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### Chile under Allende: The Decline of the Judiciary and the Rise of a State of Necessity

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# Chile Under Allende: The Decline Of The Judiciary And The Rise Of A State Of Necessity

## I. INTRODUCTION

On September 11, 1973, the government of President Salvador Allende of Chile was overthrown by a four-member military junta.<sup>1</sup> The overthrow came in the form of violent *coup d'état* in which President Allende was killed.<sup>2</sup> "The demise of the brief Allende experiment in 1970-73 came as the cumulative result of many factors — external and internal. The academic debate as to whether the external or the internal factors weighed more heavily is endless."<sup>3</sup>

It is quite clear that in the early 1970's the United States had adopted a foreign policy using diplomatic, covert and economic pressure against Chile.<sup>4</sup> This policy was the response by the United States to the Allende regime.<sup>5</sup>

Although this is true, the overthrow of Salvador Allende's government cannot be attributed solely to external factors, nor can one factor or event explain what occurred. This Comment will concentrate on a few of the internal factors which led to the overthrow of Salvador Allende by the military junta in 1973. In his 1973 testimony before the Senate Foreign Relations Subcommittee on Multinational Corporations, Charles Meyer, Assistant Secretary of State for Inter-American Affairs (during the Nixon Administration), stated that "[t]he policy of the United States was that Chile's problem was a Chilean problem, to be settled by Chile."<sup>6</sup> This Comment will attempt to show that during the Allende rule in Chile the existence of a

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1. L.A. Times, Jan. 16, 1987, § 1, at 12, col. 1.

2. *Id.*

3. STAFF OF SENATE COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., 1ST SESS., COVERT ACTION IN CHILE 1963-73 32 (Comm. Print 1975) [hereinafter COVERT ACTION IN CHILE].

4. *Id.* at 32.

5. *Id.*

6. *Id.* at 26-27 (quoting *Multinational Corporations and United States Foreign Policy: Hearing Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 93rd Cong., 1st Sess. 402 (1973) (testimony of Charles Meyer, Assistant Sec. of State for Inter-American Affairs)).

"Chilean problem" was a significant factor leading to the overthrow of Allende. Furthermore, this Comment will demonstrate that the "Chilean problem" was initiated and created by the Allende government and eventually settled by the public unrest in Chile which resulted in the *coup d'etat* by the military junta.

This article intends to explain the *coup d'etat* from an internal perspective, and also to solve the enigmatic occurrence of a *coup d'etat* in such a firmly rooted democratic country as Chile.<sup>7</sup> Some comparisons with the United States Constitution and certain ideas of its Framers will be used to develop an understanding of what occurred in Chile under Allende. In addition, the jurisprudential maxim *salus populi suprema lex* (the law of necessity) will also be used to explain the overthrow of Allende. It should be noted, however, that this Comment is not intended to excuse the atrocities that occurred during the *coup d'etat* or those that have occurred subsequently.<sup>8</sup>

There are three pertinent historical facts which make the overthrow of Salvador Allende in Chile a very unique event. First, Chile "is the only country in the world that freely and democratically elected a Marxist President . . ."<sup>9</sup> Second, that President was removed from office prior to the expiration of his constitutional term in a violent, unconstitutional manner.<sup>10</sup> Thirdly, this unconstitutional overthrow (*coup d'etat*) "occurred in a country with the longest and best established democratic tradition in all of Latin America."<sup>11</sup> To understand the overthrow, some understanding of the history of Chile is required.

## II. HISTORY

### A. Constitutional History

Chile's constitutional and, in turn, judicial life, began with the

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7. Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis* (pt. 1), 9 LOY. L.A.L. REV. 480 (1976).

8. COVERT ACTION IN CHILE, *supra* note 3, at 62; *see also* S. CHAVKIN, THE MURDER OF CHILE 9-10 (1982); CHILE: A COUNTRY STUDY 42-43 (Merrill 2d ed. 1982).

9. Velasco, *supra* note 7, at 480.

10. *Id.* at 480-81. For a good discussion of the constitutionality of a *coup d'etat* *see* Hassan, *A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of Coup d'Etat in the Common Law*, 20 STAN. J. INT'L L. 191 (1984).

11. Velasco, *supra* note 7, at 481.

Constitution of 1833.<sup>12</sup> The Constitution of 1833 lasted until September 18, 1925, when a new Constitution was approved in a national plebescite.<sup>13</sup> The new Constitution reestablished "a clear presidential regime with a strong executive power, in which the ministers were of the President's exclusive confidence and freely appointed by him."<sup>14</sup> Congress maintained its power to impeach ministers and the President for certain defined infringements on the Constitution.<sup>15</sup> The separation between Church and State, as well as complete freedom of conscience and worship, were created.<sup>16</sup> Individual rights were enlarged and improved.<sup>17</sup>

The Constitution further set up an independent judiciary with the attributes of a third state power.<sup>18</sup> It established a Congress which consisted of two houses: "a Senate with forty-five members, representing nine senatorial districts, and a House of Representatives, whose members represented congressional districts in proportion to population."<sup>19</sup>

All elections in Chile were to be direct with the presidential candidate needing an absolute majority (one-half of the votes plus one) for victory.<sup>20</sup> In the event that none of the candidates obtained a majority, Congress was required to choose the President from between the two candidates who had received the highest number of votes.<sup>21</sup> In addition, the Constitution established an autonomous election tri-

12. *Id.* For a copy of the Constitution of 1833, see L. VALENCIA AVARIA, ANALES DE LA REPUBLICA 160 (1951).

13. Velasco, *supra* note 7, at 485. For a copy of the Constitution of 1925, see PROYECTOS DE REFORMA DE LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1925) [hereinafter PROYECTOS].

14. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 arts. 60 & 72, reprinted in PROYECTOS, *supra* note 13, at 23, 26.

15. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 art. 39, reprinted in PROYECTOS, *supra* note 13, at 15.

16. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 art. 10, § 2, reprinted in PROYECTOS, *supra* note 13, at 7.

17. Velasco, *supra* note 7, at 485; see, e.g., CHILE CONST. OF 1925 art. 10, reprinted in PROYECTOS, *supra* note 13, at 7.

18. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 art. 80, reprinted in PROYECTOS, *supra* note 13, at 29. Article 80 states: "The power of judging civil and criminal causes belongs exclusively to the established courts of law [the Judiciary]. Neither the President of the Republic, nor Congress, shall, in any case exercise judicial functions . . ."

19. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 arts. 24-25, reprinted in PROYECTOS, *supra* note 13, at 12.

20. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 art. 63, reprinted in PROYECTOS, *supra* note 13, at 24.

21. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 art. 64, reprinted in PROYECTOS, *supra* note 13, at 24.

bunal in order to supervise presidential and congressional elections as well as to resolve any problems that might arise in connection with them.<sup>22</sup>

Many similarities existed between the structure of the government of Chile under Allende and that of the United States.<sup>23</sup> Both governments were established as constitutional democracies. Comparable to the United States, in Chile there existed three, almost four, branches of government which acted as a set of checks and balances upon one another. These branches were the Executive (the President), the Judicial (the Judiciary), and the Legislative (the Congress, which consisted of a senate [Senado] and a house of representatives [Camara de Diputados]). A "quasi" fourth branch of government also existed in Chile. This was a public institution called the Contraloría General of the Republic.<sup>24</sup> It was completely autonomous and its essential duties were to exercise preventive control over the legality of executive acts and to supervise and approve expenditures of public funds in accordance with the law.<sup>25</sup> It should be noted that Chilean law provided a solution for certain serious disagreements be-

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22. Velasco, *supra* note 7, at 485; see CHILE CONST. OF 1925 art. 79, reprinted in PROYECTOS, *supra* note 13, at 29.

23. The government of the United States consists of a three branch system very similar to that established by the Constitution of Chile. Comparable to the Chilean Constitution, the U.S. Constitution established a strong executive power vested in a President of the United States who is also Commander in Chief of the armed forces. See U.S. CONST. art. II, §§ 1, 21. The legislative branch of the U.S. Government consists of a Senate and House of Representatives (House numbers represent congressional districts created in proportion to population) which possess the power to make laws. The Senate has the sole power to try all impeachments. See U.S. CONST. art. I, § 2, cl. 3, § 3, cl. 6 and § 8, cl. 18. The U.S. Government also consists of a judicial branch (power) which is created by article III of the U.S. Constitution. Compare with Chilean Constitution of 1925, *supra* notes 14, 15, 18, 19.

24. Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis* (pt. 2), 9 LOY. L.A.L. REV. 711, 723 (1976).

25. *Id.* Velasco states:

In order to carry out its first duty, every decree dictated by the President, and all administrative resolutions of the public agencies had to be sent to the Contraloría for its analysis and approval prior to being officially promulgated. In the event the Contraloría considered the decrees of resolutions illegal, it rejected and remanded them, thereby rendering them unenforceable.

*Id.* However, it should be noted that

there were exceptions to this general principle, one of which was that in extraordinary cases where there was an evident urgency for the enforcement of the decree, the Contraloría could permit the immediate execution prior to its approval. It was clearly understood, however, that the decree would become void if the Contraloría later rejected it.

*Id.* The executive branch had the largest amount of power of all the branches of government and hence the Contraloría acted as a "checks and balance" institution on the executive. *Id.* Also note that it has been suggested that the President of the United States has similar emer-

tween the Contraloría and the Executive with respect to the legality of a supreme executive decree which the Executive considered as the solution to an urgent problem.<sup>26</sup> Apparently, if the Contraloría disagreed with the Executive about the legal interpretation of a proposed decree, the interpretation of the executive was to prevail only in extreme situations.<sup>27</sup> In order for the Executive interpretation to prevail, a new decree was to be issued and signed this time by the President and all his ministers, thus constituting a virtual insistence that the Contraloría approve the decree and permit its enforcement.<sup>28</sup> This type of decree was known as a "Decree of Insistence" and "its sole objective was to provide a solution in certain cases of conflict of interpretation."<sup>29</sup> One can see the potential for abuse in the use of this decree when an independently minded executive wishes to unilaterally institute his policies and ideologies. This is, in fact, what occurred under Allende and will be discussed later in this article.

### B. History of the Allende Government

In the Chilean presidential election of 1970, Allende obtained 36.3 percent of the votes.<sup>30</sup> His two main opponents obtained the following percentages: Allesandri 34.9 percent, and Tomic 27.8 percent.<sup>31</sup> Since a clear majority was not achieved by any candidate (one-half of the votes plus one) the Congress was left with the task of electing the new president. It followed the candidate with the largest popular vote and elected Allende as president.<sup>32</sup>

"Allende's platform consisted of the Popular Unity (UP) program."<sup>33</sup> The UP program was aimed at the construction of an "area of social property."<sup>34</sup> This area consisted of "(1) companies that al-

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gency powers to legislate on a short term basis. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); War Powers Resolution of 1973, § 2(c), 87 Stat. 555 (1973).

26. Velasco, *supra* note 24, at 723-24.

27. *Id.* at 724.

28. *Id.*

29. *Id.*

30. CHILE AND ALLENDE 31 (L. Sobel ed. 1974).

31. *Id.*

32. *Id.* at 31, 35. It should be noted that the Christian Democrats, who were the strongest party in Chile, voted for Allende on one condition. That condition was that a constitutional amendment, designed to prevent the Marxist minority from taking advantage of its power to end the democratic and free regime that existed in Chile, be approved, and it was. CHILE AND ALLENDE, *supra* note 30, at 32.

33. Velasco, *supra* note 24, at 724.

34. *Id.*; see also D. CUSACK, REVOLUTION AND REACTION: THE INTERNAL DYNAMICS OF CONFLICT AND CONFRONTATION IN CHILE 33 (1977).

ready belonged to the state . . . [and] (2) certain privately owned companies which were to be legally expropriated, including foreign owned companies which exploited the basic wealth of the country."<sup>35</sup>

The expropriation of property was instituted on a large scale.<sup>36</sup> "Allende had been advised by one of his advisors, a professor of law, that it was possible to transform socio-economic structures in Chile without enacting new laws, just by taking advantage of existing legal rules."<sup>37</sup> One of these existing laws came about from the Socialist Republic of 1932 and allowed for the requisition of products or basic goods in a temporary or transitory form when abnormalities in the production process made it necessary for the public interests.<sup>38</sup> This law was eventually abused by the Allende government. On hundreds of occasions, the Allende government requisitioned not only the products, but the producing companies themselves.<sup>39</sup> Furthermore, these requisitions were done on a permanent basis rather than for only short, transitory periods as required by law.<sup>40</sup> This allowed the government to effectively, although not legally, transfer the companies into the "area of social property."<sup>41</sup>

This same legislation allowed the government to intervene in the management of a company when a labor conflict paralyzed it.<sup>42</sup> All that was required of the government was that it appoint an "inter-venor" whose task was to manage the enterprise temporarily while he looked for the quickest possible solution to the labor conflict."<sup>43</sup> The intervention was deemed to end when the conflict was resolved.<sup>44</sup> On many occasions these conflicts were never resolved and the UP gov-

35. Velasco, *supra* note 24, at 711.

36. See *infra* note 39 and accompanying text.

37. Velasco, *supra* note 24, at 714.

38. *Id.*; see also CHILE AND ALLENDE, *supra* note 30, at 44 (where Economy Minister Pedro Vuskovic was accused of being involved in illegal government takeovers and requisitions of private textile plants). See *infra* note 45 and accompanying text.

39. Velasco, *supra* note 24, at 714. The Allende government "requisitioned" the Ford Motor Company plant, ITT, RCA Victor Electronic Enterprises, as well as 150 Chilean firms it deemed as key to the economy. CHILE AND ALLENDE, *supra* note 30, at 56-57. It also nationalized the copper industry. *Id.* at 52. Further examples of manufacturing and industrial plants which were requisitioned are Pizarpeño, Aga Chile, Cumming Diesel, Toro Glassware, Artela Schiaffino, Marisio, Cerillos Copper, and Lucchetti and Lanex. *El Mercurio*, July 3, 1973, at 1, col. 4.

40. Velasco, *supra* note 24, at 714.

41. *Id.*; see *infra* note 45 and accompanying text.

42. Velasco, *supra* note 24, at 714.

43. *Id.*

44. *Id.* at 714-15.

ernment maintained control of the companies.<sup>45</sup> The UP government was, therefore, able to accomplish a transfer of factories into the social area.<sup>46</sup> As stated earlier, many of these interventions and expropriations were arbitrary and illegal.<sup>47</sup>

Protests to these expropriations came from the public sector as well as from Congress.<sup>48</sup> The Allende regime used the "Decree of Insistence" to override any objections to the expropriations that were taking place. When an expropriation or "government requisition" took place, the Allende government would issue a "requisition" or "intervention" decree and send it to the Contraloría.<sup>49</sup> When "the Contraloría rejected one of these decrees as being illegal, which occurred with increasing frequency, the President and his ministers is-

45. *Id.* at 715. The takeovers of Cervecerías Unidas and Insa Automobile Tire Co. "reportedly followed a pattern of worker seizures followed by State intervention through appointed ministers." CHILE AND ALLENDE, *supra* note 30, at 57. Furthermore, this pattern "had been used extensively by the government of President Salvador Allende to extend public ownership to important plants." *Id.* It was also noted that the Allende government artificially created labor conflicts itself in order to requisition and expropriate these plants. An example of this occurred in the takeover of the Mademsa Company plant which resulted in the Contraloría overtly condemning this type of action by the executive as illegal. *El Mercurio*, May 8, 1973, at 19, cols. 6-7.

46. Velasco, *supra* note 24, at 715; see also *supra* note 44.

47. See *supra* notes 38 & 45 and accompanying text. Furthermore, there were "legal" expropriations resulting from these legislative loopholes, yet the MIR (Movimiento de Izquierda Revolucionaria) under Jacques Chonchol, Allende's Minister of Agriculture, were engaging in illicit tomas (seizures of land). With the silent concurrence of Chonchol, the MIR simply "booted people out of their houses and off their farms, killing those who resisted." These people were not all great landowners or absentee landlords but were people who lived and worked on their property, having everything they owned tied up in their land, machinery, stock, and buildings. Buckley, *Death of a Republic: An Impression*, NAT'L REV., Aug. 1, 1975, at 831. Velasco states:

From a legal point of view it is evident from these cases of intervention that there existed not only the abuses and arbitrariness described above, but also a serious violation of the law by the government because of its passive attitude and because of its failure to fulfill its constitutional duty to maintain public order and to respect the rights of citizens.

Velasco, *supra* note 24, at 715. The constitutional duty of the President to maintain the public order and respect the rights of citizens is stated in article 71 of the Constitution of 1925 and incorporated by reference. PROYECTOS, *supra* note 11, at 26.

48. Large anti-Allende demonstrations were held and strikes were instituted as a protest to the Allende government. See CHILE AND ALLENDE, *supra* note 30, at 49; CHILE: A COUNTRY STUDY, *supra* note 8, at 244-45, 246-47. The Chilean Congress accused Allende of illegal and unconstitutional acts. *El Mercurio*, Aug. 24, 1973, at 1, col. 1. The Chamber of Deputies (analogous to the U.S. House of Representatives) declared the government illegal in a special session. They also voted to "censure Allende's government and appealed to the armed forces to 'reestablish the Constitution and the law.'" See *El Mercurio*, Aug. 22, 1973, at 1, col. 5; see also CHILE: A COUNTRY STUDY, *supra* note 8, at 248.

49. Velasco, *supra* note 24, at 724.



sued a Decree of Insistence forcing the Contraloría to approve it.”<sup>50</sup> “This became a more or less habitual form of administering the country. It was evident that this procedure, marginally legal at best, was being abused, since it is inconceivable that this exceptional legal institution was intended to permit the executive systematically to violate the law.”<sup>51</sup>

### C. Breakdown of the Judiciary (Judicial Branch)

“The Constitution of 1925 categorically established the judiciary as a state power and, therefore, autonomous, independent, and supreme with respect to the administration of justice.”<sup>52</sup> According to the Constitution, the executive branch of government was required to “provide the public force necessary to execute the decisions of the judiciary *without inquiring into the substance of the decisions nor whether they are just or not.*”<sup>53</sup>

It is worth noting here that in any constitutional democracy such as that of Chile under Allende or the United States, the judicial branch of government is the weakest.<sup>54</sup> This is because the judiciary, unlike the executive and legislative branches of government, has no power to compel compliance with its orders or decisions but relies solely on the executive for enforcement or compliance.

In many of the cases dealing with the expropriations of property by the Allende government, “the people affected turned successfully to the courts.”<sup>55</sup> Judges ordered many peasants and workers to return illegally occupied land as well as to evacuate illegally seized fac-

50. *Id.*

51. Velasco, *supra* note 24, at 724.

52. *Id.* at 725.

53. *Id.* (emphasis added).

54. This is because, in Chile, as in the United States, the Executive's power is manifested by the fact that he is Commander in Chief of the armed forces. The Legislative power is exhibited by its power of law making and of impeachment. See text accompanying note 15; see also note 23 and accompanying text. The Judiciary (in both countries) relies on the executive to carry out its judgments. From the judiciary's dependence on the executive for enforcement of its judgments comes its weakness. As stated by Alexander Hamilton in the *Federalist Papers*:

The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments.

THE FEDERALIST NO. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

55. Velasco, *supra* note 24, at 725.

tories.<sup>56</sup> These judgments and orders of the courts became worthless because "almost invariably the Interior Ministry [which was the administrative department in charge of enforcing judicial decrees] refused to authorize police forces to carry out the orders."<sup>57</sup> The judges and the affected parties brought these facts to the attention of the Supreme Court which in turn pointed out the illegality of the executive's inaction to the President, but to no avail.<sup>58</sup>

As one might imagine, a heated controversy and ultimately a struggle for the independence and autonomy of the judicial system arose between the judiciary and the executive branch of the Chilean government. In October of 1972, the Supreme Court sent an official letter to Allende informing him of "the absolute necessity of instructing his cabinet to instruct in turn their subordinates to adhere strictly to the decisions that, in the exercise of their constitutional attributions, emanate from the ordinary courts of justice."<sup>59</sup> Furthermore, "[i]n this letter the Supreme Court also called on the President to instruct his subordinates to show the judiciary the courtesy which it deserved."<sup>60</sup> What followed was that the:

Intendente of Santiago declared to the press that he would not provide the public force for the return of any of the intervened companies pursuant to the judgments, because this "could cause serious incidents and public disturbances." . . . [T]he Minister of the Interior sent a "confidential memo" to all the Intendentes and governors ordering them not to exercise the public force [necessary] to carry out any judgment unless the Minister himself considered it convenient.<sup>61</sup>

The controversy became so heated that in May of 1973 the Supreme Court sent an official and emphatic letter to the President "directly mentioning 'the breakdown of the legal order of the country.'"<sup>62</sup> In the letter the Court stated:

This Court must protest to you, as it has done numerable times in the past, about the illegal acts of the administrative authorities who are illicitly interfering with the proper exercise of the judicial

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56. N.Y. Times, Sept. 15, 1973, at 12, col. 4.

57. *Id.*

58. Velasco, *supra* note 24, at 725.

59. *Reprinted in* El Mercurio, Oct. 31, 1972, at 9, col. 7, as translated by Velasco, *supra* note 24, at 725-26.

60. Velasco, *supra* note 24, at 726.

61. *Id.*

62. *Id.*; see *supra* note 48 and accompanying text (where the Chamber of Deputies voted to censure the Allende government due to the disregard for the Constitution and the law).

power, and who are preventing the police force from carrying out criminal sentences duly emanating from the criminal courts, when, according to the laws, these sentences should be carried out by said force without any obstacles. These acts signify a decided obstinacy in rebelling against the judicial sentences and a total lack of concern about the alteration that these attitudes and omissions have produced in the juridical order. All of this no longer means a simple crisis of state under the rule of Law, as was manifested to you in our previous letter, but a peremptory or imminent rupture of the country's legality.<sup>63</sup>

This time Allende responded with a long, harsh letter theorizing that with respect to the execution of judicial sentences, "the government, as 'warrantor of peace and public order,' should analyze each case and make its own judgments on the merits as to whether or not it would grant the assistance of the public force to carry them out."<sup>64</sup> Under the Constitution of Chile this was not within the powers of the Executive branch, and hence was unconstitutional.<sup>65</sup> In fact, by the arbitrary and reluctant attitude of enforcing the judicial judgments, the President had ironically disturbed the peace and public order. He had become the agitator of peace and public order rather than the "warrantor," and had thus violated his constitutional duty.<sup>66</sup>

The Supreme Court in another letter replied:

The President has undertaken the task, specially difficult and painful for him since he only knows the Law through hearsay, of determining for this Supreme Court the rules for the interpretation of the Law, *a duty which* in the matters entrusted to it, *belongs exclusively to the judiciary and not to the executive.*<sup>67</sup>

What resulted was the definite breakdown of the respect and comity between the executive and the judiciary as well as the independence and autonomy of the judicial system.<sup>68</sup> The judiciary had lost its autonomy and because of the Executive's (Allende's) inaction, it had in essence become a worthless entity. This was July of 1973 and

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63. Velasco, *supra* note 24, at 726 (quoting letter to President Allende from Chilean Supreme Court dated May 1973).

64. *Id.* (quoting President Allende's letter in response to Chilean Supreme Court's letter dated May 1973).

65. See *supra* notes 18 & 53 and accompanying text.

66. See PROYECTOS, *supra* note 13, at 26.

67. Reprinted in *El Mercurio*, June 26, 1973 at 1, cols. 2-3, as translated by Velasco, *supra* note 24, at 726-27 (emphasis added).

68. Velasco, *supra* note 24, at 727.

within two months the military coup would take place.<sup>69</sup>

### III. SEPARATION OF POWERS ANALYSIS

What occurred between the executive and judicial branches of government during the Allende rule in Chile exemplifies a prime violation of the doctrine of separation of powers.<sup>70</sup> It serves as a harsh lesson which evidences the extreme importance of this doctrine. It has been stated that the "absolute independence of the Judiciary is the Bulwark of the Constitution against encroachment by . . . the executive."<sup>71</sup> Furthermore, "[t]o vest in the same body executive and judicial power is to remove a vital constitutional safeguard."<sup>72</sup> The "vital constitutional safeguard" of an autonomous judiciary was displaced by the Allende government in Chile.

What happened in Chile was that Allende, the executive, in effect, had swallowed up the powers of the judicial branch. This was done through the selective enforcement and nonenforcement of judicial decrees.<sup>73</sup> The power and effectiveness of a constitution and its corresponding protection of civil liberties do not emanate from its mere existence, but rather from the recognition by the people and the branches of government that the constitutional guidelines and limitations must be followed.<sup>74</sup> More plainly stated, the separation of powers must be maintained to prevent the tyrannical concentration of all the powers of government in the same hands.<sup>75</sup>

The Constitution of 1925 had been effective up until the Allende era because this basic premise was maintained. Allende's attempt to

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69. *Id.*

70. This doctrine states that in a three branch system of government (executive, legislative, and judicial), each branch has its independent function which should remain autonomous and separate from the other two. The legislative branch "is empowered to make the laws, the executive is required to carry out the laws and the judicial . . . is charged with interpreting the laws and adjudicating disputes under the laws. One branch is not permitted to encroach on the domain of another." BLACK'S LAW DICTIONARY 1225 (5th ed. 1979).

71. G. MARSHALL, CONSTITUTIONAL THEORY 118 (1971) (quoting Lord Simmonds).

72. *Id.*; see also *infra* note 75 and accompanying text.

73. See *supra* text accompanying notes 56-58.

74. James Madison recognized this when he stated "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all powers of government in the same hands." THE FEDERALIST NO. 48, at 313 (J. Madison) (C. Rossiter ed. 1961).

75. *Id.* It has been stated that "[a]n independent judiciary is a *sine qua non* of a Free Society. Where judges are subservient to the executive . . . power, they become instruments for expressing the whim or caprice of those in power." W. DOUGLAS, THE ANATOMY OF LIBERTY 88 (1963).

socialize Chile was severely hindered by constitutional limitations. Inherent in the Constitution was a system of checks and balances which prevented any single branch of government from abrogating the rights guaranteed to the people and guarded by the Constitution.<sup>76</sup> As part of this system, an independent judicial branch serves as the foremost check on the abrogation of the rights of the individual.<sup>77</sup>

By his inaction and selective enforcement of judgments, Allende had violated the separation of powers which was vital to the effectiveness of the Chilean Constitution. His unilateral imposition of ideas and policies, in excess of his constitutional authority and in abrogation of the rights of individuals, eventually destroyed Chile's constitutional framework. What resulted was the breakdown of the constitutional process and the loss of fundamental rights. As James Madison stated, quoting Montesquieu, "[t]here can be no liberty where the . . . power of judging be not separated from the legislative and executive powers . . . ."<sup>78</sup> Where liberty is lost, oppression begins.<sup>79</sup> This was demonstrated by Allende's attempt to unilaterally impose his policies on the public and the corresponding public unrest and chaos which followed.<sup>80</sup>

#### IV. JURISPRUDENTIAL ANALYSIS

The doctrine of *salus populi suprema lex* stands for the concept that the welfare of the people is the supreme law.<sup>81</sup> This maxim is the foundation principle of civil government and has been a ruling princi-

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76. The Constitution of 1925 guaranteed many rights called "Constitutional Guarantees" to all individuals, such as the right of equality under the law, the right to freedom of worship, freedom of movement, freedom of the press, etc. See CHILE CONST. OF 1925 art. 10, reprinted in PROYECTOS, *supra* note 13, at 7.

77. Alexander Hamilton said: "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men . . . sometimes disseminate among the people . . . ." THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

78. *Id.* at 302.

79. Madison states: "Were [the power of judging] joined to the executive power, the judge [executive], might behave with violence of an oppressor." THE FEDERALIST NO. 47, at 303 (J. Madison) (C. Rossiter ed. 1961).

80. "Strikes, riots and street demonstrations in Santiago, Valparaíso and other important cities virtually paralyzed the nation. Scores were injured and a few deaths were reported. On June 21 an estimated 700,000 people took part in an anti-government demonstration near the presidential palace." CHILE: A COUNTRY STUDY, *supra* note 8, at 247; see also D. CUSACK, REVOLUTION AND REACTION: THE INTERNAL DYNAMICS OF CONFLICT AND CONFRONTATION IN CHILE 71 (1977).

81. BLACK'S LAW DICTIONARY 1202 (5th ed. 1979).

ple of jurisprudence for ages.<sup>82</sup> The law of necessity (*salus populi suprema lex*) envisions the police power as the power which protects the welfare of the community.<sup>83</sup> This doctrine defines the outer limits of the police power.<sup>84</sup> It suggests that the public welfare must necessitate the exercise of the police power by the State.<sup>85</sup> Furthermore, "[t]he police power extends to all the great public needs and it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and prepondering opinion, to be greatly and *immediately necessary* to the public welfare."<sup>86</sup>

The Allende government, although initially attempting to change Chile through the Chilean democratic process, had overstepped the bounds of its constitutional authority.<sup>87</sup> The expropriation and nationalization of companies, factories, and land became arbitrary, illegal, and unconstitutional.<sup>88</sup> Requisition of companies and factories were occurring on a daily basis.<sup>89</sup> Social, political, and economic disorder, bordering on anarchy, were present everywhere and daily life lacked the most elementary sense of security.<sup>90</sup>

Chaos was prevalent and a "state of necessity" had been created.<sup>91</sup> The judicial branch was powerless. It had attempted to maintain constitutionality in Chile but was ineffective because of its lack of power. The checks and balances on the Executive branch of government ceased to exist. What resulted was that "[a] climate inexorably built up that prevented any sort of institutional solution."<sup>92</sup>

82. 6 RULING CASE LAW 188, § 187 (1929).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 189 (emphasis added).

87. Buckley, *supra* note 47, at 829, 831; *see also* D. CUSACK, *REVOLUTION AND REACTION: THE INTERNAL DYNAMICS OF CONFLICT AND CONFRONTATION IN CHILE* 71 (1977).

88. *See supra* notes 38 & 45 and accompanying text; *see also* text accompanying notes 40-41.

89. Velasco, *supra* note 24, at 730.

90. CHILE: A COUNTRY STUDY, *supra* note 8, at 145; *see also* CHILE AND ALLENDE, *supra* note 30, at 128, 133, 135-36.

91. *See supra* note 48 and accompanying text. The situation had become so grave that "Allende was also alienating many left-liberal moderates through his manhandling of democratic institutions in violation of his 'guarantees.'" Buckley, *supra* note 47, at 831. Ultimately "a large majority of Chileans came to oppose him, *fearing for the survival of their country*. Peor Es Nada. [Worse, there is nothing.]" *Id.* (emphasis added).

Furthermore, "[s]o bitter were relations between Dr. Allende and the legislature that he openly called that body a 'circus' and legislative opponents, in turn, systematically impeached key members of his many cabinets." N.Y. Times, Sept. 15, 1973, at 12, col. 4.

92. *Id.*

Intervention by a military junta in the form of a *coup d'etat* was obviously an unconstitutional alternative since it would be undemocratic and unauthorized by the Congress.<sup>93</sup> Yet under the theory of state necessity, "[w]hat is otherwise illegal becomes legal due to the exigencies of the situation."<sup>94</sup> Thus, "a necessity doctrine may be acceptable at least, partially, to restore or keep the confidence of the population in the basic institutions of government without which chaos would arise."<sup>95</sup> In effect this is what happened in Chile. Allende had created chaos and a state of necessity by destroying the national institutions of democracy.<sup>96</sup> In fact, this was the rationale and justification given by the military junta.

On the night of the coup, September 11, 1973, General Mandozo of the Military Junta stated:

In this important moment of decision, the Chilean Police Force, in forming part of the Junta that today has assumed command on the Nation, has as its objective the re-establishment of the judicial order that recently has been seriously violated . . . . [I]t is a question of re-establishing the public order and returning the country to the path of the Constitution and the law. Therefore, the spirit of the Junta is to return to the real route of the legality.<sup>97</sup>

In other words, the justification for the military junta and the coup was that a state of necessity was created in Chile which mandated that the police force assume control of the country in order to protect the public welfare. This justification was a prime example of the theory of state necessity.

The doctrine of state necessity commonly comes into play where there is avid public sentiment against the existing government.<sup>98</sup>

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93. See Hassan, *supra* note 10.

94. *Id.* at 201.

95. *Id.* at 202.

96. It was stated by F. Reid Buckley that

On the evidence, there can be no reasonable doubt that he [Allende] was bent on utterly revolutionizing Chile through absolute and irreversible destruction of the economy and of all national institutions, including the congress and the supreme court, by means of executive powers that violated the spirit of the constitution but that could be inferred (by stretching logic) from carelessly worded legislation of the Frei Years, and even from loopholes in the constitution itself.

Buckley, *supra* note 47, at 829. Other recent examples of countries other than Chile where states of necessity were created are Nicaragua under Somoza and the Philippines under Marcos.

97. Reprinted in *El Mercurio*, Sept. 13, 1973, at 1, col. 8, as translated by Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis* (pt. 3), 9 LOY. L.A.L. REV. 961, 973 (1976).

98. Hassan, *supra* note 10, at 240.

Under this doctrine, a military junta can only be justified because a revolution has already taken place.<sup>99</sup> In Chile, a revolution had occurred. The Judiciary, the Congress, and the Contraloría had opposed the Allende regime. Public sentiment was largely anti-Allende.<sup>100</sup> The last contingency to oppose the Allende government was the military. Their opposition came in the form of a military junta and *coup d'état* which removed Allende from office on September 11, 1973.

## V. CONCLUSION

Salvador Allende had attempted to redress the serious problems in Chile by socializing the country. One cannot doubt his idealism or his (constitutional) motives, for he initially attempted his "solution" through the democratic process and with respect for all ideologies.<sup>101</sup> However, his "attempt" or his means, and the "solution" or the ends, eventually became incompatible. Allende's "revolution" of Chile was one of contradiction. He attempted to change Chile using the democratic process and then-existing laws, yet he ended up breaking down the democratic process and traditions of Chile. It may very well be true that a change or "revolution" to Socialism (Marxism) cannot be completely achieved through a democratic process, but must be violent and totalitarian in order to crush its opposition and be successful.<sup>102</sup> This may be especially true in the Allende experiment for he was a minority president attempting to socialize the country, and at the same time quell mounting opposition from the communists and the conservatives. In the end this was impossible. Any attempt at concession alienated someone. In fact, Allende not only alienated many factions from him, but he united them against him. The Allende experience may be very important in the evolution of Marxist thought and process, and it has special meaning for the large Marxist parties existing today, especially those in France and Italy.<sup>103</sup>

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99. *Id.*

100. See *supra* notes 80 & 91 and accompanying text.

101. It was noted that "Allende and the Unidad Popular had planned 'the Chilean way to Socialism' as a democratic pluralistic process to be achieved according to the Constitution and with respect for all ideologies and parties." S. CHAVKIN, *THE MURDER OF CHILE VIII, IX* (1982); see also *infra* note 103 and accompanying text.

102. Holland, *Allende Out*, *NAT'L REV.*, Sept. 28, 1973, at 1038.

103. Holland states:

Allende believed he could bring about a Marxist revolution without abandoning democratic forms and without seizing control of the entire repressive apparatus of the state. It now looks as though the "Chilean road" is no go and orthodox commu-



What happened in Chile under Allende shows the importance of the role of the judiciary in a constitutional democracy, especially in third world countries. Unlike the United States which is dominated by a two party political system (Democrats and Republicans), most third world countries contain multiple political parties. In order to obtain enough votes to win a presidential election, a candidate must align himself with other factions or form a coalition. Only in this way is it possible to rally enough votes to win. As in Chile with Allende, most presidents in other countries are elected by a minority of the population — 30-40 percent of the popular vote being enough for victory since the rest of the votes are spread over the remaining parties. What follows is that a minority president will attempt to institute his policies on the remaining majority of the people. As president, he will have the executive power at his disposal for this purpose. In order to prevent arbitrariness and abuses of the constitutional rights of the individual in a democracy, an independent and autonomous judiciary is required. If an independent and autonomous judiciary does not exist, the executive will go unchecked and the possibility of repression will be great.

One lesson to be learned from the Allende experiment in Chile is the true weakness of the judiciary in a constitutional democracy. Another lesson to be learned is that the power of the people of a nation and of public opinion is extremely strong. Allende lost the support of the middle class which then turned against him, and that factor contributed substantially to his downfall. For a revolution of any form to be successful, the support of the people is necessary, and Allende, through many of his actions, lost the support of the people of Chile.

What has been presented are certain historical facts, which, coupled with a jurisprudential analysis, tend to illuminate and explain the violent *coup d'état* which ousted Salvador Allende from power in Chile. It is by no means a rationalization or justification for the atrocities and violence which followed and continue today in Chile.<sup>104</sup> It is well known that “[o]nce the principle of necessity is accepted, opportunities for abuse inevitably arise.”<sup>105</sup> Necessity, once it is accepted, can be used as an excuse for all actions. Furthermore, power can be a

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nist expectation correct: a genuine Marxist revolution must be violent and totalitarian in order to crush the inevitable opposition to it.

*Id.* at 1040.

104. See COVERT ACTION IN CHILE, *supra* note 3, at 62; S. CHAVKIN, *supra* note 8; CHILE: A COUNTRY STUDY, *supra* note 8.

105. Hassan, *supra* note 10, at 202.

tremendously dangerous and almost addicting instrument leading to many kinds of abuses.

Chile remains under the rule of the military. "Meanwhile, the constitutional tradition of Chile has been irremediably riven: The 160 years of almost continuous democratic tradition simply cannot be revived after the abuses of Allende, the Counter-revolution, and what may be the long tenure of the current regime."<sup>106</sup> It was not until quite recently that the military junta restored legal status to political parties in Chile after a thirteen year suspension — that is, of course, with the exception of Marxist political parties.<sup>107</sup>

*Neal P. Panish*

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106. Buckley, *supra* note 47, at 847; *see also* Wall St. J., Sept. 29, 1986, § 1, at 1, col. 1 (uncertainty and fear cloud the political future of Chile).

107. L.A. Times, Jan. 16, 1987, § 1, at 12, col. 1.

