

COURTS OUT OF CONTEXT: AUTHORITARIAN SOURCES OF JUDICIAL FAILURE IN CHILE (1973-1990) AND ARGENTINA (1976-1983)

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Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973-1990) and Argentina (1976-1983)¹

Robert Barros INTRODUCTION

The purpose of this chapter is to investigate how military dictatorships that concentrate formerly separated and shared powers effect the activity of regular courts that survive from a prior, formally constitutional regime. Specifically, I explore two dictatorships, the Argentine (1976-1983) and the Chilean (1973-1990), to examine whether courts can conceivably uphold rights and liberties, as warranted by the constitutional definition of their powers, out of context, that is once dictatorship has displaced the regular constitutional-institutional framework. This study thus points to the limits on courts in authoritarian regimes and to the limits of what might be called "partial constitutionalism" – the idea that a judiciary, as structured by a given constitution, ought to uphold and defend another part of the constitution, its guarantees of rights, even after the core institutions of that constitution --elected legislative and executive institutions -- have been suppressed and displaced by an autocratic centralization of power.

This formulation may appear peculiar, but it is noteworthy that such expectations regarding the potentialities of courts in authoritarian regimes are implicit in many critical accounts of the judiciary under dictatorship and are even to be found in the final official reports issued by the truth commissions formed in the aftermath of military rule to clarify the worst violations of rights in Argentina and Chile, the *Comisión Nacional sobre la Desaparición de Personas* (hereafter CONADEP) and the *Comisión Nacional de Verdad y Reconciliación's* (hereafter *Comisión Rettig*²),

¹This chapter benefitted from discussions with Paola Bergallo, Martín Böhmer, María Angélica Gelli, Lucas Grossman, and the participants at the Philadelphia conference on courts in authoritarian regimes.

²This unofficial name was coined after the commission's president, the former Senator Raúl Rettig.

respectively. While each of these reports squarely identified the national armed forces, intelligence, and police agencies as responsible for the massive rights violations which each state for the first time thus officially recognized, quantified, and began to seek to repair (CONADEP 1984 and *Comisión Rettig* 1991), each report also included a chapter on the judiciary that maintained that the courts were partially responsible for the massive rights violations that had occurred.

The arguments of both reports are strikingly similar: before unprecedented, systematic, arbitrary repressive acts by organs of the state, the power charged with upholding rights, the judiciary, had absolutely failed to protect to the thousands of individuals who were victims of this onslaught of illegal force. More specifically, in both countries the courts had allowed the state free reign in its use of powers applicable under states of siege, stood aloof from supervising military courts, and abandoned the disappeared to their fate by complacent, formalistic decisions on the Both commissions found that the judiciary had failed in its writ of habeas corpus. constitutional mission to uphold rights and had thereby been complicit in the deaths of thousands of victims of state violence. The tone of these charges is clear from the following excerpts. According to the CONADEP (1984, 392), "The Judicial Power, which should have set itself as a brake on the prevailing absolutism, became in fact a simulacra of the jurisdictional function to protect its external image.....the reticence, and even the complacency of a good part of the judiciary, completed the picture of abandonment of human rights." In Chile, the Comisión Rettig maintained that the stance adopted by the judiciary during the military regime "produced, in some important and involuntary measure, an aggravation of the process of systematic human rights violations, both in regards to immediate violations, by not providing protection to the persons detained in the cases denounced, as well as by giving repressive agents growing certainty of impunity for their criminal actions (*Comisión Rettig* 1991, 97)."

The objective of this chapter is neither to criticize these reports, defend the actions of the Argentine or the Chilean judiciary, nor evaluate the ethical dilemmas before judges in authoritarian situations. Rather I seek to contribute to understanding judicial institutions in autocratic polities by exploring the counterfactual implicit in each truth commission's finding that the judiciary had failed: that even in authoritarian contexts, if there had been the appropriate volition among judges, courts could have effectively exercised their powers and upheld the liberties and legal procedures whose defense was ascribed to each judiciary under their respective national constitutions.³ I address this question by examining how the broader political context created by dictatorship impinged upon the operation of courts as limits upon arbitrary repressive practices in the two cases.

Although it might be objected that to concentrate on judicial failure in the face of state terrorism is to focus on an extreme situation that cannot possibly elucidate the operation of courts in authoritarian regimes, I will suggest that the mutations in the political-institutional setting of the courts not only explain the judiciary's inability to uphold rights of due process, liberty, and integrity but also illustrate general dynamics constraining courts in authoritarian regimes, which in turn reflect and intensify restrictions upon judicial activity that are common in regular constitutional systems.

The shifts effected by dictatorship which transformed the political-institutional setting of courts, with variations in each case, involved: (a) a turn towards the mass utilization of discretional forms of coercive political control by state agents

³ Strikingly, apologists for military rule shared this assumption with critics of military rule when the former insisted that the independence of the courts after military intervention provided for the protection of rights and the rule of law. For a Chilean example, see Navarette 1974. On the status of the constitutions nominally in force in both countries, see footnote 14.

situated outside of the judiciary, such as administrative detention under state of siege powers and absolutely unlawful abduction and extrajudicial murder; (b) the activation of special courts also external to the judiciary that employed procedures and standards of proof far less demanding and rule-bound than regular judicial procedures and that were staffed by officials tied to the same military hierarchies that wielded legislative and executive power; and (c) most fundamentally, the suppression of representation and the separation of powers, as executive and legislative functions were concentrated at the apex of the same military forces whose subordinate officers or units were effecting the repression (a) and exceptional forms of justice (b).

In both Chile and Argentina these institutional mutations were sufficiently consequential as to give rise to the type of judicial failure identified by each country's truth commission. Dictatorships do not have to interfere with judges (although they did in Argentina), nor involve the courts in political repression, to render courts ineffectual before extralegal and/or extraordinary repression. In the face of the formidable shifts in the setting of judicial activity just mentioned, judges had only to apply the law and decide cases following standard procedures to be rendered: (1) ineffective before extralegal repression since the state agencies that courts regularly turned to for investigatory assistance were now in the hands of agents directly or indirectly associated with or subordinate to the forces wielding prerogative repressive force; (2) incompetent before administrative detentions ordered under states of siege because both court systems, under the guise of the separation of powers, had traditionally refrained from qualifying the executive's use of these prerogative powers; and (3) generally secondary and dependent, given each regime's facile capacity to make laws that the courts had to apply and which could be made to circumvent the courts when and if necessary. In this regard,

existing features of courts under democracy (2 + 3 just mentioned) facilitated each dictatorship's ability to apply massive coercive force against political enemies unconstrained by the judiciary. These effects were primarily the consequence of transformations in the context external to the judiciary. The courts were devitalized by the authoritarian context, yet it was perhaps inevitable also that the Argentina and Chilean judiciaries would bear part of the blame for rights violations, if only because courts were associated with expectations about rights that had their origins in non-authoritarian contexts.

THE CONTEXT OF JUDICIAL FAILURE: MILITARY DICTATORSHIP AND CONSTITUTIONAL EXCEPTION

Notably, "judicial failure" arose in countries which, otherwise, were very different on significant dimensions, such as their prior political-institutional history, traditions of judicial independence, and nature of the crises that gave rise to military rule, as well as each dictatorship's organization of authority, composition of its security apparatus, and patterns of repression. The significance of many of these variables for the operation of courts, particularly those that concern the organizational format of each authoritarian regime, is unclear because we lack the fine-grained knowledge of the inner-workings of these dictatorships that would allow us to analyze how the characteristics mentioned impinged upon the situation, strategies, and decisions of military and judicial actors. Nevertheless, these dimensions are worth sketching as they provide context for the analysis that follows, are a source of hypotheses for further research, and, given judicial failure in both polities, suggest that the common institutional mutations associated with military rule were more significant than differences in prior political-institutional

history, particularly in regards to the judiciary, or in the structure of each authoritarian regime.

Within the post World War II Latin American context, the Chilean and Argentine polities stood at opposite extremes on a continuum of regime stability and instability. Chile, along with Uruguay, was the exception to the Latin American pattern of recurrent military intervention, typified and taken to an extreme by Argentina. Prior to the 1973 coup, Chile was renowned for its highly legalistic, competitive politics and the solidity of its representative and judicial institutions -the operation of Congress, for example, had only been interrupted briefly on two occasions during the twentieth century (in 1924 and 1932). This institutional stability was associated with the emergence of professional armed forces, as well as a functionally independent judiciary which never experienced the political dismissal of justices that accompanied regime crises in Argentina. A further consequence of this history – one which weighed heavily on the military government -- was that the breakdown of democracy in Chile emerged from within the constitutional system, after a democratically elected left-wing government- the Unidad Popular – attempted to implement a program of socialist transformation through legality. These events precipitated sharp social conflict, polarization, an insoluble constitutional crisis, and eventually military intervention. Prior to the coup the clash between government and opposition increasingly took the form of a conflict over legality and the constitutionality of the Allende government's measures and over time the Supreme Court fell in with the opposition after repeatedly lodging complaints that government officials were not implementing judicial resolutions.⁴ Against this backdrop, within a day of the military coup the

⁴ On at least eleven occasions the President of the Supreme Court notified President Allende or his Minister of the Interior of situations where judicial resolutions were not

President of the Supreme Court publicly declared his satisfaction with the new government's intention to uphold judicial rulings without interference.

After the first *coup de etat* in 1930, the Argentine political history leading up to the 1976 military coup, as is also well known, was one of repeated military intervention following brief interludes of civilian government and a failure -- particularly after the emergence of Peronism in the mid-1940s-- to find a political-institutional formula that could protect dominant class interests without involving military rule or the proscription of Argentina's single largest political party, the peronist *Partido Justicialista*. With military coups in 1943, 1955, 1962, 1966 and 1976, this "impossible game" entangled the military and the judiciary in the "Peronist" versus "anti-Peronist" struggle, generating factionalism within the armed forces and unstable tenure among Supreme Court justices, notwithstanding the 1853 constitution's provision for office during "good behavior."

After the first Peronist government impeached three of five justices in 1946, the military responded upon taking power in 1955 with a purge of the court. This purge proved to be the first act in what would become a cycle of judicial turnovers whereby the Supreme Court was reappointed with each transition to and from military rule.⁵ A related by-product of this pattern of regime instability was the

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being implemented. The rulings in question usually ordered the eviction of illegally occupied farms or factories. These notes are reproduced in Orden de Abogados (1980, 69-129). The Supreme Court was not involved in the central constitutional controversy that divided the government and the opposition congress, which concerned the supermajority required to override a presidential veto of a constitutional reform. This task fell to the newly-created Constitutional Tribunal which declared itself incompetent to decide. On Chile's first Constitutional Tribunal, see Silva Cimma 1977.

⁵ Following coups in 1955, 1966, and 1976, the entering military governments sacked the Supreme Court. In turn, succeeding civilian presidents maintained the cycle by appointing new justices after the resignation of the military appointees. Aside from the first coup in 1930, the 1962 coup, which ousted President Arturo Frondizi after Peronist backed candidates won gubernatorial and legislative elections, was the only coup that did not involve military reappointment of the Supreme Court. Following Peron's presidency

development by the Supreme Court of a peculiarly Argentine, branch of jurisprudence, the "doctrina de facto," regarding the continuous force of the legal enactments of "de facto" governments.⁶

This ongoing history also shaped the events that culminated in the 1976 coup. Shut out by proscription and military rule, factions within Peronism and the Left turned to armed activity in 1970 as a tactic to push for a return to civilian rule. These operations, however, continued after the military withdrew in 1973 and Peron himself returned to Argentina and the presidency. In contrast to Chile, the threat to order in Argentina emerged outside of constitutional channels and, particularly after Peron's death in 1974, took the form of internecine warfare between right- and left-factions of Peronism, as government-organized, death squads responded to the left guerrillas, as well clashes as between the guerillas and the military.

Argentina and Chile prior to the onset of military rule, therefore, were societies with very different patterns of political organization and conflict, had undergone very different crises, and bore very different traditions of judicial independence, understood as independence from the executive. These contrasts in political, institutional, judicial and military history were associated with important

the change in the turnover rates of Supreme Court justices is striking: prior to his government 82% of all justices' terms ended because of death or retirement; subsequently, 91% of all justices left the court prematurely because of irregular removal, resignation or impeachment (Iaryczower, Spiller, Tommasi 2002, 702). On the relations between the Supreme Court and prior military governments, see Ancarola 2001, Carrió 1996, Gelli 2001, Pellet Lastra 2000, and Snow 1975.

⁶On the "doctrina de facto" and its evolution since 1930, see Bidart Campos 1989, II:505-537; Cayuso and Gelli 1998, and Groismann 1989. This jurisprudence did not impugn the illegitimacy of authoritarian power. Rather on the grounds of a "de facto" government's factual control of power, it sought to define the scope of the powers possessed by military regimes and, in particular, the validity over time and transitions of their administrative and legislative acts.

differences in the specifics of how each military dictatorship organized its rule,⁷ some of which were also influenced by lessons that military officials and advisors in one country drew from events in the other.⁸ Nevertheless, these many

⁷ The inter-service negotiations within the Argentine military in 1976, for example, are said to have been overshadowed by prior experiences of military rule, particularly the preceding dictatorship of General Juan Carlos Ongania, in which Ongania exercised executive and legislative powers without a military junta. To avoid such personalization of power, the armed forces in 1976 formed a military junta which, as "supreme organ of the Nation," designated the president and granted him executive and legislative powers, but retained powers associated with the armed forces as well as the declaration of the state of siege. Provision was also made for junta participation in the legislative process through a legislative advisory commission whenever this commission resolved that a bill submitted by the executive was of "significant transcendence." The legislative advisory commission was staffed by three representatives for each of the three branches of the armed forces. Both the military junta, except when considering the removal of the president, and the legislative advisory commission were to decide by absolute majority. At least on paper, these were the terms of the dictatorship's internal organization as stipulated in the "Statute for the Process of National Reorganization" and Law 21.256, respectively published in the Boletín Oficial, March 31, 1976 and March 26, 1976. Whether and how these institutions operated in practice is only hazily known. The chief source (Fontana 1987) is based on scant documentation of the internal workings of the dictatorship.

Similarly, it has been suggested that the reversals of repressive legislation and policy upon each pendular shift in regime in Argentina, particularly the 1974 amnesty of political prisoners, convinced high ranking military officers of the futility of administrative (state of siege) and repressive penal responses to subversion and contributed to the turn to a strategy of physical annihilation of opponents (Acuña and Smulovitz 1995, 29; Pereira 2005, 130).

In Chile, on the other hand, despite the concentration of executive power in General Pinochet and the widespread interpretation of the Chilean regime as a personalistic dictatorship, Pinochet's hold on the executive important sectors of the political class and the military was counterbalanced by a military junta that wielded legislative and constituent powers. Until the 1980 constitution went into force in March 1981 General Pinochet was one of four members of the junta; subsequently an army general represented him. However, unanimity was the effective decision rule, which allowed Pinochet and his later delegate to veto legislation, but it also denied him of the power to legislate without the agreement of the other commanders. The adoption of these institutions and their effect upon the military regime are reconstructed in Barros 2002.

⁸ Thus, Acuña and Smulovitz (1995, 29) conjecture that a clandestine strategy of repression was adopted in Argentina to avoid the international protests and pressures that the Chilean military faced after an initial period of open repression. In Chile, Pinochet's chief constitutional advisor, Jaime Guzmán, on the other hand, explicitly referred to Argentina to argue that prolonged military rule was futile and that a new constitution was imperative (Barros 2002, 206).

differences also were set within broadly similar political-ideological universes that defined some variant of liberal constitutional democracy as the "normal" political order, even as important sectors of the upper- and middle-classes, the political class, and the military in both countries came to advocate military rule as an "exception" preferable to continued political conflict and social disorder.

Military Dictatorship as Constitutional Exception

This liberal-constitutional political-ideological backdrop to the Argentine and Chilean political crises of the 1970s shaped the range of alternatives to civilian rule that were acceptable internationally and internally, and indirectly contributed to defining the character of each military dictatorship. In particular, this liberal-constitutional tradition, however qualified in practice by the reality of dictatorship, set constraints on how law and the courts could be utilized publicly by each authoritarian regime. As a result, in Chile and Argentina the military presented

⁹As Juan Linz noted in reference to the post-1964 Brazilian military dictatorship, the international political-ideological climate after WWII left little room for non-liberal, authoritarian experiments. Given these constraints, he characterized the Brazilian military government as an "authoritarian situation," rather than an authoritarian regime because it enjoyed little space to institutionalize itself as a regime. On similar terms, recent Latin American dictatorships were distinguished from inter-war European mobilizing totalitarian regimes during the theoretical discussion of the late 1970s (Cardoso 1979).

¹⁰In many situations the consequences of these constraints were perverse because their acknowledgement by military rulers tended to result in the opposite of freedom and worse, as what could not be done legally in public was done without judicial oversight in secret by each dictatorship's security forces. Elsewhere (Barros 2002, 152-158) I have shown that the turn to clandestine repression in Chile followed after members of the junta recognized that they could not lawfully try prominent figures from the Allende regime. Similarly, Osiel (1995, 521, 524) suggests that the Argentine military's perception that Supreme Court judges were not sufficiently cooperative drove political repression underground.

their intervention and rule as an exception impelled by the force of circumstances and stipulated that their government would last only until the normalization of conditions allowed democracy to be restored. In both cases, the military made clear that temporary rule could be protracted and that it was the regime's prerogative to decide when normalcy prevailed. Nevertheless, the range of conceivable regimes tended to be restricted to two forms: either some variant of constitutional democracy, which in the short term appeared untenable, or military rule which could be more or less prolonged, but could not easily be established as an acceptable form of regular rule. Accordingly, unlike their totalitarian or revolutionary counterparts, neither military dictatorship set out to organize a "new regime" on a permanent basis.¹¹

In their form and objectives, both regimes then portrayed themselves as variants on the classical model of dictatorship: before severe threats to state continuity, a body or individual assumed extraordinary powers of rule, unconstrained by ordinary constitutional limits, precisely to restore order and conditions under which the constitution could again function. Despite this color, the distance from the classical model was always in evidence: in neither military dictatorship were exceptional absolute powers conferred by civilians according to prior constitutional procedures, nor were dictatorial powers authorized subject to a temporal limit. Still, in both Argentina and Chile, notwithstanding the fact of

¹¹ This claim may appear controversial in regards to the 1980 Chilean constitution. However, despite the constitution's objectionable features and associations with prolonging military rule, it was conceived as a variant of constitutional democracy. On this point, see Barros 2002.

¹²For the same reason, neither case can be subsumed under Schmitt's [1923] category of "commissary dictatorship." On the classical model of dictatorship, see Nicolet 2004 and Rossiter 1948. As will be discussed below, both military regimes drew upon each country's constitution's provisions for exceptional powers to frame and justify some emergency measures, particularly administrative detentions and restrictions on rights.

usurpation, the military regimes that took power in the 1970s bore some affinity, although qualified, to the model of dictatorship: in both cases an exceptional institute had been constituted that obtained --in fact, arrogated-- supreme power to confront a situation perceived to be beyond the capacity of regular constitutional institutions. Fundamentally, this meant that neither military regime could easily move beyond the dichotomy that opposed constitutional and exceptional regimes.¹³

Exception, Dictatorship and the Courts

This type of exceptional military dictatorship involved at least two types of departure from the rule of law that impinged upon the operation of the pre-existing judicial system in each country. The first concerned the constitution as a higher law. In both cases, the military's arrogation and centralization of legislative and executive power shattered the constitutional organization and separation of powers. This had the effect of "deconstitutionalizing" the constitutional text nominally in force, as the constitution became endogenous to the authoritarian ruling body which could at its prerogative enact or amend nominally constitutional norms.¹⁴

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However, in neither case were the extraordinary measures taken limited to those permissible by pre-coup constitutional emergency powers. Similarly, in niether case was the use of emergency powers conferred by the constitutionally defined authorizing power, as congress had been suppressed in both countries.

¹³In both cases, factions advocated permanent military rule and presented projects to mobilize civilians. However, proponents of a military-civic movement made no headway in Chile, whereas the best known project of civil-military convergence in Argentina, Admiral Massera's scheme to co-opt Montonero prisoners, was intended to build a personal power base in anticipation of eventual competitive elections.

¹⁴ Regarding the status of the constitution under each dictatorship, there are some interesting differences between the cases. The Chilean junta, after specifying that it had assumed Supreme Command of the Nation (*Mando Supremo de la Nación*), declared in its "Act of Constitution of the Junta of Government" that it would guarantee the full

The second departure concerned the rule of law as a procedural guarantee of rights. Under the imperative of the emergency situation, constitutionally anticipated emergency powers allowed the abeyance of regular legal forms. The chief instrument which effected and typified this type of displacement of law was the provision for administrative arrest and detention without legal cause or due process under powers given by a state of siege.

Both types of departure from the rule of law – the collapse of higher law constitutionalism and the suspension of due process—involved a shift from legalistic to discretionary forms of articulating political power. This shift was intensified in both Chile and Argentina by the parallel activation of military courts which, particularly when operating under provisions for time of war, followed less than standard burdens of proof and evidence.

powers of the Judiciary and respect the Constitution and the laws, but conditioned upon "the extent that the present situation of the country allows...(Decree-Law No. 1, [hereafter, D.L.], *Diario Oficial*, [hereafter, D.O.], 18 September 1973)." Subsequent decree-laws clarified that the junta held constituent powers, and in late 1974 at the instigation of the Supreme Court the Junta established that only decree-laws enacted in express exercise of constituent powers would modify the 1925 constitution.

A similar concern with the formalities of the 1853 constitution was apparently absent from the 1976 Argentine dictatorship. The already mentioned "Statute for the Process of National Reorganization" invoked the constitution only as a source for the specific powers that were divided between the president and the junta. Otherwise, this founding document asserted the sovereignty of the junta, describing it as "supreme organ of the Nation" which would "ensure the normal functioning of the rest of the powers of the State and the basic objectives to be reached (art. 1)" -- art. 9 and 10 regulated new appointments to the Supreme Court, even guaranteeing justices tenure in good behavior. Strikingly, despite the absence of any reference to the 1853 constitution, the junta decreed the statute in express "exercise of the constituent power," thus suggesting that the junta had arrogated constituent powers. The absence in 1976 of any explicit acknowledgement of the continued force of the constitution, albeit qualified, was a departure from the founding acts of the 1955 and 1966 dictatorships, each of which stated that the constitution and the law would remain in force but only as long as they did not thwart each revolution's objectives. It should be noted that the 1955 regime's acknowledgement of the constitution did not inhibit it from suppressing the constitution in force -- Peron's 1949 constitution -- and restoring the 1853 constitution as it stood when it had been replaced in 1949.

In this regard, in contexts of severe political and social crises, the immediate tasks of social control before each dictatorship were conceived as essentially extra-juridical. In both Chile and Argentina, political repression largely sidestepped the regular system of justice and was situated within the ruling military-administrative apparatus, producing an awesome, unpredictable area of discretionary power, which generally overstepped the extraordinary powers associated with constitutional states of exception. These discretionary mechanisms of social control –extrajudicial repression, administrative emergency powers, and military courts – were centered in the military— were not legalistically rule-bound, and to the extent that these acts were recognized, they were generally portrayed by the ruling militaries as exceptional political measures or command functions, not acts of adjudication, and therefore were held to be beyond the supervision of the ordinary judiciary.

This separation of political repression from the judiciary permitted the courts to operate with legal standards of justice in areas subject to their jurisdiction and gave shape to a dual state of prerogative and law, as well as some semblance of judicial independence.¹⁵ However, the sidestepping of the judiciary did not leave the courts untouched, as in both cases the judiciary ended up being tainted by their failure to provide redress to the thousands and thousands of families and

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¹⁵ The concept of dual state is drawn from Fraenkel 1969. His concept is compatible with the dependence of courts upon the legislative enactments of an authoritarian regime, as the distinctive feature of Fraenkel's "normative state" is that controversies in this sphere are resolved according to law rather than the arbitrary discretion of the authoritarian ruling body as occurs in the paralell realm of the "prerogagive state." Authoritarian law as a limitation on authoritarian judicial independence appears to have been overlooked by Toharia 1975. The fact that even prototypically independent courts, such as the English, are rendered subordinate by legislative sovereignty is a central theme in Shapiro 1981.

individuals who turned to the courts to protect rights in the face of administrative and extra-legal dictatorial force.

Before turning to examine why judicial remedies designed for democratic contexts were unlikely to limit authoritarian power, it should be noted that in both Argentina and Chile the turn to administrative-political forms of political control under dictatorship was parasitic upon norms and jurisprudence drawn from the prior legal and constitutional order. Rather than being a response to non-compliant courts, as has been suggested in some theories of courts in authoritarian regimes, the shift away from law and the courts was effected by activating exceptional instruments that were already at hand in the constitution and statutes. This was the case with state of siege powers, which were inscribed in both the Chilean 1925 constitution and the Argentine 1853 constitution, as well as with the military courts which were regulated in each country's code of military justice. 17

A state of siege had been in force since November 1974 when the Argentine military took power in March 1976 and remained standing until 28 October 1983, only days before the elections that inaugurated the return to democracy. The Chilean military upon taking power immediately declared a state of seige. In effect until 11 March 1978, the state of siege was reinstated on two occasions during the mid-1980s: first in response to mass opposition protests in late 1984 and after the September 1986 assasination attempt on Pinochet. Throughout the period the lower ranking "state of emergency was also in effect.

¹⁶More generally, both military regimes enacted decree-laws and statutes to link their rule to already established faculties and legal orders. In part, this was done to assure legal and administrative continuity within the state apparatus. Such references to prior norms also provided a means to establish specific balances among the forces composing each military regime, as the constitution could be drawn upon to specify and distribute particular powers.

¹⁷Under the Chilean constitution of 1925 (Art. 72, no. 17) the declaration of a state of siege empowered the president only to restrict personal liberty, "to transfer persons from one department to another and to confine them in their own houses, or in places other than jails or intended for the confinement or imprisonment of ordinary criminals." The Argentine provisions were broader and allowed for the suspension of individual liberties and allowed the executive to detain individuals and transfer them to other parts of the country. By article 23 of the constitution individuals so effected were allowed the option of leaving the country, although the military government immediately and repeatedly suspended this option.

Both military dictatorships immediately built on these frameworks by enacting through decree-law new penal offenses subject to military jurisdiction, and each, at different points, modified the powers associated with the state of siege. Yet by being framed against prior institutions, these innovations could be tied to an ongoing jurisprudence regarding the state of siege and military justice that tended to favor executive prerogative and non-involvement of the regular judiciary in both areas.

MODALITIES OF REPRESSION AND THE RULE OF LAW

To make sense of how these authoritarian transformations in the political-institutional context of the courts impacted upon the Chilean and Argentine judiciary's capacity to guarantee individual rights of liberty and personal integrity, it is helpful to distinguish different modes of repression and their relationship to law. The following list orders various modalities by which a state may pursue the repression of political enemies according to the manner that each conforms with or departs from the rule of law.¹⁸ Proceeding from unlawful to legal forms we can distinguish the following four modalities of repression:

(a) Extra-juridical repression (state terror), which consists of all punitive acts inflicted by state agents without any prior authority that effect individual rights and lives without any legal cause, exceptional authorization, nor adherence to judicial or administrative formalities. Given their illegality, such arbitrary measures tend to be taken covertly and are rarely acknowledged by state authorities that execute them.¹⁹

(b) Administrative repression, which includes detentions authorized by a state of siege, as noted above, departs from the rule of law because it involves restrictions on individual liberty without any prior trial and conviction for a legal violation. In contrast to wholly arbitrary extra-juridical measures, these discretionary administrative acts have some legal foundation when they are anticipated in constitutional and statutory norms governing emergency situations and are effected by competent authorities.²⁰

¹⁸ Elsewhere (Barros 2003), drawing on Raz 1979, I have explained how the rule of law can be compatible with autocracy. The two intermediate modalities of repression presented here should not be interpreted as points on a continuum towards the rule of law as it is unclear whether one of the two should be seen as closer to the rule of law than the other. My final category, legal repression, conforms to Raz's conception of the rule of law.

¹⁹ Many times, these acts – abduction, unauthorized detention, torture, disappearance, and execution – are unlawful even bythe inflicting regime's own legality. Such measures constitute terror because individuals have no security when a state power arbitrarily disavows legal protections and remedies.

²⁰When employed properly, administrative measures can afford individuals some minimal protection insofar as their correct use requires adherence to formalities which can be subject to review. In fact, the legalization of an initially secret illegal detention via its acknowledgement and subsumption under state of seige authority often meant that an individual was no longer subject to torture and would not disappear. Whether this actually constituted protection attributable to the institution, however, is unclear, since being in the legal system may only have signaled that someone had decided that the prisoner in question would live. In both countries, individuals under officially authorized administrative detention subsequently disappeared, and tragically thousands of persons disappeared without any protection from emergency powers.

(c) Summary (quasi-) judicial repression, which as a form of punitive action differs from the administrative measures in that it involves some form of trial proceeding. However, such trials depart from rule of law standards because they apply laws that are either retroactive, secret, or unclear; limit the defendant's right to a defense; and/ or employ doubtful standards of evidence. In these cases, a veneer of legality is given to the discretionary repression of political enemies and opponents.

(d) Legal repression, which is a form of political control that involves the repression of individuals for political offenses but that proceeds via regular judicial mechanisms which afford the accused full protection from arbitrary applications of the law. In other words, individuals may be convicted of political crimes but only after their guilt has been established in a fair and legal trial. Repressive law in this context may be draconian, but it allows individuals to form reasonable expectations about the consequences of different courses of action since it is prospective, public, clear, relatively stable, and fairly applied -- individuals can have some certainty that if they submit to the law's constraints they will not be punished.

At different times, one or more, or all of these modalities of political repression may be used by a regime, and the use of one or another may wax or wane as a function of the nature of the specific political targets at which they are directed, levels of perceived threat and insecurity, and the relative costs associated at the moment with the use of each mode.

This classification of extralegal, administrative, summary, and legal modalities of repression leaves open the identity of the agents or institutions that engage in each. This gap is intentional because these different forms of punitive action can be effected by numerous, heterogeneous agencies and organs, that may be specialized or competing, more or less subordinate to or autonomous of superior hierarchies, as well as more or less proximate to the executive, the regular judiciary, or the armed forces and its branches. Since authoritarian regimes are likely to combine various modalities of political control, rather than identify a single repressive legal strategy for each case as Pereira does (in this volume and 2005), I think that research should try to identify and reconstruct punitive spaces and networks, as well as trace stages in their evolution, notwithstanding the informational problems that hamper empirical research on authoritarian repression.²¹

²¹ Brysk 1994 discusses the obstacles before any assessment of the full extent of extra-judicial repression. It should additionally be noted that our images of patterns of repression in different cases have been greatly influenced by the work of national truth commissions, which have produced necessarily partial accounts given that these bodies' official commissions are usually delimited to specific types of rights violations. Another complication is the limited availibility of documentation of military justice systems in most cases. In Latin America, the slimmest public documentary record probably concerns administrative forms of repression.

To fully comprehend the political institutional context before courts we need to be able to make sense of these authoritarian punitive spaces in their institutional and practical complexity, as this varied field shapes the pressures facing courts, something that this chapter only sketches. In this regard, it is important to note not only that multiple competing organizations may be engaged simultaneously in repressive activities, but also that different components of a single institution may engage in multiple modes of repression, as, for example, simultaneous army engagement in clandestine repression and military justice. Similarly, the distinction between summary judicial repression and legal repression does not have to imply a set division between special and regular courts. Special courts may apply regular legal procedures or far less stringent standards depending on states of events anticipated by law and so successively organize legal or summary repression. This pattern was characteristic of both military justice systems, as procedures and burdens of proof varied enormously depending on whether courts were operating under juridical time of war or peace.²² In a similar fashion, a regime can define trial procedures for specific categories of crimes and through such legislation compel regular courts to use summary procedures and thereby implicate them in a regime's quasi-judicial shams. The same effect can also be achieved when the administrators of justice disregard standing rules and convert in practice what might formally have been a legal trial form into a mechanism for summary punishment or exacerbate the arbitrary character of an already summary procedure.

²² In time of peace, military justice provided considerable guarantees to defendants. The Chilean code, for example, assimilated ordinary judicial rules and procedures from the organic code regulating the civilian courts. Military justice in time of war, on the other hand, was summary and afforded defendants few guarantees. This was also the case in Argentina. The Argentine procedures in force during the 1970s, for example, allowed a defendant facing a *Consejo de Guerra* only three hours to prepare his defense and only one hour to appeal a conviction. See arts. 497 and 501, respectively (Igounet h. and Igounet 1985: 149, 150).

This array of possible mode of punitive action and the multiplicity of potential enforcers suggests that types of regimes, subtypes, and specific cases are likely to differ in their matrices of political control. Clearly, competitive democratic regimes are subject to greater legal, political, and ideological constraints on the modalities of repression that can be publically employed as under normal political conditions only legal forms of repression are permissible. Different types of non-democratic regimes, on the other hand, may draw on a broader range of modes and agents of control as a function of the institutional or political basis of their ruling bodies, the format of their internal organization of power, their capacity for institutionalizing their rule by absorbing social demands, and, most centrally, the extent to which ruling elites consider themselves to be threatened and insecure. As I am suggesting here, how a regime carries out political control fundamentally shapes the judiciary's ability to protect rights, particularly those of individuals targeted by state coercive activity.

JUDICIAL FAILURE IN CONTEXT

As already examined, the Argentine and Chilean military regimes were dictatorships that emerged as exceptions within liberal-democratic political, constitutional and ideological frameworks, following severe social, political and institutional crises that had arisen of processes of intense popular political mobilization and elite counter-reaction. In this broad context, as I have noted, the ruling military juntas sought to procure their supremacy by suppressing perceived threats to state security and restoring order on their terms. The urgency and severity of this situation as experienced by the military led to setting aside ordinary legal constraints, as was evidenced in the swell of repressive force that was unleashed and whose modalities ranged over the extra-legal, administrative, and quasi-judicial forms

just described, with a preponderance, at least during the worst years of repression, of arbitrary state terror, in a context of censorship, restrictions on rights, and a general prohibition upon political party and union activity.

In both Argentina and Chile this turn toward repressive military dictatorship took place against the backdrop of standing judicial systems whose courts were left However, this dictatorial largely on the margins of this punitive process. dejuridicalization of political control, despite the separation and autonomy of political repression from the judiciary, necessarily implicated the courts given expectations that each populace associated with the legal and judicial system. Following liberal notions of the separation of powers and constitutionalism in Argentina and Chile the judiciary held exclusive power to try civil and criminal cases, subject to constitutional guarantees designed to protect individual liberty from unlawful restriction, and to review the constitutionality of legislation when questioned in cases before the courts.²³ Thus, although each dictatorship's repressive activities generally bypassed the courts, it was inevitable that individuals and families effected would seek remedy before the courts, since it was the judiciary's task to apply the law and to guarantee freedom from arbitrary abuses of power.

The tragedy, which perhaps was also inevitable, was that the standard writs and remedies available within the legal system, out of context, could at best effect marginal, generally insignificant, correctives, while the court's jurisprudence developed during democratic periods regarding political questions, out of context,

²³ The judiciary's exclusive power to exercise judicial functions, as well as express prohibitions on judging by the executive (Argentina) and by both the executive and congress (Chile), were established in articles 94-95 of the Argentine constitution and article 80 of the Chilean constitution. Guarantees conforming to rule of law standards for detention and trial were given in articles 18 and 11-20 of the respective constitutions, while the constitutional review powers of the respective Supreme Courts were established in article 86 of the Chilean constitution and in Argentina by the Court's own jurisprudence in 1887.

only validated the space of dictatorial prerogative. The resulting judicial failures illustrate the structural weaknesses of carryover judiciaries in contexts of dictatorship, particularly in areas concerning individual rights.

From a standpoint of rights, the task before each judiciary was to guarantee that each dictatorship contained its acts of political control within the limits of what I have above called legal repression and, if a less stringent view is allowed, the strict confines of pre-established constitutional emergency powers. In other words, the judiciary ought to have assured that political control proceeded through courts that followed reasonable procedures of justice, under the supervision of the Supreme Court, or, if one concedes that exceptional situations may warrant administrative detention, through administrative measures that conformed to law.

In both countries, the reality on the ground far exceeded these limits and, as the CONADEP and the *Comisión Rettig* reports insisted, the judiciary was incapable of checking arbitrary dictatorial repressive force. With intensities and mixes that varied at different conjunctures, in both countries state agents engaged in acts of repression that involved summary military courts, administrative detentions and exile, and absolutely extra-judicial abduction, torture and execution.²⁴ Generally, extra-judicial acts of repression were executed in secret, with victims abducted by unidentified teams and sequestered in clandestine detention centers where their fate was decided.²⁵ Thus, as I have been suggesting, not only did lethal political repression sidestep the courts during the most intense periods of state violence, it also was deliberately shrouded from judicial oversight and further shielded by restrictions on press freedoms that prohibited reporting on political acts of violence (Knudson 1997). These forms of clandestine repression could not be restrained with standard judicial remedies, as these

A careful comparative analysis of the specific organization of repression within each dictatorship is needed to evaluate how internal tensions may or may not have arisen in each case over the "costs of repression" and led some officers to seek to rein in extrajudicial and quasi-judicial modes of coercion. In both countries, military justice in time of war was closely integrated within the chain of command and applied by ad-hoc war councils formed on the order of regional zone and subzone commanders. In broad strokes, after an initial period of open mass repression, extra-judicial repression in Chile was primarily, though not exclusively, centralized within a specialized security apparatus, the DINA, which was subordinate to President Pinochet. In Argentina, on the other hand, special units within the Army and the Navy operated within each military zone. These military units, which operated covertly, were organized outside of the regular chain of command and operated with considerable autonomy from superior officers.

²⁴The number of deaths resulting from state repression is evaluated in each truth commission's reports and, particularly in Argentina, remains a subject of debate. The CONADEP concluded that 9,000 people were murdered in Argentina, while other estimates of the number of disappeared reach 30,000.

²⁵According to Calveiro (1995: 38-39) in Argentina the stages in the disappearance of an individual – abduction, interrogation, confinement, and execution – were compartmentalized into discrete tasks discharged by different groups of officers and soldiers, which limited knowledge of the overall process even among many of those directly implicated.

remedies were disabled by each regime's obstinate denial that it was effecting the acts that each was in fact executing in secret

The principal shortcoming of regular judicial remedies was that they were designed to be effective within a system of rule of law, not an autocracy intent on crushing it political enemies. Out of context, these instruments, especially the writ of habeas corpus, became inane. In both legal systems, habeas corpus or the recurso de amparo, as it is called in Chile, was the traditional instrument with which a person arbitrarily detained, or a party on their behalf, could file to have a court remedy an unlawful detention. In both Chile and Argentina the writ was absolutely ineffectual before disappearances, as the petition presumes that illegal detentions are unlawful on the margins of an otherwise lawful system of justice, not wholly unlawful, clandestine acts that completely circumvent the legal system. ²⁶ As the Second Chamber of the Chilean Supreme Court noted in an April 1978 decision, in order to put an end to an arbitrary deprivation of freedom, "the precise place where the amparado is must be known."²⁷ In such circumstances, when the whereabouts of a person presumably detained was unknown, the courts had little alternative but to follow the standard procedure of requesting, by official letter, information from the Minister of the Interior, local military authorities, or intelligence agencies as to whether they had in detention the person in question. In these instances, when the official response, whether out of duplicity or ignorance, informed the judge that no registry could be

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²⁶This point becomes apparent if one examines the contemporary statutory and constitutional regulation of *habeas corpus*. Articles 11-16 of the Chilean constitution and articles 306-17 of the Chilean penal code, as well as articles 617-645 of the Argentine penal code regulated the writ in reference to the order of arrest or imprisonment, and the legal irregularities that *habeas corpus* was to correct related to the competence of the authority ordering an arrest, its legal merit, and the adherence to procedural formalities.

²⁷ "Hernán Santos Pérez," 8 May 1978. This decision confirmed an appellate court resolution. The Rettig Commission resolved that Santos Pérez, on leaving his workplace in October 1977, had been abducted by DINA agents and, henceforth, his whereabouts are unknown.

found indicating that person in question was being held by the executive under state of siege authority or under indictment before the military courts, the courts had little further recourse. Neither judiciary possessed its own independent investigative police. Each could investigate allegations of illegal detention only by eliciting the cooperation of executive and military agencies which were either directly associated with clandestine repression, complicit in protecting these perpetrators, or being kept in the dark about these acts by knowing officials.

Given the scope of repression in each country, the repetition of this pattern on thousands of occasions, and the attendant breakdown of habeas corpus as an effective remedy placed considerable strain upon the courts. In both cases there is evidence that these situations created tensions between the judiciary and each dictatorship and which indicates that justices were cognizant that the intelligence agencies' refusal to provide accurate information to the courts was impeding the judiciary's ability to defend individual liberty and life. These tensions were particularly deep between the Appellate Court of Santiago and the DINA in 1975 (Barros 2002, 147-149), whereas in Argentina the stonewall before the Supreme Court during 1978 was so firm that the Court exhorted the military executive to create conditions in which the courts could effect justice in the many cases where parties were seeking the protection of individual liberty in the face of disappearances.²⁸

As to administrative and quasi-judicial forms of authoritarian political control, the courts in both countries, on the grounds of the separation of powers, largely forsook any judicial oversight of the military executives and the military justice systems. In neither country were courts, particularly the high courts, willing to challenge the executive's use of state of siege powers. Legal challenges to these measures were consistently rejected as being political questions beyond the courts' authority: longstanding jurisprudence in both countries defined state of siege powers as exceptional administrative powers whose merit and use was solely the prerogative of the executive authorized to employ them. On this basis, it was held that to review the merit of these acts would be to invade the legitimate domain of executive authority and encroach upon the separation of powers.

Strikingly, these references to the separation of powers disassociated from the momentous fact that in contexts of dictatorship the executive was no longer exercising exceptional powers that had been conferred by another regular and separate constitutional power (i.e. Congress), an incongruity that was rendered innocuous by each court's countenance of the concentration of executive, legislative and constituent powers in the military. Subject to these limitations, then, courts in

²⁸ The decision "Pérez de Smith, Ana María y otros s/pedido" was handed down on 18 April 1978 and reiterated on virtually identical terms on 21 December 1978 (Fallos de la Corte Suprema, vol. 297, p. 338 and vol. 300, p. 1282, respectively). The principal condition that the Court demanded as requisite for the judiciary to effect justice was that the executive be forthcoming with information regarding the whereabouts and situation of the individuals reported as disappeared. The case is discussed in Carrió (1996, 102-105). In Chile the military repeatedly pressured the courts to limit the number of recursos de amparo or else to allow them to be processed by the military courts.

Argentina and Chile did on rare occasion accept habeas corpus petitions that challenged the executive's failure to observe the formalities legally prescribed during the use of state of siege powers. These were constraints on the margins, that had little or no impact upon the overall situation, but which in these rare instances held the executive to the legal bounds of emergency powers.²⁹ Generally, however, in cases where an administrative detention was officially acknowledged, once the courts received notification that an individual was being held by order of the executive in application of the state of siege, they would reject the appeal for habeas corpus.

The courts took a similar tact before complaints filed to challenge the constitutionality of military war councils or to petition the Supreme Court to correct legal errors committed by military courts. Just two months after the 11 September 1973 coup, the Chilean Supreme Court sidestepped this potential confrontation with the military by ruling that military tribunals in time of war fell outside of the Supreme Court's constitutional authority to oversee and discipline all courts of justice. The reason, which though controversial may not have been without foundation from a rule of law standpoint given the summary character of the war councils, was that military tribunals in time of war were not courts of law but a part of the military command function. This finding was reiterated in a 1976 decision which again declared the Supreme Court's incompetence, explicitly stating, "the military tribunals of time of war configure a hierarchical organization autonomous and independent of all other authority of the ordinary or special jurisdiction, which culminates in the General in Chief to whom is granted the plenitude of this jurisdiction..." In effect, the Chilean high court was disavowing competence to correct the injustices of summary proceedings on the grounds that that they were summary and hence non-judicial! When faced with challenges to the constitutionality of military war councils, the Argentine Supreme Court did not elaborate separation of power arguments, but following prior jurisprudence merely asserted that summary military trials of civilians in emergency situations were not incompatible with the constitution's guarantee of a fair trial.³²

²⁹ In Chile the few rulings that I am aware of that ordered the Minister of the Interior to rectify procedural irregularities concerned the holding of a minor among common criminals – a violation of the constitution's requirement that administrative detainees be held apart from criminals – and a 1978 petition involving prominent members of the Christian Democratic Party who had been transferred to a province other than that indicated on the executive's order. In Argentina the principal case associated with use of state of siege powers was the internationally high-profile case of Jacobo Timerman. Timerman, the publisher of the daily *La Opinión*, was expelled from the country after the Supreme Court ordered his release.

³⁰ "Jorge Garrido y otro. Recurso de queja," Rol 10.397, 21 September 1976.

³¹ This reasoning suggests that the Court conceived its superintendency over all tribunals to be internal to courts whose organizations and procedures could be assimilated to minimal standards of the rule of law. This hypothesis also suggests that the Supreme Court justices were implicitly acknowledging that to correct and contain quasi-judicial practices external to the regular court system implied a confrontation with the military regarding the rationality and merit of summary procedures. I suspect that the juridical-ideological worldview of these jurists, as well as strategic considerations, limited contemplation of this alternative.

³² "Saravogi, Horacio Oscar s/alteración del orden público," 9 November 1978, *Fallos de la Corte Suprema*, vol. 300, p. 1173. Another constitutional issue that generated considerable controversy in Argentina was the regime's repeated suspension of the the

In these three domains of dictatorial punitive activity – extra-juridical repression, administrative repression, and summary quasi-judicial repression – the avoidance of judicial interference with executive measures was achieved by bypassing ordinary courts and trial procedures. Clandestine detention centers, official camps for holding individuals detained under states of siege, and military tribunals were the sites where political control was effected beyond the superintendence of the courts. As I have noted, on the grounds that they involved "political questions" or stood outside of the regular judicial system, both the Argentine and the Chilean Supreme Courts stood aloof from directly confronting each dictatorship's use of emergency powers and administration of military justice.

While in the three areas of political control just examined the military dictatorships acted without restriction by sidestepping the courts, in both countries the military also subordinated the courts to their purposes by means of their capacity to legislate new law or modify standing provisions. Thus, despite the apparent independence of the judiciary from the ruling military executives, courts were immediately subject to the dictatorships insofar as they were bound by the law enacted by each dictatorship. Not only were the courts compelled to apply each regime's law when applicable in litigation, but dictatorial law was also used to directly keep the courts in line. By enacting new legislation or modifying constitutional norms, the military ruling bodies asserted their supremacy over the judiciary. Unfavorable rulings were overturned through such modifications, and any progress that judges made in investigating crimes committed by agents of each dictatorship was hindered by altering jurisdictions or through amnesties.³³ And, particularly once military justice became politically costly,

constitutional "opción de salida" whereby individuals subject to administrative arrest during a state of siege could opt to leave the country. The Supreme Court accepted these restrictions on the grounds that the Actas Institucionales that suspended the right to option, like the Estatuto para el Proceso de Reorganización Nacional, were norms that integrated the constitution as long as the conditions that gave them legitimacy persisted – i.e. as long as there was, in the words of the Court, "a real state of necessity that forced the adoption of measures of exception." For the 1 November 1977 ruling, see "Lokman, Jaime," Fallos de la Corte Suprema, vol. 299, p. 142.

³³Thus in Chile after the worst years of repression the discovery of evidence of heinous crimes often gave rise to the following sequence: semi-tolerated institutions, such as the Catholic Church, would express outrage; the Supreme Court would appoint a special investigatory judge (Ministro en Visita); the judge would discover evidence of military involvement; the judge would declare his incompetence given the involvment of persons subject to military jurisdiction; once in the hands of the military courts, the case would be dismissed if it fell under the 1978 amnesty law. This cycle occurred for the first time after the discovery of the remains of 15 persons in a clay pit in Lonquen in November 1978. The investigation of notorious crimes committed by state agents after the 1978 amnesty usually languished or were dismissed after being transferred into the military justice system. On one occasion, however, the diligent work of the special investigating judge, José Cánovas Robles, produced solid evidence that members of the national police, Carabineros, were behind the March 1985 assasination of three members of the Communist Party, leading to the arraignment of high level officers of the national police force and the resignation of its director, who was also a member of the military junta. On the case, which was eventually dismissed after repeated obstructions, see Cavallo, Salazar, and Sepulveda (1989: 468-478).

law could be used to attempt to drag the courts into political disciplinary activity by placing repressive legislation under their jurisdiction.

This dependence of courts on legislation which structures not only the organization, jurisdiction and procedures of the court system but also the substantive law that the courts must apply is hardly exclusive to authoritarian regimes; as Martin Shapiro (1981) insisted in his now classic volume on courts, judiciaries, such as the English that are generally seen as independent, are in fact subject to legislation. However, under dictatorships this subordination is taken to an extreme that usually leaves very little space for "judicializing" authoritarian politics. If, as contemporary strategic theories of judicial behavior suggest, courts can diverge from the legal status quo p only when the fragmentation of political forces within a legislature allows judges to anticipate that their rulings will not be overturned, then these conditions were generally absent under the Argentine and Chilean dictatorships. ³⁴ In both cases, legislative and constituent powers were concentrated in the hands of an extremely limited number of actors. Despite our generally limited knowledge regarding the internal workings of both military regimes, there is evidence that differences emerged in each authoritarian legislative process. However, to what extent these differences transpired to the courts is unknown, particularly as the legislative function was exercised in secret in each regime. Still, a central implication of strategic approaches to judicial politics is that divergent judicial interpretations in contexts of dictatorship could not emerge on issues around which the ruling military actors remained united. ³⁵

PRELIMINARY CONCLUSION

In this chapter, I have avoided attributing "judicial failure" in Argentina and Chile to irresolute or complicit judges and instead have tried to sketch the larger political and institutional context in which courts operated under the two dictatorships. It is indeed the case that many judges in both countries celebrated military intervention. Still, further comparative research on courts under military rule in Argentina and Chile would also reveal that there were judges who were resolute in their pursuit of justice even when deference appeared to be the only rational strategy if judges interested in their careers. In a number of cases, this independence cost judges their jobs, suggesting in fact that the explanation for "judicial failure" during

³⁴ For the argument that fragmentation among political forces is a condition for judges to pursue preferred modes of judicial interpretation or policies, see Ferejohn and Weingast 1992 and Ferejohn 2002.

³⁵ It is on this point that differences in the internal organization of regimes becomes relevant. As I have documented (Barros 2002), institutionalized intra-service differences within the military junta provided the ballast that allowed the 1980 constitution to take on a life of its own through constitutional court decisions.

recent military dictatorships in Latin America should go beyond charges about reprehensible judges and analyze judicial activity in the broader political and institutional context created by authoritarianism.

This type of research is all the more necessary because criticisms of judicial behavior under military rule rest upon a striking theoretical assumption: that courts, as structured by a given constitution, ought to able to uphold and defend another part of the constitution, its guarantees of rights, even after the core institutions of the constitution have been destroyed by a military usurpation of legislative and executive powers. As I have tried to show in this chapter, this assumption is probably untenable: military authoritarianism in Argentina and Chile destroyed the ordinary context of judicial activity in the realm of protecting individual liberties. Out of context, available judicial procedures were of little avail before state agencies that had ceased to accept legality as a binding constraint.

This question of the existence of constitutional and, in particular, judicial devices to check an authoritarian state brings to mind John Locke's argument that there is no legal remedy in the face of a state turned tyrant, only the remedy of an "appeal to heaven" -- Locke's euphemism for violent resistance. Leaving aside the strategic and ethical dilemmas associated with the use of force, it might first be objected that Locke's theory is pre-constitutional and that modern constitutional systems contain internal mechanisms that guarantee rights and ward against abuses of power. However, it must be underscored that these mechanisms are designed and intended to function within the context of an ongoing constitutional regime, not a dictatorship. As I have argued here, out of context the parts of a constitution are likely to be woefully inadequate in service of their original purposes. In this regard, Locke was right. Any move by the Chilean or the Argentine judiciary to step beyond their regular jurisdiction would have placed either judiciary at loggerheads with the

military over essentially political questions for which there were no shared legal criteria nor acknowledged mechanism of resolution. This never happened, but the point holds that only political decision, not judicial action, could contain, if not always eliminate, non-judicial state punitive action under these dictatorships.

Perhaps inevitably, what I have been calling "judicial failure" has cast a long shadow over research on judicial behavior in Latin American authoritarian regimes. Nevertheless, the judiciary is one institution for which we have available considerable documentary sources even for the military periods. In this regard, my sketch of the broad context of judicial activity needs to be complemented by further research, particularly on lower courts which have usually not been studied. Furthermore, research on the ordinary aspects of judging might also reveal points of tension between the courts and the military. Though its possibility has been overshadowed by the fact of judicial failure, we should not scoff at the idea that the judiciary's defense of legality within its ordinary jurisdiction may have prevented a spillover of arbitrary power beyond the realm of emergency punitive control. This possibility will never repair the crimes of the military dictatorships, but it may open up questions that allow us to begin to explore less diametric understandings of judicial activity under military autocratic regimes.

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