose transitions had been effected without a full accounting of the crimes of the outgoing authoritarian regime. After Pinochet, in a context of intense globalized publicity and greater mobilization of likeminded citizens and experts across borders, it became harder for politicians even in consolidated democracies such as Spain to fall back on the ends of their amnesties – social peace, opening the way towards political stability and economic prosperity – to justify its means - impunity.

In this paper, I will put forward a framework for understanding the impact of transnational flows of ideas and norms in these “most difficult cases”: the return to transitional justice politics and issues in consolidated new democracies many years after transition. My first contention is that this theory and practice of “transitional justice” constitutes a culture -- that is, an organized and systematic set of beliefs, practices, and norms, and a way of ordering individual, group and state behavior accordingly. This culture has diffused transnationally via a variety of vectors, such as human rights NGOs, international lawyers, judges, international criminal tribunals, and the media. Another key characteristic of transitional justice culture is its overtly didactic nature: it offers templates, normative guidance, and a veritable database of national experiences to bolster the contention that transition to democracy requires a public accounting of the crimes of the past authoritarian regime. It is also highly legalistic, which appeals in contexts where politics has previously brought only violent conflict, but which raises issues about deliberative legitimacy of norms. Finally, there is the element of world-historical time: TJC saw its current rising influence and appeal in a context of globalization, which not only bolstered the supply of ideas, via the internet and NGO practice, but also enabled the channeling of access from the demand side. With freer and less costly access to journalistic, testimony, and documentary sources, human rights activists could transcend both space and time to substantiate claims of

crimes against humanity, which have no statutes of limitations and ostensibly require legal action according to states' treaty obligations. At the same time, while the ideological "transnationalism" at the heart of TJC reflects a normative preference for a world without state sovereignty, in practice anti-impunity norms have advanced in part because of the ability of their "champions" to engage in cross-border power politics. Transnational legal and political cultural diffusion is, after all, a process that cannot be fully understood without reference to asymmetry and power relations. While analysts have referred to the spread of human rights norms and the influence of NGOs and IGOs under globalization as evidence of the "democratization of international relations," the pluralization of actors has not brought with it an end to the cross-border exercise of power politics.

In the course of this theoretical discussion of TJC, I hope to elucidate some of the dynamics by which countries embrace its norms and practices, including the variable extent of adoption in a given domestic legal and political environment, and at which stage of transition and consolidation the diffusion has effect. Specifically, I am interested in the puzzle suggested by what might be called "most difficult cases" – those countries which have defied or contradicted the master narrative of TJC, either by managing their democratic transitions and their consolidations through amnesties and pacts (Spain and Chile), or by reversing processes of transitional justice in response to untenable instability (Argentina). Why is it that all three of these countries have experienced, albeit at different moments and to varying degrees, a return to transitional justice practices and debates at a later date, often years into consolidation? Was this the result of the increased projection of transnationalized "transitional justice culture," responsible for a revolution in expectations underscored by the Pinochet arrest in 1998 and the Milosevic trials a few years later? Or are there more compelling evolutionary international- and domestic-level explanations? I would argue that, rather than a dichotomy, "revolution" and "evolution" are processes which interact – that is, in path dependent fashion, the development of democratic institutions over time is conditioned by the choices made at earlier stages of transition and consolidation, leaving certain domestic contexts more or less vulnerable at a given time to the impact of transnationally-propagated ideas.

This paper explores the competing hypotheses, analyzes the precepts and ideological contradictions of "transitional justice culture," and contends that a key dyad connecting the revolutionary and evolutionary dynamics at work in the spread of anti-impunity norms across borders is formed by victims' groups and national courts. Both have been the targeted reception sites for transnationalized norms, and they have served as potential nodes of transformation for their respective national legal cultures. To illustrate this, I present a brief overview of Spain's own dual processes in the post-Pinochet moment, tracing the interaction between civil society and judicial activism within an evolving domestic political context showing signs of both revolutionary "new thinking" and structural obstacles impeding rapid, wholesale normative change. By suggesting that revolution is tempered by evolution, and evolution is punctuated and

accelerated by revolution, this paper argues for a more nuanced, multi-dimensional approach to transitional justice politics, at once highly globalized and yet not in the least homogeneous.

2. TRANSITIONAL JUSTICE CULTURE ACROSS BORDERS: EXPANDING THE MEANING OF “RULE OF LAW” INWARD AND OUTWARD

“Culture,” for political scientists, has traditionally been denigrated as a very slippery term; indeed, it is only with trepidation that our field has even admitted this interloper from anthropological and sociological hinterlands. And yet the concept of “political culture” has enjoyed a recent rehabilitation in the literature on democracy and democratic transition in the guise of debates about which cultural values – individual autonomy or social capital; secular or religious – are most consistent with building effective and legitimate democratic systems.¹³ Here, “culture” becomes a useful window into understanding, at least in theory, why individuals submit to democratic authority, in that it posits an identification with democracy not only procedurally but also normatively or affectively. Democratic transition, then, can be viewed as a refounding moment for civil society and the state, a time when the “culture” of citizenship under dictatorship is shed or transformed to conform to a new “civic culture” or democratic identity. At the same time, however, in addition to being slippery, the concept of “culture” is also often viewed as “sticky”: it is taken as a term denoting continuity, beliefs that are resistant to external forces of change. How, then, is democratic identity effectively transformed or remade in transition and consolidation if “culture” is so difficult to change?

One way that legal scholars have suggested is through the law and through society’s perception of the meaning of law. If the law is itself a cultural artifact, shaped by human societies rather than a given part of nature, then changing who governs (and according what principle of legitimate authority) implies the possible reinvention of the legal system and citizens’ expectations of it.¹⁴ However, it may take a dramatic test of the system to bring about this transformation, though such a test may also pose a risk to the underlying stability of the new regime itself. It

13 A new wave of studies of “social capital” was led in the 1990s by Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993); for a useful review of the literature, see Jonathan Grix, “Social Capital as a Concept in the Social Sciences: The Current State of the Debate,” *Democratization* vol. 8, no. 3 (2001): 189-210. The classic statement on “civic culture” is Gabriel Almond and Sydney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton, NJ: Princeton University Press, 1963).

14 This is the basic premise of Jurgen Habermas’ approach to law. Habermas views the law as a discourse that can “translate” between the ferment within civil society at the time of democratic regime change (what he calls the discourse of the ‘lifeworld’) and the institutional or policy ‘system’ that puts those ideas and norms into operation to govern the polity. Under democracy, Habermas implies, the law provides an equilibrating force that legitimates government by bringing cherished values and beliefs into public life; likewise, if we believe that our government is responsive and accountable to us, then, by extension, we believe that the law is a concrete manifestation of that bond of trust between citizens and the state. See Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. (trans. William Rehg) (Cambridge: MIT Press, 1996), esp. p. 354.

is this dilemma which leads the vast majority of transitioning governments to forego, reject, or derail attempts at prosecuting former regime officials under the new legal order. Amnesty, it is often decided, sets the nation on a forward-facing course, and communicates a rejection of an adversarial legal culture that many may welcome after years of enforced quiescence, but which is viewed as dangerous to the bargain, or pact, struck with the generals in order to get them to leave. Moreover, as legal scholar Ruti Teitel has argued, amnesty may also represent a key “before-and-after” moment for the legitimation of the new liberal legal order, in that, like punishment, it provides a legal rite to symbolize the change in sovereignty, while also demonstrating mercy, a quality usually absent in the previous authoritarian order.¹⁵

In today’s age of globalization, however, this bargain has been struck down by actors transcending the nation’s borders, actors such as human rights NGOs, victims’ groups who seek redress abroad, and, in the future, will be challenged by the International Criminal Court. The Pinochet Case, in particular, highlighted the spectacle of a country whose pacted transition was deemed suboptimal and whose sovereignty was called into question because it had not been able, or willing, to prosecute its aging former dictator. For a growing segment of the global human rights community, the standard of “democratic rule of law” was not a matter of protecting property rights or even voting rights; it would also transcend the signing of human rights treaties and the protection of rights going forward in a new democratic constitution. Rather, the new standard would focus on confronting impunity: that is, it would be measured by the willingness and ability of a country’s institutions to confront and to punish mass crimes of the state against its own citizens, no matter how long ago they happened and with what political or ideological justification. “Democratic rule of law” required nothing less than the equalizing of all citizens as subject to the law, and the acceptance of responsibility by the democratic successor state – that is, the legal and symbolic elevation of international humanitarian law above the pragmatics of regime change.

At this fraught intersection of the domestic and the global, of citizens and the democratic state, and of the past and the future, we find the development of “transitional justice culture,” a set of norms and practices that have come to be expected of democratizing polities and of citizens in these new democracies centered on the question of impunity. Here I would put forward three preliminary theoretical propositions that form the contours of this “culture.” First, transitional justice culture demands a change in legal culture¹⁶ from a veneration of the “rule of law” as

15 Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), p. 59.

16 Comparative legal scholars Rogelio Pérez-Perdomo and Lawrence M. Friedman define “legal culture” as “the cluster of attitudes, ideas, expectations, and values that people hold with regard to their legal system, legal institution, and legal rules...[eventually shaping] the patterns of demands on the legal system.” They also distinguish between internal legal culture, which refers to the beliefs and practices within the legal system itself, held by practitioners such as judges, lawyers, and other related professionals such as paralegals, court officials, and even civil servants; and external legal culture, which encompasses the beliefs and expectations of the public. See Rogelio Pérez-Perdomo and Lawrence M. Friedman, “Latin Legal Cultures in the Age of Globalization, in Pérez-Perdomo and Friedman (eds.) *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford: Stanford University Press, 2003), p. 2.

a limiting, pacifying construct towards a transformational view of the law as itself a tool of liberation and of social and historical justice. In processes of democratization, it is arguably vital to establish “rule of law” in contrast to the arbitrary system of privileges and coercion that often characterizes authoritarian regimes. However, it is important to unpack what is meant by “rule of law,” or more specifically, who benefits from the following of the laws in question. Authoritarian regimes may legitimate their rule through elaborate “legalization” processes,¹⁷ while today’s new democracies are under pressure to adopt “rule of law” reforms that give priority to guaranteeing property rights in order to promote foreign investment. Transitional justice cultural norms, on the other hand, reject this view of the law as a bulwark to protect the state from an unruly citizenship, bent upon upsetting the political and, by extension, economic stability of a system benefiting a small elite. Rather, the law should be viewed as the people’s instrument of control over the behavior of the powerful, protecting citizens from abuse by state authorities and expanding the boundaries of the exercise of rights. This expansion of the rule of law inward must take place both at the elite level – in terms of “judicial culture” (the education and reasoning of judges) – and at the level of the average citizen, reshaping beliefs and expectations regarding the community values reflected in, and advanced through, the law and the legal system.

In civil law systems, such as the ones under study in this paper, the challenge is to overcome positivist legal cultural traditions that predate recent authoritarian experiences, even as they have been reinforced by them. Law is traditionally viewed by civil law jurists as “written reason,” defining the judge as an administrator of a rule whose content is generally not questioned.¹⁸ Ironically, as Judith Shklar has noted, this “positivist” approach to law was originally of liberal inspiration, in its attempt to render the law neutral and free from manipulation by authorities enforcing religious or other norms that violated the freedom of conscience of the individual.¹⁹ In practice in highly unequal societies such as 19th century Spain and Latin America, however, positivism melded quite effectively with elitist, conservative interests; in the 20th century, under both dictatorship and democracy, conservative judiciaries hewing to the letter of the law served to protect the state from citizen demands and, consequently, to distance large segments of the population from the state-as-political community. To use Shklar’s terms, if authority is “out there,” law is simply “there,” and judges apply mechanistic formulas rather than reason through convincing arguments, citizens’ expectations of justice are similarly truncated. If, however, authority is “in here” (i.e., exercised through the consent of the governed), law is only “there” for as long as it serves a legitimate societal purpose, and courts are viewed as accessible even

17 See Anthony W. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005), esp. pp. 191-200. On Franco’s use of legalistic legitimation, see Ruiz, *Franco’s Justice*, op. cit.

18 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, CA: Stanford University Press, 1985), esp. pp. 34-8.

19 Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA and London: Harvard University Press, 1986 [1964]), pp. 41-4.

to the most humble, then more citizens will experience, and come to believe in, expect, and eventually demand, “equality before the law.” Meanwhile, a parallel change has to come about in the judicial and legal professions: new generations of law students and candidates for the judiciary must be educated in new ideas about the role of law in society, breaking with traditional views that cordoned them off from the unruly rough-and-tumble of political debate. In some cases, such as Chile, this process is accelerated by the adoption of new, more adversarial procedures that insert Anglo-American common law practices and approaches as part of judicial reform.²⁰ Expanding the “rule of law” inward, then, is as much a matter of ideational and legal-cultural transformation as it is the constitutional and institutional redesign associated with democratization.

Next, transitional justice culture aims to connect domestic and international legal regimes in a symbiotic normative system that reshapes citizens’ expectations of the state. According to TJC’s precepts, the legitimacy of a democratic state should be judged not only by the expansion of its domestic protection of individual and collective rights, but also by its willingness and ability to enforce globally-sanctioned humanitarian norms, particularly when they go above and beyond norms at home. Similarly, citizens of a democratic state should see no contradiction between compliance with, or domestic citation of, international law and effective (national) legal sovereignty. If anything, the rejection of the “dualist” approach -- which traditionally has allowed both democratic and dictatorial governments to selectively comply with their international legal obligations²¹ -- demonstrates a higher standard of democratic practice that would add to, not detract from, the nation’s international prestige. What this requires is a second shift in legal culture – again, on both the elite and popular level – expanding the understanding of legitimate “rule of law” to encompass international legal norms. In Habermas’ conception, this is achieved through the transformation of ideas in the public sphere regarding the substance and practice of democratic citizenship, which today involves the influence of transnational flows of ideas about law and justice. It also involves the acceptance of international law as a legitimate guide to both state behavior and citizen expectations for justice. The anti-impunity norms first emerging at Nuremburg and Tokyo, conflictively advanced at the UN through the Covenant on Civil and Political Rights and the Convention against Torture, and then somewhat more robustly advanced through the international tribunals for the former Yugoslavia and Rwanda and the International Criminal Court, have now set the bar in terms of what should be expected by citizens of post-conflict societies. The current vogue for truth commissions likewise reflects the “domestication” of international norms, specifically ideas about “rule of

20 Chilean legal reform began in 2000. For more on Chile’s complex legal cultural change, and specifically the German influence, see James M. Cooper, “Competing Legal Cultures and Legal Reform: The Battle of Chile,” *Michigan Journal of International Law*, vol. 29, no. 3 (Spring 2003) : 501-563.

21 See Don Wallace and Akis Kalaitzidis, “The Monistic Goal of Overcoming the Divide between Domestic and International Law: Historical Lessons for 21st Century Globalization of the International Legal Community,” paper presented at the 2009 Annual Meeting of the International Studies Association (New York, February 15-18, 2009), p. 4.

law” and impunity.²²

Finally, after expanding the definition of “rule of law” outward to converge with international humanitarian legal standards, it is once again expanded inward to recognize the ongoing harm done by the democratic state when crimes of the past regime remain unproscribed, unpunished and often unrecognized.²³ This reasoning is seen in the legal arguments made in the Pinochet case both by Spanish Judge Baltasar Garzón and by Chilean Judge Juan Guzmán, citing forced disappearance by state authorities as an ongoing crime against humanity akin to torture, for which there are no statutes of limitations. Similarly, it widens the scope of those harmed to include family members who may themselves have not been “disappeared,” but whose rights and dignity are continuously violated over time by the ongoing crime. The democratic state should not have as its goal the protection of citizens from their own history; rather, the goal of new democracies should be the full social, political, and economic inclusion of past regime victims, first and foremost through the official recognition (procedural or symbolic) of their status as victims, not criminals.²⁴ Indeed, transitional justice culture suggests that full democracy requires official recognition of state criminality and victims’ rights by the democratic state itself, which may not have perpetrated the crimes of the past, but which must take responsibility in the name of the political community of today, no matter how long ago the crimes were committed. Pacts and amnesties may serve conjunctural needs, but they only extend the temporal reach of state culpability, which must eventually be confronted and assimilated in order for a nation to be truly free. Impunity, by setting certain individuals and groups above the law, perpetuates state-sanctioned inequality and injustice over time, often with economic implications, as elites who benefited under authoritarianism are allowed to keep, and expand, their privileges and holdings.²⁵ But the responsibility to confront impunity is to be viewed as equally a domestic necessity and an international obligation, even for crimes committed decades ago. Universal standards of justice not only cross borders, they also transcend time, making “transitional” justice an ongoing concern, extending beyond the transition itself.

22 An excellent and prescient overview of this phenomenon is Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge Press, 2001).

23 Teitel makes a similar argument for affirmative action for African Americans in the U.S.: over time, she writes, the direct harm may be attenuated, but “what nevertheless persists in the society is the sense of unrepaired state wrong...and the successor governments’ continued failures to respond in and of themselves are deemed part of the ongoing wrong.” See Teitel, p. 142.

24 Judge Garzón has publicly discussed witnessing (and taking some part in) this transformation. Remarks of Baltasar Garzón, Abraham Lincoln Brigade Annual Lecture, New York University (New York, April 28, 2000), author’s notes.

25 For a critique of this phenomenon in the case of Brazil, see Frances Hagopian, “Democracy by Undemocratic Means? Elites, Political Pacts, and Regime Transition in Brazil,” *Comparative Political Studies*, vol. 23, no. 2 (1990), pp. 147-70. Over a half-century later, victims of the Nazi regime have used civil law to collect damages from German companies that benefited from slave labor and looted property. For a discussion by one of the leading legal participants in these proceedings, see Burt Neuborne, “Toward Common Procedures in Seeking Compensatory Relief for the Violation of Core Aspects of Customary International Law: The Experience of Holocaust Cases,” paper presented at the 2009 Conference of the International Association of Procedural Law, (Toronto, June 3-5, 2009).

The preceding theoretical sketch of TJC suggests a normative system imbuing certain practices and legal procedures with deeper meanings of inclusivity, belonging and citizen equality under democracy. However, in addition to providing a system of beliefs and values, TJC also provides a structured, political narrative that blurs the lines between culture, on the one hand, and ideology, on the other. Like other ideologies, TJC's didactic ethos offers to simplify and make sense of a complex environment through the application of guiding principles and templates. Under TJC, both the domestic legitimacy and international legitimacy of the state depend upon confronting impunity; similarly, dilemmas of social peace vs. justice may be decided to favor the former temporarily, but must eventually resolve in favor of the latter. Such simple answers to complex questions are reassuring but are often fraught with contradictions; indeed, what makes ideology such a fascinating political phenomenon is the way that systems of thought come to absorb their contradictions, proving themselves flexible in their rigidity and solid in their variations. For example, the "revolutionary" ideology of the single party that governed Mexico for seven decades served to legitimate such counter-revolutionary projects such as the privatization of indigenous communal landholdings and the North American Free Trade Agreement.²⁶ In the case of TJC, two elements generate contradictions that bear consideration here: legalism and transnationalism.

Legalism

On first glance, it would appear that transitional justice culture is anti-legalistic, if we take as our definition of "legalism" from Shklar:

"[Legalism] 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."²⁷

Indeed, I have suggested that the transnational diffusion of TJC is responsible for a "revolution" in beliefs and practices based upon the rule-challenging and rule-breaking quality of its precepts. Specifically, I have argued that TJC demands a change in legal culture away from formalistic approaches to justice, leading citizens to expect their laws to change and break with past practices of impunity, even those "democratically" approved ostensibly to protect the nation from violent upheaval. Rule-following is associated with the respect for amnesties and pacts, themselves instruments bearing legalism's distaste for the moral turpitude of politics (bargaining, partisanship) in favor of clean, neutral guidelines for behavior. If combined with a positivist legal culture, what matters for the exercise of "justice" is not the substance of the decision but its form: what does the law say, and how does it apply in this case? For impunity to be confronted, however, "what the law says" must be expanded beyond its narrow textual confines to encompass new contextual areas of theory and practice. As one senior Chilean judge

²⁶ See Stephanie R. Golob, "Beyond the Policy Frontier: Canada, Mexico, and the Ideological Origins of NAFTA," *World Politics*, vol. 55, no. 3 (April 2003): 361-98.

²⁷ Shklar, p. 1.

observed, in his country the judicial system has made moves on three levels that have opened the way for a confrontation of impunity: away from law as a pure science; towards law as a reflection of society and a guide sensitive to contemporary context; and beyond national norms to embrace – and thus promote – universal standards protecting human dignity.²⁸ Moreover, transitional justice culture’s emphasis on the transcendence of time overturns the cornerstone of criminal justice in both civil and common law traditions: the non-retroactive nature of criminal responsibility. For example, if Ms. X engages in a behavior that is legal at Time 1, she cannot later be tried for breaking the law at Time 2, when that behavior is declared illegal. However, for practitioners of TJC, “what the law says” at a particular moment matters less than what justice demands for all times.

This last point brings up a glaring contradiction: “what justice demands” is not lawlessness, or even simply the transformation of local law, but rather the primacy of international law – both treaty-based and customary – over domestic norms in the interest of confronting impunity. This is, itself, an approach with a heartily legalistic core, and almost a positivistic approach to the application of rules that are considered “neutral” or universal. There is to be, for example, “zero tolerance” for mitigating circumstances (pacts, amnesties) when it comes to impunity: sooner or later, the law must be applied, and politics must be transcended so that rules are followed. Not simply a rejection of the pragmatics of dualism, this is a radical expression of monism, whereby domestic and international law make up a single system, with international law representing a “higher” authority that can trump the lower-order interests and petty concerns that shape domestic law.²⁹ Citizens should thereby be protected from abuse by their government by the rigorous and automatic application of a higher law; however, in practice, the state is where citizenship is founded and where rights are defined, not in an abstract international sphere governed by an as-yet politically constituted (or universally enforceable) cosmopolitan regime of human rights. Thus it is not a settled matter, especially in post-conflict societies and in pacted democracies, whether the application of international law should always override domestic political arrangements. Asserting that international rule-following is required and constitutes domestic legitimacy belies a legalism that, to its opponents, appears rigid and, at times, downright autocratic. Like their political counterparts, legal-cultural revolutionaries are just as likely to fall into the trap of believing that radical change can only be brought about by force (or other forms of coercive behavior), and without dissent.

More sympathetic critics of the legalistic approach to confronting impunity have focused on the requirements of deliberative democracy, whereby international legal standards become part of an open, inclusive public discussion about community norms that leads to an agreement about when they have been violated and how the society should respond through the legal system.

28 Confidential interview, Santiago, July 17, 2009

29 Wallace and Kalaitzidis, p. 2.

The Argentine legal scholar Roberto Gargarella, citing the work of Duff, Habermas, and Nino, argues that such an inclusive public discussion regarding the validity of international human rights law must be somewhat skeptical regarding the wholesale imposition of the decisions of international courts – which are imperfect institutions at best and suspect as fully representative of the “normative community” at stake – but must remain open to other countries’ experiences as a guide for best practices.³⁰ Local courts, then, play a pedagogical role for the society at large by studying other countries’ application of international norms such that their opinions help politicians and citizens in their deliberations regarding the expanding scope and content of democratic community norms. Gargarella further argues that “[t]his attitude of openness is particularly advisable, if not simply required, for those communities that are or have been, controlled by authoritarian leaders who prevented or put obstacles to the introduction of critical ideas about their enacted laws and adopted policies.”³¹ In this formulation, international law is recognized and treated as one of the many “forbidden fruits” denied by a closed, authoritarian legal order. I might also add that its inclusion in the domestic debate regarding community standards is consistent with the extension of “rule of law” inward and outward central to transitional justice culture – without the legalistic absolutes that undermine its domestic legitimacy.

Rather than simply the result of a revolutionary overthrow of outdated norms, it is also through an iterative, contentious, evolutionary process centered on an ongoing dialogue in the domestic realm that globalized norms regarding impunity and the rights of victims of past authoritarian repression become legitimated and normalized within the local legal culture. In the case of Argentina, Gargarella draws a dotted line of sorts connecting the newly-democratic Supreme Court’s invalidation of the junta’s self amnesty law (1983) and the later Court decision in the *Simón* case (2007), which invalidated the pardons extended under President Carlos Menem in 1990, demonstrating that the definition of “community norms” under democracy is a fluid and contentious process. The legal reasoning in 1983 centered on condemning the “exclusionary” character and origin of authoritarian law, which reflected the pressing need at the time to delegitimize the authoritarian regime’s division of Argentines into those who were “pro-“ and “anti-*patria*” and to convince citizens that there would be equality before the law in the new democratic order. It is well known that the trials of leading regime officials set off a violent response from the military, which succeeded in regaining impunity for many of its members, first through the Laws of Due Obedience (1987) and Full Stop (1986), and then through the 1989 and 1990 pardons. Gargarella, however, maintains that this was not the product of “progressive, collective decisionmaking” reflecting a new, broadly-legitimate pro-impunity consensus so much as a return to exclusionary deliberation and the “imposition” of the interests of one segment of society over the others. The *Simón* decision, though it might be viewed as “inclusive” in that it declared unconstitutional Menem’s “exclusionary” policy, may merely

30 Roberto Gargarella, “Human Rights, International Courts and Deliberative Democracy,” unpublished manuscript, Fall 2008, available at <http://lanic.utexas.edu/project/etext/llilas/vrp/gargarella.pdf>

31 Gargarella, p. 16.

have reflected a new imposition following an internal struggle in Argentine political and legal society from the late 1990s through the early years of this century. Between 2002 and 2004, regime victims gained a powerful ally: a group of newly-arrived Supreme Court justices citing the international legal obligations of the (democratic) Argentine state, now firmly established as the highest law in the Constitution revised in 1994. Gargarella's analysis, however, strikes a cautionary note: are we witnessing yet another swing of the pendulum, or will TJC norms take root more broadly? The nodes of reception and diffusion of TJC – the high judiciary and victims' groups – view themselves within global and regional epistemic communities and are cognizant of how other countries are addressing these issues; but do these elite and quasi-elite groups find their message having resonance in broad segments of the Argentine population? Are politicians able to win votes by citing their promotion of international legal standards as the standards of behavior of the Argentine state? And has the normative valence of affect changed to include international law as a community norm central to the essence of Argentine democratic identity? As in other evolutionary processes, many moving parts, and many of them moving at different rates, will condition the outcome, not only the dictates of a new legalistic revolutionary order.

But *Simón* offers another important lesson regarding the dangers of legalism for the participation of transitional justice culture in domestic-level evolutionary processes. If we follow the Habermasian model, it is not simply the existence of a public sphere free of impediments to the open exchange of ideas that matters in democracy; it is also the quality of the discourse. While it is true that professionalized elites such as economists and lawyers often make use of technical language to bolster their prestige within the public sphere, judges emitting decisions on higher courts know that they must present convincing arguments that resonate with and make sense to the general public. This is particularly true when a court cites international law to overturn a domestic law or to demand compliance with the state's international obligations in contravention of settled domestic practice. As far as the average citizen is concerned, "the law" is what emanates from the institutions s/he has voted for or has empowered through the vote, unless s/he is convinced that it is preferable/desirable/necessary to accept rules that claim universal enforcement. It is up to domestic authorities and their allies in the public sphere to make this case publicly and convincingly, so that the citation of international law and legal decisions is naturalized within the legal and political culture.

In *Simón*, the Argentine Supreme Court cited the Inter-American Convention on Human Rights – or, more precisely, a key decision of the Inter-American Court of Human Rights based on that convention (*Barrios Altos*, 2001) – to claim that national courts lacked discretion in the blanket order made to nullify all amnesties that prevent the full investigation of past state crimes. What was missing, according to Leonardo Filippini's critical analysis,³² was a set of convincing

32 Leonardo Filippini, "Algunos problemas en la aplicación del derecho internacional de los derechos humanos en el fallo *Simón* de la Corte Suprema argentina," unpublished manuscript, Yale University School of Law, 2008.

arguments; instead, the majority's decision was overly legalistic, in that it gave highest moral standing to following the rules, treating international law as a neutral arbiter that is simply "there," and the IACHR as a quasi-superior court which had the right to overrule and dictate to Argentina's national courts. As was visible during both the Pinochet extradition attempt and the trial of Slobodan Milosovic in the Hague, significant segments of the home population objected strongly to what they perceived as the inappropriate imposition of international law as "superior" to domestic law. Thus, rather than encourage the naturalization of international humanitarian norms in the domestic sphere, excessive legalism runs the risk of undermining their legitimacy at home.

Transnationalism

Hand in hand with legalism goes transnationalism in the ethical system underlying TJC: there are universal rules to follow, and these rules must transcend national borders. Such transcendence, it is implied, is necessary both because of the division of the world into separate territorial sovereignties, and because international law is designed to protect humans-qua-humans, without regard to national origin. If anything, international law is supposed defend the citizen from her/his own state, which enjoys a monopoly over the legitimate use of force and the recognition of other, similarly empowered states. Transnationalism, then, is a normative preference for a world without the barriers of state sovereignty and without the power hierarchies of the international state system, rendering the law of even the most powerful state subject to global norms of decency and correct behavior. It inverts the classic concept of state sovereignty, described by R.B.J. Walker as the ordered "inside" protecting against the disordered and dangerous "outside."³³ Instead, it is the order from "outside" that sets the rules for an "inside" that is disordered and dangerous. These rules, moreover, are viewed as the universal extension of an egalitarian order, whereby no individual is above the law, no state is entitled to selectively apply the law, and a cosmopolitan humanity shares an equal interest in the enforcement of the law everywhere.

In practice, however, the diffusion of transitional justice culture across borders has been a power-infused process conditioned by asymmetry and, at times, even coercion. Legal cultural change requires a rethinking, both in the legal professions and throughout society, of the content and the validity of law in a given national context. To come to a new understanding of these two dimensions of law, Gargarella argues that a deliberative process in the public sphere is necessary in order to identify perspectives that have been systematically excluded, as dominant groups also tend to write the law in ways that favor their interests.³⁴ But this begs a question: how egalitarian is the "public sphere" itself? In many countries experiencing

33 R.B.J. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1990).

34 Gargarella, p.6.

democratic transition in the contemporary era, injustices perpetrated over time by the past regime have been both economic and political, and depending upon the deals struck at home and the international exigencies (debt restructuring, foreign exchange through investment, etc.), many of those injustices persist. In South Africa, for example, the end of apartheid in political terms was arguably only the starting point for a longer-term transition bringing economic justice to those excluded from educational, vocational and other opportunities based upon race. Former communist states sought new liberal democratic and economic arrangements while also facing the entrenched privileges of the party elite in what were claimed to be radically egalitarian societies. Endemic and persistent inequality in Latin America was, in some sense, only exacerbated by the continued access to power and privilege of an elite which benefited from the repression of popular class mobilization under dictatorship. In such contexts, access to the “public sphere” – whether through the media, the education system, or the party system – can be assumed to be unequal.³⁵

Legal cultural change, then, can be visualized as a revolutionary process of “capturing” access to and, ultimately, achieving hegemony in the public sphere through the mobilization of resources that help overcome the biases and barriers defending the interests of dominant groups. Norms coming from “outside” or favoring the “outside” order must have their “champions,” and these norm-promoters make strategic use of the prestige and legitimacy of their external allies as they argue for a rethinking of the content and validity of the law. In the case of anti-impunity norms, I will postulate that the two key domestic “champions” are judges – specifically those on high national courts – and victims’ groups. Individually and in their interaction, these two groups leverage the “outside” and bring it into the public sphere to confront and overturn entrenched views promoting and protecting impunity for past regime crimes. Their arguments gain traction because of both their content – their moral weight, their appeal to egalitarian fairness and to the view of law as responsive to changing community values – and their validity – bolstered by the imprimatur, and often the asymmetrical resources, of their prestigious globalized allies in the legal professions³⁶ and legal academy, international institutions, non-governmental organizations (such as the International Center for Transitional Justice), foreign judiciaries, foundations, and the progressive media. As Peter Haas’ classic study of environmental policymaking demonstrated, “epistemic communities” that bring together experts sharing beliefs about necessary change are not necessarily egalitarian;³⁷ at the same time, these very asymmetries can play in the favor of

35 This theme runs throughout the analysis in Leonardo Avritzer, *Democracy and the Public Sphere in Latin America* (Princeton: Princeton University Press, 2002).

36 British international lawyer and law professor Philippe Sands has chronicled his participation in this anti-impunity legal community in *Lawless World: America and the Making and Breaking of Global Rules* (London and New York: Allen Lane, 2005).

37 Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination,” *International Organization*, vol. 14, no. 1 (1992): 1-36. For a recent analysis of “assemblages” of experts and government officials that shift the conceptual boundaries of issue areas (in this case, disease and public health policy) across borders, see Kirsten Edquist, “Globalizing Pathologies: Mental Health Assemblage and Spreading Diagnoses of Eating Disorders,” *International Political Sociology*, vol. 2, no. 4 (December 2008): 375-91.

the ostensibly “weaker” parties. International law, and particularly treaties, allow governments to claim their ‘hands are tied’ when confronting domestic opposition to new normative frameworks. And legal borrowing, whereby a foreign law or model is adopted wholesale, similarly appears to be an illegitimate imposition, but often provides reassuring templates at times of impasse that, through fair and consistent implementation, can earn validation by the broad public.³⁸ In short, because transnationalism cannot will away the dynamics of asymmetry and power, bringing the “outside” in risks subordination, but can also prove a valuable tool in the power struggle over legal cultural change in the not-so-equal public sphere.

Furthermore, as a substantial literature in international relations attests,³⁹ the non-state actors who engage in transnationalism are not completely able to transcend the nation-state and the hierarchies of the competitive international state system. As I have argued elsewhere, the “boomerang” dynamic described in Keck and Sikkink’s study of transnational non-state “advocacy networks”⁴⁰ may target international organizations and otherwise mobilize external agents of international norms, but the objective remains the home state – its legal regime and its behavior.⁴¹ Meanwhile, international organizations, treaty-based and ostensibly neutral executors of international law, are also inter-state political organizations; indeed, as Susan Strange most memorably observed, these regimes are subject to the same competing national interests and relative power hierarchies that define, and corrupt, the international system at large.⁴² And while Harold Koh describes and celebrates the development of “transnational law,” he equally recognizes that, in legal and practical terms, the state is what we have got to enforce it, no matter how “globalized” the norm is.⁴³ Thus, the sovereign state is at once the greatest obstacle to the diffusion of anti-impunity ideas claiming universal jurisdiction and the only viable vehicle for bringing about true universal jurisdiction, one particular jurisdiction at a time.

38 See Martin Böhmer, “Borrowings and Acquisitions: The Use of Foreign Law as a Strategy to Build Constitutional and Democratic Authority,” paper presented at the conference on “Law and Culture,” Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), Yale Law School (San Juan, PR, June 12-15, 2007), available in English at

http://www.law.yale.edu/documents/pdf/sela/MartinBohmer__English_.pdf, accessed August 28, 2009.

39 For an early entrant in the field, see Robert O. Keohane and Joseph S. Nye (eds.), *Transnational Relations and World Politics* (Cambridge, MA: Harvard University Press, 1972). For “next generation” treatments, see Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks* (London and Ithaca: Cornell University Press, 1998); Anne-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 (January 1998), pp. 1-35; Jeffrey Ayres and Laura C. Macdonald, “Deep Integration and Shallow Governance: The Limits of Civil Society Engagement across North America,” *Politics and Society* 25 (Spring 2007): 23-42.

40 Keck and Sikkink, Figure 1, p. 13.

41 See Stephanie R. Golob, “Forced to Be Free: Globalized Justice, Pacted Democracy and the Pinochet Case,” *Democratization*, vol. 9, no. 2 (Summer 2002): 42.

42 Susan Strange, “Cave, hic dragones! A Critique of Regime Analysis” in Stephen D. Krasner (ed.), *International Regimes* (Ithaca and London: Cornell University Press, 1983), pp. 337-54.

43 Harold Hongju Koh, “Transnational Legal Process” *Nebraska Law Review*, 75 (1996), pp. 181-206.

To overcome this dilemma, transnational actors crossing borders in hopes of extending their worldview can adopt one of two strategies. First, they may stand to benefit from “piggybacking” on the strategic interests of states in order to advance their norm-promoting agenda. As it turns out, the question of norm compliance – why a self-interested state would submit to an international rule – has taken center-stage in debates within international relations theory, pitting realists and liberal internationalists favoring interest-based explanations against constructivists favoring explanations based upon state identity.⁴⁴ Constructivists argue that states engage not only in behaviors that are materially beneficial, but also those that are appropriate given the norms of the system. States’ identities – how they are perceived and, in turn, how they view themselves – are formed through an intersubjective process that is not fully explained by internal ideology or by relative position in the international system. Reputation becomes more than merely an instrumental quality or a “power resource”; rather, it is the central motivating principle of the state, which operates within an international society with rules, norms, and the power to withhold privileges to those who break the rules. In the area of human rights, regional and international courts share the enforcement role with member states: courts claim jurisdiction and emit decisions based upon treaties and international law, and if a state does not cooperate and comply with the norms, the consequences can be the limitation of its sovereignty rights, as other national or international jurisdictions can claim the right to intervene – militarily, economically through sanctions, or judicially through the prosecution of alleged perpetrators the home state either cannot or will not try. This dynamic – on view in the Pinochet case – appears to be at work in the Argentine Supreme Court’s majority decision in the *Simón* case. As Filippini notes, a number of judges cited a threat to “national dignity” and the fear of “paying a price” by not complying with Argentina’s international obligations under the Inter-American Convention of Human Rights. Though the possibility of direct intervention was remote, not so the possibility that by not trying *Simón* Argentina would lose its right to exercise sovereignty over other such cases, à la Pinochet Case.⁴⁵ Thus, impunity can be confronted with the help of state concerns for reputation and identity, as they intersect with the aim of maintaining full (normative and sovereign) membership in international society.

But more power-based theories of international relations also offer succor to the transnational bearers of anti-impunity ideas. That is, if states comply with norms to advance material interests, they would also comply with them selectively, based upon the material or strategic costs and benefits of the behavior, rather than any identification with the norm or with respect for international norm-enforcing regimes. If powerful states favored the prosecution of past regime

44 See, for example, Janice Bially Mattern, “The Power Politics of Identity,” *European Journal of International Relations* vol. 7, no. 3 (2001): 349-97; Jeffrey T. Checkel, “The Constructivist Turn in International Relations Theory,” *World Politics* vol. 50, no. 2 (1998): 324-48; Martha Finnemore, *National Interests in International Society* (Ithaca and London: Cornell University Press, 1996).

45 Filippini argues that the threat was overblown by the justices, and suggests that such exaggeration undermines the legitimacy of otherwise credible reputational and identity-based arguments. See Filippini, pp.15-20.

members and there were negative, coercive incentives involved, a less powerful state would be more likely to move forward with trials or to surrender suspects to an international court. Of course, the most extreme examples are the cases of “transitional justice by occupation,” such as the Nuremberg Trials and, more recently, the trials of Slobodan Milosovic in the Hague and of Saddam Hussein and other Ba’athist leaders in Iraq.⁴⁶ But even when the new democratic state has achieved its sovereignty without external intervention, often the promise of aid or other positive incentives from powerful states favors the domestic opponents of impunity. At the same time, the recent experience of Spain as a site for universal jurisdiction-based cases shows the other side of this power-based coin. Starting with the first cases involving Operation Condor in the early 1990s, human rights lawyers targeted Spain, whose domestic laws incorporated language from human rights treaties claiming jurisdiction over crimes against humanity if they were not being tried in the country in question. In addition to Pinochet, cases have been brought against government officials and military officers from Guatemala, Argentina, and, most recently, Israel (for events in Gaza in 2002), China (for killings and torture in Tibet) and the United States (for Guantánamo). Given the power and influence of the three latter target states, these cases took on the aura of a test: could a relatively peripheral state, like Spain, advance anti-impunity norms and universal jurisdiction over the objections of superpowers and their allies? In the end, the answer appeared to be negative: in late May 2009, the otherwise antagonistic Socialist government (PSOE) and the center-right opposition Popular Party (PP) entered into a rare agreement on the need to limit universal jurisdiction,⁴⁷ and in October 2009 the Spanish parliament passed legislation changing the language of the Organic Law in question, now limiting Spain’s jurisdiction to cases involving Spanish victims or in which Spain has a direct interest.⁴⁸ While the change was, in part, justified as a practical solution to the general problem of an overwhelmed judicial docket, the anti-impunity cause was arguably set back because it reached the limits imposed by a system of states in which national interests, not universal norms, still prevail.

46 While “transitional justice by occupation” may appear to be the most straightforward means of diffusing TJC – i.e., impunity was confronted because there was no other choice available -- these cases are actually more complex than meets the eye. Nuremberg has been cited as the precedent that led to the development of the international humanitarian law regime over the past 50 years, and it also has been held up as an example of how transitional justice can be achieved through trials. However, the de-Nazification process created great unrest and was not fully completed, even as the top Nazi leaders faced emblematic trials. For a critical view of Nuremberg and its legacy, see Jeremy Rabkin, “Nuremberg Misremembered,” *SAIS Review*, vol. 19, no. 2 (1999): 81-96. The case of Iraq is also ambiguous, in that the top leaders were tried, but the legitimacy of the courts was tied to the questionable legitimacy of the U.S. invasion. Meanwhile, de-Ba’athification has been criticized as having left Iraq’s government without technically-trained personnel, and for stoking the sectarian claims of Sunnis fearing Shi’ia resurgence.

47 See Fernando Garea and Manuel Altozano, “El Congreso limita de tapadillo la justicia universal,” *El País*, Print Edition, May 22, 2009, at http://www.elpais.com/articulo/espana/Congreso/limita/tapadillo/justicia/universal/elpepinac/20090522elpepinac_8/Tes/, accessed June 4, 2009.

48 See José Yoldi, “Las Cortes recortan la jurisdicción universal,” *El País*, Print edition, October 16, 2009, at http://www.elpais.com/articulo/espana/Cortes/recortan/jurisdiccion/universal/elpepinac/20091016elpepinac_9/Tes/, accessed October 16, 2009.

The preceding discussion highlights the complex and often conflictual nature of the diffusion of transitional justice culture across borders. Those advancing the “revolution” in global anti-impunity norms face the challenge of “domesticating” their arguments and finding allies within national-level democratic legal and political orders in order to fully legitimate the norms they profess. Similarly, state sovereignty and appeals to “national interest” remain bulwarks against “intervention” in domestic affairs, while the asymmetries and power politics obtaining in the international system of states condition the advancement and enforcement of international law. In the next section, I will examine how two key domestic actors – national high courts and civil society – participate in these transnational networks of power and influence, offering potential nodes of domestic norm transformation that bring revolutionary “new thinking” into direct contact with settled practices and institutionalized limitations on the domestic level. Focusing on the interaction of courts and civil society allows for greater traction in tracing what turn out to be highly variable and contentious processes of transnational legal cultural transformation as anti-impunity norms cross borders.

3. THE DYNAMIC DUO: NATIONAL HIGH COURTS AND CIVIL SOCIETY GROUPS

Particularly in Latin America, judicial and legal reform has had an outsized real and symbolic meaning in processes of democratization. As mentioned earlier, authoritarian regimes often did not dismantle the judiciary, but rather used it as a means of enforcing repressive measures while legitimating them with the imprimatur of “binding legal authority.” Under the rubric of “judicial independence,” for example, the highly conservative Supreme Court of Chile, which had objected to the Allende government’s more transformational approach to the law, was able to return to its philosophical positivist tradition as it enforced Pinochet’s Constitution as “written reason.” Mexico’s single-party authoritarianism presented another model, whereby the judiciary was reduced to acting as an appendage of the super-empowered presidency, and impunity prevailed through the highly selective enforcement of the law. In both cases, victims of state terror or arbitrary punishment were branded as criminals, and were deprived of basic guarantees under the law. Thus the transformation that Teitel discusses – the instantiation of liberal rule of law during democratization – required changes not only in the legal order (i.e., the laws themselves) but also in the institutions administering justice, such that citizens could trust courts as integral and legitimate parts of a democratic state based upon popular sovereignty. Processes of judicial and legal reform in Latin America, while in no way uniformly rapid and complete, have taken on greater meaning for constructing democratic citizenship as courts slowly become more accessible to more people, and also as their continued limitations come in for more public scrutiny and opprobrium in an increasingly open media environment.

For our purposes, three interrelated processes shape the role of high courts in democratizing contexts in the diffusion of transitional justice culture. First, “access to justice” reforms allow for more citizens to view the courts as a legitimate means of staking claims, including claims

against the state for recognition of, or compensation for, past regime crimes. Courts may even become the venue of first resort for citizen claims if other kinds of democratic institutional reform, such as electoral, legislative and party reform, appear blocked or not sufficient to provide adequate responsiveness. Though much of this reform is focused on lower-level courts or even informal means of settling local disputes, in some countries though not all, access to higher courts and appeals courts for human rights cases has also been expanded. Second, “access to the judiciary” reforms target the mechanisms and political formulas for naming judges to high courts, as well as the qualifications for the judicial career. In new democracies, while legal continuity may be disposed of, it is often harder to “dispose of” judges who serve on higher courts who may, due to philosophical or political commitments, reject “new thinking” regarding impunity. Some renewal of personnel occurs by attrition and retirement; in other cases, new formulas are devised to add or subtract seats, or to insert legislative approval of executive decisions, in order to shift the philosophical balance on the higher courts away from older, often more conservative judges. Meanwhile, phenomena such as the creation of judicial academies⁴⁹ and the development of new public law (and human rights) curricula and concentrations in law schools send new generations of lawyers and judges into the judicial system seeped in a democratic legal culture and in more globalized professional norms.

This brings us to the third process, which is the globalized revolution of expectations regarding the judiciary. As Anne Marie Slaughter has argued, domestic judiciaries in settled democracies are becoming increasingly globalized, more often looking beyond their nation’s borders for guidance regarding standards of justice, while also networking professionally and sharing ideas in formal as well as informal settings.⁵⁰ A similar phenomenon has recently linked the judiciaries in democracies in Latin America, as regional professional networks and summit meetings⁵¹ generate cross-border dynamics that complement the expanding jurisprudence of regional institutions such as the Inter-American Court of Human Rights. For example, the XIII Iberoamerican Justice Summit, attended by presidents and chief justices of the highest courts and councils in Latin America, Spain and Portugal, formally approved an Iberoamerican Model

49 A good example is Chile’s Academia Judicial, established in 1994. See http://www.academiajudicial.cl/quienes_somos.php, accessed July 10, 2009.

50 See 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.

51 Iberoamerican Network of Judicial Schools (Red Iberoamericana de Escuelas Judiciales, RIEJ), was first proposed at the 2nd Summit of Iberoamerican Judicial Councils (II Encuentro Iberoamericano de Consejos de la Judicatura) and approved at the 6th Summit of Iberoamerican Supreme Court Presidents (VI Cumbre Iberoamericana de Presidentes de Cortes Supremas y de Tribunales Superiores de Justicia) in 2001. See http://www.riaj.org/index.php?option=com_content&task=view&id=1&Itemid=42, accessed July 10, 2009. This year, the 10th Meeting of Iberoamerican Female Magistrates was held in Cartagena, Colombia, and focused on international and regional legal approaches to human rights and women’s rights. See “TSJ Participa en el X Encuentro de Magistradas de Iberoamérica,” *Noticiero Legal* (Caracas, November 11, 2009), at http://www.noticierolegal.com/index.php?option=com_content&view=article&id=819:tsj-participo-en-el-x-encuentro-de-magistradas-de-iberoamerica&catid=20:tribunal-supremo-de-justicia&Itemid=25, accessed December 14, 2009.

Ethics Code for their judiciaries in 2006.⁵² A similar impetus towards shared standards was encouraged in the late 1990s and early 2000s by international financial institutions, such as the World Bank, which launched programs in “rule of law” reform during the height of “good governance” aid in the late 1990s-early 2000s⁵³

While judges have been networking, reading each other’s decisions, and forging formal and informal shared standards in line with international norms, the expansion of media freedom, on the one hand, and of information technology, on the other, have publicized judge’s decisions both within and across borders more than ever. This new exposure can have two, related impacts that can, in turn, help or hinder the domestic acceptance of globalized anti-impunity norms. First, judges embracing these new norms can, as Gargarella has noted, use this publicity pedagogically, to educate the public and engage in the Habermasian public sphere to explain and defend the benefits of expanding citizens’ rights by expanding rule of law outward. However, this publicity can also lead to a domestic backlash, as more conservative and nationalist factions criticize judges for stepping outside traditional bounds of professional conduct, or for putting international norms above domestic norms, in a violation of national sovereignty. In a recent theoretical exploration of the diffusion of human rights norms across borders, democratic theorist Seyla Benhabib refers to these critics as “domestic sovereigntists,” and notes that their arguments, while compelling on the surface, fall flat if the transnationalized norms in question have been subject to “public and free processes of democratic opinion and will formation.”⁵⁴ Though Gargarella is more skeptical regarding the quality of discourse in the public sphere in democracies than is Benhabib, they both direct our attention to civil society, arguing that the inclusion of voices previously excluded and their empowerment through international legal discourse gives them a special role in the diffusion and consolidation of globalized norms into the domestic arena.

The past decade has seen the explosion of “civil society”-related literature within political science in general, but more specifically we have seen the discovery of civil society within the previously “people-averse” subfield of international relations. As IR theory developed in the Cold War era and became more rigorous and more focused on parsimony through the 1980s, state-centrism reached an extreme. “Foreign policy” was merely “state behavior,” and theorists aimed to eliminate all signs of particularity in order to engage in deductive theory building rather than mere inductive description. The notion that voluntary groups autonomous from the state – with possibly the exception of interest group lobbies, which were also state-centric in

52 Available at <http://www.cumbrejudicial.org/eversuite/Templates/Cumbres/swf/docsuno/CodigoEtico.pdf>, accessed December 14, 2009.

53 On the World Bank’s Justice Reform program today, see <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,menuPK:1990161~pagePK:149018~piPK:149093~theSitePK:1974062,00.html>, accessed December 14, 2009.

54 Seyla Benhabib, “Claiming Rights across Borders: International Human Rights and Democratic Sovereignty,” *American Political Science Review*, vol. 103, no. 4 (November 2009): 692-3. The essay is dedicated to Jürgen Habermas “on His Eightieth Birthday.”

their political strategies – could have an impact on state behavior in the anarchic international system was generally disparaged. Social movements were viewed as epiphenomena of the domestic level, which IR theorists tended to treat as a “black box” whose outputs could be ascribed to relative material capabilities, anyway. In the 1990s, however, the rise of non-state actors became one of the hallmarks of a post-Cold War international system characterized by networks of private actors – political, religious, economic, and normatively-oriented – engaging in cross-border activities and activism with a verifiable impact on state behavior and on system function. Scholars such as Keck and Sikkink, Smith, and, in a more radical tradition, Hardt and Negri, shifted international protagonism to self-organized people and to the compelling arguments and strategies they employed to change state behavior both from the inside and from the outside.⁵⁵ Today, studies of transnational politics and global civil society proliferate, now joined by studies of transnational extremist networks engaging in cross-border politics in a less civil manner.

While much attention has been paid to the ability of transnational groups to exert influence across borders, these actors also play a pivotal role inside national borders in the “domestication” of globalized norms. In a Habermasian formulation, Benhabib cites the rigorous and repeated exchange between proponents and skeptics as the central dynamic in legitimating international norms entering the domestic public sphere. These “democratic iterations,” as she calls them, center around the interpretations and re-interpretations that advocates in civil society associations formulate to make richer and more compelling arguments that gain greater traction in the general public over time.⁵⁶ Anti-impunity norms of TJC are similarly championed by victims’ groups in the domestic context, but they may be advanced not only with the universalized international-legal discourse aiming to restore the humanity of a person dehumanized and thus denied his/her rights, but also through emotional appeals to traditional values of family, and even religious appeals for a decent burial for a loved one discarded in an unmarked grave.⁵⁷ Amidst these multiple interpretations and discourses, two stages in discourse evolution consolidate the hold of TJC specifically within domestic victims’ groups. First, these groups begin to latch on to and internalize the discourse of international law, and begin to see what happened to their family members as more than simply a personal or even historic tragedy, but also a crime against humanity. Once that interpretation is solidified, an additional step leads to the recognition that it was a state – or, better said, one’s own state – that perpetrated the crime, and that today’s

55 See Keck and Sikkink, op. cit.; Jackie Smith, “Global Civil Society? Transnational Social Movement Organizations and Social Capital,” *American Behavioral Scientist*, vol. 42, no. 1 (1998): 93-107; Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000).

56 For her definition, see Benhabib, “Claiming Rights,” pp. 698-99. For her extended discussion of civil society organizations’ role in these processes, see the section on “CEDAW [UN Convention to Eliminate All Forms of Discrimination Against Women] and Women Living Under Muslim Law,” pp. 700-701.

57 Multiple, evolving discourses, converging in a language of “dignification,” are evident in Francisco Ferrándiz’ analysis of the political culture developing within “pro-exhumation associations” in Spain. See Ferrándiz, “Fosas comunes, paisajes del terror,” *Revista de Dialectología y Tradiciones Populares*, vol. LXIV, no. 1 (January-June 2009): 61-94, esp. pp. 87-90.

democratic state is the appropriate representative of the political community as the inheritor of other aspects of citizen identification. By embracing the political and legal as well as the normative message of TJC, and by connecting the universal to their particularity, victims' groups are empowered to make claims on the state, through the courts, both at home and abroad, and to build support for their claims (democratic legitimacy) in the broader public sphere.

Like the judiciary, civil society advocacy groups and social movements are increasingly exposed to, and their messages projected through, a technologically-enhanced media environment that can be a blessing and a curse. As Keck and Sikkink famously pointed out, transnational advocacy groups exercise influence internationally mainly through information power: the persuasive power of issue framing and the provision of verifiable and legitimate information that helps get their issue on state and international organization agendas. The web has also been instrumental in generating membership bases in multiple countries, as well as instantaneous forms of documentation and communication that connect activists in peril with foreign allies in real time (e.g., the Twitter phenomenon during the aftermath of Iran's contested elections in June 2009). At the same time, "civil society" – qua-citizen activism is not all progressive; indeed, as Corey Robin has eloquently pointed out, Nazism in Germany and Jim Crow in the U.S. south cannot be fully understood without recognizing the role played by the complicity and active participation of societal groups in enforcing repression.⁵⁸ Today's Internet is the vehicle for the advancement of human rights norms alongside multiple forms of intolerance; each has its networks that engage in cross-border norm projection. The public sphere has become more crowded, more vibrant, and yet in some ways more confrontational. Often, what one says is taken out of context, or the opening of a new area of discourse can be distorted by one's critics. Take, for example, two recent evocations of the Franco regime by critics of the left which made waves in the Spanish press: the accusation by Valencia's regional president (who later apologized) that his Socialist opponent would like to take him out, shoot him, and leave him "dead in a ditch" (using the word that human rights advocates use for the secret mass graves);⁵⁹ and a television program equating a recent labor march with Franco's mobilizations, most provocatively showing only images from the dictatorship.⁶⁰ If the taboo prohibiting public discussion of the past can be dismantled by the anti-impunity movement, then there is potentially greater freedom also to appropriate rhetoric, images, and other aspects of the past. And as the debate surrounding the controversial Law of Historical Memory also demonstrated,

58 Corey Robin, *Fear: The History of a Political Idea* (New York: Oxford University Press, 2004).

59 See Joaquín Ferrandis, "Camps acusa al PSOE de querer darle el 'paseo' y tirarle en 'una cuneta,'" *El País*, Print Edition, November 13, 2009, at

http://www.elpais.com/articulo/espana/Camps/acusa/PSOE/querer/darle/paseo/tirarle/cuneta/elpepiesp/20091113elpepinac_3/Tes, accessed December 14, 2009.

60 See Elena G. Sevillano, "Telemadrid compara la marcha por el empleo con las que organizaba Franco," *El País*, Print Edition, Madrid section, December 14, 2009, at

http://www.elpais.com/articulo/madrid/Telemadrid/compara/marcha/empleo/organizaba/Franco/elpepiespmad/20091214elpmad_2/Tes/, accessed December 14, 2009.

an “open debate” on the past does not itself create consensus around anti-impunity norms.⁶¹

Benhabib gives pride of place to civil society, but I would argue that the model of “democratic iterations” depends essentially on a back-and-forth not only within society, but between social movements, legal professionals, and the judiciary – that is, the interaction with legal institutions and the professionals within them. The Pinochet Case – the actual case brought against the former dictator in the Spanish Audencia Nacional which resulted in the international arrest warrant issued by Judge Garzón – cannot be understood outside of its double context: that of a Chilean human rights movement focused on gaining justice through courts and willing to go outside of the country’s borders to achieve it; and that of individual lawyers and, eventually, judges, whose own training and anti-impunity norm construction, coupled with their understandings of legal orders and institutions, moved the case ahead. The movement to unearth mass graves – the “recuperation of historical memory” movement – in Spain has labored locally but its members and advocates have also sent new conceptualizations of “the disappeared” (i.e., not only a Latin American phenomenon) into the Spanish public sphere; meanwhile, lawyers working for victims collected testimony and evidence and filed the suit at the AN in December 2007 that eventually led to the investigation of the *Caso Franquismo* by Judge Garzón.⁶² Without this last link to institutions – to actors within them changing their normative orientation, and to how their structures and functions change due to processes of democratic transition and consolidation, prior to or in response to popular demand for change – our understanding of legal cultural change and normative diffusion in the domestic context is incomplete.

We also lose the all-important dimension of time. Transnationalized civil society today operates in a sped-up cybersphere that crosses borders effortlessly, but it also confronts the slowness and stasis of institutions located in, and having jurisdiction over, designated territories that also are the sites of meaning and affect for citizens. Time also matters specifically for advocates of anti-impunity norms, which seek to reach across decades and must confront obstacles embedded in institutions to that effort. It is this back-and-forth between space and time scales that best captures the dual patterns – revolution and evolution – that characterize the multiple ways TJC has diffused to national democratizing and democratic contexts. While neither Benhabib nor I offer a clear, replicable mechanism for the form of the “democratic iterations” that we each posit, I would maintain that the difficulty of such work only underscores the importance of more detailed, empirical work to get at the multiple and varying ways in which actors in and out of the state contribute to transnational norm diffusion and domestication.

61 I make this point in “Volver: The Return of/to Transitional Justice Politics in Spain,” *Journal of Spanish Cultural Studies*, vol. 9, no. 2 (July 2008): 13.

62 In a future version of this paper, I will be adding an empirical section on this case, which will also look at the Law of Historical Memory. I would welcome a discussion and critique of my initial reading here.

4. CONCLUSION: REVOLUTION AND EVOLUTION

In this paper, I have argued that the diffusion of transitional justice culture across borders is itself potentially dependent upon power shifts both at home and abroad, and arguably cannot be accomplished without the exercise of power within asymmetrical relationships on both levels. The key nodes in these networks of power and influence are the national high courts, and victims' groups. Exposed to and (at least partially) embracing anti-impunity ideas that privilege international norms, these two groups play important roles in the domestic realm, developing rule-based arguments, publicizing them, and seeking to leverage legitimacy and prestige from the legalistic "outside" in the public sphere "inside." This is the revolution which aims to displace longstanding impunity-accepting norms with new norms rejecting impunity. But the same actors then have to dis-place them in, and to, other places – the media, Congress, state institutions, political parties, the legal profession, the educational system, public opinion – where legal cultural change intersects with public policy debates. This is the more complex evolutionary process that then also transforms these ideas so that they become acceptable and convincing within a specific domestic environment. As Judith Shklar points out in the case of the U.S., Supreme Court decisions are uncontroversial only when there is societal consensus around an issue, otherwise controversy is to be expected, and is consequently reflected in the heated public response. These debates, rather than proof of the instability of the system, allow public policy to evolve with changing times and norms, even when those changes are not yet fully assimilated.⁶³ Similarly, activism in the judiciary against impunity is, and should be, controversial so that debates which previously were silenced or considered moot are engaged and brought fully into the public sphere, however belated their (re-)appearance is.

Simply re-engaging the debate, of course, does not in any way guarantee the eventual hegemony of anti-impunity norms over public policy. In some countries, a certain degree of impunity will persist – whether by general societal consensus or by enforcement by powerful groups or individuals – even as progress is made on other fronts, such as symbolic recognition, access to archives, and economic compensation of victims.⁶⁴ More interesting, and a more fruitful point of entry for a research program, are these gaps and discontinuities that reveal the conceptual and temporal contours of the evolutionary processes at work in the midst of revolutionary pressures for change.

63 Shklar, pp. 10-11.

64 See Neuborne.

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