

ESSAY

THE CHILEAN DICTATORSHIP AND THE JUDICIARY

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I. THE CHILEAN DICTATORSHIP

Socialist President Salvador Allende was elected in Chile on September 4, 1970, with a little over 30 percent of the vote; therefore, the Senate, according to the Chilean Constitution, was called to decide who the Chilean President would be between the two candidates that had obtained the highest majorities. The Senate then elected Dr. Salvador Allende to be President of Chile from 1970 to 1976, but he only ruled in that position until September 11, 1973, when a violent military coup d'état withdrew him from office.

A. What had the Political, Economic, and Social Situation been after Allende's Election?

A great political, economic and social chaos took place in the country. In congress, President Allende did not have the necessary majority in order to pass the laws that he promoted; a great polarization took place and hatred arose from the two political extremes; industries suspended their production, vital products disappeared from stores, rural properties were expropriated and given to the peasants, most of the important industries were intervened by state agents, and copper mines were nationalized.

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B. Preparing for the Coup

The hard right wing never accepted the idea of having a socialist as president of the country. Parts of the hard right wing and the armed forces began to prepare this coup many months before it was perpetrated. Extreme right wing activists exploded bombs, destroyed electric posts and other objects, producing panic. Meanwhile, the United States government was collaborating with Chilean armed forces in order to reinstate the president and to sabotage industry and commerce, increasing the economic and social chaos.

C. Chile's Form and Characteristics

Chile's geography makes it vulnerable to paralysis. If its main bridges are cut or bombed; the main high roads would be interrupted, and that would cut the country into many pieces. As all the rivers flow from the Andes Mountains to the Pacific Ocean, cutting the country into many pieces would be a very easy task to undertake. With that strategy, the truck owners and drivers, important allies of the military, blocked the most important bridges, which paralyzed the roads and the country.

A few days before the coup, U.S. vessels were spread in front of some important ports, ready to support the coup d'état. But once the coup had begun, in a matter of three days all the country was under military control and all resistance activity was useless. A military junta was created, and that junta declared a "state of war," applied court martial, and established a very strict curfew.

D. THE MAIN PURPOSE OF THE COUP

The main purpose of the coup was to get President Allende out of the way, because he was considered to be a permanent threat to democracy. On the other hand, he presided over a government that was incompetent, and increased the growing economic, political and social chaos. The military junta that was appointed would put order in the country and reestablish social security. Meanwhile, the National Congress was suspended and the junta would rule through decree-laws.

II. HOW DID THE JUDICIARY PERFORM ITS TASK DURING THE LAST FORTY THREE YEARS?

A. During Allende's Government (from 1970-1973)

The government interfered with the jurisdictional decisions, impeding them from being enforced. A new requirement was established when President Allende's government considered that certain decisions would produce harmful social consequences, and in these cases, the government impeded their effects. For example, if a tenant would not pay his rent and was judicially dispossessed from the property he rented, the government would not permit this dispossession because of the social harm that it would produce. This factor provoked great animosity between the judiciary and the government, and newspaper headlines helped enormously to encourage the verbal combat that was generated between these authorities.

B. During the Military Dictatorship (1973-1990)

It is important to remember that in a dictatorship, all or most of the state power is concentrated in the hands of one person or one group. In Chile, the military junta performed the tasks of both the executive and legislative powers, and the judicial power ruled according to the interests of the military system. Thus, it is absolutely fair to consider that the power was concentrated in the hands of only one group of people. This way, Pinochet, the military junta, and the judiciary gave form to a totalitarian government.

During the dictatorship, some groups that belonged to the armed forces, as well as other state agents, committed more than 3,100 assassinations, more than 1,200 forced disappearances, the torturing of an undetermined number of people, and numerous other sorts of civil rights violations. The assassinations took all sorts of forms: by shooting the victims with a firing squad, by killing them during torture, and by utilizing lethal injection.

The disappearances were utilized to conceal the different forms of torture that were applied or to systematically produce state terrorism. It was common to use lethal injection. The bodies were then put in aircrafts and thrown into the ocean. Torture was systematically

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employed by utilizing methods imported from the United States, Brazil, France, and other places.

1. How Did the Judiciary Collaborate in the Perpetration of These Crimes?

During the first five years after the coup, tens of thousands of people were taken to secret prisons where they were tortured; many were killed or disappeared. More than 10,000 habeas corpus writs were filed to end these disappearances, and more than 10,000 were rejected by the Courts of Appeal and the Supreme Court. In other tribunals, most of the cases regarding disappearances ended or were suspended through definitive or temporary acquittals, and a great number of cases that were sent to the military tribunals were acquitted after a short period of time. The result of this rather mediocre jurisdictional activity created a permanent immunity for the authors of these crimes.

2. How Did the Judiciary Perform Justice after March 1978?

The dictatorship is divided into two periods. The most terrifying crimes were committed during the first five years. These crimes were perpetrated by the DINA or military secret police in the country and abroad, such as the assassination of former Commander in Chief of the Army, General Carlos Pratts and his wife in Buenos Aires, and the assassination of Allende's former Secretary of State Orlando Letelier and a North American citizen Ronnie Moffit, committed in Washington D.C. The U.S. government then pressured the Chilean dictatorship to investigate these latter crimes and to dissolve the DINA. Then, the DINA changed its name, General Manuel Contreras was replaced by General Odlanier Mena, and an auto-amnesty was promulgated.

A milder period came after this, from April 1978 until the end of the dictatorship in 1990. In April 1978, the military junta promulgated an amnesty decree-law that covered the crimes committed by the military between the coup d'état on September 11, 1973, and March 10, 1978.¹ The judiciary then started to acquit all the cases regarding

1. Law No. 30042, Apr. 18, 1978, DIARIO OFICIAL [D.O.] (Chile) (This was Decree Law No. 2191.).

homicide, abduction, and torture. Impunity continued, but this time it was supported by a decree-law of amnesty.

C. After the Dictatorship (from 1990 onwards)

During this period the judges were divided. There were those who considered that the amnesty and the statute of limitations should operate always regarding the crimes committed during the dictatorship, and there were those who considered that these two legal instruments should not operate in the cases of abduction or the forced disappearance of people.

1. Pinochet Continued to be Commander in Chief of the Army, According to His Constitution

In this period, two members of the military secret service (DINA), the former director General Manuel Contreras and the subdirector Brigadier Pedro Espinoza, were convicted as authors of the assassinations of former President Allende's Secretary of State Orlando Letelier, and of a North American citizen Ronnie Moffit.

2. The Judiciary after Pinochet Ended as Commander in Chief of the Army and was Appointed Senator for Life, According to His 1980 Constitution

On January 12, 1998, a criminal complaint was filed against General Pinochet by a few lawyers representing Gladys Marin, the Secretary General of the Communist Party. This complaint accused him of having committed crimes of genocide, kidnapping, and homicide. This case was known as the "Calle Conferencia Affair." It was a clandestine ambush perpetrated against a group of leaders of the Communist Party, committed in April and May of 1976. One of the victims was Jorge López, Gladys Marin's husband.

This case arrived in my hands by lottery. Normally, any case that is filed to investigate a crime is instructed by a first instance trial judge, but when the defendant is shielded with constitutional immunity, as in Pinochet's situation, a member of the local Court of Appeals is called to investigate the case.

One of the first decisions I made was to demand the lifting of Augusto Pinochet's immunity. The Court of Appeals, by majority of

votes, rejected this petition. Therefore, Pinochet could not be indicted of having been the intellectual author of these crimes. But many other generals and other state agents were indicted by me and later convicted for their responsibility in these crimes.

As I had been assigned to investigate the “Conferencia Affair,” all the other cases that were filed against Pinochet came to my hands, due to the principle of accumulation that establishes that all the trials regarding crimes committed by the same person be investigated by the same judge. Therefore, I instructed and investigated all the cases filed against Augusto Pinochet, more than 200, during a certain period of time.

Some of the cases included: “Calle Conferencia Affair,” described above; “Caravana de la Muerte,” that consisted of a trip, first to the south of the country and later to the north, in an army helicopter that took a group of army officers and shot over 75 prisoners; “Operación Cóndor,” a plot that was planned within the country and abroad to abduct, transport, torture, kill, and have prisoners disappear; “Operación Colombo,” a plot that was structured to conceal crimes committed by the armed forces; and many others.

3. Some Legal Factors and/or Strategies that Slowed Down or Impeded Advancing the Cases Against Augusto Pinochet

a. The lifting of General Pinochet’s immunity

Pinochet was the main defendant, as well as the most responsible one. Therefore, in all these cases, the first step was to have his immunity lifted. This legal barrier was indispensable in order to be able to indict him and then prosecute him.

b. The 1978 amnesty decree-law

At the beginning of my investigations, I considered that the amnesty decree-law was not to be applied regarding the crimes of abduction, because these crimes are continuing crimes. That is, they are being perpetrated from the moment that a person is deprived of his liberty, until he is set free. More than 1,200 people continued to disappear, thus more than 1,200 abductions or kidnappings continued to be perpetrated. In these cases the amnesty was not applicable

because only part of the lapse, the first five years, was covered by the amnesty, but not all, that is the lapse after March 10, 1978.

c. The statute of limitations

The same logic used to get around the amnesty decree-law was applied to the statute of limitations. As abduction is a continuing crime, it is perpetrated while the victims' disappearance continues. Therefore, there is no lapse to be computed in order to have the statute of limitations operate.

d. The exception of res judicata or double jeopardy

Most of the cases had been acquitted during the dictatorship, thus the defendants, among them Pinochet, claimed that the exception of *res judicata* had operated, and that these cases had to be archived. In my opinion their logic was wrong because to accept this exception, it was necessary to have two forms of identity regarding these cases: the same crimes had to exist, as well as the same defendants. And when the ordinary tribunals had acquitted these cases, the defendants were unknown; therefore they were not even mentioned in the acquittals. And, in Pinochet's case, his responsibility was mentioned only after 1998. Therefore, the exception of *res judicata* or double jeopardy was to be rejected.

4. Interrogating General Pinochet

In order to indict a person according to Chilean procedural law, it is necessary to interrogate him first. The procedural code, then in force, established that three requirements were indispensable to indict a person suspected of a determinate crime:

- 1) to have established, through sufficient evidence, that a specific crime had been committed; 2) that there were enough presumptions to consider that a determinate person had performed as an principle, an accomplice, or a coverup agent in the perpetration of that crime; and finally, 3) that the person had been interrogated.

Pinochet and his lawyers did all under their power to prevent me from interrogating him. Therefore, it was necessary for me to consider the 75 questions that I had sent him when he was in prison in London as his interrogation in order to indict him for the crimes regarding the "Caravan of Death." I, therefore, indicted him considering that the requirement of having interrogated him was satisfied. Consequently, his lawyers filed a habeas corpus writ against my indictment, and this habeas corpus was accepted, firstly by the Court of Appeals of Santiago and later by the Supreme Court. Pinochet's imprisonment in London had been ordered by Judge Baltasar Garzón when he petitioned Pinochet's extradition from England to Spain in 1998.

5. Pinochet's Mental Health

While I was investigating the different crimes attributed to Pinochet and other state agents, Pinochet traveled to London where he had surgery, and during his convalescence at a hospital in London, Spanish Judge Garzón filed a petition of extradition to the British government. Many hearings took place in London during more than 500 days, and the British judiciary accepted Pinochet's extradition to Spain under the charge of crimes against humanity. But finally, arguing humanitarian reasons, Secretary of State Jack Staw decided that Pinochet's mental condition did not permit him to be tried in Spain nor in any other country in the world, and released him to travel to Chile.

III. CONCLUSION

The Chilean judiciary was considered to be traditionally independent up until 1970, when Salvador Allende was elected President of the country. But during Allende's government a great number of the decisions issued from the judiciary were considered socially harmful, and therefore, were not enforced by the executive. This created great animosity between these two powers, and the judiciary started to lose its objectivity and independence

During the military dictatorship that took place from 1973 until 1990, the judiciary had no independence at all. It has been thought with certain authority that if the judiciary had performed its mission properly, hundreds of crimes would have been spared.

Today, the judiciary is divided in its decisions regarding the crimes perpetrated by Pinochet, members of the armed forces, and other state agents during the military dictatorship. Some judges always apply the 1978 amnesty decree-law, the statute of limitations, and *res judicata*, while others do not in the cases regarding crimes committed during the military dictatorship, particularly in the crimes of abduction or forced disappearances. Other judges have ruled that international jurisdiction prevails over national jurisdiction and international treaties regarding human rights prevail over national law.

In a dictatorship or a totalitarian government, all the state powers are concentrated in the same hands. But, as said above, in Chile, the judiciary was not dissolved during the dictatorship. At the same time, it was composed by professional judges, and the justices that sat at the Supreme Court were at the last stage of a long career.

If they would had adopted a firm position, defended the people's civil rights, and performed their task according to their oath, many lives would have been spared and hundreds of thousands of people would have suffered less. The most that these judges would have risked would have been their careers, as many judges lost theirs. And what did the judiciary and the judges who cooperated with the dictatorship lose? They lost their dignity.