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Can Justice be Traded for Democracy?

A thesis

in fulfilment

of the requirements for the degree

of

Doctor of Philosophy in Political Science

at

The University of Waikato

By

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THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

2017

Abstract

For much of the Twentieth Century, the transition processes of democratizing states have followed a familiar pattern. Outgoing authoritarian regimes relinquished power after extracting the promise of amnesty from the incoming democratic leadership. These authoritarian leaders demanded amnesty for gross human rights violations. The incoming democratic leaders felt like they had no choice. Amnesty has consistently been viewed as a necessary price to pay for democracy. While expedient, in agreeing to amnesty the incoming democratic leaders agreed to sacrifice justice for democracy.

This thesis examines the long-term consequences of the amnesty pact on the democratic state and questions whether justice can be sacrificed without ultimately undermining the basis of the democracy. While other studies have focused on the moral implications of amnesty, this work examines the functional realities. Rather than asking whether democratic elites should agree to amnesty, this work asks whether they actually can. Can measures of justice be sacrificed without fundamentally undermining the development and stability of democracy? Can the argument that amnesty is in the interest of the greater good subdue later demands for restoration or retribution? Case study methodology is employed in the examination of the political transitions of Brazil, Chile and South Africa. These countries have each employed different approach to amnesty, though all coming to the same general end. The political and social outcomes in each country speak to the fundamental consequences of amnesty legislation decades after the bargain was struck. The case studies inform my response to the larger theoretical question.

This research posits the argument that there are fundamental incompatibilities between the injustice of amnesty and the fundamental requirement of justice that is characteristic of democracy; the current collapse of democracies in Brazil and South Africa, and the fundamental struggles in Chile, are, it is argued, the inevitable results of this impossible trade-off. Building on the data gained from in-country qualitative research, this thesis argues that democratic norms will either be fundamentally weakened by the continued existence and use of amnesty, or, alternatively, democratic norms will be forced to undermine the law or decree itself, compelling leaders to eventually repeal such legislation that ultimately makes

democracy, in its basic foundation in justice, impossible. Either situation is highly problematic, creating the potential for instability and the possibility of regime reversal. At its core, this research suggests that the long-term negative consequences of amnesty outweigh the immediate gains made during the transition. For democracy to work, it must be built on a foundation of justice. Amnesty legislation undermines that foundation, and this is simply more than a newly democratizing state can sustain.

Acknowledgements

One of the challenges of comparative analysis is that events continue to take place long after the pen has been set down. This has certainly been the case here. Brazil and South Africa have both entered a period of political crises. Chile is equally facing questions around its democratic legitimacy. Events relevant to the questions presented here continue past my publication date. However, my hope is that this analysis helps to explain some of the underlying issues that drive the current crises in Brazil, Chile and South Africa, and to mark out the pitfalls of amnesty pacts for states looking to follow this transition path.

I would like to thank my supervisors, Professor Daniel Zirker and Dr Colm Mckeogh for their incredible supervision, support, guidance and patience. Additionally, I would like to thank Dr Alan Simpson for his guidance during the time that he also supervised my work. I would also like to acknowledge the profound impact of the late Dr Ross Casci, who inspired my first foray into political science almost two decades ago.

A number of people helped and housed me during my research trips to Brazil, Chile and South Africa. A particular thank you to Garth, Shirley, Karen, Göran, Leah, Pam, Chris, João, Tania, Carla, Juana and Pelu. You all gave me a place to stay as I conducted research, as well as additional support, advice and, at times, translation services. I would not have been able to finish this thesis without all the help that was given to me during these travels. I would also like to thank all of those who were willing to participate in this research. Your contributions have been invaluable.

In New Zealand, I would like to thank all my friends who have been there for me throughout my academic journey. In particular, thank you Gemma, Graeme, Stan and Ben. During different periods, you all helped me forward with laughter, friendship and encouragement. Thank you to all of the other doctoral students at the University of Waikato who shared the challenges of this experience: Gauri, Rebecca, Estelle, Ibikunle and Todd. A particular note of appreciation must also be given to Bev and Frances.

This research was made possible through the University of Waikato Doctoral Scholarship and the Zonta Whangarei Women's Graduate Scholarship.

The travel was made possible by a gift from the late Alistair Miller. Even in passing, the positive impact of your life has continued through the generations of our family.

Finally, thank you to my family. To Wendy, Gordon, David, Neil, Carola, Katie and Leah, you have all been amazing. Thank you to Phillip for your support when we were together. And to Nova, my precious girl. I hope this inspires you and proves that you can do anything.

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List of Abbreviations

CAH Crimes Against Humanity

Chile

UP Unidad Popular (Popular Unity)
PDC Partido Demócrata Cristiano (Christian Democratic Party)
DINA Dirección de Inteligencia Nacional (National Intelligence Directorate)

Brazil

UDN União Democrática Nacional (National Democratic Union)
ARENA Aliança Renovadora Nacional (National Renewal Alliance)
MDB Movimento Democrático Brasileiro (Brazilian Democratic Movement)
PMDB Partido Movimento Democrático Brasileiro (Brazilian Democratic Movement Party)
PDS Partido Democrático Social (Social Democratic Party)
CNV Comissão Nacional da Verdade (National Truth Commission)
OAB Ordem dos Advogados do Brasil (Order of Attorneys of Brazil)
IACtHR Inter-American Court of Human Rights
AC Amnesty Commission
PT Partido dos Trabalhadores, (Workers Party)
PNDH – 3 Programa Nacional de Direitos Humanos - 3 (Third National Program of Human Rights)
COHA Council on Hemispheric Affairs
RDE Regulamento Disciplinar do Exército (Army Disciplinary Regulations)
ESG Escola Superior de Guerra (Superior War College)
STF Supremo Tribunal Federal (Supreme Federal Court)
MPF Ministério Público Federal (Federal Public Ministry)

South Africa

TRC Truth and Reconciliation Commission
ANC African National Congress
ANCYL African National Congress Youth League
AZAPO Azanian People's Organisation
SANNC South African Native National Congress
SAP South African Party
UP United Party
PAC Pan African Congress
MK Umkhonto weSizwe (Spear of the Nation)
SWAPO South West Africa People's Organization
SACOD South African Congress of Democrats
UDF United Democratic Front
LP Labour Party
PNR Promotion of National Unity and Reconciliation Act (1994)
SACP South African Community Party
SADF South African Defence Force

SAP	South African Police
SAPS	South African Police Service (after 1994)
CODESA	Convention for a Democratic South Africa
MPNP	Multi Party Negotiation Process
AC	Amnesty Commission
HRVC	Human Rights Violations Committee
NPA	National Prosecuting Authority
ICTJ	International Committee for Transitional Justice.

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Chapter One

Introduction

*Justice needs to be debated – especially in countries where people have lost faith in justice.*¹

1.1 Introduction

Patricio Aylwin, the first democratically elected president of Chile after the Pinochet regime, argued in a personal interview with me that by not seeking justice for crimes committed by the previous government, he had made a clear choice.² It was, he said, the only way to guarantee democracy in Chile and the only way to guarantee stability. As a condition of the transition, Aylwin accepted the military's self-granted amnesty and later defended the decree against attempts at legislative repeal. One of the key characteristics of the state transition by negotiation in the Twentieth and Twenty-first centuries has been the use of amnesty legislation to 'grease the wheels'.³ Offering some level of impunity to the outgoing regime has become the norm in bargains for democracy. This amnesty can either be a pre-existing law that is then codified into the legal structure of the new regime,⁴ or part of the negotiation process itself, with democratization contingent on its introduction.⁵ Either way, amnesty legislation has become commonplace.

Aylwin, like other leaders in his position, argued that state-granted immunity for politically motivated crimes committed by the previous regime was necessary to bring together "a nation of enemies".⁶ According to supporters of amnesty laws, civil unrest is a very real possibility when outgoing leaders

¹ Howard Varney, Personal Interview, Cape Town, 21/02/2011.

² Patricio Aylwin, Personal Interview, Santiago, 18/05/2011.

³ For an excellent empirical study on the use of amnesty legislation see: Mallinder, "Exploring the Practice of States in Introducing Amnesties."

⁴ This was the case in both Brazil and Chile, where amnesty laws were introduced by the military regimes during the authoritarian periods.

⁵ Amnesty as part of the negotiation process was a key feature of the South African experience.

⁶ Aylwin, Personal Interview. Other leaders have used similar justifications for putting forward or accepting amnesty laws

feel threatened by potential prosecution.⁷ Reflecting on the transition experience of Chile and South Africa, among many others, conflict and even a regression into civil war were certainly possibilities.⁸ However, those opposed to the use of amnesty legislation argue that immunity creates a deficit in justice, one that is insurmountable regardless of the benefits of the new democratic state and implicitly incompatible with democracy.⁹ These opponents argue that demands for justice will continue in the democratic era, undermining system norms and creating a political environment that can be more easily manipulated.¹⁰ This research assesses these arguments with the benefit of hindsight. Do these arguments for and against amnesty hold up decades on? Can democracy be built on a legacy of injustice?

At their core, amnesty laws mean that a section of society (victims and their families) will pay more than others for the transition to democracy. They will pay with their right to pursue justice for the state-sponsored crimes committed against them. The debate around amnesty often continues long after the transition is considered complete, as can be seen in Chile (which began the democratization process 27 years ago), Brazil (33 years) and South Africa (27 years). The dominant amnesty discourse focuses on the normative question of whether or not forgiveness *should* be mandated by the state and whether or not crimes against humanity *should* be forgotten. There has been a significant increase in transitional justice scholarship over the last 25 years, coinciding with the tail end of Huntington's 'third wave' of democratizations that included Brazil, Chile and South Africa.¹¹

While much of the discourse has focused on the question of whether amnesty *should* be used to negotiate in exchange for democracy, there has been some neglect on the question of whether it actually *can* coexist side-by-side with a democratic state, considering the core characteristics of a modern liberal

⁷ Markel, "The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States."

⁸ The risk of civil unrest was a real possibility in South Africa, with different factions using communal violence to further power interests during the negotiation period. In Chile, the threat of a second Pinochet-led coup was viewed as possible, though certainly not inevitable.

⁹ Roht-Arriaza and Gibson, "The Developing Jurisprudence on Amnesty."

¹⁰ This opinion was expressed by several interview participants, most notably Kgekong, Personal Interview, Johannesburg, 01/02/2011.

¹¹ Huntington, *The Third Wave: Democratization in the Late 20th Century*.

democracy.¹² Is there something inherent in democracy that excludes the use of amnesty? The question of compatibility needs to take a greater role in the discourse on amnesty legislation and its role in democratization. As they negotiate their way out of an authoritarian regime now, political elites in states like Fiji, for example, need to ask themselves if amnesty legislation, and its usual inclusion of impunity for gross human rights violations, can co-exist with a consolidated democratic state. This debate forms the heart of this research. Boiled down then, the key question of this thesis is: *can justice be sacrificed for democracy?* In other words, can amnesty legislation be effectively used during a transition without fundamentally undermining the democracy that emerges afterwards?

For some, the question of whether or not amnesty is compatible with democracy is a moot point – the transition is oft described as an exceptional period, one that requires exceptional measures that have no place in the normal state of affairs.¹³ However, long after the transition period is considered finished by both the political elites and the public, the consequences of an amnesty law remain. These can include high profile members of the former regime, including torturers and assassins, continuing to work in the public sphere while receiving no punishment for the crimes they committed, or are alleged to have committed.¹⁴ Research also indicates that granting amnesty during a transition can foster a culture of impunity within state institutions such as the police.¹⁵

Amnesty also often means that victims, or family members, are asked to put aside questions of justice, usually for patriotic or financial reasons. Few are willing to accept this in perpetuity, often leading to the emergence over time of advocacy groups, high profile court battles, public debate and, ultimately, direct challenges to state governability and the viability of democratic institutional structures.

¹² The key characteristics used are those outlined by Diamond and Morlino, *Assessing the Quality of Democracy*.

¹³ Ntoubandi, *Amnesty for Crimes against Humanity under International Law*; Markel, “The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States.”

¹⁴ One well known case of a victim encountering his alleged torturer decades later is discussed in Verdugo and Brett, *De la tortura no se habla*.

¹⁵ Muntingh and Dereymaeker, “Understanding Impunity in the South African Law Enforcement Agencies.”

Considering the experiences of a number of states that have used amnesty legislation as part of the democratisation process, is the use of amnesty in this way tenable? Can the opposing structures of political amnesty and democracy co-exist? This research has two distinct components to its construction.

First, is a normative approach – using theories of democracy and justice to examine spatial constructs that might allow for the use of amnesty legislation in emerging democratic states. It is necessary in this comparative theoretical analysis to pinpoint whether equality, as a key characteristic of both justice and democracy, can be absent in one sense (as an essential component of justice) without undermining the overall sense of equality inherent in the democratic regime.

A second useful analytical approach involves a real-world context. By conducting a comparative case study analysis, the experiences of three states offer alternative perspectives as to whether amnesty might have a place in a consolidated democracy. The democratic governments that emerged after the transition have been disaggregated to pinpoint variables that may indicate problems with the use of amnesty in the context of liberal democratic consolidation.

Both the normative and empirical approaches are used in this research to examine the impact of amnesty on consolidated democracies. This research calls on an extensive body of literature on theories of democracy and justice theory that can be applied to the questions of amnesty and also looks at a number of states that have chosen this trade-off (amnesty for democracy), with varying degrees of success.

For the purposes of this research, Brazil, Chile and South Africa have been chosen as the case studies. Their experiences offer rich comparisons and contrasts regarding the long-term sustainability of amnesty legislation in the context of the real world. In terms of amnesty legislation, Brazil and Chile used similar models. The authoritarian regimes in both countries granted themselves blanket amnesty prior to the transition. The progress of each country's transition pivoted on the maintenance of these amnesty decrees. However, during and after the transition the approaches of Brazil and Chile diverged, with Brazil opting for more complete silence on the past. In contrast Chile's truth commission, held less than two years after the end of the Pinochet regime,

established an official record of what happened, although further measures of justice were limited. These two experiences differ from the South African experience. Amnesty in South Africa was heavily contested during the transition process. The truth commission was quasi-judicial with a courtroom atmosphere and process, though with no prosecutorial powers. There has been a persistent narrative around the crimes of the apartheid regime, however again few tangible measures of justice. Despite differences in the development and use of amnesty laws, in all three cases the subsequent democratic governments have actively resisted demands for justice, arguing that revocation of amnesty would destabilize the state. That said, in all three states demands for justice have remained, at times directly impacting on governability. While each case is an example of one of the different approaches to the use of amnesty legislation during a transition, there are also similarities in both the reasoning behind why amnesty was used, and the outcomes that have emerged since.

United, the two approaches presented here in this research, (normative and comparative-empirical) offer a more complete picture as to whether justice can be traded for democracy in the long run. This introductory chapter presents the key hypotheses that guide the research before examining the place this research has within the wider literature. A literature review of the main themes in this research will explore and respond to the theoretical constructs around democracy, justice and amnesty, followed by an explanation of the methodology used in data collection. Finally, there will be a brief outline of the structure of this thesis with a brief chapter summary.

1.2 Hypotheses

The core question of this thesis is whether justice can be traded for democracy. As mentioned above, there are primarily two prongs used here to unravel this question. The theoretical literature on democracy and justice form the basic underpinning of this thesis. In addition to this, case studies and case study analysis will be employed in an attempt to give a clearer illustration of the impact of amnesty in a real-world setting. These case studies are structured around evidence gathered in response to the three hypotheses outlined below. This represents, then, a positivist approach to empirical evidence, and while not

entirely free from the criticisms of qualitative research, allows for a slightly more objective analysis than a purely constructivist research.¹⁶

Each of the hypotheses represents an attempt to address the fundamental thesis question by examining an aspect of the ways in which, after the departure of an authoritarian regime, amnesty legislation and efforts towards justice are dealt with in a socio-political setting. As will be discussed at a later stage in this chapter, perceptions play an important role in the legitimisation of regimes, and as such, in regime longevity and effectiveness. The three hypotheses aim at understanding the undercurrent of opinion around the question of amnesty and whether this opinion has then been expressed in terms of legitimisation of the government, political discourse, or in the destabilisation of the democratic regime.

The following three hypotheses have been tested against the experiences of Brazil, Chile and South Africa to better understand amnesty in practice, and the impact this has had on the socio-political experiences of each state. The data that informs each case comes from personal interviews, archival documents and secondary sources.

The first hypothesis (H_0) is that amnesty legislation can be compatible with expectations and norms of an entrenched liberal democracy. This hypothesis uses the data to weigh the expectations of the different forms of amnesty (particularized or blanket) with the expectations of a robust democratic system. Can a democracy that fulfils Leonardo Morlino's 'quality of democracy' indicators also maintain an amnesty law that restricts justice, equality and even government legitimacy? H_0 is tested against the development of democracy in each case study, and how examines this state has incorporated its respective amnesty law into its democratic development.

The second hypothesis (H_1) is that amnesty is agreed to in good faith. Amnesty legislation requires all sides to commit to the bargain, without any plans on the side of the incoming democratic leadership to repeal the law once in power. Anything short of good faith would cause further instability in the transition.

¹⁶ Stake, "Case Studies."

Finally, **(H₂)** is that amnesty is widely acceptable with time as demographics shift. This hypothesis takes into account the idea that future generations will move beyond expectations of justice, particularly as the collective memory of the regime fades. This hypothesis is tested against evidence of continued mass mobilization in the decades following the transition.

Cumulatively, the hypotheses aim to examine whether 1) democracy requires that an element of justice be sustained, and 2) whether instrumentalist arguments can trump basic democratic norms.

1.3 Situating the question in literature – transitional justice

Can justice be traded for democracy? This question finds its space on the edge of the transitional and post-transitional justice literature. The majority of the pre-existing research focuses on the efforts to secure justice during and immediately after state transitions, without significant examination of the long-term consequences of these transitional changes. Broadly speaking, transitional justice is defined as "judicial and non-judicial measures ... implemented ... to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms."¹⁷ Transitional justice, as part of the re-institution of democracy, is almost as old as the democratic ideal itself, with the first amnesty measures reportedly passed by Solon in 594 BC.¹⁸ The French utilised transitional justice measures in the form of amnesty in 1814 and again in 1815, but it was really only in the Twentieth Century that transitional justice became widely used during state transitions. Over the last 100 years, transitional justice has included elements of the following forms of justice: distributive justice (compensation), restorative justice (reconciliation) and procedural justice (fair and transparent process),¹⁹ as well as amnesty measures. Paige Arthur presents a conceptual matrix for complete transitional justice that includes justice, reparation, truth and institutional reform.²⁰ Some of the more recent forms of

¹⁷ "What Is Transitional Justice?"

¹⁸ Elster, *Closing the Books*.

¹⁹ Gibson, "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance"; Arthur, "How 'Transitions' Reshaped Human Rights."

²⁰ Arthur, "How 'Transitions' Reshaped Human Rights."

transitional justice have included retributive justice in the form of public shaming, as opposed to criminal punishment. There is debate around the different approaches to questions of justice during state transitions, with a general acceptance that there is no 'one size fits all' model.²¹ In the end, every transitional justice effort has potential to sit somewhere within the space between Nuremburg style trials and complete amnesty.²²

Transitional justice as discussed herein comes under the banner of *endogenous transitional justice*, originally outlined by Jon Elster²³ and discussed by Marek M. Kaminski and Monika Nalpea.²⁴ The key features of this definition are that it is:

implemented (1) by the country in transition itself, not by any power or court; (2) by the legislative or executive branches of the government rather than non-governmental organisations (NGOs) or individuals; (3) shortly after the transition rather than decades later; and (4) that it targets the violations of rights that occurred before or during the transition, not after it is over.²⁵

One note should be made regarding this definition. While endogenous transitional justice is a base line, in a “global village” there is little possibility of state actions of this significance standing alone. There will always be international involvement at some level. That said, endogenous transitional justice is markedly different from International Criminal Court (ICC) trials, which are driven almost solely by organisations outside of the state.²⁶

A fundamental branch of the body of literature involving transitional justice focuses on what has been described as the *peace vs. justice dilemma*.²⁷ “The “peace versus justice” debate centres on how societies emerging from political violence and repressive rule should address human rights abuses committed in the past.”²⁸ Scholars have long debated whether the winning side in a conflict should seek retribution against the vanquished. However, the contemporary debate has coalesced around the International Criminal Court and its involvement in pursuing

²¹ “What Is Transitional Justice?”

²² Markel, “The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States.”

²³ Elster, *Closing the Books*.

²⁴ Kaminski and Nalpea, “Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures.”

²⁵ Kaminski and Nalpea.

²⁶ “What Does the International Criminal Court Do?”

²⁷ Sengupta, “Peace or Justice?: The Dilemma of the International Criminal Court.”

²⁸ Rodman, “Peace Versus Justice,” 824.

justice against leaders accused of committing crimes against humanity (CAH).²⁹ The discourse around “peace vs. justice” is markedly different from the research here, as it fails to take into account the expectations and norms of the incoming regime type. The interest is not in the long-term establishment of democracy, but rather the absence of conflict without specific reference to regime type. The focus is on whether peace and justice are mutually exclusive concepts during a state transition.

Transitional justice is not without sceptics or significant debate. From a legal standpoint, one of the fundamental issues with transitional justice is the principle of retroactivity.³⁰ Transitional justice involves holding the past accountable to present-day law.³¹ In a majority of instances where transitional justice is applied, the violations being investigated were legal according to the contemporary legislation. Apartheid, while morally repugnant, was legal in South Africa. Many of the political crimes now condemned in Chile and Brazil had a veneer of legality when they were committed under the umbrella of a national state of emergency. In a legal framework, retroactivity creates problems. Kaminski and Nalepa argue that retroactivity “can be justified on the grounds of natural or other law after demonstrating the lack of legitimacy of the past regime.”³² On the other hand, the use of amnesty legislation as part of the process of transitional justice raises another set of concerns. These will be discussed in greater detail below, although it is worth noting that a majority of transitional justice efforts, such as truth commissions and other restorative justice measures following pacted transitions include amnesty as cornerstones of agreements.³³ The use of amnesty has the potential to create a deficit in justice.

A theory of post-transitional justice has developed to address the growing dissatisfaction with the measures achieved during the pacted negotiations and

²⁹ Keller, “The False Dichotomy of Peace versus Justice and the International Criminal Court”; Kersten, “Bringing Conflict into the Peace Versus Justice Debate”; Pillay and Sriram, *Peace versus Justice? The Dilemma of Transitional Justice in Africa*; Portilla, “A Forgiveness Law: The Path to Solve the Peace Versus Justice Dilemma”; Rodman, “Peace Versus Justice.”

³⁰ Kaminski and Nalepa, “Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures.”

³¹ Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*.

³² Kaminski and Nalepa, “Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures,” 389.

³³ Mallinder, “Exploring the Practice of States in Introducing Amnesties.”

to explain the amnesty reversals in the last 15 years.³⁴ In explaining the concept of post-transitional justice (PTJ), Cath Collins outlines six characteristics of PTJ that separate this theoretical approach from traditional transitional justice theory. First, traditional transitional justice is concerned with the bare minimum that will ensure the stability of incoming democracy while PTJ measures are more concerned with questions of the perfectibility, quality and reach of the system. Second, PTJ questions the validity of the initial pacts that placed justice second to the political needs of the state. Third, PTJ is largely pushed forward by non-state actors. Fourth, PTJ efforts stem from a number of sources rather than a central effort. Fifth, the multiple sources of the efforts mean, in contrast with traditional transitional justice efforts, PTJ tends to have multiple aims. Sixth, PTJ is more likely to be more international in nature, in contrast with the endogenous transitional justice more commonly seen during the transition.³⁵

Transitional justice and PTJ measures are fundamentally concerned with the perceived deficit in justice that emerge during state transitions. Victims of a past regime are required to accept a bargain that ensures the path of democratisation at the expense of traditional justice for crimes committed against them. Transitional justice is the stop-gap measure to avoid complete collective forgetting. The emergence of PTJ paradigms reflect the failure of traditional transitional justice measures to satisfy the popular needs for justice.

What marks the following study as different from the existing transitional and post-transitional justice literature is the examination of transitional justice in the context of democratic longevity. Rather than focusing on choices made during the transition as unique decisions made during a difficult period, the focus of this research is on the long-term consequences of these decisions, and their impact on the legitimacy of the democracy that amnesty effectively purchased.

1.4 Theoretical review

Theories of democracy, justice and amnesty intersect and form the framework of this study. They are a response to the fundamental questions outlined above, and also inform this work's key hypotheses. At the point of intersection of the three

³⁴ Collins, *Post-Transitional Justice*.

³⁵ Collins, *Post-Transitional Justice*.

main theories is the concept of equality. It is a characteristic that is fundamental to both justice and democracy, and without which serious concerns are raised about both concepts.³⁶ However, of interest is not just that there is equality, but rather that it is perceived by the public to be present. Public perceptions of the presence of equality, justice and democracy legitimise and validate the choices made during and after the transition.³⁷

Do the general population believe that they have been granted or denied justice after a negotiation that “trades” the establishment of democracy for amnesty for human rights violators? Does the outcome of this perception challenge or confirm their perception of the legitimacy of the newly democratic government? Ultimately, political leadership can argue that exceptional times of a state transition call for exceptional measures, however the validity of this argument is dependent on how the actions are perceived by anyone involved. The long-term consequences of these trades rely on perceptions of them, and on whether the public supports a deficit in justice as a legitimate and sustainable choice. The question of legitimacy is central as, all definitions aside, it is considered one of the core drivers of any regime, as was observed by Max Weber.³⁸

1.4.1 The impact of perception on legitimacy

One of the essential components of any political regime is the legitimacy of rule. At its most basic form, a state has political legitimacy when its authority to exercise political power and to make and enforce laws is generally accepted.³⁹ Broadly, legitimacy requires the perception of legality, as well as the belief that the decision makers are doing what is in the interest of the wider public. Political legitimacy tends to break down when there is a belief that the leaders no longer represent the interests of the people and when the government loses the consent of the governed.⁴⁰ One of the core drivers behind legitimacy is perception as perception can impact on how both the political elites and the public accept their governing regime.

³⁶ Dahl, *Democracy and Its Critics*; Saward, “Democratic Theory and Indices of Democratization”; Holden, *Understanding Liberal Democracy*.

³⁷ Barnard, *Democratic Legitimacy: Plural Values and Political Power*.

³⁸ Anter, *Max Weber’s Theory of the Modern State: Origins, Structure and Significance*.

³⁹ Buchanan, “Political Legitimacy and Democracy.”

⁴⁰ Buchanan.

An individual's perception of an event, issue or environment by no means translates into reality, it is a reflection of how each person senses and makes sense of their environment. Individual perception becomes the truth we each hold on to.⁴¹ Studies of perception, particularly in the field of psychology, have tended to show that a person's perception of justice and injustice can alter perceptions of fact.⁴² This can create challenges in the communication of events and processes, particularly in a political context. Each person and social group has the potential to sense an event or fact differently, based on ideology, situation and experience.⁴³

Public perceptions can have potentially volatile consequences. It is not just that each person perceives the world differently; individuals make decisions based on their perceptions, potentially placing how they sense the world above the reality of situations. Perceptions of concepts such as democracy and justice hold significant weight as drivers of decision-making and behaviour. As such, perceptions can have an impact on the legitimacy of a state, regardless of regime type. Weber argues that legitimacy stems from three sources – traditional, legal and charismatic authority – with no single source entirely able to exist without elements of the others.⁴⁴ Traditional authority is based on the idea that the institutional structure is how it has always been, and therefore legitimacy stems from the status quo. Legal authority is established through the widely acknowledged rules and laws of the state. Charismatic authority centres on the appeal of a leader. Citizens develop loyalty to the individual over the institutional structure.⁴⁵ Similarly, John Fraser identifies two streams of thought regarding the term "legitimacy", one that focuses on legality and the other that focuses on psychology.⁴⁶ The first looks at legality, traditionally understood in terms of a ruler's lineage with previous rulers. In a democratic environment, this has meant that governments are seen as legitimate

⁴¹ University of Chicago, "Perception."

⁴² Headey, "Distributive Justice and Occupational Incomes: Perceptions of Justice Determine Perceptions of Fact."

⁴³ Causes of perception and preferences in terms of political understanding are often divided into two groups – social group theories, which consider the role of identity in perception and preference formation, and social justice theories, which consider experience. See Cole and Thomas, "Group Differences in Fairness Perceptions and Decision Making in Voting Rights Cases."

⁴⁴ Anter, *Max Weber's Theory of the Modern State: Origins, Structure and Significance*.

⁴⁵ Anter.

⁴⁶ Fraser, "Validating a Measure of National Political Legitimacy."

when following the legal structure of succession. However, simply assuming legality as a source of legitimacy may not be sufficient. Fraser argues that a second way of looking at legitimacy, as articulated by a number of other political scientists, is as a psychological concept. As Fraser explains,

In this sense, legitimacy doesn't refer to whether authorities or structure follow some concrete set of objective legal rules but to the extent to which members of the political system believe that the authorities and structures are adequate to meet the members' own expectations as to how the political system ought to behave.⁴⁷

According to this explanation of political legitimacy, the public's perception of the behaviour of the government is more important than the institutional structure. If a person feels that the government is meeting his or her needs, this perception offers a higher level of legitimacy than if that person feels that there is a discrepancy between government actions and his or her own needs. The same can be said for collective groups, such as victim groups and other political actors during a transition.

Collective memory can be said to play an important role in the development of individual perceptions. According to Holly Ryan, collective memory is “constructed within social structures and institutions such as the family, organization, and the nation-state... Collective or cultural memory to some degree determines what kinds of political ideas and practices become dominant in civil society.”⁴⁸ While influencing the development of society in general, collective memory is particularly important in reference to understandings of authoritarian regimes, transitions and justice. Truth commissions are often an attempt to establish an official narrative of the past with the hope to influence the public's collective memory.⁴⁹ Justice and injustice can become central to a particular collective narrative, causing victims to embrace the identity of victimhood long after the state transition.⁵⁰ This can then be passed from generation to generation, causing demands for justice and challenges to government legitimacy to long outlive the original victims and the original perpetrators.

⁴⁷ Fraser, 118.

⁴⁸ Ryan, “From Absent to Present Pasts: Civil Society, Democracy and the Shifting Place of Memory in Brazil,” 162.

⁴⁹ Meiring, *Chronicle of the Truth and Reconciliation Commission*; Tutu, *No Future Without Forgiveness*; Ryan, “From Absent to Present Pasts: Civil Society, Democracy and the Shifting Place of Memory in Brazil.”

⁵⁰ Zalaquette, Personal Interview, Santiago, 08/05/2011.

Jean d'Aspremont argues that there are two important distinctions in the concept of legitimacy; *legitimacy of origin* (LO) and *legitimacy of exercise* (LE).⁵¹ According to d'Aspremont, LO refers to the source of power, while *legitimacy of exercise* refers to how that power is used.⁵² For non-democratic regimes, LO is often cultivated in providing a clear rationale for the interruption of the previous institutional structure, for example, protection from a threat to national security or stability. LE can be provided by blending regime types. In the late Twentieth Century, a number of non-democratic regimes embraced, or at least claimed to embrace, elements of democracy to bolster public perceptions of legitimacy.⁵³ In the context of *real-politik*, the actions of these regimes reflected the importance of perceived legitimacy for stable governance. However, over the last 50 years the most legitimate form of governance from both a domestic and international standpoint has been democracy.⁵⁴ A key perception of democracy is that it provides for freedom of choice and human rights, and that it is thus deemed to be preferential over authoritarian regimes.⁵⁵ How accurate this perception is, particularly considering the pacts made to usher in the democratic institutional structure after an authoritarian regime, requires some analysis.

1.4.2 Democracy Theory

1.4.2.1 Defining democracy: the liberal democratic model

Liberal democracy, defined broadly as a system that allows for both political liberties and democratic rule,⁵⁶ requires both the expectation of human rights, as well as the expectation of certain electoral processes, government practices and law.⁵⁷ It is this blend of liberalism and democracy that is most often seen as the 'success' of western states and the goal of democratizing nations. However, as proposed by T.F Rhoden, such rights belong more to liberalism than democracy itself. Without the rights enshrined in liberalism,

⁵¹ d'Aspremont, "Legitimacy of Governments in the Age of Democracy."

⁵² d'Aspremont.

⁵³ From 1980, Chile's Augusto Pinochet, claimed that the country was an authoritarian democracy while in South Africa, some non-white groups were given their own institutions of representation to ensure continued support.

⁵⁴ Dunn, *Democracy*.

⁵⁵ Huntington, *The Third Wave: Democratization in the Late 20th Century*.

⁵⁶ Bollen, "Liberal Democracy: Validity and Method Factors in Cross-National Measures."

⁵⁷ Dahl, *Democracy and Its Critics*; Dahl, *Polyarchy*.

the outcome of rule by the people creeps closer to populist despotism than our current ideal.⁵⁸ Equal rights place the liberal democratic model apart from other types of democratic regimes, such as delegative, participatory and electoral.

Even at its most minimal definition, in a liberal democracy people have the right to vote and the expectation that their electoral choices will be translated to political representation. Liberal democracy also includes the expectation of a number of political rights, including free speech, freedom of expression, universal suffrage, the right to run for office and access to alternative sources of information.⁵⁹ At its core is the expectation of legal and electoral equality.⁶⁰ There is some debate around the level of economic development required to be defined as a liberal democracy,⁶¹ although the wider expectation has been that a free market goes hand in hand with this type of democratic development. This is, in part, due to the international push for democratisation that directly involves financial institutions including the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank).⁶² Research into the role economics plays in liberal democracies has found that "liberal-democratic societies are stable because this model of society is the most able to produce constant economic growth."⁶³ Peter Kotzian argues that it is the economic growth of liberal democracies that fosters support of, and in turn support from the citizens. However, once economic growth is the norm, people will seek confirmation of their rights as expected from a liberal democracy. According to Kotzian, "economic growth may not be sufficient to make people fully satisfied, but without it support for democracy is at risk."⁶⁴

A liberal democracy can be built as a minimalist institutional structure with the basics listed above, or liberal democracy can become a way of life.⁶⁵ These broader or *maximalist* definitions of democracy require a number of core

⁵⁸ Rhoden, "The Liberal in Liberal Democracy."

⁵⁹ This list of political rights has become the base expectation of a state that calls itself a democracy. See: Dahl, *Polyarchy*.

⁶⁰ Holden, *Understanding Liberal Democracy*.

⁶¹ Chan, *Liberalism, Democracy and Development*.

⁶² Rakner, Rocha Menocal, and Fritz, "Democratisation's Third Wave and the Challenges of Democratic Deepening: Assessing International Democracy Assistance and Lessons Learned."

⁶³ Kotzian, "Public Support for Liberal Democracy," 35.

⁶⁴ Kotzian.

⁶⁵ Macpherson, *The Life and Times of Liberal Democracy*.

characteristics beyond process to be present, including vertical and horizontal accountability and independence of elected officials from undue influence of outside institutions such as the military and government responsiveness.⁶⁶ Authors that promote this view of democracy argue that the top-down structural definition that places importance on process, institutions and law are not sufficient in identifying a democracy as such.⁶⁷ Instead, a well-functioning democracy requires the presence of a number of characteristics that contribute to the quality of life of a democracy's citizens.

1.4.2.3 What makes for a "good" democracy

Several authors have attempted to establish a method of assessing the quality of democracy, including David Beetham, Gerardo Munck, Jay Verkuilen, Tatu Vanhanen, Leonardo Morlino and Larry Diamond among others.⁶⁸ These definitions of liberal democracy often include a description of characteristics required to be good or effective systems of governance. Such characteristics go beyond a traditional understanding of democracy discussed above by arguing that a *good* democracy must include a deep level of interaction between the government and the governed. This interaction, as well as the broader functioning of the democracy, is assessed via a number of quality indicators.⁶⁹ Morlino offers three different potential meanings of the word *quality* when assessing democracy: procedure, content and result.⁷⁰ Broadly, he argues that a widely legitimised regime offers quality of result. A moderate level of liberty and equality provides for quality in terms of content while a good democracy where citizens themselves can act as a check and balance to the power of the government provides for quality in terms of procedure.⁷¹ Maximalist theorists attempt to present frameworks built around characteristics or qualities that “must be present” for a democracy to be effective. The quality

⁶⁶ Munck, *Measuring Democracy*.

⁶⁷ Diamond and Morlino, *Assessing the Quality of Democracy*.

⁶⁸ Munck and Verkuilen, “Conceptualizing and Measuring Democracy: Evaluating Alternative Indices”; Munck, *Measuring Democracy*; Beetham, *The Legitimation of Power*; Diamond and Morlino, *Assessing the Quality of Democracy*; Vanhanen, “A New Dataset for Measuring Democracy, 1810-1998.”

⁶⁹ Morlino, “‘Good’ and ‘Bad’ Democracies: How to Conduct Research into the Quality of Democracy.”

⁷⁰ Morlino.

⁷¹ Morlino.

of democracy literature encompasses either quantitative or qualitative data measures, although they occasionally incorporate both. Quantitative assessments have traditionally involved survey data, assessing public perception of government action. Citizen audits of democracy, as advocated by O'Donnell and others, involve large-scale surveys gaging public perception of a particular state's governance.⁷² Qualitative works have tended towards individual interviews and academic assessment of government action, as is presented in this research. The Quality of Democracy Index, produced by the Economic Intelligence Unit, uses both survey data and expert analysis to produce its assessment of global democracies.⁷³ Brazil, Chile and South Africa have all been assessed as flawed democracies, at risk of following the global trend towards becoming hybrid regimes.⁷⁴

According to Morlino, eight qualities should be present for a regime to be considered a good democracy. These are *rule of law, electoral accountability, inter-institutional accountability, participation, competition, freedoms, equality and responsiveness*.⁷⁵ Other authors also present analytical frameworks incorporating both qualitative and quantitative research methods to assess the quality of democracy, in particular Arend Lijphart,⁷⁶ and David Altman and Aníbal Pérez-Liñán,⁷⁷ although each author offers a different set of criteria for their assessment.⁷⁸ The decision to utilise Morlino's framework for analysis is based on the potential for a qualitative analysis of a democracy using the eight criteria without the need of the addition of survey data. These eight qualities have been assessed against each case study by analysing available data, primary sources and interview responses.

⁷² O'Donnell, Cullell, and Iazzetta, *Quality of Democracy*.

⁷³ Economist Intelligence Unit, "Democracy Index 2016: Revenge of the 'Depolorables.'"

⁷⁴ Economist Intelligence Unit.

⁷⁵ Diamond and Morlino.

⁷⁶ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999).

⁷⁷ D. Altman and A. Pérez-Liñán, 'Assessing the Quality of Democracy: Freedom, Competitiveness and Participation in Eighteen Latin American Countries', *Democratization*, 9.2 (2002), 85–100.

⁷⁸ Altman and Pérez-Liñán outline three criteria for their assessment of democracy; effective civil rights, effective participation and effective competition. Lijphart's framework is focused more on typology, with a comparison of consensus and majoritarian regimes. Throughout the work, he employs a number of indicators to assess the democratic success of each system including corruption, participation, enfranchisement (principally female representation) and satisfaction with the regime.

The maximalist definition of democracy that includes an assessment of the quality of democracy is valuable for a number of reasons, it goes beyond the sometimes superficially applied regime labels. Maximalist understandings of democracy require a level of depth that may not necessarily be present in process orientated definitions of a democratic system. In some cases, including those of Brazil, Chile and South Africa, the regimes prior to the transition labelled themselves as democratic, embracing aspects of the process orientated definition including limited elections and some space for opposition.⁷⁹ On the other hand, a number of aspects characteristic of authoritarian regimes, including state sponsored violence, continued to be present. The maximalist requirements of a good democracy are obviously much more difficult for authoritarian regimes to attain.

A second rationale for embracing a maximalist application of the quality of democracy is that more pervasive democratic norms have the potential to increase the legitimacy of the regime.⁸⁰ According to Morlino, "...there is legitimacy when there is a widespread belief among citizens that, in spite of their shortcomings and failures, existing political institutions are better than any others that might be established."⁸¹ On the flip side, established democracies can experience a decrease in legitimacy when citizens or political elites begin to feel that there are failures or weaknesses in democratic institutions.⁸²

The meaning and impact of democracy are important parts of the theoretical base of this study. Democracy, first at a process level and then in a more complete sense, is the central rationale for sacrificing demands for justice during a transition from an authoritarian regime.⁸³ While the maximalist requirements of democracy may be beyond the reach of states in the early stages of transition, consolidation of a democratic system typically forces a more

⁷⁹ The Pinochet regime held a number of plebiscites that allowed for civilian participation. In South Africa, the white population could vote and in Brazil, there was some public participation in the lower levels of government.

⁸⁰ Bo Rothstein, 'Creating Political Legitimacy: Electoral Democracy Versus Quality of Government', *American Behavioral Scientist*, 53.3 (2009), 311–30.

⁸¹ Leonardo Morlino, 'Legitimacy and the Quality of Democracy', *International Social Science Journal*, 60.196 (2009), 211–22 (p. 211).

⁸² Morlino, 'Legitimacy and the Quality of Democracy'.

⁸³ This reasoning was articulated in a number of personal interviews as well as in the general literature around state transitions.

complete assessment. As important as an understanding of democracy may be, it is also vital to explore transition theory. A brief explanation of this aspect of democratization is offered below.

1.4.2.4 Disaggregating Governments

While Morlino established elements for assessing a maximalist definition of a liberal democracy, there are a number of variables that can undermine the consolidation of the government. There are casual pathways between these variables, all emerging from the decisions made around amnesty, and issues that emerge in the development of each country's democratic practices and norms. Each of these variables have been identified within the empirical research and then contrasted with the normative arguments around definitions of liberal democracies. Each variable contradicts or undermines characteristics considered essential for a good democracy.

The variables considered within this research as contributing to the weakening of liberal democracies are as follows:

1. Institutional impunity

In each case study, cultures of impunity have continued to exist within key structures, including in political, police and judicial institutions. The culture of impunity that has developed within these key areas correlates to norms and expectations established by amnesty laws. Additionally there are instances where the boundaries of amnesty have been expanded to apply to actions outside of the agreed limits of amnesty or where the norms established by the amnesty have been used as justification for non-prosecution. This indicates the beginning of causal relationship between the use of amnesty and ongoing issues of impunity. Public perception of this impunity can undermine democratic legitimacy.

2. Use of authoritarian practices within democratic context

The use of particular authoritarian practices, and authoritarian era laws, during the democratic era directly challenges democratic norms. The continued use of these elements is connected to the absence of reckoning afforded by amnesty laws.

3. Corruption

There are a number of causes of corruption and it would be impossible to establish a single casual pathway between corrupt practices and amnesty. However, as discussed above, it is reasonable to argue that a culture of impunity that develops through a lack of accountability will additionally contribute to impunity around corrupt practices.

1.4.3 State Transitions

The shift from authoritarian regimes to democratic systems is generally not a quick process. Moreover, a state transition involves many variables, some of which may not be entirely clear at the onset of the process. Existing power dynamics, national identity, the economy, the opposition and the long-term goals of each significant group all influence the democratic processes. The outcomes of such processes are by no means certain, with the potential for either a return to authoritarian rule or, often equally likely, to an alternative form of governance that may not necessarily be any better.⁸⁴

According to several authors, on the one side of the transition is the dismantling of the authoritarian regime or liberalization of the institutional structure,⁸⁵ while on the other is the development of some form of democracy, a return to authoritarianism or the emergence of some sort of revolutionary alternative. This shift in regime type can be triggered either through defeat, a pacted negotiation or a mix of the two.⁸⁶ While a number of theorists argue that

⁸⁴ Transition literature is extensive, focusing predominantly on transitions during the latter half of the Twentieth Century. While, some of the key authors will be touched on here, there is simply insufficient space to cover the entire field. For more see: Huntington; *The Consolidation of Democracy in Latin America*, ed. by Joseph S. Tulchin and Bernice Romero (L. Rienner Publishers, 1995); Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, *Transitions from Authoritarian Rule, Vol. 4: Tentative Conclusions about Uncertain Democracies* (The Johns Hopkins University Press, 1986); Gretchen Casper and Michelle M Taylor-Robinson, *Negotiating Democracy: Transitions from Authoritarian Rule* (Pittsburgh, Pa.: University of Pittsburgh Press, 1996); David L. Epstein and others, 'Democratic Transitions', *American Journal of Political Science*, 50.3 (2006), 551–69; Yi Feng and Paul J. Zak, 'The Determinants of Democratic Transitions', *The Journal of Conflict Resolution*, 43.2 (1999), 162–77; Stephan Haggard and Robert R Kaufman, *The Political Economy of Democratic Transitions* (Princeton, N.J.: Princeton University Press, 1995); Adam Przeworski, *Capitalism and Social Democracy* (Cambridge; New York; Paris: Cambridge University Press ; Editions de la Maison des sciences de l'homme, 1985).

⁸⁵ Liberalization can be explained as the redefining and extending of rights within the authoritarian institutional structure.

⁸⁶ The concept of a pacted negotiation is outlined in O'Donnell, Schmitter, and Whitehead. The authors described pacts as an explicit, though not always publicly transparent, process that allows multiple actors to establish the rules of governance. Pacts are usually used to prevent potential

the liberalization that leads to a regime change is primarily triggered by schisms in the authoritarian coalition,⁸⁷ Scott Mainwaring argues that this explanation provides only for a limited understanding of the process.⁸⁸ According to Mainwaring, opposition actors and mass mobilization also play an important role. In some cases, there is, in fact, a combination of both elements intersecting to create the conditions suitable for a transition.

The challenges facing the incoming democratic regime include a resistant authoritarian leadership concerned with maintaining their interests regardless of the transition's outcome, a weakened economy and a divided population. Institutional structures may have to be reworked, all the while maintaining enough stability to ensure the day-to-day functioning of governance. There is no clear map as to how to approach a transition, although some authors identify key steps. Dankwart Rustow's model, for example, begins with a fundamental background element: national unity. "It simply means that the vast majority of citizens in a democracy-to-be must have no doubt or mental reservations as to which political community they belong to."⁸⁹ The first step in Rustow's model is the preparatory phase – a political struggle. This can be likened to O'Donnell et al.'s *schism within the authoritarian regime*,⁹⁰ or Mainwaring's *opposition and mass mobilization*.⁹¹ Like Schmitter, Rustow points out that the preparatory stage is precarious, and not without the possibility of de-democratization. The fight may drag on until the opposing parties become weary and the issues fade away without the emergence of any democratic solution, or one group may find a way of crushing its opponents.⁹² According to Rustow, what concludes the preparatory phase is a deliberate decision on the part of the political elites to institutionalize some aspect of democratic procedure. The final stage of

threats to the governability of a transitioning state by guaranteeing the protection of vital interests of one or both sides.

⁸⁷ O'Donnell, Schmitter, and Whitehead; Haggard and Kaufman; Przeworski.

⁸⁸ Scott Mainwaring, *Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues* (University of Notre Dame, Helen Kellogg Institute for International Studies, 1989).

⁸⁹ Dankwart A. Rustow, 'Transitions to Democracy: Toward a Dynamic Model', *Comparative Politics*, 2.3 (1970), 337–63.

⁹⁰ O'Donnell, Schmitter, and Whitehead.

⁹¹ Mainwaring.

⁹² Rustow.

Rustow's model is habitation, also described as consolidation.⁹³ This is an entrenchment of democratic ideals and institutions, to make any shift away from democracy a significant rupture.

Transition theory is focused on achieving the minimal requirements of democracy, while the post-transition period looks towards the deepening of democratic institutions and the achievement of a more maximalist quality. The period of transition, while important, is of less importance for purposes of this study than the eventual post-transitional period that allows for reflection on the processes of democratization and establishment of justice. Once democratic culture has become firmly entrenched in a state, or at least is perceived as being more dominant than any other system, there is room to investigate the long-term impact of amnesty legislation on the needs of justice and the perceptions of the democratic system.

1.4.4 Theories of Justice

1.4.4.1 Understanding Justice

Primarily found in the field of philosophy, discussions on the meaning of justice have produced a variety of answers; from Thrasymachus' argument that justice is the interest of the stronger to the Rawlsian argument that justice is fairness.⁹⁴ While there is value of this debate, the popular perception of justice, as a concept and in practice, tends to fall outside of philosophical definitions. As discussed above, perception and the role it plays in legitimacy is given greater weight in this research, particularly as perceptions of justice can alter and determine perceptions of fact.⁹⁵

⁹³ Rustow argues that the democratization path requires national unity, the preparatory stage, decision phase and finally the habitation stage.

⁹⁴ The purpose of this section is to focus on the perception of justice rather than the philosophical definitions of the concept. For more in-depth focus on the debate around the definition of justice see: Hans Kelsen, *What Is Justice: Justice, Law, and Politics in the Mirror of Science: Collected Essays*, Reprint of (The Lawbook Exchange, Ltd., 2000); Plato, *Plato's The Republic; (The Modern Library of the World's Best Books. [153.2])*, trans. by Benjamin Jowett (The Modern Library); B. Diggs J., *The State, Justice, and the Common Good: An Introduction to Social and Political Philosophy*, ed. by B. J. Diggs, 1st edn (Educators Intl Pr Inc, 1998); Immanuel Kant, *Metaphysical Elements of Justice: Part I of The Metaphysics of Morals*, trans. by John Ladd (Indianapolis: Hackett Pub. Co., 1999); James Steintrager, *Bentham* (Cornell University Press, 1977); John Plamenatz, *Mill's Utilitarianism Reprinted with a Study of the English Utilitarians*, First Edition edition (Basil Blackwell, Oxford, 1940); John Stuart Mill, *The Collected Works of John Stuart Mill* (Indianapolis, Ind.: Liberty Fund, 2006); John Rawls, *A Theory of Justice: Original Edition* (Belknap Press of Harvard University Press, 2005).

⁹⁵ Headey.

1.4.4.2 Two streams of justice

Definitions of justice develop along two distinct paths. Justice is either described as an innate quality of a situation, for example in John Rawls' argument of justice as fairness,⁹⁶ or as an outcome.⁹⁷ These two streams complicate the definition of justice, and are often used interchangeably rather than as distinct concepts. However, there are important differences between the two, particularly as to how one responds to the core question of whether fundamental principles of justice can be sacrificed for democracy. While justice as an innate quality is the focus of most of the academic debates around its definition, public perceptions of justice most often relate to outcomes such as the punishment of illegal or immoral acts.⁹⁸ The fact that this stream of justice ties into public perceptions makes it relevant to explore the validity and impact of amnesty legislation central to state transition. As argued above, public perceptions are closely linked to legitimacy,⁹⁹ and can have an important impact on the sustainability of a government, regardless of regime type.

Viewing the concept of justice through the outcome paradigm also allows for a more tangible analysis of a given situation. This perspective allows researchers to ask questions that offer empirical responses. For example, was justice served by a particular measure? Rather than attempting to establish a

⁹⁶ Rawls developed what he calls the original position (OP), a place that removes individual bias in regards to his two principles of justice; the equal liberty principle, which requires equal liberty for all and the difference principle, which requires that all inequalities are worked out to the advantage of everyone. People in the OP are self-interested in motivation but they don't know what their particular interests are – what Rawls called the veil of ignorance. It is under these conditions that those in the OP must decide the general conditions of human life. For more on Rawls' theory of justice see: Rawls, *A Theory of Justice*.

⁹⁷ In the discussion of justice as an outcome, two types of justice develop – retributive justice and restorative justice. Both have elements of punishment to them, though the methods and ultimate goals are different.

⁹⁸ Research into the public perception of justice as an outcome is best found in the field of psychology, with a number of researchers exploring how the public perceive measures of justice. See: Tyler G. Okimoto, Michael Wenzel, and N. T. Feather, 'Beyond Retribution: Conceptualizing Restorative Justice and Exploring Its Determinants.', *Social Justice Research*, 22.1 (2009), 156–80; John M. Darley, Kevin M. Carlsmith, and Paul H. Robinson, 'Incapacitation and Just Deserts as Motives for Punishment', *Law and Human Behavior*, 24.6 (2000), 659–83; John M. Darley, 'Citizens' Sense of Justice and the Legal System', *Current Directions in Psychological Science*, 10.1 (2001), 10–13; Tyler G. Okimoto and Michael Wenzel, 'Punishment as Restoration of Group and Offender Values Following a Transgression: Value Consensus through Symbolic Labelling and Offender Reform.', *European Journal of Social Psychology*, 39.3 (2009), 346–67; Michael Wenzel and others, 'Retributive and Restorative Justice', *Law and Human Behavior*, 32.5 (2008), 375–89.

⁹⁹ Headey.

philosophical framework to justify a given response, interviewees are able to examine their own experience and respond according to specific views. The outcome approach to understanding justice also allows for a concrete analysis of events. Did a person who committed a crime incur some form of punishment, either through retributive or restorative measures? If not, does this impunity amount to a lack of justice? To respond to this last question, it is important to establish what justice is from the perspective of the wider public. What do public groups and political elites mean when they demand justice after a crime has been committed?

1.4.4.3 The “perception of justice” framework

To understand justice from an outcome perspective it is necessary to establish a clear framework of justice. The question as to *what is justice* should be explored in relation to what the public *perceives* as justice. However, many contemporary debates on justice are distinctly philosophical and fail to take into account the power of perception in public understandings of the concept. As discussed above, positive perception can lend legitimacy to a political event or process. In analysing the threads of discourse that emerged from the primary and secondary data collection for this research, it became clear to the author that public perception plays an important role in how the concept of justice was used. In other words, it is helpful to assess what characteristics are required for a retributive or restorative act to be considered “justice”. After failing to find a suitable perception of justice framework in the existing literature, the author of this research developed a framework that was subsequently applied in each of the three case studies. A number of characteristics have been considered before settling on four distinct elements. The characteristics of justice are fairness, equality of application, law and legitimacy.

Fairness - Rawls explored the concept of justice as fairness at great length in a number of his works.¹⁰⁰ In outcomes, fairness encompasses a number of basic factors, in particular proportionality. The outcome or punishment should be proportional to the crime. A sentence of one or two years for crimes against

¹⁰⁰ Rawls, *A Theory of Justice*; John Rawls, ‘Justice as Fairness’, *The Philosophical Review*, 67.2 (1958), 164–94; John Rawls, ‘Justice as Fairness: Political Not Metaphysical’, *Philosophy & Public Affairs*, 14.3 (1985), 223–51.

humanity¹⁰¹ has the potential to be viewed by the wider public, and by victims in particular, as disproportionate to acts committed, even in the context of a state transition. Granting amnesty contravenes a basic sense of fairness, offending public sensibilities that demand visible consequences that are beyond narrow legal norms.¹⁰²

Equality of Application - A clear argument can be made for universality of application in punishment.¹⁰³ If person A is sentenced to 10 years for a crime, then the same sentence should be handed out to person B if they have committed a similar offense. While this may be obvious, the impunity or light sentences typically enjoyed by the political and military elites during and after a state transition are not shared by other groups in society accused of the same crimes. Amnesty legislation, used to facilitate the transition, tends to favour the elites of the outgoing regime. In some cases, as in Chile, the left was either so diminished that the universality of the amnesty legislation was a token gesture to legitimise self-granted immunity or, as in the case of South Africa, the law was seen as the only way to halt state sponsored violence, giving the opposition little room to dictate the terms.

Law - The third indicator of justice the entrenchment in the legal system. Government and civil society actors should follow the same 'rule book', and the rules should be generally agreed upon in the form of a constitution or statute. If the outcome of an infraction is clearly established prior to the crime itself, then most can agree that justice is served when the punishment is enacted accordingly.

Legitimacy - This fourth indicator of justice, legitimacy, dictates that a law must be proportional and follow established legislation. The question will remain, however, whether it is perceived as legitimate by the public. As discussed above, legitimacy has an impact on government. Legitimacy can also have an impact on the form and content of law. If a piece of legislation is considered as illegitimate, the public will resist it. Prohibition, Jim Crow Laws and Apartheid are all examples of legal norms

¹⁰¹ Crimes against humanity, as described in the introduction and discussed below, are defined as crimes "committed as part of a widespread or systematic attack directed against any civilian population". For further explanation see Article 7 of 'Rome Statute of the International Court', *International Committee of the Red Cross*, 1998 <<http://www.icrc.org/ihl/WebART/585-07?OpenDocument>> [accessed 29 July 2014].

¹⁰² Okimoto and Wenzel.

¹⁰³ Daniel Mendonça, 'Equality in the Application of the Law' (presented at the Seminario en Latinoamerica de Teoria Constitucional y Politica, Yale Law School Latin American Legal Studies, 1999) <http://www.law.yale.edu/documents/pdf/Mendonca_equality_in_the_application_of_the_law.pdf>.

that were widely contravened, to the detriment of the law and, in some cases, the regional or national governance. Fundamentally illegitimate laws tend to be viewed and challenged as unjust.

The following table examines each of these factors and the research questions that relate to each one.

Table 1.1: Perception of Justice Indicators

Indicator	Research Questions
Fairness	Was the sentence proportional to the crime?
Equality of Application	Did everyone who committed the crime receive the same outcome (whether amnesty or punishment)?
Law	Did the act contravene an existing law?
Legitimacy	Do the wider public perceive the law and outcome as legitimate?

Each of these characteristics contributes to public perceptions of justice, while individual characteristics are, at times, identified in public discourse, the four taken together as the basis of a framework offer a more robust explanation of public perceptions of justice, giving depth to the term for purposes of this study.

1.4.5 A word on equality

As mentioned above, one of the key intersections of democracy and theories of justice is the concept of equality. Dahl outlined an argument on the central role of equality in democracy in his book *Democracy and its critics*. According to Dahl, "democracy might...be little more than a philosophical fantasy were it not for the persistent and widespread influence of the belief that human beings are intrinsically equal in a fundamental way..."¹⁰⁴ While certainly one of the most direct explanations of the role that equality plays in democracy, Dahl is by no means the only theorist to claim this as an intrinsic characteristic, nor was he the first. John

¹⁰⁴ Dahl, p. 85.

Locke expanded on the idea of equality in his *Second Treatise of Government*,¹⁰⁵ and Bhikhu Parekh argued that political equality before the law and the state is a core characteristic present to some degree in all liberal democracies.¹⁰⁶ In *Understanding Liberal Democracy*,¹⁰⁷ Barry Holden contended that equality is one of the three key concepts of liberal democracy, along with liberty and democracy. Holden argued that democracy is seen to be bound in two ways to the principle of equality. First, most supporters of democracy support the idea that all men are equal. Second, this inherent quality of humanity is best served by democracy.¹⁰⁸

These fundamental beliefs in equality are also present in discussions of justice, although they are often tied to the language of fairness. The Rawlsian argument of justice as fairness¹⁰⁹ places everyone in an equal position of ignorance before the collective decision of what is just can be decided. Christopher Ake claims that there is something more tangible in the relationship between justice and equality than simply that of a social virtue as described by Rawls. He argues that "justice in a society as a whole ought to be understood as a complete equality of level of the benefits and burdens of each member of that society."¹¹⁰ Justice requires equality to permeate through every facet of society, not only in the legal sense.

The argument that the perception of equality is at the heart of both democracy and justice raises a key question in relation to the use of amnesty legislation. The denial of justice during a state transition creates an absence of equality before the law.¹¹¹ Victims' rights are placed below those of the rest of the state, highlighted in the "exceptional times" argument used in support of amnesty legislation.¹¹² This vacuum of equality does not stand alone. According to the arguments presented by

¹⁰⁵ John Locke, *Second Treatise of Government* (Watchmaker Publishing, 2011).

¹⁰⁶ Bhikhu Parekh, 'Cultural Diversity and Liberal Democracy', in *Defining and Measuring Democracy*, SAGE Modern Politics Series (London; Thousand Oaks, Calif: SAGE Publications Ltd, 1995).

¹⁰⁷ Holden.

¹⁰⁸ Holden.

¹⁰⁹ Rawls, *A Theory of Justice*; Rawls, 'Justice as Fairness: Political Not Metaphysical'.

¹¹⁰ Christopher Ake, 'Justice as Equality', *Philosophy & Public Affairs*, 5.1 (1975), 69–89 (p. 71).

¹¹¹ This absence in equality before the law was highlighted in the case brought by victims' groups against the South African government. Lawyers for the plaintiffs argued that amnesty legislation contravened guaranteed rights articulated in the new democratic constitution, in particular the right of all people to seek redress for crimes committed against them. For more see: 'Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996)' <<http://www.saflii.org/za/cases/ZACC/1996/16.html>> [accessed 2 September 2015].

¹¹² The exceptional times argument is presented clearly in the South African Constitutional Court's findings in the above case, and is regularly cited as the reason for using amnesty legislation as a tool during state transitions.

Holden et al, equality is at the heart of democracy. The absence or denial of equality in justice fosters the perception that there is an absence of equality in the democracy. In turn, this can have a direct impact on the quality of democracy and the state's governability.

1.4.6 Amnesty legislation

1.4.6.1 A negotiated choice

One of the core issues that arise during pacted negotiations is the agreement to and/or the continuance of amnesty legislation. This effort to expunge criminal or civil liability for crimes committed during an authoritarian regime is usually considered necessary to the transition process, with one side – the outgoing regime – requiring the acceptance to amnesty before democratization can begin. The threat of violence is often articulated by outgoing leaders or their supporters if amnesty, in some form or another, is not agreed to.¹¹³ Chile's outgoing dictator, Augusto Pinochet, reportedly warned "touch one hair on the head of my soldiers, and you lose your new democracy."¹¹⁴ If the request for a new amnesty law is made, or the request for the maintenance of an existing law is expressed, it is almost always accepted during the negotiation process. Too weak to force domestic trials, or facing a political environment with too many factions, the incoming government often sees little alternative to accepting amnesty legislation.¹¹⁵ But while seen as a tool during a fragile process, amnesty legislation can take on a more prominent role in the post-authoritarian political and institutional development, becoming entrenched in the state's democratic structure.¹¹⁶ Amnesty legislation, often cloaked in the claim of necessity, becomes the sticking point in the questions around what to do about the past. But to understand whether amnesty can be maintained in perpetuity, a clear understanding of amnesty, its application and its historical role in democratic transitions must be considered.

¹¹³ This threat can be explicit, as in the case of Chile, or more subtly as in South Africa.

¹¹⁴ Ben Chigara, *Amnesty in International Law* (Longman Group United Kingdom, 2002), p. 10.

¹¹⁵ Markel.

¹¹⁶ The TRC process, and amnesty in particular, has taken an important role in South Africa's democratic legal structure. For a complete list of laws connected to the transitional justice efforts after the transition, see: 'TRC/Legal Background' <<http://www.justice.gov.za/Trc/legal/index.htm>> [accessed 9 October 2015].

Most amnesty laws are used to eliminate criminal or civil liability for violence including crimes against humanity (CAH). CAH are typically considered "international" in nature.¹¹⁷ This adds an important dimension to the understanding and debate around the use of amnesty legislation. The international nature of crimes against humanity means that they tend to generate international acknowledgement and response. William Schabas argues that the international nature of human rights obligations bypasses the traditional state sovereignty argument.¹¹⁸

Where these obligations are breached, the individual may be punished for such international crimes as a matter of international law, even if his or her own State, or the State where the crime was committed, refuses to do so.¹¹⁹

Amnesty has been used periodically throughout history, and was particularly evident during the wave of democratization that took place in the latter half of the Twentieth Century.¹²⁰ The use of amnesty legislation during a state transition typically reflects its pacted nature and the absence of a clear victor.¹²¹ It also indicates a fragmented community, with enough support for the outgoing regime to guarantee a continuing lack of accountability for the political violence perpetrated by its leaders and more often than not, the state's military and police forces.¹²² This was the experience of Chile and South Africa, where negotiators in Chile had to deal with an almost 50/50 split of support, and a very powerful defence force in South Africa. History has also shown, in parts of Latin America and Europe at least, that amnesty legislation does not last. This negotiated law, considered vitally necessary at the time, becomes problematic in the decades following the transition, creating a contested legacy of the state transition.

¹¹⁷ Ntoubandi; Chigara; Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002).

¹¹⁸ The state sovereignty argument rests heavily on the idea that law and order is a sovereign issue, to be dealt with domestically. See: William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000).

¹¹⁹ Schabas, p. 2.

¹²⁰ Huntington.

¹²¹ Markel; James L. Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa', *American Journal of Political Science*, 46.3 (2002), 540–56; Roht-Arriaza and Gibson.

¹²² Aylwin, Personal Interview.

1.4.6.2 What is amnesty legislation?

On a simple level, amnesty legislation can be defined as a form of impunity or amnesia regarding past criminal actions. The words "amnesty" and "amnesia" originate from the Greek term "amnestia", meaning "forgetfulness".¹²³ National amnesty legislation inevitably involves some form of public forgetfulness of past crimes. According to the United Nations Commission on Human Rights,

Impunity" means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.¹²⁴

While impunity can take on a number of forms during a transition, from statutes of limitations to *de facto* immunity through an unwillingness to pursue criminal liability,¹²⁵ the focus here is on the actual amnesty laws that are passed or maintained as part of the pacted transition. According to Ben Chigara, the goal of national amnesty laws is to expunge "criminal and/or civil liability of agents of a prior regime alleged to have violated basic human rights of individuals."¹²⁶ These laws can be self-granted, written and passed by the authoritarian regime, usually after a particularly violent period. In Chile, Brazil and South Africa, the authoritarian regimes granted themselves, and their agents amnesty after periods of significant repression, and these grants occurred long before the eventual democratic transition.¹²⁷ While self-granted, the outgoing regimes make it very clear that these laws would be non-negotiable during the democratisation process.¹²⁸ Alternatively, national amnesty laws can be debated during the state transition and are considered a key part of negotiations for the transfer of power. South Africa's transition pivoted on

¹²³ Chigara.

¹²⁴ Diane Orentlicher, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (UNCHR, 2005) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>>.

¹²⁵ Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford; Portland, Or.: Hart, 2008).

¹²⁶ Chigara, p. 21.

¹²⁷ South Africa's apartheid government periodically passed indemnity acts, which were essentially the same as limited amnesty.

¹²⁸ As highlighted by the quote from Pinochet regarding the impunity of his officers, discussed above. See: Chigara.

granting amnesty for the more brutal aspects of the country's authoritarian order.

1.4.6.3 Typology of Amnesty legislation

As mentioned above, amnesty laws can be broken down into two types of legislation. They are either imposed on the people, or they can stem from the electoral process.¹²⁹ Chigara explains that imposed amnesties are put into law by authoritarian regimes themselves either as laws or decrees that predate the transition process, or as fundamental requirements of eventual negotiation processes. While many would argue the latter is not an imposition per se, the lack of flexibility of the outgoing regime on this point and the perceived inability of the incoming government to institute some sort of punishment or criminal liability for past crimes, transforms such negotiated laws into impositions.¹³⁰ The core difference in elective amnesty laws from those that are imposed is that the incoming governments decide that granting amnesty to members of the previous regimes is beneficial to the state. These are pragmatic and highly political decisions that are not necessarily required for transition to democratic rule.

From within this broad typology of amnesty comes a defining subcategory. Amnesty legislation inevitably falls within two forms: *blanket* amnesty and *particularized* (also known as *conditional*) amnesty.¹³¹ Blanket amnesty is the blanket coverage of political crimes committed during a specific time period, without any requirement of information, remorse or acceptance of culpability.¹³² Particularized amnesty requires something from those who would seek coverage of the law. This type of amnesty process can require those seeking amnesty to give up their weapons, provide information, admit the truth about past violence and tell the incoming government where their victims may

¹²⁹ Chigara.

¹³⁰ Chigara gives an extended explanation of this typology in his work, with a particular focus in the imposed nature of most forms of amnesty legislation.

¹³¹ Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge, GBR: Cambridge University Press, 2010).

¹³² Garth Meintjes and Juan E Mendez, 'Reconciling Amnesties with Universal Jurisdiction', *International Law FORUM Du Droit International* 76, 2.2 (2000), 76–97.

be hidden or buried.¹³³ Particularized amnesty is a response to some of the core criticisms of the former, though whether particularized amnesty is in fact able to make up for the shortcomings of blanket amnesty is up for debate, particularly in its application.¹³⁴

The best-known use of particularized amnesty was in South Africa, through its Truth and Reconciliation process (TRC). This will be discussed at length in Chapter Four. Briefly, the majority of the goals of the South African process lay in reconciliation, with a lesser form of accountability. Particularized amnesty was meant to provide healing through truth, while pursuing prosecutions against those who refused to take part, or who gave misinformation.¹³⁵

1.4.6.4 Arguments for and against amnesty legislation

For every amnesty law that is passed, there are those who support the action out of necessity, or the desire to move beyond the atrocities of the past. There will also always be those who argue against the legislation, arguing that those who committed significant violence should be held accountable and thus punished. Those against amnesty are left with few options outside of the judicial arena to pursue traditional forms of justice.¹³⁶ The following reasons for and against amnesty legislation are often cited in debates, court cases and academic literature.

The pro-amnesty side of the debate can be distilled into five main arguments.¹³⁷ These are politically pragmatic in nature, as opposed to the more idealistic goal of reconciliation that is also often cited. While other arguments in support of amnesty may also be put forward, the five listed here are those arguments that are most often used.¹³⁸ First, without some form of amnesty,

¹³³ Jorge Heine, 'All the Truth but Only Some Justice? Dilemmas of Dealing with the Past in New Democracies', in *Atrocities and International Accountability: Beyond Transnational Justice* (Tokyo, JPN: United Nations University Press, 2007).

¹³⁴ Varney Personal Interview.

¹³⁵ Heine.

¹³⁶ Rama Mani, 'Does Power Trump Morality? Reconciliation or Transitional Justice?', in *Atrocities and International Accountability: Beyond Transnational Justice* (Tokyo, JPN: United Nations University Press, 2007).

¹³⁷ These reasons, though often discussed by multiple sources, have been clearly distilled regarding the South African process by Markel.

¹³⁸ Tutu; Aylwin, Personal Interview; Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa'; 'Azanian Peoples Organization (AZAPO) and Others v

there is a real possibility that the security forces of transitioning states and their supporters will resist any change to the power structure. Second, most incoming governments have few resources to pursue investigations and convictions of past human rights abuses. Third, even if investigations are feasible, the number of victims and the secretive nature of many authoritarian regimes mean that proving guilt beyond the shadow of doubt will be difficult. This is particularly the case where past regimes have conducted extensive campaigns to destroy evidence, as was the case in Brazil and South Africa.¹³⁹ Fourth, in some cases criminal prosecutions may extend beyond the outgoing regime to include members of the opposition, and this has the potential to destabilise the transition. Fifth, pacted negotiations are not a matter of a victor and loser.¹⁴⁰ More often than not, neither side is able to win outright.¹⁴¹ The authoritarian regime recognises that its legitimacy has been reduced to the point that it can no longer rule without an escalation of violence. Nevertheless, it may still have enough support from the political elite to play the role of kingmaker or, at very least, of influence within the democratisation process and hence disrupt proceedings.

A growing number of scholars have presented legal arguments against amnesty legislation, for example that agreement to existing or to new amnesty laws represents illegal acts on the part of the incoming democratic leaders. Chigara identifies four reasons that make amnesty laws untenable. First, if justice, and more broadly, "life, liberty and estate",¹⁴² are the rights of each individual, then amnesty laws are the trade-off of the rights of the victim by the state without the right of title. Second, state legitimacy is called into question

President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996)'.

¹³⁹ Hennie van Vuuren, *Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994* (Institute for Security Studies, May 2006) <<http://opensecrets.org.za/wp/wp-content/uploads/Apartheid-Grand-Corruption-2006.pdf>>; Edson Teles and Renan Quinalha, 'Scopes and Limits to the Transitional Justice Discourse in Brazil', in *Legacies of State Violence and Transitional Justice in Latin America: A Janus-Faced Paradigm?*, ed. by Marcia Esparza (Lexington Books, 2015).

¹⁴⁰ 'Desmond Tutu | Robert F. Kennedy Center for Justice & Human Rights | Robert F. Kennedy Center for Justice & Human Rights' <<http://rfkcenter.org/desmond-tutu>> [accessed 2 January 2014].

¹⁴¹ The issues that arise from a lack of a clear victor can be seen in the South African case study. By not pushing the opposing side into submission, the ANC were left to negotiate with the National Party rather than being in a position to establish an entirely new institutional order.

¹⁴² C. B Macpherson, 'Human Rights as Property Rights', *Dissent*, 24.1 (1977), 72–77.

if the government is able to transfer victim's rights for the hope or promise that democracy will be realised at some undetermined time in the future. Third, amnesty legislation flies in the face of international law. In the case of crimes against humanity, in particular, international statutes such as the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), take precedent over domestic sovereignty. Fourth, amnesty legislation asks for some form of a "blind, denied or forgotten history."¹⁴³ But with no future guaranteed, can the trade-off of victim's rights be justified? The danger is that if democracy proves too difficult, victim's still have no redress for the past. Granting or maintaining amnesty "adjusts" the rights of the victim to zero on the basis of an unguaranteed greater good. In addition to these stated reasons against amnesty, the use of this type of legislation raises questions regarding the legitimacy of a state built on the denial of justice.

1.4.7 Crimes against Humanity

Arguments against the use of amnesty legislation tend to be built around the idea that the crimes that most often come under its aegis go beyond the jurisdiction of domestic law.¹⁴⁴ The concept of crimes against humanity (CAH) was developed at the end of World War Two as one of the three classes of crimes articulated in the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal signed by the allied forces.¹⁴⁵ The other two were crimes against peace, and war crimes. Since then, a number of international laws have given a special status to CAH, which are also described as international crimes. The Office of the High Commissioner on Human Rights (OHCHR) *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* specifically restricts the use of amnesty for international crimes (such as crimes against humanity). Principle 25 goes on to say that these restrictions

¹⁴³ Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), p. 5.

¹⁴⁴ Norman Geras, *Crimes against Humanity: Birth of a Concept* (Manchester; New York: Manchester University Press: Distributed exclusively in the USA by Palgrave, 2011).

¹⁴⁵ 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945', *Treaties and States Parties to Such Treaties* <<https://www.icrc.org/ihl/INTRO/350?OpenDocument>> [accessed 9 October 2015].

stand, even when the legislation is part of peace agreements or to promote national reconciliation.¹⁴⁶

International crimes are considered crimes against more than merely the individuals involved, but against humanity as a whole. These are acts that "trample underfoot the laws of God, and humanity, crimes *jus cogens*, and grave violations of human rights."¹⁴⁷ Applying the parameters established by the International Military Tribunal in 1945, crimes against humanity were more clearly defined during the trial of Klaus Barbie in France in 1987.¹⁴⁸ For the purposes of the Nuremberg Trials, crimes against humanity were defined as

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during war; or persecution on political, racial, religious grounds in execution of or in connection within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where it was perpetrated.¹⁴⁹

The international community has since further entrenched the concept of crimes against humanity into international law with the *Convention of the Non-Applicability of Statutory Limitations of War Crimes and Crimes Against Humanity* (1968), the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973), which establishes apartheid as a crime against humanity, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), among others. More recently, during the case against former military leader, Lt.Col Desi Bouterse, international law expert John Dugard explained the six characteristics that now make up the legal understanding of CAH.¹⁵⁰ According to Dugard, crimes against humanity must be committed against a civilian population, must be collective in nature, there must be accompanied by evidence that the acts were

¹⁴⁶ Orentlicher.

¹⁴⁷ Chigara, p. 6.

¹⁴⁸ On July 4, 1987 Klaus Barbie, also known as the "Butcher of Lyons", was convicted of 17 counts of crimes against humanity. Barbie argued that his crimes were war crimes, with a statute of limitations that had long passed rather than crimes against humanity. The court disagreed. He was found guilty of murder, arrest and illegal sequestration with physical torture and complicity therein. A more extensive examination on the Barbie case can be found in Nicholas R Doman, 'Aftermath of Nuremberg: The Trial of Klaus Barbie', *University of Colorado Law Review*, 60.3 (1989), 449 (p. 449).

¹⁴⁹ 'The trial of German major war criminals: proceedings of the International Military Tribunal sitting at Nuremberg Germany' <<http://avalon.law.yale.edu/imt/imtconst.asp>> [accessed 3 January 2014].

¹⁵⁰ John Dugard, 'Bouterse Case 2000 Opinion', 2001 <<http://www.icj.org/objectives/opinion.htm>>.

State - or organised non-state - sanctioned, must be systematic, widespread or large-scale, do not need to be carried out in a discriminatory or persecutory manner, and the perpetrator must be proven to have the necessary *mens rea* to be held accountable.¹⁵¹ Despite international agreements that are generally punitive against CAH, the international community has generally been slow to take actual action against leaders of previous authoritarian regimes, particularly those that have been amnestied. In the 313 post-WWII conflicts identified by Mahmoud Cherif Bassiouni, only 1 per cent of perpetrators of CAH have been held accountable, with 40 per cent of perpetrators receiving some form of amnesty.¹⁵²

Granting amnesty for crimes against humanity is problematic, raising significant questions around which offenses can be granted immunity from prosecution. The arguments for amnesty reflect the pressing needs of exceptional and difficult times, while the arguments against it reflect growing legal concerns. In the end, there is a fundamental standard of human rights that typically insists on those rights' precedence over convenience.

1.5 Methodology

1.5.1 Two Methodological Approaches

Two distinct methodological approaches have been employed in this research. The normative approach pivots on the fundamental question of whether amnesty can be used in a liberal democracy without undermining the political structure. As a normative argument, this focuses on the norms and expectations of liberal democracy in contrast with the requirements of amnesty. The normative approach attempts to establish whether there are areas of incompatibility between the expectations of a liberal democracy and amnesty legislation.

The second methodological approach is empirical, pivoting on the evidence gleaned through primary and secondary research to explore whether amnesty can have an impact on the development of a stable liberal democracy. While there is a myriad of variables that have an impact on democratic consolidation in the decades that follow a transition, the empirical section of this research points to correlation

¹⁵¹ Cited in Chigara.

¹⁵² M. Cherif Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention', *Washington University Global Studies Law Review*, 9.4 (2010).

between amnesty and some of the key areas of weakness in the subsequent democracy. These areas include culture of impunity in political, judicial and police services, corruption and the use of authoritarian political tools within the democratic context.

The correlation between amnesty, these areas of weakness and the stability of liberal democracies is an area that is explored in this research, with the understanding that there is significant space for further investigation.

1.5.2 Comparative Analysis

The long-term efficacy of amnesty legislation can be examined either through quantitative or qualitative methods and both of these very general approaches were considered for this research. The choice to examine this issue using qualitative measures and a case study research design stems from the depth of understanding and detail that it offers. Case study analysis allows researchers the opportunity to examine a causal relationship from a number of angles and to explore what makes that case unique, interesting and informative. Within the small set of case studies in this work, there is an implicit micro-macro link, that is, the ability to draw limited generalisations regarding social and political behaviour from a smaller to broader scale.¹⁵³ This is significant with what are called *instrumental case studies*, which aim to "provide insight into an issue or to redraw a generalisation."¹⁵⁴

Bill Graham describes case studies as "a unit of human activity embedded in the real world...which can only be studied or understood in context."¹⁵⁵ This straightforward explanation of case studies is disputed, in that others argue that there is more ambiguity in the construction of a case study than simply a unit of human activity. Such ambiguity breeds confusion. Gerring describes this situation as a "definitional morass"¹⁵⁶ made more difficult by a number of near-synonyms of the term *case study* such as single unit, single subject and single case. Rob VanWynsberghe and Samia Kahn¹⁵⁷ claim that the term case study has become a

¹⁵³ John Gerring, *Case Study Research: Principles and Practices*, 1 edition (New York: Cambridge University Press, 2006).

¹⁵⁴ Stake, p. 137.

¹⁵⁵ Cited in *Case Study Research*, ed. by Matthew David, Four-Volume Set edition (London; Thousand Oaks, Calif: SAGE Publications Ltd, 2005), p. XXV.

¹⁵⁶ Gerring, *Case Study Research*, p. 17.

¹⁵⁷ Rob VanWynsberghe and Samia Kahn, 'Redefining Case Study', *International Journal of Qualitative Methods*, 6.2 (2008), 80–94.

catch-all for a variety of research methods, methodologies and designs, and as a consequence has come to mean very little. In an attempt to clear away the confusion and introduce a solid definition, Gerring argues that at its heart, a case study is made up of three elements -- time, space, and a phenomenon. These boundaries can be small, such as in a case study of a single person, or they can expand to the study of a nation-state. Gerring's definition of a case study tends towards presenting the idea as a research design. Harry Eckstein¹⁵⁸ identifies four types of case studies, based on the underlying goals of case studies in relation to theory formation. His typology is made up of the configurative-idiographic study, disciplined-configurative study, heuristic case studies and plausibility probes. While it is debatable whether development of theory is possible from case studies, Eckstein argues that this is one of the key roles of case study analysis, with each type of case study offering a different path to theory development. VanWynsberghe and Kahn disagree with this approach, however, and argue that defining case studies as a research design is restrictive. They argue that case studies represent a "transparadigmatic" and "transdisciplinary" heuristic "that allows for the circumscription of the unit of analysis."¹⁵⁹ The authors present their inclusive definition in an effort to accommodate variables that sit outside tighter definitions.

Criticisms of the case study approach are most often based on the argument that an in-depth study cannot provide the basis for generalizability—one of the goals of social science.¹⁶⁰ At issue, according to Bent Flyvbjerg, are misunderstandings regarding the case study's ability to provide a measure of "theory, reliability and validity".¹⁶¹ However advocates of this approach including Flyvbjerg, Eckstein and others, reject this view. Eckstein's work relates "n = 1 to all phases of theory building and particularly to stress the utility of cases study where rigour is most required and case studies have been considered least useful."¹⁶² Flyvbjerg ties the value of case studies to basic human experience with learning.

¹⁵⁸ Harry Eckstein, 'Case Study and Theory in Political Science', in *Strategies of Inquiry*, ed. by Fred I. Greenstein and Nelson W. Polsby, 1st Edition edition (Reading, Mass: Addison-Wesley Educational Publishers Inc, 1975).

¹⁵⁹ VanWynsberghe and Khan, p. 90.

¹⁶⁰ Eckstein; Bent Flyvbjerg, 'Case Study', in *The SAGE Handbook of Qualitative Research*, ed. by Norman K. Denzin and Yvonna S. Lincoln, Fourth Edition edition (Thousand Oaks: SAGE Publications, Inc, 2011); Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research', *Qualitative Inquiry*, 12.2 (2006), 219–45.

¹⁶¹ Flyvbjerg, 'Five Misunderstandings About Case-Study Research', p. 221.

¹⁶² Eckstein, p. 132.

First, he argues, the context-dependent knowledge born out of case studies is what allows a person to move from "rule-based beginners to virtuoso experts. Second, in the study of human affairs, there appears to exist only context-dependent knowledge, which, thus, presently rules out the possibility of epistemic theoretical construction."¹⁶³ According to Gerring, case studies are

generally more useful when (1) when inferences are descriptive rather than causal, (2) when propositional depth is prized over breadth and boundedness, (3) when (internal) case comparability is given precedence over (external) case representativeness, (4) when insight into causal mechanisms is more important than insight into causal effects, (5) when the causal proposition at issue is invariant rather than probabilistic, (6) when the strategy of research is exploratory, rather than confirmatory, and (7) when useful variance is available for only a single unit or a small number of units.¹⁶⁴

The method of research that underpins case study analysis can be as ambiguous as the definition of case study itself. While phrases such as qualitative research or ethnographic studies are used as a short hand for case study research, this is misleading, or rather, incomplete.¹⁶⁵ As Eckstein indicates in his work briefly mentioned above, there are a number of types of case study analysis, each with its own approach to gathering data. Ultimately, the "intensive study of a single unit with the aim to generalize across a larger set of units"¹⁶⁶ can be constructed in a number of ways. Eckstein illustrates the case study methodology by contrasting experimental medical studies using large sample numbers and clinical studies that focus on individuals. The experimental study is run by a strictly defined and constrained research design, while "the typical clinical study is much more open-ended and flexible at all stages."¹⁶⁷ Typical case study research includes interviews, archival documents and other related research with the goal of deep understanding of the topic. Robert Stake argues that case study analyses draw from six areas: "the nature of the case; the case's historical background; the physical setting; other contexts (e.g., economic, political, legal and aesthetic); other cases through which this case can be recognised; the informants through whom the case can be known."¹⁶⁸

¹⁶³ Flyvbjerg, 'Five Misunderstandings About Case-Study Research', p. 221.

¹⁶⁴ John Gerring, 'What Is a Case Study and What Is It Good For?', *The American Political Science Review*, 98.2 (2004), 341–54 (p. 352).

¹⁶⁵ Gerring, 'What Is a Case Study and What Is It Good For?'

¹⁶⁶ Gerring, 'What Is a Case Study and What Is It Good For?', p. 352.

¹⁶⁷ Eckstein, p. 81.

¹⁶⁸ Stake, pp. 139–40.

In examining whether amnesty legislation and a robust liberal democracy can co-exist, a number of research-related choices became necessary. Put simply, the methodological approach used for this research is a collective (multi) case study analysis examining the experiences of Brazil, Chile and South Africa. The study is instrumental rather than intrinsic in language employed by Stake;¹⁶⁹ these selected case studies should tell us something about the long-term impact of amnesty legislation in a democracy. The information gathered through interviews, archives and broader research promise to illustrate the experience of each of the case studies, offering both points of similarity and contrast.

This research was designed as collective case studies to provide depth of understanding of the experiences of each state, as well to identify points of comparison. As a heuristic case study, this work "tie[s] directly into theory building, and therefore is less concerned with overall concrete configurations than with potentially generalizable relations between aspects of them..."¹⁷⁰ Gerhard Kleining and Harald Witt argue that heuristic case studies are defined by their flexibility, allowing new evidence to shape the direction of the research.¹⁷¹

Chile, Brazil and South Africa are not the most common grouping of states in the literature dealing with transitional justice. The differences between these three states include region, authoritarian regime types, levels and types of violence, transition processes and outcomes of transitional justice efforts. Their single commonality is their use of amnesty legislation as part of their respective bargain for democracy. South Africa, Brazil and Chile all introduced or maintained amnesty legislation during their democratisation processes. However, even here there were differences -- each of these three countries used amnesty legislation differently, and with varying degrees of success. The choice of these three countries came down to a single concern: each individual country was instructive as a single case study about the transitional justice process. Together, this group of states appeared to be instrumental in understanding a key problem: the capacity of democracy and amnesty to co-exist.

¹⁶⁹ Stake.

¹⁷⁰ Eckstein, p. 104.

¹⁷¹ Gerhard Kleining and Harald Witt, 'The Qualitative Heuristic Approach: A Methodology for Discovery in Psychology and the Social Sciences. Rediscovering the Method of Introspection as an Example', in *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research*, 2000, 1.

Since the end of World War II, a number of states have used some form of amnesty legislation to help convince authoritarian leaders to step aside and allow for democratisation.¹⁷² In an attempt to identify suitable cases for this research, selection parameters were created. The basic parameters set for this research were:

1. Time frame -- the authoritarian regime had to have risen to power in the mid-to second half of the Twentieth Century and the transition needed to have taken place in the 1980s/early 1990s, giving sufficient time to reflect on the longevity of amnesty legislation in a liberal democracy.
2. Pacted negotiation -- The existence or maintenance of the amnesty legislation had to be agreed upon rather than serving as the preference of the conquered over the vanquished.
3. The presence of violence -- the amnesty legislation had to cover state-sponsored acts of violence
4. Democratic development -- the state had to have developed, or attempted to develop, some form of liberal democracy.

Beyond these basic points, this research also sought to highlight the outcomes of the different types of amnesty legislation, attempting to identify whether or not there was greater utility in particularised amnesty in its coexistence with a liberal democracy over the outcomes generated by blanket amnesty laws.

Out of a potential pool of case studies, South Africa, Brazil and Chile were chosen for their compatibility with the above parameters as well as what could be learnt from their differences. In terms of points of commonality, these three states all experienced forms of authoritarian regimes after World War II. South Africa's apartheid regime stands slightly separate from the other two countries in its form of authoritarian regime; however, it is still in the same wheelhouse in its opposition to the ideal of the liberal democratic state and use of the security apparatus as a core tool of control. Brazil, Chile and South Africa all transitioned towards democracy in the 1980s or very early 1990s, giving ample time for the democratic structure and norms to take hold and, potentially, to challenge the legitimacy of the agreed upon amnesty legislation. Pacted negotiations marked the transition towards democracy for Chile and South Africa, although less so for Brazil. In Brazil, the

¹⁷² Elster.

negotiation process was within the authoritarian regime itself as opposed to within any significant opposition. The levels of violence in each of the three states varied. Regardless, opposition members in all three states experienced violence, repression and general persecution at the hands of the non-democratic regimes. Finally, each one of these countries entered a period of liberal democracy at the end of the transition process.

The points of differences in the case studies are as valuable as the points of similarity. Brazil, Chile and South Africa have each begun with an amnesty law, however these laws have developed in different ways over time. Have the differences at the laws' inception changed the outcomes? The answers to these questions can be found in the outcomes of the individual case studies.

I also have a personal connection with each of the cases studies. I am South African by birth. My family left apartheid-controlled South Africa when I was five. I am connected to Chile through my sister-in-law, and travelled there a number of times prior to conducting research. My first degree was in Spanish. Finally, my chief supervisor has focused on Brazil throughout his academic career and was able to provide a depth of understanding and insight valuable to this work. My field research in Brazil, and my interviews there, opened my eyes to a world of comparisons and contrasts in that rich land.

In the tradition of case study analysis, the purpose of this research is to explore an idea (amnesty legislation; democracy), to be flexible about the research direction, and to discover the similarities and significant contrasts between these case studies. This is achieved through a number of different methods of inquiry. Primary and secondary sources in various forms were utilised to develop a clearer picture of the often-surprising uses of amnesty, as well as its unexpected longevity in South Africa, Brazil and Chile.

In 2011, I spent five weeks in each country conducting interviews and accessing archival documents. Subsequent interviews were conducted via Skype. These interviews were conducted in English. These data sets were supplemented by an extensive analysis of academic literature examining the authoritarian and democratic experiences of each state.

1.5.2.1 Primary Sources

The primary sources used in this research include interviews, source documents and other forms of data from a number of in-country archives. As explored in Ranjit Kumar's *Research Methodology*,¹⁷³ interviewing best accommodates complex situations and is useful for collecting in-depth data. Information can be supplemented by non-verbal cues and questions and answers can be teased out and explained. Interviews can also be adapted and used across the population. However, interviewing, particularly as part of international research, is expensive, time consuming and language dependent. Interviews are dependent on the "quality of interaction" between the participants and the interviewer, and depend on the skill and experience of the interviewer. The information gathered during an interview has the potential to vary due to outside factors (such as relationship between participants and interviewers, the number of times a person is interviewed, etc), and there is the possibility that the interviewer may introduce his/her own bias into the data collection and analysis.¹⁷⁴

Archival documents, such as minutes of negotiations, can offer the official narrative of an event or period. The strength of these documents is that they rely less on recollection than do other sources. However, as documents of record, they have already been subject to levels of interpretation, including the very simple decision to keep one document over another.

Interviews

During research conducted in 2011 in Brazil, Chile and South Africa, 11 in-depth interviews were held with members of the political elite, human rights activists and lawyers who were part of the transition process. Three further interviews were conducted via Skype and in-person from New Zealand following the same methodological approach as the interviews conducted in-person. A further seven interviews were conducted with observers such as journalists and academics. All questions were submitted in advance to, and approved by, the Faculty of Arts and Social Sciences of the University of Waikato Research Ethics Committee, as per standard human research ethics protocol. These interviewees all contributed to a deeper understanding of decision-making process involved during the pacted

¹⁷³ Ranjit Kumar, *Research Methodology: A Step-by-Step Guide for Beginners* (Sydney, Australia: Addison Wesley Longman Pty Limited, 1996).

¹⁷⁴ Kumar.

negotiations, particularly in relation to the amnesty legislation. They were also asked to explore the ongoing roll of the amnesty and justice in their respective countries and how these two concepts interacted as part of the state's democracy. The process was semi-structured, with a set of predetermined questions complimented by the direction offered by the participants themselves. The focus of each interview—the use of amnesty and its long-term consequences—were predetermined and made clear amongst the various participants. The interviews tended to range across a variety of subjects; including the concept of justice, how it is popularly perceived and the connection impunity has in popular perceptions with current human rights issues. Each interviewee was selected on the basis of the role also played in the transition process. Availability and willingness to speak on these issues played a key role in the number and selection of participants. In South Africa and Chile interviewees were more available and willing to be interviewed than they were in Brazil. There are a number of possible reasons as to why this may have been the case, although it is likely that timing contributed to the unwillingness of some members of the political elite to participate in this research—interviews were conducted at the same time as the negotiations that took place in the formation of Brazil's first truth commission. In the end, 37 potential participants who belonged to this group were contacted, of which 20 were willing to be interviewed.

The interview responses were then thematically organized in a discourse-analysis matrix. The analysis themes included *justice*, *amnesty*, *transitional justice*, *post-transitional justice*, *democracy*, *international involvement*, *the authoritarian regime and legal*. This process allowed the researcher to identify and highlight the fundamental threads of the discourse, and points that were commonly shared across interview participants.

Archival documents.

Archived documents were accessed in each country. These archived materials included minutes from negotiations, transcripts and reports of the truth commission proceedings, and copies of the constitution and other related laws. These documents added significantly to the case study analyses, giving first-hand information regarding the transitional justice processes, as well as clarifying the laws used to establish the subsequent liberal democracies. The key themes of discourse, *amnesty*, *justice* and *democracy* were used as general search terms, though research was not

limited to these. Articles from contemporaneous media coverage on these topics have also been used to inform the research.

1.5.2.2 Secondary Sources

Media Reports. Efforts at transitional justice, amnesty legislation and their impact on democracy, have featured in local media. Accessed via archives in both digital and hard copy, these reports contributed to the texture and depth of information for each case study, with the information illustrating how the key issues are perceived in the media. These reports also provided useful information and quotes from members of the political elite that were unavailable for interviews, and further information from those that were interviewed. Media reports can be classified as either primary or secondary sources, depending on the focus of analysis. When part of a discourse analysis, media reports are primary sources. When used to give context to past events, they were secondary sources.

Relevant literature. There are a number of works broadly examining the transitional justice experiences of Chile, South Africa and Brazil. These texts have been used, where appropriate, to contribute towards the analysis of the longevity of amnesty legislation in liberal democracies.

As touched on above, there were a number of challenges that shaped the methodology of this research. One issue was participation. Prospective participants were approached to be a part of this research via email and telephone. Of those contacted, 22 declined to be interviewed or did not respond, while 8 were unable to meet due to location or time schedule conflicts. Those who were willing to be interviewed did so in a common language shared by the interviewer and interviewee, either English or Spanish. Archives were also problematic. At the time that this research was conducted, documents pertaining to South Africa's Truth and Reconciliation Commission were still held by the South African Department of Justice and were unavailable to researchers.

This research was conducted in a manner that reflected these challenges. While more time in-country and greater access to a larger number of sources would have been ideal, this was not possible. Despite these limitations, the use of both primary and secondary sources has allowed for the necessary depth of understanding to examine the core question of whether or not amnesty legislation can be maintained in a liberal democracy.

1.6 Chapter Summery

The following substantive chapters of this thesis are broken down by case study. Chapter Two covers Chile, Chapter Three covers Brazil, and Chapter Four covers South Africa. Each chapter explores the socio-political experiences of the state in question, beginning with a brief sketch of the pre-authoritarian period. The goal is to outline the norms established in each state just prior to the political rupture that led to the authoritarian regime. In the case of Brazil and Chile, political and institutional patterns established in the early 20th Century have re-emerged with democracy, with populist rhetoric (Brazil) and a deeply legalist approach (Chile) once again the norm. In South Africa, the historical context explains both the rise of Afrikaner nationalism and the deep divisions that remain amongst the different political groups.

After examining the historical context of each case study, the chapters then move to an examination of the authoritarian regime, including an accounting of the violence perpetrated by the state. These sections are informed by first-hand accounts given to each country's truth commission, as well as published narratives and archived data. By establishing a legacy of violence, the sections on the authoritarian regimes then draw a line between the events of the non-democratic period and the demands for justice after the transition.

In outlining the socio-political history of the transition period in each state, the goal is to examine the negotiations for democracy, and in particular, the decisions around amnesty laws and transitional justice. It is in this section in each chapter that H_1 is explored, to examine whether amnesty was, indeed, agreed to in good faith. The arguments addressing H_0 and H_1 are then presented in the subsequent two sections. The health of each case study's current democracy is assessed and examined in the context of H_0 . This section includes an assessment of the quality of democracy in each state, and an examination of whether or not particular issues such as corruption, impunity, and falling legitimacy can be identified and linked to decisions made during the negotiation period. The chapters then move to examine whether time has made a difference in demands for justice, as the percentage of the population born after the transition increases. The quality of democracy indicators are used here to assess the state of democracy in each case. Finally, each chapter outlines the different

threads of discourse expressed by the different elite groups that participated in the pacted negotiations and democratization process. The interview participants gave insight into the decisions made during the transition, and how they are viewed decades on. The participants also reflected on the concept of justice during exceptional times, and the impact the absence of justice has had on the current democratic development.

The conclusion of each chapter pulls together the socio-political experience of the case studies, the themes outlined in the discourse analysis of the interviews and results of the tested hypotheses. The concluding analyses in each chapter use the different streams of data to respond to the key question – *can justice be sacrificed for democracy?* While the experiences of Brazil, Chile and South Africa are unique, the data presented in each chapter finds that amnesty and democracy are fundamentally incompatible. A liberal democracy requires equality and justice that are in direct conflict with the requirements of amnesty.

Chapter Two – Chile

Chile is a case of a country that attempts blanket amnesty with a truth commission. At the point of transition, Chile was still split between those who supported Pinochet and those who sought his demise. The democratic leadership had sufficient political legitimacy to mandate a truth commission through an executive order. However, it was unable to convince congress to pass legislation that would have given the commission judicial weight. On the completion of the commission's report, the government actively attempted to move on from the transition, arguing that it had fulfilled its responsibility towards justice. Victims were not so easily persuaded. Despite threats from Pinochet to challenge the democratic order, victims continued to pursue justice, culminating in both domestic and international court cases against Pinochet in 1998. Since then, efforts for justice have moved forward slowly despite general resistance from the legislative branch. Democracy has been generally well established; however, victims are still able to upset governability during periods of mass mobilization. The demands for the repeal of the 1979 amnesty law remain, as do demands for further measures of justice in the courts and the congress.

Chapter Three – Brazil

From the early days of the transition, the political elites in Brazil remained committed to a pact of forgetting; blanket amnesty in its purest form. This was, in part, due to the nature of the decade-long military-controlled democratization process, as well as the nature of the amnesty law and the limited impact of the authoritarian regime's CAH on the wider population. This commitment to silence remained for over two decades until a former victim of the regime, Dilma Rousseff, became president. Despite congressional resistance, Rousseff managed to establish a Truth Commission, with the report delivered in 2014. However, Rousseff declined to pursue potential prosecutions and the issue became subsumed in the broader constitutional crises and corruption charges. The amnesty law remains part of Brazil's legislative structure, however democracy is in decline. Issues that correlate somewhat with the use of amnesty such as impunity, corruption and violence, remain as significant issues in Brazil. Demands for justice, however, are persistent albeit muted. Chapter Three is illustrative of what can happen when justice and equality are ignored, undermining democracy in the process.

Chapter Four – South Africa

The South African transition was intended to be a new example for how difficult negotiations could be shaped to include both elements of justice and amnesty. It was lauded as the way forward, however as the evidence presented in Chapter Four shows, the expectations of this model remain unfulfilled. Particularized amnesty required truth telling at the Truth and Reconciliation Commission before amnesty could be granted. It was individualized and limited. However, the process of particularized amnesty has become an ad hoc blanket amnesty. The government has failed to pursue prosecutions, despite recommendations by the commission to do so, and other measures of justice have likewise been ignored. At the same time, the quality of South Africa's democracy has been severely limited. Similar to Brazil, South Africa has been beset by corruption, impunity for state violence, and accusations of state capture. The narratives around justice, democracy and amnesty remain strained, with serious concerns that democracy in South Africa is in crisis. The

generation of South Africans born after the end of Apartheid still demand justice, however it is less tangible than the demands expressed by direct victims. Rather, it is a more nebulous and volatile demand for justice in a country beset by widespread violence, unemployment and economic inequality.

Chapter Five – Conclusion

The final chapter in this work brings together the two key elements of this thesis – the theory and the cumulative evidence gathered in the case studies – to answer the research’s guiding question: *can justice be traded for democracy?* The answer, simply, is no. The requirements of democracy exclude the possibility of key legislation that prohibits some measure of justice for crimes committed by the state. The case studies, each representing a different approach to amnesty, have all landed within the same ballpark in terms of outcomes. In Chile, amnesty has been successfully undermined by persistent demands for justice while in South Africa and Brazil, amnesty laws remain, however the respective democracies are fundamentally unstable with issues around corruption, continuing impunity and widespread violence. The concluding chapter outlines a correlative argument that a requirement of a healthy and entrenched democracy is the appropriate handling of past crimes against humanity. To ignore demands for justice, the evidence indicates, is to risk issues in governability and perceived legitimacy.

1.7 Conclusion: Intersecting theories

A large number of rights are taken for granted in established democracies. The right to vote is well entrenched, as are the rights to justice, to security, to equality and to a responsive government, among others. While academics may debate the nature of democracy, the characteristics identified by Morlino provide a good indicator of what is widely perceived by the public as a good democracy,¹⁷⁵ and this public perception matters. Collective memory plays a powerful role in the interactions between the public and state, with demands for justice persisting well beyond the time limits of the transitional period. The quality of democracies rise and fall on their ability to respond to the needs and,

¹⁷⁵ Leonardo Morlino, ‘Qualities of Democracy: How to Analyze Them’ (Istituto Italiano di Scienze Umane, Florence, 2009).

more importantly, the expectations of the public. In democratizing states, the constitutions are written to replicate the norms and expectations of existing democracies. In the case of South Africa, the constitution of 1996 was one of the most socially advanced of its time.¹⁷⁶ However, while the legal structure looks to the future, the presence of amnesty creates a significant issue. How can a country that holds the rights of citizens above all else then ask a section of those citizens to forgo their rights in relation to justice? Amnesty in any form directly challenges the expectation of equality that is inherent in a democratic structure.

From a theoretical perspective, amnesty laws are a significant issue; an irregularity that may cause problems once the exceptional nature of the democratization process is over. From a practical perspective, the evidence gathered from the experiences of Chile, Brazil and South Africa have shown that attempts to maintain amnesty in democratizing states can correlate to either the diminished quality of the democracy in the long run, or the dismantling of the amnesty law altogether. The latter option raises a series of questions that fall within the scope of post-transitional justice theory.

Returning to the question at the heart of this research, the answer appears to be less positive than proponents of amnesty would like. *Can justice be traded for democracy?* No, the need for justice, or at least perceived justice, seems to be fundamental to democracy, and democracy, after all, is universally accepted as a political system that is built on equality above all else. By removing this aspect of democracy for those who have been persecuted at the hands of the authoritarian regime, the negotiators of the transition in effect inflict a deficit within the institutional structure that is extremely difficult, if not impossible, to overcome, impacting the socio-political development for generations.

¹⁷⁶ Francois Venter, Personal Interview, Potchefstroom, 08/02/2011.

Chapter Two

Chile

2.1 Introduction

The Pinochet regime (1973-1989) cast a significant shadow over Chilean politics for more than two decades, with questions around human rights and justice playing a role in each presidential administration after the transition. Chile's experience with authoritarianism and democratization provides an informative case study for addressing the key question of this research. Can justice be traded for democracy? More specifically, can amnesty legislation, in the form of blanket amnesty as in Chile as opposed to the particularized amnesty of South Africa, be effectively used during a transition without either suffering a reversal, or having a significantly adverse impact on the quality of democracy that emerges afterwards?

According to Patricio Aylwin, the first democratic president of Chile after the Pinochet regime, the answer is simple. The sacrifice of justice was said to be the price Chileans would have to pay for a democratic future.¹⁷⁷ During a personal interview conducted with the author of this thesis before his death, Aylwin argued that by agreeing to maintain the amnesty decree the opposition did what was necessary to ensure a peaceful transition. Though resolute in his belief that maintaining amnesty was the best option, Aylwin also insisted that there were few alternatives available to him as leader of a still-divided Chile. He rejected subsequent demands for justice, saying that the government did what it could.¹⁷⁸ This view has proved to be somewhat hollow in the face of the continued discourse over amnesty, impunity and justice. Protestors continue to march *en mass*, demanding measures of accountability, and the democratic system in Chile is still periodically disturbed today by revelations of past crimes and by questions over the impact impunity has had on the country's development. The amnesty decree itself has been directly challenged in national

¹⁷⁷Aylwin, Personal Interview.

¹⁷⁸Aylwin, Personal Interview.

and international courts, with the possibility that the decree will be revoked under the current administration of President Michelle Bachelet.¹⁷⁹

Initially the result of an uneasy pact agreed during a tense transition, democracy in Chile no longer has the will to allow for full impunity as demands for justice persist longer than the expected by the political elites. Public legitimisation of the transition, or the lack thereof, has played an important role in the path of democratization. How the Chilean public accepted the process is important in understanding the effectiveness of efforts at justice and democracy.

Volatility in the political system marked much of the decade leading up to the 1973 coup, with the election by a minority of Chile's first Socialist president, Dr Salvador Allende, in 1970 marking a tipping point for conservative interests. After three years on Chile's 'democratic road to socialism', the military took power by non-democratic means. A violent coup, the events of September 11, 1973, marked the beginning of 17 years of authoritarian leadership by Augusto Pinochet. The military regime acted criminally in its indiscriminate torture, murder and kidnapping of members of the opposition.

Just prior to the formulation of a new constitution in 1980, the military junta, by then led by Pinochet, issued an amnesty decree (1978) that ensured impunity for the violence during the first period of the authoritarian regime. Decree 2.191 was a blanket amnesty for criminal offenses committed between 1973 and 1978. Described by torture victim and advocate Hector Cataldo as something that "came back to haunt us,"¹⁸⁰ this decree, still in effect as of December 2015,¹⁸¹ had become a focal point for efforts by victims to achieve some form of justice. Significant debate had emerged over the legality of the decree in the post authoritarian period. The transition and eventual post-transition era, as outlined below, had been characterised by the re-establishment

¹⁷⁹Brianna Lee, 'Chile Moves to Overturn Pinochet-Era Amnesty Law', *International Business Times*, 2014 <<http://www.ibtimes.com/chile-moves-overturn-pinochet-era-amnesty-law-1687092>> [accessed 26 November 2014].

¹⁸⁰Hector Cataldo, Personal Interview, Via Alemana, Chile, 5 May 2011.

¹⁸¹In 2014 Bachelet presented legislation that would revoke the 1978 amnesty law. However, this has since been stuck in Congress. Tihomir Gligorevic, 'Chile: Effort to Repeal Pinochet Amnesty Law Languishing in Congress | InSerbia News' <<https://inserbia.info/today/2015/09/chile-effort-to-repeal-pinochet-amnesty-law-languishing-in-congress/>> [accessed 17 February 2017].

of democratic principles, albeit based on the authoritarian-formulated 1980 Constitution, which remain the law today. Civil society has played a significant role in pushing accountability at both domestic and international levels for the human rights abuses of the authoritarian regime. But the question arises as to whether these popular calls for justice have impacted the institutional structure and stability of the subsequent Chilean state.

2.2 Historical Background

2.2.1 Before the coup

Electoral participation in Chile during the middle of the 20th Century was about 80 per cent, and registration grew rapidly by the 1960s. As the country's experience with democracy increased, so did the strength of the country's political organisations and party affiliation.¹⁸² The competitive nature of the regional and national elections meant that it was rare for one party to gain a clear majority over the others.¹⁸³ Coalitions were the norm. Coalition-building became particularly important during the later stage of the democratic period that pre-dated the coup, with the fragmentation of parties leading to smaller percentages for the different political organisations.

Authors have questioned whether the intense activity of the electoral process truly reflected a stable democratic system. As pointed out by Whitting: "high levels of group activity aimed at economic goals may be incompatible with political procedures designed to moderate and mediate conflicting interests."¹⁸⁴ Labour activities, in the form of both legal and illegal strikes, marked much of the democratic period, and were particularly prevalent during the Allende administration.¹⁸⁵ During the 1950s and 1960s a number of demands were made by the unions, pushing successive governments to focus

¹⁸²Simon Collier and William F. Sater, *A History of Chile, 1808-2002* (Cambridge University Press, 2004).

¹⁸³Between 1925 – 1973, the parties that dominated Chilean politics were the Radicals, Liberals, Conservatives, Socialists and, during the late 1950s and 1960s, the Christian Democrats. As the parties split into smaller interest based organisations, coalitions became more frequent. Collier and Sater; T. R. Scully and Scott Mainwaring, *Building Democratic Institutions: Party Systems in Latin America* (Stanford University Press, 1995).

¹⁸⁴V. R. Whiting, *Political Mobilization and the Breakdown of Democracy in Chile* (Allegheny College, 1984) <<http://sites.allegheny.edu/latinamericanstudies/latin-american-issues/volume-1/>>.

¹⁸⁵ The legality of union movements was dictated by Alessandri's Labour Code. For a closer examination of the Labour Code see: Brian Loveman, *Chile: The Legacy of Hispanic Capitalism*, 1st Edition edition (New York: Oxford University Press, USA, 1979).

on public expenditure as a response to the so called ‘social question’ (public health, social assistance, labour, social security, housing and education).¹⁸⁶ The effectiveness of these policies over the four decades of democracy, particularly with regard to wage increases in the industrial sector, depended heavily on the price of copper, which fluctuated wildly during this period.¹⁸⁷ Inflation was a significant issue, particularly in the late 1950s, reducing the standard of living for most Chileans, despite increased social spending.¹⁸⁸ The 1960s saw continued volatility as the ruling Christian Democrats utilised foreign aid, in the form of the US sponsored Alliance for Progress.¹⁸⁹ The commitment to agrarian reform required by the Alliance for Progress programme eventually led to a significant dismantling of the existing hacienda system by the Christian Democratic administration, intensifying the already existing polarization of the Chilean political electorate and effectively weakening the decades-long political stability in Chile.¹⁹⁰

Equality in Chile during this period was of concern for both the government and labour unions. While social spending significantly increased during the mid-20th century,¹⁹¹ traditional class structures remained.¹⁹² Secret ballots were introduced in 1958, allowing tenant farmers some independence from the hacienda owners, who had previously held sway on the voting choices of the poorer farmers. Vote buying was also reduced by the secret ballot measure. As discussed above, in the late 1960s the requirements of foreign borrowing and in particular the US sponsored Alliance for Progress, led to changes in the hacienda system, further weakening the dominance of the land-owning elites over voting preferences. The social spending in Chile during this

¹⁸⁶Jose-Pablo Arellano, ‘Social Policies in Chile: An Historical Review’, *Journal of Latin American Studies*, 17.2 (1985), 397–418.

¹⁸⁷Collier and Sater.

¹⁸⁸Arellano; Sebastian Edwards and Alejandra Cox Edwards, *Monetarism and Liberalization: The Chilean Experiment* (University of Chicago Press, 1991).

¹⁸⁹Albert L. Michaels, ‘The Alliance for Progress and Chile’s “Revolution in Liberty,” 1964–1970’, *Journal of Interamerican Studies and World Affairs*, 18.1 (1976), 74–99.

¹⁹⁰Large land-holdings with tenant farmers. For much of this democratic period, the hacienda owners still had significant influence on how the tenant farmers voted, maintaining the status quo of the elites in rural Chile. A more detailed discussion on the hacienda system and the impact of its dismantling had on Chile’s political stability can be found in Loveman, *Chile*.

¹⁹¹A clear presentation and analysis of the social spending increases in Chile during this period can be found in Arellano.

¹⁹²Divisions of class in Chile during this period not only included the rich/poor divide but also significant differences between the urban and rural communities. Many of the most powerful members of Chilean society belonged to the rural elites as owners of Chile’s hacienda estates.

period was remarkable for its sheer amount in comparison to the growth of the gross domestic product, placing Chile first in Latin America in social spending and in line with the average spending of OECD nations.¹⁹³ On the other hand, Kantor argued that despite government investment in social spending, poverty remained high, with up to 75 per cent of the Chilean people excluded from mainstream society based on financial standing, class structures and location.¹⁹⁴ Faundez points out that “income gains by the poorest sections of the population, though not negligible, were far from satisfactory.”¹⁹⁵ As regards to broader equality measures, women were eventually allowed to participate in the political system, and granted the vote in national elections in 1949. Illiterates, who represented between 27 per cent (1940) and 11 per cent (1970) of the population, were granted voting rights in 1970.¹⁹⁶

Though Chilean culture was considered broadly legalistic, particularly during this democratic period, presidential power increased beyond the scope of the 1925 Constitution. “During this period the executive regularly expanded and often abused its regulatory powers, especially in the areas of economic regulation and state security”.¹⁹⁷ The institutional body expected to oversee and review the application of the constitution, the Supreme Court, tended not to use this power, opting to “avoid confrontations with the political organs of the state.”¹⁹⁸

While there are some areas of concern regarding Chile’s democratic period, particularly concerning equality and the expansion of executive power, many of the qualities of a ‘good’ democracy were met. The core characteristics of democracy most notably absent were perceived equality and equal treatment, though the evidence shows a concerted effort by succeeding governments to invest in social expenditure and to increase economic equality to some extent.¹⁹⁹ The failure to achieve this goal fully could be put down to the prevailing class system that continued to give significant power to both the

¹⁹³ Arellano, p. 417.

¹⁹⁴ Harry Kantor, *Patterns of Politics and Political Systems in Latin America*. (U.S.A: Rand McNally & Co., 1969), p. 543.

¹⁹⁵ Julio Faundez, ‘Chilean Constitutionalism Before Allende: Legality Without Courts’, *Bulletin of Latin American Research*, 29.1 (2010), 34–50 (p. 39).

¹⁹⁶ Arellano.

¹⁹⁷ Faundez, p. 39.

¹⁹⁸ Faundez, p. 41.

¹⁹⁹ Arellano.

urban and rural elites as well as the volatility in the political system that decreased political continuity and ensured the constant building and rebuilding of political coalitions.

2.2.2 A Tradition of Justice in Chile

Early approaches to justice at a state level did not bode well for the democratic period after the implementation of the 1925 Constitution. The first real test of justice in Chile after the political upheaval of the 1920s was the *Comisión Investigadora de los Actos de la Dictadura* (Commission to Investigate the Acts of the Dictatorship),²⁰⁰ established in 1931 to investigate acts of censorship, illegal detention, arrest, torture, exile, assassinations, disappearances and murder. Despite the initial political will to limit impunity, the commission soon became an inconvenient distraction for the ruling elites in Congress, who were attempting to return governability to Chile by granting a number of amnesties. After a series of upheavals, the commission's members resigned and the commission was dissolved. As outlined by Loveman and Lira,²⁰¹ the use of amnesty to ensure stability and prevent political rupture became the norm.

To avoid political breakdown and restore governability in moments of crisis, pardons, amnesties, and other methods of political pacification conceded juridical impunity to government officials, military and police personnel, party and labour leaders, and miscreants of all sorts. Amnesties and self-amnesties became routine – ever more frequent, ever more institutionalised – for political matters, failed coups, bureaucratic malfeasance, violations of the electoral law, the failure to comply with the obligatory military service law, and for common crimes.²⁰²

There has been widespread debate over the nature of justice but of greater relevance are the *perceptions* of justice. In the preceding chapter, a number of dimensions of the perceptions of justice were outlined. Briefly, these are fairness, equality in application, legitimacy of both the claims of justice and its application, and that justice is legally enshrined in legislation. These dimensions contribute to the perceptions, or lack thereof, of justice. In theory,

²⁰⁰ For more in this commission and the events that led to its creation see: Brian Loveman and Elizabeth Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.', *Radical History Review*, 2007, 43–76.

²⁰¹ Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.'

²⁰² Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.', p. 60.

at least, Chile's 1925 Constitution guaranteed Chileans "all the traditional liberties, including equity before the law, freedom of conscience, of speech, and of the press, and the right to assemble, to create organisations, to teach, to own property, and to have a fair trial."²⁰³ For much of the Twentieth Century, this liberal legal foundation was complemented by the perception of a strongly legalistic culture, with respect for the law reaching 'cult' status.²⁰⁴ In the 1925 Constitution, the Supreme Court was given equal status with the legislative branch, with the intention that it would oversee the behaviour of Congress and the executive. The willingness of the court to carry out these duties, both preceding and during the 1973 coup, was limited, however. Despite this inactivity, the perception of legalism came to represent an important cultural characteristic.²⁰⁵ However, legalism, and its contribution as a dimension of good democracy, did not necessarily translate into a dynamic system of justice. For the urban and rural elites and the middle class, liberty and access to justice were a reality. But the entrenched class system ensured that for the rest, access to justice was limited,²⁰⁶ particularly in the context of fairness and equality of application.

Faith in the system, regardless of actual outcomes, can provide a level of legitimisation. This was the case in Chile during the 1932-1973 democratic period. The widespread protests that marked this period had to do with labour and poverty as opposed to questions of justice.²⁰⁷ That is not to say that this period was without violence. However, political leaders quickly justified acts of violence, and followed these rationalisations with general amnesties.²⁰⁸ The frequent use of amnesties to maintain order was debated by the Congress, particularly during the 1960s, but they were still considered a matter of course for what is sometimes described as the *Via Chilena*.²⁰⁹

²⁰³Kantor, p. 559.

²⁰⁴Carlos F. Gomez and Jenny K. Rodriguez, 'Four Keys to Chilean Culture: Authoritarianism, Legalism, Fatalism and Compadrazgo', *Asian Journal of Latin American Studies*, 19.3 (2006), 43–65 (p. 52).

²⁰⁵Gomez and Rodriguez.

²⁰⁶Kantor, p. 560.

²⁰⁷Collier and Sater.

²⁰⁸Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.'

²⁰⁹ Loveman and Lira provide an in-depth discussion in the development and meaning of the *Via Chilena*, explaining the cycle of impunity, memory and governability employed by the political elites to ensure stability and the postponement of political ruptures that had marked much of Latin

Research examining the justice tradition and practices prior to the 1973 coup indicates a perception of justice that was not always reflected in the actual practice of justice, particularly across social classes.²¹⁰ This perception legitimised the actions of the political elites after occasionally violent disturbances focused attention on labour policy and reform.

Some commentators have argued that Chileans who voted for Allende in 1970 may have been depending on Chile's strong democratic tradition to address the social and legal injustices that had marked much of the democratic period.²¹¹ This was, in many ways, the underlying promise of the UP electoral platform: a democratic road to socialism. The volatility that quickly ensued after Allende's election pointed to the significant political rupture that was to come.

2.3 The Breakdown of Democracy? Allende, Pinochet and the human rights abuses

2.3.1 An end to Chile's 'road to socialism'

On the morning of September 11, 1973, the people of Chile faced the consequences of the preceding decades of political volatility. The armed forces took power by force, removing Allende, Chile's democratically elected socialist president. While the political rupture was decried by some observers as sudden and unexpected,²¹² an examination of the preceding three years reveals a number of signs of the government's instability. Allende was elected in 1970 with only 36.3 per cent of the vote, placing his left-wing coalition on precarious ground as a minority-led government. His first year was marked by a number of successful policies, but these were quickly reversed by rising inflation, leading to an increase in the cost of living, a drop in foreign and

America during this period. Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.', p. 60.

²¹⁰Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.'

²¹¹Mark Falcoff, *Modern Chile, 1970-1989: A Critical History* (Transaction Publishers, 1989).

²¹²Allende believed that in selecting Augusto Pinochet to be the Commander-in-Chief of the army, he had chosen someone committed to the letter of the 1925 Constitution, with Pinochet declaring his loyalty to the president just one week before the coup. For further discussion on this period in Chile's history see Edy Kaufman, *Crisis in Allende's Chile: New Perspectives* (Praeger, 1988); Paul E. Sigmund, *The Overthrow of Allende and the Politics of Chile, 1964-1976* (University of Pittsburgh Press, 1977); Robinson Rojas Sandford, *Murder of Allende: And the End of the Chilean Way to Socialism*, 1st edn (Joanna Cotler Books, 1977); Loveman, *Chile*.

domestic investment, a drop in copper prices, and an almost complete reduction in the foreign capital reserves that had allowed a number of the initial policies to be possible.²¹³

Prior to the popular election of Allende in 1970, the Chilean political institutional structure was known for its stability and its ability to adapt external economic changes, power transfers and mass mobilization.²¹⁴ Its institutional tradition included negotiation between the political elites and a commitment to the requirements of the 1925 Constitution. However, by 1971 “the political institutions were increasingly divided and rigid in their inability to reach any accord in the exercise of their shared power”.²¹⁵

Moreover, opposition to Allende by 1971 emerged from both ends of the political spectrum.²¹⁶ That the parties on the right, that is the Liberals and the Conservatives, opposed Allende’s democratic road to socialism is of little surprise. However, Allende himself may not have expected the level of political resistance he faced from leftist parties, and even from within his own Unidad Popular (Popular Unity, or UP).²¹⁷ The centrist party, the Partido Demócrata Cristiano (the Christian Democratic Party, or PDC), while sharing many broad social goals with UP, was reluctant to support Allende for fear that he would transform Chile into a second Cuba.²¹⁸ The PDC’s opposition to Allende, and the party’s eventual support of military intervention, played a key role in the democratic breakdown to come. However, the instability from within the UP itself was of significant concern to Allende. The UP was a coalition of left parties, including the Socialist Party, the Communist Party, the Radical Party, the Social Democratic Party, the Independent Popular Action, as well as other smaller groups. Allende, rising to leadership out of the Socialist Party, struggled to maintain control of the coalition. He faced public criticism from members of the individual parties within the UP. They either claimed that he

²¹³ Collier and Sater; Kaufman; Robinson Rojas Sandford, *Murder of Allende: And the End of the Chilean Way to Socialism*, 1st edn (Joanna Cotler Books, 1977).

²¹⁴ Peter A. Goldberg, ‘The Politics of the Allende Overthrow in Chile’, *Political Science Quarterly*, 90.1 (1975), 93–116.

²¹⁵ Goldberg, p. 98.

²¹⁶ H. Zelman and Patricio Leon, ‘Political Opposition to the Government of Allende’, *Government and Opposition*, 7.3 (1972), 327–50.

²¹⁷ Falcoff.

²¹⁸ Youssef Cohen, *Radicals, Reformers, and Reactionaries: The Prisoner’s Dilemma and the Collapse of Democracy in Latin America*, 1 edition (Chicago: University of Chicago Press, 1994).

was going too far, too fast in his attempts to move Chile towards democratic socialism, or alternatively, that he was not going fast enough.²¹⁹

The growing tensions that developed between the government and the opposition parties in 1971 continued throughout 1972. The hyper-mobilization on the streets, initially welcomed by Allende as a potential form of support, soon undermined Chile's social stability.²²⁰ While "controlled mobilization was precisely what a minority government needed as it sought to embark on an immensely ambitious schemes of social and political change,"²²¹ the scale tipped towards chaos. Groups that were seemingly natural allies of the socialist cause, such as unions and other labour organisations,²²² sought ever higher pay increases, displaying what some academics have described as rampant "economism".²²³ Strikes and factory takeovers were more frequent and widespread than ever before, heightening the sense of crisis across the country.²²⁴ As succinctly pointed out by Peter Goldberg,

Besides the opposition parties, the actions of the United States, the army, business and professional elites, small businessmen (notably the independent truckers), and even some factory workers, peasants, and Popular Unity functionaries constituted sources of resistance whose collective effect was to plunge the society into near civil war.²²⁵

By 1973 Chile was crippled by labour strikes, food shortages and hoarding, a gridlocked Congress and a crumbling economic outlook. Many in the Congress felt that "the president had violated his constitutional authority, and Congress sought to uphold its constitutional mandate, to assure or ensure respect for the constitution, and to prevent executive tyranny."²²⁶ In the middle of August, 1973, Congress appealed to the military to restore order and save Chile's democratic tradition. Less than a month later, the military took over.

Of the dimensions outlined by Morlino as indicators of a good democracy, very few appeared in the regime that emerged after the 1973 coup, supporting

²¹⁹Sigmund, *The Overthrow of Allende and the Politics of Chile, 1964-1976*.

²²⁰ While trade unions seem natural allies to the Socialist cause, the decentralized organisational structure and political consciousness of the labour movement in Chile meant that the loyalty of union members was spread across the political spectrum. Ultimately, Allende was unable to rely on their commitment to his democratic socialist ideals. Henry A. Landsberger and Tim McDaniel, 'Hypermobilization in Chile, 1970-1973', *World Politics*, 28.4 (1976), 502-41.

²²¹Landsberger and McDaniel, p. 509.

²²²Landsberger and McDaniel.

²²³Goldberg.

²²⁴Kaufman.

²²⁵Goldberg, p. 108.

²²⁶Loveman, *Chile*, p. 334.

arguments that a profound democratic rupture had occurred.²²⁷ Despite claiming constitutional support for the coup, General Augusto Pinochet and his junta seized power, violating the 1925 Constitution.²²⁸ The cornerstone of Chile's legal system, the Constitution, was not completely removed but rather was subjugated to subsequent military decrees. Pinochet effectively built a façade of legality around the actions of his regime,²²⁹ but his actions were against the wording and spirit of the Constitution. The rule of law, in the strict sense, was absent from the new regime, particularly in the first stages of repression (between 1973 and 1978), and the other dimensions of democracy were largely or completely absent. Over time, there was some (albeit questionable) popular participation in the form of a plebiscite for the 1980 Constitution.²³⁰ Accountability for the violence committed by the regime was non-existent, while all political parties were eventually outlawed, eliminating any potential competition. A 'state of siege in time of war'²³¹ was declared, curtailing most of the freedoms expected in a democracy. It would be difficult to argue that this new military junta was responsive to the needs of the people, particularly in light of the state-sponsored violence that emerged. Equality was equally difficult to identify in post-coup Chile, in the midst of repression after the takeover. With a focus on the left, and particularly on Marxism, the repression took on a class focus, with the poor and lower middle classes bearing the brunt of the repression.²³²

The military-led violence that began as the first tanks rolled into Chile's major cities included human rights abuses (subsequently defined as *international crimes*, as discussed in the "Introduction"). These abuses included beatings, torture, disappearances, murder and assassinations on

²²⁷Diamond and Morlino.

²²⁸Owen Fiss, 'The Right Degree of Independence', in *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. by Irwin P. Stotzky (Boulder: Westview Pr, 1993), p. 64.

²²⁹Paul E. Sigmund, 'The Chilean Military: Legalism Undermined, Manipulated, and Restored', *Revista Ciencia Política*, 23.2 (2003), 241–50 (p. 244).

²³⁰A number of studies have claimed evidence of fraud during the 1980 plebiscite to ratify the constitution including S. A. Rickard and others, *Chile: Human Rights and the Plebiscite* (Americas Watch Committee, 1988); Alan Angell and Benny Pollack, 'The Chilean Elections of 1989 and the Politics of the Transition to Democracy', *Bulletin of Latin American Research*, 9.1 (1990), 1–23.

²³¹Pinochet claimed that this was allowed for under the 1925 Constitution, however the constitution requires that the state of siege be declared by the Congress, not the military, undermining his claim that the military acted legally and in accordance with the constitution.

²³²The claim of class-based targeting was made by Cataldo, Personal Interview.

foreign territory. The Report of the National Commission for Truth and Reconciliation (commonly known as the Rettig Report) documented the violence committed after the democratic rupture.²³³ While torture was not the focus of the report, the commissioners did outline details relating to the use of torture in Chile. As discussed in the Rettig Report, a common practice of the interrogation teams was the staging of mock executions, holding the victim's head under water or excrement almost to the point of suffocation, beating the victim until they bled and bones were broken, or hanging the victim upside down with a pole placed behind the knees and biceps.²³⁴ The Rettig Report describes the torture techniques of the military regime as "extremely varied,"²³⁵ and used to gain evidence, or to punish. Many who were killed by the regime, particularly in the initial months of the dictatorship, were often shot or died after extensive torture.

One of the most high profile killings in Chile by the Pinochet regime was that of folk singer Victor Jara, who was killed at the National Stadium. Jara's face and hands were severely disfigured from torture before he was reportedly shot 44 times.²³⁶ In another infamous case, the "Caravan of Death",²³⁷ Pinochet sent a delegation of officers by helicopter to the provinces to ensure the heads of these outposts were not being "soft" on their detainees. Almost 100 detainees in 16 towns were killed between 30 September 1973 and 22 October 1973.²³⁸ Violence was characteristic of the state repression experienced in Chile throughout the 17 years of the dictatorship. However, the violence was particularly prevalent during the first four years of the regime.²³⁹

Targeted victims were predominantly left wing activists from the Movimiento de Izquierda Revolucionario (the Left Revolutionary Movement),

²³³Raul Rettig, *Comisión Nacional de Verdad y Reconciliación 'Report of the Chilean National Commission on Truth and Reconciliation'* (English translation published by the Center for Civil and Human Rights, Notre Dame Law School, 1993)

<http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf>.

²³⁴Rettig.

²³⁵Rettig, p. 158.

²³⁶J. Patrice McSherry, 'The Victor Jara Case and the Long Struggle against Impunity in Chile', *Social Justice*, 41.3 (2015), 52–68.

²³⁷Patricia Verdugo, *Chile, Pinochet, and the Caravan of Death*, trans. by Marcelo Montecino, First Edition edition (Coral Gables, Fla. : Boulder, CO: Univ of Miami North South Center Pr, 2001).

²³⁸Rettig.

²³⁹Rettig.

politicians from the Communist and Socialist Parties (among others), and students and labour union representatives.²⁴⁰ For the new regime, those with “left-leaning ideologies were not only implacably totalitarian and anti-Christian, they were also agents of a foreign power.”²⁴¹ Some authors have claimed that the military’s goal was to round up 20,000 of these ‘enemies of the state’, with 6000 to be captured in the first day.²⁴² While it is uncertain how many were initially trapped in the military’s net, it is known that most of the violence committed by the military regime took place in the first four years, though even this violence became much more systematic with the creation of the Dirección de Inteligencia Nacional (Directorate of National Intelligence, or DINA) after November 1973. Over 200,000 Chileans fled the country or were exiled during the dictatorship. The Chilean National Commission on Truth and Reconciliation (1990) later focused solely on those who had been killed or disappeared and identified 3400 victims of the Pinochet regime.²⁴³ The National Commission on Political Imprisonment and Torture Report, also known as the Valech Commission, identified those who were tortured by the regime and documented the torture of 27,255 victims 12 years after the Rettig Commission.²⁴⁴ At the end of her first term in office Bachelet reopened the two commissions with further investigations, increasing the number of victims of Pinochet’s regime to over 40,000.²⁴⁵

2.3.2 Left and Right perceptions of the military regime

Both during the regime and after the transition there have been competing narratives regarding the level of violence, culpability and motives.²⁴⁶ The

²⁴⁰ The extent of the violence has been documented via three different commissions since the transition, the Rettig Commission, the Valech Commission and the Mesa Dialogo.

²⁴¹ Pamela Lowden, ‘The Ecumenical Committee for Peace in Chile (1973-1975): The Foundation of Moral Opposition to Authoritarian Rule in Chile’, *Bulletin of Latin American Research*, 12.2 (1993), 189–203 (p. 189).

²⁴² Sandford, *Murder of Allende*.

²⁴³ Rettig.

²⁴⁴ ‘Dealing with Torture in Chile Achievements and Shortcomings of the “Valech Report” - Nürnberger Menschenrechtszentrum’ <<http://www.menschenrechte.org/lang/de/lateinamerika/dealing-with-torture-in-chile-achievements-and-shortcomings-of-the-valech-report>> [accessed 15 March 2014].

²⁴⁵ ‘Chile - NHRI’ <<http://nhritortureprevention.org/local-and-regional-resources/domestic-torture-laws/chile/>> [accessed 27 November 2014].

²⁴⁶ M. A. Garretón, *Incomplete Democracy: Political Democratization in Chile and Latin America* (University of North Carolina Press, 2004); Nathan Thornburgh, ‘Chile’s 9/11: President Piñera Speaks with TIME on 40th Anniversary of the Coup’, *Time*

discourse from the right has focused on the claim that intervention was necessary, and was ultimately caused by the actions of the left.²⁴⁷ The right have also argued that any violence that may have occurred was committed by rogue officers acting outside the official mandate. The left have argued that the sheer level of violence as well as its widespread use indicates that it was official policy directed from the highest echelons of the regime.²⁴⁸ Differing perspectives on the level of violence committed during the Pinochet regime, and contrary arguments regarding culpability, have played an important role in how the eventual efforts at securing justice have been viewed. Those supporting Pinochet have claimed that the left committed acts of violence, and see this as weakening charges of government repression, or at the very least, providing excuses or even justifications for the junta's behaviour.²⁴⁹ The most reliable figures show that while some violence was committed by left wing groups,²⁵⁰ this was significantly overshadowed by the sheer scale of government actions. These actions, as recorded by a number of sources, were asymmetrically greater in number and intensity, and belie attempts by the regime and its supporters (mostly in the middle and upper classes) to argue otherwise.²⁵¹

It is clear from the level of violence, outlined by Chile's three subsequent truth commissions as well as the testimony of victims and witnesses, that the human rights of a significant number of Chileans and foreigners were violated. The coup, and the subsequent actions of the military junta, violated the 1925 Constitution, as well as the fundamental requirements of democracy discussed in the preceding chapter. The subsequent impunity awarded in the self-granted

<<http://world.time.com/2013/09/11/chiles-president-speaks-with-time-40-years-after-its-911/>> [accessed 1 April 2014].

²⁴⁷ Several right-wing critiques of the Museum of Memory and Human Rights have argued that the memorial lacks the context of the coup. For more on this debate see: Peter Kornbluh and Katherine Hite, 'Chile's Turning Point', *The Nation* <<http://www.thenation.com/article/chiles-turning-point/>> [accessed 16 November 2015].

²⁴⁸ Collins, *Post-Transitional Justice*.

²⁴⁹ Leigh A. Payne, *Unsettling Accounts: Neither Truth Nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008).

²⁵⁰ Leftist actions, particularly by Movimiento de Izquierda Revolucionaria (MIR), included attacks on both government personnel and buildings, as well as attempts to strengthen the guerrilla movement by bringing in activists from Argentina.

²⁵¹ This argument continued to be present in Chilean political discourse. Sebastian Piñera, former president of Chile (2010-2014) put forward a mild version of this argument in an interview with Time Magazine. See: Thornburgh.

amnesty, however, effectively limited the options for justice for the survivors of the government repression and for their families.

The tension between supporters of the amnesty legislation, and those who have attempted to repeal it is clearly illustrated in the interview responses from former President Patricio Aylwin and lawyer Jose Zalaquette, as well as statements released by the military and judiciary on the one hand, and interview responses from justice advocates such as Roberto Garretón and Hector Cataldo on the other.²⁵² The narrative that emerged from the collective interviews as well as extensive data analysis of statements and media coverage of relevant groups shows a divided nation, with the amnesty legislation as a key sticking point.

2.4 Amnesty Decree in Chile

The use of amnesty legislation in Chile was not unusual after periods of unrest, and generally reflected an effort to maintain stability, the *via Chilena*.²⁵³ What was unusual was the *self-declaration* of amnesty legislation by Pinochet in 1978.²⁵⁴ Decree 2.191 stated:

an amnesty shall be extended to all persons who, as principals or accessories, have committed criminal offenses during the period of state of siege, between 11 September 1973 and 10 March 1978, unless they are currently on trial or have already been convicted.²⁵⁵

Of the differing types of amnesty legislation discussed in “Chapter One”, this decree falls under the category of a self-granted blanket amnesty. While the decree did not prevent the investigation of crimes once applicability of the amnesty was identified, the decree allowed the courts to shut down any further investigative activity. The stated goal of the decree, according to its preamble, was “to strengthen the ties that bind Chile as a nation, leaving behind hatred that has no meaning today, and fostering all measures that consolidate the re-

²⁵²Aylwin, Personal Interview; Cataldo, Personal Interview; Roberto Garretón, Personal Interview, Santiago, 14/04/2011; Zalaquette, Personal Interview; Onur Bakiner, ‘From Denial to Reluctant Dialogue: The Chilean Military’s Confrontation with Human Rights (1990–2006)’, *International Journal of Transitional Justice*, 4.1 (2010), 47–66.

²⁵³Loveman and Lira, ‘Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.’

²⁵⁴Earlier amnesties were legislated by the Chilean Congress after the conflict had been resolved.

²⁵⁵Decree 2.191, translated from original Spanish in Collins, *Post-Transitional Justice*, p. 68.

unification of all Chileans.”²⁵⁶ But critics have argued that the decree, instead of uniting Chile and fostering reunification, ended up becoming an insurmountable obstacle to reunification.²⁵⁷ As pointed out by Cataldo, “To make amnesty palatable, Pinochet offered the same [law] to the left. Why did the left use violence? To defend itself against the state, and this is not the same. But the right uses this reasoning to manipulate the situation.”²⁵⁸

Considering the political and social environment in Chile at the time of the decree, the question arises as to whether the amnesty was viewed either as fundamentally unjust or necessary and legitimate. The nature of the government repression at the time meant that there was no widespread debate on its merits, nor an examination of its immediate effectiveness. What is clear is that the benefits of the decree were felt to a much greater degree on the side of the armed forces than by those who were fighting against them.²⁵⁹ Only 69 political prisoners were released after the decree.²⁶⁰ By the time the amnesty decree was written, many in the opposition had been murdered, disappeared or exiled.²⁶¹ It was not until much later, in 1988, that those forced out of the country were allowed to return, suggesting that the protection of the amnesty decree was felt to a much greater degree by military and pro-government forces than by the opposition. While perspectives on the amnesty decree after the transition will be explored below, popular views tended to call for the repeal of the decree in the lead-up to the 1988 plebiscite.²⁶² The repeal of Decree 2.191, in fact, became a policy platform for the *Concertación* alliance that took power in 1990, though this policy was later dropped due to the political realities of the

²⁵⁶ ‘DerechosChile - Judiciary - Amnesty and Impunity’

<<http://www.derechoschile.com/english/amnesty.htm>> [accessed 29 January 2014].

²⁵⁷ ‘DerechosChile - Judiciary - Amnesty and Impunity’.

²⁵⁸ Cataldo.

²⁵⁹ Robert J. Quinn, ‘Will the Rule of Law End--Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile’s New Model’, *Fordham L. Rev.*, 62 (1993), 905.

²⁶⁰ ‘Memoria y Justicia - Avenues and Obstacles to Justice’

<http://www.memoriayjusticia.cl/english/en_avenues.html> [accessed 23 November 2015].

²⁶¹ Roht-Arriaza and Gibson.

²⁶² A. Ferrara, *Assessing the Long-Term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective* (Taylor & Francis, 2014); Sergio Bitar and Abraham F. Lowenthal, *Democratic Transitions: Conversations with World Leaders* (Johns Hopkins University Press / The International Institute for Democracy and Electoral Assistance (Co-published), 2015).

transition and negotiations with the outgoing regime.²⁶³ In a personal interview, Aylwin outlined the challenges he face in navigating the transition period.

You have to understand that the process to incorporate democracy had to happen without taking away all the power of Pinochet and his collaborators. I was President but I didn't have the power to charge General Pinochet. The military followed Pinochet, as did his supporters. With them, we had to negotiate. One side of the right stuck behind Pinochet, the other opened the door, working with the government to reintroduce the country's democracy.²⁶⁴

During the initial transition period, amnesty was prioritized over other legislation, with the Supreme Court citing Article 44 of the 1925 Constitution (in place at the time of the Amnesty Decree), and Article 60(16) of the 1980 Constitution in the case of *Insunza Bascuñán*,²⁶⁵ both of which appeared to give the government the power to decree amnesty.²⁶⁶ Zalaquette argues that “under Aylwin, removing the amnesty decree would have been wasted political power.”²⁶⁷ This attitude persisted within subsequent left and right-wing administrations, until Bachelet. Cath Collins, the founder and director of the Transitional Justice Observatory at Diego Portales University in Chile and a specialist on transitional and post-transitional justice, claims that

leaving the decision to the courts would be the best thing politically. The *Concertacion* coalition's policy was to leave it to the courts until the late 1990s. Then they started to meddle and they have found that they are getting into trouble that way.²⁶⁸

While the complainants attempted to use international law in support of their argument, including the Geneva Convention, the Supreme Court rejected these claims, arguing that the period after the coup was not one of armed conflict, invalidating the applicability of the Convention.²⁶⁹

The on-going realities that faced those attempting to remove impunity by political means became very clear in 1998, when legislators presented an *acusación constitucional* (constitutional accusation) against Pinochet, who had just been made a senator for life. If this legislative effort had been successful,

²⁶³Ferrara.

²⁶⁴Aylwin, Personal Interview.

²⁶⁵*Insunza Bascuñán*, heard by the Supreme Court in 1990, was a joint court case, representing 70 disappeared, that attempted to challenge the constitutional validity of Chile's amnesty legislation. The Court decided in favour of the existing legislation.

²⁶⁶Marny A. Requa, 'A Human Rights Triumph? Dictatorship-Era Crimes and the Chilean Supreme Court', *Human Rights Law Review*, 12.1 (2012), 79–106.

²⁶⁷Zalaquette, Personal Interview.

²⁶⁸Cath Collins, Personal Interview, 09/05/2011.

²⁶⁹Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador', *Journal of Latin American Studies*, 38.4 (2006), 711–38.

Pinochet would have lost his position in the senate and been open to civil and criminal prosecution. This effort was rejected, however, and it was later revealed that Aylwin and then-President Eduardo Frei, had actively petitioned members of the Christian Democratic Party to reject the *acusación*.²⁷⁰ The fear was that if it were successful it would cause significant instability and raise the possibility of military action. According to Zalaquette, the mode of the transition, with an emphasis on the truth commission rather than prosecution, was one of political realities. “The Pinochet government was defeated through the ballot box, not on the battlefield. You can’t kick over the game board.”²⁷¹ Chileans were clearly presented with the options before their political leaders, according to academic Cath Collins. “What Chileans were told during the transition was that it was democracy or justice. You can’t have both.”²⁷²

Chile’s amnesty decree has been maintained since the transition, despite a number of challenges to its validity. Domestically, while still part of the legal system, the use of amnesty has declined,²⁷³ reflecting a weakening in the arguments in support of impunity as well as concerted efforts by groups in civil society groups to seek court action against the law. Instead, judges are handing out significantly reduced sentences.²⁷⁴ What has also developed in Chile is a greater certainty around the stability of the democratic regime, at least at an institutional level. Internationally, the continued use of amnesty in Chile, although less than in the initial transition period, has been sharply criticised. Zalaquette pointed out that “the international community and international law has said some crimes must be prosecuted.”²⁷⁵ However, this has been poorly received by the judiciary both during and after the transition. Roberto Garretón encountered this judicial resistance to international judgement as part of his

²⁷⁰Loveman and Lira, ‘Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.’

²⁷¹Zalaquette, Personal Interview.

²⁷²Collins, Personal Interview.

²⁷³The decline was most notable after then President Eduardo Frei made changes to the structure of the Chilean Supreme Court in 1998, diluting the influence of the Pinochet loyalists. Frei increased the court membership from 17 to 21 and provided a comfortable retirement for all judges over the age of 75. Though the overall impact of Frei’s changes were diluted by specifics, his reform measures did allow for a shift in composition of the penal chamber of the court, which changed the court’s handling of Pinochet-era human rights cases. For more see: Gretchen Helmke and Julio Rios-Figueroa, *Courts in Latin America* (Cambridge University Press, 2011).

²⁷⁴Elizabeth Lira, Personal Interview, Santiago, 20/05/2011.

²⁷⁵Zalaquette.

legal advocacy for victims. “During the dictatorship, we started using international law. But the judges hate this, it makes them indignant. So we mentioned it occasionally, but it was rare.”²⁷⁶ In 2006 the Inter-American Court of Human Rights decided against the Chilean government in the *Almonacid v. Chile* case over the continued use of the amnesty law, deciding that amnesty legislation goes against a number of international treaties and should be revoked.²⁷⁷ This decision prompted little action in Chile beyond some political debate, with the president of the Supreme Court declaring that the *Almonacid v. Chile* case “was not binding, but merely a guide.”²⁷⁸

Amnesty in Chile has an established history dating back to the 1920s, as does the debate regarding impunity vs. justice following military interventions. Regularly used during the democratic period without any particular legislation to establish its validity, and ostensibly allowed in the 1925 Constitution, the employment of an amnesty decree by the Pinochet regime was not a significant deviation from established practice. H₁) hypothesises that amnesty is agreed to in good faith, and this is born out in the Chilean case. The evidence is clear that while the amnesty decree itself was passed by Pinochet, the opposition leaders agreed to maintain the amnesty decree and at times actively advocated for the maintenance of the status quo in terms of the existing impunity. There is no evidence that either side expected significant challenges to the amnesty decree, however the continued existence of the decree following the transition raises important questions regarding legislated impunity, and whether it can coexist with a modern democratic institutional structure.

2.5 The Transition Period and Transitional Justice

2.5.1 Justice in-so-far as possible

By the time Pinochet officially relinquished power to the new democratically elected government, Chileans had experienced 17 years of

²⁷⁶Garreton, Personal Interview.

²⁷⁷Christina Binder, ‘The Prohibition of Amnesties by the Inter-American Court of Human Rights’, in *International Judicial Lawmaking* (Springer, 2012), pp. 295–328.

²⁷⁸The debate around the amnesty law is ongoing. In 2014, Michelle Bachelet promised to revoke the law, though this proposal has made little progress. Alexandra Huneeus, ‘Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights’, in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. by Javier Couso, Alexandra Huneeus, and Rachel Sieder, 1 edition (Cambridge; New York: Cambridge University Press, 2013), p. 121.

repression. The final ten, from 1980 – 1990 had come to be seen as an odd blend of “authoritarian democracy”,²⁷⁹ a repressive regime that allowed for some public participation as long as it was limited to officially mandated events, such as plebiscites. In 1980, the people were asked to ratify a newly drafted constitution that both justified the continued military regime as well as marking out a path for an eventual transition.²⁸⁰ According to Aylwin,

Under Pinochet this [democratic] characteristic of Chile was limited. But the period wasn't a full tyranny. Chileans were eventually allowed some expression and to vote [in the plebiscite]. That said, Pinochet's people were very much in power...Pinochet didn't open many doors for the opposition to move forward, but this didn't impede progress. He couldn't go back on the plebiscite...If you look at the late period of Pinochet in hindsight, you could say it was a democracy. This was good for the country and the opposition. The power of the military reduced, along with the military environment.²⁸¹

The new constitution named Pinochet as president until 1989, when a national plebiscite would be held to decide whether to continue with the existing order or hold democratic elections. The new constitution significantly expanded the powers of the president and limited the role of Congress. It also allowed for the suspension of civil liberties and individual rights and institutionalized the political dominance of the armed forces while providing for the permanent militarization of politics. All movements, groups, organizations and parties that were thought to promote violence or class conflict were banned.²⁸² Despite the obvious authoritarian nature of the constitution, Chileans were described as “born free and equal in dignity and rights.”²⁸³ Chile was also described as a democratic republic (Article 4).²⁸⁴

The 1980s saw significant movement within the left, with overt action against the government in 1983, leading to the declaration of another state of siege.²⁸⁵ By 1988, and the time of the plebiscite, the opposition, including some

²⁷⁹ Pinochet used this term to describe Chile after the 1980 Constitution, which he argued would protect the Chilean people from the causes of the pre-coup volatility. Aylwin has supported this view. Aylwin, Personal Interview.

²⁸⁰ ‘Constitutional History of Chile’,

ConstitutionNet <<http://www.constitutionnet.org/country/constitutional-history-chile>> [accessed 24 November 2015].

²⁸¹ Aylwin.

²⁸² Brian Loveman, ‘Government and Regime Succession in Chile’, *Third World Quarterly*, 10.1 (1988), 260–80 (p. 269).

²⁸³ Article 1, ‘Chile: Constitution, 1980 with ’89 Reforms’

<<http://pdba.georgetown.edu/Constitutions/Chile/chile89.html>> [accessed 29 May 2014].

²⁸⁴ ‘Chile: Constitution, 1980 with ’89 Reforms’.

²⁸⁵ Lydia Chavez, ‘State of Siege Is Imposed in Chile’, *The New York Times*, 7 November 1984, section World <<http://www.nytimes.com/1984/11/07/world/state-of-siege-is-imposed-in-chile.html>> [accessed 24 November 2015].

conservatives, rallied around a new leader, Patricio Aylwin. The pro-democracy movement won the plebiscite with 54.7 per cent of voters opting for ‘No’ when asked to continue Pinochet’s rule. While Pinochet was reluctant to let go of power, it was clear that many in the military would not support his going against both the 1980 Constitution and the will of the people.²⁸⁶ His regime had come to an end.

The results of the plebiscite ushered in a new era in Chilean politics. The year following the vote involved negotiations between opposition leaders, led by military regime, and members of parties from across the political spectrum.²⁸⁷ The focus of these negotiations was to shape the 1980 Constitution into a document suited to the impending democratic institutional transition. Military leaders were able to push for concessions from opposition leaders, however the junta needed the opposition groups to agree to these changes to lend them legitimacy.²⁸⁸ The 1989 constitutional changes ultimately created a more democratic document, albeit one that still granted significant oversight to the military. “Restrictions on individual liberties and national security provisions that informed decisions on education, political party formation and activities, and even some forms of press censorship remained despite the democratic government’s efforts to change them.”²⁸⁹

While the result of the plebiscite was sufficient to end the dictators rule, Pinochet still held enough support, over 40 per cent, to ensure that the authoritarian institutional structure, and importantly, the 1978 amnesty decree, would remain.²⁹⁰ In 1990, Aylwin took office and ushered in a new democratic era, albeit limited by the letter and spirit of the 1980 Constitution, as well as the continued presence of Pinochet as commander-in-chief of the army.

H₀ hypothesises that the experiences of transitioning states show that amnesty legislation is compatible with expectations and norms of an entrenched

²⁸⁶ Documents released by the US National Security Archives in 2013 revealed that Pinochet did in fact propose ignoring the plebiscite results. See ‘Pinochet “Tried to Hang on to Power”’, *BBC News* <<http://www.bbc.com/news/world-latin-america-21563384>> [accessed 20 April 2014].

²⁸⁷ Claudia Heiss and Patricio Navia, ‘You Win Some, You Lose Some: Constitutional Reforms in Chile’s Transition to Democracy’, *Latin American Politics and Society*, 49.3 (2007), 163–90.

²⁸⁸ Heiss and Navia; Fredrik Uggla, “‘For a Few Senators More’? Negotiating Constitutional Changes during Chile’s Transition to Democracy’, *Latin American Politics and Society*, 47.2 (2005), 51–75.

²⁸⁹ Heiss and Navia, p. 184.

²⁹⁰ Bitar and Lowenthal.

liberal democracy. The recent history of Chile, from transition to the present, affords an opportunity to test H_0 and to identify when, if ever, the amnesty law and the democratic institutional structure have become incompatible. The evidence, as discussed below, shows a growing tension between the amnesty law and Chile's democracy, in direct opposition to the expectation of H_0 .

Chile's transition reflected a number of trends that were taking place across the globe. For example, the use of the pacted negotiations,²⁹¹ allowing for the continued participation of members of the previous regime, the use of amnesty as a bargaining tool within the negotiations and the establishment of a truth and reconciliation commission as part of the transition.²⁹² The pacted negotiation in Chile that allowed for continued impunity via the maintenance of the amnesty decree, introduces the question of whether modern conceptions of democracy allow for the denial of justice for past state sponsored crimes.

President Aylwin took power on March 11, 1990, confirming the democratisation process that had begun the preceding year with Chile's first competitive elections since the coup. The seasoned politician, a Christian Democrat, was the head of a 17 party coalition, the *Concertación*, which represented political parties from across the centrist-left spectrum. Arguably hamstrung by the realities of Chile's transition, Aylwin was unable to fulfil all the hopes of the electorate, particularly in relation to justice for the human rights abuses of the Pinochet regime. Aylwin's leadership became known for the governing principle of "justicia en la medida de lo posible" ("justice – insofar as is possible").²⁹³ During a personal interview in 2011, Aylwin claimed that

[he] didn't feel limited by the military or by Pinochet, though there were some exceptions. Decisions were sometimes limited. We didn't have the legal means to convict Pinochet, but we were able to end his presidency.²⁹⁴

²⁹¹ The concept of pacted negotiations is discussed by O'Donnell, Schmitter, and Whitehead. The authors described pacts as an explicit, though not always publically transparent, process that allows multiple actors to establish the rules of governance. Pacts are usually used to prevent potential threats to the governability of a transitioning state by guaranteeing the protection of vital interests of one or both sides.

²⁹² The same pattern can be seen in South Africa's transition process, at about the same time (1988-1990) while the other case study in this research, Brazil, approached the transition process in a significantly different way.

²⁹³ Bitar and Lowenthal.

²⁹⁴ According to Aylwin, the government's involvement in the transitional justice process began and ended with the truth commission. Anything more, he argued, belonged in the judicial realm. See Aylwin, Personal Interview.

Government-led transitional justice efforts focused on the National Commission on Truth and Reconciliation and the Rettig Report it generated. During a personal interview Aylwin argued that “the Rettig Report clarified the magnitude of the topic but it also limited it, drew a ring around it. It permitted that the most grave cases were charged but also allowed society to move forward and for the fighting sides to live with each other.”²⁹⁵ Aylwin stood by the Rettig Report, which was the result of a significant amount of personal effort, viewing it as the end of the government’s involvement in the transitional justice process.

For me, the Rettig Report finished the need for justice. We sought the truth in the fairest way possible. The Rettig Report opened the door for judicial work. Undoubtedly, we could have had a collective vendetta against the tormenters but we chose the path of the judiciary not a vendetta. The Rettig Report was about truth and establishing that these were crimes that could be followed up in the judiciary. This was our chosen path. A path that I believe was right, it permitted social healing.²⁹⁶

Limited by the fact that it was created by executive order rather than legislation, the commission was a fact gathering effort rather than a judicial one seen in a handful of other TRC processes.²⁹⁷ The eight commissioners were assigned four main tasks: to establish as complete a picture as possible of the most serious human rights violations committed during the Pinochet regime; to identify victims by name and establish their fate and whereabouts; to establish a recommendation for reparations for the families of the victims; and to outline measures designed to ensure that such violations would never happen again.²⁹⁸ While marking out a clear path for Chile’s transitional efforts at providing justice, the limitations of the mandate triggered a number of criticisms, including, for example, failure to name perpetrators or establish that violence was authorised by the state.²⁹⁹ A number of commentators have pointed out that these were among the only measures of justice possible, considering the continued existence of Decree 2.191, and the fact the power was still held by Pinochet through his supporters, particularly in the business community,³⁰⁰ and

²⁹⁵Aylwin, Personal Interview.

²⁹⁶Aylwin, Personal Interview.

²⁹⁷Aylwin, Personal Interview.

²⁹⁸Rettig, p. 6.

²⁹⁹Garreton, Personal Interview.

³⁰⁰Bitar and Lowenthal.

that there was a lack of full congressional support for anything more than this toward complete justice.

Roberto Garretón, a lawyer for the Vicaria de Solidaridad,³⁰¹ has pointed out that this report was a product of its time and circumstance.³⁰² Jose Zalaquette, one of the eight commissioners who wrote the *Rettig Report* agreed with his colleague in a personal interview, arguing that it would have been a waste of political power to attempt anything more than what was achieved. In reflecting on the early transitional justice efforts of the government, Aylwin reiterated that the report established facts that could be followed up by the judiciary, if appropriate. But his focus as president was on uniting above all else, to reduce efforts at vengeance and to establish a stable democracy. He argued that

My conscience is clear. We did what we had to and what we could. It wouldn't have been possible to chase Pinochet. I would have been out as President and we probably would have returned to a dictatorship. We did what was possible and what was desirable. I believe we did well... We tried to be uniting, and we succeeded with the politics that we followed.³⁰³

To varying degrees, Chile has enacted the basic transitional justice processes, as outlined by Arthur.³⁰⁴ These processes: justice, reparations, truth and institutional reform, have been progressively implemented by Chilean governments. The table below is a brief overview of the different transitional justice processes in relation to Chile.

Table 2.1 Transitional justice processes in Chile

Justice	Limited, dependent on individual members of the judiciary.
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³⁰¹ The Vicaria was the main source of opposition during the Pinochet regime, organising habeas corpus writs in a continued effort to locate and protect victims of the regime. While mostly unsuccessful, the archive of documents that was built from these efforts created one of the most complete records of the violence committed by the regime.

³⁰² Garretón.

³⁰³ Aylwin.

³⁰⁴ These processes, discussed in the introduction, are considered the basic norms of transitional justice. For more, see: Arthur.

Reparation	Uneven, though increasingly widespread. Certain groups initially left out of reparation process, including torture victims, who were only considered for reparations in 2003. Reparations took several forms including programs based on pensions, social services, educational benefits, public recognition of the violations of the victims' rights, monuments, sites of memory, and health assistance, mainly in the form of mental health services. Recent legislation has included health service mandated for victims of CAH, including third generation relatives.
Truth	Multiple truth initiatives, including the <i>National Commission for Truth and Reconciliation</i> (1990), <i>National Commission on Political Imprisonment and Torture</i> (2003) and the round table discussions of the <i>Mesa de Diálogo</i>
Institutional Reform	Some institutional reform including changes to judiciary, military reform and rule of law. However, amnesty decree is still in force, as is the Pinochet-era constitution.

2.5.2 Opposing views of the transitional processes of justice

While the president and his advisors were satisfied with the transitional justice processes, with Aylwin going so far to say that he felt that the Rettig Report ended government involvement in and responsibility for bringing about justice efforts,³⁰⁵ victims of the past repression were less satisfied.³⁰⁶ Many felt that the administrations that followed Aylwin's tenure have failed to address the perceived basic requirements of justice in addressing the violence committed by the Pinochet regime, with some arguing that this failure has fundamentally impacted Chile's development as a democracy.³⁰⁷

Civil society groups, focused on different categorisations of victims, have developed around the need for judicial activity. In a personal interview, Hector Cataldo, member of the Agrupación de Ex-Presos Políticos (Association of

³⁰⁵ Aylwin, Personal Interview.

³⁰⁶ Subsequent administrations have attempted to increase public satisfaction with perceived measures of justice, for example with the Mesa Dialogo, where, for the first time, the military provided information themselves. But these attempts have continued to maintain levels of impunity. After the Mesa, the names of identified perpetrators were put under embargo for 50 years, fostering the belief that the government was continuing to protect the perpetrators over meeting the needs of the citizens.

³⁰⁷ Cataldo, Personal Interview; 'Q&A: Chilean Human Rights Lawyer Carmen Hertz', *The Santiago Times* <<http://santiagotimes.cl/qaa-chilean-human-rights-lawyer-carmen-hertz/>> [accessed 17 April 2014].

Former Political Prisoners), outlined a number of concerns that have remained since the transition. He argued that justice is necessary for survivors, their families, and for the social organisations that work with them. He also maintained that there is no democracy without justice.³⁰⁸“We don’t accept immunity... Common crimes can be amnestied but crimes against humanity, as in the crimes committed by the state, can’t be amnestied. The state violated human rights...justice has to be equilibrated.”³⁰⁹

This criticism of the amnesty decree and transitional justice is confirmed in the volume of cases that have come before the courts over crimes committed during the Pinochet era,³¹⁰ including the attempted extradition of Pinochet by a Spanish Court,³¹¹ as well as the continued protests of organisations of survivors³¹² and the presence of groups such as the FUNA, whose members still picket both the homes and work places of former military personnel known to have been involved in the authoritarian regime.³¹³ This group has become a mouthpiece for the post-authoritarian generation seeking to express frustrations over how questions of justice have been handled.³¹⁴

While the continued efforts of civil society may not have challenged the stability of the government, however, governability has occasionally been called in to question with the protests and public shaming of Pinochet era politicians who are still active in the Chilean political sphere.³¹⁵ Amnesty

³⁰⁸Cataldo, Personal Interview.

³⁰⁹Cataldo, Personal Interview.

³¹⁰ As of 2010, 782 agents of the Pinochet regime had been indicted or convicted, with much of this justice activity occurring between 1998 and 2010. For more see: Collins, *Post-Transitional Justice*, pp. 138–40.

³¹¹ In 1998, a Spanish judge attempted to extradite Pinochet while he was in Great Britain, to be held on charges of the murder of a number of Spanish citizens. This caused an international outcry and raised the question of sovereignty and justice.

³¹² The 40th anniversary of the coup saw 60,000 Chileans take to the streets of Santiago in protest at the government’s lack of justice measures. See: AFP, “Thousands March for Human Rights in Chile on 40th Anniversary of Augusto Pinochet Coup,” *Telegraph.co.uk*, 01:38, sec. world news, <http://www.telegraph.co.uk/news/worldnews/southamerica/chile/10295315/Thousands-march-for-human-rights-in-Chile-on-40th-anniversary-of-Augusto-Pinochet-coup.html>.

³¹³ Ana Ros, *The Post-Dictatorship Generation in Argentina, Chile, and Uruguay: Collective Memory and Cultural Production* (Springer, 2012).

³¹⁴Ros.

³¹⁵This governability issue has recently reappeared with newly elected president, Michelle Bachelet, being forced by protests to repeal her nomination of one minister due to her family ties connecting her to the violence of the military regime. ‘Michelle Bachelet Acepta Renuncia de Carolina Echeverría a Subsecretaría de FFAA’ <<http://www.latercera.com/noticia/politica/2014/03/674-568552-9-michelle-bachelet-accepta-renuncia-de-carolina-echeverria-a-subsecretaria-de-ffaa.shtml>> [accessed 22 April 2014].

legislation has, thus far, co-existed with the democratic process, though uneasily and constantly challenged. Regardless of efforts by successive administrations to move beyond the past, the demands for justice remain, with a new generation continuing the debate around impunity.

2.6 Justice and Democracy in the long run: Can amnesty and democracy coexist?

2.6.1 The current state of democracy

Over 25 years have passed since Chile's democratic transition. The last 17 years, in particular, have seen significant shifts in public perceptions of justice and amnesty, as well as the successes of a number of court cases challenging the Pinochet-era amnesty decree. The government has been pushed into playing a more active role, "at a time when amnesty is not a particularly rewarding issue in Chile",³¹⁶ especially during the crises surrounding the attempts to extradite Pinochet. There have been two additional truth commissions, as well as calls for further evidence from victims during the final months of Michele Bachelet's first term as president (2006-2010). The justice issue has not gone away. However, despite concerns around the continued use of the amnesty decree, as well as the persistent demands for justice, a number of the qualities considered to be part of a good democracy as outlined by Morlino³¹⁷ are identifiable in Chile's most recent democratic period.

The country has continued to use the 1980 Constitution as the cornerstone of its legal institutions. While this Constitution has been criticised as being a legacy of authoritarianism, changes to the document have ensured that oversight has shifted into the hands of the civilian government, including a reduction in the role of the military in the political sphere and changes in the rules of the Central Bank, among others.³¹⁸ Bachelet, in her second term as President, indicated the desire to introduce a new constitution, one "born out of democracy",³¹⁹ although there are doubts as to whether this is achievable

³¹⁶Collins, Personal Interview.

³¹⁷Morlino, 'Qualities of Democracy: How to Analyze Them'.

³¹⁸Claudio Fuentes, 'Shifting the Status Quo: Constitutional Reforms in Chile', *Latin American Politics and Society*, 57.1 (2015), 99–122.

³¹⁹Dan Collins, 'Bachelet Pledges Radical Constitutional Reforms after Winning Chilean Election', *The Guardian*, 16 December 2013, section World news

despite majority support in the Congress. Greater accountability is seen in the increase of dictatorship-era cases before the courts, as well as a number of members of the Pinochet regime that have either been convicted, or at least indicted, for their crimes.³²⁰ These measures of accountability suggest a decline in the use of amnesty legislation.

Considering that perceived equality and equal treatment are core characteristics of democracy, it is important to note that inequality is still one of the most significant issues to face the Chilean government.³²¹ The World Bank data shows that 14.4 per cent of Chileans live below the country's poverty line, with an overall Gini index rating of 52.1, giving Chile the largest gap between the rich and poor in the OECD.³²² Freedom of the press is another concern, with Chile listed as only 'partly free'.³²³ Many Chilean people have apparently checked out of the political system, with participation in the last election at 42 per cent.³²⁴ Whatever its causes, this abdication of civic responsibility may be the greatest challenge to the democratic system, especially when combined with the disparity between the rich and the poor. Volatile protests have continued to be a feature of the discourse between the public and the government, with tens of thousands of Chileans protesting less than two weeks after the inauguration of Bachelet in her second term of government. Protestors claimed they were marching to keep the pressure on the government to pursue the leftist agenda and the revision of the Constitution.³²⁵

Table 2.2 below analyses Chile's current situation in the context of Morlino's quality of democracy indicators.

<<http://www.theguardian.com/world/2013/dec/16/chile-president-elect-michelle-bachelet-election-reforms>> [accessed 24 May 2014].

³²⁰Chile: Amnesty Law Keeps Pinochet's Legacy Alive | Amnesty International'

<<https://www.amnesty.org/en/latest/news/2015/09/chile-amnesty-law-keeps-pinochet-s-legacy-alive/>> [accessed 13 November 2015].

³²¹Ramón López and Sebastian J. Miller, 'Chile: The Unbearable Burden of Inequality', *Special Section: Social Movements and the Dynamics of Rural Development in Latin America* (Pp. 2874-2952), 36.12 (2008), 2679–95.

³²²World Bank, 'Chile | Data' <<http://data.worldbank.org/country/chile>> [accessed 24 May 2014]; World Bank, 'GINI Index | Data | Table' <<http://data.worldbank.org/indicator/SI.POV.GINI>> [accessed 24 May 2014].

³²³Freedom House, 'Chile - Press Freedom' <<http://www.freedomhouse.org/report/freedom-press/2013/chile#.U4EyRij-ouR>> [accessed 24 May 2014].

³²⁴ It is important to note that this was the first election where registration for voting was automatic, however, voting was optional. During previous electoral cycles the situation was reversed where registration was optional however voting once registered was compulsory.

³²⁵'Chile's Bachelet Faces First Protest', *BBC News* <<http://www.bbc.com/news/world-latin-america-26703699>> [accessed 25 May 2014].

Table 2.2: Quality of Democracy in Post-Authoritarian Chile: An Analysis

Dimension	Chile	Commentary
Law	Broadly legalistic, though with the continued existence and some use of 1978 Amnesty decree.	Rule of law based on 1980 Constitution. While authoritarian in origin, adjustments have ensured wider freedoms. Supreme Court has been reorganised to ensure greater transparency and government input, Pinochet era judges have slowly been replaced. Still open to applying amnesty decree, or light sentences to human rights abuses cases. Legal environment rated well by Freedom House.
Accountability	Traditional democratic accountability via electoral process and active Congress.	Regular elections, stable administrations. Continued movement in accountability for past actions, weakening amnesty legislation.
Participation	Broad enfranchisement. New voting system and voting apathy has seen a significant drop in voter participation. 2014 was the first time voting in a presidential election was not mandatory.	Presidential elections in Chile in 2013 saw voter participation of 49% in the first round and 42% in the final run-off.
Competition	Widespread competition.	Parties on both the left and right politically active, with a right-wing president elected for the 2012-2014 term for the first time since the dictatorship.
Freedoms	Constitutionally established rights widespread	Personal freedom relatively widespread, including religious freedom (though preferential treatment is given to the Catholic Church) and economic freedom. Press freedom listed by Freedom House as 'partly free'.
Equality	Procedural equality in terms of democracy. Gender equality in terms of education and employment. Current president is female. Still significantly unequal in regard to the rich and poor, and in regard to the indigenous population	Gini Index of 52.1 (2009), indicating a relatively unequal society (0 is perfectly equal, 100 is perfectly unequal). 14.4 per cent of the population lives below the national poverty line. Continued issues between government and the Mapuche, with the police in Chile accused of "a systematic use of force."

Responsiveness	Some government responsiveness, still facing significant protests regarding a number of social issues including education, indigenous rights and general social justice.	Praised for quick action after recent earthquakes, government responsiveness depends on issue. Social spending at 10.2% of GDP (2012), significantly lower than in earlier democratic period.
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While democracy has gradually been consolidated in Chile, a number of concerns remain. Commentators have remarked on the continued shadow of the Pinochet regime and his authoritarian legacy, arguing that institutionally, at least, Chile has been slow to adapt.³²⁶ Inequality and low spending on social issues has perpetuated long existing divisions in the electorate, as well as becoming a potential cause for low participation levels now that voting is voluntary.

2.6.2 Justice for Human Rights Violations in Chile

The democratization experience of Chile over the last 25 years reveals the constant presence of the debate over justice, potentially drowning out other issues until, ostensibly, it is resolved. In the abstract, according to Zalaquette,

justice is an essential element of society. Dealing with the past is essential for healing a broken society...But the reality is, even those who must be prosecuted may not be able to be now...The question is, if you are not in a position to met out justice, at least don't condone what you can't prosecute.³²⁷

Whether the current demands for justice will change as victims eventually die, as is expected by a number of observers,³²⁸ remains to be seen. Successive governments have had to ensure governability and social stability by maintaining amnesty legislation and resisting taking an active role addressing claims for justice. Leaders, moreover, have emphasised that to ensure the viability of the democracy project, Chileans needed to move beyond the perceived need for justice, or as some argue, vengeance, and embrace a certain level of forgetting.³²⁹ Aylwin calculated that this was the best possible outcome for Chile. "Undoubtedly, we could have had a collective vendetta against the

³²⁶Jonathan R. Barton, 'State "Continuismo" and "Pinochetismo:" The Keys to the Chilean Transition', *Bulletin of Latin American Research*, 21.3 (2002), 358–74.

³²⁷Zalaquette, Personal Interview.

³²⁸This sentiment was expressed in a number of interviews including: Lira, Personal Interview; Zalaquette, Personal Interview; Collins, Personal Interview.

³²⁹Collins, *Post-Transitional Justice*.

tormenters but we chose the path of the judiciary not a vendetta.”³³⁰ However, the arguments for separating impunity from the violence have continued to be questioned by survivors as well as members of the international community. The quest for justice by organisations in civil society has spilled over into a general debate around the possibility of a culture of impunity regarding government interaction with marginalised groups.³³¹ Chilean academic Elizabeth Lira observed that the world has changed since the transition. She argues that “amnesty has become problematic.”³³²

Chile continues to foster a highly legalistic culture³³³ with mainstream faith in the legal processes acting as a legitimising force. But a number of the elements that could be expected in an effective system of justice are weak or absent, particularly punishment of past CAH. The continued push memorialisation, by successive governments has left victims on their own regarding seeking punishment. Lira argued that “none of these things resolves the issues. We have to ask: how do we take the past positively forward? Audio visual documentary, television, and books don’t help that much anymore.”³³⁴ At times, court cases have involved victims challenging the established mechanisms of impunity. When cases have succeeded, perpetrators have been given extremely lenient sentences.

There is also little certainty of success in these cases, and the outcome of a case can often depend more on location and judge than on universally established law or mandate.³³⁵ While civil liberties are generally protected by the 1980 Constitution, the application of state terror laws and Pinochet-era anti-terror legislation, have raised concerns and been internationally condemned as a potential abuse of human rights. Equality in the application of these laws is also in question. The anti-terror laws for example, are used almost exclusively

³³⁰ Aylwin, Personal Interview.

³³¹ This spread in the social justice debate by victims groups has begun to focus on the plight of the Mapuche, in particular. See: Gideon Long BBC News and Santiago, ‘UN Attacks Chile’s Action on Mapuche’, *BBC News* <<http://www.bbc.co.uk/news/world-latin-america-23512784>> [accessed 24 May 2014]; Gilda M. Waldman, ‘Historical Memory and Present-Day Oblivion: The Mapuche Conflict in Post-Dictatorial Chile’, *Time & Society*, 21.1 (2012), 55–70; Cataldo, Personal Interview.

³³² Lira, Personal Interview.

³³³ A number of sources have argued this point, in particular: Collins, Personal Interview.

³³⁴ Lira, Personal Interview.

³³⁵ Collins, Personal Interview.

as part of the government's solution to the Mapuche crisis.³³⁶ Table 3.4 below briefly outlines the dimensions of the quality of justice, as applied to present-day Chile.

Table 2.3 Quality of Justice Dimensions in Modern Chile: An Analysis

Dimension	Chile	Commentary
Fairness	Limited.	Continued presence of Amnesty legislation has been slated as unfair by victims of the regime, as well as ensuring general impunity.
Equality of application	Unequal, with increasing success and some noticeable failures.	Success of human rights cases depend on location and sitting judge as there is no national policy. Leniency of convictions has also been unequal compared to the punishment handed out for a similar non-political crime.
Law	Civil liberties along democratic traditions established by the 1980 Constitution. Some concerns over the legality of some of the remaining dictatorship era laws regarding state security etc.	State Terror Laws have raised concern regarding use during Mapuche crisis, particularly regarding impunity for police in regard to violence committed against protesters.
Legitimacy	Strong legitimisation for legal structure.	The continuance of a strongly legalistic culture, particularly amongst the mainstream.

Justice for crimes against humanity has been slow to come and unequal in its application. Chileans in general still seem to have faith in a highly legalistic culture, although victims have continued to despair of what they see as a lack of options to oppose overwhelming impunity. There has been some visible progress however, although whether that progress has been enough to establish the perception of justice in the wider Chilean community is debatable. On the 40th anniversary of the coup, over 60,000 Chileans protested on the streets of Santiago, calling for the end to the continued impunity for crimes against

³³⁶Elizabeth Benjamin, *Chile Invokes Pinochet-Era Anti-Terrorism Law against Mapuche Demonstrators* (Washington: The Council on Hemispheric Affairs, 29 January 2010), p. 12–13,15.

humanity. The FUNA, an organisation which has taken public shaming into its own hands, has continued to be active with actual victims of the Pinochet regime as well younger Chileans taking part in the group's protest activities.

2.7 Perspectives on the tension between justice, amnesty and democracy

Over the last 25 years, interest groups have developed distinct perspectives on the progress made in Chile regarding democracy, justice and the continued use of the amnesty law.³³⁷ H₂ proposes that amnesty becomes widely acceptable with time as population demographics shift. However, the threads of discourse regarding the amnesty decree and related issues point to a continued resistance to the ongoing impunity. This is particularly the case for those that identify with the left, and members of victim's advocacy groups. Personal interviews, public statements and position documents have all informed the examination of H₂ in relation to the Chilean case study. It is clear from the development of FUNA, an organisation that organises protests outside the homes of former members of the Pinochet regime and military apparatus, that the quest for justice has become intergenerational.³³⁸

The perception of each group regarding culpability for the initial rupture and continuing impunity has had an impact on how they interact with efforts at securing justice as well as how they view Chile's progress in democratization. It is clear that no one opinion can speak for all of Chile, nor can a single perspective represent all opinions within a group. However, specific strains of discourse can be identified. These strains were explored through the personal interviews with political elites, human rights advocates, academics and members of the judiciary, as well as through an extensive canvas of public statements, media commentary and related documents. The evidence shows that the military and political elites tend to view questions of justice resolved, arguing that those that continue to discuss the past may threaten hard-fought stability. A number of human rights lawyers agree, to some extent, with this perspective. In another strain, human rights lawyers call for more government

³³⁷For the purposes of this research, five groups have been identified as key participants of the transition.

³³⁸Zalaquette, Personal Interview; Karen Sorensen, *Media, Memory, and Human Rights in Chile* (Palgrave Macmillan US, 2009).

action to challenge persisting impunity, arguing that inaction has intensified a growing problem and that avoidance can make continuing calls for justice impossible to deal with in the long run. A wide range of groups in civil society representing the interests of victims continue to be vocal regarding these interests.

2.7.1 Military Perspectives

The military has seen the most change both in regards to the way in which it views its role in the past violence, and in regards to demands for justice. It has generally resisted any demands for accountability, holding on to the established narrative of national saviour from the chaos of socialist efforts. This view was particularly dominant in the initial transition period, 1990-1998, with Pinochet threatening a return to military rule if the new civilian government pursued accountability measures.³³⁹ During this early period, military disdain for civilian accountability efforts was publically illustrated twice.³⁴⁰ The military leadership rejected the Rettig Report,³⁴¹ while the armed forces universally believed that the coup was justified and that any violence committed was done by a handful of rogue officers. This belief began to weaken in 1997 with the claim from former DINA head Miguel Contreras who was facing a lengthy jail term, that he had “always acted according to the orders given by the President of the Republic who, as the maximum authority behind the DINA, was the only one...who could order missions.”³⁴² A number of human rights successes, including the multiple convictions against Contreras for the assassination of Orlando Letelier in Washington, and the Spanish extradition attempt against Pinochet, ultimately forced the Chilean military to

³³⁹Bitar and Lowenthal; Collier and Sater; Claudio A. Fuentes, ‘After Pinochet: Civilian Policies toward the Military in the 1990s Chilean Democracy’, *Journal of Interamerican Studies and World Affairs*, 42.3 (2000), vi-142.

³⁴⁰ After congressional and criminal investigations into financial irregularities involving members of the Pinochet family, Pinochet ordered the army back to their barracks for a “security, readiness and coordination” exercise on December 19, 1990, without informing the Aylwin government. Less than a month later, the army issued a statement warning that political moves against Pinochet and his family may constitute a threat to national security. Then, in 1993, members of the military took to the streets of Santiago in full battle gear to protest the handful of human rights cases that were taking place, as well as the continued fraud investigations into Pinochet’s family.

³⁴¹Thomas C. Wright, *State Terrorism in Latin America: Chile, Argentina, and International Human Rights* (Rowman & Littlefield, 2007).

³⁴² Miguel Contreras, quoted in Collins, *Post-Transitional Justice*, p. 82.

change publically expressed attitudes towards human rights violations and impunity. The military participated in the evidence gathering *Mesa Dialogo* (1999-2001), though the information revealed during this process was questionable at best.³⁴³ Since 2001, the military has accepted the assumption of some guilt for the human rights violations of the coup. In 2004, the then Commander-in-Chief, Juan Emilio Cheyre, wrote that “the Army of Chile took the hard, but irreversible decision to assume responsibilities that fall on it as an institution for all the punishable and morally unacceptable events of the past.”³⁴⁴

While some members of the military leadership have publically accepted responsibility for Pinochet-era crimes, others have not. Academics have noted the discrepancies between Cheyre’s words and actual behaviour as leader of the military. Through payroll deductions, the military continues to finance the defence of accused participants as well as continuing to place the blame for the coup on left wing political elites.³⁴⁵

Out of all those charged with some degree of accountability for human rights violations in Chile, in its discourse of the last 14 years the military has been the most resistant in accepting culpability. The military continues to view the on-going trials as unnecessary and a product of the politics of revenge.³⁴⁶ However, members of the military are less vocal against the efforts of government and civil society to achieve justice for human rights violations of the Pinochet regime than ever before. Their view acknowledges the past and pushes, albeit gently, for closure of that chapter.³⁴⁷

2.7.2 Perspectives of Political Elites

Political elites emerged from the 17 years of dictatorship relatively intact considering the level of repression experienced across the ideological spectrum.³⁴⁸ However, hamstrung by the strength of the outgoing military

³⁴³Bakiner.

³⁴⁴Cheyre as quoted in: Bakiner.

³⁴⁵Bakiner.

³⁴⁶The military are supported in this belief by ongoing support from the right. This is reinforced by the political deference to right-wing preference in the political sphere, particularly during the initial transition period. See Collins, *Post-Transitional Justice*.

³⁴⁷Bakiner.

³⁴⁸Paul W. Drake and others, *The Struggle for Democracy in Chile, 1982-1990* (University of Nebraska Press, 1991).

regime, the 1980 Constitution, the amnesty decree and a significant minority that supported Pinochet, the new governing parties were limited in what they could achieve in the arena of transitional justice. The promise to revoke the amnesty decree was quietly dropped, as was the hope to significantly restructure Chile's institutional base.³⁴⁹ Rightly or wrongly, any direct action against the Pinochet regime was perceived as a potential threat to democracy and, beyond that, governability. Reflecting on his role in the transition of Chile, former president Aylwin argued that he had no regrets.

In terms of justice for crimes committed by the dictatorship, I continue to say [that] justice must be found through judicial means. I don't have any regrets in the idea that my government didn't seek to limit or that we protected the responsible. Pinochet has been charged so he didn't have absolute impunity.³⁵⁰

Aylwin believed that anything more than what had been achieved under his government would have bordered on vengeance rather than justice. From his perspective, that would have converted the topic of transitional justice into a fundamental characteristic of Chile's society and would have made it impossible for his "nation of enemies" (*nación de enemigos*)³⁵¹ to find common ground. "We did what we had to. Some wanted more but personally, I think more would have been about vengeance rather than justice. This sort of politics would have converted the topic of violations into a fundamental characteristic of society."³⁵²

A "conspiracy of consensus"³⁵³ marked the majority of political perspectives on the transitional justice process in Chile, with successive *Concertación* governments almost actively unwilling to take action on securing accountability for the human rights violations of the Pinochet regime.³⁵⁴ Right wing political elites viewed any effort at securing justice as unnecessary vengeance against the "saviour" of Chile from the communist threat of

³⁴⁹Gavin Cawthra and Robin Luckham, *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (Zed Books, 2003).

³⁵⁰Aylwin, Personal Interview.

³⁵¹Aylwin has regularly used this term to describe Chile at the point of transition, and is also used in one of the key texts on the authoritarian period: Pamela Constable and Arturo Valenzuela, *A Nation of Enemies: Chile Under Pinochet* (Norton, 1993).

³⁵²Aylwin, Personal Interview.

³⁵³This term has most effectively been used to describe Chile's post transition period in Alexander Wilde, 'Irruptions of Memory: Expressive Politics in Chile's Transition to Democracy', *Journal of Latin American Studies*, 31.2 (1999), 473–500.

³⁵⁴Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"', *The International Journal of Transitional Justice*, 2009, 1–20.

Allende's leadership. On the left, there was a general unwillingness to destabilize Chile's governability as an emerging democratic state. In line with the tradition established by Aylwin, the majority of the political elite believed that any movement on issues of justice beyond the Rettig Report belonged with the judiciary.³⁵⁵ For Aylwin, the *Report* also served as a justification for the transition to democracy, something that should not be undervalued. "If we didn't have it, it would have been hard to explain the difficulties of the change, the reasons behind it and to weaken the power of Pinochet."³⁵⁶

On the rare occasion that human rights issues were brought to the Congress, they tended to fail in the face of right wing, and some left wing, resistance. The newer generations of political elites were comfortable with the memorialisation of the past,³⁵⁷ allowing for the establishment of the Museum of Memory and Human Rights, as well as the Human Rights Institute.³⁵⁸

Of those that were involved in the transition other than the military, the political elites have been the most comfortable with relegating demands for justice to simply a necessary sacrifice of the bargaining process. Along with the political leadership's satisfaction in hindsight that the process took the best possible course considering the alternatives, the elites have been actively resistant to any efforts to pursue more traditional justice measures.³⁵⁹ At times, human rights groups seeking justice have been in direct conflict with the government.³⁶⁰ Truth and memory³⁶¹ have taken precedence over retributive or restorative justice measures. The bargain was for democracy, according to the

³⁵⁵ The judiciary was assisted in seeking justice through what came to be known as "the Aylwin doctrine". In an open letter to the Supreme Court, the president encouraged justices to apply amnesty only once a case had been fully investigated, allowing for full disclosure, if not punishment. See Hayner; Ferrara.

³⁵⁶ Aylwin, Personal Interview.

³⁵⁷ Wilde; Katherine Hite and Cath Collins, 'Memorial Fragments, Monumental Silences and Reawakenings in 21st-Century Chile', *Millennium - Journal of International Studies*, 38.2 (2009), 379–400.

³⁵⁸ Even these efforts have faced significant political resistance, with both the museum and institute fostering significant debate in Congress before being allowed.

³⁵⁹ Collins, *Post-Transitional Justice*; Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.'; Brian Loveman and Elizabeth Lira, *Las Ardientes Cenizas Del Olvido: Vía Chilena de Reconciliación Política 1932-1994* (LOM Ediciones, 2000); Kornbluh and Hite.

³⁶⁰ S. J. Stern, *Reckoning with Pinochet: The Memory Question in Democratic Chile, 1989–2006* (Duke University Press, 2010).

³⁶¹ Truth and memory efforts in transitional justice refer to truth commissions and memorialization such as the establishment of museums, art projects and official historical accounting of the authoritarian period.

political elites and articulated by Aylwin.³⁶² The goal of a fully democratic government, however, has taken significant time to eventuate, with Bachelet still removing some of the vestiges of the Pinochet regime in her second term. The 1980 Constitution, while altered, is still the law of the land. Other Pinochet-era laws, particularly relating to police responses to the mobilization of the Mapuche Indians, continue to be used.³⁶³

2.7.3 Perspectives from the Legal Community

The legal community has played the most significant role in the development of justice and the ways this justice has been perceived in Chile during and after the transition period. From the earliest stages of the coup, the *Comité de Paz* and then *La Vicaría de la Solidaridad* acted as legal representation for victims. Both church based organisations, the goals of the *Comité* and *La Vicaría*, according to Garreton, were “for the family to have action, to second guess the authorities, to have the effect of a drop of water on a rock, and finally, as a way to reconnect all the information. It gave us evidence, contemporary evidence.”³⁶⁴ As the only organizations that could protest the regime, the groups became the main source of answers for victims.³⁶⁵

However, since the transition, the legal community has also been the group that is most divided over the methods and degree of justice to be meted out for crimes against humanity committed by the Pinochet regime.³⁶⁶ Perspectives on efforts at securing justice over the last 25 years via legal means can be divided along two main lines: those of human rights lawyers, and those of the judiciary. Amongst the lawyers, there have been marked differences over perspectives on justice, which will be discussed below. Such differences appear

³⁶² Aylwin, Personal Interview.

³⁶³ COHA, ‘Chile Invokes Pinochet-Era Anti-Terrorism Law Against Mapuche Demonstrators’, *COHA* <<http://www.coha.org/chile-invokes-pinochet-era-anti-terrorism-law-against-mapuche-demonstrators/>> [accessed 25 November 2015]; Benjamin; Martin Edwin Andersen and Robert A. Pastor, *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in ‘Latin’ America* (Lexington Books, 2012).

³⁶⁴ Zalaquette, Personal Interview.

³⁶⁵ Garreton, Personal Interview; Zalaquette, Personal Interview.

³⁶⁶ Some authors have argued that the perspectives of the judiciary are heavily influenced by public perspectives and opinions, rather than pushing discourse forward themselves. See *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, ed. by Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (Bloomsbury Publishing, 2007).

to depend on the view that individual lawyers take regarding the transition and subsequent efforts to secure justice, thus complicating the identification of a single discourse. Nevertheless, there are two identifiable opinions regarding justice in these cases. There are continuing beliefs shared by Zalaquette and Garretón, among others that the time for traditional justice is over.³⁶⁷ However, other lawyers, such as Carmen Hertz,³⁶⁸ have argued that the lack of accountability creates a fundamentally flawed society. Hertz, along with others, has continued to pursue justice through judicial means for victims of the Pinochet regime. The judiciary, on the other hand, has actively resisted efforts for justice, opting rather for a wide application of amnesty, handing out short sentences and resisting international pressures to remove amnesty from widespread usage.³⁶⁹

Reflecting on transitional processes of justice, both Zalaquette and Garretón described the choices and compromises made by the incoming *Concertacion* government as part of the political realities of the transition. According to Zalaquette, one of the architects of the human rights policy and a lawyer who was part of the Truth and Reconciliation process, the term ‘transitional justice’ is misleading, because there are variables that make this type of process unique.

The concept of justice, when you are dealing with it like here, has to take this into consideration. Criminal justice punishes crimes. There is a degree of criminality in every society. When a society breaks down, criminality is a result of a nuclear fission. It tends to be massive and more cruel than usual. You can't just extrapolate normal justice during un-normal times.³⁷⁰

Zalaquette said that from an ethical standpoint, leaders of the transition had to reconstruct a broken society. They also had to establish a path that would handle the past, the present and have a mind on future aims. These aims, according to Zalaquette, were twofold: “attempting to guarantee non-repetition as well as repair what was repairable.”³⁷¹ Zalaquette said that while the personal responsibility for atrocities is an absolute value, within the western ethical debate this has not yet been fully united with responsibility during war. The

³⁶⁷Zalaquette, Personal Interview.

³⁶⁸Hertz, ‘Q&A’.

³⁶⁹Requa; Halliday, Karpik, and Feeley.

³⁷⁰Zalaquette, Personal Interview.

³⁷¹Zalaquette, Personal Interview.

international community has decreed that some crimes must be prosecuted but the question, according to Zalaquette, is what happens when you are not in a position to mete out justice? Is it enough to simply condemn what you cannot prosecute? In many respects, he argued, this is where a truth commission, in acknowledging the violence of the past, plays an important role. It is an acknowledgement of what cannot be prosecuted.³⁷²

Garratón, the director of the Law Department of the *Vicaria de Solidaridad*³⁷³ during the Pinochet regime, was a little less circumspect in regard to the progress made during the last 25 years. He described the amnesty decree as a “cursed inheritance” of the former Pinochet regime. “Amnesty is a message to criminals: continue killing because we will continue granting [impunity].”³⁷⁴ Regardless of the restrictions of the amnesty legislation and authoritarian institutional structure, Garretón argued that Chile had made more progress during the last 25 years than many other countries.

I don't know of any country that has so many criminals in the process of being convicted. But this is also full of frustrations. It's not the justice that we worked for but at least it is a form of absolute justice. Chile has made a lot of progress.³⁷⁵

According to Zalaquette, the progress may not be enough, particularly for the victims of the regime.

For relatives of the disappeared, the cause is just but it also becomes a way of life. The search for justice becomes a meaningful role. The cause becomes a way of life. Some creeds have become sacred – just cause and a heroic existence – criminal justice to the last extent.³⁷⁶

Hertz, one of Chile's best known human rights lawyers and a staunch advocate for justice, has been critical of the process that involved both Zalaquette and Garretón. Hertz's views reflect those who continue to represent victims of the Pinochet regime in the court of law. She also straddles the boundary between the legal fraternity and victim; her husband was killed as

³⁷²Zalaquette, Personal Interview.

³⁷³ An arm of the Catholic Church that provided legal assistance for victims and their families during the Pinochet regime. As part of the Catholic Church, the organisation was able to continue despite its opposition to the authoritarian leadership.

³⁷⁴Garretón, Personal Interview.

³⁷⁵Garretón, Personal Interview.

³⁷⁶Zalaquette, Personal Interview.

part of the Caravan of Death in October 1973.³⁷⁷ In a newspaper interview just before the recent elections, Hertz discussed contemporary justice in Chile.

In terms of justice, progress has been relative. The doses of justice are small or insignificant compared to the magnitude and importance of the crimes committed, which are crimes against humanity. In Chile, violations to fundamental human rights were systematically committed on a large scale and these are crimes against humanity, ordered by the state apparatus. This is what happened in Chile. And the justice that has been served is not equivalent to the nature of the crimes that were committed.³⁷⁸

According to Hertz, the pervasive impunity holds back the democratic reconstruction process. The impunity “generates an erosion of institutions, a distrust in them, and in the end, less democracy, less democratic sense and less civic sense.”³⁷⁹ According to Hertz, the on-going impunity is the real scandal of the last 25 years.

There has been an absolute social, moral and political impunity and that is a scandal. It is very bad for us as a society to see impunity of this kind, of this nature, because it mostly affected citizens and nothing good can come of that. It is not possible to really reconstruct a democratic and decent society with this impunity.³⁸⁰

Zalaquette rejects the idea that impunity has been universal. The *Rettig Report* and the Valech Commission acknowledged the CAH. Reparations have been paid, and over 150 former members of the Pinochet regime have served time in jail. “But I believe the time [for justice] has passed. The last time for traditional justice was 2005.”³⁸¹ Zalaquette also pushed back against calls for a more transparent process, along the lines of the public hearings in South Africa.

I consider the criticisms to be superficial. An open commission like that of South Africa would not really have been possible. The executive branch issued the order for the Truth and Reconciliation Commission. This came from the executive and not the congress.³⁸²

The other half of the judicial equation, the court system, persistently resisted any question regarding the court’s pro-Pinochet stance during the authoritarian regime, and the generous application of amnesty since.³⁸³ This contradicted the hope expressed by Aylwin that the courts would take up the mantle of justice once the Rettig Report concluded its investigations.³⁸⁴ The

³⁷⁷Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2006).

³⁷⁸Hertz, ‘Q&A’.

³⁷⁹Hertz, ‘Q&A’.

³⁸⁰Hertz, ‘Q&A’.

³⁸¹Zalaquette, Personal Interview.

³⁸²Zalaquette, Personal Interview.

³⁸³Halliday, Karpik, and Feeley; *Requa*.

³⁸⁴Aylwin, Personal Interview.

changes made to the structure and make-up of the courts in 1997/1998 by President Eduardo Frei led to a greater presence of liberal or centrist judges examining Pinochet-era cases, allowing for some cases to be prosecuted.³⁸⁵ However, amnesty has continued to be used and, where amnesty is not applicable, the court has handed out significantly reduced sentences.³⁸⁶ While there is significant judicial opposition to the involvement of the courts in amnesty cases, there are an increasing number of dissenting voices, particularly as those loyal to Pinochet and his memory begin to fade in prominence. In a speech given to Amnesty International in 2005, Judge Juan Guzman Tapia, the first Chilean judge to prosecute Pinochet, criticised the continued resistance of the Chilean Courts to full and open justice. After stepping down from his seat on the Santiago Court of Appeals, Guzman argued that a siege mentality still existed in the courts, with judges fundamentally opposed to reform and implementation of measures of justice.³⁸⁷ However, this mentality may be shifting beyond lone voices. In the lead up to the 40th anniversary commemorations of the coup, the National Association of Magistrates of the judiciary released a statement apologizing for the actions of judges under military rule. The judges admitted that they had abandoned their role as protector of the Chilean people. The judges went on to say that “the time has come to ask for forgiveness of victims...and of Chilean society.”³⁸⁸

2.7.4 Perspectives of Organisations in Civil Society

Many advocacy groups have emerged since Chile’s transition from authoritarian rule and these groups, with some crossover in representation and end goals, have played a significant role in the push for truth and accountability. Despite progress, a number of these groups argue that not enough has been done towards accountability and justice. Some, like FUNA, have publically named

³⁸⁵One of the most significant decisions of the court in favour of the victims seeking post-transitional justice was the *Poblete Cordova* case, establishing a clear doctrine regarding disappearances as on-going crimes and therefore outside the bounds of amnesty. See: Requa; Collins, *Post-Transitional Justice*.

³⁸⁶Collins, *Post-Transitional Justice*.

³⁸⁷‘Memoria y Justicia - Current Issues, Appeals Court Ruling Is Negotiated Out’ <http://www.memoriayjusticia.cl/english/en_issues-guzman.html> [accessed 20 April 2014].

³⁸⁸‘Chile Judges Apologise for Past Role’, *BBC News*<<http://www.bbc.co.uk/news/world-latin-america-23967816>> [accessed 20 April 2014].

and shamed perpetrators rather than waiting for traditional judicial measures.³⁸⁹ Cataldo, an active member of *Agrupacion de Ex-Presos Politicos* (Association of Former Political Prisoners/AEXPP), whose members are the survivors of torture and military imprisonment, insisted that the starting point for dealing with the past must be an understanding of the fundamental nature of human rights.³⁹⁰ He noted that this is often forgotten when the past is manipulated for political means. From Cataldo's perspective, the amnesty decree has been a source of significant difficulty for Chile, a negative legacy of the transition period. He was critical of the impact the decree has had on the country's democracy.

We don't accept impunity. For us, democracy is not an electoral game. It is more complete. A government for the people, by the people, of the people. Democracy here is described as that, but it is not like that at all...we do not have democracy.³⁹¹

Cataldo is not alone in his disgust at the lack of progress in justice. Lorena Pizarro, President of the *Agrupación de Familiares de Detenidos Desaparecidos* (Association of the Families of the Disappeared Prisoners/AFDD) was part of the protest in 2013 marking the 40th anniversary of the Pinochet coup. Over 60,000 Chileans carried pictures of family members who had been killed or kidnapped by the state, along with signs that reiterated that not one of the victims had been forgotten. According to Pizarro: "Forty years on, we are still demanding truth and justice. We won't rest until we have found out what happened to our loved ones who were arrested and went missing."³⁹²

The table below outlines the opinions regarding the justice process expressed in personal interviews with politicians, human rights lawyers and victims groups, and public statements made by members of the above groups, as well as by the military and judiciary.

³⁸⁹ For more on FUNA's protests see: 'Archivo Chile CEME' <http://www.archivochile.com/Derechos_humanos/html/dd_hh_funa.html> [accessed 26 November 2015].

³⁹⁰Cataldo, Personal Interview.

³⁹¹Cataldo, Personal Interview.

³⁹²AFP.

Table 2.4: Long-term opinions regarding justice, amnesty and democracy

Accountability Actors	Justice	Amnesty	Democracy
Military	Not necessary. Coup justified, violence sporadic. Eventually, limited apology given.	Necessary for the transition to prevent civilian led vengeance.	Established after the completed mission of the coup. Built on the path deemed appropriate by the armed forces.
Political Elites	Truth over justice a necessary compromise. Further justice efforts belong to the courts not the government.	Necessary compromise to ensure democratic consolidation.	Successfully consolidated after the declared end of the transition (1993).
Judiciary (Lawyers)	General agreement that traditional justice is absent. Split over whether there should be continued justice efforts.	Split opinion. Some agree with political elites. Others believe Amnesty is illegal as a piece of legislation and impunity is problematic.	Split opinion. Viewed either as a complete success, with military subordination and successful election process, or materially weakened by continued impunity of dictatorship era crimes.
Judiciary (Courts)	Limited, subject to liberal use of amnesty legislation. Court organizations have recently apologized for court complicity in the Pinochet era breeches of justice, as well as resistance to recent justice efforts.	Key piece of domestic legislation. Protected from international interference by the sovereignty of the domestic court system.	N/A
Victim's Groups/HROs	Lacking and must be addressed. The lack of justice places serious burden on the nation's democracy. For some, truth is enough. For others retribution required.	Fundamentally problematic. Must be removed from the country's legislation.	Significantly weakened by the lack of justice.

Demands for perceived justice continue to form part of the national discourse as well as having the potential to influence the political agenda, as has recently been experienced by Bachelet.³⁹³ Political elites are now being pushed beyond their own preferences, and forced to face questions of justice.

2.8 Conclusion: Examining Chile in Relation to Hypotheses

The Chilean experience is illustrative of the gauntlet that can be run during and after a democratic transition that is predicated on the use of amnesty legislation. The Pinochet regime passed a wide-reaching amnesty decree in 1979, while still in power. This decree forgave the significant human rights violations committed during the first four years of the military regime. Under direct threat from Pinochet, groups steering the transition process gave up earlier promises to revoke the amnesty law after the transition.³⁹⁴ Without the support of congress, a truth commission was instituted via executive order and focused on the most easily identifiable victims, the dead and missing. However, as a product of an executive order rather than a legally binding process, the commission lacked sufficient power to fulfil its mission and the perpetrators of human rights violations remained officially unidentified.³⁹⁵ While the government funded reparations were paid to some of the victims, the first eight years after the transition saw little in the way of punishment of those who had committed the CAH. As the experience with and stability of democracy deepened, victims began to question the blanket amnesty that remained.³⁹⁶ These questions culminated in a direct challenge to Pinochet,³⁹⁷ as well as a rejection of the continuing existence of the amnesty law by the Inter-American Court.³⁹⁸ After the attempted extradition of Pinochet by a Spanish judge and domestic efforts to have him charged, the issue of amnesty, impunity and justice became a regular part of the political discourse in Chile, reflected in the

³⁹³Michelle Bachelet Acepta Renuncia de Carolina Echeverría a Subsecretaría de FFAA’.

³⁹⁴Bitar and Lowenthal; Claudio A. Fuentes; Zalaquette, Personal Interview; Aylwin, Personal Interview.

³⁹⁵Garreton; Collins, *Post-Transitional Justice*; Stern.

³⁹⁶Requa.

³⁹⁷Cath Collins, *Prosecuting Pinochet: Late Accountability in Chile and the Role of the ‘Pinochet Case’* (Center for Global Studies, 2009).

³⁹⁸Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Brill, 2015).

political agenda, media coverage and community protests.³⁹⁹ The amnesty decree was challenged in a legal context, with judges taking alternative judicial measures, such as giving light sentences, rather than directly implementing amnesty. Democracy and its institutions were occasionally challenged through protest, however the overall stability remained intact.

What then of the three hypotheses that form the key underpinning of this research? The first hypothesis addressed whether justice can be sacrificed for democracy in the long run. This hypothesis is stated in the following:

H₀) Amnesty legislation is compatible with expectations and norms of a liberal democracy.

Transitional and post-transitional justice efforts in Chile have put the continued existence of the state's amnesty decree at the centre of the political debate.⁴⁰⁰ While Chile has an established democratic system that is thriving according to many of the indicators used to measure the quality of democracy,⁴⁰¹ questions involving justice remain. As discussed above, association with the previous authoritarian regime can trigger public outcries and the removal of certain political actors from public office.⁴⁰² There are also questions surrounding the culture of police impunity and the continued use of authoritarian-era laws in relation to the Mapuche Indian movement. According to Collins, it may be that these questions merely arise because of the maturation of the democracy, which allows the room for direct challenges without undermining institutional stability.⁴⁰³ In Chile there are indications that validate Collins' argument. Ongoing legal efforts sponsored by organizations within civil society, protests and memorialization have found space in a society entrenched in liberal democratic ideals.⁴⁰⁴ The ability to protest has emboldened a community that no longer fears the heavy-handed reprisals of an authoritarian regime.

The mobilization of victims, families and young people raises the question

³⁹⁹ Collins, *Prosecuting Pinochet: Late Accountability in Chile and the Role of the 'Pinochet Case'*.

⁴⁰⁰ The discussions around amnesty legislation are ongoing, with Bachelet promising to revoke the legislation as recently as late 2014. See: Lee.

⁴⁰¹ As discussed in previous chapters and at length in: Diamond and Morlino.

⁴⁰² Michelle Bachelet Acepta Renuncia de Carolina Echeverría a Subsecretaría de FFAA'.

⁴⁰³ Collins, *Post-Transitional Justice*.

⁴⁰⁴ Ideals discussed in the previous chapter, and in texts such as: Macpherson, *The Life and Times of Liberal Democracy*; Holden.

as to whether the protests and legal challenges to the amnesty law were inevitable in a liberal democratic environment. Should citizens of a democratic state challenge the amnesty law, simply because they can? Do such challenges necessarily create instability? In the case of Chile, amnesty was regarded, at least at one juncture, as the price of democracy.⁴⁰⁵ As a pre-existing decree, and then an unmovable part of the transition process, amnesty was agreed to by the political elites in order to re-establish the *via Chileña*.⁴⁰⁶ The closed-door Truth Commission mandated by executive order, with members of the Commission appointed by the President, was viewed by political elites as the limit to what the government could do. Victims and the wider public had no say in a process that directly and intimately affected them. Persistent challenges to amnesty may be civil society's way of challenging both the bargain (in favour of the victims) and the political solution (in favour of justice) going far beyond the narrow constraints of politics.⁴⁰⁷ The evidence seems to indicate that the more democratic Chile has become, the more space victims, and civil society in general, have found to pursue justice, with varying degrees of success. By so doing, they are challenging the decree that allowed democracy to be possible in the first place.

H₁, Amnesty (and the trading of justice for democracy) is agreed to in good faith.

When opposition leaders participated in Chile's highly negotiated pacted transition,⁴⁰⁸ all the evidence indicates that they did so in good faith. By the time that Aylwin took power, it was clear that his administration was unlikely to revoke amnesty, despite promises to do so during earlier campaigning. As argued by Zalaquette, attempting to revoke the amnesty decree would have been a waste of political power⁴⁰⁹ when democracy was still dependent on the compliance of a powerful and watchful military apparatus. There is evidence

⁴⁰⁵As discussed earlier, Pinochet, as the head of the military, openly threatened the democratic stability if the amnesty legislation was revoked. During the initial transition period (1990 – 1994) the military was twice called back to the barracks in a saber-rattling show of force when the congress threatened the Pinochet family's impunity over financial mismanagement.

⁴⁰⁶Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.'

⁴⁰⁷Aylwin argued that the government did what it could in the realm of politics and that the final decisions on amnesty and justice belonged to the judiciary. Aylwin, Personal Interview.

⁴⁰⁸Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years".'

⁴⁰⁹Zalaquette, Personal Interview.

that Aylwin and Frei actively supported the amnesty law as a way to ensure continued stability or *via Chileña*.⁴¹⁰ That is not to say that Aylwin, and his colleagues in the negotiation process, unequivocally supported the idea of amnesty. It is clear from the opposition discourse prior to the 1988 plebiscite, and subsequent negotiations, that impunity for human rights violations was considered to be a controversial issue. However, faced with continuing support for Pinochet, and the contradictory discourses on the causes and ramifications of the coup, there was little-to-no political will to alter the pact that promised to make democracy possible. By moving efforts for justice into the judicial sphere, Aylwin ensured that he could continue to claim that, from the perspective of the politicians at least, amnesty was agreed to in good faith and that, through the Rettig Commission, all political responsibility had ended.⁴¹¹

H₂) Amnesty becomes acceptable with time in a given democracy as population demographics shift.

From interview responses and other gathered information, it seems that perceptions of Chile's amnesty decree over time are based on an individual experiences with the authoritarian regime, the transition and political process in general. There is no single discourse. Victims and families, related groups in civil doesn't sound right society groups, have all continued to seek justice and to challenge the ongoing impunity that continued to exist for crimes committed by the Pinochet regime. There is an underlying belief that the amnesty decree is problematic for the democracy,⁴¹² and that justice should be served.⁴¹³ In contrast, political elites who were part of the process, even those from the centre left, believe that the amnesty law served its purpose, making the transition possible. They argue that if justice in the traditional, retributive sense were ever possible, it needed to have happened sooner.⁴¹⁴ The political division that marked the plebiscite, and led Aylwin to describe Chile as a "nation of enemies",⁴¹⁵ has persisted, with the debate over Pinochet's amnesty decree

⁴¹⁰ Loveman and Lira, 'Truth, Justice, Reconciliation, and Impunity as Historical Themes: Chile, 1814 - 2006.'

⁴¹¹ Aylwin, Personal Interview.

⁴¹² Cataldo, Personal Interview.

⁴¹³ Hertz, 'Q&A'; Cataldo; Verdugo and Brett; AFP.

⁴¹⁴ Zalaquette, Personal Interview.

⁴¹⁵ Constable and Valenzuela.

continuing amongst a new generation of politicians.⁴¹⁶ To argue that the decree is generally perceived to be un-democratic would negate the presence of a large percentage⁴¹⁷ of the Chilean community that continue to support the legacy of Pinochet. However, there are also vocal groups pushing for the removal of the amnesty law on the basis of its perceived illegality.⁴¹⁸

Protests in Chile have continued despite the passage of time. The political influence of the protesting groups has been varied, although the mobilization of victims and other human rights groups is occasionally very effective.⁴¹⁹ The protests tend to coincide with memorialisation efforts and coup-related anniversaries, with an estimated 60,000 marking the 40th anniversary of the Pinochet takeover in 2013.⁴²⁰ While some commentators argue that a human rights voting bloc has developed to influence electoral outcomes,⁴²¹ the real influence of these groups has been in the persistence to pursue justice through both domestic and international courts. Despite the continued existence of the amnesty decree, 260 people have been convicted of dictatorship era crimes, though only 60 have spent any time in jail. Over 1000 cases are slowly grinding their way through the court system.⁴²²

Demands for what the public perceives as justice have not diminished as the military and politicians would have liked. Implicitly related to equality and equal treatment, the public's perceptions of justice do not necessarily demand prison sentences. Many would like to see the perpetrators simply named so that those who committed the crimes experience some public consequences for the human rights violations that they committed. This is the goal of FUNA, and has been underscored in a number of cases over the last 25 years. But this grass

⁴¹⁶Chile: Amnesty Law Keeps Pinochet's Legacy Alive | Amnesty International'.

⁴¹⁷ While the number of Chileans that continue to believe that the military behaved appropriately in 1973 is significant, 16 per cent in 2013, this is down from 36 per cent in 2003. See 'On 40th Anniversary of Chile Coup, Divisions Remain - CNN.Com', *CNN* <<http://www.cnn.com/2013/09/11/world/americas/chile-coup-anniversary/index.html>> [accessed 16 November 2015].

⁴¹⁸This perceived illegality is framed in both the domestic and international context.

⁴¹⁹'Michelle Bachelet Acepta Renuncia de Carolina Echeverría a Subsecretaría de FFAA'.

⁴²⁰AFP.

⁴²¹Kornbluh and Hite.

⁴²² Some, like Zalaquette, have argued that this number is a significant achievement considering the legal and social restrictions, while others argue that this number is not sufficient to close the books on the justice process. See Zalaquette, Personal Interview; 'Divided by a Coup | The Economist' <<http://www.economist.com/news/americas/21586339-successful-country-past-still-haunts-divided-coup>> [accessed 16 November 2015].

roots justice, outside of the institutional structures of government, has the potential to trigger vigilantism and become a threat to the governability (the *via Chilena*) that is so prized by Chilean politicians. Had the human rights violations of the 1973 coup not been so violent or widespread, the victims may have been willing to allow some form of universal impunity. However, in Chile this was clearly not the case. On the promise of stability and a ‘greater good’ (democracy), Chileans were told to accept something that was almost solely directly beneficial to the military and political elites. The one-sided nature of amnesty and the impunity that has followed, discussed at length by Cataldo,⁴²³ and voiced by other victims, is part of a nexus of perceived injustices. The absence of the perception of equality before, during and after the authoritarian period has been a source of unrest for marginalised communities. The failure to address this issue has potentially weakened Chile’s democracy, potentially undermining the hoped-for stability. As illustrated by an examination of the period preceding the coup, the Pinochet regime became an interruption of democracy and seriously compromised an existing framework of justice. The human rights violations that accompanied the coup, the ensuing repression, compromised reasonable measures of justice. The exceptions to this were in those who supported the coup, many of whom felt that the regime was doing what was needed to return Chile to a path of stability.⁴²⁴ Regardless of ideologies, the coup violated the letter of the 1925 Constitution, and thus the military intervention was illegal. Once the democratization process began with the inauguration of Aylwin, a number of questions were raised regarding the continued viability of the amnesty decree. Twenty-five years on, the evidence seems to show that legalised impunity cannot coexist with the perception of a fully developed democracy. Rather than the amnesty decree undermining the ensuing democracy, it seems that the nature of democracy, with the opportunity it provides to challenge the state and to be vocal regarding popular perceptions of justice, has undermined Decree 2.191. That is not to say that the amnesty law is without power. It is still used, though not uniformly, and judges are just

⁴²³Cataldo, Personal Interview.

⁴²⁴Gideon Long and Santiago, ‘Chile Still Split over Gen Augusto Pinochet Legacy’, *BBC News*, 9 September 2013 <<http://www.bbc.com/news/world-latin-america-24014501>> [accessed 23 November 2015].

as likely to hand down lenient sentences as they are to continue to grant blanket impunity.

The overarching question of this thesis is whether justice can be sacrificed in the long run for democracy. The experience of Chile shows that the perception of an absence of justice for past crimes can become a significant and continuing issue, one that is unlikely to go away while impunity for human rights violations remains. The Chilean interviewees were split over whether the time for justice has passed. Many of those who directly participated in the political transition process, such as Aylwin, argued that a deal was struck and, despite ongoing concerns over the legitimacy of amnesty in a democratic system, these interview subjects felt that the Republic needed to honour that bargain. Interviews with former political and legal operatives revealed a desire to move beyond the dictatorship, arguing that the time for justice has long past. On the other hand, other interviewees expressed a persistent refusal to let go of their demands for justice. Their claim is built on the argument that a societal and political organisation cannot move forward before dealing with the most egregious crimes of the past. To do so would allow a rot to develop from within the institutional structure itself.⁴²⁵ As is clear from the interviews as a whole, the debate is ongoing and has become intergenerational, possibly providing an illustration of the point made by Zalaquette, that the quest for justice may have become a sacred and heroic creed.⁴²⁶ Ultimately, democracy has afforded a climate that allows justice to be demanded. However the quality of that democratic system can be undermined by the popular dissatisfaction with the government's response to past CAH and by persisting perceptions of inequality and injustice.

⁴²⁵ Interviewees from civil society organisations argued that amnesty undermined the institutional structure of Chile's democracy, and created a culture of impunity. See: Cataldo, Personal Interview; Garreton, Personal Interview.

⁴²⁶ Zalaquette, Personal Interview.

Chapter Three

Brazil

3.1 Introduction

At times highly restrictive and violent towards opponents though at other times more open to left wing elements, the five presidencies of Brazilian military rule (1964-1985) had a significant impact on the subsequent development of Brazilian democratic institutions. While vestiges of authoritarianism remain in the legal and political framework as well as the national symbols of Brazil such as the flag, the violence committed by state apparatus following the 1964 coup is less widely known. The pact between the military and incoming civilian leadership pivoted on an amnesty law passed in 1979 which ensured a state-mandated culture of amnesia that continued for almost three decades. On the surface, Brazil's transition experience confirms that justice can be sacrificed for democracy. The almost blanket forgetfulness over past state crimes meant that there were few public challenges to the state-granted impunity. However, the simple narrative of Brazil's democratic transition belies several important factors that become clear when the case is examined more closely. These factors include the continued violence committed by state operatives, widespread corruption, the conviction of the former president and the questionable impeachment of a democratically-elected president.⁴²⁷ According to Marlon Weichert, a federal prosecutor who has been active in seeking justice for victims of the previous regime, the 1979 amnesty law has damaged Brazil's political system.⁴²⁸ During a personal interview, Weichert argued that by maintaining impunity Brazil's democracy has failed to mature with all the rights expected of a liberal democratic system.

⁴²⁷Justin Salhani, 'Police Brutality In Brazil Is Out Of Control', *Think Progress*, 2015 <<http://thinkprogress.org/world/2015/08/04/3687750/police-brutality-in-brazil-is-out-of-control-we-have-a-ferguson-every-day/>> [accessed 2 April 2016]; Sergio Peçanha and Simon Romero, 'Corruption Scandals in Brazil Reach All the Way to the Top', *The New York Times*, 17 March 2016 <<http://www.nytimes.com/interactive/2016/03/17/world/americas/corruption-scandals-in-brazil-reach-all-the-way-to-the-top.html>> [accessed 22 March 2016]; Uri Friedman, 'Is a Coup Taking Place in Brazil?', *The Atlantic*, 2 May 2016 <<http://www.theatlantic.com/international/archive/2016/05/brazil-coup-dilma-rousseff/480291/>> [accessed 11 December 2016].

⁴²⁸Marlon Alberto Weichert, Personal Interview, Via Skype, 21/01/2016.

In Brazil we have a political democracy, and it's working. But we are not a complete democracy. Brazil has an enormous gap between civil rights and social economic rights – with this I mean security and state violence. It's clear to me that it's connected with the oblivion and accountability for human rights violations.⁴²⁹

Brazil's stunted democratic growth, illustrated recently in the continuing corruption scandals and the impeachment of President Dilma Rousseff, seems to provide a relatively clear answer to the question of whether amnesty can be sustained alongside democratic development. The answer, for Brazil it seems, is no. Democracy remains fragile, with the current president, as of June 2017, Michel Temer, viewed as illegitimate by a significant portion of the Brazilian public.⁴³⁰ The reasons for the lack of depth in Brazil's democratic culture can be seen in the causes for the 1964 coup, the nature of the subsequent authoritarian regime, the slow eventual transition to democracy, and the political elite's commitment to the amnesty legislation over the last 30 years.

As was the case with Chile, the characteristics of justice and democracy are relevant to the country's institutional structure and to the public perception of the transitional justice process in Brazil. Public perception can play a key role in a country's transition, legitimising or delegitimizing the political process and the developing institutional structure.

The 1964 military coup in Brazil was a response to increasing political polarisation, a series of economic crises and a governing leader with populist tendencies. Out of the coup developed a hybrid system of governance that incorporated both authoritarian and democratic elements, with fluctuating periods of repression. Between 1964 and 1985, five generals held the position of president, giving Brazil both continuity and change. General Emílio Garrastazú Médici (1969-1974) oversaw the period of most severe repression, with thousands of leftist rebels tortured and hundreds killed. His successor, General Ernesto Giesel, began what was a repudiation of Médici's hard-line leadership, moving Brazil towards a transition that took almost a decade to complete.

⁴²⁹Weichert, Personal Interview.

⁴³⁰ According to surveys conducted by Data Folha, 58 per cent of Brazilians believed that Temer should be impeached, numbers matching those of Rousseff. Staff Writer, '61% apoiam ??impeachment de Dilma e 58%, de Temer, diz Datafolha', *Globo.com* (Brasília, 9 April 2016), Online edition, section Política <<http://g1.globo.com/politica/noticia/2016/04/61-apoiam-impeachment-de-dilma-e-58-de-temer-diz-datafolha.html>> [accessed 23 February 2017].

Amnesty in Brazil was first fought for by the left, seeking to annul some of the restrictions placed on them by the regime's judicial system. The expansion of the law's coverage to include crimes committed by the state met initial resistance from the law's supporters, however this was considered non-negotiable by the government. The blanket amnesty passed into law in 1979 as Law 6,683 and benefited members of the opposition as the civilianisation of the government began in earnest. However, the law also blocked any avenue for justice once the country became democratic. This pact between civilian and military leaders has been strictly maintained since the democratic transition in 1985. Until recently, political leaders refused to consider annulling the amnesty law, and in 2010 the Supreme Court confirmed its legitimacy. The rise of a former leftist guerrilla to the presidency of Brazil, and the continued push from the legal community and groups in civil society to reassess the question of impunity, have introduced the issue of justice for human rights violations back into the Brazilian consciousness. The conversation though, is limited by the general lack of interest, ongoing state-sponsored violence and other high profile political crises, leaving advocates and victims fighting for attention in a crowded political environment.

3.2 Historical Background

3.2.1 Setting the stage for the coup

Like many of its neighbours, Brazil had an established tradition of military involvement in the political sphere well before the 1964 military coup. The military facilitated the demise of the First Republic (1889-1930), and was a source of legitimacy for Getúlio Vargas' 1937 coup and eight-year dictatorship. When Vargas began to court the left in the lead up to the long-promised 1945 election, it was the military, this time a group of army generals, who forced him to resign and return to his ranch in Rio Grande do Sul.⁴³¹ A two-decade experiment with democracy was ushered in at the will of the nation's generals, setting the tone for future interactions between the democratic government and military institutions.⁴³² Much like Brazil's previous flirtation with democracy (1930-1935),

⁴³¹ Thomas E. Skidmore, *Brazil: Five Centuries of Change, 2nd Edition*, 2nd edition (New York: Oxford University Press, 2009); Thomas E. Skidmore and Peter H. Smith, *Modern Latin America Third / 3rd Edition*, 3rd edn (Oxford University Press, USA, 1992).

⁴³² Between 1945 and 1964, successive presidents in Brazil were reliant on military acceptance for legitimacy, unable to sustain direct opposition to military interests. This was particularly apparent

the first years of the so-called Second Republic followed a particular pattern. The political opening of the democratic system was followed by a burst of leftist activity, climaxing in government repression and the outlawing of the Communist Party.⁴³³ Throughout this period, the military stood as an autonomous institution with the belief in its role as protector of the state from both external and domestic threats to national order.⁴³⁴ At times the perception of domestic threats included politicians and political movements perceived to be triggering economic and political instability.

Between 1946 and 1964, franchise was limited to literate adults over the age of 18 years old.⁴³⁵ This benefited the urban and rural elites, who were able to afford higher standards of education. A secret ballot for elections was introduced in 1962. During the Second Republic, electoral participation of registered voters was unpredictable, ranging between 60 per cent and 83 per cent.⁴³⁶ These numbers represented about 25-30 per cent of the population over 18 years old.⁴³⁷

While access to the ballot was limited by literacy requirements, the Brazilian population still saw significant mobilization and polarization over the course of the almost two decades of democratic government. Academic Renato Colistete has argued that the conflict that emerged between the labour movement and employers was one of the primary reasons for Brazil's failure to consolidate

during Vargas's democratic turn as President, which ended in his suicide after a scandal and requests from senior army generals to resign. Opposition parties also appealed to the military to take action after the election of Juscelino Kubitschek, candidate for the *Partido Socialista Democrático* (Social Democratic Party, PSD), attempting to derail his ascension to the role of President. In this instance, the military played the role of guarantor of the legal succession, and were rewarded with significant arms investment by Kubitschek. For more, see: Boris Fausto, *A Concise History of Brazil* (Cambridge, UK ; New York, NY, USA: Cambridge University Press, 1999); Skidmore, *Brazil*; Thomas E. Skidmore, *Brasil: de Getúlio a Castello (1930-64)* (São Paulo: Companhia das Letras, 2007); Ronald M. Schneider, *Brazil: Culture And Politics In A New Industrial Powerhouse*, First Edition, First Printing edition (Westview Press, 1996).

⁴³³Skidmore and Smith.

⁴³⁴ Domestic threats included politicians and political movements considered by military elites as threatening state stability. This role expansion by the armed forces was seen as a product of professionalization of the armed forces. For more see: Kees Koonings, 'Political Orientations and Factionalism in the Brazilian Armed Forces, 1964–85', in *The Soldier and the State in South America: Essays in Civil-Military Relations*, ed. by Patricio Silva (Palgrave MacMillan, 2001).

⁴³⁵ Goulart proposed extending voting rights to illiterates in 1962, following the introduction of the secret ballot. This was vehemently opposed by several sectors of Brazilian society and his proposal was dropped until 1964, when he declared the extension of franchise and land reform. The coup took place within weeks. For more, see: N. D. Lapp, *Landing Votes: Representation and Land Reform in Latin America* (Palgrave Macmillan, 2004).

⁴³⁶ Voter Turnout Data for Brazil (Parliamentary, Presidential) | Voter Turnout | International IDEA' <<http://www.idea.int/vt/countryview.cfm?id=30>> [accessed 12 December 2015].

⁴³⁷ Olavo Brasil de Lima Junior, 'Electoral Participation in Brazil (1945-1978): The Legislation, the Party Systems and Electoral Turnouts', *Luso-Brazilian Review*, 20.1 (1983), 65–92.

democracy during the Second Republic.⁴³⁸ Indeed, a number of authors have claimed that the military's fear of populism in general and the trade union movement in particular, contributed to their involvement in the democratic process, and eventual interruption of the nation's democracy.⁴³⁹ The debate around Brazil's labour movement became a prominent characteristic of the political discourse, without members of the movement being able to wield any real policy power. As outlined by Colistete, "Although left-wing trade union leaders took over key positions in the Brazilian labour movement, demanding substantial improvements in workers' social standing, they were not seen as reliable partners by industrialists and other elite groups in Brazil."⁴⁴⁰

This polarized political climate, with unions seeking to break the residual corporatist structure that remained from Vargas's Estado Novo⁴⁴¹ and the right attempting to maintain the status quo, led to policy instability during the Second Republic, with six economic stabilization measures attempted and then abandoned.⁴⁴² During this period, inflation was a significant issue, as was the question of raising the minimum wage. Rather than following internationally supported prescriptions to control the overheated economy, the response by Brazil's leaders was to "act favourably on a series of political demands that piled more obligations on the federal budget, without any concomitant measures to increase revenue."⁴⁴³

Though quantitative data covering the social development and spending is sparse for a number of reasons,⁴⁴⁴ the general picture of post-WWII Brazil is one

⁴³⁸Renato P. Colistete, 'Productivity, Wages, and Labor Politics in Brazil, 1945-1962', *The Journal of Economic History*, 67.1 (2007), 93–127.

⁴³⁹Youssef Cohen, 'Democracy from Above: The Political Origins of Military Dictatorship in Brazil', *World Politics*, 40.1 (1987), 30–54; Skidmore and Smith; Skidmore, *Brasil: de Getúlio a Castello (1930-64)*; Ronald M. Schneider, *Brazil*.

⁴⁴⁰Renato P. Colistete, p. 95.

⁴⁴¹Corporatist institutional structures have stubbornly remained part of Brazil's labor movement, to the benefit of the government, employers and political parties. This structure, that limits freedom of association and frames labor unions as organisations that must work with the government for the greater good of the public, restricts the ability of non-sanctioned groups to negotiate in the interests of the workers. For an excellent analysis of the ongoing impact of corporatism see: Ana Virginia Gomes and Mariana Mota Prado, 'Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System', *Comparative Labor Law & Policy Journal*, 32.4 (2010), 843–90.

⁴⁴²M. M. Lyne, *The Voter's Dilemma and Democratic Accountability: Latin America and Beyond* (Pennsylvania State University Press, 2008) <<https://books.google.co.nz/books?id=cGOcWsRG6mQC>>.

⁴⁴³Lyne, p. 222.

⁴⁴⁴The reasons for the lack of robust quantitative data on income distribution etc are canvassed by Skidmore, see: Skidmore, *Brazil*.

of significant social inequality and exclusion. Cultural and social norms, rapid industrialisation coupled with rampant urbanisation, and unequal regional growth all contributed to the lack of equality in Brazil. For much of this democratic period, rural communities were dominated by a system of patronage that quashed any real communal action.⁴⁴⁵ This reticence towards collective action by rural workers during the first decade of democracy only compounded the prevailing inequality, with the benefits of Brazil's economic growth going to the landed elites. Industrial workers fared little better. Despite an average GDP growth of 7.3 per cent, and an increase of 9.5 per cent a year in industrial output, wages remained static.⁴⁴⁶ Labour action found its footing in the latter half of the democratic period. Peasant Leagues representing the interests of rural workers began to crop up in 1955, along with mobilization in other sectors. However, the coup interrupted any real progress achieved by these organisations.

Although the 1946 Constitution that governed this period seemingly embraced liberal democratic ideals such as a division of power between president, legislature and judicial system, it also maintained the bases of the previous power structures that favoured the political elites, industrialists and landowners.⁴⁴⁷

At their best, the Vargas-era innovations forged an idealized form of Brazilian citizenship, creating a wide array of political, social and economic rights that gave working people hope in the possibilities of law and politics. Yet that citizenship mostly excluded rural people, and it extended only partially to the urban poor, thus also helping to create an urban underclass whose position in Brazilian society was often akin to those of undocumented migrants: people for whom neither economic prosperity nor citizenship was fully attainable, who built their lives with a patchwork of scanty rights and hard-won tolerance, and whose access to theoretically public benefits and guarantees was scarce or non-existent.⁴⁴⁸

Technically democratic with a somewhat competitive electoral cycle, and rules of succession and representative leadership, there were also features of the Second Republic that point to Brazil being, at best, a semi-democracy. Equality tangible or perceived, was lacking to a very great degree, and the franchise was significantly limited by literacy requirements. The exclusion of large swathes of the adult population, and the banning of the Communist Party,⁴⁴⁹ meant that the

⁴⁴⁵Skidmore, *Brazil*.

⁴⁴⁶Colistete.

⁴⁴⁷Francisco Vidal Luna and Herbert S. Klein, *The Economic and Social History of Brazil since 1889* (New York: Cambridge University Press, 2014).

⁴⁴⁸B. M. Fischer, *A Poverty of Rights: Citizenship and Inequality in Twentieth-Century Rio de Janeiro* (Stanford University Press, 2008), p. 2.

⁴⁴⁹President Eurico Dutra banned the Communist Party in 1947.

representative democracy could only be claimed to represent a small section of society. The instability of the political climate caused by a series of economic crises, while not inherently undemocratic, raises questions about the consolidation of democratic principles in the Second Republic. The ever-present military threat contributed to a constrained political climate that limited the government's ability to be responsive to the needs of the general population.

3.2.2 Justice in the Second Republic

The democratic period (1945-1964) of the Second Republic was built on an essentially liberal constitution. Basic individual rights were established, at least legislatively, and Brazil's political structure was defined as a representative democracy. However, the law was subject to the pervading system of patronage and was applied unevenly across the class structure.⁴⁵⁰ This phenomenon was not limited to the Second Republic and has been characteristic of Brazilian constitutional development in general. As pointed out by Paulo S. Pinheiro, "far from the ideals present in its constitutions, judicial procedures and the workings of the law reflect the cruel realities of Brazilian society and never manage to moderate the vast differences between the rich and the poor."⁴⁵¹ The nature of Brazilian patronage circumvented collective action⁴⁵² and the successive leadership of the populist democratic period was more inclined to ignore gross human rights than intervene and potentially aggravate military or police interests.⁴⁵³ Amnesty was also common throughout Brazilian post-colonial history, with 38 amnesties granted for political crimes since 1889.⁴⁵⁴

If fairness, equality in application, legitimacy and legality are considered necessary for the perception of justice then the limited data available regarding Brazil's levels of social exclusion, mobilization (particularly after 1955) and judicial procedures highlight a society that can only be perceived as unjust. The absence of justice, either perceived or tangible, can be identified in varied levels of

⁴⁵⁰ 'Political Transition and the (Un)Rule of Law in the Republic', in *Brazil: A Century of Change*, ed. by Ignacy Sachs and others (University of North Carolina Press, 2009), pp. 174–214.

⁴⁵¹ Sachs and others, p. 179.

⁴⁵² Skidmore, *Brazil*.

⁴⁵³ Paulo S. Pinheiro, 'Navigating in Uncharted Waters: Human Rights Advocacy in Brazil', *NACLA* <<https://nacla.org/article/navigating-uncharted-waters-human-rights-advocacy-brazils-new-democracy>> [accessed 14 December 2015].

⁴⁵⁴ Ann Schneider, 'Amnestied in Brazil, 1895--1985' (University of Chicago, 2008).

access to resources experienced by the different classes and races, as well as in the interactions between vulnerable communities and the state judicial apparatus.

Despite lofty claims of being a racial democracy,⁴⁵⁵ successive censuses from 1940 onwards have highlighted “persistent disparities between the white and non-white populations in education, vocational achievement, earnings, and life expectancy.”⁴⁵⁶ However, race was not the only divider. Class in Brazil played a significant role in who was able to access justice, with the poor in both rural and urban communities suffering the most from state-sponsored violence during the Second Republic, as well as being the only group to be punished or imprisoned for the majority of crimes.⁴⁵⁷ Levels of political violence varied across the different administrations of this period, though limited access to courts was a consistent feature of Brazilian justice in the Second Republic.

Torture remained a consistent feature of police interrogation, particularly of lower class groups, with the vulnerable, such as the homeless and beggars, facing summary execution by those that were supposed to protect them. “Thus, even during democratic eras, judicial procedures and police investigations were officially inquisitorial, making the systematic recourse to torture seem a “legitimate,” albeit unofficial, means of obtaining confessions from common prisoners.”⁴⁵⁸

During the Second Republic, the tradition of justice in Brazil was limited to the rural and urban elites above all others, to the detriment of both fairness and equality of application. That the laws benefited the elite, and ultimately right wing, undermined the legal legitimacy of the 1946 Constitution.⁴⁵⁹ Faith in the judiciary, and in the laws that supported the institution, is not readily apparent. Justice for all, in its most basic form, is imperceptible. Although the populist appeals of João Goulart targeted key economic justice issues, such as wage increases and cost of living, however it is unlikely that the fundamental elements of repression that

⁴⁵⁵This term has been used to describe states that allow colour-blind franchise (though not necessarily between genders).

⁴⁵⁶George Reid Andrews, ‘Brazilian Racial Democracy, 1900-90: An American Counterpoint’, *Journal of Contemporary History*, 31.3 (1996), 483–507 (p. 483).

⁴⁵⁷Sachs and others.

⁴⁵⁸Sachs and others, p. 198.

⁴⁵⁹Unions, for example, refused to abide by constitutional requirements that placed such tight restrictions on labour activity that only workers at perfumeries would be allowed to protest. Fausto touches on the labour movement’s views of the Constitution in: Fausto.

marked both the democratic and dictatorial periods⁴⁶⁰ would have changed had Goulart been allowed to complete his term.

3.3 The Fall of the Second Republic: The end of the populist democracy

3.3.1 Goulart's demise

The final years of the Second Republic in Brazil were characterised by increasing polarization, mass mobilization and economic instability. The military was ever watchful of, and at times directly involved in, the volatile political environment. While the causes of the 1964 coup can be partially traced back to the nature of the 1945 transition to democracy, and the maintenance of the military as a deciding force in the electoral process, the development of populism between 1955 and 1964 as a direct threat to the political elites brought to the surface the tension that had long been present. Some authors have emphasised the role the economic crisis had in causing the military coup, while others, such as Youssef Cohen, argue that it was the political crisis, rather than the economic one, that triggered military intervention.⁴⁶¹ Economic crises were not unusual during the democratic period, partially caused by Brazil's reliance on a single export crop⁴⁶² and unwillingness to follow economic stabilisation packages that came with a high political cost. However, despite rising inflation,⁴⁶³ failed stabilization measures and a significant increase in the cost of living, the military resisted intervention. During the Second Republic, military involvement in the political process increased with political changes and threats to the existing power balance. By the early 1960s, the military elites perceived "an internal enemy threatening the socio-political and ideological ('moral') integrity of the nation."⁴⁶⁴

The path towards the 1964 coup began with the election of João Quadros in 1960. The popular leader seemed to unite Brazilians tired of the pervasive corruption as well as conservative interests in/of the National Democratic Union (*União Democrática Nacional, UDN*). Quadros was a hugely popular candidate and

⁴⁶⁰Sachs and others.

⁴⁶¹Cohen, 'Democracy from Above: The Political Origins of Military Dictatorship in Brazil'.

⁴⁶²Brazil's reliance on coffee as its main export revenue stream is similar to Chile's reliance on copper. The economies of both states were subject to international demand and price fluctuations, which ultimately had a destabilizing effect on their economic development.

⁴⁶³Inflation reached over 89 per cent in early 1964.

⁴⁶⁴Koonings, p. 130.

won the 1960 election by a relative landslide with 48 per cent of the vote.⁴⁶⁵ However, his popularity was personal rather than party based. The vice presidency went to Goulart, the candidate on the opposing party's ticket, rather than Quadros' own running mate. Quadros tried to unite interests from both the right and left, leading to general disappointment. After attempting to stabilize the economy, Quadros suddenly quit. He had been president for seven months.⁴⁶⁶ According to the Constitution, Goulart's ascension to the presidency was straightforward. However, the former labour minister was

unacceptable to many high ranking officers as well as to powerful civilians. They considered Goulart, the most prominent national leader of the Labour Party, dangerous not only because he was the heir of Vargas's labour populism, but also because he had strong political ties with the left.⁴⁶⁷

Legalists within the military ensured the inauguration of Goulart, though his rise came with a compromise – Brazil became a parliamentary system, with the presidency an almost figurehead role.⁴⁶⁸ The majority of presidential power was transferred to the newly created position of prime minister. While attempting to minimise the risk of a shift towards communism, the military pushed the nation towards greater instability, requiring Goulart to move further left as he sought political support. This political manoeuvring polarized the country, as well as creating unease amongst international financial institutions and U.S observers. A plebiscite in 1963 restored Brazil to its former presidential system. With less than two years left as president, Goulart attempted to implement another economic stabilization policy before abandoning the restrictions in favour of radical nationalism.⁴⁶⁹ By March 1964, the president appealed to the people to support his policies in the face of rigid congressional resistance. Goulart organised several rallies where he planned to announce policies, including the decision to expropriate land and the nationalization of all privately-owned oil refineries. The first rally was held on March 13 in Rio de Janeiro. One of the key outcomes of the rally was to

⁴⁶⁵Fausto.

⁴⁶⁶Though never fully explained, the general consensus is that Quadros expected the Brazilian Congress to refuse his resignation and request his return to the presidential palace. Whatever the reasoning, Quadros's resignation triggered one of the worst political crisis in Brazilian history, and lay the foundation for the military coup three years later.

⁴⁶⁷Cohen, 'Democracy from Above: The Political Origins of Military Dictatorship in Brazil', p. 36.

⁴⁶⁸Skidmore and Smith, p. 176.

⁴⁶⁹Thomas E. Skidmore, *The Politics of Military Rule in Brazil, 1964-1985* (New York: Oxford University Press, 1990).

unite and mobilise the anti-Goulart factions in the military, congress and amongst the business and political elites. The polarised political climate motivated even centrist military officers to support a proposed coup.⁴⁷⁰ The core group of conspirators, led by General Humberto Castelo Branco, had the political and military support they needed. On March 31, military units seized control of key government offices in both the capital, Brasília, and in Rio. Appeals for mass mobilization of the people against the coup were ineffective. Goulart fled to Uruguay, leaving Brazil on the hands of a military-technocrat coalition. Congress elected Castelo Branco as president, while the UDN benefited by political appointments. The economy fell under the management of Roberto Campos, an economist and former diplomat. Campos instituted a new stabilisation policy, with the hope of reining in inflation, encouraging new foreign investment and improving the overall economic outlook.⁴⁷¹

3.3.2 The military regime: neither fully authoritarian nor fully democratic

Brazil's authoritarian period (1964-1985) was atypical for its time and place. Unlike the military regimes that emerged throughout Latin America during the 1960s and 1970s, the Brazilian military allowed the continuance of traditionally democratic processes,⁴⁷² such as local and regional elections. In this way, the authoritarian period can best be described as a partnership between conservative civilian elites, the middle classes and the military, with a high-ranking general chosen to fill the role of president for a set period of time.⁴⁷³ Non-military technocrats played a role in each successive government, with varying degrees of influence.

Between 1964 and the election of a civilian in 1985, the presidency was filled by five four-star generals. These five military leaders, along with much of the armed corps, were generally divided into two groups, the hardliners and the

⁴⁷⁰Skidmore, *Brazil*; Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*; Fausto.

⁴⁷¹Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*.

⁴⁷²While the democratic process may have continued in terms of elections etc, this was not without significant military intervention. Opposition politicians had their political rights suspended for 10 years along with the general repression and human rights abuses experienced by opposition activists.

⁴⁷³Fausto; Weichert, Personal Interview.

moderates.⁴⁷⁴ This divided political outlook influenced their policy approach as well as how they interacted with the surviving opposition. Each of the regimes was distinct, reflecting the political factionalism that had long been a characteristic of the military as an institution.⁴⁷⁵ Selected from within the military hierarchy, the presidential candidates had to be approved by Congress via an electoral college. After 1965, only two parties were permitted – the government’s National Alliance for Renewal (Aliança Renovadora Nacional, or ARENA) and the Brazilian Democratic Movement (Movimento Democrático Brasileiro, or MDB) as an umbrella organisation for the opposition. The government party dominated Congress for much of the authoritarian period, assisted by political manoeuvring and an emerging media (TV) dominated by the regime.

Under moderate Castelo Branco, the military maintained the façade of restricted democracy. Castelo Branco was a legalist who had supported the constitutional succession of Goulart in 1961. On taking power, he was committed to the traditional moderating power of the military. In the immediate aftermath of the coup,⁴⁷⁶ Brazil experienced a “negative phase” that included purges of both political elites and leftist military,⁴⁷⁷ significant human rights violations⁴⁷⁸ against left-wing opposition and restrictions on political norms via the first Institutional Act I (Acto Institucional, or AI).⁴⁷⁹ This negative phase lasted a few months, followed by restricted political activity dominated by the military leadership. This moderate

⁴⁷⁴This division is, to some extent, fluid. Moderates were committed to democracy after a period of military rule to address the political instability. Hardliners distrusted the political elite and argued for greater levels of repression in the face of popular resistance. While Castelo Branco is considered a moderate, the successive governments of Marshal Artur de Costa e Silva and General Emílio Garrastazú Médici were increasingly repressive. General Ernesto Geisel’s leadership signalled a shift back towards more a more moderate approach with a political programme of *distensão* (softening of authoritarian restrictions, also known as a decompression) and General João Figueiredo solidified this change with his gradual *abertura* (opening).

⁴⁷⁵Kees Koonings, ‘Political Orientations and Factionalism in the Brazilian Armed Forces, 1964–85’, in *The Soldier and the State in South America: Essays in Civil-Military Relations*, ed. by Patricio Silva (Palgrave MacMillan, 2001).

⁴⁷⁶Also called a revolution by a number of authors, following the word choice of military leaders.

⁴⁷⁷Conservative estimates put the number of dismissed civil servants at around 1,400 along with 1,200 from the armed forces. See: Boris Fausto, *A Concise History of Brazil* (Cambridge, UK ; New York, NY, USA: Cambridge University Press, 1999).

⁴⁷⁸The peak of initial human rights violations was during the ten days between Goulart’s overthrow and Castelo Branco’s official election by the Congress, although torture and other violations continued in the Northeast until June. Unofficial estimates put the arrest numbers between 10,000 and 50,000. For more see: Thomas E. Skidmore, *The Politics of Military Rule in Brazil, 1964-1985* (New York: Oxford University Press, 1990).

⁴⁷⁹Ronald M. Schneider, *Order and Progress: A Political History of Brazil* (Boulder, CO: Westview Press, 1991).

approach changed with the 1965 gubernatorial elections. Direct elections were held in 11 states, with the opposition winning in Guanabara and Minas Geras. For the military hardliners, these results proved that the government was being too soft on the opposition. Facing mounting pressure from within the military, Castelo Branco decreed AI-2, which increased the powers of the president and expanded the reach of the national security apparatus.⁴⁸⁰ The AI-2 also outlawed all existing parties and replaced them with the two-party structure that favoured the government.

General Artur da Costa e Silva ascended to the presidency in 1967 supported by military hardliners. Despite coming from the section of the military that believed in "...the idea of the armed forces as the country's proper and semi-permanent ruler..."⁴⁸¹ the new president promised to "humanise the Revolution".⁴⁸² It took the significant mobilisation of political opposition in 1968 for Costa e Silva to fully embrace the hardliner's authoritarian perspective with his declaration of AI-5. Any pretence of a restricted democracy ended. "With AI-5, the military nucleus of power became concentrated in the so-called information community, that is among those people in command of intelligence and repression."⁴⁸³ Congress was again purged, repression increased and censorship, previously conducted in an ad-hoc and unorganised manner, became significantly more systematic.

Costa e Silva's death in 1969, followed by the election by Congress of General Emílio Garrastazú Médici ended any doubts about the character of the regime. Médici maintained the climate of control that had begun in 1968 under Costa e Silva. In maintaining, and even increasing government led repression, Médici was able to finally achieve the long-hoped for political stability. This is not to say that the opposition was dormant. Rather, government control of the media⁴⁸⁴ as well as brutal reprisals by the military and police muted effective subversive action.⁴⁸⁵

It was during the Médici administration that Brazil became a fully-fledged authoritarian regime, and his time as leader was also to be the peak of the hardliner's

⁴⁸⁰Fausto.

⁴⁸¹Ronald M. Schneider, *Order and Progress: A Political History of Brazil*, p. 251.

⁴⁸²Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*, p. 67.

⁴⁸³Fausto, p. 290.

⁴⁸⁴Government media campaigns included the censorship of opposition activity, except when fear was useful, as well as the trumpeting of events that would increase national pride and distract the population from the ongoing guerilla warfare. The Football World Cup victory in 1970 gave the government the perfect distraction at a time of increased opposition activity.

⁴⁸⁵Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*.

power. After significant deliberation, General Ernesto Geisel was elected to the presidency in 1974. Geisel marked the return of the military's moderates. Geisel began his term with four principal goals: to maintain the unity of the military while reducing the power of the hardliners; to control subversive elements that sought to undermine the government's overtures towards liberalization; to (slowly) return to some form of representative democracy; and finally, to maintain economic growth.⁴⁸⁶ The *distensão* (decompression or softening) progressed slowly, facing a sceptical yet increasingly politically active civilian opposition, as well as determined hard-line resistance. The transition to democracy was to be "slow, gradual, and certain."⁴⁸⁷

Geisel's successor, João Batista Figueiredo, expanded the liberalisation project to *abertura* (opening). A blanket amnesty was passed by Congress in August 1979 and covered all political crimes, allowing exiles to return. At the same time, unions and other centres of leftist opposition began to mobilise, seeking a number of concessions from the softening regime. The old multi-party system was abolished, leading to a splintering of the left and right movements. In 1982, Brazilians voted in their first direct gubernatorial election since 1965. The government-supported Social Democratic Party (Partido Democrático Social, or PDS) won most states, however the opposition party, the MDB, won the important states of São Paulo, Minas Gerais, and Rio de Janeiro. Opposition leaders called for direct presidential elections, though the 1985 elections were still decided through Congress. The difference was that this time there was a real competitive edge to the electoral process. In the end, the loyal opposition candidate, Tancredo Neves,⁴⁸⁸ running on the Democratic Alliance (Aliança Democrática) ticket, won the Electoral College. His vice-presidential candidate, José Sarney, was an established member of the political elite. He had been part of the government supported PDS before defecting to support Neves. While running and winning on

⁴⁸⁶ Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*; Ronald M. Schneider, *Order and Progress: A Political History of Brazil*.

⁴⁸⁷ Ernesto Geisel as quoted in Thomas E. Skidmore, *Brazil: Five Centuries of Change, 2nd Edition*, 2nd edition (New York: Oxford University Press, 2009), p. 177.

⁴⁸⁸ Neves had stepped in briefly as the Prime Minister when the military changed the constitution of 1946 in an attempt to prevent Goulart from succeeding to the presidency in 1961. Neves represented the elites in this move.

the opposition ticket, Sarney was less a revolutionary and more a continuation of the military abetura in civilian dressing.⁴⁸⁹

3.3.3 Levels of repression

The levels of repression throughout the authoritarian period were inconsistent, and depended directly on the presidential policy regarding opposition, as well the levels of mobilisation on the left. According to academic Brasillio Sallum Jr., “in comparison to neighbours, to other countries, Brazil had a very light regime.”⁴⁹⁰ In the lead up to the coup, leftist radicals and student organisations in particular, placed pressure on Goulart to embrace their agenda. These radicalising elements were obvious targets of repression once the military took control of the government.⁴⁹¹ Over the course of 21 years, the authoritarian regime targeted labour unions, church-based organisations, the student movement, leftist politicians and other perceived dissidents. Torture became part of state policy, despite sporadic outrage from the public.⁴⁹² The state-led crimes against humanity (CAH) became more selective after the initial negative phase of Castelo Branco’s administration, though the military and police apparatus set up to deal with the opposition remained in place. CAH peaked again as a response to urban warfare waged by subversives that included the kidnapping of diplomats during the student protests of 1968, and during the guerrilla war waged in the region of Araguaia between 1972-1974.⁴⁹³ The initial wave of repression was driven by the military, with the worst violence committed in rural areas and in the Northeast in particular. The first institutional act (Ato Institucional, or AI) passed just days after the coup, allowed for the creation of Police and Military Investigations (Inquéritos Policial-Militares, or IPMs), setting the stage for detention of perceived subversives.⁴⁹⁴ In June 1964, the

⁴⁸⁹Ronald M. Schneider, *Order and Progress: A Political History of Brazil*.

⁴⁹⁰Brasillio Sallum Jr., Personal Interview, São Paulo, 12/04/2011.

⁴⁹¹Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*.

⁴⁹²Daniel Zirker, *Democracy and the Military in Brazil: Elite Accommodation In Cases of Torture, Armed Forces & Society*, (1988), 587-606

⁴⁹³The guerrilla war fought in Araguaia involved members of the Communist Party of Brazil (Partido Comunista do Brasil, or PCdB), aligned with the Maoist strain of communism. The small group (at its peak it had an estimated 60 members) attempted to trigger a communist revolution from their adopted base in Araguaia, in the Amazon. The PCdB militants were inspired by the Cuban Revolution, despite their Maoist allegiance. The regime’s war against the militants was brutal, with almost all of the revolutionaries killed over the course of two years. For more see: Fausto; Maria Helena Moreira Alves, *State and Opposition in Military Brazil* (Texas: University of Texas Press, 1985).

⁴⁹⁴Fausto.

regime set up the National Information Bureau (Serviço Nacional de Informações, or SNI), which became a key centre of power in the “struggle against the internal enemy.”⁴⁹⁵ The legal foundation for the regime, particularly during the peak of state repression (1967 – 1974), was the Military Criminal Code, the Code of Military Criminal Procedure and the Military judiciary Organization Law, decreed in 1969.⁴⁹⁶ Each branch of military had their own secret services and intelligence centres, subordinated to the SNI. The military police, which had been governed at a state level, was also brought under federal control. The security apparatus of Brazil’s military regime became a pervasive and controlling force in Brazilian politics.⁴⁹⁷

Government repression, and the subsequent CAH, targeted those groups seen as threatening the national security of the state.⁴⁹⁸ Groups targeted included student movements, church affiliated groups, labour unions and rural peasant leagues. The size and level of activity of the student movement fluctuated during the regime, split by the ideological differences of Communism at the time.⁴⁹⁹ However, students and activists united after the death of Edson Luís Lima Souto during a peaceful protest in March 1968. Tensions between police and students spilled over in every state, accompanied by increased repression.⁵⁰⁰ The unrest peaked in June with the “March of 100,000” in Rio de Janeiro, and was followed by significant repression enhanced by the declaration of AI-5, considered the key piece of legislation for the hardliners in entrenching Brazil’s authoritarian state and in legalising the CAH committed against the opposition.

⁴⁹⁵Fausto.

⁴⁹⁶Glenda Mezarobba, ‘Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil’, *International Journal on Human Rights*, 7.13 (2010).

⁴⁹⁷Wendy Hunter, *Eroding Military Influence in Brazil: Politicians Against Soldiers* (North Carolina: University of North Carolina Press, 2000).

⁴⁹⁸The military, as an almost devoutly anti-communist organisation communist movement as a threat. This assessment included student movements, left-wing church-based groups, labour movements and peasant leagues., *viewed any socialist or*

⁴⁹⁹ This division was dominated by ideological disagreements between members of the banned Communist Party and those prescribing to Maoist and Trotskyist political philosophies. For more see: Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*; Joao R. Martins Filho, *A Rebelião Estudantil* (Campinas, SP: Mercado Letras, 1996).

⁵⁰⁰*Pela Democracia, Contra O Arbitrio: A Oposicao Democratica, Do Golpe de 1964 a Campanha Das Diretas Ja*, ed. by Flamarion Maués and Zilah Wendel Abramo (São Paulo, SP, Brasil: Fundação Perseu Abramo, 2006); Arquidiocese de São Paulo, *Brasil: Nunca Mais*, 38th edn (SP, Brasil: Vozes, 2009).

Despite periods of unrest, public awareness of government repression was limited. Weichert argued that the censorship of the media has influenced public understanding of the regime's repression.

It's very important to understand at this time we had strong censorship over the press. So it was unknown amongst civil society that torture was widespread and that we had legal provisions protecting exclusively the government. And, so [at the time that amnesty was passed] civil society had no idea what happened and what was still happening connected to the repression.⁵⁰¹

The scale of the CAH committed by state agents was first highlighted in Brasil: Nunca Mais,⁵⁰² a secretly prepared report on torture in Brazil. Approximately 1,843 victims provided evidence to church-based investigators. The report outlines 283 torture techniques used by agents of the state, identifies 242 clandestine torture centres and names 444 torturers.⁵⁰³ Released in 1985, the report revealed a side of the authoritarian regime that many Brazilians had been able to ignore. Victims testified to being used as teaching tools in classes on torture⁵⁰⁴ that included electrocution, beatings and the parrot's perch.⁵⁰⁵ Electric shocks were given across the body, including to the genitals, and drowning was common (often as complementary to the parrot's perch). Victims were also subjected to psychological torture (watching loved ones tortured etc.), rape and forced abortions.⁵⁰⁶ While the law at the time allowed for a death sentence to be handed out, the majority of deaths in police custody were a result of summary executions, excessive torture or faked suicides.⁵⁰⁷

Though rare, judicial action against the regime was not unheard of. On October 25, 1978, federal judge Márcio José de Moraes decided against the state in the death of journalist Vladimir Herzog. Officials claimed that Herzog committed suicide; however the judge found the state guilty of detention, torture and death. Moraes ordered the state pay reparations to Herzog's widow. Between 1979 and

⁵⁰¹Weichert, Personal Interview.

⁵⁰²Arquidiocese de São Paulo.

⁵⁰³Arquidiocese de São Paulo; Joan Dassin, *Torture in Brazil: A Shocking Report on the Pervasive Use of Torture by Brazilian Military Governments, 1964-1979, Secretly Prepared by the Archdiocese of São Paulo* (University of Texas Press, 1998).

⁵⁰⁴Arquidiocese de São Paulo.

⁵⁰⁵Also known as Pau de Arara, the parrot's perch torture technique involved hanging the victim upside down with a bar behind the knees and another behind the biceps.

⁵⁰⁶Dassin; Arquidiocese de São Paulo.

⁵⁰⁷Mezarobba, 'Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil'.

1981, similar decisions were reached in the deaths of Manoel Fiel Filho and Mario Alves.⁵⁰⁸

The National Truth Commission (Comissão Nacional da Verdade, or CNV) has identified 434 murdered or disappeared victims of the authoritarian regime.⁵⁰⁹ The CNV also highlighted the widespread practice of torture, arbitrary detention and other human rights violations during the military regime, as was initially outlined in *Brasil: Nunca Mais*.

3.3.4 Left and Right-Wing Perceptions of the Authoritarian Regime

The civil-military coalition that took power in 1964 under the guise of saving Brazil from the communist threat was able to maintain support with a focus on the economy, as well as the effective use of propaganda.⁵¹⁰ The regime's initial supporters were typical of the time – anti-communist, right wing, U.S supported and church based.⁵¹¹ Over time, the military was able to build and maintain significant levels of support from the wider public. In a survey conducted during 1972-1973, 59 per cent of respondents said that they could either “always trust the military” or “trust it [in] most cases”.⁵¹² Researchers Barbara Geddes and John Zaller found that the greatest supporters of the authoritarian regime were those who were somewhat politically literate – “... that is, [those] who pay enough attention to be heavily exposed to the government line but who are not sophisticated enough to be able to resist it.”⁵¹³ This support was influenced by the state of the economy, government propaganda and restricted coverage of the regime's human rights violations.

Opposition to the authoritarian regime did exist but was fragmented. However, there were multiple strains of opposition, weakening the effort against the regime. According to Sallum

⁵⁰⁸Ignacio Cano and Patrícia Salvão Ferreira, ‘The Reperations Program in Brazil’, in *The Handbook of Reparations*, ed. by Pablo de Greiff (Oxford; New York: Oxford University Press, 2006).

⁵⁰⁹José Carlos Dias and others, *Relatório da Comissão Nacional da Verdade - Volume 1* (Brazil: Comissão Nacional da Verdade., 14 December 2014), p. 976.

⁵¹⁰Fausto.

⁵¹¹Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*; Alves; Kenneth P. Serbin, ‘The Anatomy of a Death: Repression, Human Rights and the Case of Alexandre Vannucchi Leme in Authoritarian Brazil’, *Journal of Latin American Studies*, 30.1 (1998), 1–33.

⁵¹²Barbara Geddes and John Zaller, ‘Sources of Popular Support for Authoritarian Regimes’, *American Journal of Political Science*, 33.2 (1989), 319–47.

⁵¹³Geddes and Zaller.

The divided opposition gave the regime a greater deal of breathing room. The people that lead the opposition in the late 70s were not the same as those that were defeated in 1964 ... In 67/68 there was a rupture in the communist leadership and the mainstream of the party took arms. In the 70s there was a battle of the ideas ... The leading role was a traditional opposition – the ARENA – the professional middle class. The leading role belonged to these guys. But the left did not have the leadership, and even less so the armed left. Take the PT for example. They took a leading role in the transition, but not the initial resistance. This difference is important to explain why the quest for justice has been so weak.⁵¹⁴

The opposition emerged from within a number of sectors of society. The MDB maintained a presence in the Congress, albeit generally muted by the removal of political rights of many of its members, by the lack of coverage of left-wing political activity in the media and the threat of violence. Student organisations were vocal in their opposition to the military repression and militant groups attempted to reverse the slide to full authoritarianism in the late 1960s. The Catholic Church, long an important institution in Brazil, “walked a tightrope between the desire for justice and the need to avoid further violence.”⁵¹⁵ The regime was unable to gain full clerical support⁵¹⁶ and at times faced blatant criticism from militant groups within the church, as well as from mainstream clergy. After 1974, and the softening of the political environment, professional organisations such as the Order of Attorneys of Brazil (*Ordem dos Advogados do Brasil*, or OAB) began to call for greater freedom of expression, freedom of the press and a greater commitment to human rights.⁵¹⁷

3.3.5 Law No. 6,683/1979

Amnesty laws, passed either by Congress or by executive order, were frequently used in Brazil as a method of conciliation.⁵¹⁸ These laws consistently emphasised the policy of oblivion and impunity. “Over time, amnesty evolved as a political convention that aimed to advance state legitimacy, secure civil peace, deliver justice and otherwise guarantee citizenship rights.”⁵¹⁹ In the Brazilian context, amnesties were used as a tool to either pacify “rebels or to conciliate former

⁵¹⁴Sallum Jr, p Personal Interview.

⁵¹⁵Serbin, p. 3.

⁵¹⁶Philippe C. Schmitter, ‘The “Portugalization” of Brazil’, in *Authoritarian Brazil: Origins, Policies, and Future*, ed. by Alfred Stepan (Yale University Press, 1976), pp. 170–232.

⁵¹⁷Alves.

⁵¹⁸Ann Schneider, ‘Amnestied in Brazil, 1895--1985’ (University of Chicago, 2008).

⁵¹⁹Ann Schneider, ‘Amnestied in Brazil, 1895--1985’, p. 7.

enemies.”⁵²⁰ They were also used, as Paul Ricoeur argued “...to interrupt violence.”⁵²¹

The Brazilian Congress passed Law No. 6,683/1979⁵²² after debate over both content and coverage. Unlike other Latin American states such as Chile or Argentina, the amnesty law in Brazil initially grew out of the opposition’s efforts rather than those of the military regime.⁵²³“According to Weichert,

Amnesty in the beginning was a demand of the families of political prisoners. During 1979, the families, especially the women, started claiming for amnesty cooperation. At the time, I would say all the leftist movements were already destroyed in Brazil, there was no danger for the government to start a kind of distension of our dictatorship in order to some way prepare for our return to democracy.⁵²⁴

The first calls for political amnesty came after the declaration of AI-1, and the political purges that followed. As the political atmosphere eased during the *distensão*, and then opened during the *abertura*, the opposition ramped up pressure for amnesty with debates, marches, demonstrations and rallies.⁵²⁵The level of support for amnesty was such that when Congress passed Law No. 6,683/1979, the “Brazilian civil society viewed it as its first victory against the regime.”⁵²⁶ Marcello D Torelly, a member of the 2001 Amnesty Commission, explained, “At the time amnesty was associated with liberty. And we have, of course, on the other side [it was associated with] impunity.”⁵²⁷However Law No. 6,683/1979 was a significant compromise for the law’s original proponents.⁵²⁸Rather than being “broad, general and unrestricted”, the law came with conditions benefiting state agents accused of CAH. “The government took the opportunity, it was then the military government,

⁵²⁰ Ann Schneider, ‘Amnestied in Brazil, 1895--1985’, p. 19.

⁵²¹ Paul Ricoeur as quoted in Ann Schneider, ‘Amnestied in Brazil, 1895--1985’, p. 19.

⁵²² For the full text of the Amnesty Law of 1979, including subsequent revisions see: ‘LEI No 6.683, DE 28 DE AGOSTO DE 1979.’ <https://www.planalto.gov.br/ccivil_03/leis/l6683.htm> [accessed 13 January 2016].

⁵²³ Paulo Abrão and Marcelo D. Torelly, ‘Resistance to Change: Brazil’s Persistent Amnesty and Its Alternatives for Truth and Justice’, in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. by Francesca Lessa and Leigh A. Payne (Cambridge University Press, 2012).

⁵²⁴ Weichert, Personal Interview.

⁵²⁵ Alves.

⁵²⁶ Abrão and Torelly, ‘Resistance to Change: Brazil’s Persistent Amnesty and Its Alternatives for Truth and Justice’, p. 154.

⁵²⁷ Marcelo D. Torelly, Personal Interview, Via Skype, 4/02/2016.

⁵²⁸ Thomas E. Skidmore, ‘Brazil’s Slow Road to Democratization: 1974 - 1985’, in *Democratizing Brazil: Problems of Transition and Consolidation*, ed. by Alfred C Stepan (New York: Oxford University Press, 1989), pp. 5–42; Alves.

to introduce a provision guaranteeing amnesty impunity for their own officials that could have committed any crime.”⁵²⁹

The 195 militants accused of “blood crimes”⁵³⁰ were explicitly excluded from receiving amnesty.⁵³¹ Those prisoners who were sentenced under the National Security Law (1969) were also excluded in the short term.⁵³² The amnesty law allowed for over 5000 exiles to return to Brazil, and those who suffered from the periodic political purges were allowed to return to work or receive some form of restitution. In a key stipulation, perpetrators of the state-sponsored torture and other repressive tactics received a complete blanket amnesty.⁵³³ As pointed out by Paulo Abrão and Marcelo D. Torelly the subsequent impunity for CAH was a clear victory for the military’s hardliners.

This amnesty was constructed by the regime and; though it did allow for some benefits to the politically persecuted, it also set the political basis for an extensive interpretation bilateralism, including a dimension of amnesty as oblivion and impunity” for the perpetrators.⁵³⁴

According to Brasillio Sallum, an academic at the University of São Paulo, the government passed the amnesty law at a time that it could control the negotiations and narrative.

The amnesty law and the political reform were done before the complete loss of control, and this makes all the difference. When the reforms started, the opposition was weak. The reforms and amnesty law were passed while the opposition was still coming together. The regime had control. That’s why the amnesty was so pro-government. The amnesty had no control of the direction or wording of the law, Usually we say there was a “pact”, but that’s not true because at that moment the regime had control, which they only lost later.⁵³⁵

There are two ways to understand the Law 6.683/1979. The first is as a method of impunity for a wide range of crimes. By 2010, the initial restrictions of the amnesty law were expanded so that what was once limited, though ambiguous, became instead a blanket amnesty. The second lens through which to understand the amnesty law is as a piece of legislation that established a programme of reparations essential to Brazil’s ensuing transitional justice process.

⁵²⁹Weichert, Personal Interview.

⁵³⁰Violent crimes and so-called terrorist activity.

⁵³¹Alves; Ann Schneider, ‘Amnestied in Brazil, 1895--1985’.

⁵³²Political prisoners were released after individual examination of their cases.

⁵³³This was not explicit, however the wording of the law allowed for state agents to utilise the amnesty law to ensure impunity for what was termed “connected crimes”.

⁵³⁴Abrão and Torelly, ‘Resistance to Change: Brazil’s Persistent Amnesty and Its Alternatives for Truth and Justice’, p. 154.

⁵³⁵Sallum Jr., Personal Interview.

The Amnesty Bill of 1979 was presented to the public as a way to unite the Brazilian “family”,⁵³⁶ and as a bridge between the authoritarian past and a democratic future.⁵³⁷ According to Weichert,

The Brazilian dictatorship h[ad] a very different character...Congress was kept working almost all of the time, so the draft of the bill was sent by the government to the Congress. But it had a very complicated clause, saying that crimes connected to some sort of political [motivation] were amnestied as well...there was no public discussion over this provision. It was kind of like this “look family, you take it or you leave it. To have amnesty for your relatives, you have to agree.” It was the only provision.⁵³⁸

The military insisted this bilateral provision be included for the whole process to move forward.⁵³⁹ In response to concern over the blanket impunity for agents of the state, OAB President Raymundo Faoro made it clear to victims and their families that there was no real prospect of punishing the torturers.⁵⁴⁰ The likelihood of impunity was compounded by the fact that Giesel had quietly changed the rules so that the jurisdiction for prosecution of military crimes committed against civilians fell under the purview of the military courts, where victims had little chance of achieving a conviction.⁵⁴¹

Weichert argued in a personal interview that, in his opinion, “the amnesty played an essential role in our transitional process because according to this model, it is a transition without any rupture, any break, any truth, and any justice. [Amnesty] is part of the package, I would say.”⁵⁴² While Law 6,683/1979 was somewhat unique in that while it may be seen as an “interruption of violence”, it did not result directly in a transition to democracy.⁵⁴³ According to Torelly,

what is generally agreed is that the amnesty allowed for the reopening process ... so the amnesty helped to bring back people that belonged to different political forces that weren't allowed in the opposition due to exile or living clandestinely. It allowed people to come back to the country. [However] there are some people that say the amnesty law has helped diminish the violent social struggles in the country... The amnesty helped set the stage to

⁵³⁶ The term family is used in the context of the belief of the Brazilian authoritarian regime as a patrimonial system of governance. For more see: Carla Simone Rodeghero, ‘For the “Pacification of the Brazilian Family”: A Brief Comparison between the Amnesties of 1945 and 1979’, *Revista Brasileira de História*, 34.67 (2014), 67–88.

⁵³⁷ Rodeghero.

⁵³⁸ Weichert, Personal Interview.

⁵³⁹ Torelly, Personal Interview.

⁵⁴⁰ Wolfgang Heinz and Hugo Fruhling, *Determinants of Gross Human Rights Violations by State and State Sponsored Actors in Brazil, Uruguay, Chile and Argentina: 1960 - 1990* (Netherlands: Springer Netherlands, 1999).

⁵⁴¹ Anthony W. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh, PA, USA: University of Pittsburgh Press, 2005).

⁵⁴² Weichert, Personal Interview.

⁵⁴³ A similarity shared with Chile, where the Amnesty law was passed in 1978, a decade before the return to civilian rule.

the indirect elections we had just a few years later. The amnesty was certainly the inflection point where the military started to step back and give power to civilians.⁵⁴⁴

The military regime continued to control the process through to the election of Neves, and the ascension of Sarney, after Neves' death. The government of Sarney refused to challenge the amnesty law and embraced instead what Rebecca Atencio describes as “the politics of reconciliation by institutionalized forgetting.”⁵⁴⁵ This official commitment to reconciliation expressed via the maintenance of the amnesty law has become deeply engrained in the Brazilian political and judicial sphere. Though two reparation commissions were created during Fernando Henrique Cardoso's presidency (1995-2002), these were to establish economic restitution in accordance with the requirements of Article 8 of the Transitional Constitutional Act (1988),⁵⁴⁶ which at the same time validated the constitutionality of the 1979 amnesty law.

In 2008, the OAB filed a lawsuit challenging the validity of amnesty for state crimes. However, when the STF released its decision in April 2010, it not only defended the law, but also expanded the law's scope to include a broader range of beneficiaries and to extend the time frame of coverage to include events that took place after the original 1979 deadline.⁵⁴⁷ The court wrote in its 7-2 decision that it was not in the position to review the law that had allowed the transition from dictatorship to democracy.⁵⁴⁸ The STF reiterated that the amnesty law had been bilateral and had benefited both state and non-state actors. The two dissenting judges argued that this point was meaningless. According to Judges Ricardo Lewandowski and Carlos Ayres Britto extending amnesty to both sides does not change the fact that the authoritarian regime was also granting itself a self-amnesty. Lewandowski and Britto also argued that applying amnesty to crimes against

⁵⁴⁴Torelly, Personal Interview.

⁵⁴⁵Rebecca J. Atencio, *Memory's Turn: Reckoning with Dictatorship in Brazil* (Wisconsin, U.S.A: University of Wisconsin Press, 2014), p. 29.

⁵⁴⁶ The Transitional Constitutional Act was an addition the 1988 Brazilian Constitution that covered the laws exclusively focused on the legal requirements of the transition. See: *Constitution of Brazil 1988*, 1988 <https://www.constituteproject.org/constitution/Brazil_2014.pdf>.

⁵⁴⁷Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁵⁴⁸Arguição de Descumprimento de Preceito Fundamental n. 153, *Ministro Eros Grau*, 2010 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612960>>; Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil', *Bulletin of Latin American Research*, 30.2 (2011), 198–212; Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

humanity, including torture, was both unconstitutional and against international treaties.⁵⁴⁹

The dissenting judges' argument was prescient. Six months after the release of the STF decision, the IACtHR released its decision in the *Gomes Lund et al. v. Brazil* case.⁵⁵⁰ The court found that the Law No 6.683 was incompatible with the American Convention and therefore declared it "void of any legal effects."⁵⁵¹ The IACtHR also reaffirmed victims' rights to truth regarding CAH and access to information, dismantling the government's claim that information regarding what had happened in Araguaia was security sensitive and therefore couldn't be released. The court also recommended further compensation and truth gathering efforts.⁵⁵² Though the court decision sparked debate in Brazil, a number of prominent political figures including President Dilma Rousseff herself declared that the amnesty law was "untouchable."⁵⁵³

Leonardo Avritzer raises a key point when discussing conservative continuity in the make-up of the courts. The judges who contributed to the legitimacy of the authoritarian regime in Brazil are the same judges who now preside over challenges to the transitional justice status quo. There were no purges of the judiciary by successive democratic governments. By changing the structure of the legal system, the authoritarian regime ensured that it would be difficult to retroactively apply political accountability.⁵⁵⁴

⁵⁴⁹ *Arguição de Descumprimento de Preceito Fundamental n. 153*; Claudia R Roesler and Laura Carneiro de Mello Senra, 'Lei de Anistia e Justiça de Transição: A Releitura Da ADPF 153 Sob o Viés Argumentativo e Principiológico', *Sequência (Florianópolis)*, 2012, 131–60; Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁵⁵⁰ This case was taken to the IACtHR on behalf of victims of the military action in Araguaia. See: 'Gomes Lund et Al. (Guerrilha Do Araguaia) v. Brazil | IACHR' <<https://iachr.ils.edu/cases/gomes-lund-et-al-guerrilha-do-araguaia-v-brazil>> [accessed 17 January 2016]; Gomes Lund et al. (Guerrilha do Araguaia") V. Brazil, 2010 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf>.

⁵⁵¹ Open Society Foundations, 'Gomes Lund v. Brazil', *Open Society Foundations* <<http://www.opensocietyfoundations.org/litigation/gomes-lund-v-brazil>> [accessed 17 January 2016].

⁵⁵² Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁵⁵³ Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press, 2014); 'Brazil Urged to Scrap Amnesty Law That Protects Rights Abusers | Amnesty International' <<https://www.amnesty.org/en/press-releases/2011/08/brazil-urged-scrap-amnesty-law-protects-rights-abusers/>> [accessed 17 January 2016].

⁵⁵⁴ Leonardo Avritzer, *Democracy and the Public Space in Latin America* (Princeton, NJ, USA: Princeton University Press, 2002).

There is extensive evidence that amnesty was fought for in good faith, and agreed to with an overwhelming sense of both inevitability and the belief that there were few alternative options available for opponents of the authoritarian regime, supporting the argument presented in H₀. The unwillingness of political elites to challenge the amnesty law in the decades since the transition shows that this good faith has been maintained with the oft stated argument that the democratic state cannot undermine the agreement that allowed democracy to be possible in the first place.⁵⁵⁵

3.4 The Transition Period and Transitional Justice

The 16-year transition in Brazil began in 1974 with the election of Giesel as president and only really ended with the direct election of Fernando Collor de Mello, who was inaugurated on March 15, 1990. The military controlled the pace and direction of the process employing what Stepan called a dynamic of “regime concession and societal conquest”.⁵⁵⁶ Though Sarney was the first civilian to hold the position in 21 years, the nature of his ascension to the presidency after the death of Tancredo Neves along with his long history with the pro-regime ARENA party before he defected to run on the PMDB ticket, left some wondering if his rule was simply a continuation of the previous administration.⁵⁵⁷ There had been widespread faith in Neves’ ability to navigate Brazil out of authoritarianism and towards a functioning democracy. Sarney, on the other hand “was met with reserve, suspicion, distrust, or even distaste by much, perhaps most, of the PMDB, the dominant element of the Democratic Alliance.”⁵⁵⁸ As a consequence of circumstance, established preferences and limited leftist support, Sarney maintained a close relationship with the military, failing to challenge the existing institutional structure and prerogatives.⁵⁵⁹ The decision to have Congress act as the Constituent Assembly, for example, was a clearly expressed preference of the former authoritarian

⁵⁵⁵This argument was most clearly articulated in the Supreme Court’s defense of the amnesty law: *Arguição de Descumprimento de Preceito Fundamental n. 153*.

⁵⁵⁶Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (The Johns Hopkins University Press, 1996), p. 168.

⁵⁵⁷Ronald M. Schneider, *Order and Progress: A Political History of Brazil*.

⁵⁵⁸Ronald M. Schneider, *Order and Progress: A Political History of Brazil*, p. 306.

⁵⁵⁹Heinz and Fruhling; Hunter; Jorge Zaverucha, ‘The 1988 Brazilian Constitution and Its Authoritarian Legacy: Formalizing Democracy While Gutting Its Essence’ (presented at the Latin American Studies Association, Continental Plaza Hotel, Guadalajara, Mexico, 1997), pp. 1–25 <<http://biblioteca.clacso.edu.ar/ar/libros/lasa97/zaverucha.pdf>>.

regime.⁵⁶⁰ In the final draft of the constitution, the military was able to ensure the inclusion of a clearly defined role, though not to the extent that a number of the military elite had hoped.⁵⁶¹

The Constitution of 1988 came to be described as the *Constituição Cidadã* (Citizens' Constitution), a document focused on the rights of the people over their "duties".⁵⁶² While deeply democratic in language⁵⁶³ the military's interests were preserved, including negotiating points that had been agreed to as part of the final "pacted" step of the transition.⁵⁶⁴ The final draft of the 1988 Constitution established the military as guarantors of law and order (Article 142), though the right to call on the military to act was also given to the legislature and judiciary.⁵⁶⁵ The Constitution also reaffirmed the 1979 Amnesty Law, through Transitional Act 8.⁵⁶⁶

Constitutional expert Andrei Koerner argued that the amnesty and the Constitution were inextricably linked.

Amnesty legislation came with the question of constitutional reform. There was limited negotiation, and what negotiation was there was unequal. Amnesty was the cone at the end of the war. Amnesty unblocked everything, amnesty was the key to the opening, and amnesty completed a process while beginning another.⁵⁶⁷

⁵⁶⁰Hunter.

⁵⁶¹Heinz and Fruhling.

⁵⁶²Zaverucha, 'The 1988 Brazilian Constitution and Its Authoritarian Legacy: Formalizing Democracy While Gutting Its Essence'; Christiano Paixão, 'The Protection of Rights in the Brazilian Transition: Amnesty Law, Violations of Human Rights and Constitutional Form', *In Forum Historiae Iuris*, 2014 <<http://www.forhistiur.de/2014-08-paixao/?l=en>>; Andrea Steuer Zago and Lionel Pimentel Nobre, 'The Brazilian Citizen Constitution, the Environment and Taxation', *Loyola of Los Angeles International and Comparative Law Journal*, 20.3 (1998), 507–34; Keith S. Rosenn, 'Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988', in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. by Laurel E. Miller and Louis Aucoin (United States Institute of Peace Press, 2010).

⁵⁶³Democratic in the sense that the document lays the foundation for the democratic institutional structure that was subsequently developed.

⁵⁶⁴Three points of agreement known to have come out of the negotiations were: 1) the acceptance by the military of Neves' nomination and the maintenance of secret lines of communication between the president and the military; 2) the agreement that the Constitution would be written by Congress, rather than by a separately elected Constitutional Assembly; and 3) impunity for human rights abuses committed by state agents. For more see: Zaverucha, 'The 1988 Brazilian Constitution and Its Authoritarian Legacy: Formalizing Democracy While Gutting Its Essence'; Jorge Zaverucha, 'Relações Civil-Militares: O Legado Autoritário Da Constituição Brasileira de 1988', in *O Que Resta Da Ditadura*, ed. by Edson Teles and Vladimir Safatle (SP, Brasil: Boitempo Editorial, 2010).

⁵⁶⁵Zaverucha, 'The 1988 Brazilian Constitution and Its Authoritarian Legacy: Formalizing Democracy While Gutting Its Essence'.

⁵⁶⁶Keith S. Rosenn, "Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988," in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. Laurel E. Miller and Louis Aucoin (United States Institute of Peace Press, 2010).

⁵⁶⁷Andrei Koerner, Personal Interview, São Paulo, 3/04/2011.

Koerner also described the Constitution as a generally liberal document, with conservative elements. Under Sarney, accountability remained off the agenda. Transitional justice was absent from the democratization process, with debate focusing on Brazil's volatile economy and on the development of a democratic constitution. When *Brasil: Nunca Mais* was released in 1985, Sarney steadfastly refused to acknowledge the book or discuss the topic of military-era CAH in general.⁵⁶⁸ The Constitution of 1988 reaffirmed the amnesty law and expanded its application.⁵⁶⁹ Throughout Brazil, members of the military and secret police who had been accused of torture were promoted into positions of power, though in the instance of a few high-profile cases, the accused were stripped of some prestige, or shuffled horizontally into other positions.⁵⁷⁰

According to H_0 , the experiences of transitioning states show that amnesty legislation is compatible with the expectations and norms of an entrenched liberal democracy. Brazil's transition period extended longer than many of its neighbours, with a focus on "oblivion" over transitional justice measures.⁵⁷¹ The evidence, as discussed below, shows that the efforts of successive governments to ignore demands for recognition of CAH of the past regime have delayed justice, and potentially put traditional measures of justice out of the reach of victims. However, there are indications that this has undermined the depth and quality of the democratic development in Brazil, particularly in regard to the impunity enjoyed by police and military officers for significant acts of violence committed by them against Brazilian citizens. This directly challenges the expected outcome presented by H_0 , that amnesty and an entrenched liberal democracy are compatible in the long run.

The election of Collor de Mello marked the first truly democratic presidential election in Brazil since the 1964 coup. His presidency also marked the first political impeachment of a president in the new democratic era. Collor de Mello was elected on the strength of his personality in the television era, and his

⁵⁶⁸Atencio.

⁵⁶⁹Christiano Paixão, "The Protection of Rights in the Brazilian Transition: Amnesty Law, Violations of Human Rights and Constitutional Form," *In Forum Historiae Iuris*, January 9, 2014, <http://www.forhisiur.de/2014-08-paixao/?l=en>.

⁵⁷⁰Heinz and Fruhling.

⁵⁷¹As discussed earlier, the term oblivion is used to indicate a refusal to acknowledge or significantly discuss the previous regime's CAH. See: Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'; Weichert, Personal Interview.

neo-liberal policies that appealed to business leaders.⁵⁷² However, with little “inclination to negotiate with the Congress”,⁵⁷³ and a “presidency backed by a political party that controlled less than 5 per cent of the seats in congress”,⁵⁷⁴ Collor de Mello’s presidency struggled to maintain public support for restrictive economic policies intent on managing Brazil’s runaway inflation. Corruption rumours became persistent and public support for democracy plunged. Collor de Mello faced direct accusations of corruption in May 1992, when his own brother accused him of both financial and moral improprieties. The public mobilized against the president, pressuring the Congress to take action. On September 29, 1992, Congress voted (441 to 38 in the Chamber of Deputies and 76-5 in the Senate) to impeach Collor de Mello.

For the first time, a Brazilian president had been forced out of office not by military coup or military ultimatum, but by orderly vote of the Congress. Collor [de Mello] had done one great favour for Brazil: He had prodded the political class into proving that they could live up to their constitutional responsibility.⁵⁷⁵

While the lack of impunity faced by the president may have raised hopes of the development of a culture of accountability, it was not until the presidency of Fernando Henrique Cardoso (1995-2002) that there was any significant movement on transitional justice. After his election in 1995, Cardoso set up the Special Commission for Political Deaths and Disappearances (1995) and the Amnesty Commission (2001), in part to fulfil the right to reparation and resistance for the politically persecuted outlined in article 8 of the Transitional Constitutional Act.⁵⁷⁶ The first commission (mandated by Law No. 9,140/1995) was limited to recognising the state’s responsibility for killings and disappearances. The purpose of the second commission (Law No. 10.599/2002) was to offer reparations to those that had suffered directly from the regime’s acts of repression (torture, incarceration, political purges etc).

Reparations have become the cornerstone of Brazil’s response to transitional justice demands. The reparation measures began with the 1970 amnesty law that established the foundation for any later reparation programme. The law

⁵⁷²Skidmore, *Brazil*.

⁵⁷³Skidmore, *Brazil*, p. 209.

⁵⁷⁴Linz and Stepan, p. 170.

⁵⁷⁵Skidmore, *Brazil*, p. 211.

⁵⁷⁶Abrão and Torelly, ‘Resistance to Change: Brazil’s Persistent Amnesty and Its Alternatives for Truth and Justice’.

outlined the restitution of political rights and the right to job reinstatement for purged civil servants and military personnel.⁵⁷⁷ During the *abetura*, the courts occasionally decided in favour of the families of some victims, ordering the state to pay reparations.⁵⁷⁸ In 1995, the Cardoso government paid compensation to the families of 132 citizens who had disappeared during the authoritarian regime.⁵⁷⁹ The same Law that established the reparations for the disappeared also outlined economic compensation for the families of those killed by the regime. The first reparations programme paid a total of R\$33,456,284.87 to 280 petitioners between 1996 and 2002.⁵⁸⁰ The 2002 Amnesty Commission law was designed to offer compensation for victims of the regime's other forms of repression (such as torture, political purges, kidnapping and forced exile). Initially limited by a mandate focused on financial reparations, the Amnesty Commission (AC) became "a privileged space of state action addressing the dictatorship's crimes and legacy."⁵⁸¹ Between 2001 and 2012, 72,000 cases were filed with the commission. Of the 65,000 petitions that were processed by 2012, 45,000 individual violations were recognized. Redress included either economic reparation (16,000) or moral redress and other rights (24,000).⁵⁸²

The election of Luíz Inácio *Lula* da Silva marked a significant shift in the political landscape of the Brazilian government. A former metalworker, union organiser and long-time candidate⁵⁸³ of the Worker's Party (Partido dos Trabalhadores, PT), Lula emerged out of the Brazilian masses, a first in a political class dominated by the wealthy, educated elite.⁵⁸⁴ His frontrunner status was met with significant concern from the international financial markets,⁵⁸⁵ and strong domestic competition from across the political spectrum. However, Lula won the

⁵⁷⁷ Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁵⁷⁸ Cano and Ferreira.

⁵⁷⁹ Ernesto Verdeja, 'Reparations in Democratic Transitions', *Res Publica*, 12.2 (2006), 115–36.

⁵⁸⁰ Cano and Ferreira.

⁵⁸¹ Edson Teles and Renan Quinalha, 'Scopes and Limits to the Transitional Justice Discourse in Brazil', in *Legacies of State Violence and Transitional Justice in Latin America: A Janus-Faced Paradigm?*, ed. by Marcia Esparza (Lexington Books, 2015).

⁵⁸² 'Transitional Justice in Brazil - Torelly.Pdf'

<<http://www.vancecenter.org/vancecenter/images/stories/vancecenter/torelly.pdf>> [accessed 26 January 2016].

⁵⁸³ Lula's win in 2002 marked his fourth attempt at the presidency.

⁵⁸⁴ Skidmore, *Brazil*.

⁵⁸⁵ John Williamson, 'Lula's Brazil', *Foreign Affairs*, 82.1 (2003), 105–13.

second-round of voting with 61.3 per cent of the vote.⁵⁸⁶ The fears of the financial markets proved to be unfounded, with his administration following a relatively conservative economic plan. Lula also defied expectations that he would completely abandon the “policy of forgetting”, which was still deeply entrenched in the Brazilian political culture. For much of his tenure, Lula maintained what his predecessor had already put in motion. The Amnesty Commission continued its work, administering over USD\$1.6 billion in reparations.⁵⁸⁷ Amnesty Caravans travelled across Brazil, offering victims a restorative justice approach that included recognition of their suffering as well as an apology from the Commission.

The maintenance of the status quo faltered towards the end of Lula’s regime, in part due to the activism of his Minister of Human Rights Paulo Vannuchi. Appointed to the role in 2005, Vannuchi launched two significant programmes of remembrance the Right of Memory and Truth (*Direito à memória e à verdade*, 2006)⁵⁸⁸ and Revealed Memories (*Memórias Reveladas*, 2009).⁵⁸⁹ Historian Nina Schneider argues that another contributing factor to the shift in transitional justice approach was the strength of Lula’s political favourability ratings during his second term.⁵⁹⁰ In 2009 Lula’s approval ratings reached 84 per cent, lending his government a significant level of political legitimacy despite previous corruption scandals.⁵⁹¹ Finally, the government was aware of the impending IACHR decision against the amnesty law, with the regional organisation having already set a precedent on condemning any form of impunity for past CAH. According to federal prosecutor and member of Brazil’s Truth Commission, Marlon Weichert, there was a push to be seen as implementing changes that would mute some of the court’s impending criticism.⁵⁹² Despite the reasoning behind its introduction, the National Program of Human Rights 3 (*Programa Nacional de Direitos Humanos III – PnDH-3*), with its

⁵⁸⁶ ‘Brazil: 2002 Presidential Election / Eleições Presidenciais de 2002’

<<http://pdba.georgetown.edu/Elecdata/Brazil/pres02.html>> [accessed 26 January 2016].

⁵⁸⁷ ‘Transitional Justice in Brazil - Torelly.Pdf’.

⁵⁸⁸ The *Direito à memória e à verdade* was a travelling exhibition that retold the history of the dictatorship through images and film.

⁵⁸⁹ In 2009, the government launched *Memórias Reveladas*, an online project by the Brazilian National Archive to facilitate the release dictatorship-era documents.

⁵⁹⁰ Nina Schneider, ‘Breaking the “Silence” of the Military Regime: New Politics of Memory in Brazil’.

⁵⁹¹ Andrew Downie, ‘Brazil’s Lula, a High-School Dropout, Closes an Exceptional Era’, *Christian Science Monitor*, 31 December 2010

<<http://www.csmonitor.com/World/Americas/2010/1231/Brazil-s-Lula-a-high-school-dropout-closes-an-exceptional-era>> [accessed 27 January 2016].

⁵⁹² Weichert, Personal Interview.

focus on the establishment of a truth commission, was met with sharp criticism from both the military and conservative groups. After the Minister of Defence, Nelson Jobim and three high-ranking military officials threatened to resign, Lula agreed to review PNDH, which essentially translated into retracting the policy.⁵⁹³

A former guerrilla and victim of torture, Dilma Rousseff (PT) came to political prominence as a protégée of Lula. In some respects, she fulfilled expectations for a more direct approach to transitional justice, reintroducing legislation for a truth commission in 2011. Approved by Congress in November 2011, the seven-person National Truth Commission (*Comissão Nacional da Verdade*, CNV) began work in May 2012. The final report by the CNV was handed to Rousseff in December 2014.⁵⁹⁴ The report named 377 perpetrators of human rights violations, including military officers and former presidents. Of the 377, 200 are still alive.⁵⁹⁵ The report also identified 434 victims that were either killed or made to disappear. In addition to further detailing the extent of the political purges, the report explored the impact of the dictatorship and subsequent CAH on diverse segments of Brazilian society.⁵⁹⁶ The members of the CNV made 29 recommendations, including calling on the armed forces to recognise their responsibility for the CAH committed during the dictatorship. The CNV also highlighted the need for the judiciary and organs of the state to admit their role in the repression. As part of their conclusion and recommendations, the CNV disagreed with the 2010 STF argument that the amnesty law was untouchable. Rather, the CNV argued that Law 6,683/1979 was a barrier to fulfilling international commitments to investigate, process, judge and repair after CAH.⁵⁹⁷

A breakdown of Brazil's transitional justice process shows the limited progress achieved in the last 30 decades.

⁵⁹³Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil'; 'Brazil Truth Plan Angers Military', *BBC*, 11 January 2010, section Americas <<http://news.bbc.co.uk/2/hi/8451109.stm>> [accessed 27 January 2016].

⁵⁹⁴'Página Inicial - CNV - Comissão Nacional Da Verdade' <<http://www.cnv.gov.br/>> [accessed 31 January 2016].

⁵⁹⁵Anthony Boodle and Brian Winter, 'Brazil Dictatorship Probe Urges Prosecuting Military, Companies', *Reuters*, 10 December 2014 <<http://www.reuters.com/article/us-brazil-rousseff-dictatorship-idUSKBN0JO20L20141210>> [accessed 1 May 2016].

⁵⁹⁶'Página Inicial - CNV - Comissão Nacional Da Verdade'; OAS, 'OAS - Organization of American States: Democracy for Peace, Security, and Development', 2009 <http://www.oas.org/en/iachr/media_center/PReleases/2014/151.asp> [accessed 31 January 2016]; Comissão Nacional da Verdade, *Relatório da Comissão Nacional da Verdade* (Palácio do Planalto, Brasília, Brazil, 10 December 2014) <<http://www.cnv.gov.br/>>.

⁵⁹⁷Comissão Nacional da Verdade.

Table 3.1 Transitional Justice Processes in Brazil

Justice	Almost non-existent. Strict application of Law 6,683.
Reparation	Mandated by the 1988 Constitution and delivered by Special Commission for Political Deaths and Disappearances (1995) and the Amnesty Commission (2001).
Truth	The <i>Comissão Nacional da Verdade (CNV)</i> delivered its report on Dec 10, 2014. This report was the first official truth commission supported by the Brazilian congress and executive, though there were previous non-governmental efforts to outline the CAH committed by the 1964-1985 authoritarian regime. The Amnesty Commission (through the Ministry of Justice) and Brasil Nunca Mais (through the Catholic Church) were both partial truth measures.
Institutional Reform	Some institutional reform including changes to judiciary and military reform. However, amnesty law is still in force and there is a documented culture of impunity amongst police and armed services for ongoing human rights violations.

3.5.2 Opposing Views of the Transitional Justice Process

The differing perspectives on the justice measures that developed during the consolidation of Brazil's democratic institutions have been significantly influenced by the level of buy-in to the official policy of impunity and forgetting.⁵⁹⁸ On the one hand the support of the amnesty law, and by extension, impunity, has been the dominant discourse for 37 years. On the other hand, the use of reparations as a tool for reconciliation has ensured documentation of the past CAH, allowing for future measures towards justice to be built on established facts.

Supporters of the amnesty law and of the continuing impunity argue that the amnesty law benefited both sides of the conflict, allowed for the transition to democracy and established the foundation for the subsequent reparations programme.⁵⁹⁹ According to the defenders of the amnesty law, such as Reinaldo Azevedo, a conservative commentator for magazine *Veja*, the calls for justice

⁵⁹⁸ Paulo Abrão and Marcelo D. Torelly, 'Transformaciones Del Concepto de Amnistía En La Justicia de Transición Brasileña: La Tercera Etapa de La Lucha Por La Amnistía' (presented at the *Limites e Possibilidades da Justiça de Transição*, Porto Alegre, 2012) <<https://blogdotarso.files.wordpress.com/2013/08/abrao-torelly.pdf>>.

⁵⁹⁹ The first two points were used as part of the decision by the STF to maintain the Amnesty Law. See: *Arguição de Descumprimento de Preceito Fundamental n. 153*.

ignore the fact that both sides received amnesty, the terrorists and torturers alike.⁶⁰⁰ While for some the law has meant impunity and forgetfulness, for others the law also meant freedom and reparation.⁶⁰¹ Though the bilateral nature of the amnesty law has been challenged, it is still one of the arguments regularly used to defend Brazil's limited approach to transitional justice. The transitional justice measures that have been put forward are viewed by supporters of the military regime as a concerted effort by the media, historians and teachers to falsify history and openly practice vindictiveness.⁶⁰²

On the opposing side of the debate, supporters of the transitional justice measures enacted thus far (reparations, memorialisation and truth commission) argue that it is politically untenable to continue with the policy of oblivion. Brazil has been internationally reprimanded for its continued use of the amnesty law via the IACHR.⁶⁰³ After the release of the STF decision against their 2008 petition, the OAB argued that "The Supreme Court understood that the Amnesty Law pardoned torturers, which in our view is regressive in relation to fundamental rights in the Constitution, and international conventions, which clearly indicate that torture is not a political crime, but a common crime against humanity, and, therefore, does not expire."⁶⁰⁴

3.5. Justice and Democracy in the Long Run

3.5.1 The Current State of Democracy

More than three decades have passed since Brazil's first civilian election in 1984, establishing the state as a consolidated democracy by all traditional indicators.⁶⁰⁵ However, throughout this period the quality of democracy in Brazil

⁶⁰⁰'TERRORISTA CAÇA TORTURADOR? EM NOME DO QUÊ? | VEJA.Com'
<<http://veja.abril.com.br/blog/reinaldo/geral/terrorista-caca-torturador-em-nome-do-que/>>
[accessed 8 February 2016].

⁶⁰¹Abrão and Torelly, 'Transformaciones Del Concepto de Amnistía En La Justicia de Transición Brasileña: La Tercera Etapa de La Lucha Por La Amnistía'.

⁶⁰²Aricildes de Moraes Motta, *1964, 31 de Marco: O Movimento Revolucionario E a Sua Historia* (Rio de Janeiro: Biblioteca do Exército. BIBLIEX, 2003).

⁶⁰³'Gomes Lund et Al. (Guerrilha Do Araguaia) v. Brazil | IACHR'.

⁶⁰⁴Latin American Weekly Report, *Supreme Court Upholds Amnesty Law*, 6 May 2010, p. 16 (p. 9) <<http://latinnews.com/media/k2/pdf/tpenmiiw.pdf>>.

⁶⁰⁵Dankwart A. Rustow, 'Transitions to Democracy: Toward a Dynamic Model', *Comparative Politics*, 2.3 (1970), 337–63; Scott Mainwaring, *Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues* (University of Notre Dame, Helen Kellogg Institute for International Studies, 1989); Samuel P Huntington, *The Third Wave: Democratization in the Late 20th Century* (Norman: University of Oklahoma Press, 1991).

has been undermined by corruption scandals, economic crises, ongoing violence, persistent racial inequality, disparity in regional institutional development as well as a seemingly insurmountable gulf between the rich and poor. Each of these challenges has had an impact on the public's perception of the political elites, as well as the perception and legitimacy of the democratic system as a whole. According to political scientist José Maria Pereira da Nóbrega Jr, these factors mean that Brazil best fits what Mainwaring defines as a "semi democracy",⁶⁰⁶ though Timothy Powers argues that Brazil has just been slow to consolidate, rather than being fundamentally flawed.⁶⁰⁷

The most recent challenge to Brazil's democracy has been revelations of far-reaching corruption. At both the national and regional level, corruption has been an issue for much of the democratic period, gaining prominence in the national discourse with the impeachment of President Fernando Collor de Melo in 1992. Lula faced the potential demise of his own political career with the *Mensalão* scandal that threatened to engulf the PT party in 2006.⁶⁰⁸ Cleared of any direct connection to wrongdoing, Lula emerged from the scandal relatively unscathed. The same cannot be said for his successor, Rousseff, who was impeached in September 2016, and replaced by conservative Michel Temer.⁶⁰⁹ The current wave of scandals centre on inflated contracts and kickbacks benefiting government-allied politicians connected to the state-owned oil giant *Petrobrás*. These scandals have become symptomatic of a crisis of legitimacy in the Brazilian political arena, with nation-wide surveys showing a general decline in citizens' trust of political actors and institutions. In 2006, Brazilians named the pervasiveness of corruption as the single biggest issue facing the nation, while a third of respondents in a 2009 survey expressed the belief that "it was impossible to practice politics in Brazil without

⁶⁰⁶José Maria Pereira da Nóbrega Jr, 'A Semidemocracia Brasileira: Autoritarismo Ou Democracia?', *Sociologias*, 23 (2010), 74–141; Scott Mainwaring, Daniel Brinks, and Anibal Perez-Linan, 'Classifying Political Regimes in Latin America, 1945-1999', *Studies in Comparative International Development*, 36.1 (2001), 37–65.

⁶⁰⁷Timothy J. Power, 'Brazilian Democracy as a Late Bloomer: Reevaluating the Regime in the Cardoso-Lula Era', *Latin American Research Review*, 45 (2010), 218–47.

⁶⁰⁸Manuel Balán, 'Surviving Corruption in Brazil: Lula's and Dilma's Success Despite Corruption Allegations, and Its Consequences', *Journal of Politics in Latin America*, 6.3 (2014), 67–93.

⁶⁰⁹Jonathan Watts, 'Brazil's Dilma Rousseff Impeached by Senate in Crushing Defeat', *The Guardian*, 1 September 2016, section World news
<<https://www.theguardian.com/world/2016/aug/31/dilma-rousseff-impeached-president-brazilian-senate-michel-temer>> [accessed 9 December 2016].

engaging in some degree of corruption.”⁶¹⁰ Importantly for discussions on democratic quality and consolidation, protesters in 2015 and 2016 have begun to call for military intervention.⁶¹¹ The military had thus far rejected these appeals from the right, though they are far from avid supporters of the current administration, particularly after the criticism directed towards the military institution from the CNV.

While the corruption is a problem, some commentators have claimed that the real reason for the protests is that the population seems irrevocably divided by class and wealth and that this should raise concern for those interested in democratic consolidation.⁶¹² The steel wall erected to keep opposing rallies separated outside Congress while the impeachment vote against Rousseff went ahead inside vividly illustrated the polarisation of the country, with fears that protests would become violent clashes.⁶¹³ Class division and regional prejudice have been one of the driving forces behind the mass mobilization and impeachment efforts. Polls examining the demographics of one protest in Porto Alegre show that nearly 70 per cent were college educated, and 40 per cent belong to the economic elites.⁶¹⁴ According to economist Luiz Carlos Bresser Pereira, “the hatred [against the PT] is a result of the fact that the government revealed a strong and clear preference for workers and the poor.”⁶¹⁵

A second sign of trouble in Brazil’s democratic system is the ongoing violence and failure of the justice system to sufficiently address public safety. Quality of democracy indicators such as responsiveness, accountability, law and equality are all undermined by the violence, which is committed by both civilians

⁶¹⁰Timothy J. Power and Matthew M. Taylor, ‘Introduction: Accountability Institutions and Political Corruption in Brazil’, in *Corruption and Democracy in Brazil: The Struggle for Accountability*, ed. by Timothy J. Power and Matthew M. Taylor, 1st Edition edition (Notre Dame, Ind: University of Notre Dame Press, 2011), p. 4.

⁶¹¹Bryan Pitts, ‘Who’s Protesting in Brazil and Why?’, *NACLA Report on the Americas*, 9 April 2015 <<https://nacla.org/news/2015/04/09/who%E2%80%99s-protesting-brazil-and-why>>.

⁶¹²Pitts.

⁶¹³Jonathan Watts, ‘Brazil’s “Impeachment Wall” May Be New but Divisions Have Always Been There’, *The Guardian*, 12 April 2016, section World news <<http://www.theguardian.com/world/2016/apr/12/brazil-impeachment-wall-dilma-rousseff-vote>> [accessed 19 April 2016].

⁶¹⁴Gianpaolo Baiocchi and Marcelo Silva, ‘Brazil’s Elites Are Revolting’ <<http://america.aljazeera.com/opinions/2015/3/brazils-elites-are-revolting.html>> [accessed 5 April 2016].

⁶¹⁵Luiz Carlos Bresser Pereira quoted in Pitts.

and agents of the state.⁶¹⁶ Violence, regardless of the perpetrators, is viewed as a significant obstacle to the consolidation of democracy.⁶¹⁷ The impact this violence has on the quality of Brazil's democracy is worsened by the fact that a significant percentage of homicides are committed by on-duty and off-duty police officers.⁶¹⁸ Torture, extra-judicial killings and disappearances continue to be a feature of the state's security apparatus. Worst affected by all types of violence in Brazil are the poor. Wealthy Brazilians have increasingly moved into fortified communities and have hired private security to protect them on a day-to-day basis.⁶¹⁹

Beyond debates around security and corruption, rampant inequality undermines Brazil's quality of democracy.⁶²⁰ Using the Palma ratio (PR)⁶²¹ Brazil is considered unequal, with an average PR of 3.8 between 2005 and 2013.⁶²² Brazil's Gini-coefficient for the same period is 52.7.⁶²³ Since 2001, the rate of inequality in Brazil has declined, however this shift has been dependent on cash transfer programmes (*Bolsa familia etc*) and a change in the distribution of social security payments.⁶²⁴ The concern is that these transfers are dependent on political will and economic growth. These are important caveats in the assessment of Brazil's reduction in the income distribution gap, as they are entirely reversible with a change in government.

⁶¹⁶Justin Salhani, 'Police Brutality In Brazil Is Out Of Control', *ThinkProgress*, 2015
<<http://thinkprogress.org/world/2015/08/04/3687750/police-brutality-in-brazil-is-out-of-control-we-have-a-ferguson-every-day/>> [accessed 2 April 2016]; Lourdes Garcia-Navarro, 'In Brazil, Race Is A Matter Of Life And Violent Death', *NPR.Org*, 2014
<<http://www.npr.org/sections/parallels/2014/11/09/362356878/in-brazil-race-is-a-matter-of-life-and-violent-death>> [accessed 5 April 2016].

⁶¹⁷José Maria Pereira da Nóbrega Jr, Jorge Zaverucha, and Enivaldo Rocha, 'Mortes Por Agressão Em Pernambuco e No Brasil: Um Óbice Para a Consolidação Da Democracia', *Revista de Sociologia e Política*, 19.40 (2011), 43–58.

⁶¹⁸Amnesty International, *You Killed My Son: Homicides by Military Police in the City of Rio De Janeiro*, 3 August 2015
<<https://www.amnesty.org/en/documents/document/?indexNumber=amr19%2f2068%2f2015&language=en>> [accessed 5 April 2016]; Salhani; Garcia-Navarro.

⁶¹⁹Robert Gay, 'Toward Uncivil Society: Causes and Consequences of Violence in Rio de Janeiro', in *Violent Democracies in Latin America*, ed. by Daniel Goldstein and Enrique Arias (Duke University Press, 2010).

⁶²⁰J. S. Tulchin and A. Brown, *Democratic Governance and Social Inequality* (Lynne Rienner Publishers, 2002).

⁶²¹Alex Cobham and Andy Sumner, *Is It All About the Tails? The Palma Measure of Income Inequality*, Working Paper 343 (Centre for Global Development, September 2013)
<<http://www.cgdev.org/sites/default/files/it-all-about-tails-palma-measure-income-inequality.pdf>>.

⁶²²Human Development Reports: Inequality-Adjusted Human Development Index?
<<http://hdr.undp.org/en/composite/IHDI>> [accessed 8 April 2016].

⁶²³Human Development Reports: Inequality-Adjusted Human Development Index?.

⁶²⁴Marcos Mendes, *Inequality, Democracy, and Growth in Brazil: A Country at the Crossroads of Economic Development*, 1 edition (Boston, MA: Academic Press, 2014).

Below is a brief assessment of Brazil's quality of democracy, based on Morlino's key indicators.

Table 3.2 Quality of Democracy in Post-Authoritarian Brazil: An Analysis

Dimension	Brazil	Evidence
Law	Limited faith in legal system, particularly for those in the under and working classes. Persistent violence by state agents including claims of torture and forced disappearances.	Police-related violence kills six people a day, with the continued use of torture a source of significant concern. Faith in the judiciary lags behind many of the major institutions.
Accountability	Increasing demands for transparency and accountability for government corruption. However, corruption is still seen as a pervasive issue in the political sphere.	Brazil's CPI ranking is 78/168, with the perception that there is very little enforcement of the OECD Anti-Bribery Convention (2011). 30 of the 81 senators and 130 of the lower house's 513 deputies currently have cases before the Supreme Court. Accountability institutions are hampered by political meddling, lack of coordination and inter-branch rivalries.
Participation	Voting is compulsory in Brazil. Regular protest activity in response to government decisions and as a response to revelations of corruption.	Despite compulsory voting, the 2014 elections had abstention rate of 21 per cent. Protest activity has shown that there is a willingness to participate in mass mobilization efforts, though the demographics of the protests seem to indicate that these mobilization efforts are segregated by class and ethnicity.
Competition	High level of competition	Presence of multiple parties in the electoral process. Highly competitive election in 2014, with current president, Dilma Rousseff winning the second round of voting by just 3 per cent.
Freedoms	Under the 1988 Constitution, Brazilians are afforded the political rights expected from a liberal democracy.	This expression of basic rights is normally tolerated, though at the edges of Brazilian society (environmental protests in the Amazon, for example), the guarantee of these rights are less certain. No guarantee that the judicial arm of government (police/courts) will protect rights.
Equality	Universal suffrage and legal equality.	Significant issues around race and class equality, with regions dominated by ethnic minorities (Afro-Brazilians), facing significant levels of institutional racism, poverty and corruption.

Responsiveness	Government generally responsive though hampered by corruption, decentralization of services and entrenched class structure favouring the wealthy/Southern states.	Cash transfer programmes as a response to significant abject poverty. Federal focus on participatory democracy, including support for grass-roots organisations. However, as exhibited by government response to Zika virus (2015), there are severe shortcomings in state's response to crises.
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The assessment of Brazil as a semi-democracy, hampered by poverty, corruption and a deep racial and class divide, is appropriate. To attempt to argue that Brazil is a consolidated democracy ignores that, despite the cash transfer programmes, 7.5 per cent of the population lives in extreme poverty (on less than \$1.30 reais a day). This has dropped significantly during the Lula and Rousseff administrations after the development of targeted programmes, however economic growth has been uneven, and Afro-Brazilians have struggled to access educational opportunities that could shift the status quo.⁶²⁵ As pointed out by the Council on Hemispheric Affairs (COHA), “[Brazil’s] economic strength cannot withstand the weaknesses of social injustice and inequality without collapsing into the insurmountable gap between dark and light skin and between wealth and poverty.”⁶²⁶

3.5.2 Justice for Human Rights Violations in Brazil

Victims of state-sponsored CAH have faced a long wait for any significant movement towards justice. Unlike some of its neighbours, Brazil’s transition towards democracy excluded an official accounting of past. Members of the Catholic Church and victim’s organisations were left to establish a public record of the torture and other atrocities committed by the authoritarian regime.⁶²⁷ As discussed earlier, the government pursued a policy of oblivion above all else, which significantly impacted the efficacy of any transitional justice efforts.

While the conditions for justice have improved during the last decade, with the federal prosecutors willing to present cases to the courts, the government’s focus

⁶²⁵ Only 2.2% of Brazilians of African heritage have access to tertiary education. For more, see: COHA, ‘Income Inequality and Poverty: A Comparison of Brazil and Honduras’, *COHA*, 2015 <<http://www.coha.org/income-inequality-and-poverty-a-comparison-of-brazil-and-honduras/>> [accessed 17 April 2016].

⁶²⁶ COHA, ‘Income Inequality and Poverty’.

⁶²⁷ Dassin; Arquidiocese de São Paulo.

has shifted to truth rather than punitive measures.⁶²⁸ Despite recommendations from the CNV that perpetrators of CAH be prosecuted,⁶²⁹ Rouseff has argued that truth is sufficient. “Truth doesn't mean vengeance. Truth mustn't be the source of hatred or score-settling ... Truth frees us all from that which went unsaid. It frees us from what remained hidden.”⁶³⁰ This focus on the truth above all else has been a consistent feature of debates around the amnesty law; with Weichert pointing out that there has been a tacit agreement between civilian leaders and the military around the permanence of the amnesty law.⁶³¹ The CNV challenged this status quo, leading to a rare visible rupture between the government and military. However, the essence of the pact between former foes remained intact, and there have been very few attempts to seek punitive action against former government agents. The impunity persists.

There are exceptions to the judicial resistance to transitional justice. In 2012 Colonel Carlos Alberto Brilhante Ustra, described as the “master of life and death”⁶³² in Sao Paulo, was found guilty of human rights violations in a civil lawsuit. This court decision was confirmed in 2014, despite appeals by Ustra. Ustra died in October 2015. In a sign of continuing tension around the legacy of the authoritarian regime, federal deputy Jair Bolsonaro dedicated his vote to impeach Dilma to the memory of Ustra.⁶³³ In January 2015, federal charges were filed against Lício Maciel and Sebastião Curió Rodrigues de Moura in relation to the deaths of the Araguaia rebels. As of April 2016, the case is still to be decided.⁶³⁴

The table below examines the state of justice for CAH, using the quality of justice indicators established in the introduction.

⁶²⁸Jenny Barchfield, ‘Report Describes Brazil’s Crimes against Humanity, Political Killings, Torture (+video)’, *Christian Science Monitor*, 10 December 2014 <<http://www.csmonitor.com/World/Latest-News-Wires/2014/1210/Report-describes-Brazil-s-crimes-against-humanity-political-killings-torture-video>> [accessed 18 April 2016].

⁶²⁹Barchfield.

⁶³⁰Dilma Rouseff as quoted in Barchfield.

⁶³¹Weichert, personal interview.

⁶³²‘Feared Brazil Ex-Army Intelligence Chief Brilhante Ustra Dies’, *BBC News* <<http://www.bbc.com/news/world-latin-america-34546418>> [accessed 20 April 2016].

⁶³³‘Bolsonaro Dedicar Voto Ao Coronel Brilhante Ustra, Torturador Da Ditadura’, *Portal Fórum*, 2016 <<http://www.revistaforum.com.br/2016/04/17/bolsonaro-dedica-voto-ao-coronel-brilhante-ustra-torturador-da-ditadura/>> [accessed 20 April 2016].

⁶³⁴Matt Sandy, ‘“Sole Survivor” Recalls Jungle Conflict with Military in Brazil’, *BBC News* <<http://www.bbc.com/news/world-latin-america-35251124>> [accessed 21 April 2016].

Table 3.3: Quality of Transitional Justice in Contemporary Brazil

Characteristic	Brazil	Examples
Fairness	Limited	Amnesty law is applied universally, though there are criticisms of how and why law was introduced and maintained.
Equality of Application	Equally applied	Application of amnesty is applied in blanket manner. Some marginal cases challenging impunity have been successful, however in 2010 the STF reaffirmed the validity of the amnesty law.
Law	Legal	The Amnesty law is viewed as legal, and has been reinforced by the STF. The 1988 Constitution was written by the civilian leadership, and stipulates reparations for victims of CAH.
Legitimacy	Weakening	Recent surveys show around 50 per cent of Brazilian's interested in revoking the impunity enshrined in the amnesty law, despite STF refusal to do so. The CNV and memorialization has increased awareness of the authoritarian regime's crimes, and therefore has begun to delegitimize the impunity.

One of the most significant issues facing the Brazilian justice system, both in relation to transitional justice as well as criminal justice in general, is the deteriorating legitimacy of the judicial system. Brazilians generally have low opinion of the courts, influenced by the perception that the law favours the wealthy,⁶³⁵ and this is compounded by concerns over targeted violence committed by police and security forces.⁶³⁶ According to some observers, the Brazilian police force was less violent under the dictatorship than they are now.⁶³⁷ Impunity for state violence persists well beyond the parameters of the amnesty law and is considered a contemporary justice problem as much as a transitional-justice one.

⁶³⁵Fernando Filgueiras, 'Perceptions on Justice, the Judiciary and Democracy', *Brazilian Political Science Review*, 7.2 (2013), 62–87.

⁶³⁶Salhani.

⁶³⁷Jens Glüsing, "'Worse Than Gangs': Rio Police Criticized for Favela Crackdowns", *SPIEGEL ONLINE* <<http://www.spiegel.de/international/world/rio-police-crack-down-on-drug-gangs-in-favelas-ahead-of-world-cup-a-926719.html>> [accessed 21 April 2016].

3.6 Perspectives on the tension between justice, amnesty and democracy

After decades of muted discussion on transitional justice, Brazil's various interest groups have been forced to confront their perceptions of the transition process and the possibility of a change to the status quo. On the one hand, the response by different groups has bordered on predictable, with military and conservative elites espousing the doctrine of national security and protection of Brazilian interests as justification for the coup. On the other hand, human rights organisations, the Church and victims' groups have strenuously advocated for greater official action in the sphere of justice for past CAH. In between these two extremes lies a political class that adheres to both the established norm of civil-military relations and has supported official truth gathering efforts such as the CNV.

According to H₂, amnesty becomes widely acceptable with time as the demographics of the population shift. The threads of discourse presented below illustrate that the trajectory of the Brazilian experience refutes the expectation that the demands for justice will fade with time. Evidence indicates that the debate around amnesty legislation has experienced a period of intensification in the last 10 years peaking with the completion of the CNV in 2014. Observers are now waiting to see if this truth telling exercise has a lasting impact in a country currently focused on significant financial and political corruption scandals.⁶³⁸ Personal interviews, public statements and position documents have all informed the examination of H₁ in relation to the Brazilian case study. It's clear from the emergence of victim's rights groups in the last decade that the debate around justice in Brazil is ongoing, despite fluctuating levels of interest in the current contentious political climate.

3.6.1 Military Perspectives

The ability to understand the military perspective on transitional justice is limited by the Army Disciplinary Regulations (*Regulamento Disciplinar do Exército*, RDE), which explicitly prohibits active duty officers from commenting on political matters.⁶³⁹ I was unable to interview any active duty military officers while in Brazil. However, statements issued by the military institution, by the

⁶³⁸Weichert, Personal Interview.

⁶³⁹*Regulamento Disciplinar do Exército, Decreto N 4.346, 2002*
<http://www.planalto.gov.br/ccivil_03/decreto/2002/D4346.htm> [accessed 4 May 2016].

retired officers organisation (the *Clube Militar*) and by officers going against the RDE as well as official interviews given to military researchers, informs the following section. The Brazilian military complex, including both the civil and military police, has maintained the view that the Brazilian coup was necessary to prevent the national descent into social and institutional chaos.⁶⁴⁰ This so-called National Security doctrine is typical of both the time - the height of the Cold War, and place. Several Latin American military institutions offered the same reasoning for their intervention in the political process.⁶⁴¹ While Brazil has been under civilian control for 32 years, the military's reasoning for the coup has remained unchanged. The National Security doctrine remains part of the military's reasoning for the "democratic revolution", as taught at the Superior War School (*Escola Superior de Guerra*, ESG) and the date of the coup, the 31st of March, has been institutionally commemorated as the day that the military came to Brazil's rescue.⁶⁴² Periodically, these celebrations are marked in a manner to garner national attention, though at other times the celebratory efforts are muted in deference to the national mood around the coup.

In general, the armed forces have defended themselves against charges of CAH with two arguments. The first prong of their defence has consistently been that the CAH were committed by rogue officers and did not reflect an institutional policy towards the left.⁶⁴³ In 1969, for example, the military regime released a statement insisting that claims of torture were "promoted by international agents of subversion and harboured by a morbid and sensationalist sector of the foreign press."⁶⁴⁴ Since then, leaders have either denied awareness of torture, or claimed that torture was committed by a handful of officers acting outside of official orders.⁶⁴⁵ This defence has been weakened by the sheer weight of the evidence of

⁶⁴⁰Fernando da Silva Rodrigues and Cláudio Beserra de Vasconcelos, 'Brazilian reserve officers and the defense of the institutional memory of "March 31, 1964"', *História Unisinos*, 18.3 (2014), 514–28; Motta.

⁶⁴¹Scott Mainwaring and Anibal Perez-Linan, *Democracies and Dictatorships in Latin America: Emergence, Survival, and Fall* (Cambridge University Press, 2014).

⁶⁴²Rodrigues and Vasconcelos.

⁶⁴³Mezarobba, 'Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil'.

⁶⁴⁴James Green, *We Cannot Remain Silent: Opposition to the Brazilian Military Dictatorship in the United States* (Duke University Press, 2010), p. 164.

⁶⁴⁵Martha K. Huggins, 'Legacies of Authoritarianism: Brazilian Torturers' and Murderers' Reformulation of Memory', *Latin American Perspectives*, 27.2 (2000), 57–78.

an institutional policy that emerged both during the dictatorship and in the years since.⁶⁴⁶

The second prong of justification has been a consistent element of the military's response to accusations of torture since 1964; that is, the "excesses" were justified as a natural response to the violence being committed by the subversives.⁶⁴⁷ Martha Huggins' interviews with former police and military officers are illustrative of the reasoning behind the use of violence during interrogations. Among a number of identified reasons – blaming individuals, professionalism, diffusing responsibility and just cause – the latter provides insight into the institutional justification of the torture and deaths of dissidents. As pointed out by one participant "We worked as if at war. We were patriots, we were defending our country, we were proud of that, so they were adversaries, the enemy. We were proud of what we did...working in DOPS...that pride of ridding the country of a threat, of a communist regime..."⁶⁴⁸ After pictures of a naked torture victim were published in 2004, the Army released a statement justifying the imprisonment and torture of members of the left by arguing that it was "a legitimated response to violence of those who refused dialogue (...) and took the initiative to arm themselves."⁶⁴⁹

Since 1984, members of the armed forces have insisted that the amnesty law closed the door on discussions around the crimes of the regime. This belief is clear in a series of interviews conducted by Celso Castro and Maria Celina D'Araujo. The fourteen in-depth interviews with politicians and military officers illustrate the discourse around the military's role in Brazilian politics and include questions around the dictatorship, transition and amnesty. In one interview, Airforce General Mauro José Miranda Gandra argued that amnesty as a process was about

⁶⁴⁶Dias and others; Barchfield; Arquidiocese de São Paulo; Jonathan Watts and Jan Rocha, 'Brazil's "Lost Report" into Genocide Surfaces after 40 Years | World News | The Guardian', *The Guardian* (London, England, 29 May 2013) <<http://www.theguardian.com/world/2013/may/29/brazil-figueiredo-genocide-report>> [accessed 26 April 2016].

⁶⁴⁷Huggins; João Roberto Martins Filho and Timothy Thompson, 'The War of Memory: The Brazilian Military Dictatorship According to Militants and Military Men', *Latin American Perspectives*, 36.5 (2009), 89–107.

⁶⁴⁸Huggins, p. 67.

⁶⁴⁹Maria Helena de Castro Santos, 'The Brazilian Military in Post-Democratic Transition*', *Revista Fuerzas Armadas y Sociedad*, 18.3/4 (2004), 115–46 (p. 137).

definitively turning a page as a nation.⁶⁵⁰ The former minister of the Navy during Cardoso's administration, Mauro César Rodrigues Pereira, claimed that amnesty was "a way to settle what normal efforts had been unable to resolve."⁶⁵¹ Pereira articulated an oft-claimed point: that the amnesty law was two-sided, and if revoked, the punishment needed to be two-sided as well.

This entrenched disdain for transitional and post-transitional justice came to head with Lula's PnDH-3, and Rousseff's subsequent push for the CNV. Lula's official proposal was quickly followed by the threat of four high-profile resignations (the minister of defence, Nelson Jobim, and three high ranking military officials). The reasoning behind this threat was the belief that any move against the amnesty law was a direct attack against the military forces, and an act of revanchismo, or revenge taking.⁶⁵² Lula backed off, compromising on the wording of the controversial section of the PnDH-3. The driving force behind the proposal, the Special Minister of Human Rights Alexandre Leme Vannuchi, denied that there was vindictive intent towards the armed forces.⁶⁵³ Rousseff faced the same resistance to her proposal of a Truth Commission; with the legislation moving through the Brazilian Congress only after the emphasis was placed on truth above all else, and after the military was assured that the commission would have no prosecutorial powers.⁶⁵⁴

Senior military reluctantly participated in an audit of documents as part of the CNV process.⁶⁵⁵ However, by the release of the final report by the CNV in December 2014, military officials had coalesced around the belief that the process was a political exercise in revenge taking. Unusual for Brazil, some of these attacks came from generals on active duty, including statements made by General Sérgio

⁶⁵⁰ *Militares e política na Nova República*, ed. by Celso Castro and Maria Celina D'Araujo (Rio de Janeiro: Fundação Getúlio Vargas, 2001).

⁶⁵¹ Castro and D'Araujo, p. 282.

⁶⁵² Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil'.

⁶⁵³ Nina Schneider, 'Truth No More? The Struggle over the National Truth Commission in Brazil', *IBEROAMERICANA*, 11.42 (2011), 164–70.

⁶⁵⁴ Manuela Picq, 'Building Truth in Brazil - Al Jazeera English', *Al Jazeera* (Online, 6 December 2011) <<http://www.aljazeera.com/indepth/opinion/2011/12/2011125101215630312.html>> [accessed 28 April 2016].

⁶⁵⁵ Par Engstrom, 'Brazilian Post-Transitional Justice and the Inter-American Human Rights System' (presented at the Latin American Centre Seminar Series, St Antony's College, Oxford, 2014), p. 14 <https://www.academia.edu/6116388/Brazilian_Post-Transitional_Justice_and_the_Inter-American_Human_Rights_System> [accessed 9 December 2016].

Etchegoyen whose father was on the list of the 377 agents accused by the CNV of crimes during the dictatorship.⁶⁵⁶ The *Clube Militar*, an organisation of retired and current military officers, released two statements on the CNV, the first of which was deleted. The second press release focused on the universality of the Amnesty law, and criticised the CNV for focusing solely on the crimes committed by the state.⁶⁵⁷ Gilberto Pimentel, the General of the Reserves and president of the *Clube Militar*, argued that the proposal by the CNV to revise the amnesty law was unacceptable to the military institution.⁶⁵⁸

The Superior Military Tribunal (*Superior Tribunal Militar*, STM) released a statement disputing sections of the CNV report that were critical of the court. The STM called the report “false, unfair and wrong” in calling the military justice as “the judicial rear guard to repression” and in describing the court as being “tolerant or remiss with respect to allegations of serious violations of human rights.”⁶⁵⁹

3.6.2 Perspectives of the Political Elites

Brazil’s experience over the last five decades has, in many respects, been an exercise in the “instrumentalization and abuse of memory.”⁶⁶⁰ Political scientist Holly Ryan argues that political elites gave primacy to the military’s narrative. “Here, the military, some mainstream media and even the first civilian governments armed themselves with an ‘authorised’ history that undersold the violence of the *ditadura* and spoke to the interests of the armed forces.”⁶⁶¹ While Ryan argues that there has been a significant shift in the Lula and Rousseff administrations, others are more sceptical. According to Marlon Weichert, a federal prosecutor and key actor in the recent legal challenges to the amnesty law, the political elites in Brazil

⁶⁵⁶Anderson Gabino, ‘General Da Ativa Contesta Comissão Da Verdade Em Nota’, *Revista Operacional* <<http://www.revistaoperacional.com.br/2014/exercito/general-da-ativa-contesta-comissao-da-verdade-em-nota/>> [accessed 1 May 2016].

⁶⁵⁷Wm! Estúdio- www.wmestudio.com.br, ‘NOSSA OPINIÃO – Sobre a Anistia’, *Clube Militar* | <<http://clubemilitar.com.br/nossa-opiniao-sobre-a-anistia/>> [accessed 1 May 2016]; Tania Monteiro and Wilson Tosta, ‘Militares repudiam relatório da comissão - Política’, *Estadão* (São Paulo, SP, Brasil, 11 December 2014) <<http://politica.estadao.com.br/noticias/geral,militares-repudiam-relatorio-da-comissao,1605184>> [accessed 1 May 2016].

⁶⁵⁸Monteiro and Tosta.

⁶⁵⁹EFE, ‘Tribunal Militar Brasileño Critica El Informe Final de La Comisión de La Verdad’, *Eldiario.Es*, 15 December 2014 <http://www.eldiario.es/politica/Tribunal-brasileno-critica-Comision-Verdad_0_335267495.html> [accessed 2 May 2016].

⁶⁶⁰Holly Eva Ryan, ‘From Absent to Present Pasts: Civil Society, Democracy and the Shifting Place of Memory in Brazil’, *Journal of Civil Society*, 2016, 1–20 (p. 11).

⁶⁶¹Ryan, p. 11.

have generally continued to support the pact with the armed forces that allowed for the transition, that is, a general amnesty in exchange for civilian control.⁶⁶²

the deal that was made during the 1980s and is always reiterated when you have a new government, is that civil government will not deal with the past, I mean promoting justice or any kind of accountability for wrong doings in the past. And, in exchange, the military will respect the civil government...so even Dilma, as a former leftist guerrilla involved in the former armed movements against the dictatorship, you can see it's hard for her but she is respecting this deal.⁶⁶³

A slow and steady shift toward accepting some of the most basic processes of transitional justice such as reparations and truth mechanisms, has emerged from within the political discourse. However, even the smallest shifts in the policy can descend into a politically charged debate over history, vengeance and the right to justice.⁶⁶⁴ The reactionary nature of the transitional justice discourse reflects two key features of Brazil's political elite. First, the political elites are representative of the highly polarized nature of Brazilian society.⁶⁶⁵ Those on the left and right exert greater control of the political sphere than the "middle" in Brazil, with each side pulling strongly towards their own interest groups. Second, both emerging from and perpetuating this polarization, the "truth" about the causes of the coup, the authoritarian period in general and the transition, remains heavily contested.⁶⁶⁶ Without an official accounting of the 1964 – 1984 era, the political elites have been left to establish their own narrative of the authoritarian period.

The muted response to Cardoso's 1995 Special Commission for Political Deaths and Disappearances, which barely received any press coverage and was supported and repudiated in almost equal measure by the political elites,⁶⁶⁷ was indicative of the willingness of elected officials and state organisations to address questions of state responsibility for previous CAH. The key sources of public

⁶⁶²Weichert, Personal Interview.

⁶⁶³Weichert, Personal Interview.

⁶⁶⁴Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil'; Nina Schneider, 'Truth No More?'

⁶⁶⁵Simon Romero, "'Bullet Caucus' in Brazil Signals Political Shift to the Right', *The New York Times*, 14 January 2015 <<http://www.nytimes.com/2015/01/15/world/americas/bullet-caucus-in-brazil-signals-a-shift-to-the-right.html>> [accessed 10 May 2016]; Simon Romero, 'Conservative's Star Rises in Brazil as Polarizing Views Tap Into Discontent', *The New York Times*, 7 May 2016 <<http://www.nytimes.com/2016/05/08/world/americas/conservatives-star-rises-in-brazil-as-polarizing-views-tap-into-discontent.html>> [accessed 10 May 2016].

⁶⁶⁶Atencio; Filho and Thompson; Huggins; Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil'; Rodrigues and Vasconcelos.

⁶⁶⁷Nina Schneider, 'Waiting for (an) "Apology": Has Post-Authoritarian Brazil Apologized for State Repression?', *Journal of Human Rights*, 13.1, 69–84.

repudiation of Cardoso's transitional justice programme were established political elites, the Supreme Court and military officials.⁶⁶⁸

The first real test of political willingness to address the historic CAH emerged in 2001 with the proposal and establishment of the Amnesty Commission (AC). The purpose of the commission was to judge reparation claims, with a focus on Brazilians who had been, due to political persecution, inhibited from "exercising economic activities" between 1946 and 1988.⁶⁶⁹ While lauded as the linchpin of Brazil's transitional justice efforts, others have criticised the uneven reparations programme that reflected class inequities.⁶⁷⁰ Under the stewardship of Abrão, the focus of the commission expanded to include the nation-wide Amnesty caravans, which involved public hearings and apologies from members of the commission. According to Torelly, who was a member of the AC, the Minister of Human Rights asked Abrão to

...reformulate the public policy that the commission was [following] in order to encompass a greater level of moral and symbolic redress, and analyse how the commission can reconnect with the political agenda of the social movements that were connected to the struggle for amnesty.⁶⁷¹

The caravans were "a way to address, to get a better result in terms of moral and symbolic reparations. The commission started to apologise...and started several measures in order to address this dimension."⁶⁷² While some commentators have questioned whether the government sanctioned these apologies,⁶⁷³ the effect of the public hearings was to raise awareness of the CAH, and to put pressure on political supporters of the amnesty law. For their part, political elites have pushed back against efforts to remove the amnesty law by arguing that the law allowed for reconciliation and to alter it would lead the nation down a path of *revanchismo* or revenge taking.⁶⁷⁴ The emphasis on reconciliation has been at the forefront of

⁶⁶⁸Nina Schneider, 'Waiting for (an) "Apology": Has Post-Authoritarian Brazil Apologized for State Repression?'

⁶⁶⁹Ann Schneider, 'Amnestied in Brazil, 1895--1985'.

⁶⁷⁰Paulo Abrão and Marcelo D. Torelly, 'The Reparations Program as the Linchpin of Transitional Justice in Brazil', in *Transitional Justice: Handbook for Latin America*, ed. by Félix Reátegui (Brasília and New York: Brazilian Amnesty Commission/Ministry of Justice and International Center for Transitional Justice), pp. 443–85; Glenda Mezarobba, 'O preço do esquecimento: as reparações pagas às vítimas do regime militar (uma com- paração entre Brasil, Argentina e Chile)' (unpublished Ph.D dissertation, University of São Paulo, 2007).

⁶⁷¹Torelly, Personal Interview.

⁶⁷²Torelly, Personal Interview.

⁶⁷³Nina Schneider, 'Waiting for (an) "Apology": Has Post-Authoritarian Brazil Apologized for State Repression?'

⁶⁷⁴Atencio.

political discourse around both the amnesty legislation and transitional justice. Even with the Amnesty Commission, “the very name - ‘Amnesty’ instead of ‘Reparations’ Commission—associates reparations payments with the conciliatory framework set by the 1979 amnesty.”⁶⁷⁵

The battle over transitional justice amongst the political elites is ongoing. As discussed above, Lula’s proposal for the PnDH-3 was met with significant resistance from members of his own cabinet, including the threat of resignation by the then Minister of Defence, Nelson Jobim. In 2011, conservative senators rejected the first version of the law creating the truth commission (PLC 88/2011), arguing that it illegally circumvented the 1979 amnesty law.⁶⁷⁶ A number of changes were made, including the reduction in the number of commissioners, limiting the time that the commission would work to two years, and extending the time that the commission would cover from 1964 – 1988 to 1946 to 1988. Most importantly, conservative senators ensured the removal of any reference to the amnesty law. The eventual compromise diluted the truth commission to such a point that some senators question the objectives of the commission. Senator Pedro Taques (PDT-MB) argued that the changes to the legislation meant that the commission was a farce.⁶⁷⁷ Senator Randolfe Rodrigues (PSOL-AP) took issue with the fact that the primary stated purpose of the truth commission was to promote national reconciliation. Rodrigues argued that the commission needed to have the capacity to investigate crimes and seek some form of justice. “This is not a commission to reconcile perpetrators and victims. It is a commission to complete our process of democratic transition.”⁶⁷⁸

The final report from the CNV was received with initial fanfare but was then quickly side-lined by the deepening political crises. According to Weichert, “the truth commission handed in its work in December 2014, since then we [have] only [been] discussing corruption and the political climate and so on. We don’t have time for this subject.”⁶⁷⁹ With the impeachment of Rousseff, and the ascension of

⁶⁷⁵Nina Schneider and Rebecca J. Atencio, ‘Reckoning with Dictatorship in Brazil The Double-Edged Role of Artistic-Cultural Production’, *Latin American Perspectives*, 2016, (p. 6).

⁶⁷⁶‘Comissão Da Verdade: Senadores Querem Permitir Punição de Acusados de Crimes Contra Direitos Humanos’, *Senado Federal*<<http://www12.senado.leg.br/noticias-2/materias/2011/10/18/comissao-da-verdade-senadores-querem-permitir-a-punicao-de-acusados-de-crimes-contra-direitos-humanos>> [accessed 10 July 2016].

⁶⁷⁷‘Comissão Da Verdade’.

⁶⁷⁸‘Comissão Da Verdade’.

⁶⁷⁹Weichert, Personal Interview.

conservative Michel Temer as interim president in May 2016, the human rights agenda of the Brazilian government has been relegated to the backburner. The Ministry of Human Rights has been folded back into the Ministry of Justice, leaving observers uncertain of the path forward in terms of future political and legal challenges to the amnesty law.⁶⁸⁰

3.6.3 The Legal Community

The legal community in Brazil is clearly divided along institutional lines. The judiciary, and in particular the Supreme Court (STF), has remained steadfastly conservative; supportive of the narrative of the coup as a revolution, and the amnesty law as the key tool for national reconciliation.⁶⁸¹ On the other hand, the key organisation representing lawyers, the OAB, has long been a vocal proponent for changes to the amnesty law, arguing for more significant measures of justice.⁶⁸²

This division within the legal community has existed from the initial stages of the dictatorship, with the courts lending legitimacy to the authoritarian regime's actions. In turn, the regime's leaders allowed the courts a level of autonomy, leading to what Anthony W. Pereira calls "a high degree of civilian military consensus in the legal sphere."⁶⁸³ Changes to the institutional structure of the judiciary by the regime were incremental, and in response to challenges coming from political opposition.⁶⁸⁴ Political dissidents and members of the opposition were tried in military courts, however civilians staffed these trials and defendants could technically appeal to the Supreme Court. In a regional comparison with Chile and Argentina, Pereira found that Brazil's justice system was closest to what it had been prior to the coup.

The military regime did not engage in large-scale purges of the judiciary, and political prosecutions took place without radical innovations or breaks with traditional military and judicial practice – military court jurisdiction had been merely expanded to include civilians, and existing national security laws modified.⁶⁸⁵

⁶⁸⁰Weichert, Personal Interview.

⁶⁸¹*Arguição de Descumprimento de Preceito Fundamental n. 153*; Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil'.

⁶⁸²Nina Schneider, 'Impunity in Post-Authoritarian Brazil: The Supreme Court's Recent Verdict on the Amnesty Law', *ERLACS*, 90 (2011), 39–54.

⁶⁸³Anthony W. Pereira, 'Explaining Judicial Reform Outcomes in New Democracies: The Importance of Authoritarian Legalism in Argentina, Brazil, and Chile', *Human Rights Review*, 4.3 (2003), 3–16 (p. 3).

⁶⁸⁴Anthony W. Pereira, 'Political Justice under Authoritarian Regimes in Argentina, Brazil, and Chile', *Human Rights Review*, 4.2 (2003), 27–47.

⁶⁸⁵Anthony W. Pereira, p. 7.

The institutional continuity was maintained through the transition, with the court structure remaining fundamentally intact during the democratisation period. Reforms during the 1990s and 2000s were limited and the judiciary, while distrusted, was able to continue without significant interference from the executive or groups within civil society.⁶⁸⁶ During the first decade of the transition the composition of the Supreme Court was dominated by judges appointed during the dictatorship period. These authoritarian era judges were able to control the judicial response to petitions for transitional justice. With a series of early decisions, the court set the 1988 Constitution as its benchmark, making the examination of any earlier legislation, including the amnesty law, significantly more difficult.⁶⁸⁷

The Brazilian judiciary has aligned itself with the will of the executive around transitional justice, honouring the political pact between the military regime and the opposition. Significant politicisation has been a characteristic of the Brazilian justice system; however, the courts have resisted both domestic and international pressure to pursue transitional or post-transitional justice measures.⁶⁸⁸ In fact, the absence of the courts in the discourse around transitional justice have been noticeable, particularly in comparison to neighbouring countries.⁶⁸⁹

The clearest indicator of the court's perspective regarding the amnesty law and impunity can be found in the 2010 decision to maintain the existing legislation. Rather than simply affirming amnesty, the 7-2 decision expanded the law to include historical crimes that previously stood in a grey legal area.⁶⁹⁰ The ruling, written by Judge Eros Grau, affirmed the role amnesty played in the transition. Grau argued that democratisation was a product of extensive negotiations that would not have

⁶⁸⁶William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Praeger, 2000).

⁶⁸⁷Andrés del Río, 'Dictatorship, Democracy and Transitional Justice in Brazil: Trajectory and Legacies of the Federal Supreme Court', *Dados*, 57.4 (2014), 1169–1201.

⁶⁸⁸Augusto Zimmerman, 'How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal', *Int'l Trade & Bus. L. Rev.*, 11 (2008), 179; Power and Taylor; Eliane Brum, 'Brazil Is in Danger of Turning the Clock Back on Democracy', *The Guardian*, 18 March 2016, section Opinion <<https://www.theguardian.com/commentisfree/2016/mar/18/brazil-judiciary-democracy-sergio-moro-impeach-dilma-rousseff>> [accessed 13 July 2016]; Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. by Javier Couso, Alexandra Huneeus, and Rachel Sieder, 1 edition (Cambridge; New York: Cambridge University Press, 2013); Hillebrecht; Río.

⁶⁸⁹Río.

⁶⁹⁰*Arguição de Descumprimento de Preceito Fundamental n. 153*; Nina Schneider, 'Impunity in Post-Authoritarian Brazil: The Supreme Court's Recent Verdict on the Amnesty Law'.

been possible without “a firm commitment to reconciliation and national unity.”⁶⁹¹ The court also confirmed the judicial norm established in the early 1990s that enshrined the 1988 Constitution as the “original rule”.⁶⁹²

In response to the 2010 IACtHR decision to condemn the continued use of amnesty in Brazil, the president of Supreme Court, Cezar Peluso, declared that anyone convicted of crimes that had previously come under the 1979 amnesty law would be granted habeas corpus.⁶⁹³ The refusal to revoke the amnesty law has put the STF on a collision course with the IACtHR. Weichert points out that the STF’s refusal to accept the international court’s decision creates significant legal and political difficulties.

The general prosecutor is saying, look, despite the decision of 2010, we have the decision of the IACtHR, and we have to follow it because it is part of the international commitments of Brazil. The STF has to decide...It’s very complicated if the Supreme Court says we don’t have to follow the decision of the IACtHR. It would be a disaster for the entire system. They [the judges] are aware of the risk.⁶⁹⁴

There are approximately 20 cases currently before the Supreme Court that will test the status quo regarding the amnesty law. While federal prosecutors were initially cautiously optimistic regarding the push towards challenging impunity, the current political climate and shift towards conservatism has quashed some of this early optimism.⁶⁹⁵

Two organisations representing the legal community have provided consistent legal agitation against the amnesty legislation. Members of the Federal Public Ministry (Ministério Público Federal, or MPF) and the Federal Bar Association (Ordem dos Advogados do Brasil, or OAB) have been vocal opponents to the blanket impunity offered by amnesty, targeting both the law itself as well as particular elements of the law.⁶⁹⁶ These groups have added visibility to the

⁶⁹¹ *Arguição de Descumprimento de Preceito Fundamental n. 153*, para. 39.

⁶⁹² *Arguição de Descumprimento de Preceito Fundamental n. 153*; Paixão; Keith S. Rosenn, *Recent Important Decisions by the Brazilian Supreme Court* (Rochester, NY: Social Science Research Network, 8 May 2014) <<http://papers.ssrn.com/abstract=2443021>> [accessed 18 July 2016]; Ríó.

⁶⁹³ Felipe Recondo, ‘STF defende Lei da Anistia após decisão sobre Araguaia - Política - Estadão’, *Estadão*, 15 December 2010, Online edition <<http://politica.estadao.com.br/noticias/geral,stf-defende-lei-da-anistia-apos-decisao-sobre-araguaia,654094>> [accessed 18 July 2016].

⁶⁹⁴ Weichert, Personal Interview.

⁶⁹⁵ Weichert, Personal Interview.

⁶⁹⁶ *Arguição de Descumprimento de Preceito Fundamental n. 153*; Recondo; Abrão and Torelly, ‘Transformaciones Del Concepto de Amnistía En La Justicia de Transición Brasileña: La Tercera Etapa de La Lucha Por La Amnistía’; Weichert.

transitional justice agenda, often in the face of the reconciliation narrative presented by the political elites and judiciary.

The MPF, previously accountable to the executive, became an independent institution under the 1988 Constitution.⁶⁹⁷ Over the last three decades, the MPF, and its regional subsidiaries, have cultivated the public perception as the voice of institutional accountability. Indeed, Weichert argues that the MPF, along with the Amnesty Commission and the OAB, was key in removing the shroud of silence around the crimes of the dictatorship and transitional justice.

In 2007 we here in the MPF and the Amnesty Commission in Brazil started addressing all of these subjects. It was the first time civil society was open to all these subjects, or not open but it was listening [to] different voices, and not only [to] victim's voices. [They could claim that] the victims were prejudiced because they lost. But when society in general hear from public institutions, public services, the amnesty commission and the human rights commission that was just founded a few years before [the public and civil society] can see that they are some official voices, they spoke with some authority. For the first time...we unblocked the discussion, we opened the box for the first time.⁶⁹⁸

According to the traditional processes of transitional justice, Brazil was a late starter. Weichert reasons that this was because Brazil was “a very successful case of a dictatorship and a controlled transition ensuring oblivion and impunity.”⁶⁹⁹ The STF's refusal to revise the amnesty legislation has not finished the legal debate around impunity and justice. The MPF has continued to send cases challenging the MPF through the court system, with the hope for a shift in juridical approach to transitional justice.⁷⁰⁰

The OAB's resistance to the amnesty law began with reluctant acceptance before moving to active resistance. In 1979, outgoing OAB president Raymundo Faoro encouraged victims' families to accept the law as the best possible outcome. He told them “there was no real prospect for punishing torturers.”⁷⁰¹ However, Faoro's successor, Seabra Fagundes, reversed this approach. He sought accountability for torturers and failing that, the right to pursue civil suits.⁷⁰² Since then, the OAB has played a role in providing opposition to the pervasive culture of

⁶⁹⁷Monique Julien Garcia, ‘A Origem Do Ministério Público e Sua Atuação No Direito Comparado’, *Escola Superior do MP*, 2 (2012), 131–55.

⁶⁹⁸Weichert, Personal Interview.

⁶⁹⁹Weichert, Personal Interview.

⁷⁰⁰Weichert, Personal Interview.

⁷⁰¹Raymundo Faoro quoted in Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*, p. 383.

⁷⁰²Heinz and Fruhling.

impunity. In 2008, the OAB spearheaded the legal challenge to Law 6,683/1979, asking the STF to assess the validity of amnesty for CAH. The decision to reject this position has not changed the long-term goal of the OAB, with continued efforts by the organisation to challenge the law through the courts.⁷⁰³

Weichert describes the political silence around the crimes of authoritarian regime and by extension, amnesty, as a block to any real discussion on transitional justice from within academia or even organisations in the civil society. He argues that the early reparations programmes were disconnected from the framework of transitional justice.

The subject was so blocked, even in academia. Since 2008, there has been an explosion...and it's very important to see that in 2008, 2009 Data Fohla conducted a poll asking civil society if they knew that we had an amnesty law and if they were in favour of removing [it]. The answer was, look, we don't know what the amnesty law is, and we're not in favour of prosecuting the perpetrators. And, in 2014, the Data Fohla conducted a second poll during the 50th anniversary of the coup, and the answer was just the opposite. Civil Society was aware of the amnesty and, of those that were aware, more than 50 per cent were in favour of accountability. It's about information and giving information to civil society in the process of the truth commission.⁷⁰⁴

Weichert argues that the decade's silence around transitional justice was shattered by the legal efforts of the OAB and MPF as well as the awareness raised by the Amnesty Commission caravans. "In my opinion, the truth commission in Brazil is a process [begun] in 2007. It's a process but [one that is] an outcome of civil society engagement with truth commission and not a decision of the government."⁷⁰⁵ The legal progress, however, is dependent on the political climate, with Brazil's turn towards the right raising serious concern regarding the potential judicial outcomes.⁷⁰⁶

With the explosion of interest in transitional justice issues, Weichert has begun to reflect on the role amnesty has had in terms of Brazil's current issues with democratic structure. Impunity, according to Weichert, is part of Brazil's political landscape, reflected in the widespread and tolerated corruption. This is an extension

⁷⁰³Yi Shin Tang, 'International Justice through Domestic Courts: Challenges in Brazil's Judicial Review of the Amnesty Law', *International Journal of Transitional Justice*, 2015; 'Bar Association of Brazil Strategizes Changes to Amnesty Law', 2013 <<https://oliveiralawyers.com/news/business-law/bar-association-of-brazil-strategizes-changes-to-amnesty-law/>> [accessed 2 August 2016].

⁷⁰⁴Weichert, Personal Interview.

⁷⁰⁵Weichert, Personal Interview.

⁷⁰⁶Weichert, Personal Interview.

of the deal made between government and the military, he argued. “[it’s a matter of] you don’t hit me and we won’t hit you.”⁷⁰⁷ Democracy, he pointed out, can only tolerate so much unanswered illegal activity.

Yes, it is possible to have a democracy [with amnesty]. But the question is: what kind of democracy? I think a democracy cannot survive impunity for human rights abuse. Even if you believe that criminal law and criminal accountability should be for only very specific cases, human rights cases should be the very first place. [We need to consider] how it effects the equality principal, how it effects the idea officials being subject to control, all these essential values of a democracy. So, a formal, political democracy is possible, but not a substantive, complete democracy. A strong democracy without truth and without accountability for all the HRV, I think it’s not possible.⁷⁰⁸

3.6.4 Perspectives of Organisations in Civil Society

During the first two decades after the transition, organisations emerging from within civil society were generally muted compared to those in neighbouring states. The initial impact of the secret publication of *Nunca Mais*,⁷⁰⁹ the secret report on state sponsored torture published in 1985 by the Archdiocese of São Paulo, failed to significantly propel the transitional justice debate forward, despite becoming a bestseller across the country.⁷¹⁰ In part, this muted response is tied to the nature of the slow, controlled transition with a narrative dominated by the government-sanctioned silence and the lack of moral imperative expressed by the government and society at large.⁷¹¹ Many organisations within civil society were fragmented and focused on the democratisation process. Any real transitional justice effort was left to families of victims and to groups within the labour movements.⁷¹²

Brazilian researcher and academic Maria do Socorro Sousa Braga disagrees with Weichert’s assessment of transitional justice and argues that, despite the efforts by the Amnesty Commission and other organisations to raise awareness,

People in Brazil generally don’t care about what happened, many don’t know what happened. The process, the transition process can explain why it’s like that. We took a different route; it took 10 years and led by the military – slow, gradual and

⁷⁰⁷Weichert, Personal Interview.

⁷⁰⁸Weichert, Personal Interview.

⁷⁰⁹Arquidiocese de São Paulo; Dassin.

⁷¹⁰Atencio.

⁷¹¹David Backer, ‘Civil Society and Transitional Justice: Possibilities, Patterns and Prospects’, *Journal of Human Rights*, 2.3 (2003), 297–313.

⁷¹²Abrão and Torelly, ‘Resistance to Change: Brazil’s Persistent Amnesty and Its Alternatives for Truth and Justice’.

secure. The truth is that a big part of the population has a positive memory of the dictatorship, that it helped the country avoid the communist threat.⁷¹³

Torelly suggests that a profound distrust in the criminal justice system has influenced the behaviour of organisations from within civil society, and their reluctance to pursue transitional justice through the courts.

The civil society in Brazil never decided to use justice, they didn't trust the justice system... because the justice system strongly supported military rule, implemented what Anthony Pieria called authoritarian legality and hasn't been reformed after military rule. The last judge appointed by the military retired in 2003. So this is key to understand why the victims didn't trust [the system]. It's possible to say that the movement for the dead and disappeared made mistakes in not accessing justice earlier, but it's also true to say that there are reasons not to believe that the justice system was an alternative.⁷¹⁴

Regardless of this reluctance to engage with the institutional structure of democratic Brazil, organisations emerging from civil society have become increasingly vocal regarding the state of Brazil's transitional justice process. This has emerged parallel to government transition justice efforts, and has been helped by some government ministries, particularly the MPF.⁷¹⁵ The Torture Never More Group (*Grupo Tortura Nunca Mais*, GTNM), has publically advocated for access to archives documenting the crimes of the authoritarian regime, as well as seeking expanded health and psychological care for torture victims.⁷¹⁶ In an article marking the 50th anniversary of the coup, advocate Cecilia Maria Bouças Coimbra wrote that

We continue the resistance, because the crimes committed by state terrorism remain little known and the documents proving these atrocities remain secret, as well as the testimonies of those who have committed such crimes. The silence around the dictatorship continues
...⁷¹⁷

The focus on information about the CAH committed by the authoritarian regime above other measures of justice is indicative of the options available to

⁷¹³Maria do Socorro Sousa Braga, Personal Interview, Universidade Federal de São Carlos, São Carlos, Brazil, 08/03/2011.

⁷¹⁴Torelly, Personal Interview.

⁷¹⁵Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁷¹⁶Grupo Tortura Nunca Mais RJ | O Grupo Tortura Nunca Mais Do Rio de Janeiro (GTNM/RJ) Fundado Em Abril de 1985, Tornou-Se Uma Referência No Cenário Nacional e Internacional, Por Sua Luta Pela Memória Do Período Da Ditadura Civil-Militar, Contra a Tortura e Em Defesa Dos Direitos Humanos' <<http://www.torturanuncamais-rj.org.br/>> [accessed 18 August 2016]; 'Grupo Tortura Nunca Mais | World Without Torture' <<https://worldwithouttorture.org/tag/grupo-tortura-nunca-mais/>> [accessed 18 August 2016].

⁷¹⁷Cecilia Maria Bouças Coimbra, '50 Anos Depois: A Resistência Continua... | Grupo Tortura Nunca Mais RJ', *Grupo Tortura Nunca Mais/RJ*, 2014 <<http://www.torturanuncamais-rj.org.br/artigo/50-anos-depois-a-resistencia-continua/>> [accessed 18 August 2016].

organisations from within civil society, and a reflection of the pace of transitional justice in Brazil. In Chile and South Africa, the narrative around the dictatorship was established early, with truth commissions taking place within five years of the transition. While these narratives may be contested, the truth commissions established an official account of the past. In Brazil, this official accounting of the authoritarian regime began over 25 years after the transition. This has meant that much of the focus for transitional justice has been on access to the truth.

The table below outlines the opinions regarding the justice process expressed in personal interviews with politicians, human rights lawyers and victims' groups, and public statements made by members of the above groups, as well as by the military and judiciary.

Table 3.4: Long-term opinions regarding justice, amnesty and democracy

Accountability Actors	Justice	Amnesty	Democracy
Military	Not necessary. Crimes limited to rogue officers and legitimate action against communist threat. General refusal to fully cooperate with CNV.	Fundamental element of the transition. Benefits both sides, non-negotiable and originally fought for by the left, therefore mandated by populace.	Shaped by military prerogatives. Military no longer poses direct threat to institutional structure with widespread professionalization.
Political Elites	Generally resistant to domestic and international pushes for justice. Not considered part of the current political agenda, despite findings and recommendations of the CNV. Government initiatives have included some memorialization of victims, reparations and truth gathering.	Amnesty viewed as a fundamental element of democratization process and therefore is entrenched in the system. No significant moves to review or revoke amnesty law.	Institutional structure of democracy currently challenged by significant corruption scandals including the impeachment of President Dilma Rousseff.
Judiciary (lawyers)	Possibly the most active in pursuing traditional transitional justice measures. Via the MPF, OAB as well as the efforts of individual lawyers, the legality of impunity has been challenged in court in an effort to create a pathway for justice.	Have challenged legality of amnesty via petition to STF and individual court cases. View amnesty law as illegal in accordance with national and international legal norms.	Supportive of democratic institutions.
Judiciary (Courts)	Have aligned with executive in terms of resisting transitional justice measures. Top court rejected challenges to the amnesty law and also declined to act on the inter-American court recommendations	Have maintained amnesty legislation, arguing that it is a cornerstone legislation that made democracy possible.	Politicized, however supportive of democratic institutions.
Victims Groups/HROs	Believe that even the minimal standard of	Initially supportive of amnesty for	Argue that democracy is failing

	transitional justice – truth – has not been met.	dissidents however opposed the expansion of law to include military and government operatives. Have since been part of the coalition calling for the law’s removal.	victims with a continued institutional amnesty for government-sponsored violence (both during authoritarian regime and the democratic period).
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The delayed truth commission has had a significant impact on the course of transitional justice in Brazil. Without an official narrative of the events immediately after the authoritarian regime, civil society have been left to first try and establish ‘truth’ before being able to gain justice. While the legal community has driven the process forward, the military, judiciary and political elites have limited progress by refusing to change the amnesty law, and by limiting access to evidence of past events.

3.7 Conclusion: Examining Brazil in Relation to Hypotheses

Brazil’s attempts at ignoring the past in favour of developing a new democratic institutional structure are instructive in illustrating what an enshrined amnesty legislation can mean to a democracy three decades after a transition. Between 1964 and 1985 there was, overall, a limited awareness of the violence committed by the dictatorship. The lives of many Brazilians continued, and even flourished, regardless of the authoritarian leadership of the country. A semblance of democratic machinery occasionally emerged from within the political apparatus however, it was eventually clear that a full democratic transition was inevitable. The military took control of the process, ensuring the continuation of military prerogatives long after the reestablishment of democracy. The amnesty legislation, first advocated for by victims and their families, eventually included measures of impunity for CAH committed by the state. Despite the advent of democratic institutions and culture, political elites held firm on the pact that allowed the process of democratization to begin. Time and time again, Brazil’s presidents have refused to engage with groups demanding justice beyond the constitutionally mandated reparations. The Ministry of Justice’s Amnesty Commission and subsequent Amnesty Caravans were able to raise some awareness, though the apologies given by members of the travelling commission fell short of any official government repentance and were critiqued for

being too political. Until 2012, there was no official narrative on the crimes committed by the former authoritarian regime and even the report delivered by the government-sponsored truth commission in 2014 received only the minimum level of acceptance from some quarters. Despite recommendations by the truth commission to repeal the amnesty law, the government returned to the political status quo and continued to support amnesty and the bargain that was struck in 1979. Any developing discourse around transitional justice has since been muted by a series of corruption scandals, one of which led to the impeachment of Brazil's first female president, Dilma Rousseff. The national political focus has firmly moved beyond the truth commission's findings, leaving Brazil's transitional justice process in a state of flux.

What then, does this current state of affairs mean for the three hypotheses that form the foundation of this research?

H₀ presents the argument that amnesty legislation is compatible with the expectations and norms of an entrenched liberal democracy. In the case of Brazil, the sustainability of the amnesty law has benefited from a general lack of official discourse around the military regime's violent crimes. Oblivion has allowed amnesty to continue, however this has not necessarily helped the development of an entrenched democratic structure. The maintenance of military prerogatives without significant question, ongoing impunity for crimes committed by police and military members during the democratic era, and persistent concerns over corruption have all undermined the perception and reality of Brazil's democracy. As pointed out by Koerner, the amnesty law has become "a blank card for police, even today. There is a continued tolerance of the sorts of crimes that had been amnestied."⁷¹⁸ Many of the quality of democracy indicators used to assess the depth of a state's democratic development show a faltering democratic system when applied to Brazil.⁷¹⁹ Weichert argues that while it is possible to have both democracy and amnesty, the latter has had a significant detrimental impact on the depth of Brazil's institutions.⁷²⁰

⁷¹⁸Koerner, Personal Interview.

⁷¹⁹Leonardo Morlino, 'Qualities of Democracy: How to Analyze Them' (Istituto Italiano di Scienze Umane, Florence, 2009); Larry Diamond and Leonardo Morlino, *Assessing the Quality of Democracy* (Baltimore: Johns Hopkins University Press, 2005).

⁷²⁰Weichert, Personal Interview.

While it would be impossible to argue that all of the concerns over Brazil's democratic institutions are a direct result of the 1979 amnesty legislation, it is clear that a culture of impunity has developed since the 1985 transition, one that continues to this day despite a number of high-profile corruption cases.⁷²¹ According to recent studies those "Latin American countries that successfully prosecuted past human rights abusers have drastically diminished the incidence of torture and mass violations during their post-transition periods,"⁷²² giving credence to the idea that a culture of impunity can cross over from authoritarian regimes into democratising states and those believed to have consolidated democratic norms.

The 2001 Amnesty Commission and eventual Amnesty Caravans were able to raise some public awareness regarding the dictatorship's CAH, particularly with the testimony of high profile victims,⁷²³ however the impact of these efforts on the general political discourse has been limited. Victims' groups have failed to coalesce around a single goal for transitional justice. Even the 2014 report produced by the CNV and delivered with some fanfare, failed to push transitional justice concerns to the necessary tipping point of public concern to trigger pressure on the political elites and judiciary.⁷²⁴ The evidence seems to show sustained support for amnesty legislation in a political environment that is not yet fully democratic.

While efforts for justice have been muted, there are some who have continued to agitate for accountability. The OAB, individual lawyers and some victim's groups have ensured that some debate over transitional justice continues. These efforts have yet to become as vocal, or intergenerational, as in other states, however they have continued despite widespread apathy, reluctance and even outright resistance from the government, military and judiciary.⁷²⁵

From a legal standpoint, the reasoning behind maintaining the status quo around the amnesty law confirms, in some respects, the argument put forward by **H₀**, that amnesty (and the trading of justice for democracy) is agreed to in good

⁷²¹Sergio Peçanha and Simon Romero, 'Corruption Scandals in Brazil Reach All the Way to the Top', *The New York Times*, 17 March 2016
<<http://www.nytimes.com/interactive/2016/03/17/world/americas/corruption-scandals-in-brazil-reach-all-the-way-to-the-top.html>> [accessed 22 March 2016]; Power and Taylor; Balán.

⁷²²Tang, p. 28.

⁷²³Torelly, Personal Interview.

⁷²⁴Weichert, Personal Interview.

⁷²⁵*Gomes Lund et Al. (Guerrilha Do Araguaia) V. Brazil*; 'Brazil Truth Plan Angers Military'; Teles and Quinalha; Nina Schneider, 'Truth No More?'

faith. Unlike in Chile, citizens in Brazil advocated *for* the 1979 amnesty law, seeking some form of legal reprieve for political prisoners and exiles.⁷²⁶ The inclusion of state officials for political crimes moved the amnesty law beyond what was originally intended and led to last minute resistance from victims and their families.⁷²⁷ Despite concern, the amnesty law was passed by congress and became an integral part of Brazil's slow transition towards democracy. Political elites have steadfastly maintained the pact between the military and successive administrations. Considering the political taboo around amnesty, there was little challenge to the amnesty law before the OAB petitioned the Supreme Court in 2010.⁷²⁸ The Supreme Court rejected the petition, in part defending the sanctity of the bargain that established democracy in Brazil.⁷²⁹ The 2014 CNV report recommended, among other measures, the dismantling of the amnesty legislation and prosecutions against the former regime's worst offenders. This was firmly rejected at each level of government, with then-president Rousseff arguing that the stability of democracy was more important than prosecutions for past CAH.⁷³⁰ Since Rousseff's impeachment and Brazil's shift right, it is even less likely that the law will be effectively challenged. Illustrating the new government's approach to historical justice issues, in September 2016 President Michel Temer appointed a former military officer and defender of the dictatorship to the Amnesty Commission.⁷³¹ There is now even less willingness from political elites to challenge the Supreme Court's reasoning that amnesty was established in good faith and therefore should remain as part of Brazil's legal system.

H₂) hypothesises that amnesty becomes acceptable with time in a given democracy as population demographics shift.

Observing the increase of activity in the field of transitional justice in the late 2000s seems to directly contradict the idea that impunity has become more acceptable overtime. There has been a growing awareness in academia and civil

⁷²⁶Weichert, Personal Interview; Alves; Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁷²⁷Heinz and Fruhling.

⁷²⁸*Arguição de Descumprimento de Preceito Fundamental n. 153*.

⁷²⁹Tang; Nina Schneider, 'Impunity in Post-Authoritarian Brazil: The Supreme Court's Recent Verdict on the Amnesty Law'; Rosenn, *Recent Important Decisions by the Brazilian Supreme Court*; Latin American Weekly Report.

⁷³⁰Boadle and Winter.

⁷³¹'Temer Appoints Dictatorship Defender to Amnesty Commission', *Telesur TV*, 2016 <<http://www.telesurtv.net/english/news/Temer-Appoints-Dictatorship-Defender-to-Amnesty-Commission-20160903-0023.html>> [accessed 17 November 2016].

society of both the crimes of the dictatorship and impact of the amnesty law.⁷³² According to Weichert, this delayed interest is directly tied to the delayed transitional justice process. “We may say that our transition following the traditional values of transitional justice process started only in 2007, over 20 years after the end of the dictatorship. It’s a successful case of a dictatorship and a controlled transition ensuring oblivion and impunity.”⁷³³

In the last decade Brazilian “society has become aware”,⁷³⁴ with a recent survey in 2014 showing that 46 per cent of Brazilians asked supported a repeal of the amnesty law; 37 were against a repeal and 17 per cent said they were unsure.⁷³⁵ In the same survey, 46 per cent of those interviewed were in favour of punishing those found guilty of torture.⁷³⁶ The director of Datafolha, Maurio Paulino, argued that the results of the survey showed a highly divided society. Paulino believed that the increase in political discourse and available information on transitional justice had had a positive impact, however he also argued that experience, education and class divided respondents; those with a higher education and greater access to information aligned with victims in seeking change.⁷³⁷ The survey confirms a point made by a number of interviewees: transitional justice and a significant political discussion on the validity of amnesty legislation is viewed as important, however it is generally perceived as less important than other issues directly related to democratic stability such as corruption, state violence and rampant inequality.⁷³⁸ Therefore, it is not a case of amnesty legislation becoming more acceptable, rather that there are more pressing justice issues for the citizens of Brazil at this time.

The Brazilian government’s active refusal to address the past for so long as well as an ingrained culture of amnesia has, in many respects, been very effective in muting any real debate on transitional justice.⁷³⁹ The absence of a legitimised

⁷³²Weichert, Personal Interview.

⁷³³Weichert, Personal Interview.

⁷³⁴Weichert, Personal Interview.

⁷³⁵Ricardo Mendonça, ‘Maior Parte Da População Quer Anular Lei Da Anistia, Aponta Datafolha’, *Folha de São Paulo* (São Paulo, 31 March 2014), Online edition, section Poder <<http://www1.folha.uol.com.br/poder/2014/03/1433374-m3aior-parte-da-populacao-quer-anular-lei-da-anistia-aponta-datafolha.shtml>> [accessed 18 November 2016].

⁷³⁶Ricardo Mendonça.

⁷³⁷Ricardo Mendonça.

⁷³⁸Weichert, Personal Interview; Sallum Jr, Personal Interview.

⁷³⁹Weichert, Personal Interview; Nina Schneider, ‘Breaking the “Silence” of the Military Regime: New Politics of Memory in Brazil’.

collective memory influenced the reception of the CNV.⁷⁴⁰ Even today, the debate is limited. Victims' rights organisations persist, as do memorialisation efforts led by a number of groups from within civil society.⁷⁴¹ Federal prosecutors continue to push the limits of the 2010 STF decision.⁷⁴² However, there is no national outrage, nor have there been the widespread protests marking coup-related anniversaries similar to those seen in Chile. The military were able to essentially opt-out of providing significant information to the CNV, claiming that relevant records had been destroyed.⁷⁴³ While Datafolha survey results show a growing number of Brazilian's open to some measures of accountability for dictatorship-era CAH, public opinion does not seem to be driving any shift in the decision making of the judicial or political elites. While the truth commission has been described as the epilogue of the transitional justice process in Brazil,⁷⁴⁴ it is hard to identify all of the key transitional justice indicators required for a complete process.⁷⁴⁵

The overarching question of this thesis is whether justice can be sacrificed in the long run for democracy. In Brazil, institutional silence has not eliminated the demands for justice, nor has it ensured the establishment of a robust democracy as compensation for blanket impunity. Interview subjects outlined the individual efforts towards greater accountability particularly amongst the legal community, however as feared by Weichert, corruption scandals and the impeachment of President Rousseff have overshadowed questions of justice for historic crimes.⁷⁴⁶ An opposition that was divided during the transition⁷⁴⁷ has remained so, failing to create a collective movement for justice.⁷⁴⁸ The recommendations of the truth commission to prosecute military officers have failed to make a significant impact on the political discourse and it is unlikely that the new Temer government will make any significant changes to the status quo. That said, in the last three

⁷⁴⁰Ryan.

⁷⁴¹Schneider and Atencio.

⁷⁴²Weichert, Personal Interview.

⁷⁴³Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'.

⁷⁴⁴Celso Amorim, 'Reflections on Brazil's Global Rise', *America's Quarterly*, May 2011 <<http://www.americasquarterly.org/node/2420>> [accessed 21 November 2016].

⁷⁴⁵These indicators include justice, reparation, truth, and institutional reform. For more see: Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly*, 31.2 (2009), 321–67.

⁷⁴⁶Weichert, Personal Interview.

⁷⁴⁷Sallum Jr., Personal Interview.

⁷⁴⁸Ryan.

decades the military has been subjugated to civilian rule, with few political outbursts and in 2014, the CNV was able to establish Brazil's first official record of the crimes committed by the authoritarian regime, a significant measure of progress in a country that had embraced amnesia above all else.

Chapter Four

South Africa

4.1 Introduction

Apartheid, the governing system of South Africa for almost five decades, mandated a brutal segregation based on the division of the White community from the rest of the country. The non-White community - Blacks, Coloureds and Indians⁷⁴⁹ - were subject to oft-times inhumane treatment at the hands of a government that claimed to be ruling with paternalistic interest for all.⁷⁵⁰ However, at its heart, apartheid was about a single group maintaining political power, despite its minority status. It couldn't last. In 1994, after almost a decade of negotiations, and a decade of violent civil unrest, the first democratically elected president rose to the podium to give his inaugural address. Nelson Mandela told the crowd of dignitaries and the millions listening on TV and radio "Out of the experience of an extraordinary human disaster that lasted too long must be born a society of which all humanity will be proud."⁷⁵¹ Unfortunately, after all the promise of the negotiated transition, the hope of Mandela was ill rewarded.

During the 1990 – 1994 period, the African National Congress (ANC) and the National Party (NP) negotiated the latter out of power.⁷⁵² A cornerstone of the transition to democracy was the agreement for particularized amnesty – amnesty for truth. Lauded as the new way forward for transitioning states, negotiators hoped that this limited amnesty, and the Truth and Reconciliation Commission (TRC) that granted it, would provide a bridge to reconciliation. However, as soon as the process began it was beset by controversy, accusations of bias and the refusal by key groups to participate. Over time, South Africa's vaunted particularized amnesty has become an ad hoc blanket amnesty. The result is a population dissatisfied with the

⁷⁴⁹ These classifying terms are remnants of the apartheid era, however they are used throughout this chapter as they are the terms used in the majority of the primary and secondary data in South Africa and so, for clarity, they will be used here.

⁷⁵⁰ Christi van der van der Westhuizen, *White Power and Rise and Fall of the National Party* (Cape Town: Struik Publishers, 2008).

⁷⁵¹ Martin Meredith, *Mandela* (Jeppesstown: PublicAffairs, 2010), p. 515.

⁷⁵² Although other parties were involved in the negotiations, the ANC and NP were the dominant negotiating partners.

transitional justice mechanisms and frustrated with the failures of the ANC government.

The research here outlines the path South Africa took into and then, 50 years later, out of, apartheid. Through first person interviews, archival and secondary sources, this research explores perceptions of the authoritarian regime, the transition and subsequent efforts to manage demands for justice, amnesty and democracy. Importantly, this chapter highlights growing domestic scepticism of the TRC process, with interview subjects expressing concern that, rather than uniting the country, the last 20 years has created a fractured society that is moving further and further away from the liberal democratic ideals set out in its 1996 Constitution. These interviews include participants of the 1990 – 1994 negotiations, members of the TRC, South Africa’s legal community and activists from civil society organizations. The research and perspectives outlined here aim to inform the fundamental question of this research: *can justice be sacrificed for democracy?* More specifically, can particularized amnesty be effectively used during a transition without either suffering a reversal, or having a significantly adverse impact on the quality of democracy that emerges afterwards?

In 1993, amnesty was presented as the only option for a democratic future, however, according to Mpotseng Kgokong, General Secretary of the Azanian People’s Organisation (AZAPO), law and justice were sacrificed for political expediency. “In our view, our country was no different to other countries where there had been crimes against humanity. We believe the people who committed these heinous crimes should be held responsible. The people involved should have been held to book.”⁷⁵³ AZAPO led an early legal challenge against the amnesty provision of the transition, arguing that it violated rights guaranteed by the 1996 Constitution. Since then, the battle in South Africa in relation to transitional justice has not been directed at removing amnesty all together. Instead, it has been about fulfilment of a legal obligation by the political elites, and what it means when the government ignores or impedes the law.

⁷⁵³ Kgokong, Personal Interview.

4.2 Historical Background

4.2.1 Before Apartheid

The origins of the development of apartheid can be traced to the fracturing between the British, Afrikaners and indigenous tribes during the country's colonial period.⁷⁵⁴ The historical grievances between the two White cultures were a key factor in the development of the distinct Afrikaner identity and the political system many Afrikaners deemed necessary to maintain it.⁷⁵⁵ While apartheid created a clear framework of racism, the structural violence against the indigenous and "Coloured" (mixed race) communities in South Africa began long before that.⁷⁵⁶ From the time the British took control of the Cape Colony in 1806 until the legal implementation of apartheid in 1948, 171 race-based laws were passed to control where non-White communities could live, work and own land.⁷⁵⁷ While in 1948 apartheid became an international symbol of institutionalized racism "...by the time the Native Lands Act of 1913 was enacted, South Africa was already moving in the direction of spatial segregation through land dispossession."⁷⁵⁸ Apartheid was the systematic entrenchment of colonial norms that had existed in one form or another for centuries.⁷⁵⁹

After taking control of South Africa from the Dutch settlers in 1806, the British dominated the industrial and political sphere while the Afrikaners

⁷⁵⁴ Apartheid is a system of legalized racism that dominated South Africa's institutional structure between 1948 and 1990. Brian Lapping, *Apartheid: A History* (New York: George Braziller, 1987); Hermann Giliomee, *The Afrikaners: The Biography of a People*, 2nd Edition edition (Charlottesville : Cape Town, South Africa: Tafelberg Publishers, South Africa, 2003).

⁷⁵⁵ Lapping.

⁷⁵⁶ The term "coloured" refers to mixed race South Africans. Coloureds developed distinct communities, particularly in the Cape region, though they can be found through South Africa. Under apartheid, coloureds were viewed as illegal, as the races were not allowed to interact with each other.

⁷⁵⁷ Padraig O'Malley, 'Racial Legislation 1806-1947', *O'Malley Archive* <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646.htm>> [accessed 8 December 2016].

⁷⁵⁸ South Africa History Online, 'The Natives Land Act of 1913', 2013 <<http://www.sahistory.org.za/topic/natives-land-act-1913>> [accessed 19 December 2016].

⁷⁵⁹ Colonialism in South Africa was viewed along two distinct paradigms. The British followed a state led model of colonialism, focused on the pacification of indigenous communities through British law. The Boer settler model advocated greater autonomy, away from a centralized government, and contributed to the Afrikaner resentment of the intrusion of the British government in the South African political discourse. John L. Comaroff, 'Images of Empire, Contests of Conscience: Models of Colonial Domination in South Africa', *American Ethnologist*, 16.4 (1989), 661-85.

established agricultural strength. Non-White populations were considered a poorly paid labour force, with many working as slaves or in slave-like conditions.⁷⁶⁰

The Afrikaner and African nationalist movements became the key forces in the debate over apartheid, with the subsequent violence building as the groups fought to achieve their opposing goals. Injustice at the hands of the British, both real and imagined, a growing underclass of Afrikaners competing for manufacturing jobs against an established cheap labour source (Blacks), and the nationalistic rhetoric of Afrikaner elites all contributed to the eventual civil war between the two White ethnic groups.⁷⁶¹ The Boer War (1899 – 1902) had a significant impact on the development of Afrikaner identity.⁷⁶² Journalist Christi van der Westhuizen best articulated this argument when she wrote:

...it is undeniable that the experiences of the Boers – the extreme methods of the British (the scorched-earth policy and concentration camps in which 27,000 women and children died) and [Cape Colony Governor] Milner's subsequent Anglicization policies – reinforced and radicalized a self-aware Afrikaner cultural elite.⁷⁶³

The Afrikaner nationalist movement coalesced around the National Party, founded by Boer War General J.B.M Hertzog on 2 July 1915. The party was built on a particular "...brand of anti-imperialist, racist nationalism [that] resonated with White workers' interests..."⁷⁶⁴ The two main thrusts of the party were to lift the Afrikaner people into positions of leadership, displacing the *uitlanders* (foreigners, a term used to describe British South Africans) and the suppression of the Black population by means of 'retribalisation'.⁷⁶⁵

The African nationalist movement also gained momentum in the early Twentieth Century. Between 1652 and 1879 the Xhosa, Khoikhoi, San, Sotho and Zulu all led sporadic armed campaigns against the widespread land dispossession caused by the moving colonial boundaries.⁷⁶⁶ However, by the end of the Anglo-Zulu War (1879) the tribal military resistance had all but ended. Through economic,

⁷⁶⁰ Though slavery was officially abolished in 1807, the practice continued for several decades. R. W. Johnson, *South Africa: The First Man, The Last Nation*, New edition (London: Phoenix, 2006).

⁷⁶¹ van der Westhuizen.

⁷⁶² Giliomee.

⁷⁶³ van der Westhuizen, p. 14.

⁷⁶⁴ van der Westhuizen, p. 21.

⁷⁶⁵ Retribalisation was the policy of pushing black populations onto reserves, with separate institutions and laws, paving the way for future policies that would deny citizenship. The Native Lands Act (1913) and the Black Administration Act (1927) are viewed as laying the foundation of the apartheid state 20 years later. See: van der Westhuizen.

⁷⁶⁶ R. W. Johnson.

legislative and physical coercion, blacks became subjugated to the will of the minority White population.⁷⁶⁷ Colonization changed the social structure of the indigenous communities, and, while still present, tribal identification began to decrease in importance as black males from across the country migrated towards the diamond and gold mining centres of Kimberly and Witwatersrand.⁷⁶⁸

The British were generally ambivalent regarding rights for the non-White population, despite promises to the contrary, and preferred to foster positive relations with the rising Afrikaner nationalist leaders. As pointed out by Afrikaner historian Hermann Giliomee, “Black and coloured people were on their own in their fight to prevent South Africa from becoming a ‘White man’s land.’”⁷⁶⁹

The South African Native National Congress (SANNC) was formed on January 8, 1912 and was renamed the African National Congress (ANC) in 1923. The founders sought citizenship for the African population, including political franchise and equal rights. The organization attempted to place pressure on the British and South African governments through national petitions, delegations to London and via the use of passive resistance inspired by Mahatma Gandhi.⁷⁷⁰ In 1919 non-violent SANNC-led protests against pass laws⁷⁷¹ led to the arrest of thousands. However, the South African government was able to divide support for the protests by putting pressure on tribal chiefs in their employ.⁷⁷²

Originally dominated by educated, middle-class elites, support for the ANC had shifted by 1927 with the emergence of communist members. Under the leadership of Josiah Tshangana Gumede, the ANC adopted a more revolutionary and distinctly communist rhetoric, aligning itself closer to the Pan African movements across the continent as well as ideas coming out of the Soviet Union.⁷⁷³ This shift left was not universally supported in the ANC, causing the existing factions between conservatives and revolutionaries to deepen. When commenting

⁷⁶⁷ South Africa History Online.

⁷⁶⁸ Francis Meli, *A History of the ANC: South Africa Belongs to Us*, Annotated edition (Harare : Bloomington: Zimbabwe Publishing House/Indiana University Press, 1989).

⁷⁶⁹ Giliomee, p. 278.

⁷⁷⁰ Lapping; Pdraig O’Malley, ‘African National Congress (ANC)’, *The O’Malley Archives* <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv03188/06lv03189.htm>> [accessed 27 December 2016].

⁷⁷¹ Pass laws required Blacks to carry papers that confirmed permission to be in areas designated by the Native Lands Act (1913) as for ‘Whites only’. Passes became an early tangible symbol of the country’s segregationist policies.

⁷⁷² R. W. Johnson.

⁷⁷³ Meli.

on the centenary celebrations of the ANC, historian Philip Bonner argued that factions, and the attempt to unite them to a common cause, were a dominating characteristic of the ANC.

From its foundation, the ANC sought to appeal to and, more infrequently, to mobilise a number of distinct and potentially conflictual constituencies. These were, first, the traditional leaders of South Africa – its kings and its chiefs; second, South Africa’s Christian educated elite – its doctors, lawyers, journalists, clergymen and teachers; third, its urban masses and fourth its rural populace.⁷⁷⁴

The ANC Youth League (ANCYL) was formed in 1942-43. The ANCYL became a “pressure group for the younger, more militant elements within ANC ranks.”⁷⁷⁵ Nelson Mandela and Walter Sisulu were early leaders of the ANCYL, and would go on to dominate the legacy of the organization as a whole.

Prior to the implementation of apartheid, the South African polity had two tiers, one basically democratic, the other authoritarian in nature. Whites in South Africa enjoyed political rights similar to those seen in other British dominions at the time.⁷⁷⁶ Elections were regular, competitive and involved peaceful transfers of power between the South African Party (SAP), the United Party (UP) and the National Party (NP). The government was responsive and accountable to the needs of the White population. Democratically empowered populist sentiment and mass hysteria regarding unemployment and the “*swart gevaar*”⁷⁷⁷ allowed for the rise of the NP with its increasingly nationalistic agenda.⁷⁷⁸ However, the democratic government of White South Africa was an authoritarian regime for non-White communities, who were unable to participate in the electoral process, had limitations placed on where they could live and work, were subject to increased police activity and were not considered full citizens.⁷⁷⁹ Unlike Brazil and Chile, there was no clear rupture of the democratic state. South Africa’s apartheid era began as a dual system with a quasi-democracy that was, over time, tainted by the authoritarian system that supported it.

⁷⁷⁴ Arianna Lissoni and others, *One Hundred Years of the ANC Debating Liberation Histories Today* (Chicago: Wits University Press, 2013), p. 2.

⁷⁷⁵ R. W. Johnson, p. 135.

⁷⁷⁶ Anthony Butler, *Democracy and Apartheid: Political Theory, Comparative Politics and the Modern South African State* (Springer, 1998).

⁷⁷⁷ Threat of the black population, also used to describe fear of the black population. When the British were no longer seen as a threat to the Afrikaner nation, Afrikaner elites needed to construct another threat to ensure continued support for their separatist agenda. Lapping.

⁷⁷⁸ Butler.

⁷⁷⁹ Lapping.

4.2.2 Justice prior to the advent of apartheid

The 1909 Constitution that created the Union of South Africa was “flagrantly discriminatory”⁷⁸⁰ against non-White communities and established the framework for a series of race-based laws that significantly impacted on the rights and freedoms of Blacks, Coloureds and Indians.⁷⁸¹ Pieced together from the four constitutions of the existing colonies, the constitution limited electoral participation to the White population across South Africa, with the exception of the Cape. The Cape Qualified Franchise, though limited by property and educational qualifications, remained in the Constitution.⁷⁸² However, this changed with the Representation of Natives Act (1936). All black voters in the Cape were moved from the general electoral roll and placed on a special native role that allowed them to only vote for designated White representatives at different levels of government.⁷⁸³

Parliamentary supremacy was established in early amendments to the 1909 Constitution.⁷⁸⁴ The judiciary was subordinate to the will of the legislature, and as such, provided little challenge to the rising separatist politics.⁷⁸⁵ Non-White South Africans had limited judicial recourse as they became increasingly marginalized within the separatist system.⁷⁸⁶ In the first two decades after the Union was established a number of prominent judges, including the country’s second Chief Justice, Sir James Rose-Innes, expressed liberal opinions regarding race.⁷⁸⁷ However, these extra-curial opinions failed to make a significant difference to the delivery of justice. According to jurist Albie Sachs,

⁷⁸⁰ Neville Rubin, ‘Law, Race and Color in South Africa’, *Issue: A Journal of Opinion*, 4.3 (1974), 6–11.

⁷⁸¹ Of particular note were the Natives Land Act (1913), the Mines and Works Act (1911) and the Native Labour Regulation Act (1911). These three laws established a number of the key restrictions that would form the framework of apartheid.

⁷⁸² The Cape Qualified Franchise was a remnant of British rule. Blacks were technically allowed to vote in the Cape region, however the franchise requirements were so high that few were able to.

⁷⁸³ Harold Simons and Ray Simons, *Class and Colour in South Africa, 1850-1950* (University of Michigan: Penguin, 1969); O’Malley, ‘Racial Legislation 1806-1947’.

⁷⁸⁴ John Dugard, ‘A Bill of Rights for South Africa’, *Cornell International Law Journal*, 23.2 (1990).

⁷⁸⁵ Rubin; Dugard, ‘A Bill of Rights for South Africa’.

⁷⁸⁶ *Assessing the Performance of the South African Constitution* (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 2016)

<http://www.constitutionnet.org/files/assessing_the_performance_of_the_south_african_constituti_on_abridged_report.pdf>.

⁷⁸⁷ Albie Sachs, *Justice in South Africa* (University of California Press, 1973).

Innes stressed that the courts would come to the aid of any person, whether high or low, who was injured other than by due process of law; but where the jurisdiction of the courts was excluded, either by clear terms of a statute or by the operation of martial law, he accepted such limitations though not without expressing disapproval.⁷⁸⁸

Prior to the institutionalization of the scattered race-based laws, the judiciary was guided by the doctrine of “separate but not substantially unequal”, though this was not without debate and dissension.⁷⁸⁹

If fairness, equality in application, legitimacy and legality are considered necessary for the perception of justice, as this research proposes, then it is reasonable to argue that prior to apartheid, there was already a lack of available justice measures for the non-White population. The separatism of the 1910 – 1948 period created significant social exclusion for non-Whites, with colour bars placed on most facets of everyday life. Though technically required to be separate but equal (or not substantially unequal), most facilities failed to provide equal services. The Native Lands Act (1913) led to land alienation, with just 7 per cent of agricultural land set aside for Blacks, despite the fact that 67 per cent of South Africa’s population was classed as Black.⁷⁹⁰ The impact of this was dehumanizing. Sol Plaatje, one of the founders of the ANC, wrote in his 1916 book *Native Life in South Africa* “awaking on Friday morning, June 20th, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth”.⁷⁹¹

4.2.3 Apartheid in all but name

During the interwar years, power shifted between the British-leaning liberal internationalist Jan Smuts (in power between 1919 – 1924 and 1939 – 1948) and conservative Afrikaner Barry Hertzog (1924 – 1939). The two leaders presented conflicting views on South Africa’s relationship with Britain, particularly in the lead up to WWII, and were oppositional regarding Afrikaner parity in language and education.⁷⁹² However, the ideological differences between these two were less

⁷⁸⁸ Sachs, *Justice in South Africa*, pp. 136–37.

⁷⁸⁹ Sachs, *Justice in South Africa*.

⁷⁹⁰ Chris Bell, ‘Apartheid’s Roots: The Natives Land Act’, *BBC History*, 19 June 2013 <<http://www.bbc.co.uk/history/0/22786616>> [accessed 30 December 2016]; Lapping; R. W. Johnson.

⁷⁹¹ Sol Plaatje quoted in Bell.

⁷⁹² Though Smuts and Hertzog disagreed on the majority of domestic and international policies, the two were forced into a tense coalition (the United Party) after the rise of republican sentiment from within Hertzog’s own National Party. van der Westhuizen; Lapping; Rodney Davenport and

significant in relation to the “native question”.⁷⁹³ Segregation was expanded under both the Smuts and Hertzog administrations, with the African population pushed further out of the White designated areas without significant expansion in the land allocated for the reserves.⁷⁹⁴ Coloureds and Indian’s fared little better. New laws were passed that placed restriction on land ownership, employment and other basic rights for all non-White populations. Particularly egregious was the introduction of the job colour bar in 1926, restricting semi-skilled and skilled labour positions to Whites only.⁷⁹⁵ The colour bar, and the requirement of Afrikaans as qualification for employment in the public service,⁷⁹⁶ was aimed at alleviating widespread Afrikaner poverty during the difficult economic climate of the late 1920s and early 1930s. Hertzog also hoped to appease the strengthening Afrikaner nationalism that found support in the lower class White population.⁷⁹⁷

Divisions over South Africa’s participation in WWII contributed to the split of the NP and the rise of the Afrikaner nationalists lead by *dominee* (clergyman) Daniel François Malan.⁷⁹⁸ More than Smuts or Hertzog before him, D.F Malan sought not just parity with the English-speaking Whites, but dominance over them. However, unlike previous leaders, he viewed conflict between the two populations as relatively insignificant when compared to the issue of what to do with the African population. According to Malan “the contradiction between black and White went beyond difference in civilization or language or history or general lifestyle.”⁷⁹⁹ He also argued that Whites had the responsibility for oversight of the African population, who should be encouraged to “develop in accordance with their own nature”.⁸⁰⁰ Malan first used the term “apartheid” in parliament in 1944, arguing that the overarching goal of the NP was “to ensure the safety of the White race and of Christian civilization by the honest maintenance of the principles of apartheid and

Christopher Saunders, *South Africa: A Modern History*, 5th edition (Hampshire England : New York: Palgrave Macmillan, 2000).

⁷⁹³ Lapping; Davenport and Saunders.

⁷⁹⁴ The Native lands Act (1913) allocated 7 per cent of land to reserves, this was eventually expanded to 13 per cent with the Native Land and Trust Act (1936). Bernadette Atuahene, *We Want What’s Ours: Learning from South Africa’s Land Restitution Program* (OUP Oxford, 2014).

⁷⁹⁵ Davenport and Saunders.

⁷⁹⁶ The requirement of Afrikaans for government positions was targeted at British South Africans, as well as non-Whites. The goal was to undermine British political power by requiring Afrikaans language competency.

⁷⁹⁷ Davenport and Saunders.

⁷⁹⁸ van der Westhuizen.

⁷⁹⁹ van der Westhuizen, p. 24.

⁸⁰⁰ van der Westhuizen, p. 25.

guardianship.”⁸⁰¹ Malan was elected to the premiership in 1948 with a razor thin majority that depended on smaller Afrikaner-rights parties for support. Though the term apartheid had become part of the political discourse, few knew what it really meant. Over time it became clear that “rather than being a blueprint, apartheid was a set of policies that were continuously adapted to serve the NP’s ultimate goal: staying in power.”⁸⁰²

The rise to power of the political apparatus of the Afrikaner nationalist movement coincided with the strengthening of the ANC. The influence of the ANC waxed and waned during the interwar years.⁸⁰³ The ANC failed to provide significant resistance to the legislative measures of Smuts and Hertzog, despite some industrial action. With the so-called Hertzog Bills,⁸⁰⁴ the African population was pushed further to the edges of South African society. However, by 1945 a new generation of activists was beginning to emerge from within the ANC under the leadership of American-trained physician A.B Xuma.

In an analysis of African protest in South Africa, academic Tom Lodge argued that the 1940s were

...a period in which a massive expansion of the black urban labour force, its increasing deployment in manufacturing industry, the revival of trade unionism and the stimulation of class consciousness, all had a radicalizing effect on political organisations...In an environment of developing popular militancy manifested by industrial action and informal community protest, the frustrated aspirations of an African middle class assumed fresh significance within the contest of formal political movements.⁸⁰⁵

The founding of the ANCYL as well as the development of intellectual debate around the goals of the ANC laid the foundation for the subsequent mass mobilization that took place in the 1950s and 1960s.⁸⁰⁶

⁸⁰¹ Edgar Harry Brookes, *Apartheid: Documentary Study of Modern South Africa*, 1st Edition edition (London: Routledge & Kegan Paul PLC, 1968), p. 1.

⁸⁰² van der Westhuizen, p. 39.

⁸⁰³ *Mandela, Tambo, and the African National Congress: The Struggle Against Apartheid, 1948-1990, A Documentary Survey*, ed. by Sheridan Johns and R. Hunt Davis (New York: Oxford University Press, 1991).

⁸⁰⁴ This refers to the three bills put forward by Hertzog in 1936 that were particularly focused on the African population. These were the Native Representation Bill, the Native Trust and Land Bill, and the Urban Areas Amendment Bill. None passed in their entirety, however Hertzog’s efforts laid the groundwork for the entrenchment of apartheid by D.F Malan in 1948.

⁸⁰⁵ Tom Lodge, *Black Politics in South Africa Since 1945* (London ; New York: Longman Group United Kingdom, 1983).

⁸⁰⁶ Johns and Davis.

4.3 The Apartheid Years

Giliomee describes apartheid as a “flexible operational ideology for Afrikaner nationalism, attracting both those wanting to keep down all those who were not White and those who wanted to rehabilitate them and recognize their dignity...”⁸⁰⁷ At its heart, apartheid was about the separation of races to the benefit of the White population. Between 1948 and 1994, the White political elite employed all methods possible, including violence and assassinations, to maintain their precarious position at the top. The principles of apartheid seeped into every aspect of life for non-White South Africans and left a lasting scar on the nation’s collective memory.

Malan’s electoral victory on 26 May 1948 marked a significant shift in South Africa’s political landscape. He quickly attempted to reassure the political opposition that the NP policy, though detailed regarding non-Whites, would not involve oppression. Rather, apartheid would involve “a large measure of independence with the growth of self-reliance, self-respect and at the same time the creation of opportunities for free development in conformity with their own character and capacity.”⁸⁰⁸ However, as pointed out by van der Westhuizen, it would be left to the White population to make decisions on the “character and capacity” of the blacks.⁸⁰⁹ NP politicians cultivated this concept of trusteeship as reasoning for apartheid, arguing that the different ethnicities would eventually become good neighbours, each with distinct territory of their own.⁸¹⁰

Within the NP itself, leaders struggled to reconcile the desire of the most ardent supporters for total segregation and the economic realities of modern South Africa.⁸¹¹ Mining, manufacturing and agriculture relied on the underpaid, docile and migratory African workforce. Even with job reservation legislation, labour shortages forced employers to open semi-skilled positions for non-Whites, contravening official government policy.⁸¹² Ultimately, economic integration while

⁸⁰⁷ Giliomee, p. 482.

⁸⁰⁸ D.F Malan as quoted in van der Westhuizen, pp. 39–40.

⁸⁰⁹ van der Westhuizen.

⁸¹⁰ van der Westhuizen.

⁸¹¹ Giliomee.

⁸¹² Anti-apartheid Movement, *Racism and Apartheid in Southern Africa: South Africa and Namibia: A Book of Data Based on Material* (Unesco Press, 1974).

simultaneously attempting to implement geographic segregation was a point of cognitive dissonance.⁸¹³

During the apartheid era there were two breeds of legislation passed by NP leaders: petty apartheid and grand apartheid. Petty apartheid referred to the laws covering segregation of everyday life, including laws separating public facilities.⁸¹⁴ Grand apartheid, on the other hand, referred to the ideologically driven laws that created the framework of the system for over 40 years. Arguably, grand apartheid was built around four key pieces of legislation: the Population Registration Act (1950), which classified all South Africans as either White, Coloured, Asian or Black,⁸¹⁵ the Group Areas Act (1950), which created racially segregated zones where members of “one specific race alone could live and work”,⁸¹⁶ and the Immorality Amendment Act (1950), which outlawed sexual relations between Whites and non-Whites.⁸¹⁷ A fourth law, the Bantu Education Act (1953), had possibly the most destructive and long lasting impact on the African population beyond the time limits of apartheid. The 1953 law “...barred Africans from acquiring skills or knowledge that could not be used in the native reserves or in the service of the Whites in White areas.”⁸¹⁸ Subsequent apartheid laws were passed, 162 in total, however these three laws formed the foundation of the apartheid state.

Apartheid went through three distinct phases before ending in 1994.⁸¹⁹ Considered the “classical” period of White supremacy in South Africa, the first phase of apartheid (1948-1959) was focused on the construction of the system through legislation.⁸²⁰ The second phase, from 1960 and the declaration of South Africa as a republic through to the early 1970s, was considered the pinnacle of

⁸¹³ R. W. Johnson; Giliomee.

⁸¹⁴ Robert S. McNamara, ‘Before It’s Too Late in South Africa’, *The New York Times*, 14 August 1985, section Opinion <<http://www.nytimes.com/1985/08/14/opinion/before-it-s-too-late-in-south-africa.html>> [accessed 16 January 2017].

⁸¹⁵ ‘1950. Population Registration Act No 30’, *The O’Malley Archives* <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01838.htm>> [accessed 18 January 2017].

⁸¹⁶ ‘1950. Group Areas Act No 41’, *The O’Malley Archives* <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01839.htm>> [accessed 17 January 2017].

⁸¹⁷ This was an amendment to the 1927 Immorality Act, which outlawed relationships between Whites and blacks. ‘1950. Immorality Amendment Act No 21’, *The O’Malley Archives* <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01837.htm>> [accessed 18 January 2017].

⁸¹⁸ R. W. Johnson, p. 143.

⁸¹⁹ Roger B. Beck, *The History of South Africa* (Greenwood Publishing Group, 2000).

⁸²⁰ Beck.

apartheid and Afrikaner nationalism, and, at the same time, the resistance to it shifted from non-violent to violent measures.⁸²¹ The final period saw the beginning of the end of the apartheid system, with implementation and failure of the “total strategy”, which “argued for the mobilization of all available resources...to defend and advance the interests of the apartheid state, both internally and regionally.”⁸²² During this time, rights were eventually granted to Indians and Coloureds in the hope that these groups could be co-opted to support White interests.⁸²³ The end of this period was marked by secret and then public negotiations with the ANC, the release of Mandela and a period of significant civil unrest once the transition towards democracy had begun.

African resistance, particularly through the ANC, also experienced several somewhat distinct phases of development. The first, from the development of the ANCYL in 1944 to the end of the Defiance campaign in 1952, was dominated by theories of non-violence and legal resistance to the growing apartheid system. In 1949, members of the Youth League presented the Programme of Action, urging the use of mass mobilization techniques including boycotts, strikes, and civil disobedience in their fight against the apartheid regime.⁸²⁴ The Programme of Action eventually became the Defiance Campaign. For six months members of the ANC broke many of the rules of petty apartheid, using public services designated as “Whites only”, refusing to carry passbooks and employing other methods of civil disobedience.⁸²⁵ The government responded by reducing the capacity of Africans to meet and with widespread arrests. By the time the campaign wound down after instances of mob violence, 8,326 people had been arrested and convicted of an offence.⁸²⁶ The government passed the Public Safety Bill (1953), which expanded its powers to declare a state of emergency, and the Crime Law Amendment Bill (1953), which increased the punishment for breaches of the peace or incitement to violence.⁸²⁷

⁸²¹ Beck; Giliomee; Lodge.

⁸²² Bertil Oden and Thomas Ohlson, ‘South Africa - A Conflict Study’, in *The South African Tripod: Studies on Economics, Politics and Conflict* (Uppsala : Stockholm, Sweden: Nordiska Afrikainstitutet, 1994), p. 226.

⁸²³ These rights included their own forums for decision making and representation. Oden and Ohlson; Beck.

⁸²⁴ Lodge; Davenport and Saunders.

⁸²⁵ Heidi Holland, *100 Years of Struggle - Mandela's ANC*, Revised edition (South Africa: SA Penguin, 2012).

⁸²⁶ Lodge.

⁸²⁷ Davenport and Saunders.

The principal development of the second phase of resistance to apartheid (1953 to 1960) was the signing of the Freedom Charter in 1955 by the Congress of the People.⁸²⁸ The charter was controversial both within the organisations that signed it, and to the government that viewed the document as a direct threat to the goals of the apartheid state.⁸²⁹ However, it marked a key moment of clarity and cooperation for the anti-apartheid movement, before the Pan-Africanist Congress (PAC) formed in the late 1950s, and the complete banning of the ANC in 1960.⁸³⁰

The third phase of resistance began with the banning of the ANC and PAC following the massacre at Sharpeville on the 21 March 1960.⁸³¹ The incident was significant for two reasons. First, it focused international attention on South Africa's race laws, giving momentum to the global anti-apartheid movement that would last until 1994. Second, it sparked a level of anger in the African population that had rarely been seen by the apartheid government.⁸³² Though banned, the ANC established the Umkhonto we Sizwe (Spear of the Nation, or MK) in 1961. Led by Mandela and others, the underground MK was a militant organization that carried out hundreds of acts of sabotage on government infrastructure and installations. Eventually, the government captured and put on trial the key leaders of MK, and in 1964 eight of the ten were given life sentences for terrorist activities.⁸³³ Regardless, MK continued its acts of sabotage. The ANC moved many leaders overseas, with prominent political émigrés based in London and Dar es Salam.⁸³⁴

The final distinct phase of resistance (1976 – 1994) began with the student uprisings in Soweto in 1976 and was marked by rolling states of emergency as townships across the country became increasingly unstable.⁸³⁵ As one journalist commented at the time, the young Black population were not as scared of the police as their parents had been, forcing the apartheid security apparatus to change how it

⁸²⁸ The Congress of the People was made up of the ANC, South African Indian Congress, the South African Coloured People's Organisation and the Congress of Democrats. Lodge; R. W. Johnson; 'The Freedom Charter' (Congress of the People, 1955), Historical Papers Research Archive <http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf> [accessed 19 January 2017].

⁸²⁹ R. W. Johnson.

⁸³⁰ R. W. Johnson.

⁸³¹ On the 21 March 1960 69 protestors were shot by the police, many in the back, indicating that they were shot as they fled.

⁸³² R. W. Johnson.

⁸³³ Lodge; 'Rivonia Trial 1963-1964', *South African History Online*, 2011, <<http://www.sahistory.org.za/topic/rivonia-trial-1963-1964>> [accessed 19 January 2017].

⁸³⁴ Lodge.

⁸³⁵ Holland.

responded to the increasing challenges to the status quo.⁸³⁶ However, by implementing the “total strategy” and engaging with the students on a war footing, the apartheid government failed to recognize that it was losing. Images of young children shot in the back, the arrests of 10 year olds and the townships in flames challenged the legitimacy of the regime, both internationally and domestically. In 1978 NP leader P.W Botha described apartheid as “a recipe for permanent conflict.”⁸³⁷ He was not wrong. Periodic violence in the townships coincided with almost crippling industrial strikes and the formation of the United Democratic Front (UDF), a distinctly socialist organization that pulled support from all races and classes, and rejected completely the institutional structures of apartheid.⁸³⁸ Alternative structures of governance, including informal committees, developed, layered on top of spreading mob violence, and the government militarization of the crises.

4.4. The Violence of Apartheid

Due to the very nature of apartheid, state-sponsored violence in South Africa permeated through every aspect of the lives of non-Whites. The legislative means by which the minority White government maintained control were violent in of themselves. Forced classification, segregation and relocation were all methods of implementation of apartheid. This sort of violence destroyed the family and cultural structures, creating a series of social issues that persist to this day.⁸³⁹ However, the security apparatus that developed to defend White interests were perpetrators of significant CAH in the traditional sense; both domestically and across regional borders.⁸⁴⁰

Early state-sponsored violence was limited to detention and torture by security police.⁸⁴¹ The emergence of secret counter-insurgency units in the late early 1960s led to an increasing number of abductions and killings as government forces focused on shutting down the armed wings of the ANC and PAC (MK and

⁸³⁶ Holland.

⁸³⁷ Davenport and Saunders, p. 459.

⁸³⁸ Davenport and Saunders.

⁸³⁹ These issues include persistent inequality, a breakdown in family structures, violence and race-based identity issues. Lapping.

⁸⁴⁰ *Truth and Reconciliation Commission of South Africa Report* (Cape Town : New York, NY: Palgrave Macmillan, 7 April 2001).

⁸⁴¹ *Truth and Reconciliation Commission of South Africa Report*.

Poqo respectively). Deaths in captivity were often listed as suicides or accidents, despite clear evidence to the contrary.⁸⁴² The establishment of the Bureau of State Security (BOSS) in 1968, attached to the Department of the Prime Minister, created a super security structure that included security and military police.⁸⁴³ Despite opposition in parliament and in the liberal press, BOSS went on to have a significant role in the defence of apartheid, moving the security-related structures from the fringes of the state to its very centre.⁸⁴⁴

The security apparatus in South Africa viewed itself as at war against anti-apartheid forces. The death of Steve Bantu Biko, a leader within the PAC movement, on 12 September 1977, illustrated the brutality of the repression. Biko sustained significant head injuries during an interrogation in Port Elizabeth. The police then placed him naked in the back of a police ute and transported him 941 kilometres to Pretoria, where he subsequently died. After first implying that Biko had died from a hunger strike, security forces then claimed that the activist had become violent during an interrogation and sustained the injuries after hitting his head against the wall.⁸⁴⁵ As described by the TRC report:

The security forces used both overt and clandestine methods to suppress resistance and counter armed actions by opponents of apartheid. Overt methods included bannings and banishment, detention without trial, judicial executions and public order policing. More clandestine and covert forms of control included torture, extra-judicial killings and support for surrogate forces.⁸⁴⁶

South African regional counter-insurgency efforts included military action in Mozambique, Namibia, Zimbabwe and Angola. The South African Defence Force (SADF) was tasked with hunting down MK, Poqo and other guerrilla training camps.⁸⁴⁷ The violence committed by South African soldiers in pursuit of enemies of the state was brutal. According to testimony given to the TRC, while hunting the South West Africa People's Organisation (SWAPO) in Angola and South West Africa (now Namibia) the SADF forces abandoned all pretence of following the Geneva Conventions.

⁸⁴² Alex Hepple, 'South Africa's Bureau for State Security', *The World Today*, 25.10 (1969), 436–39.

⁸⁴³ Hepple; *Truth and Reconciliation Commission of South Africa Report*.

⁸⁴⁴ *Truth and Reconciliation Commission of South Africa Report*.

⁸⁴⁵ *The Truth and Reconciliation Commission Report - Volume 2* (South Africa: Truth and Reconciliation Commission, 29 October 1998)

<<http://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf>>.

⁸⁴⁶ *The Truth and Reconciliation Commission Report - Volume 2*, p. 165.

⁸⁴⁷ *Truth and Reconciliation Commission of South Africa Report*.

The Security Forces stop at nothing to force information out of people. They break into homes, beat up residents, shoot people, steal and kill cattle and often pillage stores and tearooms. When the tracks of SWAPO guerrillas are discovered by the Security Forces, the local people are in danger. Harsh measures are intensified. People are blindfolded, taken from their homes and left beaten up and even dead by the roadside. Women are often raped ...There is no redress because reporting irregularities or atrocities to commanders is considered a dangerous or fruitless exercise.⁸⁴⁸

According to evidence given to the TRC, members of the cross-border counter-insurgency units were encouraged to kill opponents rather than keep detainees.⁸⁴⁹

There is no way to enumerate exactly the number of people killed or tortured by the apartheid regime. However, while the strength of the security apparatus fluctuated, the evidence presented to the TRC proves that violence was a key characteristic of the apartheid state from 1960 through to the 1994 democratic elections.

4.5 Perceptions of the Authoritarian Regime

As the nature and consequences of apartheid became clear, the discourse around the system became increasingly bi-modal. Proponents touted apartheid as the only logical institutional structure for South Africa. The South African Bureau of Race Relations "...argued that apartheid was the only possible way to guarantee peace and safety for both Blacks and Whites."⁸⁵⁰ While publicly positioning the White population as protectors of the "inferior" Black communities, privately, the political elites acknowledged that apartheid was the only way to maintain control. During correspondence with his predecessor, JG Strijdom wrote "...by allowing urbanization and education of Black people they would 'necessarily' become more 'civilised', which would make the colour bar impossible to impose and lead to equality."⁸⁵¹ Just prior to becoming prime minister in 1954, Strijdom seemed to acknowledge that there was no superiority between the races, but rather that apartheid was about power structures. He admitted

that the White man would not be able to maintain his superiority by merit alone and owed his dominant position to the fact that he had the vote. It was part of the essence of apartheid, therefore, that the Bantu [African populations] should never

⁸⁴⁸ *The Truth and Reconciliation Commission Report - Volume 2*, p. 73.

⁸⁴⁹ *The Truth and Reconciliation Commission Report - Volume 2*.

⁸⁵⁰ *South Africa & Apartheid*, ed. by Robert W. Peterson, Enlarged edition (New York: Facts On File Inc, 1975), p. 18.

⁸⁵¹ van der Westhuizen, p. 57.

have the vote in White areas, but greater rights in their own reserves under White supervision.⁸⁵²

Throughout the apartheid period race was invoked to reinforce hierarchy.⁸⁵³

The NP were able to maintain broad spectrum support by presenting apartheid as the solution that would allow Whites to survive as distinct communities while also technically permitting non-White peoples to govern themselves in separate locations.⁸⁵⁴ By and large, the White community accepted the government's justifications for apartheid. Exceptions to this White support were found in the South African Congress of Democrats (SACOD) and the Liberal Party (LP). The SACOD partnered with the ANC and the SAIC in their extra-parliamentary efforts to gain full and immediate equality. The LP, on the other hand, sought the gradual evolution of the South African democracy to allow for a non-racial meritocracy.⁸⁵⁵ The communist party, with membership open to all, was a third source of multi-racial opposition, with party leaders supporting ANC efforts. White opposition was generally viewed as treasonous, with the government actively pursuing White anti-apartheid activists.⁸⁵⁶

Opposition groups, both domestically and in exile, described the apartheid regime as fundamentally evil. Anti-apartheid leaders such as Archbishop Desmond Tutu, were confident that the inherent moral judgment against the system would, eventually, cause the regime to fall. According to Tutu

[he] never doubted that apartheid - because it was of itself fundamentally, intrinsically evil - was going to bite the dust eventually... It wasn't a question of 'if', it was just that one wondered about the 'when', because this is essentially a moral universe. And it's part of the make-up, the structure of this universe, that evil will not ultimately prevail.⁸⁵⁷

Psychologist Peter Lambley, living in exile after fleeing South Africa in 1978, described apartheid as essentially a “psychological phenomenon” and South

⁸⁵² van der Westhuizen, p. 57.

⁸⁵³ van der Westhuizen.

⁸⁵⁴ Davenport and Saunders.

⁸⁵⁵ David Everatt, *The Origins of Non-Racialism: White Opposition to Apartheid in the 1950s* (Johannesburg: Wits University Press, 2009).

⁸⁵⁶ Donald McRae, 'The Death of Anti-Apartheid Campaigner Neil Aggett and South Africa's Dark Past', *The Guardian*, 23 November 2013, section World news <<https://www.theguardian.com/world/2013/nov/22/death-anti-apartheid-campaigner-neil-aggett>> [accessed 5 March 2017]; Alan Wieder and Nadine Gordimer, *Ruth First and Joe Slovo in the War Against Apartheid* (New York: Monthly Review Press, 2013).

⁸⁵⁷ Nick Stadlen, 'The Nick Stadlen Interview with Desmond Tutu: Part 1', *The Guardian*, 26 September 2007, section Politics <<https://www.theguardian.com/politics/2007/sep/26/3>> [accessed 6 March 2017].

Africa as a “mentally deranged society.”⁸⁵⁸ This derangement, caused in part by the paradox of a system that was both extremely powerful economically and extremely vulnerable due to its dependence on black labour, made it susceptible to the internal and external pressures of protest.⁸⁵⁹

After the volatility of the transition, support for apartheid remained. During a 2012 interview, F.W de Klerk, the last president of the apartheid regime, refused to repudiate the system on moral grounds. He argued that no apology was needed for the original goal “of seeking to bring justice to all South Africans through the concept of nation states”.⁸⁶⁰ Apartheid failed in South Africa, according to de Klerk, “because the Whites wanted to keep too much land for themselves. It failed because we (Whites and blacks) became economically integrated, and it failed because the majority of blacks said that is not how [they] want [their] rights.”⁸⁶¹ He argued that the ideology of the system, however, was not a problem.

The tension between opponents of apartheid and those who supported the regime has persisted. Race continues to be an issue. However, a recent survey found that the debate over race is considered less important than those around unemployment, crime and poor service delivery, and the failures of democracy to provide economic stability.⁸⁶²

4.5 Amnesty in South Africa

Amnesty for the crimes committed during the apartheid regime began in all but name with the Indemnity Act of 1961.⁸⁶³ Passed to protect police officials from being held accountable for the Sharpeville massacre the previous year, the indemnity acts granted a sweeping indemnification for government officials and

⁸⁵⁸ Peter Lambley, *Psychology of Apartheid*, 1st Edition edition (Athens: University of Georgia Press, 1980), p. 252.

⁸⁵⁹ Stephen Zunes, ‘The Role of Non-Violent Action in the Downfall of Apartheid’, *The Journal of Modern African Studies*, 37.1 (1999), 137–69.

⁸⁶⁰ ‘De Klerk: “No Animosity” with Mandela’ <<http://amanpour.blogs.cnn.com/2012/05/10/de-klerk-no-animosity-with-mandela/>> [accessed 6 March 2017].

⁸⁶¹ ‘De Klerk’.

⁸⁶² *Race Relations in South Africa: Reasons for Hope 2017* (Johannesburg, South Africa: South African Institute of Race Relations, February 2017).

⁸⁶³ Indemnity acts for various state-sponsored crimes date back to 1914, however the first major indemnity act during the apartheid period was passed in 1961. Adam Sitze, *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (University of Michigan Press, 2013).

agents of the state.⁸⁶⁴ A second law granting indemnity for officers of the government was passed in 1977, while amendments made in 1977 and 1980 to the Defence Act (1957) granted blanket indemnity to the SADF, significantly limiting any repercussions for violence committed by agents of the state.⁸⁶⁵ As pointed out by Howard Varney, Senior Programme Advisor of the International Centre of Transitional Justice, “these types of crimes would not have been committed had those who committed them not believed that they would be given immunity.”⁸⁶⁶ In 1990 and then again in 1992, de Klerk passed further Indemnity Acts, essentially creating “an ad hoc equivalent of a blanket amnesty for apartheid’s loyalists.”⁸⁶⁷

Adam Sitze, a legal researcher and academic, argued in *The Impossible Machine* that the prior indemnity acts were closer to the blanket amnesties of Latin America than many TRC advocates would like to admit.

Indeed, one of the reasons that the TRC “itself” did not have to engage in a blanket amnesty is that a blanket indemnity was already in effect prior to the inaugural hearing of the TRC’s Amnesty Committee. It is perhaps even the case, in fact, that this categorical indemnity is one of the conditions that enabled the TRC itself to come into being in the first place: it is doubtful that, in the absence of a blanket indemnity, the SADF would have consented to any sort of political transition at all.⁸⁶⁸

The terms amnesty and indemnity were used interchangeably through much of the negotiations between 1990 and 1994. However, according to jurisprudence tradition, the goal of amnesty is to end conflict, while indemnity aims to cover state actions during legitimate governance.⁸⁶⁹ The NP sought to simply expand indemnity coverage, however the ANC and PAC delegates argued that this would open their side to litigation, as indemnity would position the violent acts committed by the opposition as “...nothing more than crimes, violations of an otherwise legitimate law, and not acts committed in the course of a just war against an essentially and thoroughly criminal and illegitimate occupation.”⁸⁷⁰

⁸⁶⁴ *Indemnity Act of 1961*, 1961, 61 1961, 2 <<http://www.justice.gov.za/legislation/acts/1961-061.pdf>>.

⁸⁶⁵ Sitze.

⁸⁶⁶ Varney, Personal Interview.

⁸⁶⁷ These final two indemnity laws were revoked with the passing of the Promotion of National Unity and Reconciliation Act 34 1995, however the benefits to some 13,000 – 20,000 loyalists remained, ensuring amnesty without having to participate in the TRC process. Sitze, p. 27.

⁸⁶⁸ Sitze, p. 28.

⁸⁶⁹ Sitze.

⁸⁷⁰ Sitze, p. 39.

Eventually, South Africa's process became defined by the term "amnesty"; a peace pact that allowed for the possibility of democratization. Amnesty in South Africa was built around the following post-amble of the 1993 Interim Constitution.

In order to advance...reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

The Promotion of National Unity and Reconciliation Act 34 1995 (PNR), signed after South Africa's historic democratic elections in 1994, established the Truth and Reconciliation Commission (TRC) with the goal of investigating the human rights violations committed during the apartheid era, to grant amnesty to those who made full disclosures of any politically motivated crimes that they may have been involved in, and to consider reparations for the victims.⁸⁷¹ While members of the NP sought a blanket amnesty to cover the 1960 – 1994 period, the ANC argued for the necessity of investigations into the gross violations of the apartheid regime. Prior to the transition, the military believed that they would receive full amnesty in return for not threatening the transition.⁸⁷² Conditional, or particularized amnesty was the hard fought for compromise between the opposing groups. With the PNR, three committees were established, each addressing one of the legislated goals of the TRC.⁸⁷³

The TRC's Amnesty Committee (AC) was set up to "facilitate and promote the granting of amnesty in respect of acts associated with political objectives by receiving from persons desiring to make a full disclosure of all the relevant facts relations of such actions."⁸⁷⁴ Those who received amnesty would be exempt from both criminal and civil action. Applicants had to meet specific conditions to be considered for amnesty; the crime being amnestied had to fall within the established time frame (though this was later extended to include the violence committed during the transition period), the violations had to have political objectives, the

⁸⁷¹ *Promotion of National Unity and Reconciliation Act 34 of 1995, 1995-034, 1995, p. 39* <<http://www.justice.gov.za/legislation/acts/1995-034.pdf>>.

⁸⁷² Varney.

⁸⁷³ The nature and efficacy of these committees will be discussed further in the following section.

⁸⁷⁴ *The Provocations of Amnesty: Memory, Justice, and Impunity*, ed. by Erik Doxtader and Charles Villa-Vicencio (David Philip, 2003), p. 145.

applicant had to provide full disclosure of the violation, and the violation had to be proportional to the political objective.⁸⁷⁵

The amnesty provisions of the TRC were challenged in courts, most notably in *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa* (1996).⁸⁷⁶ In a case that went straight to the Constitutional Court, the applicants argued that the amnesty provisions of the PNR directly contravened rights established by the interim constitution, in particular their rights as outlined in section 22 of the constitution that guaranteed “every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.”⁸⁷⁷ The court found that violations of rights were permissible if sanctioned by the constitution or justified in terms of certain sections of the constitution.⁸⁷⁸ The unanimous decision was that the postamble to the constitution that established the TRC process also allowed for the limitation on the right to access judicial processes. Judge Ismail Mahomed wrote that the amnesty law was key to the negotiated process, without which it was unlikely the apartheid regime would have relinquished power.⁸⁷⁹ The judgment established the argument that the greater good of the nation allowed for the limitation of some constitutional rights. From the first, the AC faced an avalanche of litigation, both macro as in the AZAPO case and smaller disputes over perceived bias, among other complaints.⁸⁸⁰ While the political elites were committed to the amnesty law, each side was dogged in protecting their perceived interests in the process.

Of the 7116 applications submitted for amnesty, nearly two thirds were rejected for not meeting the above criteria. Many of the applicants claimed to be ANC or PAC operatives.⁸⁸¹ There was little buy-in from the SADF into the whole

⁸⁷⁵ *Promotion of National Unity and Reconciliation Act 34 of 1995*.

⁸⁷⁶ *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and others*, 1996 <<http://www.saflii.org/za/cases/ZACC/1996/16.html>>.

⁸⁷⁷ *Constitution of the Republic of South Africa, Act 200 of 1993, Act No. 200 of 1993*, 1994 <<http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993>>.

⁸⁷⁸ *AZAPO*.

⁸⁷⁹ *AZAPO*.

⁸⁸⁰ *The Truth and Reconciliation Commission Report - Volume 1* (South Africa: Truth and Reconciliation Commission, 29 October 1998) <<http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>>.

⁸⁸¹ ‘TRC Category - 3 Amnesty’, *Traces of Truth: Documents Relating to the South African Truth and Reconciliation Commission* <truth.wvl.wits.ac.za/cat_descr.php?cat=3> [accessed 3 September 2017].

TRC process, and even less into the AC.⁸⁸² Only 885 members of the security forces applied for amnesty, 80 per cent of whom applied for amnesty for gross human rights violations.⁸⁸³ Covered by earlier indemnity laws, there was no reason for ranking members of the armed forces to admit what they had done during the apartheid regime.⁸⁸⁴ There were even fewer applications from political elites, with notable exceptions such as Roelf Meyer and long-time Minister of Police Adriaan Volk. Political parties on all sides actively discouraged participation in the process, significantly reducing the number of applicants.⁸⁸⁵ De Klerk, for example, refused to apply for amnesty on the grounds that he had committed no crime, while Botha flat out refused to participate in any of the TRC processes.⁸⁸⁶ In the end, 1312 applications were either partially or fully approved.

An important element of the amnesty process in South Africa was reliance on the criminal justice system to threaten prosecutions for those that did not apply for amnesty. As pointed out by Varney,

Ironically successful conditional amnesty is based on successful prosecution. As we saw here, without credible prosecutions, few come forward. Without credible prosecutions, it demeans the whole process for victims. Perpetrators don't come forward, and even if they do, the system failed – there are no consequences. Victims are justified in asking: “What was the point?”⁸⁸⁷

Architects of the legislation hoped this carrot and stick approach would motivate individuals to apply for amnesty and do so truthfully, however, the two institutions came to stand in competition with each other, rather than cooperation.⁸⁸⁸

The TRC process in general, and the amnesty process in particular, have been long vaunted as an ideal path for future transitional justice processes.⁸⁸⁹ However, even as the PNR passed, there were some misgivings at the highest level of the new ANC government. Then Minister of Justice, Dullah Omar, had misgivings regarding what the TRC could achieve. “It's the best balance that we

⁸⁸² The Human Rights Commission, which ran concurrently to the Amnesty Commission received over 22,000 applications from victims, however there was little correlation between the work of the two committees, with the Amnesty Commission relying on applications from perpetrators themselves. ‘Traces of Truth’.

⁸⁸³ J. Sarkin-Hughes, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, 2004).

⁸⁸⁴ Sitze.

⁸⁸⁵ Sarkin-Hughes.

⁸⁸⁶ Davenport and Saunders.

⁸⁸⁷ Varney, Personal Interview.

⁸⁸⁸ Sarkin-Hughes.

⁸⁸⁹ Sitze.

could achieve in the tension between justice and reconciliation. I do not think we should pretend that the [PNR] Act makes provision for complete justice.”⁸⁹⁰

H₁ sets forth the proposition that amnesty is agreed to in good faith. The fraught negotiation process that led to the PNR and the creation of the TRC, discussed further below, meant that the opposing views of amnesty were thoroughly debated. All sides ended up compromising to allow for the development of the TRC and the particularized amnesty process. The process was agreed to and put forward to the public in good faith. However, participation in the amnesty process by the very people who agreed to its conception was limited, indicating that, while still maintained and defended, particularized amnesty has been sacrificed for ad hoc blanket coverage.

4.6 The Transition

4.6.1 Violence and Rebirth

Negotiations between government officials and members of the ANC began in the midst of South Africa’s worst state of emergency (1986 – 1988), and long before the wider public was aware of any change. With the “Trek to Lusaka”, White business leaders met with ANC leaders in exile.⁸⁹¹ The tacit official support for this meeting in the Zambian capital and the 75 that followed⁸⁹² showed that the higher echelons of the regime realized that the end of rigid apartheid was near. The first talks between Nelson Mandela and the then Minister of Justice Kobie Coetsee took place in 1987.⁸⁹³ President P.W Botha disapproved of significant change, however he was aware of the undercurrents of transformation within his own party. According to Botha, “reform apartheid” would maintain White dominance while opening the door to a single South African citizenship, universal franchise and some restricted avenues of black participation in government.⁸⁹⁴ The limits of these changes were soon seen when black leaders and their Indian counterparts refused

⁸⁹⁰ Dullah Omar quoted in Sarkin-Hughes, p. 53.

⁸⁹¹ Lee Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press, 2015).

⁸⁹² Timothy D. Sisk, *Democratization in South Africa* (New Jersey, U.S.A: Princeton University Press, 1995).

⁸⁹³ Sisk.

⁸⁹⁴ Jones.

to participate in the restricted institutions available to them until apartheid was dismantled all together.⁸⁹⁵

While Botha attempted to navigate the external demands of non-White South Africans and the internal pressures of conservative elements in Parliament, violent resistance within the townships increased. From the mid-1980s, the South African townships saw an “explosion of a highly re-politicized and angry society.”⁸⁹⁶ This palatable anger was expressed most clearly in a series of youth and student led uprisings that began in 1976 in Soweto and Sharpeville. The initial uprisings were quickly controlled, however they left a simmering tension that exploded in 1984 and were legitimized by the ANC in 1985 in its declaration of a “People’s War”.⁸⁹⁷ The ANC’s stated goal was to make South Africa ungovernable, forcing either a revolution or, at the very least, serious negotiations.⁸⁹⁸ ANC’s goals of disruption were aided by the development of new political groups, such as the increasingly militant UDF. By the mid-1980s members of the UDF, the ANC and the Inkatha Freedom Party (IFP) were fighting each other, as well as the government. An estimated 20,500 people were killed during the “People’s War”, a period that began in 1984 and ended with the 1994 democratic election.⁸⁹⁹

Against the backdrop of extreme violence and increasingly ineffective armed operations to quell the uprisings in the townships, Botha won the 1987 elections. However, the NP won with its smallest victory since 1948.⁹⁰⁰ Pre-negotiation talks took place between increasingly senior levels of government and the ANC, and in particular, with Mandela. The substance of these negotiations was wide ranging, including the question of how to adjust South Africa’s “violent equilibrium”.⁹⁰¹ The track-two diplomatic efforts of the Dakar encounter in 1987 and a conference in Lusaka in 1989 proved to be the most significant political gatherings during the early transition period.

⁸⁹⁵ Jones.

⁸⁹⁶ Author Timothy D. Sisk applies a phrase sourced from O’Donnell, Schmitter and Whitehead to describe the political situation in South Africa. Sisk, p. 71.

⁸⁹⁷ In June 1985, at the ANC’s Second Consultative Conference in Kabwe, Zambia, the organisation launched the “People’s War” to either force the demise of the apartheid regime, or at least force the NP to the negotiating table. Sisk.

⁸⁹⁸ Sisk.

⁸⁹⁹ Anthea Jeffery, *People’s War: New Light on the Struggle for South Africa* (Jonathan Ball Publishers, 2014).

⁹⁰⁰ Sisk.

⁹⁰¹ J. E. Spence, ‘South Africa: Reform versus Reaction’, *The World Today*, 37.12 (1981), 461–68; Sisk.

De Klerk took over the leadership of the NP in August 1989. Considered a party conservative, de Klerk was also a pragmatist. His negotiations with the ANC reflected the total stalemate facing the country.⁹⁰² “Neither side could defeat each other, but each could prevent the other from ruling alone.”⁹⁰³ On Feb 2 1990, de Klerk lifted the bans on the ANC, the SACP and the PAC, released some restrictions on the press and announced that he would release Mandela from prison.⁹⁰⁴ The release of Mandela on February 11, 1990 produced a watershed moment for the South African government. Long considered a dangerous terrorist, Mandela was now the NP’s negotiating partner for the future of South Africa.

However, both sides had diametrically opposed proposals for the structure of South Africa’s new government. The NP sought to develop a “consociational democracy”, a permanent power sharing arrangement that would afford the NP a veto of ANC policy, while the ANC sought a simple majority rule.⁹⁰⁵ It was only with the Convention for a Democratic South Africa (CODESA) that negotiations moved forward. The popular narrative on both CODESA I and II (which took place in 1992) is that the multi-party talks failed to make any significant progress towards a democratic South Africa. However, the multi-party talks were “a first, and necessary, stab at negotiations.”⁹⁰⁶ The collapse of CODESA was followed by calls for mass action by the ANC and its ideological partners, which resulted in bursts of violence and accusations of a government-sponsored third force.⁹⁰⁷ Conflict between supporters of the ANC, the IFP, and the UDF, led to the most serious waves of violence, with several massacres in the mining sector hostels.⁹⁰⁸

⁹⁰² Sisk; van der Westhuizen; Richard Spitz and Matthew Chaskalson, *Politics of Transition: The Hidden History of South Africa’s Negotiated Settlement* (Johannesburg, South Africa: Witwatersrand University Press Publications, 1999).

⁹⁰³ Spitz and Chaskalson, p. 14.

⁹⁰⁴ ‘BBC ON THIS DAY | 2 | 1990: De Klerk Dismantles Apartheid in South Africa’, *BBC News* <http://news.bbc.co.uk/onthisday/hi/dates/stories/february/2/newsid_2524000/2524997.stm> [accessed 10 March 2017].

⁹⁰⁵ Consociational democracy refers to a power sharing arrangement that allocates each group collective rights within the governance of the state. Spitz and Chaskalson.

⁹⁰⁶ Spitz and Chaskalson, p. 20.

⁹⁰⁷ While there is some debate over the actual impact of the so-called third force on the violence, there is little doubt that the government had sponsored some covert action to destabilize the transition. ‘Convention For A Democratic South Africa (CODESA)’, *O’Malley Archive* <<https://www.nelsonmandela.org/omalley/index.php/site/q/031v03445/041v03446/051v03459.htm>> [accessed 10 March 2017]; Anthea Jeffery; Spitz and Chaskalson; Peter Harris, *Birth: The Conspiracy to Stop the ’94 Election*, 1st Edition edition (Cape Town: Penguin Random House South Africa, 2011).

⁹⁰⁸ After the transition a committee of enquiry found that the apartheid regime contributed to the violence via its use of the third force. Bill Keller, ‘Island of Fear: Inside a Soweto Hostel’, *The New York Times*, 20 September 1992, section Magazine

The stalemate and the spreading violence prompted the ANC and NP negotiators to begin bi-lateral negotiations. On 26 September 1992 Mandela and de Klerk agreed to the Record of Understanding, which established the structure and role of the interim government. Once this milestone was reached, multi-party negotiations resumed. During the Multi-Party Negotiating Process (MPNP) in 1993, an interim constitution was developed, and the date for the 1994 election was set. On one of the last nights of the MPNP, the postamble was written and attached to the interim constitution, establishing the TRC and outlining the basic parameters of amnesty.⁹⁰⁹ In closing the MPNP, Mandela optimistically laid out the future of South Africa.

We emerge from a conflict-ridden society; a society in which colour, class and ethnicity were manipulated to sow hatred and division. We emerge from a society which was structured on violence and which raised the spectre of a nation in danger of never being able to live at peace with itself.⁹¹⁰

Amidst violence, threats, jubilation and hope, South Africa held its first truly democratic election on the 27 April 1994. According to the Independent Electoral Commission and international observers, the election was free and fair, with 19,726,579 votes cast out of an eligible electorate of 21.7 million.⁹¹¹ Archbishop Tutu described the election result, and the surprising lack of violence on that election-day, as nothing short of a miracle.

It was as if someone had a massive magic wand and they had waved it over us, and in the twinkling of an eye, that we had all undergone a strange metamorphosis. To have a White man who had been boss for so long, standing with a black worker and chatting as if they'd just suddenly discovered this major, major, major scientific discovery, you know, these people are human! And they were talking about the kinds of things that you would be chatting about - the weather and then talking about children, and I think discovering that they had much the same kinds of aspirations, you want a decent job, you want a good home, you want your children to be able to have a good education. So most commentators would say, even those who would claim to be very secularised, find that they have to use the strange language of religion: that it was a miracle.⁹¹²

<<http://www.nytimes.com/1992/09/20/magazine/island-of-fear-inside-a-soweto-hostel.html>> [accessed 10 March 2017].

⁹⁰⁹ Spitz and Chaskalson.

⁹¹⁰ Nelson R. Mandela, 'Address by Nelson R. Mandela to the Plenary Session of the Multi-Party Negotiations Process' (presented at the Multi-Party Negotiations Process, World Trade Centre, Kempton Park, 1993) <<http://www.anc.org.za/content/address-nelson-r-mandela-plenary-session-multi-party-negotiations-process>>.

⁹¹¹ 193,081 of 19,726,579 ballots cast were considered invalid. While there were some reports of intimidation, these were limited and international observers deemed the election result as reflecting the will of the people. 'The 1994 Elections', *O'Malley Archive* <<https://www.nelsonmandela.org/omalley/index.php/site/q/031v02039/041v02128/051v02130.htm>> [accessed 10 March 2017].

⁹¹² Stadlen.

4.6.2 Justice in transition: The TRC

The inauguration of Nelson Mandela on May 10, 1994 marked a significant shift in the direction of the South African state. However, debates around key issues, including the question of justice, continued. The TRC was made up of three committees to address the stipulations of the PNR, discussed above. The Human Rights Violations Committee (HRVC) was tasked with investigating the abuses of the apartheid regime. The goal of the Reparation and Rehabilitation Committee was to restore the dignity of victims and make recommendations for reparations. As victims were prohibited from pursuing civil cases, the recommendations made by the Reparations Committee represented the only way victims would receive compensation. Finally, the AC, as discussed above, was tasked with hearing and considering amnesty applications.⁹¹³ Each committee worked independently, with a final report to be presented to President Mandela at a specified time.⁹¹⁴ The president chose Archbishop Tutu to lead the TRC. In justifying the structure of the TRC, Minister Omar argued that a traditional amnesty law would ignore the rights and needs of victims.

We recognised that we could not forgive perpetrators unless we attempt also to restore the honour and dignity of the victims and give effect to reparation...The question of amnesty must be located in a broader context and the wounds of our people must be recognised. I do not distinguish between ANC wounds, PAC wounds and other wounds - many people are in need of healing, and we need to heal our country if we are to build a nation which will guarantee peace and stability.

The TRC was both a direct response to the outcomes of Latin American transitional justice processes and a significant departure from them.⁹¹⁵ Unlike Chile, the commission's processes were to be public, not just the final report. Victims were to be central to the process, with a focus on restorative rather than punitive practices. Formal hearings of the TRC began on 15 of April 1996. Tutu set the process in motion by telling the crowds in East London that

We are charged to unearth the truth about our dark past; to lay the ghosts of that past so that they will not return to haunt us. And that we will thereby contribute to

⁹¹³ 'TRC/Committees' <<http://www.justice.gov.za/Trc/trccom.html>> [accessed 10 March 2017].

⁹¹⁴ The final TRC report presented to Mandela on the 30 October 1998 was officially only a draft, as the Amnesty Committee had not finished its work. Two final volumes encompassing the work of the Amnesty Commission were presented to Mandela's successor, Thabo Mbeki, in 2003.

⁹¹⁵ Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge, 2016).

the healing of a traumatised and wounded people – for all of us in South Africa are wounded people – and in this manner promote national unity and reconciliation.⁹¹⁶

Tutu argued that the TRC process rested on the idea of Ubuntu: recognizing the humanity in everyone, including our enemies.⁹¹⁷ During a personal interview

Pieter G. J. Meiring, one of the TRC commissioners, argued that, despite criticisms

the TRC was justice, not retributive but restorative justice. We were looking for a way to heal. Reconciliation is a process, not just an event. The South African TRC was not an ideal solution. It was a compromised between the needs of the victims and the fears of the perpetrators. [However] it was by no means a perfect commission. That we should be there for the victims was utmost on our minds, to make the process easier to try and achieve some healing, We viewed the truth as a pathway to healing.⁹¹⁸

The approach of the HRVC in particular, with its focus on restoration through storytelling and the validation of individual experiences of people who had been victimised and silenced by apartheid drew both praise and significant criticism from groups and individuals.⁹¹⁹ The AZAPO case, discussed above, challenged the constitutionality of amnesty, and by extension, the TRC process as a whole. Others objected to the religious nature of the process,⁹²⁰ while some victims argued that forgiveness was a personal act and impossible for the government to mandate.⁹²¹ Some argued that the expectation of reconciliation was oppressive in of itself.⁹²² Marius Schoon, whose wife and daughter were killed by a letter bomb sent by the South African Police, argued against enforced forgiveness. Coinciding with the launch of the TRC, Schoon wrote to a number of newspapers. “Tutu has no right to use his position of power to call for victims to forgive. I am a victim of heinous abuse. There is no feeling of forgiveness in my heart.”⁹²³

The impact of the TRC as an act of restorative justice is undeniable. The TRC received testimony from approximately 21,000 victims; 2000 were heard at

⁹¹⁶ Desmond Tutu, *No Future Without Forgiveness* (Image, 2000), p. 87.

⁹¹⁷ Tutu.

⁹¹⁸ Pieter Meiring, Personal Interview, West Auckland, 13/07/2012.

⁹¹⁹ Lyn S. Graybill, ‘South Africa’s Truth and Reconciliation Commission: Ethical and Theological Perspectives’, *Ethics & International Affairs*, 12.1 (1998), 43–62.

⁹²⁰ Phillip Dexter, Personal Interview, Cape Town, 15/02/2011.

⁹²¹ Graybill.

⁹²² Meiring, Personal Interview.

⁹²³ Janet Smith, ‘TRC: Remembering Deep Emotion of That First Day’, *IOL*, 2016

<<http://www.iol.co.za/news/politics/trc-remembering-deep-emotion-of-that-first-day-2009955>> [accessed 10 March 2017].

public hearings.⁹²⁴ It provided a venue for discussion of the past and a forum for the dissemination of information regarding the gross human rights violations of the past. It established a narrative for future generations, fulfilling some of the requirements of traditional transitional justice paradigms.⁹²⁵ During a personal interview, Professor Francois Venter, who was involved in the negotiation process as a legal advisor, and who also contributed to writing the Interim Constitution (1993) argued that the structure of TRC was designed to foster social cohesion.

The whole process was one that can't be explained in legal terms. It was an extra legal process. With Tutu in control, it couldn't be a legal process. It was more emotional. He sometimes cried, showed compassion. It was run as almost a social catharsis. The AZAPO judgement carried that forward.⁹²⁶

However, dissatisfaction emerged early. Victims faced emotionally intense hearings that, while possibly cathartic, had little tangible impact on the day-to-day inequalities that remained.⁹²⁷ Additionally, South Africa's White population felt targeted by the implicit blame that emerged from the TRC. In writing that South Africa needed a mutually agreed history to work from before progress could be made, former apartheid era civil servant Dave Steward argued that

The TRC also stamped Whites with an almost indelible mark of guilt and created the perception of moral inferiority. Even loyal White ANC supporters like Carl Niehaus have said that they will accept that their grandchildren will have to go to the end of the queue in South Africa.

The assumption of blanket White historical guilt and the unwillingness of most Whites to acknowledge it is the wedge that continues to create a chasm between us. It explains why Archbishop Tutu still feels so strongly that Whites have not given proper recognition to the generosity of blacks for "not wanting to knock their blocks off."

Characterising racial groups with negative moral labels is a very dangerous business. When married to self-interest or the search for scapegoats, it can be a recipe for dehumanisation and catastrophe...⁹²⁸

Major parties, including the ANC and NP, rejected elements of the final report, with many in the opposition arguing that there was a false moral equivalency created by treating crimes committed by the ANC during its resistance as the same as those committed by the apartheid regime.⁹²⁹ Fears of bias, regularly expressed

⁹²⁴ Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge, 2010).

⁹²⁵ Arthur.

⁹²⁶ Venter, Personal Interview.

⁹²⁷ Wiebelhaus-Brahm.

⁹²⁸ Dave Steward in Mamphela Ramphele, *Laying Ghosts to Rest: Dilemmas of the Transformation in South Africa* (Cape Town: NB Publishers, 2010), p. 51.

⁹²⁹ Wiebelhaus-Brahm.

during the process were minimized by the fact that, at one time or another, all political sides were antagonistic to the TRC.⁹³⁰

Complicating the legacy of the TRC is the uneven efforts of the National Prosecuting Authority (NPA) to prosecute apartheid era operatives. The authority has pursued only a handful of the cases forwarded to them by the TRC, despite the presence of evidence and testimony.⁹³¹ The most iconic prosecution was that of Eugene de Kock, head of the infamous Vlakplaas unit, for six murders that were found to have no direct political motive.⁹³² The overall reluctance by the criminal justice system to pursue the retributive requirements of the TRC process has been blamed, in part, on the unwillingness of the ANC government to open itself up to prosecutions in light of their very limited participation in the AC.⁹³³

For a number of reasons, the recommendations made by the TRC have largely been ignored, and sometimes directly circumvented. In 2003 Thabo Mbeki, Mandela's successor as President and head of the ANC, granted amnesty to 33 ANC and PAC convicts that had been denied amnesty through the TRC process.⁹³⁴ President Jacob Zuma has considered doing the same. Financial reparations have been slow coming, with only piecemeal efforts made by the South African government to fulfil this component of the transition process, despite the TRC recommending that R3 billion be put aside for victims. The slow action on reparations has been in stark contrast with the relatively instant amnesty offered to those who applied, and the ad hoc general amnesty that has since emerged by the NPA's lack of action.

Using Arthur's basic indicators of transitional justice, the South African process can be assessed as being partially complete.

⁹³⁰ Wiebelhaus-Brahm.

⁹³¹ Jason Burke, 'Four Former Apartheid-Era Guards on Trial over 1983 Student Murder', *The Guardian*, 26 February 2016, section World news
<<https://www.theguardian.com/world/2016/feb/26/four-former-apartheid-era-guards-on-trial-over-1983-student>> [accessed 11 March 2017].

⁹³² De Kock admitted to committing over 100 acts of murder, torture and fraud. He was amnestied for the majority of these crimes, however was prosecuted for those crimes that lacked clear political motivation. David Smith, 'South African Death Squad Leader Eugene de Kock to Be Freed from Jail', *The Guardian*, 30 January 2015, section World news
<<https://www.theguardian.com/world/2015/jan/30/south-africa-eugene-de-kock-released-prime-evil>> [accessed 11 March 2017].

⁹³³ Burke.

⁹³⁴ Doxtader and Villa-Vicencio.

Table 4.1: Transitional Justice Process in South Africa

Justice	Traditional mechanisms of justice, such as criminal or civil litigation, largely unavailable to victims due to the legal parameters of the PNR. Some victims have pursued legal recourse, arguing that the perpetrators failed to meet the requirements of the TRC. This has found limited success, with an ad hoc blanket amnesty emerging despite obligations of legislation.
Reparations	Recommended by the TRC. Limited payments received, significantly less than recommended.
Truth	Comprehensive truth commission with a focus on the experiences of victims during the apartheid regime.
Institutional Reform	Widespread institutional and legal reform dismantling the apartheid system. Economic inequalities, as a result of decades of poor investment in non-White communities remain.

H₀ presents the argument that amnesty legislation is compatible with expectations and norms of an entrenched liberal democracy. Initially, South Africa’s use of particularized amnesty was seen as a solution catering to some of the concerns of blanket amnesty, while still allowing for the democratization process. Phillip Dexter, former ANC cadre argues “that for a moment, South Africa had something profound but it has got lost along the way.”⁹³⁵ A number of issues have arisen from the TRC process, bringing into question both the long-term impact of the use of amnesty law and the culture of impunity that has been maintained. Some of these issues are tied to the failure of the government to follow key expectations of the TRC. Other issues are tied to the nature of the apartheid, and the failure of the TRC to tackle the depth of the apartheid structure in South Africa. South Africa differs from Brazil and Chile, in that the replaced regime (apartheid) was long standing and all encompassing. By focusing its work at the individual level, i.e. the perpetrator and victim, the TRC failed to address the systematic oppression of apartheid, and the lasting devastating impact this has had on the country and its institutional structure.

⁹³⁵ Dexter, Personal Interview.

4.6.3 Opposing views of the Transitional Justice Process

The post-transitional justice period has revealed a complicated political and public relationship with the TRC and transitional justice process as a whole. While Mandela supported the process, subsequent leaders of the ANC have been less enthusiastic. There were a number of criticisms, although the primary issue rested on the Commission's decision to treat the violence of the opposition as the same as that committed by the apartheid regime.⁹³⁶ Successive ANC governments have resisted addressing the recommendations of the TRC regarding reparations, a wealth-tax to address the persistent economic inequality and the prosecution of those who refused to participate in the amnesty process.

The White population has, as Steward argued, emerged from the transitional justice process with the sense of being morally judged for legitimizing the system of apartheid.⁹³⁷ The resentment at being held accountable for the systematic violence of the apartheid regime has created the chasm Steward warned against, with a palpable sense of self-pity evident amongst the conservative Afrikaner community.⁹³⁸ After fifty some years as the arbitrator of the apartheid system, the NP has had to at once negotiate its history while at the same time navigating a political presence. In discussing the persistent fears that the commission was biased against the White population, de Klerk has argued that he should have handled the TRC process differently, with a greater insistence on a model closer to that used in Chile, distinguished by being conducted behind closed doors and with an emphasis on the victims over naming perpetrators.⁹³⁹

The broader public perception of the TRC and its legacy has shifted. In 1998 opinion on the TRC indicated a general lack of support for the process, with an Afrobarometer survey finding that two thirds of those surveyed believed that race relations were worse off.⁹⁴⁰ By 2000, public perception of the process was markedly different, with two thirds viewing the TRC as integral to race relations in South Africa. However, by 2003, three-quarters of respondents argued that it was time to

⁹³⁶ Alex Boraine, *What's Gone Wrong?: South Africa on the Brink of Failed Statehood* (New York: NYU Press, 2014).

⁹³⁷ Ramphele.

⁹³⁸ van der Westhuizen.

⁹³⁹ Neil Southern, 'Conflict Transformation and Truth-Seeking: The Impact of South Africa's Truth and Reconciliation Commission on the National Party', *Nationalism and Ethnic Politics*, 21.3 (2015), 335–56.

⁹⁴⁰ Wiebelhaus-Brahm.

move on.⁹⁴¹ Surveys have now begun to include members of South African society who were born after the end of apartheid (called *born-frees*). Their concerns have expanded beyond demands for justice, with unemployment and economic hardship dominating. However, many of these concerns have roots in the systematic inequalities of the apartheid regime that remained despite the transition, and therefore are related to the justice process, even if not directly connected to the TRC.⁹⁴² According to Meiring,

The attention of the people has shifted [from justice for apartheid era crimes]. We live in a totally unjust country. There is an inability of police to deal with crime. Another cry that is developing is for justice in our structures. The ANC have been in power for 18 years and little has changed. The feeling is that there is no justice in the system, especially in education. The feeling is that the state is run really badly. The strange thing is that people still vote for the ANC.⁹⁴³

4.7 Justice and Democracy in the long run: Can amnesty and democracy coexist?

4.7.1 The current state of democracy

Democracy in South Africa is in crisis.⁹⁴⁴ What the Economist labelled a “hollow state”⁹⁴⁵ has also become a violent and unstable one. There is a growing frustration amongst the public over government failures, corruption and persistent cronyism.⁹⁴⁶ Over the last decade, protesters have become more militant and violent, targeting foreigners as scapegoats for the current state of affairs.⁹⁴⁷ The police, in response, have become increasingly oppressive, returning to organizational norms more akin to those of the apartheid era than the early

⁹⁴¹ As pointed out by Wiebelhaus-Brahm, race had a significant impact on how respondents reacted to the questions, with these numbers reflecting an average overall. Wiebelhaus-Brahm.

⁹⁴² Robert Mattes, *The ‘Born-Frees’: The Prospects for Generational Change in Post-Apartheid South Africa*, Afrobarometer Working Papers (Afrobarometer, April 2011) <<http://afrobarometer.org/sites/default/files/publications/Working%20paper/AfropaperNo131.pdf>>

⁹⁴³ Meiring, Personal Interview.

⁹⁴⁴ Boraine; Mattes; Mbekezeli C. Mkhize, ‘Is South Africa’s 20 Years of Democracy in Crisis? Examining the Impact of Unrest Incidents in Local Protests in the Post-Apartheid South Africa’, *African Security Review*, 24.2 (2015), 190–206; Raymond Suttner, ‘South Africa in Crisis: Is There a Way Out?’, *The Daily Maverick* (South Africa, 20 July 2016), Online edition, section Politics <<https://www.dailymaverick.co.za/article/2016-07-20-south-africa-in-crisis-is-there-a-way-out/#.WMW6zBBy50Q>>.

⁹⁴⁵ ‘The Hollow State’, *The Economist*, 19 December 2015 <<http://www.economist.com/news/middle-east-and-africa/21684146-two-decades-after-south-africas-transition-non-racial-democracy-its>>.

⁹⁴⁶ Suttner; Mkhize.

⁹⁴⁷ Jean Pierre Misago, ‘Xenophobic Violence in the “Rainbow” Nation’, *Al Jazeera*, 2017 <<http://www.aljazeera.com/indepth/opinion/2017/03/xenophobic-violence-rainbow-nation-170301075103169.html>> [accessed 13 March 2017].

democratic one.⁹⁴⁸ Under the leadership of Mbeki and then Zuma the ANC has eroded the lines between the ruling party and the government itself, calling into question the health of the democratic institutions.⁹⁴⁹ Of particular concern is the sway Zuma has had on supposedly independent organisations such as the NPA. In 2009 Zuma faced 783 charges of fraud, racketeering and corruption relating to a major government arms deal in the late 1990s.⁹⁵⁰ The NPA decided to drop all charges just weeks prior to voting, allowing for his election. The President is now facing a potentially negative decision from the country's Supreme Court of Appeal.⁹⁵¹ While in office, Zuma used \$USD23 million of state funds to refurbish his private residence. The president was forced to repay \$USD600 000 of this, although questions have been raised regarding where this payment came from.⁹⁵² Immediately prior to his presidency, Zuma also faced accusations of rape but was acquitted of charges in May 2006.⁹⁵³

In November 2016, a report on the capture of the South African state by private interests was released. Produced by public protector Thuli Madonsela, the report investigated the role a wealthy immigrant family, the Guptas, had in influencing decisions at the highest level of government.⁹⁵⁴ The Guptas are close personal friends of Zuma, with the report showing a number of lines of political and economic contact between the president, his family and the businessmen.⁹⁵⁵

⁹⁴⁸ Mkhize; 'The Hollow State'.

⁹⁴⁹ 'The Hollow State'; Meredith.

⁹⁵⁰ Agencies, 'South African Court Blocks Jacob Zuma Corruption Appeal', *Al Jazeera*, 2016 <<http://www.aljazeera.com/news/2016/06/south-african-court-blocks-jacob-zuma-corruption-appeal-160624174719894.html>>.

⁹⁵¹ Phillip de Wet, 'Timeline: How the Spy Tapes Saga Continues to Haunt Zuma since 2001', *Mail and Guardian* (Cape Town, South Africa, 23 May 2016), Online edition, section National <<https://mg.co.za/article/2016-05-23-spy-tapes-timeline-zuma-avoids-his-day-in-court-for-15-years-and-counting>>.

⁹⁵² Govan Whittles, 'Zuma Pays Back the Money – but Where Did He Get the R7.8-Million?', *Mail and Guardian* (Cape Town, South Africa, 12 September 2016), Online edition, section National <<https://mg.co.za/article/2016-09-12-zuma-pays-back-the-money-but-where-did-he-get-the-r78-million>>.

⁹⁵³ Zuma became president of the ANC in 2007, before being elected to the South African presidency in 2009. Andrew Meldrum, 'Sobbing Witness Accuses Zuma of Rape', *The Guardian*, 8 March 2006, section World news <<https://www.theguardian.com/world/2006/mar/07/southafrica.andrewmeldrum>> [accessed 12 March 2017].

⁹⁵⁴ Jan Hofmeyr, 'State Capture in South Africa', *Transparency International*, 2017 <<http://blog.transparency.org/2017/02/14/state-capture-in-south-africa/>> [accessed 12 March 2017].

⁹⁵⁵ Lynsey Chutel and Lily Kuo, 'What the "State Capture" Report Tells Us about Zuma, the Guptas, and Corruption in South Africa', *Quartz*, 2016 <<https://qz.com/825789/state-capture-jacob-zuma-the-guptas-and-corruption-in-south-africa/>> [accessed 12 March 2017].

Despite the visible controversy surrounding the ANC, the party has maintained majority support since 1994. However, in the 2014 elections, the first in which *born-frees* were able to participate, the ANC won 62 percent of the vote, its lowest national result since 1994.⁹⁵⁶ The local elections of 2016 reflected the deepening crisis over service delivery and government responsiveness, with ANC holding only 54 per cent of the vote which is the first time the party had dropped below 60 per cent since the end of apartheid.⁹⁵⁷ An Ipsos South Africa survey found that an increasing number of South Africans felt that the country was going in the wrong direction, while 57 per cent believed that the ANC had lost their moral compass.⁹⁵⁸ Survey data from 2015 found that “majority of citizens would be willing to give up elections in favour of a non-elected government that would provide basic services.”⁹⁵⁹

The drop-in support for democracy has not been helped by an ever-widening gap of inequality. South Africa has consistently had a Gini-coefficient of 66.00 to 69.6, with limited prospect of positive change.⁹⁶⁰ Unemployment in South Africa has risen above 27 per cent, or five million, with 3.5 million under the age of 35.⁹⁶¹ The rise of the Economic Freedom Fighters, a left wing political party taking their cues from the policies of the likes of Venezuela’s Hugo Chavez reflects the growing dissatisfaction with the current economic direction.

⁹⁵⁶ ‘2014 National and Provincial Elections: National Results’, *Electoral Commission of South Africa* <<http://www.elections.org.za/content/Elections/Results/2014-National-and-Provincial-Elections--National-results/>> [accessed 13 March 2017].

⁹⁵⁷ Abdi Latif Dahir, ‘South Africa’s Latest Elections Show Mandela’s Legacy Can’t Protect the ANC from Its Own Incompetence’, *Quartz*, 2016 <<https://qz.com/751858/south-africa-latest-elections-show-mandelas-legacy-cant-protect-the-anc-from-its-own-incompetence-any-more/>> [accessed 13 March 2017].

⁹⁵⁸ Ipsos, ‘Ipsos South Africa - Election Outlook_Poll of Polls’, *Ipsos South Africa*, 2016 <http://www.ipsos.co.za/SitePages/Election%20Outlook_Poll%20of%20polls.aspx> [accessed 13 March 2017].

⁹⁵⁹ Rorisang Lekalake, ‘AD71: Support for Democracy in South Africa Declines amid Rising Discontent with Implementation’, *Afrobarometer*, 2016 <<http://afrobarometer.org/publications/ad71-south-africa-perceptions-of-democracy>> [accessed 13 March 2017].

⁹⁶⁰ World Bank, ‘GINI Index | Data | Table’ <<http://data.worldbank.org/indicator/SI.POV.GINI>> [accessed 24 May 2014]; Haroon Borat, ‘Is South Africa the Most Unequal Society in the World?’, *Mail and Guardian* (Cape Town, South Africa, 30 September 2015), Online edition <<https://mg.co.za/article/2015-09-30-is-south-africa-the-most-unequal-society-in-the-world/>> [accessed 13 March 2017].

⁹⁶¹ Nomasa Maseko, ‘South Africa’s Unemployment Crisis: Begging for Jobs’, *BBC News*, 25 May 2016, section Africa <<http://www.bbc.com/news/world-africa-36367703>> [accessed 13 March 2017].

According to Kgekong, the voting public in South Africa is still swayed by loyalty to the ANC resistance. However, he believes that it will change.

We are convinced people won't follow manifestos, they follow sentiments. It will change. Unemployment is bad, people are struggling... Ways and means have to be sought to bring equality to our nation. There is a huge gap. There is an opulence on one side and abject poverty on the other side. Its not just White anymore. We want to improve life of our South Africans. We're not saying South Africans should be rich but people ought to live decently regardless of colour.⁹⁶²

Unemployment, poor service delivery, impunity for the rampant corruption, increasing inequality and a fundamental leadership deficit have all contributed to the volatile state of affairs in South Africa. Over the last decade there have been waves of xenophobic attacks, leading to the death or harassment of tens of thousands of foreigners.⁹⁶³

Table 4.2: Quality of Democracy in Post-Apartheid South Africa: An Analysis

Dimension	South Africa	Commentary
Law	Broad liberal legal structure in place, based on the 1997 Constitution.	Prosecutorial independence undermined by scandals involving the President and the NPA. President has ignored orders issued by the courts, undermining the judiciary. Rise in police violence, including torture while in detention, and heavy-handed responses to protest action.
Accountability	Traditional democratic accountability present, however undermined by corruption.	Elections deemed free and fair, though partisan violence present in recent election cycles. Uneven response by government to unfavourable court decisions.
Participation	Universal franchise	Fairly high participation rates, with 77 per cent of the voting age population registered to vote, and 73 per cent of registered voters making it to the voting booth.
Competition	Widespread competition.	Despite fears of South Africa becoming a one-party state, opposition parties have been fairly robust, with active challenges to ANC dominance

⁹⁶² Kgekong, Personal Interview.

⁹⁶³ Misago.

		in certain regions. Some concerns expressed over tribal allegiance to the dominant party, with limits on individual voting choices in rural areas.
Freedoms	Constitutionally established rights widespread	Personal freedom relatively widespread, including religious freedom and economic freedom. Press freedom listed by Freedom House as 'partly free' and is facing increasing government restrictions, including the use of the apartheid-era National Key Points Act to restrict reporting on locations deemed to have national security importance, including Zuma's controversial Nkandla residence.
Equality	Procedural democratic equality, including gender equality. Significant economic disparities maintained between races, despite the dismantling of the apartheid institutional sector.	Gini Index of 69 (2009), indicating a highly unequal society (0 is perfectly equal, 100 is perfectly unequal). 21.7 per cent of the population live in extreme poverty, while 39 per cent live in relative poverty.
Responsiveness	Limited government responsiveness, hampered by corruption and ineptitude.	Frequent, and often violent protests over basic service delivery, corruption, and the redirection of resources and alignment of government prerogatives.

Democracy in South Africa has suffered for a number of reasons, not least of all the leadership deficit that has developed within the ANC and the failure of opposition parties to effectively challenge the dominant party. While claims that South Africa had become a one-party state are premature, there is little doubt that the ANC dominates the country's political discourse, to the detriment of democracy overall.⁹⁶⁴ The claims of state capture, increasingly widespread protests, significant economic inequality, persistent violence and overall lack of security all undermine democratic quality, leaving South Africa in a precarious position and, at best, a semi-democracy.

⁹⁶⁴ Neeta Misra-Dexter and Judith February, *Testing Democracy: Which Way Is South Africa Going?* (South Africa: African Books Collective, 2010).

4.7.2 Justice for Human Rights Violations in South Africa

The discussion on justice for HRVs in South Africa inevitably needs to be divided into two separate discourses. The first is the continuing debate around justice for apartheid-era crimes, both punitive and in the form of reparations. The second discourse pivots on the pervasive impunity for crimes committed by agents of the state in the post-apartheid era. The two are inextricably linked, with researchers from the Civil Society Prison Reform Initiative (CSPRI) arguing that “the failure by the [NPA] to prosecute apartheid-era perpetrators of rights violations following the [TRC] set a particular benchmark that left victims frustrated and, more importantly, a prosecutorial approach tolerant of rights violations.”⁹⁶⁵

Victims’ organisations, along with other groups from within civil society, have continued to battle the South African government and the NPA over prosecutions for those who abstained from the amnesty process.⁹⁶⁶ The Khulumani Support Group has developed into one of the primary victims’ lobbying organisations, influencing both policy and jurisprudence.⁹⁶⁷ In her book, *Bodies of Truth* Rita Kesselring describes victim-government interactions during the post-apartheid period as distinctively legal.

In other words, although South Africa is still widely known for choosing a reconciliatory path to deal with past atrocities, apartheid matters took a judicial turn post TRC. Despite the TRC’s explicitly non-retributive approach, South African citizens have pursued questions of victimhood and truth through legal avenues.⁹⁶⁸

While Khulumani has spearheaded several legal challenges to the TRC process, it has also called on the government to increase the reparations paid out to

⁹⁶⁵ Lukas Muntingh and Gwenaëlle Dereymaeker, *Understanding Impunity in the South African Law Enforcement Agencies* (Civil Society Prison Reform Initiative, 2013), p. 4 <<http://cspri.org.za/publications/research-reports/understanding-impunity-in-the-south-african-law-enforcement-agencies>> [accessed 14 March 2017].

⁹⁶⁶ Burke; Chris McGreal, ‘Apartheid-Era Minister Guilty of Attempted Murder’, *The Guardian*, 18 August 2007, section World news <<https://www.theguardian.com/world/2007/aug/18/southafrica.chrismcgreal>> [accessed 13 March 2017]; ‘Khulumani Support Group’, *Khulumani Support Group* <<https://www.khulumani.net/>> [accessed 13 March 2017]; Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge, 2010); Rita Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa* (Stanford University Press, 2016).

⁹⁶⁷ Victims represented by Khulumani have filed legal action in both the U.S and South Africa, targeting companies that benefited from apartheid, but failed to participate in the TRC process. ‘Khulumani Support Group’; Kesselring, *Bodies of Truth*.

⁹⁶⁸ Kesselring, *Bodies of Truth*, p. 4.

victims as well as questioned the use of the TRC “closed list” as the guide for reparation payments.⁹⁶⁹ The efficacy of these efforts is limited, at least in a purely legal sense. The 2016 trial of four apartheid era guards in the death of MK operative Nokuthula Simelane was the first of its kind in over a decade. According to several affidavits, the family had to approach the high court before the head public prosecutor would deliver the indictment to the four accused.⁹⁷⁰ Lawyers acting on behalf of the victim’s family have subsequently petitioned the government to pay the legal fees of the accused so that the trail could go forward.⁹⁷¹

HRVs continue to be committed by agents of the state, albeit on a much smaller scale. In the best light possible, it can be argued that, faced with high crime rates and limited resources, the South African Police Service (SAPS) have reverted to authoritarian style policing.⁹⁷² However, it could also be argued that those impulses never left. Senior apartheid-era police officers of what was then the South African Police (SAP) were guaranteed job security as part of the negotiation process. SAPS also became a “dumping ground of unwanted men with guns”,⁹⁷³ as well as the thousands of *kitskonstabels* (instant constables) who were given township policing jobs in the final days of the apartheid with little training or support.⁹⁷⁴ Violent action committed by police has been an ongoing issue⁹⁷⁵ and successful prosecutions are rare. According to Professor Peter Jordi, from the Wits Law Clinic, “Torture was carried out at local police stations before and it continued today. The police torture people all the time, in their homes, in police cells, in cars – torture is standard police investigation practice. The policemen are serial

⁹⁶⁹ The closed list refers to the list of 21,000 victims identified by the TRC. However, Khulumani argue that this list is arbitrary, and excludes a number of victims who chose not to or were unable to submit applications to the TRC. Rita Kesselring, ‘Experiences of Violence’, in *The Politics of Governance: Actors and Articulations in Africa and Beyond*, ed. by Lucy Koechlin and Till Förster (Routledge, 2014).

⁹⁷⁰ Kevin Bloom, ‘RSA in a Dewdrop: Reflections on the Political Murder Trial of the Decade | Daily Maverick’, *The Daily Maverick* (South Africa, 13 March 2017), Online edition <<https://www.dailymaverick.co.za/article/2017-03-13-rsa-in-a-dewdrop-reflections-on-the-political-murder-trial-of-the-decade/#.WMdCpBBy50Q>> [accessed 14 March 2017].

⁹⁷¹ The case has since been delayed. Burke; Bloom; Iosif Kovras, *Grassroots Activism and the Evolution of Transitional Justice* (Cambridge University Press, 2017).

⁹⁷² Gready.

⁹⁷³ SAPS incorporated both the original SAP and members of the resistance groups, non-state security forces. Gready, p. 132.

⁹⁷⁴ Mike Brogden, Professor of Criminal Justice Mike Brogden, and Clifford D. Shearing, *Policing for a New South Africa* (Routledge, 2005).

⁹⁷⁵ During the 2015/2016 period the Independent Police Investigative Directorate (IPID) reported 366 deaths as a result of police action, as well as 216 deaths in police custody, 145 cases of torture, including 51 cases of rape, by police officers on duty, and 3,509 cases of assault by police.

criminals.”⁹⁷⁶ One unintended legacy of the apartheid era amnesty “is that it created a high threshold of tolerance for human rights violations. What should have been a hallmark for justice for apartheid-era victims, became the benchmark for impunity.”⁹⁷⁷

Table 4.3: Quality of Transitional Justice in Contemporary South Africa

Characteristic	South Africa	Commentary
Fairness	Very limited	Amnesty legislation fulfilled as decided during the negotiations. Particularized amnesty has become an ad hoc blanket amnesty. Limited opportunity for victims to seek redress.
Equality of Application	Poor	Limits on amnesty have been inconstant, including time limits, amnesty for previously denied applicants and prosecution of those who refused to participate in the amnesty process.
Law	Legal	Particularized amnesty is enshrined in the PNR Act (1995). Viewed as legal.
Legitimacy	Somewhat legitimate	The PNR Act, passed after South Africa’s first democratic election, is considered legitimate. However, the justice process as has developed over the last 20 years has been questioned, particularly as the government has resisted further prosecutions.

The pervasive impunity that has been maintained well beyond the purview of the TRC process has had a significant impact on how people view the process, and how people view the justice system as a whole. South Africans have lost faith in the judicial process, with 54 per cent of respondents in a 2015 Afrobarometer

⁹⁷⁶ Peter Jordi quoted in Richard William Johnson, *How Long Will South Africa Survive?: The Looming Crisis*, 2nd edn (South Africa: Oxford University Press, 2015), p. 119.

⁹⁷⁷ Muntingh and Dereymaeker, p. 15.

survey saying that they didn't trust the police at all and 41 per cent say that they didn't trust the courts of law.⁹⁷⁸ Over 22 years after South Africa's first democratic elections 54 per cent of respondents to the Afrobarometer survey also said that they believed the courts treated people differently based on race.⁹⁷⁹ As pointed out by Dexter, if you go to court, the people who were hanging judges (members of the judiciary during the apartheid period) were now responsible for dispensing justice.⁹⁸⁰ The institutions set up to protect the people are being perceived as dangerous and unequal, undermining the legitimacy of the entire system.

4.8 Perspectives on the tension between justice, amnesty and democracy

South Africa's democratic transition had all the potential for success. The negotiation process brought almost all of the country's political elements together to decide on the interim constitution. Despite threats of violence, non-participation by certain groups, and long queues, the first democratic election took place without a significant loss of life and, in quick order, the PNR was passed to ensure the country dealt with the legacy of the past and the TRC was created. Seemingly, South Africa had managed to negotiate some of the key issues of transitional justice and democratization, creating a global example. However, 20 years on the success of the process is up for debate. The public has lost faith in the political institutions created to support the consolidation of democracy, in the TRC and in the party that triggered the dismantling of apartheid. South Africa is currently considered one of the most unequal societies in the world, corruption levels are very high and the majority of South Africans would support the return to authoritarian rule if it would ensure basic service delivery. All this bodes ill for the future of South Africa's democracy.

H₂ proposes that amnesty becomes widely acceptable with time as population demographics shift. Over 36 per cent of the population is under the age of 35, with the largest percentage in the zero to nine age group.⁹⁸¹ The number of

⁹⁷⁸ Anyway Chingwete, *In South Africa, Citizens' Trust in President, Political Institutions Drops Sharply*, Afrobarometer Dispatch No. 90 (Afrobarometer, 17 May 2016) <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno90_south_af_rica_trust_in_officials.pdf>.

⁹⁷⁹ Chingwete.

⁹⁸⁰ Dexter, Personal Interview.

⁹⁸¹ Statistics South Africa, *Community Survey 2016* (Pretoria, South Africa, 2016) <http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-_Statistical-releas_1-July-2016.pdf>.

born frees will soon outnumber the number of people who remember what it was like to live under apartheid. The population's experience with apartheid is becoming increasingly secondary, there is a significant gap between how the political elites view the transition process and the views of the wider public. According to Professor Pierre du Toit, this generational change works against the claims for traditional forms of justice.

The TRC gave answers to questions on specific crimes. For the next generations, the goal must change. The target of retribution has moved on. But the desire for blame may be displaced onto a particular community, or broadened out to wider blame. The desire for retribution can end up being displaced into xenophobia, for example.⁹⁸²

Maintaining the TRC as is has the potential to significantly disrupt the political system. This is not to say that people want to go back to redo the TRC. Rather, there is ongoing frustration that the whole process was flawed, giving too much to the outgoing forces for too little return.⁹⁸³

Many of the participants of the negotiation process however, remain committed to the path taken, as flawed as it may be. The following sections are the outcome of interviews conducted with several members of the transition team, opposition groups, human rights activists and journalists who witnessed the transition first hand; as well as additional research. The threads of discourse presented, while no means canvassing all views, offer a clearer understanding of the dominant elite perspectives in South Africa as they relate to amnesty, justice and democracy.

4.8.1 Military Perspectives

South Africa was not a military dictatorship of the type seen in Brazil and Chile, however, the security apparatus held a central role in the apartheid regime. They propped up the regime, quelling resistance and hunting external threats during cross border conflicts. The transition shook the security institutions, pushing some

⁹⁸² Pierre Du Toit, Personal Interview, Stellenboush, 18/02/2011.

⁹⁸³ Eve Fairbanks, 'Why South African Students Have Turned on Their Parents' Generation', *The Guardian* (South Africa, 18 November 2015), section News <<https://www.theguardian.com/news/2015/nov/18/why-south-african-students-have-turned-on-their-parents-generation>> [accessed 15 March 2017]; Kenichi Serino, 'How Apartheid Haunts a New Generation of South Africans', *The Atlantic*, 21 September 2016 <<https://www.theatlantic.com/international/archive/2016/09/south-africa-apartheid-mandela-born-free-university/500747/>>.

career soldiers and police officers to question the mandate they had been given by their own government.⁹⁸⁴ The majority, however, prescribed to the idea that the organisations were “above politics”⁹⁸⁵ and were “serving the government of the day. In other words, the SADF regarded itself as preserving South African national security rather than White privilege and power.”⁹⁸⁶ As a consequence of this official narrative, members of the SADF were actively discouraged from making applications to the TRC. Most high-ranking officials of the armed forces also refused to attend a TRC hearing on conscripts, arguing that their presence there would validate the process. General Magnus Malan did testify at the TRC, claiming to represent the entire SADF. He was followed by General Georg Meiring and General Constand Viljoen. Malan did not apply for amnesty. Rather he was there because he felt

...that there is a total lack of military expertise in the Truth Commission when it comes to assessing the past actions of the South African Defence Force...Blatant, untrue and unfair accusations are being made against the former SADF in an apparent vendetta...I am not prepared to permit these incorrect perceptions to go unchallenged.⁹⁸⁷

Malan’s refusal to acknowledge a policy of systematic HRVs was reinforced by SADF spokesperson Deon Mortimer, who argued that “the theme of forgiveness appears to be essentially incompatible with the military self-understanding of their place in history.”⁹⁸⁸ The SADF became the South African National Defence Force (SANDF) in 1994. Much like the political elites, the SANDF actively ignored the recommendations of the TRC, refusing to acknowledge any blame for the HRVs committed during the apartheid period.⁹⁸⁹ Members of the military elite have continued to seek blanket amnesty from leaders

⁹⁸⁴ Cristina Buarque de Hollanda, ‘Human Rights and Political Transition in South Africa: The Case of the Truth and Reconciliation Commission’, *Brazilian Political Science Review*, 7.1 (2013) <<http://www.bpsr.org.br/index.php/bpsr/article/view/153>> [accessed 12 March 2017].

⁹⁸⁵ Gary Baines, *South Africa’s ‘Border War’: Contested Narratives and Conflicting Memories* (A&C Black, 2014), p. 24.

⁹⁸⁶ Baines, *South Africa’s ‘Border War’*, p. 24.

⁹⁸⁷ General Magnus Malan as quoted in Pieter Meiring, *Chronicle of the Truth and Reconciliation Commission: A Journey through the Past and Present into the Future of South Africa* (South Africa: Wipf and Stock Publishers, 2014), p. 127.

⁹⁸⁸ Buarque de Hollanda, p. 19.

⁹⁸⁹ Noel Stott, *From the SADF to the SANDF: Safeguarding South Africa for a Better Life for All?*, Violence and Transition Series Vol. 7 (Centre for the study of Violence and Reconciliation, 2002) <<https://www.sa-soldier.com/data/09-SADF-links/UsedPDFs/fromsadtosandf.pdf>>.

of the ANC, with former Gen. Viljoen petitioning Mbeki in 2002 for an expanded amnesty for former members of the SADF.⁹⁹⁰

While there is a growing body of literature by conscripts exploring individual and institutional culpability for the crimes committed during the apartheid regime, the leaders of the SADF have maintained the “pact of forgetting”.⁹⁹¹ According to researcher Gary Baines,

...SADF veterans were complicit in a self-imposed and consensual silence about human rights abuses following the country’s democratisation. This was partly enabled by a ‘pact of forgetting’ struck by the political elites and leaderships of the statutory and non-statutory forces. Finally, SADF veterans have employed silence as a strategy of control; they have invoked their experiential knowledge of the ‘Border War’ to assert their authority to tell the ‘truth’, thereby constructing a narrative that remains largely unchallenged in the public domain.⁹⁹²

The South African Police played a key role in the country’s internal war. During apartheid the government “wielded the police like a club, using them to keep black South Africans in check and brutally extinguish any dissent.”⁹⁹³ At its core the SAP was the security branch. Much like the opinions expressed by the heads of the SADF, members of the SAP testified at the TRC arguing that their role in apartheid was to uphold national security. According to one-time head of the security branch, General Johann van der Merwe

From the viewpoint of the SAP and the special branch the government was - the aim was to ensure law and order and to ensure the security of the civilian population. This was so closely allied with the activities of the police that the police regarded itself as an ally of the government inevitably. Since 1948 an intimate relationship developed between the police and the Cabinet and this was influenced by many factors - the attitude of the Afrikaans churches and other organisations. The National Party was the natural home of most Afrikaners and the top echelons of the SAP agreed fully with the policies of the National Party.⁹⁹⁴

However, the difference between the SADF and the SAP was that the latter participated to a greater extent in the whole TRC process. SAP applications to the

⁹⁹⁰ Jaspreet Kindra, ‘Pardons “Apartheid Justice”’, *Mail and Guardian*, 17 May 2002, Online edition, section News <<https://mg.co.za/article/2002-05-17-pardons-apartheid-justice/>> [accessed 15 March 2017].

⁹⁹¹ Baines, *South Africa’s ‘Border War’*, p. 79.

⁹⁹² Gary Baines, ‘SADF Soldiers’ Silences: Institutional, Consensual and Strategic’, *Acta Academica*, 47.1 (2015), p. 79.

⁹⁹³ Norimitsu Onishi, ‘Police in South Africa Struggle to Gain Trust After Apartheid’, *The New York Times*, 13 August 2016 <<https://www.nytimes.com/2016/08/14/world/africa/south-africa-apartheid-police-killings.html>> [accessed 15 March 2017].

⁹⁹⁴ Johann van der Merwe, *Truth and Reconciliation Commission - Armed Forces Hearing South African Police* (Cape Town, South Africa, 1997) <<http://www.justice.gov.za/trc/special%5Cforces/sap.htm>> [accessed 15 March 2017].

amnesty committee made up 90 per cent of the applications coming from the security forces.⁹⁹⁵ After the intense coverage of the TRC process, some felt that the revelations tarnished the new SAPS, formed in 1995 out of the SAP and territorial police units.⁹⁹⁶ The TRC made some recommendations for police reform, however these were limited and, as discussed above, the culture of impunity has been maintained.

The SAPS has provided limited commentary on the long-term impact of the TRC, with many former police officers remaining silent in an environment that judges them for their past actions. The generals and the perpetrators have steadfastly maintained the idea that the crimes identified by the TRC were committed in the name of national security. While the institutions have been reformed, little has changed in terms of the perspectives held by the former operatives.

4.8.2 Perspectives from the Political Elites

The security apparatus of South Africa may have been at the core of the apartheid state, however the political elites were its driving force. Apartheid was born out of the political victory of Afrikaner nationalists, and crumbled when the political elites no longer saw the system as a viable option. Since the transition the discourse around amnesty and the TRC has been fairly consistent amongst political elites. The miracle so often described by the international press was, in fact, the product of a significant and tumultuous negotiation period. Bargains were made, inevitably leading to compromise. What is also important to note, and has been discussed briefly above, is that while dominated by the NP and the ANC, other parties and interests were present during the negotiations.

The propaganda of hope, change and reconciliation aside, recent discussions on the process have included considerations on the shortcomings of the negotiation process and the failures of the ruling party to fulfil the mandate of the TRC. Resistance stalwarts Tutu and Mandela maintained their original position regarding the TRC, with continued public defence for the process. However, these same

⁹⁹⁵ After witnessing the trial of de Kock, many former SAP officers feared the threat of prosecution and therefore applied for amnesty while this was an option. The prosecutions of others rarely came. Hugo van der Merwe and Audrey R. Chapman, *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, 2008).

⁹⁹⁶ Janine Rauch, 'The South African Police and the Truth Commission', *South African Review of Sociology*, 36.2 (2005), 208–37.

leaders have been critical of the failure of the ruling party to complete the work.⁹⁹⁷ Subsequent leaders of the ANC have been generally unsupportive of the process, pushing for something closer to a blanket amnesty.⁹⁹⁸ A broad assessment of the different discourses that have emerged from the political elites finds that they tend to fall within two themes. The first group of discourses reflects the “pact of forgetting”, with elites partnering with the security apparatus to ignore demands to fulfil the expectations of the PNR and the recommendations that came out of the TRC. The second group of discourses is reflected in the work of the politicians who are continuing to push for the government to be held accountable to the laws that made democracy possible. This discourse tends to be expressed by members of the smaller political parties.

During a personal interview Kgokong spoke of his early concern surround the MPNP. “We felt that the way things were organised, that it would only bring misery.”⁹⁹⁹ That misery, according to Kgokong, began with the amnesty legislation and has continued since. AZAPO was the lead plaintiff in the Constitutional Court case against the TRC process in 1996. The Court decided in favour of the government, arguing that amnesty was necessary to the transition. However, Kgokong argued that

In our view, our country was not different to other countries where there have been crimes against humanity. We believe the people who committed those heinous acts should be held responsible. A lot was done in the name of apartheid. Those people that were involved should have been held to book. Some people say, “but you also killed”. It was our only recourse. We decided the system had to be challenged on that basis – they had to be brought to book. The Government felt otherwise.¹⁰⁰⁰ We went to the constitutional court because we believed some action had to be taken against those who were guilty of crimes against humanity. That didn’t happen... We were disappointed it went that way. They must have discussed [the case] and given it political consideration.¹⁰⁰¹

The common argument during the early stages of the new democracy was one of political expediency at the price of justice. Kgokong believes that there was not sufficient consultation with the public, nor was there enough participation from those who were most culpable for the horrors of the apartheid regime. “Yes, I think

⁹⁹⁷ Boraine.

⁹⁹⁸ Paul Sells, ‘Political Pardons Would Damage the Legacy of South Africa’s Truth and Reconciliation Commission’, *Huffington Post*, 2015 <http://www.huffingtonpost.com/paul-seils/political-pardons-would-d_b_6810864.html> [accessed 17 March 2017].

⁹⁹⁹ Kgokong, Personal Interview

¹⁰⁰⁰ Kgokong, Personal Interview.

¹⁰⁰¹ Kgokong, Personal Interview.

people got off scot-free – particularly the big shots got away with murder. The smaller men who had been thoroughly brainwashed are the ones that had to go begging for forgiveness in the TRC. The bigshots remained back.”¹⁰⁰²

Now, argues Kgekong, the country is left with no justice and barely any democracy.

I don't think that the TRC helped. I still see people in need... These social issues are the urgent problems of the people that need to be addressed to avoid the return to a call for justice. People are not just calling for justice. They want to lynch those in government for agreeing and going along with all of this. Democracy should have been better for South Africa. But I think it is also because of the corruption that has taken hold. It's a dog eat dog situation. By the time you get the right person and bribed all the people, there are hardly any funds to do the project. Corruption is endemic. I think people expected more from democracy. Just raising the flag and singing the anthem isn't enough.¹⁰⁰³

Dexter, a former ANC courier, victim of the regime and current member of the ANC, acknowledged that the process was not what you would traditionally call “justice”, though he is more positive about the process than Kgekong.

The end product of the period was something amazing, but there are flaws. The strength of the process is that it helped us get over huge issues – a real leveller. But there are some flaws... People with resources and power were able to slip through the nets. Everyone knows who was the torturer but the generals who ordered it get off scot-free. The system has this weakness – there are people who got off scot-free.¹⁰⁰⁴

However, according to Dexter, justice is a principle that is rarely applied evenly, even in the best of democracies.

In other countries the question of impunity drives the quest for justice. In the South African case there is a measure of justice in the process of disclosure. But there was also no reckoning of economic justice and that is a huge fault of the process. There was no accounting by the big businesses that profited. A police officer who beat someone up is held accountable but what about the businesses that profited from apartheid? That is a systematic injustice.¹⁰⁰⁵

Dexter describes the decision to suspend the armed struggle as psychologically taxing. However, he argues that the ANC membership realised that it would be the only way to bring both sides to the negotiating table.

The historical discourse in the ANC was to bring down the system. You were fighting the system, not the people, which means you could reach across the table. If we didn't offer amnesty, how could we have convinced the military to lay down arms if they then thought that they would be held accountable?¹⁰⁰⁶

¹⁰⁰² Kgekong, Personal Interview.

¹⁰⁰³ Kgekong, Personal Interview.

¹⁰⁰⁴ Dexter, Personal Interview.

¹⁰⁰⁵ Dexter, Personal Interview.

¹⁰⁰⁶ Dexter, Personal Interview.

Ultimately, Dexter argued that South Africa experienced some justice, though possibly not as much as others may wish.

I think this will be with us for generations but I don't think seeking [traditional] justice is of any benefit. Where would that take us as a country, particularly for those of us who did suffer? But that is only valid as long as we don't stifle debate.¹⁰⁰⁷

Dexter was adamant that he would never forgive the men who tortured him.

Dexter and Kgokong reflect the divisions that have remained among the political elites. Both identify a society that is currently broken, however they place different levels of value on the TRC process. Dexter continues to support the goals of TRC, arguing that it allowed for South Africa to begin to move forward. Kgokong, on the other hand, argues that the transitional justice process was fundamentally flawed, failing to take into account the needs of victims to see some retributive action against their perpetrators. These flaws of the past, according to Kgokong, undermine South Africa's present.

4.8.3 Perspectives from the Legal Community

The judiciary in South Africa were called on to enforce the laws of apartheid, and for the most part did so.¹⁰⁰⁸ Despite the moral repugnance of apartheid, the law was clear. "In their view, the moral responsibility for the law rested with the parliament that made the law and not with the judge who applied it."¹⁰⁰⁹ In a submission to the TRC, Chief Justice of South Africa Michael Corbett rejected calls for all pre-1994 judges to be held accountable, arguing that judicial independence required that judges be exempt from political judgement on their actions.¹⁰¹⁰ There was, nevertheless, a TRC hearing on the judiciary. Judges, for the most part, refused to participate.¹⁰¹¹ In 1998, Judge John Freeman, then president of the Judicial Officers Association of South Africa in the

¹⁰⁰⁷ Dexter, Personal Interview.

¹⁰⁰⁸ Arthur Chaskalson, 'From Wickedness to Equality: The Moral Transformation of South African Law', *International Journal of Constitutional Law*, 1.4 (2003), 590–609.

¹⁰⁰⁹ Chaskalson, p. 594.

¹⁰¹⁰ David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order (Revised)*, 2nd Edition (Oxford, UK: Hart Publishing, 2003)

<https://www.amazon.com/Judging-Judges-Ourselves-Reconciliation-2003-08-01/dp/B01N7NLCZL/ref=sr_1_2?ie=UTF8&qid=1489877994&sr=8-2&keywords=Judging+the+judges%2C+judging+ourselves> [accessed 18 March 2017].

¹⁰¹¹ Meiring, *Chronicle of the Truth and Reconciliation Commission*.

Western Cape apologised for the profession's complicity in apartheid.¹⁰¹² Since the TRC, the make-up of the judiciary and legal profession has markedly changed, however there is still the sense for many that race counts in the courts.¹⁰¹³

Jurist and victim of the apartheid regime, Albie Sachs, declined to participate in this research. However, he directed the author to a particular chapter in his book, *The Strange Alchemy of Life and Law*, which explored his role in the commission as well as his feelings on what the TRC and the constitutional court achieved. The idea of tying amnesty to truth telling came from Sachs.¹⁰¹⁴ In his book, he reiterated that the TRC was by no means a traditional court setting. Rather, it was an “intensely human and personalised body.”¹⁰¹⁵ While Sachs acknowledged that there were few moments of real reconciliation, the foundations for national reconciliation were created. In justifying the process, Sachs wrote

For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by the abuse but also those threatened by the transition to a ‘democratic society based on freedom and equality’. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.¹⁰¹⁶

Lawyers did, however, have a significant role in the negotiation process and in supporting victims and amnesty applicants in the TRC. Professor Venter saw the negotiation process first hand. During the first and second CODESA, Venter was a legal advisor to the government's delegation. During the MPNP he was convenor of the technical committee on Constitutional Matters. Much like other participants of the transition and negotiating process, Venter recognised that traditional justice was sacrificed for something else. However, considering the dual necessities of social peace and restoration, traditional justice was never really an option.

If the TRC were determined on purely legal terms the outcome would have been very different. So, when it comes to justice, well, would it be justice if all the perpetrators were brought to justice? That would be legal justice, yes. But would

¹⁰¹² John Jeffery, ‘Judicial Officers Association of South Africa Annual General Meeting.’, 2014 <<http://www.gov.za/keynote-address-deputy-minister-justice-and-constitutional-development-hon-john-jeffery-mp-judicial>> [accessed 18 March 2017].

¹⁰¹³ Chingwete.

¹⁰¹⁴ Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, USA, 2009).

¹⁰¹⁵ Sachs, *The Strange Alchemy of Life and Law*, p. 74.

¹⁰¹⁶ Sachs, *The Strange Alchemy of Life and Law*, pp. 96–97.

it have fostered social peace? Probably not. It would have been socially destructive.¹⁰¹⁷

However, Venter argued that justice is more than a matter of law.

I think the pain of the injustices will take a century to subside. But some people will make it their quest to keep the memories alive on both sides...I think that is a major problem in the black communities now. The thinking in the poorer part of communities is becoming very agitated that there is a rich layer emerging. This is potentially a time bomb. There's a huge difference between the rich and poor. It is [now] about social justice.¹⁰¹⁸

The transition, according to Venter, was unique in its own right. None of the participants of the negotiations had any real experience with liberalism and democracy. Throughout the negotiations, each group was focused on protecting their own interests. The ANC knew they would be in power, they were negotiating the type of structure the ensuing government would take. "The NP was negotiating away their power. They were trying to ensure some form of protection."¹⁰¹⁹

The question of justice in the long run, or rather the impact of justice denial is one that emerges in a number of political discussions. From a legal perspective, Venter was keenly aware of what was bargained away.

Can justice be bargained with? Well, social memory tends to become genetic memory, which dilutes the demands for individual justice. For example, in the Afrikaner community the injustices perpetuated by the British in concentration camps [during the Boer war] is still very alive. But hounding individuals had become irrelevant. There is a parallel in the black community. Its 20 years since the transition. Many of the individuals are no longer around, or no longer identifiable. There's a communal demand for justice but not an individual one. That translates very easily into political demands and that is a dangerous area.¹⁰²⁰

Venter's assessment of democracy in South Africa is that it is hampered by the emotional ties to ANC that linger within the black community, mirroring concerns expressed by TRC commissioner Meiring.

In my opinion, 60 per cent have no inkling of democracy. There's an emotional response in the voting booth. People are still voting along racial lines. ANC is seen as a black party while the DA not so much. Its difficult for the black community to shift support.¹⁰²¹

While proud of the work he contributed to CODESA and MPNP, Venter is keenly aware that there were no guarantees for South Africa's progress.

¹⁰¹⁷ Venter, Personal Interview.

¹⁰¹⁸ Venter, Personal Interview.

¹⁰¹⁹ Venter, Personal Interview.

¹⁰²⁰ Venter, Personal Interview.

¹⁰²¹ Venter, Personal Interview.

In constitutional law and politics, ensuring results and guarantees aren't possible. There aren't certainties. The Constitution is as good as the people who are here to ensure it works, that it is enforced... Currently, various aspects of the Constitution are being put under pressure. The current government is trying to reign in control of the judiciary, for example. There is the danger of a steady decline into a morass of non-constitutionality. But it depends on who is in charge. If you look at the history of humanity, its put together by a history of war, murder and corruption.¹⁰²²

Lawyer and author Peter Harris, who was also involved in the negotiating process and led the Monitoring Directorate of the IEC during the 1994 elections, agrees with Venter that the TRC/amnesty solution may not have been justice in the traditional sense. But it was necessary.

In the end it depends on how you view justice. The fact that a murderer walked free, no, that's not justice... its an arrangement that will assist a society to get from one type of society to another. You do what you have to do. But it sticks in your throat. Its not justice, but it's what you do sometimes. It's the price. There are dangers of letting murderers off the hook, so I am not saying that this is a recipe that all nations should follow. It depends on the circumstances. However, this was the price of our deal.¹⁰²³

Harris, who has written about the threats that faced the transition during the 1990 – 1994 period rejected criticisms of the TRC. The country was so close to significant bloodshed and the TRC was one mechanism in preventing civil war.

The TRC was never going to be a panacea that healed the nation. It was a mechanism that assisted the process. Other mechanisms were the transfer to the power of the majority of the people. Majority rules. This has enabled the country to build on its foundations. That said, the TRC played an important role. South Africans came forward and said "I'm sorry". It was cathartic...the fact that there are some walking about who didn't apply, that's a problem. There must be charges. But, its an ANC decision.¹⁰²⁴

In line with other research participants, Harris believed that the failure to complete the process is a problem, one that can cause very real issues for the democracy of South Africa. Amnesty, justice and race have remained a political issue.

Amnesty and race get flung around with gay abandon – quite dangerously. If the ANC had delivered on its promises, this would have been a lot less of an issue. But when you give space – when there are massive inequalities you provide space for organisations to point at those that got amnesty and trigger discontent. The greater the inequalities, the easier it is to walk through that door. But it doesn't detract from the original decision at the time.¹⁰²⁵

¹⁰²² Venter, Personal Interview.

¹⁰²³ Peter Harris, Personal Interview, Sandton, 02/02/2011.

¹⁰²⁴ Harris, Personal Interview.

¹⁰²⁵ Harris, Personal Interview.

Having taken part of the transition process, both Harris and Venter acknowledge its imperfections. However, both lawyers are wary of revisionist histories that may weaken the value of the fundamental agreement. For both, and others, it is in the fulfilment of the promise of the TRC that the real issues lie.

4.8.4 Civil Society

The most persistent challenges to the TRC process, amnesty legislation, and the “pact of forgetting”, has come from organisations within civil society. The Khulumani Support group, the Foundation for Human Rights, and the International Centre for Transitional Justice (ICTJ), among others, have all played a role in pushing for the fulfilment of the TRC mandate, pursuing reparations, supporting victims and holding politicians and even private companies accountable. Some members of these groups were involved in the TRC process, while others have been victims who rejected the bargain that eliminated traditional retributive justice measures. Dr Hanif Vally, former chief legal advisor to the TRC and current deputy director of the Foundation for Human Rights SA, recognised that amnesty is an exception during exceptional times.

Amnesty is an exception and not a matter of course. A matter of course is justice. The whole notion of justice is that people who commit harm are held accountable. The fact that people have committed crimes and have not been held accountable is a case of justice denied.¹⁰²⁶

Vally, who had interactions with both victims and perpetrators while working with the TRC, acknowledges that there is still some resentment over the whole process. “People found that gross human rights violations couldn’t be forgiven through amnesty. People had misgivings.”¹⁰²⁷ They still do. However, there was a point to the process, one that is being lost by the perception that the TRC was an end point, rather than the beginning of the reconciliation process.

Amnesty and the TRC was used for the society to move forward, so there has to be a common narrative. But I have learned that this narrative has to be fought for. Activists feel that those that didn’t apply for amnesty have got away for murder. But it’s just the activists who are fighting. I wish it were more.¹⁰²⁸

¹⁰²⁶ Hanif Vally, Personal Interview, Johannesburg, 01/02/2011.

¹⁰²⁷ Vally, Personal Interview.

¹⁰²⁸ Vally, Personal Interview.

Vally doubts that amnesty will be challenged again, however there are continued efforts to pursue those who were referred to the NPA to be prosecuted, and who instead have been given de-facto amnesty.

If people applied for amnesty and were refused, then, according to the law, they had to be charged. The Constitution was quite specific. The government has been particularly poor at prosecuting those that were refused amnesty or going after those that refused to apply... We are pushing for prosecution and not getting very far. We argue that yes, not pursuing convictions do and did undermine the whole process.¹⁰²⁹

Howard Varney, senior programme advisor at ICTJ, shares Vally's concerns regarding the lack of prosecutions.

On paper, the amnesty legislation was meant to secure the transition, meant to provide leniency. But it was not meant to stop prosecutions of those that spawned the process – but it has. The only justification is that it has helped prevent the slide back into conflict. But truth and justice have been sacrificed.¹⁰³⁰

Victims, Varney argues, have been short-changed by the process. There is also the question of the victims who didn't present their case before the TRC. The perpetrators were granted back-door amnesty. "Our conditional amnesty has turned into a blanket amnesty."¹⁰³¹ The ICTJ has been active in trying to push for prosecutions, despite ANC resistance. "The SA model was supposed to be everything – both amnesty and an avenue for prosecution... On paper, it was a model that many prescribed to."¹⁰³² Varney, who has been involved in transition processes around the world, argued that amnesty should be used with caution.

Amnesty should not be used in negotiations except in the most aggrieved, exceptional circumstances. Those circumstances are when there is no prospect of reaching peace without amnesty, when there is the prospect of significant violence – Sierra Leone for example. In a situation like that, when there is no way out, it can be justified. But these days, that is less the case. There would be a way out, there wouldn't be a need for amnesties – there are other ways out. Amnesty can be justified, but only in the narrowest of circumstances.¹⁰³³

Meiring, a TRC commissioner and a minister, argued that the restorative justice approach was helpful in moving the country forward, it was a way to deal with fears and practicalities. "Many people disagreed with the process. They were

¹⁰²⁹ Vally, Personal Interview.

¹⁰³⁰ Varney, Personal Interview.

¹⁰³¹ Varney, Personal Interview.

¹⁰³² Varney, Personal Interview.

¹⁰³³ Varney, Personal Interview.

looking for punishment. Admittedly the promised justice has been deferred by the lack of any real reparations, by taking so long.”¹⁰³⁴

He cautioned those who saw the TRC as an end point in the reconciliation process.

Reconciliation is a process, not just an event. The TRC was a place in the middle. The South African TRC was not an ideal solution, it was a compromise between the needs of the victims and the fears of the perpetrators. The TRC was by no means a perfect commission but we aimed for symbolic reparation as well as financial reparation.¹⁰³⁵

Civil society organisations have continued to rally for victims, particularly in relation to prosecutions and on the question of increased reparations. The main theme in the discourses that have emerged from these civil society organisations is one of frustration, and a commitment to pushing the government to stay true to the letter of the PNR. There is a wariness over what amnesty in South Africa has become, and what this means for the victims of apartheid. Victims’ groups have also pushed for education initiatives to maintain a cohesive narrative around the gross HRVs of the apartheid regime.

Table 4.4: Long-term opinions regarding justice, amnesty and democracy

Accountability Actors	Justice	Amnesty	Democracy
Military	Not necessary. Military acted in the interest of national security and therefore did nothing wrong.	Expected full amnesty. For the most part, the SADF refused to take part in the TRC process and have since faced few prosecutions.	Safeguarded the transition with the expectation of full amnesty. Has since assumed traditional democratic role in the state.
Political Elites	Initially supported the TRC as a necessary part of the transition. Has since assumed a passive role to the point of blocking victim-led prosecutions. Reparations have been very limited, with political elites reticent towards	Particularised amnesty has become an ad hoc blanket amnesty. Apartheid era political elites refused to participate in amnesty process, with only one minister, Adrian Vlok, facing the amnesty	Democracy is contested however hampered by significant corruption. Reports of state capture by private, well placed families.

¹⁰³⁴ Meiring, Personal Interview.

¹⁰³⁵ Meiring, Personal Interview.

	fulfilling recommendations of the TRC.	commission. F.W de Klerk claims to not have known about the HRVs committed by the security apparatus.	
Judiciary (Lawyers)	View current state of affairs as a failure to fulfil the expectations, and law, of the TRC. Not justice, particularly in relation to reparations and lack of prosecutions.	Not ideal, however the result of difficult negotiations and, possibly, necessary for the transition to democracy.	Questionable, particularly with high level of corruption.
Judiciary (Courts)	View their role as apolitical and required to follow the law. Have generally fallen in line with the NPA, acquitting the majority of those cases that have come before the courts, though this is judge-dependent.	Constitutional Court upheld the validity of the amnesty law, supporting the argument that the PNR/TRC was the bridge to reconciliation.	N/A
Victims' Groups/HROs	The system has failed victims by not pursuing recommended measures of social research and by resisting prosecutions as recommended by the TRC.	While many victims' groups recognise the role of the amnesty law, they reject the ad hoc blanket amnesty that has emerged. Some victims' families rejected amnesty altogether, arguing that it contradicts the rights guaranteed in the Constitution.	Democracy is in crisis, being undermined by corruption, culture of impunity.

4.9 Conclusion: Examining South Africa in relation to the hypotheses

The path South Africa took towards democracy was a long, negotiated process. By the mid-1980s there was no clear winner in the conflict between the apartheid government and the ANC revolutionary fighters. Neither side could win, however, either one could have made the country ungovernable. The negotiations that began with second track diplomatic efforts in Lusaka in 1985, and ended with

the election of Nelson Mandela in 1994 were highly contested, with each side attempting to place themselves in a better position. More than once, negotiations collapsed under the weight of expectations, demands and external violence. Particularised amnesty was a product of compromise, one that promised to provide a bridge between the conflict of the past and the hope for a democratic ‘rainbow nation’.¹⁰³⁶ Reconciliation, however, has proved to be beyond the scope of the TRC process alone. The TRC heard from over 21,000 victims, and processed over 7000 amnesty applications. The final report established a single narrative of the apartheid period, revealing the lengths the government took to maintain White dominance. However, the officials who made apartheid possible and the SADF generals who implemented the most brutal parts of the system refused to take part in the process. Victims have continued to argue that these leaders have gotten off “scot-free”.¹⁰³⁷ Since the retirement of Mandela in 1999, the ANC has moved steadily away from the requirements of the PNR, and from the recommendations of the final TRC report. The NPA has resisted pursuing prosecutions and both Mbeki and Zuma have discussed blanket amnesties for sections of society. A culture of impunity has emerged, with significant corruption at all levels of government. The people of South Africa have begun to despair for the future of their country, with a distinct preference for an authoritarian regime with consistent service delivery over the current tainted democratic system.¹⁰³⁸ The biggest issue of the post-TRC government is the failure to implement effective social justice measures, including reparations for the victims of gross human rights violations identified by the TRC and a wealth tax to foster greater economic equality. Political commentators have begun to talk of a “state capture”, with decisions being made by private families and companies rather than the democratically elected government. Amongst all of this, xenophobic attacks are on the rise, reflecting a dangerous frustration amongst the third of South Africans who are unemployed.

Despite the fact that many agree that South Africa is in crisis, there are points of hope. There are a number of victims’ rights groups who persist in pushing the government to fulfil its responsibilities under the PNR. Groups such as the

¹⁰³⁶ The term ‘rainbow nation’ refers to the idealized image of South Africa as a place welcoming to all races.

¹⁰³⁷ Kgokong, Personal Interview; Dexter, Personal Interview.

¹⁰³⁸ Lekalake.

Khulumani Support Group have sought justice in both domestic and international courts. There have been a handful of successful prosecutions, with more currently before the courts. A clear narrative about the past has been established, informing discourse and providing future generations an accounting of the apartheid regime.

What then of the three hypotheses that form the key underpinning of this research? The first hypothesis addressed whether justice can be sacrificed for democracy in the long run. This hypothesis is stated in the following:

H₀, Amnesty legislation is compatible with expectations and norms of a liberal democracy.

There is little doubt that particularised amnesty in South Africa was what made democracy possible. However, it is also clear that each side went into the negotiation process with different expectations. The government sought blanket amnesty, as is typical of an outgoing regime, while the ANC sought a truth commission that focused on the crimes of the apartheid system.¹⁰³⁹ The outcome was a compromise that offered amnesty for truth for HRVs committed on both sides. It is difficult to assess what public and elite perceptions would have been had the promise of the TRC been fulfilled, with greater participation and prosecutions for those who refused. However, this was not the case. Public and elite perceptions of amnesty as it exists in South Africa are tainted by the failure of the whole process, and the public sense of betrayal by political elites. Additionally, the culture of impunity that has developed amongst the SAPS and government officials as well as the fears of state capture, have contributed to the belief that South Africa's democracy is in crisis. The norms and institutions of a liberal democracy have failed to deepen in South Africa and the lines between the governing party and government institutions have been blurred. Theoretically, the particularized amnesty that was promised, along with the fulfilment of the TRC's recommendations may have sufficiently satisfied demands for justice to support democratic development. However, the reality and the growing dissatisfaction that has emerged with it, indicates that the status quo regarding the lack of justice for past crimes directly undermines South Africa's democracy.

There is little doubt that both sides initially agreed to the stipulations of the PNR, with the expectation of adherence. This supports the argument put forward

¹⁰³⁹ Spitz and Chaskalson.

by **H₁**), that amnesty (and the trading of justice for democracy) is agreed to in good faith. However, de Klerk has subsequently said that he gave too much in the negotiations,¹⁰⁴⁰ indicating an element of “buyer’s remorse”. Also, the almost complete lack of participation by the leadership of both sides of the conflict points to a reversal of this good faith less than four years after the agreement was made. The ANC is no less guilty in terms of back peddling from the amnesty process, supporting their reluctance to fully participate with the claim that the TRC promoted a false equivalency between the crimes committed on both sides. The ANC government is now in the driver’s seat regarding subsequent prosecutions, which so far have been minimal. What good faith allowed the country to move forward through negotiations and into democracy has since disappeared.

The final hypothesis (**H₂**) proposes that amnesty becomes acceptable with time in a given democracy as population demographics shift. There are two considerations that need to be made in relation to this hypothesis. Recent surveys indicate support for the argument that a shift in demographics has reduced demands for apartheid era justice.¹⁰⁴¹ South Africans have said that they are more concerned with service delivery, unemployment, inequality and crime.¹⁰⁴² However, a deeper examination of these issues shows that many of these concerns are connected to failures of the transition. Poor service delivery in South Africa can be tied directly to the rampant corruption.¹⁰⁴³ Unemployment and inequality have ties to the lack of social and economic justice, promised with the PNR, the TRC recommendations and the 1996 Constitution. The crime rate in South Africa is tied to the culture of impunity that has emerged since 1994, and the widespread lack of faith in the SAPS.¹⁰⁴⁴ It is also important to take into account the threads of discourse that emerged during several interviews. The interviewees expressed concern that while in time people may no longer demand individual justice, the demands for justice by the *born frees* have continued, and have been redirected and found new targets, including education protests and xenophobic attacks. As highlighted by du Toit, “the fault lines in South Africa are different [from Brazil and Chile], due to our

¹⁰⁴⁰ ‘De Klerk’.

¹⁰⁴¹ Lekalake.

¹⁰⁴² Mattes; Chingwete; Lekalake.

¹⁰⁴³ Kgokong, Personal Interview.

¹⁰⁴⁴ Chingwete.

elongated peace process. If it is going to unravel, it will crumble. The state will lose its ability to govern and society will become weaker.”¹⁰⁴⁵

At its most basic, the situation in South Africa is the result of best intentions, and poor follow-through. The origins of this failure can be found in the early days of TRC, an elite-led compromise in which the very same elites then refused to participate. The ANC has shown itself less committed to the fundamentals of democracy than to the trappings of power. Ultimately, the consequences of viewing the TRC as an end point, as opposed to the beginning of a decades long process towards reconciliation, has left South Africa open to misdirected anger, resentment and mob violence.¹⁰⁴⁶ Even one of the most ardent supporters of the TRC, Tutu, is angered by the failure of the government to fulfil the promise of reconciliation. “Our soul remains profoundly troubled...By choosing not to follow through on the commission’s recommendations, [the] government not only compromised the commission’s contribution to the process, but the very process itself.”¹⁰⁴⁷

¹⁰⁴⁵ Du Toit, Personal Interview.

¹⁰⁴⁶ Kgokong, 'Personal Interview'; Harris, 'Personal Interview'; Meiring, 'Personal Interview'; Du Toit, Personal Interview.

¹⁰⁴⁷ ICTJ, '20 Years On, ANC Rules but Legacy of Apartheid Still Lingers', *International Center for Transitional Justice*, 2014 <<https://www.ictj.org/news/20-years-anc-rules-legacy-apartheid-still-lingers>> [accessed 20 March 2017].

Chapter Five

Conclusion

5.1 Introduction

Amnesty laws aim to facilitate the transition to democracy. However, justice is a key element of democracy, and is generally absent from amnesty laws. While amnesty is the outcome of negotiations during exceptional times, these laws can have consequences that extend generations after the transition. The question arises as to whether amnesty is sustainable in a liberal democracy. Is it possible to maintain both democracy and amnesty without undermining elements of one or the other? Throughout this research, this question has driven the data collection and analysis. Can justice be sacrificed for democracy? This question can be distilled even further: can amnesty be sustained in a liberal democracy? While there is almost a feeling of inevitability in the use of amnesty legislation as part of the negotiating process, it is worth asking whether all parties understand the implications of this decision, particularly whether all parties understand that the consequences of amnesty go far beyond the transitional period. The evidence from the case studies is that amnesty legislation correlates with a continuing culture of impunity and corruption, as well as the development of collective memories around victimhood and injustice. The incompatibility of amnesty and liberal democracies can also be understood through disaggregation of the political systems that emerged after the transitions. In all three cases, there is a clear emergence of a culture of impunity, the continuance of dictatorship practices in the democratic context and a general acceptance of corruption at the political elite level.

There are a number of reasons why this is an important question to ask. Amnesty as a tool to aid the negotiation process is still used. In 2014, a new constitution was passed in Fiji as part of its move from military regime to a semi-democracy. This constitution included sections that granted immunity to officers of the state accused of torture between 2006 and 2014, and made it possible for impunity to continue unchecked.¹⁰⁴⁸ The Constitution was a requirement in

¹⁰⁴⁸ Ben Doherty, 'Fiji's Police and Military Using Torture with 'near Impunity', Amnesty Says', *The Guardian*, 5 December 2016, section World news <<https://www.theguardian.com/world/2016/dec/05/fijis-police-and-military-using-torture-against-suspected-criminals-amnesty-says>> [accessed 1 April 2017].

exchange for democratic elections. Considering the legacy of torture that exists in Fiji, and the ongoing issues with police brutality, amnesty directly undermines principles of democratic development in a country considered “partly free” by Freedom House.¹⁰⁴⁹

Existing amnesty laws have been challenged in a global context. In 2011, Uruguay’s Congress voted to overturn the amnesty law covering the 1975-1983 military regime, despite public support for the status quo.¹⁰⁵⁰ In 2012, two of the surviving generals of Turkey’s 1980 coup went to trial, after the constitutional clause that granted amnesty was stripped by a referendum held in 2010.¹⁰⁵¹ In 2016, the Constitutional Chamber of the Supreme Court in El Salvador ruled that the country’s 1993 Amnesty law was unconstitutional, and had to be struck down.¹⁰⁵² Also in 2016, in a rare instance of public consultation on the negotiation process, voters in Colombia rejected a government peace deal with FARC rebels that would have granted amnesty for crimes committed during the decades-long civil conflict.¹⁰⁵³ Voters argued that there should be accountability for the CAH that destroyed whole communities, forcing the government to return to negotiations with the rebel groups.¹⁰⁵⁴ Amnesty laws are a significant part of the discourse around current transitions and historical grievances, making it important to fully understand what this sort of impunity means.

At the same time, it is important to establish the norms and expectations of a liberal democracy in an age where the terms illiberal democracy, semi-democracy and limited democracy are becoming more prevalent.¹⁰⁵⁵ Although the values identified by Morlino as being fundamental to a liberal democracy currently seem

¹⁰⁴⁹ ‘Fiji | Country Report | Freedom in the World | 2016’, *Freedom House*, 2016

<<https://freedomhouse.org/report/freedom-world/2016/fiji>> [accessed 1 April 2017].

¹⁰⁵⁰ Public support for the law was, in part, related to the fact that military lawyers promised to prosecute rebels if amnesty was revoked. ‘Uruguay Revokes Military Amnesty’, *BBC*, 27 October 2011, section Latin America & Caribbean <<http://www.bbc.co.uk/news/world-latin-america-15473619>> [accessed 9 January 2014].

¹⁰⁵¹ ‘Turkish Coup Generals Go on Trial’, *BBC*, 4 April 2012, section Europe <<http://www.bbc.co.uk/news/world-europe-17605966>> [accessed 9 January 2014].

¹⁰⁵² Naomi Roht-Arriaza, ‘El Salvador’s Constitutional Court Invalidates Amnesty Law; Will Prosecutions Follow?’, *IntLawGrrls*, 2016 <<https://ilg2.org/2016/07/19/el-salvadors-constitutional-court-invalidates-amnesty-law-will-prosecutions-follow/>> [accessed 1 April 2017].

¹⁰⁵³ Sibylla Brodzinsky, ‘Colombia Referendum: Voters Reject Peace Deal with Farc Guerrillas’, *The Guardian*, 3 October 2016, section World news <<https://www.theguardian.com/world/2016/oct/02/colombia-referendum-rejects-peace-deal-with-farc>> [accessed 1 April 2017].

¹⁰⁵⁴ Brodzinsky.

¹⁰⁵⁵ Zachary Laub, ‘End-Times for Liberal Democracy?’, *Council on Foreign Relations*, 2016 <<http://www.cfr.org/global/end-times-liberal-democracy/p38618>> [accessed 2 April 2017].

beyond the reach of traditional liberal democratic states such as the U.S.A, however these values still play a role in public understandings of the system. Anything less can lead to the slow erosion of public faith in government. The past, present and future of democracy appears to pivot on the public perception of the system. Is everyone treated equally, fairly and according to laws that are considered legitimate? A lack of justice in the past can directly challenge current system legitimacy through collective memory, mass mobilization and the development of a parallel narrative that clashes with that of the governing majority.

As a whole, Brazil, Chile and South Africa present a complicated picture of the relationship between amnesty, justice and democracy. At once viewed as both a short-term necessity and a long-term poison pill, amnesty is a significant part of the recent histories of these three states. However, the approach of each state is markedly different, with varying commitments to truth telling, reparations, punishment and the question of repeal. The democratization experiences of Brazil, Chile and South Africa are also markedly different, though there are indications that all three countries are moving to a similar point where amnesty and democracy are incompatible. Each state offered an informative case for the use of amnesty. Collectively, the case studies indicate fundamental weaknesses in the use of amnesty laws during state transition, supporting the observation made by Howard Varney that, despite its widespread usage, amnesty is only effective in a very limited number of cases.¹⁰⁵⁶

This conclusion is a blend of summation and analysis, uniting the theory presented in the Introduction with the evidence put forward in the three case studies. The importance of the key theories will be documented below, followed by a detailed examination of each of the hypotheses in relation to the case studies. Finally, the normative and empirical approaches employed in this research will be united in an examination of the core question of this research, pointing to the potential paths for handling questions of justice for states on the precipice of democratization.

¹⁰⁵⁶ Varney, Personal Interview.

5.2 Theoretical Framework in context

Theories of justice, democracy and amnesty intersect in this research, providing the framework for the three case studies. Each theory provides an important baseline from which to answer the fundamental questions at hand. A number of decisions have been made regarding the theories, particularly in relation to justice and democracy. For example, after sifting through the different definitions of democracy, this research settles on a maximalist definition of the institutional system over the more basic procedural approach. In terms of justice, the majority of definitions rely heavily on philosophical debate. For this research, it became important to explore public perceptions of justice, and establish a clear framework to assess this in each case study. The decisions made regarding the theoretical framework have given this research focus by establishing theories that aid the investigation and response to the hypotheses and, ultimately, to this work's core question.

Before examining the theoretical framework in relation to the hypotheses and case studies, it is important to touch on the role of legitimacy in political structures. As highlighted in Chapter One, legitimacy requires a sense of legality; the belief that the government is acting in the interest of the wider public.¹⁰⁵⁷ Legitimacy is both a characteristic of a good democracy and the ideal that underpins the system. The legitimacy of a state is built on public perception, which in turn is built on both individual experience and collective memory. In those states where victimhood has become more central to the national identity, such as in South Africa, the discourse around the past is more prominent than in states like Brazil, where victimhood has a smaller role to play in the political discourse.

A transition can be defined as the dismantling of the authoritarian structure in favour of an institutional alternative. It does not always lead to democracy; however democratic governance is usually the articulated goal. Transitions face a number of variables, some of which can significantly undermine the subsequent democratic institutional structures if not addressed. For example, pre-transition power structures can influence how institutional structures, decision-making

¹⁰⁵⁷ Alan Buchanan, 'Political Legitimacy and Democracy', *Ethics*, 112.4 (2002), 689–719.

processes and political norms are formed.¹⁰⁵⁸ Nothing about the transition is certain, though by the time a country reaches the habitation phase outlined by Rustow, the direction of institutional development appears to be more stable.¹⁰⁵⁹ The transitions of Brazil, Chile and South Africa were each unique, while sharing some key characteristics. The transition process in all three states was driven by an awareness of the ruling elites that democratization was inevitable. In all three, it was clear that neither the existing leadership nor the opposition could rule without the acquiescence of the other side. In South Africa, this realization came after the ANC threatened to make the country ungovernable. In Brazil and Chile, the military regimes began to see a deficit in domestic and international legitimacy. All three states experienced some level of political struggle, the first step identified by a number of transitologists.¹⁰⁶⁰ The negotiations that came to dominate the transitions of Chile and South Africa fit within the expectation that transitions require decisions to institutionalize some aspect of democratic procedure, while Brazil's military leadership chose to pursue this without significant negotiations with the opposition. The final phase of the transition is consolidation. It is difficult to identify a single point where the states moved from transition to consolidation, though it follows that successful electoral processes and transfers of power marks the beginning of the consolidation of democracy.

As established in Chapter One, a maximalist definition of democracy is used in this research. In particular, the three case studies are assessed along the lines of Morlino's "quality of democracy" indicators.¹⁰⁶¹ A robust democracy fulfils the definition of quality in procedure, content and result.¹⁰⁶² Morlino assesses democracies by examining the *law, accountability, participation, competition,*

¹⁰⁵⁸ Michael Albertus and Victor Menaldo, 'Gaming Democracy: Elite Dominance during Transition and the Prospects for Redistribution', *British Journal of Political Science*, 44.3 (2014), 575–603.

¹⁰⁵⁹ Rustow.

¹⁰⁶⁰ Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, *Transitions from Authoritarian Rule, Vol. 4: Tentative Conclusions about Uncertain Democracies* (The Johns Hopkins University Press, 1986); Mainwaring; Rustow.

¹⁰⁶¹ Leonardo Morlino, 'Authoritarian Legacies, Politics of the Past and the Quality of Democracy in Southern Europe: Open Conclusions', *South European Society and Politics*, 15.3 (2010), 507–29; Morlino, 'Qualities of Democracy: How to Analyze Them?'; Leonardo Morlino, 'What Is a "Good" Democracy? Theory and the Case of Italy', *South European Society and Politics*, 8.3 (2003), 1–32; Leonardo Morlino, 'Legitimacy and the Quality of Democracy', *International Social Science Journal*, 60.196 (2009), 211–22.

¹⁰⁶² Leonardo Morlino, "'Good" and "Bad" Democracies: How to Conduct Research into the Quality of Democracy', *Journal of Communist Studies and Transition Politics*, 20.1 (2004), 5–27.

freedoms, equality and responsiveness of the democratic process. He argues that these qualities illustrate the engagement between the public and the institutional structure of the state, providing evidence of the level of depth of democratic norms. This maximalist approach to understanding democracy contrasts directly with the basic expectations of proceduralist approaches, which focus on the act of voting as a key indicator of the system.¹⁰⁶³ The maximalist approach to democracy establishes a number of expectations of the system. The institutional depth identified by characteristics such as responsiveness and accountability takes time to establish, requiring investment in anti-corruption measures, regular and fair elections and institutions to respond to the needs of the public. The seven measures identified by Morlino all take time to develop and fit within the expectations of a consolidated democracy as opposed to one in the midst of a transition. Each of the case studies is considered to have moved out of the transition/democratization period, giving ample opportunity to observe the country's level of democratic consolidation.

On the other hand, by disaggregating elements of the state, particular challenges to the consolidation of a liberal democracy can be identified. Throughout the case studies, these elements such as cultures of impunity, dictatorship-like practices and an acceptance of corruption, have been identified. Each of these elements indicate the ongoing impact of amnesty in the era of democratic consolidation.

An analysis of Chile's quality of democracy is generally positive, with some concerns. Broadly legalistic, Chile has re-established its democratic institutional structure through the transition and consolidation period. Out of the three case studies, Chile is the most democratically stable, with mass mobilization limited to narrow flashpoints (education, indigenous rights). The elections since the transition have yielded peaceful transfers of power and in 2010 Chileans elected a member of the right-wing party to the presidency, a first since the transition. Freedoms are constitutionally protected, as are measures of equality. However, inequality is a significant issue. Several authoritarian era laws regarding national security continue to be used by the military and armed forces against the indigenous Mapuche.

¹⁰⁶³ Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper Perennial Modern Thought, 2008).

Brazil, on the other hand has struggled to entrench democracy in the same manner as Chile. Impunity for crimes committed by state agents continues to be a significant issue, as is the lack of security overall. Corruption is pervasive. Over a third of the country's senators and a quarter of the country's lower-house deputies have cases pending before the Supreme Court. Former president Rousseff was impeached for corruption, though a number of commentators have described the rise of current President Temer to be a legislative coup.¹⁰⁶⁴ Inequality is a significant issue, though previous administrations were able to reduce levels of absolute poverty through cash-transfer programs.

Out of the three case studies, the democracy of South Africa is possibly the least stable in terms of its democratic norms.¹⁰⁶⁵ With one of the most progressive constitutions for its time, legislatively speaking citizens enjoy a number of freedoms and protections. However, corruption continues to be a very significant issue, with claims of state capture by private interests. Public perception of state-run institutions is poor, with the police one of the least trusted organisations in the country. South Africa remains one of the most unequal countries in the world, and government responsiveness to the basic needs of the population is poor. The ruling party periodically threatens the media and apartheid era laws restricting media coverage of certain areas continue to be used.

A fundamental part of a consolidated democracy is the presence of justice and equality. These elements are some of the most basic expectations of democracy, and are often enshrined within democratic constitutions. An important question, then, is: *what is justice?* Or, more precisely in the context of the political realm, *what is perceived as justice?* Transitional justice measures are discussed in the context of the transition period and prior democratic consolidation. According to Arthur, these measures include justice, reparations, truth and institutional reform.¹⁰⁶⁶ Chile's transitional justice measures met the requirements of truth and some reparations, although justice and institutional reform were generally absent. Brazil included none of these measures during the transition period. The South

¹⁰⁶⁴ Uri Friedman, 'Is a Coup Taking Place in Brazil?', *The Atlantic*, 2 May 2016
<<http://www.theatlantic.com/international/archive/2016/05/brazil-coup-dilma-rousseff/480291/>>
[accessed 11 December 2016].

¹⁰⁶⁵ This, of course, depends on the interpretation of Rousseff's impeachment. It is not clear that this process was a permanent rupture of the democratic process signalling a return to authoritarian rule. However, it was certainly an indicator of instability.

¹⁰⁶⁶ Arthur.

African transition period included measures of truth and institutional reform, with the expectation that justice and reparations would follow. These expectations were only partially fulfilled. In terms of post-transitional justice, a number of court cases have moved forward in Chile, directly undermining the country's amnesty law while in Brazil, a truth commission submitted its report on the CAH 30 years after the initial transition. In South Africa, the expectations for justice measures have been disappointed with limited progress made during the democratic era.

It is clear that the perception of justice is important. In Chapter One, four key elements of justice were identified as important to public perception of justice. Fairness is considered key, as is the equality of application. A law needs to be part of legislative structure and needs to be viewed as legitimate. In the three case studies the perceptions of the transitional justice measures are neither static nor wholly tangible, however a number of threads of discourses can be identified. In South Africa and Brazil, the legal systems in general face challenges to their legitimacy and there is a broad perception that the judiciary favours the elites. These crises of faith filter into perceptions of the transitional justice process and have had limited impact or have favoured the outgoing regime. The amnesty laws in all three countries have been publically debated, with varying and shifting degrees of support. There has also been a noticeable variance in how the amnesty laws have been applied, though Brazil has managed to adhere to the letter of the law more effectively than Chile and South Africa.

Amnesty laws are not all created equal, nor do they all have the same effect. Broad variants of amnesty laws include blanket amnesties and particularized amnesties, and these can either be self-granted decrees, negotiated or in some rare cases, imposed. The amnesty legislation in Brazil falls on the one extreme of blanket amnesties, applied in such a way as to preclude any truth commission or public discussion on the CAH committed during the 1964 – 1984 period. While Chile's amnesty decree was written in a similar vein, the political elites, and the incoming democratic president in particular, were able to ensure some truth telling measures. However, the Chilean truth commission maintained the spirit of the amnesty decree, identifying crimes without naming specific perpetrators. In South Africa, the particularized amnesty model – amnesty for truth telling on an individual basis – was presented as the way forward for transitional justice. The PNR (1995) established the possibility of a blended model of amnesty, one that allowed for the

benefits of amnesty (the release of power by the authoritarian regime) as well as some punitive measures (shame, prosecution for those who refused to apply). The reality, however, has fallen short, raising the question whether the particularized model was doomed to fail under the weight of political realities.

The three case studies have first been assessed in the context of the theoretical framework established in Chapter One. Transition theory, democracy theory, justice theory and amnesty theory all provide clear markers to better understand the socio-political experiences of each case study. These theories also provide a base from which to examine and assess the three hypotheses that drive this research.

5.3. The Hypotheses and the Case Studies

5.3.1 The Compatibility of Amnesty Legislation and Democracy

H₀ posits the argument that amnesty legislation is compatible with expectations and norms of an entrenched liberal democracy. This hypothesis is built on a premise that liberal democracies have identifiable characteristics that can be assessed and that the requirements of amnesty, in whatever form, are compatible with the characteristics. The counter argument is that the key components of liberal democracies stand in direct opposition to the expectations of amnesty laws, creating a zero-sum conflict where one or the other will weaken and ultimately become unsupportable. The parameters of this hypothesis include some specific frames of reference. First, democracy here is defined along the lines of the maximalist approach, discussed above. There are a number of reasons for this. As discussed in Chapter One and in the subsequent case studies, regime types can blend, with authoritarian dictators seeking to establish legitimacy through limited participatory measures. Assessing a democracy against the characteristics established by Morlino, among others, removes these hybrid systems of governance from the equation.¹⁰⁶⁷ Morlino's framework for assessment allows academics to establish whether or not a so-called democratic state is, in fact a democracy. A second parameter is one of time. By referencing the concept of a liberal democracy, H₀ is being placed in context of a consolidated democracy, as opposed to one that is in a state of transition. This is an important parameter of this hypothesis, hinting to the

¹⁰⁶⁷ Morlino, 'Qualities of Democracy: How to Analyze Them'; Diamond and Morlino.

idea that what can be sustained in a transition, may not be possible in an entrenched democracy.

H_0 is tested by examining the status of each state's amnesty law, the depth of the country's democratic entrenchment according to the quality of democracy indicators, and identifying any negative consequences from the use of amnesty measures such as ongoing impunity, violence and corruption. While establishing a causal relationship between the use of amnesty and the ascendancy or decline of a democracy is difficult, there are certainly some correlative elements to indicate that amnesty laws can have a detrimental impact on the consolidation of democracy. On the other hand, the establishment of a strong democratic culture can result in the reverse, the undermining of the amnesty law in favour of clear measures of justice. Collectively, the case studies point to an incompatibility of democratic norms and amnesty laws. Rather, one of two possible outcomes emerges.

The most positive outcome in terms of democratic consolidation is found in the Chilean case study. Built on an existing culture of legalism, democracy in Chile has emerged fairly robust after the Pinochet regime. As discussed above, while there are some concerns around the maintenance of authoritarian-era legislation, the general democratic norms are well established. At the same time, the 1979 amnesty decree has been effectively challenged or bypassed and military impunity has been undermined. Pinochet faced serious judicial challenges prior to his death and his legacy was irreparably tarnished. A number of former officials have been charged for crimes committed during the former regime, and the current administration has talked of repealing the amnesty decree altogether. It is likely that the maturation of democracy, as described by Collins, has allowed the victims and advocates the space to challenge the impunity.¹⁰⁶⁸ Mass mobilization has taken place in Chile without widespread fear of significant reprisals from the military apparatus. This is not to say that there has been a full accounting of the past, however the amnesty decree that enshrined blanket impunity has been seriously undermined while democracy has been strengthened.

Democracy in South Africa is clearly in crisis. Poor leadership, an ailing economy and the threat of state capture are undermining democratic institutions. However, the democratic development of South Africa has been seriously limited

¹⁰⁶⁸ Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (Penn State Press, 2011).

by the culture of impunity that has been supported by the country's approach to amnesty. Corruption is rampant and, even when uncovered and debated, there are few consequences faced by the accused. The survival of President Zuma thus far, despite ongoing accusations, is evidence of the culture of impunity that persists in all levels of government in South Africa. There is a lack of faith in state institutions, particularly those expected to protect citizens such as the police and judiciary. There is also the overwhelming perception that justice in all forms is lacking. Limited accountability, as put forth by the particularized amnesty model, could have provided some measure of justice while at the same time ensuring the necessary amnesty required as part of the negotiated settlement. This is not what has happened. As it stands, the issues that arise from the use of amnesty, such as a culture of impunity, continuing demands for justice and the mutation of justice demands into a collective identity are all visible in South Africa's socio-political environment. The concern is that while amnesty remains, and along with it the culture of impunity and the ongoing demands for justice as a direct challenge to governability, South Africa's democracy will continue to struggle.

In some respects, Brazil's use of amnesty was successful right up until the point that it wasn't. For decades, amnesty legislation was sustained without significant debate, benefiting from a persistent refusal by political elites to discuss the past. Democracy in Brazil appeared to enter the consolidation period without too many concerns. However, an undercurrent of impunity persisted in Brazil, with security forces experiencing few consequences for the use of torture and extra-judicial killings. Much like South Africa, the culture of corruption in Brazil is widespread, stemming from what some describe as a *carte blanche* granted by the amnesty law. Brazil's recent truth commission, which completed its work in 2014, was one of the first official challenges to the narrative of silence maintained during the previous decades. In 2009, the OAB directly challenged the legality of the amnesty law, requesting its repeal through the Supreme Court. Though denied, this shifted the general acceptance of the amnesty law and, according to commentators, triggered a flurry of academic and mainstream research into the subject of the crimes of the authoritarian regime and the amnesty law that protects them.

The three case studies present a somewhat consistent picture of the sustainability of amnesty laws in consolidated liberal democracies. There appears to be two options for states to manage the coexistence of amnesty and democracy

after a state transition. In an environment where there is a commitment to the ideals and norms of liberal democracy, amnesty laws are less sustainable, as demands for post-transitional justice are given legitimacy within the political discourse. Government commitments to principles of democracy, such as equality and the right to legal hearing, clash with the limits placed on these by amnesty laws. At the same time, in a consolidated democracy the military presents less of a threat to the political order. Although met with disdain from the military elites, the judicial efforts to address past crimes in Chile have faced little resistance. The political elites can debate the question of repealing amnesty without reference to the potential of regime reversal. The alternative is an environment where, despite elements of democratic consolidation, negative consequences of the amnesty law persist to undermine the country's quality of democracy. For example, it is clear from the experiences of Brazil and South Africa that the use of amnesty has fostered a culture of impunity amongst security and political elites. The use of torture has continued in both countries and corruption with few consequences is rampant. Corruption can also have a significant impact on inequality, with government funds failing to meet the intended recipients. The continued use of torture, widespread corruption and significant inequality all undermine the quality of democracy in Brazil and South Africa.

There are a number of factors that contribute to the difference of outcomes between Chile, Brazil and South Africa. Chile emerged from the authoritarian regime with a relatively robust political opposition that had significant democratic experience prior to the Pinochet-led coup. Additionally, the legalistic culture remained during the Pinochet regime, explaining the dictator's need to seek legitimacy through constitutional developments and plebiscites. Despite a general commitment to the *vía Chilena*, the collective memory around victimhood developed sufficiently after the transition to allow multiple court challenges to the amnesty law. An official narrative was quickly established in 1991 and, though the divisions in the country were split almost evenly between *Pinochetistas* and those seeking democracy at the time of the transition, the supporters of the regime resisted calls for further military intervention in the face of challenges to the amnesty law. Brazil, on the other hand, had a legacy of military influenced populism prior to the rise of the authoritarian regime. Democratic institutions were less robust than those in Chile, with a tendency in Brazil towards populist rhetoric. The first civilian

presidency, that of José Sarney, was closely linked to the leadership of the military and indeed, the whole transition process was dictated by military prerogatives.¹⁰⁶⁹ The commitment to institutional silence has limited the progress made groups seeking justice, however the demands persist. The military continue to hold some sway in debates on transitional justice, with the threat of several high-level resignations derailing Lula's initial attempt to create a truth commission in 2009. Another consideration, highlighted by Sallum, is that while the number of Brazilians tortured remains uncertain, only 500 citizens were killed during the military regime.¹⁰⁷⁰ The impact of the CAH was limited to particular sectors of society, as were the individual demands for justice. When challenges to amnesty began over two decades after the transition, the first difficulty was a widespread ignorance about what actually happened during the authoritarian period. The fundamental difference in South Africa in relation to the other case studies is race. The racial divide was the context within which the authoritarian regime developed, and a complicating factor in how South Africa can be understood. The semi-democracy established in 1910 by the unification of South Africa allowed for a very narrow understanding of franchise, excluding large swathes of the population from any form of political participation. These restrictions based on race hardened with the rise of apartheid, undermining any pretence to the term "democracy". Authoritarianism in South Africa followed a different model to that of Brazil and Chile, as there was some space for political discourse, elections were held and the White population was allowed to vote. However, for the non-White population, apartheid was an oppressive authoritarian regime in every regard. Another key difference is the length of time the apartheid regime held office - 42 years; and the pervasiveness of the apartheid state that undermined fundamental institutions for the non-White community, including education and the judiciary. These institutions have struggled to recover legitimacy in the post-apartheid period. Additionally, significant income inequality has contributed to South Africa's instability. The failure of particularized amnesty to achieve the promise articulated by the transition leadership feeds into a narrative of government failures that contribute to a growing sense of government illegitimacy.

¹⁰⁶⁹ Skidmore, *The Politics of Military Rule in Brazil, 1964-1985*.

¹⁰⁷⁰ Sallum Jr, Personal Interview.

While there are a number of contributing factors to the strength or weakness of a particular democracy, the unchallenged presence of an amnesty law introduces issues that can undermine the legitimacy of the political structure. On the other hand, a robust democracy is one that allows for challenges to the amnesty law, recognizing victims' rights to seek justice. In regard to H_0 , it appears that amnesty laws are incompatible with the norms of an entrenched liberal democracy.

5.3.2 The Agreement Made in Good Faith

H_1 posits that amnesty agreements are agreed to in good faith. This principle of good faith is the idea that, at the time of negotiations around amnesty, both sides commit to the principle of amnesty, without any plans for revoking or undermining the law at some later date. There are a number of reasons why good faith during negotiations is important. At its most basic level, "negotiating in good faith means negotiating in a way that is likely to yield an agreement. Bad faith means just going through the motions for the sake of appearance, or even making moves to spoil the process."¹⁰⁷¹ The perception that one side or the other is acting in bad faith while negotiating amnesty would likely lead to the unravelling of the transition process, or at least trigger a higher level of instability. The outgoing authoritarian regime would feel a greater level of threat if it believed that the agreement would be revoked once the transition process was completed. Good faith can be measured in the level of commitment to negotiations from all sides, and in the commitment to maintain amnesty after the transition. From the political elite perspective, there are a number of arguments for maintaining amnesty long into the consolidation period. This includes the belief that amnesty was the price paid for democracy and therefore cannot be revoked (Brazil), that the government has no place in the discourse around justice (Chile) and that revoking amnesty would negatively impact those currently in government, triggering significant instability (South Africa).

In all three case studies, good faith was exhibited during the negotiations. In Brazil and Chile, this good faith extended decades after the transition. Aylwin actively protected the amnesty law against early congressional attempts to revoke it. He and his colleagues felt that all political responsibility to address the crimes of

¹⁰⁷¹ Barry O'Neill, "What Does It Mean for Nations to 'Negotiate in Good Faith'?", 2001, p. 2 <<http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf>>.

the Pinochet regime ended with the delivery of the Rettig Report.¹⁰⁷² By pushing the responsibility of the regime into the judicial sphere, Aylwin could claim that he did what was necessary without wasting his limited political capital.¹⁰⁷³ In Brazil, the pact of forgetting has ensured that there has been almost no political debate regarding revoking amnesty. The Supreme Court decision in 2010 to reject the OAB challenge to the law bolstered the claim that it was central to preserving Brazilian democracy. Even with the conclusion of the CNV in 2014, and its recommendation that amnesty should be repealed, members of the political elite have steadfastly held to the commitment made regarding the law. South Africa presents a more complicated picture that involves good faith in terms of the commitment to amnesty, not, however, to the process. The lapse in good faith measures emerged through the failure to follow the commitments of the PNR – the carrot and stick approach that required prosecution for those that refused to participate in the process. A commitment to the de-facto blanket amnesty that developed after the transition process has remained.

The challenge of good faith is that, while securing a more stable transition, it can also create in implacable resistance to future transitional justice measures. Aylwin was unmovable on the question of the government's role in transitional justice measures.¹⁰⁷⁴ For him, the society needed to move beyond the authoritarian regime. Within the Brazilian political elites, there has been almost no willingness to address the violence of the military regime. In South Africa, the questions of culpability for CAH on both sides significantly reduce any chance of a repeal of the amnesty law. Victims' rights organisations face significant political resistance in all three countries, meaning that while the good faith remains victims are challenging both the crimes of the past and the political will of the present.

5.3.3 Questions of Justice Will Fade into the Past

The hypothesis put forward by H₂ is that amnesty becomes acceptable with time in a democracy as population demographics shift. Specifically, this hypothesis posits that generational changes will reduce the need for justice. The generational consideration is important as it hints to the possibility that amnesty can be sustained

¹⁰⁷² Patricio Aylwin, Personal Interview; Jose Zalaquette, Personal Interview.

¹⁰⁷³ Zalaquette, Personal Interview.

¹⁰⁷⁴ Aylwin, Personal Interview.

indefinitely if it can be sustained through the initial transition period and generational shift. There is logic to this argument, particularly as the official narrative moves beyond the transition period and towards other more immediate issues. However, collective memory also begins to play a role in the debate over justice and becomes a consideration in responding to H₂. Collective memory can involve the retelling of histories of victimhood, a collective sense of injustice or a multi-generational commitment to mass mobilization. Collective memory over questions of justice and victimhood can be problematic for a number of reasons, including the shift from identifiable and living victims and perpetrators to a more nebulous understanding of culpability and justice. As demographics change, it becomes harder to address single instances of injustice. From a definitional standpoint, generational change refers to the point when those born after the end of the regime turn 18 and have the potential to become politically active. When the *born-frees*, as they are described in South Africa, are able to influence political imperatives, it becomes possible to assess the impact of collective memory, justice demands and the sustainability of amnesty laws. On the other hand, the options available to the political elites to manage justice expectations become increasingly limited with the generational shift. Perpetrators and victims die, limiting the efficacy of repealing the amnesty and instigating a full-scale judicial approach. Other options include memorialization efforts and reparations to communities, both of which are also complicated in terms of reach and impact.

There are a number of ways to assess both the shift in demographics and the views the younger generations have regarding the past regimes. Mass mobilization focused on questions of justice is the one marker, while the second is the expansion of scholarship on the transition period. Additionally, a number of research companies such as Datafohla, Latinobarómetro and Afrobarometer have surveyed the changing perspectives on amnesty, the transitional justice efforts and the contemporary debates around impunity and the crimes of the past.¹⁰⁷⁵ While the surveys do not always account for the age of respondents, changes in opinion can still be tracked. All these indicators provide a clearer picture on the potential shifts in perspective influenced by generational change.

¹⁰⁷⁵ Ricardo Mendonça; Mattes.

The case studies point to the persistence demands for justice, with the added complication of collective memory in shaping how people perceive justice. Each country also points to the increasingly limited options available to political elites attempting to engage with these demands. A clear picture regarding demographic changes emerges in each case study, though in Brazil and Chile the pictures that have developed are more similar with each other than they are with the one that has developed in South Africa. In Chile, the discourse regarding justice measures is still heavily influenced by experience, with victims still playing a significant role in the debate. There is, however, a shift. Protest group the FUNA is notably intergenerational, with protests focusing on the injustices of the past as well as current human rights violations.¹⁰⁷⁶ Some commentators have critiqued this demographic spread during mass mobilization efforts, arguing that it complicates questions of justice. Zalaquette expressed concern over the development of an identity centred on the victim experience.¹⁰⁷⁷ Members of FUNA protest outside the homes and workplaces of Pinochet allies, outing them as part of the authoritarian regime and using the concept of shame as a form of justice.¹⁰⁷⁸ Other forms of mass mobilization have continued to be a feature of the Chilean experience regarding justice for Pinochet-era CAH. In 2013, 60,000 protesters marked the 40th anniversary of the coup by taking to the streets of Santiago calling for the government to do more to address the need for further measures of justice.¹⁰⁷⁹ Public outcry was also able to influence government appointments, and Bachelet suggested that the repeal of the amnesty law was a priority for her government.¹⁰⁸⁰ Although the age of both the victims and perpetrators suggests that demands for

¹⁰⁷⁶ Ana Ros, *The Post-Dictatorship Generation in Argentina, Chile, and Uruguay: Collective Memory and Cultural Production* (Springer, 2012).

¹⁰⁷⁷ Zalaquette, Personal Interview.

¹⁰⁷⁸ Ros.

¹⁰⁷⁹ AFP, 'Thousands March for Human Rights in Chile on 40th Anniversary of Augusto Pinochet Coup', *Telegraph.Co.Uk*, 01:38, section worldnews

<<http://www.telegraph.co.uk/news/worldnews/southamerica/chile/10295315/Thousands-march-for-human-rights-in-Chile-on-40th-anniversary-of-Augusto-Pinochet-coup.html>> [accessed 17 April 2014].

¹⁰⁸⁰ Brianna Lee, 'Chile Moves To Overturn Pinochet-Era Amnesty Law', *International Business Times*, 2014 <<http://www.ibtimes.com/chile-moves-to-overturn-pinochet-era-amnesty-law-1687092>> [accessed 26 November 2014]; Tihomir Gligorevic, 'Chile: Effort to Repeal Pinochet Amnesty Law Languishing in Congress | InSerbia News' <<https://inserbia.info/today/2015/09/chile-effort-to-repeal-pinochet-amnesty-law-languishing-in-congress/>> [accessed 17 February 2017]; 'Michelle Bachelet Renuncia de Carolina Echeverría a Subsecretaría de FFAA' <<http://www.latercera.com/noticia/politica/2014/03/674-568552-9-michelle-bachelet-acepta-renuncia-de-carolina-echeverria-a-subsecretaria-de-ffaa.shtml>> [accessed 22 April 2014].

justice will begin to fade, the presence of groups such as FUNA and efforts to foster collective memory by victims groups, academics and in theatre and cinema support indicate a continuing discourse on the issue of justice that extends well beyond those who were directly affected by violence of the military regime.

In a similar vein, albeit delayed, Brazil has seen an explosion of intergenerational interest in questions of historical justice. Society has become aware of the crimes of the regime, in a manner that had previously been hampered by the military and political elites' pact of silence. Victims of regime were from a particular class and were not representative of the broader political groups in Brazil during the 1960s and 1970s. There was no official narrative established after the transition and for more than 20 years the political elites actively refused to support a truth commission. The current wave of interest in the authoritarian regime finds its roots in the legal efforts to have the law repealed in 2009, and in the international criticisms of the IACoHR.¹⁰⁸¹ In Brazil there is the currently widespread support for the repeal of the amnesty law despite the limited direct experience of the majority of Brazilians with the negative elements of the authoritarian regime.¹⁰⁸² One caveat needs to be made here. While in recent surveys almost half of those polled viewed the repeal of amnesty as important, other issues such as widespread inequality and corruption, are viewed as more important.¹⁰⁸³

The hierarchy of priorities in Brazil, where justice for CAH are viewed as important but secondary to other societal issues, reflects similar perspectives expressed in South Africa. A number of victims' groups continue to fight for further reparations as well as retributive justice measures in line with the expectations of the law mandating reconciliation. However, the widespread corruption and state capture, as well as a number of other political and economic crises, places the demand for justice as less important than for the majority of South Africans. This is not to say that the government's current approach to amnesty has become acceptable, but rather there are more pressing concerns. Indeed, recent protests regarding fee hikes at universities and the glorification of apartheid and colonial era

¹⁰⁸¹ Abrão and Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice'; Weichert; Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', in *International Judicial Lawmaking* (Springer, 2012), pp. 295–328.

¹⁰⁸² Ricardo Mendonça.

¹⁰⁸³ Ricardo Mendonça.

leaders have exposed a demographic rift, with *born-frees* expressing frustration with the way the previous generations dealt with questions of justice (both economic and retributive) during the transition.¹⁰⁸⁴

H₂ proposes that, with time, amnesty will become more acceptable. However, there is little evidence that subsequent generations will accept the amnesty laws without question. In fact, it seems that post-transitional demands for justice can be heavily influenced by collective narratives around the injustice, perpetuating feelings of victimhood and demands for action. All three case studies have seen continued challenges to the amnesty laws. The types of justice demanded by those born after the transition can change from individual retributive justice to more communal demands for justice. That said, while perpetrators survive, demands for traditional justice remain. This includes calls for the punishment of aged perpetrators including some who are well into their 90's. Time and death will change this; however, what it leaves may not be any easier for political elites to manage. As seen in South Africa, demands for justice can be shaped into unrest, mass mobilization and violence.¹⁰⁸⁵ Venter put it best when he pointed out that collective memory can become a genetic memory and this can easily translate into political demands.¹⁰⁸⁶

5.4 Can Justice be Sacrificed for Democracy?

The question that underpins this research is whether justice can be sacrificed for democracy. Can the justifications for democracy outweigh the need for justice for the torture, kidnappings and assassinations of thousands of civilians by state operatives? Can a society simply move on with the promise of a political system that is by no means guaranteed or perfect? Can justice for individuals be compromised for the greater good of the state? Three hypotheses were developed to direct this research. These are as follows:

H₀) Amnesty legislation is compatible with expectations and norms of an entrenched liberal democracy;

H₁) Amnesty is agreed to in good faith;

H₂) Amnesty becomes widely acceptable with time as demographics shift.

¹⁰⁸⁴ Fairbanks.

¹⁰⁸⁵ Misago; Kgokong, Personal Interview; Venter, Personal Interview.

¹⁰⁸⁶ Venter, Personal Interview.

These hypotheses were designed to investigate the role of amnesty laws during the transition and the impact that it has on the socio-political environment as democracy consolidates. Applied to the experiences of Brazil, Chile and South Africa, these hypotheses identify key elements of the transition and consolidation experience that can then be used in answering the fundamental research questions. Can amnesty be sustained in a liberal democratic state? An assessment of the three case studies indicate that no, this is not possible. From both a theoretical and practical standpoint, democracy and amnesty appear to be fundamentally opposed. The theoretical standpoint on this issue is clear. Amnesty introduces impunity into the transition process. This results in inequality amongst citizens. Former victims pay a much higher cost for democracy than the rest of society by losing their right to seek justice for the crimes committed against them and their families. Equality is a fundamental characteristic of democracy. By denying a section of society their right to justice, political elites create the potential for the development of two tiers in society and the emergence of a collective memory of victimhood. Additionally, amnesty laws have an impact on quality of democracy indicators by negatively impacting public perceptions and therefore influencing legitimacy. The impunity that results from amnesty undermines the public perception of democratic institutions, including the judiciary and police. This public perception can also feed into the understandings of justice. Theoretically, particularized amnesty was supposed to address concerns over blanket amnesty. However, particularized amnesty may still fail to meet the four indicators of perceived justice, and can still lead to a feeling of injustice within the community of victims.

Building on this theoretical base, the three case studies have further illustrated the incompatibility of amnesty and democracy. In all three cases, amnesty has been implemented or maintained as part of the transition process. In Brazil and Chile, the incoming democratic leaders subsequently maintained the self-granted amnesties that predated the negotiations. In South Africa, amnesty was negotiated as part of the transition, building on a legacy of self-granted indemnity acts spanning thirty years. Regardless of how it was implemented, the amnesty laws became a central part of the transition process. However, the outcomes of the use of amnesty have been uneven.

As discussed above, the Chilean case is an example of the democracy re-emerging strongly, reducing the impact of the amnesty legislation on the quality of

the political system. There are a number of reasons that Chile was able to achieve this. Prior to the 1973 rupture, Chile's democracy was unsettled and uneven yet also well established. Elections during the 1950s and 1960s were highly contested, with mostly peaceful transfers of power. While certainly not perfect, Chile's earlier democratic system established a pattern that remained dormant during the Pinochet regime, but not destroyed. Many of the opposition leaders that played a key role in the transition were prominent in the Congress during the Allende era, including Aylwin who was part of the PDC. Additionally, Pinochet reintroduced elements of democracy as early as 1980, seeking legitimacy from democratic norms. Chilean culture has long been considered highly legalistic, which in 1990 aided the redevelopment of democratic norms. This legalistic approach also contributed to the public perception that the plebiscite result had to be adhered to, regardless of personal opinion.

Within the first decade of democracy, the Chilean democratic leadership was also able to subjugate the military interests into the wider democratic project, reducing the threat of a democratic reversal. The military initially held on to the belief that it was the saviour of Chile against the scourge of socialism. While committed to upholding the result of plebiscite, the military under the leadership of Pinochet defended its prerogatives through the transition period. They rejected the Rettig report and officers were twice recalled to the barracks in a direct threat to democracy during the early stages of democratization. However, with the convictions against Contreras and the judicial action against Pinochet, the military began to move to embrace a more traditional civilian-military relationship.

Another key element of Chile's transition was the early truth commission. By establishing an official narrative from almost the first days of the new democracy through the Rettig Report, the *Concertación* government had some control over how the transitional justice process progressed. Importantly, the collective memory of the nation, particularly beyond the core group of victims, was shaped by the findings presented in the Rettig Report. Despite widespread concerns over the truth commission's failures, such as its weak legal status and refusal to identify perpetrators, the information provided began a discourse around the crimes of the past. The evidence presented in the Rettig report also contributed to judicial

efforts of the late 1990s, as well as providing a foundation for the formation of the Mesa de Diálogo and Valech Commission.¹⁰⁸⁷

One point of difference in Chile's approach to amnesty and justice has been the judiciary's occasional willingness to hear historical cases. That is not to say that there has been widespread court acceptance of cases challenging amnesty, however changes made to the institutional structure of the courts by Frei in 1997/98 opened the courts to post-Pinochet era judges. Amnesty is still used as a reason not to convict some perpetrators, while others have been convicted and given extremely lenient sentences. However, the courts have been open to handing down convictions, such as in the case of Contreras.¹⁰⁸⁸ Despite the amnesty decree, 260 people have been convicted of dictatorship-era crimes, though only 60 have spent time in jail. At the time of his death, Pinochet was facing both domestic and international court cases.

The willingness of the political elites to continue to discuss the Pinochet era crimes, amnesty and the possibility of change, have all undermined the blanket impunity promised as part of the negotiations. While Aylwin and Frei were committed to maintaining the amnesty decree, they did so in the face of early debates over whether or not the decree should be revoked. Current president Bachelet has proposed another repeal, though this is facing conservative resistance at a time that the right is seeing a resurgence of popularity in the figure of former president Piñera. Regardless of whether this law remains, the fact that there is open debate over the status of the law is valuable in undermining the legitimacy of the amnesty law.

Ultimately, the amnesty decree is less powerful in Chile in the face of democratic development and debate. The open discourse around amnesty at the elite level, even in the face of significant reluctance by some actors, has proven to be

¹⁰⁸⁷ Raul Rettig, *Comisión Nacional de Verdad y Reconciliación 'Report of the Chilean National Commission on Truth and Reconciliation'* (English translation published by the Center for Civil and Human Rights, Notre Dame Law School, 1993)

<http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf>; 'Dealing with Torture in Chile Achievements and Shortcomings of the "Valech Report" - Nürnberger Menschenrechtszentrum'

<<http://www.menschenrechte.org/lang/de/lateinamerika/dealing-with-torture-in-chile-achievements-and-shortcomings-of-the-valech-report>> [accessed 15 March 2014]; Mario I. Aguilar, 'The Disappeared and the Mesa de Diálogo in Chile 1999-2001: Searching for Those Who Never Grew Old', *Bulletin of Latin American Research*, 21.3 (2002), 413–24.

¹⁰⁸⁸ Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"', *The International Journal of Transitional Justice*, 2009, 1–20.

effective in reducing the power of the blanket immunity and ensuring some access to justice. However, this does not mean that the victims believe that they have experienced justice. Many perpetrators have passed away, leaving groups to find alternatives to measures of justice such as memorialization. The difficulty arises with the emergence of a collective memory that continues to struggle with the lack of traditional justice measures, and the mobilization efforts that go with it. This, however, is less of a concern than in other states where the debate over justice has been silenced.

Brazil, on the other hand, has had a much more straightforward interaction with amnesty. The elites have generally refused to engage with concerns over the 1979 amnesty law. The failure to address questions on justice hasn't reduced the demands for action. Rather, it has delayed action on those demands to be dealt with by future generations. Additionally, amnesty has left a legacy of impunity that has directly impacted on the country's political development. Brazilian democracy has developed, however it has struggled to deepen in a manner that will ensure its longevity. Brazil's democracy faces a number of struggles. Prior to the 1964 coup, the political system was dominated by populist rhetoric, with military involvement seen as a consistent characteristic of the process. The 1964-1984 dictatorship was able to reduce the efficacy of the opposition and to dismantle many elements of the previous political structure. Since the transition, democracy has been slow to move beyond the basic procedural typology. Evidence of this can be seen in rampant political corruption and security issues that continue to plague the country, as well as the issues surrounding the rise of Temer in what has been described as a legislative coup.¹⁰⁸⁹ Impunity for state sponsored crimes has become a characteristic of the democratic period, with the police, armed services and political elites continuing the norms established during the authoritarian regime.

The role of the military during and after the transition has been a point of difficulty for the development of Brazil's democracy. The military controlled the path and speed of the transition, reducing the impact of the opposition's input. The first civilian leader was deeply connected to the military establishment. At no point

¹⁰⁸⁹ Paulo Trevisani, 'Brazil's Dilma Rousseff Likens Ouster Bid to Coup d'État', *The Wall Street Journal* (Online, 16 August 2016), Asia edition, section World
<<http://www.wsj.com/articles/brazils-dilma-rousseff-likens-ouster-bid-to-coup-detat-1471377698>>.

was there any clear break between the leadership and the military, though there has been a slow civilianization. While civil-military relations have generally normalized in the later period, the military reaction was a concern during the 2016 impeachment crisis, with some protesters calling on the armed forces to step in again. That the military is still seen as a potential political player is obviously a concern for the country's democracy and reflects, in part, a lack of discourse around past CAH committed by the former regime.

The refusal to establish a clear narrative at the early stages of the transition has been a fundamental characteristic of the Brazilian experience. While *Brasil Nunca Mais* was a best seller, the political and military elites followed the policy of "oblivion" – complete forgetting. This discouraged any debate over the CAH of the past regime. Reparations were paid, in accordance with the 1988 Constitution, however very little was publically known about the actions of the military regime. Amnesty was first questioned in 2009, with the OAB case before the Supreme Court, sparking a flood of academic and media commentary on the past. The emerging discourse around the past regime's CAH gained traction with efforts led by Lula, however concrete measures were initially thwarted by military resistance. The country's truth commission only began its work in 2012. The long absence of significant discourse has had an impact on how the broader public view the past as well as influencing the type of achievable justice. It has also been very easy for the government to put aside the findings of the truth commission as other political crises have taken precedence.

The political resistance to engaging with demands for justice has been mirrored by the refusal of the judiciary to address questions of justice for dictatorship era crimes. The 2009 Supreme Court case favoured the maintenance of amnesty on the argument that it allowed for democracy and was, therefore, a foundational element of Brazil's political system. The STF also rejected international pressure from the IACoHR, claiming that the regional body had no jurisdiction. The court has shifted responsibility for challenging the amnesty law to the political elites, making the question of justice a political rather than judicial matter.

Groups from within civil society and the legal community continue to push for an increase in measures of justice. However, in many respects, by failing to discuss the past and by maintaining amnesty without question, the state has failed

to make a clear break from the authoritarian regime. While democratic, many of the key characteristics of an entrenched liberal democracy have been undermined by impunity, torture, corruption and a perceptible lack of faith in the government and in the political process.

South Africa's democracy faces similar questions around public perceptions of democracy. Victims of South Africa's apartheid regime have witnessed a particularly convoluted transitional justice process. The political elites promised particularized amnesty that would allow for some level of justice. However, both sides of the conflict largely ended up receiving an ad hoc blanket amnesty that failed to address the concerns of many victims. In this way, South Africans experienced not only a denial of justice but also a betrayal of the promised bargain that was meant to justify the limited transitional justice process. A second prong of that bargain, democracy, has also failed to eventuate as expected. Race and economic inequality is still a very significant issue. South Africa has regular multiparty elections, however there are fears that corruption and clientelism have come to dominate the process. There are growing fears that the ANC will refuse to let go of power, even in the face of a potential electoral defeat. This overall situation has inevitably led to a decline in support for the country's democracy, and for many of the democratic institutions.

Although now under a different name, the police in South Africa have struggled to move past the institutional norms of the apartheid era. Accusations of torture are widespread, as are high levels of impunity for criminal activity. The police continue to protect the interests of the wealthy, including policing private functions for the elites. Some of the issues facing the SAPS can be directly tied to both the culture of impunity that developed with the amnesty law as well as the high number of members of the apartheid era police that retained their positions in the democratic era. The heads of the new police service have struggled to eradicate the institutional norms that were entrenched during the authoritarian regime.

While the TRC process has long been hailed as the way forward, a number of issues have continued to hijack its impact. Aside from the religious dimension of the commission and its limited judicial power, the TRC failed to gain buy-in from some of apartheid's most well-known victims. The buy-in from the right, particularly the SADF and the SAP was poor, as was the participation by members of the political elite on both sides. From the beginning of the commission, the ANC

and NP used the courts to protect their interests, including protesting the findings of the final report. This has created a contested discourse around the crimes of the apartheid regime, as well as those committed by the ANC that went beyond the scope of typical armed political resistance. Since the final report was handed to Mbeki, the ANC has steadfastly refused to follow the report's recommendations. In fact, under the guidance of the ANC, particularized amnesty has essentially become a blanket amnesty.

The judicial structure in South Africa has failed to inspire faith in transitional justice. Much like the SAPS, apartheid judges remained on the bench, leaving some with the sense that colour and class still matter. Also, the NPA, the organization tasked with pursuing justice in applicable cases, have failed to do so and have, at times, actively resisted victim's demands for action in the face of significant evidence. A changing of the guard has taken time, leaving victims to decry the system without significant avenues for recourse. The complicated nature of South Africa's transitional justice process is compounded but its failure to fulfil the entirety of the process. A sense of betrayal is layered on top of injustice, creating a collective memory of continuing victimhood that has proven relatively easy for outside interests to manipulate for political ends.

Each case study reflects a different approach to the transition and transitional justice. However, the legacy of amnesty has been consistent for the two countries that failed to quickly entrench a clear democratic order. When the commitment to democracy has been limited, cultures of impunity that are directly related to the amnesty legislation are able to develop, and practices that are highly problematic, such as torture and corruption, are able to continue despite the democratization process. These complicate demands for justice as contemporary injustices take precedence. This is not to say that the injustices of the past are forgotten, they simply move in the hierarchy of priorities. A collective memory and identity can develop that can lead to mass mobilization and the manipulation of mass anger for political means. However, when democratic norms become quickly entrenched, victims' groups and the wider public are able to challenge the political system and agitate for further justice measures. The equality promised by a fully entrenched liberal democracy enables justice demands and a political discourse that questions the legitimacy of the amnesty law. The evidence gathered from the three case studies indicates that democracy and amnesty are fundamentally incompatible.

A socio-political culture that emerges within a strong democracy will directly challenge the sustainability of amnesty laws. On the other hand, in weak democracies, amnesty laws are able to have a long-term impact that can undermine the democratic order through immunity, corruption and dictatorial behaviour and weakens the legitimacy of a number of fundamental democratic institutions. The three case studies used here are supported by the theoretical framework, which points to an incompatibility from a theoretical standpoint. An old Zulu proverb says a snake gives birth to a snake. Amnesty gives birth to norms that undermine the reason amnesty was granted in the first place.

5.5 Conclusion

This research has focused on the sustainability of amnesty legislation in entrenched liberal democracies with the goal of answering a core question: *can justice be sacrificed democracy?* The use of amnesty laws as part of the transition is the sacrifice of justice for democratization. However, there is no guarantee that democracy will consolidate in a manner that will make the sacrifice worthwhile. Additionally, there is no guarantee that the wider public will be free of all aspects of the authoritarian regime, particularly in terms of the security apparatus and inequality. This is an elite made bargain that required a significant sacrifice from those who were not even part of the discussion. This has the potential to be fundamentally disruptive for a nation's political development and problematic for the shape of a community's collective memory. This threat can persist decades and generations after the transition. The theory on democracy and justice indicate that the fundamental characteristics of each are incompatible with the theoretical requirements of amnesty law. In the real-world Brazil, Chile and South Africa give insight into just how incompatible these two concepts are. Even a moderately robust democracy, such as Chile, will undermine the efficacy of an amnesty law, leading to widespread debate and possibly repeal. On the other hand, an amnesty law in a weak democracy like Brazil and South Africa will undermine the political system. Negative elements of amnesty legislation, such as the culture of impunity, have been shown to continue when democratic norms have failed to be consolidated by the political elites.

One of the primary arguments for the use of amnesty is that it is a necessary carrot for the authoritarian regime during the exceptional times of the negotiations.

Does this outweigh all arguments against the agreement to implement or maintain amnesty? No. Some commentators argue that there are a narrow number of states where amnesty can be used.¹⁰⁹⁰ Perhaps it was the only option for South Africa, due to the level of civil violence during the transition period. However, in the cases of Brazil and Chile, the need for blanket amnesty is less certain. The model of particularized amnesty, implemented to the letter of the law, could have provided these two societies with a middle way to manage both public expectations of justice and the outgoing regime's demand for impunity. This is of course hypothetical and a possible avenue for future research. Regardless, it is clear that a commitment to establishing a robust democracy from an early stage of the transition can provide avenues for victims to seek equality in terms of justice. If political elites feel that they have no other option but amnesty, they can mitigate some of the negative consequences of laws of impunity by ensuring a commitment to the quality of democracy indicators, allowing the space for amnesty to be repealed at a time when perceived risks are no longer seen as a threat to the political system.

The theory and the case studies have highlighted a significant issue for transition literature. This research has shown that the debate must move beyond the justice vs peace paradigm. This research has shown that the discussion must extend to the decades after the transition, and must examine whether amnesty can be sustained in the context of a liberal democracy. Can victims accept a democratic socio-political environment where they are less equal than the rest of their society because they are never allowed to seek recompense for the crimes that were committed against them? Or will they push back, and force a change in political discourse, in law or in governability? The evidence points to the latter and this could push future transitions to seek alternate options during negotiations. Overriding and ignoring claims for justice has the potential to create a collective memory and identity around victimhood that can sustain frustration and anger across generations, giving birth to demands for justice where the victims and perpetrators are long dead and a tangible solution has become almost impossible.

¹⁰⁹⁰ Varney, Personal Interview.

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