Checks and Balances in New Democracies: The Role of the Judiciary in the Chilean and Mexican Transitions: A Comparative Analysis

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INTRODUCTION

The literature on democratic transition in Latin America has analysed several important aspects of the transition to liberal democracy, including constitutional reforms (O'Malley, 1991); electoral reforms and elections (Tagle, 1993); the roles of legislatures (Close, 1995); the development of grassroots democratic experiences (Escobar & Alvarez, 1993; Jaquette, 1994); civil-military relations (Loveman, 1978; Rouquieu, 1982; Skidmore, 1988; Stepan, 1988); the transformations experienced by the labour movement (Middlebrook, 1995; Valenzuela, 1983) ; the role of the church (Fleet, 1985), and, above all, the implications of profound neo-liberal economic transformations (Halebsky & Harris, 1995; O'Brian & Roddick, 1983; Petras & Leiva, 1994). Noticeably missing from the literature is the study and analysis of the social and political consequences of the role that the judiciary has been playing in the said democratic transition. Although constant references are made to the systematic violations of human rights (Americas Watch, 1995; Amnesty International, 1993) that characterized the dictatorial military regime of General Augusto Pinochet in Chile, as well as the repression of civil and political rights under the authoritarian Mexican political regime (U.S. Department of State 1995 and 1996 Human Rights Reports on Mexico), scholars and authors have not directly scrutinized the rationale behind the judiciary's failure to enforce such liberal rights as the right to life, freedom of expression, freedom of association, etc. This paper contends that the role of the judiciary in these countries appears to be at variance with constitutional and other checks on state powers found in the classical examples of liberal democracy (e.g.; England, Canada, and the United States). In fact, it appears as if the division of powers in Chile and Mexico is not producing the political equilibrium that is normal in long-established democracies and that is to be expected in countries aspiring to join the still minority group of liberal democracies in the world. In Chile, the impression is that the judiciary has too much political power vis-à-vis the legislature, while in the case of Mexico there appears to be a situation in which the judiciary is too much controlled by the Executive. Not surprisingly, there is in these two countries (and in most other countries in Latin America) a recurrent concern with the perceived role of the judiciary and with the ways in which it can be transformed, so that it can become an active element in the promotion and consolidation of a democratic political culture.

Democratic theory, from Plato to Aristotle to Montesquieu to the American constituents, has maintained that state power is divided between three branches which mutually counter-balance each other. One of these branches is the judicial power. Democratic theory also maintains that while one of those power legislates and the other administers, it is the role of the judiciary to sanction the excesses committed by the legislative and the executive. In doing so, the judiciary helps to preserve democracy. Important social consequences follow from the principle of the separation of powers: First, for one power to effectively check the others it must be autonomous from the latter. Hence, the effectiveness of the judiciary in a democratic society resides in it being autonomous from the executive and the legislative. Second, since it is politics what identifies those whose goals are to attain control of political power through the executive or the legislative, it follows then that the

members of the judiciary must be apolitical, non-partisan, in order to guarantee their immunity from the political contamination which would otherwise impinge on their autonomy (Luis Pàsara, 1982). By and large, the principles of autonomy and apoliticism of the judiciary in liberal democracies are enshrined in the corresponding political constitutions of most Latin American countries. The enforcement of those principles in everyday life has not however been the norm in most of Latin America.

It is one of the objectives of this paper to focus attention on the peculiar relationship between the administration of justice and the political power found in the Chilean and Mexican societies. My hypothesis is that it is the failure to maintaining the proper system of checks and balances inimical to democratic theory what might explain the delay of the democratic consolidation in these two countries. In pursuing this hypothesis, a methodological distinction is made between the role of the Supreme Court in a democratic society, on the one hand, and the role of the judiciary and the administration of justice at large, on the other. The theme of the Supreme Court has to do mainly with the institution of judicial review, that is, its prerogative to review the constitutionality and legality of the decisions adopted by the other powers. The more general question of the judiciary has to do, in turn, with the independence and autonomy of the judges from the pressures which may be exerted by the executive and the legislative. Both issues have a great relevance for the democratic consolidation but they need to be treated differently. The problem of the Supreme Court and its powers of judicial review are theoretically related to the notion of the division of powers and to the role that in a democratic society may correspond to an institution which not only is not popularly elected but is, in most cases, ideologically attached to the minority dominant sectors of a society. It also has to do with the important role which the Supreme Court may play in legitimizing the structures of power which I deem to be insufficiently democratic in Chile and Mexico. On the other hand, the question of the autonomy and independence of the judiciary is a subject matter which revolves in various directions: the fiscal constraints suffered by the members of the judiciary and their consequences in terms of conflicts of interest, corruption, abandonment of duties, delays in adjudicating justice, etc.; the mechanisms of control involved in the appointments, promotions and dismissals of the judges and the corresponding lack of professionalism; the restriction in the judiciary's jurisdictional prerogatives as governments move to establish administrative tribunals (agrarian courts, military courts, electoral courts, labour courts) which completely violate the democratic principle of the separation of powers. This second aspect translates into a generalized view of the judiciary as an inefficient, corrupt and subordinated power which systematically fails to protect the individual citizen's civil and political freedoms proper of a democracy from governmental abuses. This has led, moreover, to a widespread social discontent with the administration of justice not only in Chile and Mexico but over most of Latin America. Latin American peoples, who traditionally distrusted or feared the judiciary, are now demanding an overhaul of this power of state.

The Chilean Case. From the point of view of the various institutions playing a role in the consolidation of the "new democracy" emerging in Chile, one can visualize the presence of (1) institutions which link the democratic past (1925-1973) with the present and, (2) new institutions which define the boundaries of the democratic transition process. Some pre-coup (1973) institutions

have been rescued and strengthened, while some others were created by the sixteen-year old dictatorship recently replaced by a civilian government (1990). Among the latter, one finds the 1980 constitution which, defines the governmental organisms and/or powers charged with the decision-making process, including such important structures as the National Security Council, the Comptroller General Office and other organisms charged with implementing public policies, e.g.; the civil and military bureaucracy as well as centralized and decentralized organisms (e.g.; the central bank). In some of these organisms one can see a solution of continuity while in the case of others, including the judiciary, they appear as the least transformed or altered during the democratic transitional phase. According to conventional wisdom, the permanence of such institutions would appear as a mechanism supporting the consolidation of democracy, yet, I intend to explore the possibility that this may not be the case. That is, I contend that in order for Chile to have a liberal democratic transition the **(a)** newly created institutions of the 1980 constitution must be democratic in the classical sense of liberal democracy, and **(b)** the institutions inherited from the pre-coup democratic experience be those which protected, defended, and safeguarded the democratic values and practices threatened and/or violated by the military.

Yet, in Chile, the only state organisms which have survived with very little changes during the transition from democracy to dictatorship and from dictatorship to democracy are precisely the armed forces, the judiciary and the general comptroller office (Nef & Galleguillos, 1995). Moreover, there is a generalized consensus that the Chilean armed forces and judiciary can be characterized as essentially un-democratic and anti-democratic institutions before, during, and after the 1973 military intervention.

A widely accepted Chilean myth is that of the supremacy of the rule of law. Since its consolidation as a nation-state in the early 1830s, Chile has distanced itself from "lesser" nations where lawlessness was widespread. Chile has long been recognized as a "civilized oasis", defined by its people's respect for the rule of law (Zeitlin, 1968). This mythology was carried further to even present the Chilean judicial system as a non-partisan organization. The idea that the judiciary could be partisan was largely inconceivable. It was deemed to be as neutral as the armed forces (Joxe, 1970). This can in part be attributed to the dominant Kelsenian (Kelsen, 1960) tradition of pure rationality and its deductive logic according to which the notion of the rule of law is a-historical and a-social. This doctrine masks both the idea and the practice that the Chilean judicial apparatuses may be eminently classist organizations which have constituted themselves in one of the last bastions, along with the armed forces, of the defence of the political power of the traditional oligarchy.

While it can be argued that some degree of political autonomy existed in some state sectors with regard to the ruling elites (e.g.; the Bismarkian nature of the armed forces (Nunn, 1976; Rouquie, 1982), and the Weberian meaning attributed to the Chilean civilian bureaucracy (Valenzuela, 1979), the same cannot be said of the country's judiciary. This is especially true of the upper levels of the judiciary, the Supreme Court. The latter has characteristics which are distinctly aristocratic; more than a bureaucracy it appears to have adopted the form of a patrimonial system with the trappings of legal-rationality. Its recruitment, selection, promotion, social relations, and the behaviour of its members have corresponded to a historical conception of justice determined by

patterns of class allegiance.

Within the terms of how this class justice is adjudicated, it is possible to find at least three levels which show how the state relates to its citizens: (1) the defence of the interests of the ruling classes (especially the landowning oligarchy); (2) the level of conduct associated with the behaviour of the middle classes; and, (3) a third level which is that of against whom is the law being applied, that is, all those conducts which fall outside what is permissible by law or, who is deemed on the margin of the law.

Accordingly, I argue here that the judiciary, more specifically its apex as represented by the Supreme Court, has been one of the mechanisms established in the 1980 constitution in order to safeguard a new institutional order which appears to justify, rationalize, and legitimate both the abuses of power by the previous military regime as well as the new restricted democracy which is the legacy of the said regime.

The reluctance on the part of the judiciary to adapt to the new democratic phase may contribute to the political fragility of the current democratizing attempts. As one of the largest bureaucracies, the Chilean judiciary stood out in opposition to the social, economic and political changes that the Christian Democratic administration (1964-1970) and the Socialist government of the Popular Unity (1970-1973) were trying to introduce in Chile. In fact, the public declaration by the Supreme Court, in August 1973, that the Allende government had placed itself outside the rule of law, provided the *carte blanche* for the military coup of September 1973 (Pinochet, 1980). In the sixteen years of military rule that followed, the Chilean judiciary, and the Supreme Court, in particular, lent political legitimacy to the military government by refusing to uphold the civil and political rights of the citizenry. Moreover, pursuant to the 1980 constitution, the Supreme Court was bestowed with a significant degree of power so to be able to preserve the juridical-institutional structure that that document establishes. Thus, more so than the military, the Supreme Court can appoint some of its members to: the National Security Council; the Senate; all the positions in the Electoral Court; all the positions in provincial electoral courts and, the majority of members of the Constitutional Tribunal. To guarantee the maintenance of a restricted democracy for years to come, General Pinochet asked for the resignation of all justices over 70 years of age and in their place appointed seven relatively young justices to the Supreme Court to whom the mandatory retirement at age seventy-five does not apply (O'Malley, 1990). These were added to other young justices appointed during the dictatorship years. In effect, like the armed forces, the senate, and the general comptroller office, the Supreme Court is stacked with individuals closely associated with the military regime who cannot be removed by the civilian government and/or parliament for years to come.

Since 1990, when Chile returned to democracy, several conflicts with political repercussions (reform of the judiciary, investigations of human rights violations in the past, congressional impeachments of judges) have arisen between the executive and congress on the one hand and the armed forces and the Supreme Court on the other. Each and every time it has been the president and/or congress that has been forced to retreat. These incidents seem to indicate an imbalance or disequilibrium between the powers of state. The balance of power appears to favour the judiciary and

the armed forces to the detriment of elected representatives (e.g.; popular sovereignty). The research will thus explore how the political powers of the Supreme Court may be inconsistent with the traditional system of checks and balances that typically characterizes a liberal democracy.

It is a common place argument in the literature on processes of democratic transition that such processes are greatly influenced, if not determined, by the nature of the military regimes that civilian governments have come to replace. Those regimes themselves adopted more or less dictatorial and authoritarian attributes, depending to a great extent on what Guillermo O'Donnell (1973) aptly referred to as the "imminent fear" of a leftist takeover felt by a wide array of civilian and military sectors.

It is also unquestionable that in the Chilean case, circa 1973, conservative forces, middle class groups, and even sectors of the working class, as well as the military and other bureaucratic agencies such as the Supreme Court and the Comptroller General Office had internalized an atavistic fear that the Popular Unity Government of Salvador Allende was bound to bring an end to Chilean democracy, as they knew it. This real or imagined fear, translated as it was into an undisguised class hatred, was undoubtedly much greater than that felt in any of those other Latin American countries that were swept by the bureaucratic-authoritarian onslaught of the mid-1960s and early 1970s.

Accordingly, the new military-civilian coalition led by General Augusto Pinochet took it upon themselves to design a new institutional framework furnished with a series of legal mechanisms aimed at constraining, if not preventing, a recurrence of the processes similar to those experienced before and during the Allende regime. Their efforts culminated with the promulgation of a new political constitution in 1980.

That document clearly established the principle that the new Chilean democracy was to be a "protected democracy". [1] Thus defined, democracy was to be safeguarded by a series of legal and juridical trenches that, individually or at unison, could present a formidable obstacle to any attempt by anti-establishment sectors to change the nature of the authoritarian state, even in the event that the military-civilian authoritarian coalition were no longer in control of the government apparatuses (including the presidency, that General Pinochet had intended to keep until 1996).

These trenches are of two sorts. They can be open and closed systems. First, and because even protected democracies must expose themselves to the vagaries of electoral politics, the 1980 constitution established a first line of defence in regards to mechanisms that would ensure domination of parliamentary initiatives and proceedings by the minority conservative sectors. Thus, both the constitution and the 1989 Electoral Law were designed in such a way as to guarantee a parliamentary over-representation to these pro-military sectors who numerically have no chance of ever winning a majority in a fair, competitive election.[2] By creating, and thus far maintaining unchanged, a binominal electoral system while also stacking the Senate with individuals appointed by the dictatorship, this first line of defence has proven quite successful at preserving the authoritarian legacy by making it almost impossible for centrist and leftist forces to have a chance at true electoral success.[3] Since 1990, the Executive's and Congress' attempts at democratizing the

institutional order inherited from Pinochet have been nothing short of futile given the ability of the minority conservative sectors to deny democratic forces the constitutional quorum needed for the amendments of the constitution: not a single piece of legislation that could have significantly altered the make-up of the institutional order has been promulgated by the legislative.

More importantly, though, has been the minority sector's spirited opposition to any attempt at passing legislation dealing with the unresolved issue of human rights violations attributed to the previous regime. More specifically, and in spite of hard evidence now (and back then) available, the minority conservative sector acts as the first series of trenches for the protection of the armed forces, the Pinochet government, the Judiciary, and the Comptroller General Office. That these organizations need protection is self-evident given the fact that they either directly violated the human rights of so many Chilean citizens or, even worst, provided the legal, judicial or administrative cover-up for the atrocities committed by the Pinochet dictatorship.

Second, there are those other trenches that are built as closed systems. They have to do mainly with those bureaucratic organizations which have been constitutionally endowed with almost total autonomy, and which appear capable in their own terms of withstanding all sorts of pressures from newly elected governments and parliaments, as well as from civil society sectors which unrelentingly demand that they be brought to account for their deeds during the dictatorship years. In addition to the military, the judiciary, and the comptroller general office, this is also the case with the National Security Council, the Central Bank, the Constitutional Tribunal, and most electoral courts. The ”bunker" mentality adopted by these bureaucratic agencies is, precisely, one of the main obstacles to the establishment of a true democratic state in Chile.

The judicial power is currently playing a crucial role in delaying the processes of democratic transition in Chile. The judiciary (especially its higher echelons, specifically, the Supreme Court) is becoming more and more a factor that contributes to constrain, decelerate and postpone the consolidation of a liberal democratic regime. This appears to be the case due mainly to: (a) the remarkable high degree of autonomy bestowed upon the Chilean judiciary by the 1980 constitution. The political powers of the Supreme Court are presented as negatively affecting the traditional system of checks and balances that ought to characterize a liberal democracy. And, (b) the overall failure of the judiciary to adjudicate justice in view of the widely recognized violations of human rights committed by the military government. In failing to protect civil and political liberties the judiciary is seen as also failing to meet one of the three essential conditions of a democracy as discussed by Robert Dahl (1971) in his classic study, ”Polyarchy".

The Judiciary in a Historical Perspective

Following the period 1891-1925, in which judges were at the mercy of Congress, which appointed them through the Council of State, and were therefore forced to be partisans to political parties, the new 1925 Constitution moved to reestablish both the moral integrity and independence of the judiciary. The independence itself was to be guaranteed by granting tenure to judges and by also leaving the selection and appointment processes of all judicial personnel in the hands of the Supreme Court (self-generation) and, therefore, out of reach from the executive and congress.

Moreover, judges were irremovable unless they were found to be derelict in the fulfilment of their duties by the Supreme Court; no other power of state could interfere with these exclusive prerogatives.

Over the years, the independence and autonomy of the judiciary was taken for granted. As Chile began an accelerated process of social transformation in the 1960s, especially with the election of reformist Christian Democrat Eduardo Frei, and as more and more Chileans demanded even more radical changes by electing Marxist Salvador Allende in 1970, the judiciary began to dramatically involve itself in the country's political quandary. As one of the largest bureaucracies, the Chilean judiciary stood out in opposition to the changes that the Christian Democratic administration (1964-1970) and the Socialist government of the Popular Unity (1970-1973) were trying to introduce in Chile. Thus, during the Frei administration the Supreme Court jumped into the political fray by legally trying to derail the implementation of the Law of Agrarian Reform, passed by a joint vote of Christian Democrats and leftist sectors in 1967. Expropriated landowners found out that by asking the Supreme Court to declare the unconstitutionality of the law, in each and every case brought before it, the court could take years in resolving the matter, thus effectively preventing the government from seizing the expropriated lands. It was at this time that some of the first criticisms regarding the class biases present in the adjudication of justice by the country's courts began to be heard ever so louder. The often made remark that in Chile a thief was more likely to go to jail than a murderer echoed the popular views that the judiciary was more concerned with the defence of private property than with the protection of the right to life. Not only that, decisions by the Supreme Court in political matters began to show a serious lack of consistency: Socialist senator Carlos Altamirano was sent to prison for the crime of sedition, resulting from a speech at one of the country's universities, while an Army General who seized one of the capital's barracks and threatened the stability of the Christian Democratic government in October 1969 , and was also involved in the conspiracy leading to the assassination of the Commander-in-Chief of the Armed Forces in September 1970, had his original sentence, passed by a military court, reduced by the Supreme Court and rather than to be sent to prison he was allowed to serve it abroad in exile. As sectors of Chilean society began to align themselves in defence of the status-quo or against it, the 1960s even witnessed the first-ever strike by lower judges in the country's history.

When Salvador Allende won a surprising plurality victory in September 1970, the Christian Democrats agreed to ratify his victory in Congress if he promised not to, among other things, interfere with the judiciary, the military, and the educational system. Those promises were then written into a Statute of Democratic Guarantees, some of which were, in turn, incorporated as amendments to the 1925 Constitution.

The Popular Unity government was faced with an unsurmountable contradiction from its very beginning: how to create a socialist society within the context of a bourgeois legality? It was evident that the Peaceful Road to Socialism could not be built within a legal system whose main objective was to defend private property at all costs. Hard-core Marxists within the socialist coalition made it clear that the new society could not be governed by the old legal-juridical system:

> The principle of legality now reigns in Chile...It is not the principle of legality which is denounced by the popular movement. Our protest is against a legal order whose principles reflect an oppressive social system. Our juridical norms, the techniques which regulate social relations between Chileans, correspond today to the requirements of a capitalist system. In the transition to a socialist regime, the juridical norms will correspond to the necessities of a people struggling to build a new society. But legality there will be. [4]

In the new institutional order to be built, the re-organization of the judiciary deserved a special section:

> The organization and the administration of justice should be based upon the principle of autonomy sanctioned by the constitution, and upon genuine economic independence. [We] envisage the setting-up of a Supreme Tribunal whose members will be decided on by the People's Assembly and shall have no other qualification but their inherent suitability. This tribunal will be free to appoint the internal powers, individual or collegiate, of the judicial system. [The] new organization and administration of the judiciary is meant to assist the majority classes. It will function more swiftly and be less elaborate than the present system. Under the Popular Unity government a new conception of the role of the magistrature will replace the present one, which is individualistic and bourgeois. [5]

Thus, the new government set on a collision course with the judiciary from early on. Their views could not be more contrasting inasmuch as bureaucracies such as the Supreme Court, the military, and the Comptroller General Office began to assume a much greater political role and moved to supersede politicians and political parties which seemed unable to find a solution to the country's growing legitimacy crisis. The opposition's inability to use electoral politics to stop the socialist government from implementing some of its promises (agrarian reform, nationalization of strategic industries, educational reform, labour reforms, and so on) meant that the support of these bureaucratic institutions had to be sought at any cost.[6]

The Supreme Court, then, continued to welcome landowners' appeals preventing the execution of government decrees ordering land expropriation. The strategy had negative counter-effects as peasants began to seize land without waiting for such "legal niceties" to be resolved. Judicial decrees ordering the government to give back the seized estates were to be ignored by some public officials, prompting the Supreme Court to proceed against some of them for contempt of court. The Court's protection of property rights became even more visible following the November 1972 general strike by opposition sectors. Faced with the first real threat of a bourgeois insurrection, industrial workers moved to seize factories and industries whose production they suspected was being sabotaged by their owners. The government, in turn, moved in to legalize this de facto situation by unearthing a 1933 executive decree, still in the books, that allowed it to appoint an interventor to restart the productive process, with or without the legal owners' consent. When thousand of industries were "nationalized" in this peculiar way, individual and corporate owners sought the protection of both the Comptroller General Office and the Supreme Court. As these bureaucracies ruled largely in the owners' favour, workers and some government

officials just ignored their resolutions. The refusal to carry out judicial resolutions added fuel to many Chileans' perception, skilfully promoted by the opposition-controlled media, that the rule of law was being blatantly flouted by the Allende government.[7]

The animosity between the judiciary and the government increased to new levels when shanty-town dwellers, associated with extreme-left groups, began to set up their own Neighbourhood Courts, with popularly elected residents serving as judges. At the same time, the emergence of informal court sessions (Audiencias Populares) by some professional judges in poor areas of Santiago added to the Supreme Court's fears that its monopoly over the adjudication of justice was being threatened by the government's failure to rein down on these ominous developments. The government and its supporters, on the other hand, pointed to the "twisted values" of the courts, as seen in the fact that the judiciary tended to treat rather leniently the illegal and criminal acts of right-wing sectors, which included terrorist acts, sabotage, hoarding of basic staples, and assassinations.[8]

The dispute between the executive and the judicial power came to a head with a highly publicized exchange of correspondence in June-August 1973. There, President Allende defended the presidential prerogatives enshrined in the political constitution. The Supreme Court, on its part, denounced the government for disregarding the separation of powers that demanded that government officials carry out without questioning the courts' resolutions. The crisis reached dramatic levels when President Allende returned without answering it a June 25, 1973 letter from the Supreme Court that he deemed to be "abusive, improcedent , unacceptable and offensive" to the dignity of Allende and the Commander-in-Chief of the Armed Forces, General Carlos Prats.[9] This correspondence will figure prominently in the justification of the September 11, 1973 military coup. In fact, the public declaration by the Supreme Court in July 1973 that the Allende government had attempted to submit the judicial power to the political needs of the government through a forced interpretation of the Constitution and the country's laws provided the *carte blanche* for the armed forces intervention (Pinochet, 1980).

The Judiciary's Abrogation of Responsibility During the Military Dictatorship

Following the military coup, the Supreme Court issued the following public statement:

> The President of the Supreme Court, with the knowledge that it is the purpose of the new government to respect and fulfil the resolutions of the judicial power without a previous examination of their legality, manifests its most intimate satisfaction in the name of the administration of justice in Chile and hopes that the judicial power will continue to meet its duties as it has done hitherto.[10]

In the sixteen years of military rule that followed, the Chilean judiciary, and the Supreme Court, in particular, were to distinguish themselves for, precisely, failing to fulfil their constitutional and legal duties to protect the human rights of tens of thousands of Chileans and foreign citizens who became victims of the new military-civilian government. Acting, literally, as "soldiers in robes", the members of the judiciary lent legitimacy to the military government in many different ways. To

begin with, senior judges travelled to foreign countries, along with businesspeople, politicians, religious peoples, and journalists to explain and justify the overthrow of the Popular Unity government. Parallelling the purges that were undertaken in the armed forces, the public sector, universities, and the educational system, the Supreme Court also moved to cleanse itself of scores of judges and judicial personnel thought to be politically unreliable.

It was, however, in the area of human rights where the judiciary showed its true colours. Indifferent at best, vengeful at worse, the Supreme Court chose not to come to the rescue of Chileans and foreign nationals who were being victimized by the most brutal military regime in Latin American history. Constitutionally endowed with the power to oversee all tribunals in the country , the Supreme Court, soon after the military rulers declared the country to be in a "state of war", stated that it had no jurisdiction over the ad-hoc war tribunals set up by the dictatorship. In doing so, the highest tribunal accepted the military version of an all out war being waged against communism, despite the fact that no communist enemy existed. The armed forces had faced little opposition and, in fact, they had assumed total control of the country in less than 48 hours! The court martials, comprised of legally illiterate military officers, presided over scores of political trials throughout the country with little or no regard for legal procedures. However, in some instances they were advised by civilian judges who often adopted harsher attitudes. In one case, in the northern city of Iquique, the war tribunal was presided by a Court of Appeals judge who sentenced to death a government lawyer who had been investigating him for involvement in the protection of drug traffickers before the coup. In another instance, a Santiago Court of Appeals magistrate, Judge Hernan Cereceda, had his own office in the Ministry of Defence, where he was in charge of reviewing and polishing the juridically and legally untenable resolutions passed by Air Force War Tribunals.

To be fair to the members of the judiciary, they were not alone in their complicity or reluctance to stand up to the violation of human rights. The post-1973 experience clearly shows that most Chileans did not have a solid, well-rooted understanding of the essential meaning of what human rights are supposed to be. For cultural and historical reasons Chileans did not seem to have fully comprehended the meaning of human rights as universal rights, as rights which belong to everyone: rich and poor, rightist or leftist, national or foreigner, as rights which all individuals should strive to attain and, more importantly, observe and respect.[11] As far as many Chileans were concerned, "their" rights had been threatened or violated by the deposed Allende government, and it had been in order to defend "their" rights that they had fought to overthrow the socialist regime. Nowhere was the existence of a consciousness concerning the vanquished's human rights apparent or present. On the contrary, the process of consolidation of the military-civilian dictatorship was to be built on the strong assumption held by many that they had been rescued from imminent peril by the opportune intervention of the armed forces. As El Mercurio, Chile's and Latin America's highly regarded conservative newspaper put it in its 13 September 1973 edition, "the intervention of the armed forces saved Chileans from the imminent Marxist dictatorship and from political, social, and economic annihilation"[12] Accordingly, whatever fate befell to the supporters of the defeated government it was of little concern to most Chileans: the "communists" were, after all, merely receiving what they surely deserved.[13]

As indiscriminate repression turned to systematic and selective persecution with the establishment of a secret police organization, the National Intelligence Directorate (DINA), in 1974, the ensuing years were to be marked by the abduction and disappearance of thousands of Chileans and foreigners alike whose whereabouts are still unknown today. By then, however, civil society began to organize to protect and denounce well-known instances of human rights violations. The ecumenical Committee for Cooperation and Peace in Chile, comprised of Catholics, Methodists, Lutherans and Jews, commenced a forceful campaign to have the civilian courts involved in many of those cases. When DINA's secret prisons and hideouts were tracked down and names of known torturers provided to the judiciary, the latter was remiss in its duty to commission a judge to go and visit and establish the state of health of the detainees, as prescribed in the Code of Penal Procedures. Not a single writ of habeas corpus that could have saved a person from torture was ever welcome by the courts, even though it was common knowledge that the detainees were being subject to inhuman tortures and abuses. [14] A typical reaction by the judiciary at the time was to request, in writing, information from the government as to whether or not the individual on whose behalf the writ of habeas corpus had been brought to the court's attention was being really held by the security services. When the predictable negative response came back, the Court would then pass resolution stating that since the detention of the person in question had not been established it had no alternative but to reject the writ of habeas corpus. As the relatives of the disappeared continued to pressure the judiciary by various means (international public opinion, mainly) the President of the Supreme Court declared in exasperation that, "I have had up to here with this issue of missing people". In one of the most delicate cases faced by the dictatorship, in terms of its relations with the United States, the Supreme Court steadfastly refused to extradite several military officers involved in the assassination on Embassy Road, Washington, D.C., of former Allende's Ambassador to the United States, Orlando Letelier. Challenging the North-American judicial system, Supreme Court's President, Israel Borquez, even declared that the Grand Jury that had indicted the Chilean officers was made up of only black peoples. [15]

Pursuant to the 1980 constitution, the Supreme Court was bestowed with a significant degree of both administrative and political autonomy as well as with very effective political power. These attributes are needed as yet another line of defence for the preservation of the juridical-institutional structure that the constitution itself establishes. To begin with, all justices from Appeals Courts and the Supreme Court are said to remain in their jobs until age 75. However, Article 8, Transitory of the Constitution, states that such age limitation does not apply to those superior judges who, at the time the constitution became in effect, were already members of the judicial power. [16] Since all present 17 members of the Supreme Court were already senior justices in 1980 they are thus effectively unremovable, except because of resignation, legal incapacity, or a resolution by the Supreme Court declaring behaviour unbecoming to a judge. Before leaving office, and to further guarantee the maintenance of a protected democracy for years to come, General Pinochet offered an early retirement incentive of about US$ 70,000 to some of the oldest members of the Supreme Court and in their place appointed several senior justices in their fifties to the highest tribunal (O'Malley, 1990).

With tenure guaranteed basically for life, the Supreme Court's efficacy in protecting the new

democracy lies in the following constitutional prerogatives: (1) the right to overview all of the country's tribunals, including administrative ones, with the exception of military courts in times of war, the Constitutional Tribunal, the Electoral Qualification Tribunal, and the Regional Electoral Tribunals. The last three exceptions are less so than what they appear to be. In fact, the newly created Constitutional Tribunal is comprised of seven members, three of which must be Supreme Court justices; one is a lawyer appointed by the President of the Republic; two are lawyers designated by the National Security Council, and one more lawyer is nominated by the Senate. The last three individuals, however, must have been ad-hoc members of the Supreme Court for at least three consecutive years.[17] That is, six out of the seven members are effectively in tune with the Supreme Court's ideological and political inclinations. Their tenure lasts for eight years or until they reach age 75, whichever comes first. The attributes of this tribunal cannot be underestimated. It has almost absolute power to "exercise control over the constitutionality" of all sort of legislation, including constitutional amendments, laws, government decrees, and calls for plebiscites. More importantly, it can declare the unconstitutionality of any organization or political party deemed to be in violation of the Constitution. Some observers (Puryear, 1994) have argued that the Constitutional Tribunal has demonstrated some degree of independence from the military government, as seen for example, in its rejection of the dictatorship' bill on political parties (1987) and its 1985 resolution declaring that the 1988 plebiscite should be held as if it were a regular election, as established in the Constitution. What Jeffrey Puryear fails to realize, though, is that those negative resolutions did in no way affect the foundations of the regime but, on the contrary, had the more specific goal of helping to consolidate the rule of law, as established by the dictatorship itself. What needs to be understood quite well is that once the dictatorship got its own constitution it had no other choice but to abide by it. The constitution, as the 1988 plebiscite demonstrated, became a noose around General Pinochet's own neck. The role of the Constitutional Tribunal is thus to support the institutional bases of the Chilean state but without being necessarily an instrument subject to the whimsical control of General Pinochet or any other military leader. Politics in this context is not about who dominates whom but is more about sharing a similar political project. The judiciary and the military are to be seen as equal parties to an unique partnership, and not in terms of subordination-domination. In interpreting legislation produced by the dictatorship the members of the constitutional tribunal are only carefully polishing the rough edges of the institutional order but without undermining its foundation pillars. Thus, the tribunal had no qualms whatsoever in using the constitution against former Allende cabinet member, Clodomiro Almeyda, whose socialist ideas were in violation of Article 8 that forbade any "doctrines which are antagonistic to the family, or advocate violence, or an conception of society, the state, or the juridical order based on class struggle".[18]

Likewise, the Electoral Qualification Tribunal, in charge of overseeing all presidential and congressional elections, is made up of five members, three of which must be justices or former justices of the Supreme Court; another one must be a lawyer, also appointed by the Supreme Court, and who must have been an ad-hoc member of the highest court for at least three consecutive years.

Similar concentration of political power can also be seen in regards to the Regional Electoral Tribunals whose role is to decide on elections held by labour unions and civil society organizations.

They are comprised of one superior judge from the corresponding Court of Appeals (17 of them in Chile) plus two lawyers appointed by the Electoral Qualification Tribunal who, again, must have been ad-hoc judges of the Court of Appeals. Thus, the judiciary, through the appointment of some of its members to these specialized tribunals, is directly engaged in the decision of important matters that cannot be separated from politics. The judges, no matter what some people my say or wish, cannot be neutral.

(2) The President of the Supreme Court is also a member of the exclusive National Security Council, along with the four commanders-in-chief of the armed forces. Together they hold a majority of votes, since the only other voting member is the President of the Republic. The National Security Council is a metapower organization whose main function is "to inform the President of the Republic, the Congress and the Constitutional Tribunal its opinion regarding any deed, act or matter which in its judgement gravely attempts against the foundations of the institutional order or which might affect the country's national security".[19] Accordingly, were the National Security Council to consider that national security is in jeopardy, then the armed forces are constitutionally entitled to move in in order to defend the "national security and guarantee the institutional order of the Republic".[20]

(3) The Supreme Court is also allowed to appoint three un-elected individuals to the Senate: two ex-judges and one ex-comptroller general. Together with four former commanders of the armed forces designated by the National Security Council, the military and the judicial power hold a sizeable voting power, strong enough to veto legislation, especially of the type considered to be in conflict with the institutional order and the previous regime's human rights records.[21]

To sum up, the military-civilian coalition was as aware as the preceding socialist administration was that the new political economy and social relations demanded a new legal, juridical and institutional order. The congruence between an economic regime based on absolute freedom of private property and politics was to be constitutionally enshrined in such a way that regardless of the way political winds blow, it would always be protected by un-elected and unaccountable bureaucratic organizations such as the Armed Forces and the judicial power.

The Democratic Transition and the Judiciary

When Patricio Aylwin assumed office on 11 March 1990, he was well aware that the road ahead of him was a minefield that he ought to thread very carefully; otherwise, he risked setting in motion some explosives constitutional situations which could blowup into pieces his desire to restore democracy. Tackling the beast head-on was certainly not his preferred strategy. On the other hand, the new President was all too conscious of the fact that the large majority of Chileans who elected him wanted some definitive answers regarding the past regime's human rights violations. An experienced politician, President Aylwin chose a circumspect, prudent, and unabrasive approach that relied to a great extent on a call to high moral and ethical principles and which fostered the need for consensus. It will prove to be less than satisfactory, but good enough to ensure governability. Of the several conflicts with political repercussions that have arisen in recent years between the government and congress on the one hand and the armed forces and the Supreme Court on the other

hand, it was the government and/or congress that at each and every time were forced to retreat, thus contributing to reinforce the often made argument that despite the progress achieved in terms of good governance the institutional order is still less than democratic.

Before being elected, and more so when he was sworn in, President Patricio Aylwin, an active human rights lawyer during the dictatorship, made unequivocal his commitment to ensure the defence of human rights at any cost.[22] He began his term by ratifying various international treaties and conventions on the protection of human rights. He also set up a special Commission for the Truth and Reconciliation to investigate the violations of human rights attributed to the military government and, last but not the least, announced his intention to introduce legislation to reform the judicial system which, he claimed, ”was in crisis".

In his third week in the presidential office, President Aylwin addressed a Judges' Convention. In his introductory remarks he cited public opinion polls, academic research studies, and the Supreme Court's President's own words to emphatically state that the ”administration of justice experiences a grave crisis". He added: ”the judicial power does not behave as a truly independent power of state...it is perceived by many as another public service that 'administers justice' in a mechanic fashion, too close to the letter of the law, and too often docile to power influences".[23] He then announced that in order to guarantee the independence and efficiency of the judiciary he would introduce a constitutional reform to create a National Council of Justice and a Judges' College. Two weeks later, Aylwin signed an executive order creating a Judicial Reform Commission and charged it with preparing the draft of the constitutional amendments bill to be sent to Congress. The Commission's President echoed the popular sentiments that ”the crisis in the system of justice has reached the point where the need for change is urgent". Nine months later, the Commission submitted its report to the President. In an interview, the President of the Commission, Manuel Guzman Vial, presented a clear radiography of the Chilean judiciary:

> ...the conduct of our officials has deteriorated, as demonstrated by the involvement and resignations of certain judges;...serious violations of justice...make countries sick and are extremely dangerous diseases...Chile...has a very serious ailment;...with respect to the failure to protect human rights, there is no the slightest doubt that many judicial officials have failed in their duty to protect basic rights;...there are abundant grounds for constitutionally accusing members of the judicial branch for noteworthy failures in their duties...but Parliament lost power to oversee acts which occurred previous to its installation. Many of those situations have unfortunately remained out of political reach.[24]

Guzman Vial then addressed the Gordian knot of Chile's judicial system: its self-generation:

> The self-generation of the judiciary has a major impact. If you were to compare the Chilean system of judicial appointments with that of other countries, you would come to the surprising conclusion that the Chilean system, particularly insofar as Supreme Court appointments are concerned, is absolutely exceptional. The Chilean system has a connotation of `self-generation' that is unique or exceptional in terms of comparative judicial law.[25]

Asked then to address the question of the judiciary's independence during the dictatorship, Guzman Vial tackled the bull by the horns:

> The higher structure of the judicial branch has accommodated to political-military power. Channels of communication have been created through which many of those appointed to the Supreme Court have been greatly influenced by political-military power...A Judicial Branch within the framework of an authoritarian government will in some way succumb to the pressure of the political government due to a normal reaction: fear. Fear that in cases it may be important to submit**.** Few can say that under the past regime they demonstrated an absolutely spotless attitude of moral integrity and evidence in the face of a thousand and one possibilities of yielding![26]

Among the recommendations made by the Judicial Reform Commission was that a National Council of Justice be created. The National Council of Justice would be comprised of members of the judiciary, members of the senate, representatives of the Executive, and other prominent individuals from the Bar Association and universities. This organism would be in charge of appointing future judges thus wrestling this attribute from the Supreme Court, and effectively ending the current system of self-generation.

The constitutional reform bill was sent to Congress in early April 1991. It included the creation of the National Council of Justice which would take part in appointing the justices of the Supreme Court while safeguarding the independence of the judiciary. Superior Court judges were to be appointed by the President of the Republic on proposals made by the Council. One provision of the bill was that a third of the Supreme Court would consist of lawyers from outside the judiciary. Its number would also be increased to 21 from the current 17. In addition, the institution of the Ombudsperson would be established. The National Council of Justice would consist of two senators, three representatives of the President of the Republic, one member of the Bar Association, and nine members of the judiciary. The Council would be in charge of formulating policy and must "be heard in advance with respect to any proposed constitutional reform, any bill, and in general, any provisions that will regulate the organization and powers of the courts of justice or that refer to procedural norms".[27]

On 24 April 1990, President Aylwin had also created a more controversial organism: the National Commission of Truth and Reconciliation, whose role was to collect and analyse all available information on human rights violations for the period 11 September 1973 to the day he became president, 11 March 1990. This "moral cleansing" was needed in order to "heal the open wounds" of the "national soul". On 5 March 1991, Aylwin announced the Commission's findings and recommendations on national television. After stating that the Commission established that 2,115 persons were victims of human rights violations, [28] he quoted the report:

> The Commission says that the judicial branch did not react with enough energy in light of these acts. This produced, in an important, though involuntary way, a worsening of the

> process of systematic violations of human rights by not granting immediate protection for detained victims in cases that were denounced before the courts and by granting the repressive agents a growing certainty of impunity for their criminal actions. [29]

President Aylwin then added that ”the judicial branch should be perfected so it can effectively perform its role as guarantor of the peoples’ essential rights". But then, and perhaps recognizing that the government’s hands were effectively tied up by institutional constraints, he added that ”we should not waste all of our efforts digging into wounds that cannot be healed". In a remarkable turn around, the President declared that all the information collected by the Commission was to be sent to both civilian and military courts for them to proceed with the corresponding investigations! That is, the same government agencies which were being blamed for the violations of human rights were now asked to do what they had failed to do in the past! The Commission’s , and Aylwin’s, decision to have the courts investigate human rights abuses let many observers perplexed since the Supreme Court has vehemently opposed recent legislation that had ordered the transfer of politically related cases handled by military tribunals to civilian courts. In all fairness to President Aylwin, he had no choice. While in other jurisdictions, special tribunals could be set up to investigate ”systematic violations of human rights", in Chile that is impossible: the dictatorship’s constitution explicitly forbids such a thing. Had President Aylwin dared to appoint such a special tribunal, the National Security Council and the Armed Forces would have been constitutionally entitled to overthrow him for violating the constitution.

The Supreme Court’s reactions to these governmental initiatives were swift, curt, and unambiguously confrontational. The Court rejected first the Truth and Reconciliation Committee Report which, it said, ”passed judgements on the courts of justice in a passionate, tendentious, and thoughtless manner as a result of irregular investigations and political prejudice that ended up placing judges at the same level of responsibility as those who actually committed human rights abuses".[30] It also denounced a threat campaign against the Supreme Court and a plot to assassinate two justices. More ominously though, the Court declared that the climate of animosity against the judiciary fostered by the government endangered ”the stability of the institutional order and the rule of law". The justices then added that they were conveying their concerns to the National Security Council. President Aylwin answered that no government campaign of any sort existed against the judiciary and called upon the Supreme Court to come forward with the evidence that a plot actually existed. Concurrently, most opposition parties jumped to the defence of the Supreme Court and repeated the Court’s statement that the conflict between the executive and the court ”endangers the state of law and the independence of state branches", or, ”there is a campaign to discredit the judicial branch", or, ”Aylwin’s attitude was regrettable" because it constitutes ”pressure at the highest level to influence court decisions", or, ”the campaign seriously affects the state of law and our institutional stability".[31]

As sabre-rattling noises by the armed forces became louder after they were declared on a state of full alert by General Pinochet following the publication of the Truth and Reconciliation Commission Report, the government sought a truce. On 15 March 1991, Justice Minister, Francisco

Cumplido, confirmed that the conflict between the executive and the Supreme Court had been overcome:

> We consider that there is no institutional conflict. All the government branches, the National Congress, the President of the Republic and his cabinet, and the Supreme Court of Justice and all the courts are working normally and all court sentences are being served. So, there is no need to think of an institutional crisis.[32]

Again, the government had no choice but bite the dust. The statements by the Supreme Court and the troop movements had an all too familiar ring to it. After all, as stated above, the words uttered by the justices were almost identical to the ones that had paved the way for the military intervention in 1973. Moreover, the conservative opposition's remarks reminded President Aylwin of similar words that his Christian Democrat peers, under his stern orders, had voiced in August 1973, and which also contributed to legitimize the coup.

Passions flared one more time when the Supreme Court released its official response to the Truth and Reconciliation Commission Report in May 1991. The Secretary-General of Government, Enrique Correa, stated that, "the conclusions of the Supreme Court essentially confirm the existence of serious human rights violations under the previous regime". Raul Rettig, after whom the Commission Report is named , said, "the Commission believes that if the Supreme Court had adopted a different attitude, many of the disgraces caused by the state violence would not have taken place". A Socialist Senator, Hernan Vodanovic, added, "I dare label the Supreme Court's ruling frivolous, careless, and irresponsible. It is trying to conceal its responsibility through subterfuge and indirect reasoning, a responsibility it did not assume during the attacks on human rights under the past regime".[33]

When Enrique Correa Labra, a hard-liner, was elected President of the Supreme Court in May 1991, government's hopes of bringing about the needed reforms with the support of the judiciary were dashed. Before his appointment, he had stated that the government "was wrong" and that he was "completely against the reform of the judicial branch".[34] His appointment was lauded by the opposition and conservative newspaper El Mercurio. His comments were unmistakeable harsh. When asked to express his opinion of the bill on judicial reforms and the creation of the National Council of Justice, he said: "I am absolutely against it; I hate it; I feel contempt for it".[35] As the bill was discussed in the lower chamber, Justice Correa Labra became more outspoken in his opposition to the reforms, even after right-wing members of the legislature agreed with the need to move along with the said reforms. Correa Labra insisted that the reforms were an attempt against the judicial power's independence, a statement that President Aylwin described as "unjust". The Supreme Court, in turn, jumped to the defence of its president by issuing a public statement, indicating that "the opinion of the chief justice is supported by almost all members" who are solidary with his "public defence of the essential and exclusive attributions of the judiciary, particularly those regarding the autonomy of the judicial branch".[36] Later on, on the opening day of the Judicial Year, Justice Correa Labra said that "the interference of the president of the republic and of the Senate in the appointment of Supreme Court members was unacceptable". Interviewed

after his official speech, he was even more blunt in his opposition: ” The government is wrong; we are right; all we need is more judges and we will resolve all the problems. There is no crisis, simply too much work". [37] The President of the Supreme Court's contempt for democracy was better exemplified when he failed to attend the opening of parliament when the President of the Republic gives his traditional State of the Nation's Address. This unrepentant individual even brought charges of defamation against the venerable El Mercurio for an editorial on corruption in the judiciary, on November 1992.

In a surprising move, and around the same time, the weakest of all institutions in Chile's institutional order, the Chamber of Deputies, started impeachment procedures against three Supreme Court justices and the Army Auditor General. What in the beginning many thought was just a Quixotic effort proved however truly rewarding when the Senate in a 25-20 vote (including conservative senators) approved the motion to impeach at least one of the four justices, Hernan Cereceda, for serious neglect of duty. Cereceda, at the time also a member of the Constitutional Tribunal, was effectively removed from the judiciary, although not for the original charges of abandonment of duty, but for corruption. Later in 1996, similar charges were brought by the Socialist elements in Congress, but the attempt to impeach the entire Supreme Court fizzled due to the lack of support from the Christian Democrat representatives.

In the end, however, President Aylwin's efforts at reforming the judiciary were doomed since his supporters lacked the two-fifth votes in the Senate to pass the constitutional amendments. As his administration neared the end, President Aylwin could only acknowledge once again the democratic forces' inability to claim the trenches that the old regime had built to ensure a ”protected" democracy:

> In my opinion, our democratic system, under our Constitution, does not establish an appropriate balance among the government branches. I believe that all Chilean democrats, those with a democratic tradition, are convinced of this. In the future, I hope that our efforts to improve the democratic system will include corrections so as to establish a better balance among the government branches.[38]

Unfortunately for Aylwin and most Chileans those hopes are not to be fulfilled anytime soon. His successor, President Eduardo Frei, is a more conservative technocrat who would like to bury the recent past of human rights violations and move forward as if nothing ever happened. He and the conservative opposition are pushing for legislation to once and for all end any future prosecution of human rights abusers, as demanded by the military and the Supreme Court.

When General Pinochet came to power in 1973 one of his first statements was there would be no elections in Chile during his lifetime. The tailor-made 1980 constitution was premised on the unwarranted belief that the General was going to be in power forever. The sociopolitical law of the unexpected consequences of human actions was to prove him wrong, though. Following his defeat in the October 8, 1988 plebiscite, Pinochet and his reactionary and conservative supporters had no

other choice but to fall back on the carefully constructed new institutional order enshrined in the 1980 constitution. That institutional order is the expression of a new juridical edifice which reflects the counter-revolutionary aspects of the victorious coalition that acceded to power in 1973. The new rule of law or state of law that they created is being preserved in almost a monopolistic fashion by those who control economic, military and judiciary power. Politically, and as far as the individuals who control those powers are unelected, the individuals and the institutions they represent remain for the most part unaccountable. In the new Chile the fundamental contradiction is between undemocratic institutions holding power and democratic Chileans holding nothing. That institutional order, moreover, is premised on the belief that competitive politics would somehow legitimize a socioeconomic order founded upon unrestricted freedom for private property and market forces, and the individualism that they promote. What the new institutional order cannot do however is to alter that socioeconomic system. It is an institutional order that allows Chile's minority conservative sectors to retain power within an open political system while shamelessly corrupting the very principles of democratic rule. Today's Chile is not a liberal democracy, much less a true democracy. As Jose Nun (1991) has said, the new transitional regimes in Latin America would best be characterized by referring to them as "democratic liberalisms". [39] It is possible still to add that the new institutional order resembles very much the old 19th century liberalism of the Chilean ruling elites. That liberalism was extremely restrictive in regards to popular participation as the new liberalism also is. The 1980 constitution contains economic and educational constrains that dramatically perpetuate the under representation of majority sectors, including the working classes, marginal sectors, indigenous groups, and women. More importantly though, the new liberalism, like the old one, revolves around the ideological acceptance of the so-called "rules of the game". The latter, in turn, are self-preserving, since they cannot be altered unless ridiculously high quorums are obtained to amend the constitution (where those rules of the game are contained) which, needless to say, are difficult to attain due to the electoral over representation of minority sectors.

What's to be done, then? Is the inherited institutional order impregnable? Can the trenches that protect it be captured? What, if any, is the best strategy to recapture power for the country's democratic forces?

I believe that the road to a full democratic state is a long but not unattainable one. It involves, in Gramsci's words, a passive revolution in which the trenches that protect the undemocratic fortress are captured with painstaking efforts at all levels, but mainly in civil society. Some of those efforts are already underway. Chile's educational system is being revamped to include the study of human rights as a way to create a new popular culture which accepts them as universal principles that belong to all. Chile's freedom of the press is yet another weapon in the fight against unjust and undemocratic institutions. Its power in denouncing the atrocities of the past and the roles that current institutions and individuals had in them cannot be underestimated. Chilean churches, and their progressive sectors, must continue their call for justice. Workers, women, students, peasants and indigenous communities who spearheaded the fight against the dictatorship in 1983-1984 should continue to pressure their leaders and representatives in elected bodies to create a new collective will, one that is morally, ethically, and politically superior to the

conservative civilian and military sectors who still control power.

Regarding the Chilean judiciary, the tasks ahead can be listed as being, among others, the following:

(1) To free spaces at the higher echelons so that the government can appoint new justices, hopefully, with greater democratic credentials. It has already being established that justices can be offered attractive retirement incentives. Pinochet paid some U.S.$ 70,000 in 1989. The Aylwin government offered a similar amount to any justice who retires at age 70.

(2) To obtain congressional support to increase the number of Supreme Court justices. As stated above, even conservative sectors agree that some sort of reform should be brought about. A larger number of justices may help to tilt the balance on democracy's favour.

(3) To amend the Court's Organic Code in order to abrogate the institution of ad-hoc lawyers at the Supreme Court level, thus forcing the Supreme Court to consider suggestion (2).

(4) To continue to use Congress to impeach superior justices in accordance with regulations stipulated in the dictatorship's own constitution.

(5) To call a national referendum to obtain popular approval to overhaul the 1980 constitution and the undemocratic legal-juridical system that it created.

The Comparative Analysis: The Mexican Case.

Unlike its Chilean counterpart, the judicial system in Mexico suffers from an acute loss of social legitimacy and of any significant degree of autonomy and independence. Even more, it is thoroughly inefficient, incompetent and corrupt. Like the Chilean judiciary under the Pinochet dictatorship, the judiciary in Mexico has made every effort possible to avoid clashing with the executive in matters of legality or constitutionality (Wayne Cornelius, 1996) even if that meant not doing everything necessary to protect civil and political rights. Like the Chilean judiciary, the Mexican courts have openly sided with society's dominant sectors represented by the Institutional Revolutionary Party (PRI) which has ruled Mexico uninterruptedly since 1929. The exaggerated presidentialist nature of Mexican politics has made possible for the president of the republic to effectively curtail the prerogatives of both the legislative and the judiciary. The latter have traditionally served merely to rubber-stamp presidential decisions. The subordination of the judiciary at the federal level is made even greater at the state or regional level where local bosses or *caciques* exert unmitigated control over most local affairs. This political control of the judicial power has reflected in a judiciary which suffers from grave deficiencies, due mainly to corruption, the lack of adequate mechanisms to identify and sanction corrupted members, the lack of human resources, and the lack of professionalism among judges and auxiliary personnel. It, moreover, has led to the development of an un-official alliance between federal and local bosses, the police, and the judiciary (Zedillo, 1995). The consequences of this alliance are seen in the almost total impunity enjoyed by federal , state, and local bosses and police officers who routinely receive preferential

treatment from the courts.

The lack of legitimacy of the Mexican judiciary has prompted repeated calls for its overhaul. Unlike the Chilean case, where reforms attempts have been successfully opposed by the judicial power, in Mexico two such reforms have been recently undertaken. In December 1994, President Ernesto Zedillo sent a bill to congress to reform the judiciary. The constitutional amendments aim at establishing the bases for an independent, impartial, professional and honest judiciary. As the President stated in his First Message to the Nation (September 1995), "for the first time in our history, the Supreme Court of Justice is a truly autonomous body, elected by the Senate of the Republic...I reiterate that the times of political appointments and influence of the President over the Supreme Court have come to an end". The reforms of 1986 and 1994 have however failed to give this power of state the autonomy, independence and wherewithal with which to successfully constitute itself in the defender of the civil and political rights guaranteed in the Mexican constitution. On the contrary, and quite paradoxically, as Mexicans have come to embrace democratic ideals and begun to move along the road to a more open polity, following processes of economic and social modernization pursued by the last two administrations and continued by the current one, the persistence of human rights violations and abuse of power by public officials continues unrelentingly. In fact, the human rights situation appears to have deteriorated in recent years, following the economic crises that have hit Mexico since 1982 and the peasant and Indian uprising in Chiapas in 1994.The failure on the part of the judicial power to solve the political assassinations of presidential candidate Donaldo Colosio and PRI's Secretary General, Jose Francisco Ruiz Massieu as well as the 1995 assassination of Judge Abraham Polo Uzcanga who, had publicly denounced the President of the Supreme Court of the Federal District for pressuring him to resolve a labour dispute on behalf of the government is indicative of the ingrained weaknesses of this state power. It also signals the limits faced by the ongoing process of democratization. What is remarkable in Mexico is that the defence of civil and political freedoms does not rest with the judicial power but with a vast array of civil society organizations, such as non-governmental human rights organizations, political leaders, political parties, and the church. This failure of the judiciary to exercise its constitutional prerogatives contributes further to the growing delegitimization of the Mexican state. It also makes the need to thoroughly reform the Mexican state a compelling task before the political system breaks down completely.

In the case of Mexico, the fragility of the democratic transition resides in the fact that sixty-seven years of one-single party rule have thoroughly corrupted all major civilian and military institutions (Morris, 1991). Recent efforts to liberalize and democratize the political system have been ineffective in eradicating political violence and corruption (Camp, 1993; Hellman, 1988). The judiciary, like other major political, economic and social institutions in the country, is subordinate to a highly centralized, authoritarian, and personalized presidency (Philip, 1992).

The reforms legislated in 1994 appear to signal a step in the right direction. However, it is not possible to lose sight of the fact that recent liberalizing reforms have fallen well short of expectations. Will this newly found independence of the Mexican judiciary contribute to establish

a better system of checks and balances such as the one that characterizes a liberal democracy? How independent can a judiciary, now elected by a senate, be when the majority of the senators belong to the ruling party and have traditionally been, literally, appointed to it by the president? How much independent has the Mexican judiciary become as a result of these reforms given the fact that in February of 1995 President Zedillo forced all members of the Supreme Court to tender their resignations, thus allowing him to appoint a whole new body of justices? Finding answers to these questions is of the utmost significance in order to assess the prospects for democratic consolidation in Mexico.

The reforms of the Mexican judiciary, limited as they are, contrast dramatically with the absence of similar political efforts in the case of Chile. For this reason, I have seen fit to study both countries in order to establish a comparison which can shed some more light on the ways in which the judiciary participates in, and influences the processes of democratic transition in these societies as well as to how the traditional system of checks and balances is being reaffirmed or undermined by the presence or absence of political reforms.

A similarity that cannot be ignored though is the one concerning the rationales or motivations behind the extensive constitutional and legislative reforms carried out by the last three administrations in Mexico. Like the Chilean case, the need to enshrine in the constitution all sorts of clauses that protect private property (land reform, labour reforms, privatization, denationalization) as well as expand the electoral processes (pluralism, proportional representation, qualified majority for further reforms) need to be seen as artful devices corresponding with the rapidly shifting correlation of forces. That is, given the steady decline that the PRI has experienced especially since the 1988 election, these reforms aim at making immutable the recent changes even in the event that the ruling party were to lose its secular control of the presidency and congress. Like Chile's, the new scenario is characterized by the existence of legal and constitutional mechanisms at odd with the desires of the large majority of population which continues to clamour for real democratic reforms. As in the Chilean case, these reforms do not make the Mexican political system any more democratic. The do make it more liberal, though. As stated above, in Latin America historically liberalism has not fused with democracy. On the contrary, the paradox that these reforms bring with themselves is that of economic liberalism coupled with political conservatism. Like the 19th century Latin American liberalism, today' liberalism is equally conservative, exclusionary, and repressive.

Conclusions (to follow)

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Endnotes

[1] The notion of ”protected democracy" first appeared in the 1976 text of the Constitutional Act No 2, entitled ”Essential Bases of Chilean Institutionalization". In its Introduction, paragraph 4, d, it is stated that among the essential values of the new institutional order is ”the concept of a new and solid democracy, that may enable the members of the community to participate in the review and resolution of great national problems and which must be provided with the proper tools to protect itself from the enemies of freedom who, supported by a misinterpreted pluralism, seek only to destroy it. The notion was expanded in a speech by General Augusto Pinochet the following year:

> [The new democracy will be] protected, insofar as it must guarantee the fundamental concept of our Declaration of Principles as a basic doctrine of the Chilean state, thereby replacing the classical, candid, and defenceless liberal state by a new one committed to freedom and the dignity of man and the essential values of our nationhood. Consequently, any assault on these principles, the content of which has been gradually established by the Constitutional Acts in effect, is considered to represent an illicit act against the institutional order of the Republic. Freedom and democracy cannot survive if they are deprived of the means required to defend themselves against those who seek to destroy them.

[2] Chilean conservative sectors, although numerically strong, have not won a competitive election since 1958. Even on that occasion, their share of the electorate amounted to just one-third of the voting population. However, the October 8, 1998 referendum and subsequent 1989 and 1993 elections have shown an increase in their share of the popular vote. Still, they have fallen short of a majority.

[3] The binominal electoral system has forced centrist forces, especially the Christian Democratic Party, to seek allies among the so-called moderate left (sectors of the old Socialist Party), while rejecting the incorporation of the Communist Party and other socialist groups. The Communist Party, whose popular support was around 13% to 15% in 1973, is thus effectively shut out from effectively competing in congressional elections.

[4] First Annual Message to Congress by Salvador Allende, in Joan Garces, editor, 1973:147.

[5] Ibid., p.36.

[6] Even though the Allende government was from its inception a minority one, the fact must not be downplayed that, against all odds, it increased its share of the electorate in the two general elections held during its tenure: Thus, while Allende won 36.1 percent in 1970, it gained just over fifty percent of the popular vote in the 1971 municipal elections and raised its share to almost 44 percent in the congressional elections of March 1973.

[7] Although technically legal, the government decrees ordering the intervention of industries seized by workers contributed to the widespread belief that the government was using ”legal loopholes" to destroy private property.

[8] The new legislation on control of guns, firearms, and weapons, which gave the courts and the armed forces the right to search for weapons, was almost exclusively used against pro-government workers and shanty-town dwellers.

[9] The entire exchange appears in a military government publication entitled Algunos fundamentos de la intervencion militar en Chile, no author, Editora Nacional Gabriela Mistral, 1974. See also: Andres Echeverria and Luis Frei., La lucha por la juridicidad en Chile, 3 volumes, Editorial del Pacifico, 1974.

[10] In Algunos fundamentos de la intervencion militar en Chile, op.cit., pp.57-59.

[11] A similar interpretation can be found in Patricio Aylwin (1992, p.).

[12] See: Sobel, Lester; 1974, p.145.

[13] It is important to note that not a single member of the deposed government was ever charged with having violated human rights nor, remarkably, with any form of corruption. Typically, and defying all logic, most government supporters were charged with sedition, treason, and membership in paramilitary groups, that is, the very crimes committed by the armed forces and civilians who plotted the overthrow of the government!

[14] In the first ten years of the dictatorship, only two out of more than 10,000 writs of habeas corpus were accepted by Chilean courts.

[15] The extradition request to no one's surprise was rejected even though a U.S.A. citizen, Michael Townley, who planted the bomb that killed Letelier and one of his associates, Ronni Moffit, acknowledged to be a DINA member working together with Chilean army officers and anti-Castro terrorists. It will take until 1975, almost twenty years after, for the Chilean courts to find two high-ranking army officers guilty of Letelier's assassination and sentence them to brief prison terms to be served in Chile, and not in the United States.

[16] For example, a 75 year-old Court of Appeals Judge, Oscar Carrasco, was appointed to the Supreme Court in 1992.

[17] Ad-hoc members (*abogados integrantes*) are senior lawyers who are asked to seat in chamber as filling-ins when the Supreme Court is understaffed. Once they hear an appellation, they are supposed to remain with the case until sentence is passed.

[18] The tribunal sentenced Almeyda to ten years of exclusion from political activities in 1987. Article 8 has since being abrogated. The Constitutional Tribunal's attributes though have been constitutionally amended to empower it with the right to declare unconstitutional any parties, movements or organizations whose "objectives, acts or conduct do not respect the basic principles of the democratic, constitutional regime, and seek to establish a totalitarian system, or incite to violence as a method of political action". See: Amnesty International (1989).

[19] Article 96 of the Political Constitution.

[20] Article 90, paragraph 2 of the Political Constitution.

[21] Again, the designated senators do no act as a monolithic force at all times. Some times their voting patterns are not predictable except in those cases when legislation aimed at reforming the institutional bases of the authoritarian state are at stake. In the latter case, their voting patterns have been quite consistent in defending it and preserving it.

[22] In an interview with the author, the day after winning the presidency, Mr. Aylwin categorically maintained that creating a true human rights culture would be one of the main goals of his administration. This commitment cannot be overemphasized enough given the author's own views on the important role that Mr. Aylwin played in creating some of the negative conditions which led to the 1973 military coup.

[23] Alywin, Patricio; op.cit.; pp.159-160.

[24] FBIS-Lat-91-007, 10 January 1991, pp.51-53.

[25] Ibid.

[26] Ibid.

[27] FBIS-Lat-91-084, 1 May 1991, p.32.

[28] The 2,115 victims include only those summarily executed after the coup and the large majority of ″missing people‟ or *desaparecidos*. The mandate of the Commission did not include the investigation of the hundred of thousands who were tortured but survived, nor the purges in the civil service, the judiciary, and other bureaucratic agencies, nor the media censorship and many other ″human rights‟ violated during the dictatorship.

[29] FBIS-Lat-91-043, 5 March 1991, pp.27-28.

[30] FBIS-Lat-91-095, 16 May 1991, p.29.

[31] FBIS-Lat-91-048, 12 March 1991, pp.22-23.

[32] FBIS-Lat-91-052, 18 March 1991, p.34.

[33] FBIS-Lat-91-098, 21 May 1991, pp.23-24.

[34] FBIS-Lat-91-052, 18 March 1991, p.34.

[35] FBIS-Lat-91-166, 27 August 1991, p.40.

[36] FBIS-Lat-92-009, 14 January 1992, p.43.

[37] FBIS-Lat-92-043, 4 March 1992, p.31.

[38] FBIS-Lat-91-131, 9 July 1991, p.34.

[39] Nun argues that the term ”democratic liberalism" is more rigorous than that of ”liberal democracy". The latter, in its European historical experience, indicates only the ways in which late 19th century liberalism managed to gain for itself a democratic justification. By changing the noun, he adds, it is then possible to avoid the commonplace ideological displacement of the adjective which transforms ”liberal democracy" into ”democracy" plainly and simply. See: Jose Nun, ”Democracy and Modernization Thirty Years After", Paper presented at the plenary session on ”Democratic Theory Today: Empirical and Theoretical Issues", 15th World Congress, International Political Science Association, Buenos Aires, Argentina, 1991.