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## **Review/Reseña**

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

### **State Terrorism, Human Rights, and the Rule of Law: Explaining the Use of Courts under Military Dictatorships**

**Brian Loveman**

San Diego State University

*Political (In)Justice* compares and contrasts the uses and consequences of political trials under military dictatorships in Brazil (1964-1985), Chile (1973-1978), and Argentina (1976-1983). Political trials, understood as “prosecution of the regimes’ opponents in courts of law for offenses against national security” (18), were used to various degrees by each of these military regimes. Brazil is the central focus; Chile and Argentina serve as benchmarks that

“highlight the distinctiveness of the Brazilian trajectory of political justice” (12). According to Anthony Pereira, what was perhaps the most impressive difference among the three cases was the extent to which Brazil “judicialized” political repression and the relatively high rate of acquittals of defendants in political trials by the Brazilian military tribunals from 1964-1979 (with regional differences ranging from a low of 37.5% to a high of 87.93% – an average of 54%) versus the Chilean military courts (average acquittal rate of 12.42%). In Argentina, “the military embarked on a much more radical war against subversion that dispensed with legal formalities almost entirely...disappearances became a full-scale program and an official policy” (138).

Pereira’s objective is to explain the differences in how and why political trials were carried out under these three military regimes and to account for variations in levels and severity of repression experienced by regime opponents. Political trials served both to intimidate and punish opponents, but also to seek legitimacy or at least passive acquiescence to military rule (33) Analysis of the differential use of such trials leads Pereira to conclude that significant “judicialization of repression” (the extent to which treatment of political prisoners was regulated by law, 5), as occurred in Brazil, somewhat ameliorated the severity of outcomes for dissidents by allowing limited recourse to the rule of law, albeit military law. In contrast, Pereira argues that largely (but not without exception) non-judicial repression, as in Argentina’s massive state-terrorist campaign of disappearances, bypassed the judiciary altogether, and the Chilean case represented an intermediate situation—usurpation of judicial authority and only superficial compliance even with military law itself.

The author cautions that this study cannot easily be generalized to other cases; authoritarian legality must be studied ideographically, with full analysis of the particular political and

overall legal context of each political system. For this reason Pereira provides a schematic historical description of national security laws in Brazil and the Southern Cone. He also offers readers an excellent synthetic overview, based on archival research and interviews, of the use and results of political trials in each of the three countries (chapters 4-6). Noting the tendency for all three military regimes to combine what he calls “conservative” and “revolutionary” approaches to law – that is, both to seek some legitimacy by cloaking repression in previously existing constitutional provisions and national security laws and also to decree modifications to such laws far beyond previously existing legality—Pereira concludes that the Chilean regime was more “radical” in its repression and the application of political injustice than the Brazilian military governments, but less so than the Argentine junta (1976-83) that carried out a massive ‘dirty war’ against its opponents and their sympathizers. The case studies of regime-opposition relations, the role of domestic and international human rights organizations, and unique domestic political conditions lead Pereira to conclude that only in Brazil did the military courts *sometimes* allow a minimum of procedural guarantees to defendants and their lawyers.

Beyond the case studies, Pereira frames the volume with an ambitious theoretical effort to assess the extent to which structural (including Marxist and broader political economy approaches), rationalist, and culturalist efforts to explain political behavior (in this case, political repression) are successful. Pereira finds himself straddling fences, aiming at a theory that takes into account (1) the high generality of theories of economic determination of repression, (2) the role of distinctive national cultures, and (3) the methodological individualism of rational choice theorists. This quest takes him back to a dynamic historical institutionalism (citing Douglas North, 1990) combined with recognition that the modalities of “transition,” that is the circumstances of political rupture and

installation of military regimes, also influenced the course of political (in)justice that followed. In short, immediate political context greatly influenced the modalities and severity of repression exercised by the military regimes in Brazil, Chile and Argentina.

After analyzing the comparative judicialization of repression for the three military regimes, Pereira then considers the effects of transitional justice and the legacies of authoritarian legality, that is of the “legislation” (decrees), institutional innovation, and practices of the military regimes. Here he finds that the most intense efforts at transitional justice—the trial and punishment of those who had violated human rights and national law—occurred in Argentina. Chile is again an intermediate case, with Brazil following behind. He explains that “conservative legal systems that are adapted to authoritarian rule may restrain security forces and offer some possibilities for human rights...However, they also create entrenched bureaucratic interests and an ‘official story’ that can serve as an immense barrier to efforts at reform after the end of authoritarian rule” (172).

Finally, in chapter 9, Pereira takes a more ambitious theoretical leap, suggesting that “the nexus between military and judicial elites can help to explain the judicialization of repression and its absence elsewhere [outside Brazil and the southern cone of South America]” (174). Going back to Nazi Germany, Franco’s Spain, Salazar’s Portugal, and forward to the United States after 9/11, he concludes that the framework adopted in this book, “may shed light on the legality of other authoritarian regimes” (190). This is because “the degree of military and judicial consensus, integration, and cooperation is a key neglected variable in unlocking the puzzle of variation in authoritarian legality” (191).

Pereira’s main point, then, is that where consensus, integration, and cooperation was high between military elites and the judiciary (Brazil), regime repression was more frequently

judicialized, and the legal system was modified conservatively and incrementally; where it was low (Argentina), repression was radical and extra-judicial/extra-legal; where it fell somewhere between these extremes (Chile), repression took a form midway between these two poles (194).

Pereira's study adds much grist to the theoretical mill regarding authoritarian regimes in Latin America and elsewhere. It also provides an important data set for ongoing study of the courts and the military violations of human rights in Latin America. While his claim that "institutional constraints on the security forces at moments of political conflict shaped the authoritarian legality of each regime" is correct, it is also somewhat misleading. He suggests that the alternative (a null-hypothesis) is that "military-judicial integration and consensus did *not* affect the legal forms of repression in these military regimes" (197). This is also correct, sometimes, and also misleading. Thus, I agree with Pereira's own observation: "this book has undoubtedly raised more questions than it has answered" (198).

Part of the confusion stems from the slippery meaning of the central explanatory variable: "military-judicial integration and consensus" (the organization of the military justice system and the connection between military and judicial elites; the extent of agreement across status groups about key national security ideas and how to apply them, 10-11). Characterizing each country's position along this variable as simply "high," "medium," or "low" is highly subjective, and obscures essential historical detail. The book would have benefited, therefore, from a deeper historical analysis, taking into account the long-term relationship between the judicial branch and military law, the system of military courts, and jurisprudence on the laws and decrees of *de facto* governments in each country (Loveman, 1999).

The history of institutionalized torture and secret police

surveillance of political oppositions in Brazil, for example, goes back long before 1964 and even before the first Vargas government in the 1930s. Anti-communism and anti-Marxism led to drastic repression in the late 1930s and after. Yet, the Brazilian constitution of 1946 *had strictly limited military jurisdiction over civilians*. Thus the “reforms” introduced by the Brazilian military juntas were hardly “conservative.” Institutional Act 2 (as incorporated into the 1967 constitution, and amended in 1969), implemented by the Castelo Branco government (1964-67), extended military jurisdiction over civilians to cases involving *internal* security. This constitutional revision represented a radical change in Brazilian political life. In some ways this constitutional change was a more “revolutionary” legal initiative (from a constitutional and civil liberties perspective) than the initial decrees enacted by the Chilean junta after 1973. From the standpoint of military-judicial relations, it took out of the civilian courts any cases chosen by the military as involving “public order” and national security (internal or external).

This meant that Brazilians could be prosecuted in military courts for offenses that had not previously existed or, if they had existed, would have been prosecuted in civilian venues. It is hard to imagine this attack on civil liberties as an indicator of “military-judicial integration and consensus” at the time of the coup in 1964 or as indicator, in the Brazilian context, of a conservative or gradualist political initiative. Instead it represented a fundamental constitutional “reform” intended to expand the jurisdiction of military courts and reduce the jurisdiction of civilian courts and the constitutional due process theoretically available before 1964.

Of course a Chilean equivalent to this move would not be necessary because military jurisdiction over civilians under state of siege was already extensive—and had been so since the first military *ordenanzas* of 1839. In any case, as Thomas Skidmore (1988) wrote almost twenty years ago, while military justice in Brazil during the

dictatorship provided a mechanism, which for some prisoners increased the odds of survival or of shorter incarceration, “the degree to which the workings of military justice mitigated the repression should not be overestimated. Torturers sometimes simply defied the tribunals, abusing and sometimes killing their prisoners with little concern for accountability to a higher military authority (132).” Notwithstanding these conditions, as Skidmore reported and Pereira seconds, Brazilian military courts acquitted on average some 50% of defendants, a clear difference between the Brazilian case and those of Chile and Argentina (even when taking into account that many of the acquittals were on appeal to the *Superior Tribunal Militar* after conviction at the lower level military courts).

However, the reasons for this important difference were just as likely the particular nature and motivations of the Brazilian coup leaders, their immediate political objectives, the personalist and ideological factionalism within the Brazilian military, the military justice system itself, and its staffing, training, and encrustation in a federal regime; they are not the result of a pattern of “integration” and “consensus” between the Brazilian military and the judiciary (see Skidmore, 131-32). General Castelo Branco was reluctant to be a Brazilian version of a Spanish-American *caudillo* or long-term dictator. He did not close the Brazilian congress (as occurred immediately in Chile in 1973 and Argentina in 1976) and he promoted reform of the party-system –not its abolition. His successors had other ideas, but Castelo Branco’s leadership made the first three years after the Brazilian 1964 coup dramatically different from the 1973-1976 period in Chile and the post-1976 years in Argentina. Indeed, despite repression of opposition forces and suspension of citizenship rights for legislators and others, Castelo Branco presided over election victories by opponents in key states shortly after the 1964 coup. In 1966, two years after the coup, general elections for state governors were held. The opposition MDB won in

all major states. This would have been unthinkable in 1975 in Chile or 1978 in Argentina (see Loveman, 2001; McSherry, 1997).

On the other hand, Institutional Act 2 (1965) increased the membership of the Supreme Court from 11 to 16 judges to assuage military hard-liners' anger over rulings by the Court in cases involving "subversives" (Skidmore 46). This 'court-packing' and the public criticism it engendered from Supreme Court Chief Justice Ribeiro da Costa calls into question the supposed "military-judicial integration and consensus" in Brazil (1964-67). The same Institutional Act (Art. 7) established the Supreme Military Court with expansive jurisdiction over civilians for crimes involving national security (referencing law 1.802, 1953) and with original jurisdiction to try and sentence Governors of the states and their Secretaries (cabinet members) for the same crimes.

Moreover, Institutional Act 5 (1968) suspended the right of habeas corpus in cases of "political crime against national security, the economic and social order, or the prevailing economy (Art. 10). It also exempted from judicial review "all acts initiated in accord with this Institutional Act, as well as their respective effects (Art. 11). In addition, the junta then reduced membership on the court back down to 11 and forced three of the acting justices into early retirement, which led the Supreme Court president to resign in protest. In short, this drastic constitutional reform, taken partly because the Supreme Court had declared unconstitutional several government decrees and supported students in *habeas corpus* proceedings (Sanders, 1981, Osiel, 1995) neutered the judicial branch as a defense of civil liberties against regime repression and precluded judicial review of government initiatives.

Is this evidence of "military-judicial integration and consensus" or of a wholesale attack on the judicial branch's authority and autonomy? If military-judicial consensus had existed prior to the 1964 coup, or in 1967, why take these measures to restrict the judicial



branch's jurisdiction?

In contrast, the Chilean junta in 1973 would immediately ban all leftist parties and make clear that there would be no short-term return to democracy and no elections—and *yet it was supported publicly and unanimously by the Chilean Supreme Court judges*. In this sense, no better “integration” and “consensus” and cooperation could be imagined than between the Chilean Supreme Court and the military junta: the Court had publicly denounced the government of Salvador Allende (1970-73) for violating the constitution and applauded the military coup. No public dissent developed among the judges, and the Court self-circumscribed its authority by refusing to review the decisions of military tribunals. According to the Rettig Commission (1990-91), the Chilean judiciary was virtually complice in the regime's violations of human rights (Rettig Commission, I, February, 1991: 95-104). Would not this indicate very high levels of “integration” and “consensus” for military and judicial elites?

Even better for the Chilean junta, military courts already had jurisdiction over civilians for certain sorts of crimes, for example violation of gun control legislation, even in normal times (that is, without state of siege or other constitutional regime of exception). Civilian judges, legislators, and average citizens were aware of this possibility. Military jurisdiction was possible not only for crimes against internal security of the State, or crimes committed under state of siege or other sorts of regimes of exception, but also punching, kicking, or insulting a police officer. Crimes against national police officers (*carabineros*) were sent to military tribunals. In part for this reason, military courts in Chile saw as many or more civilians as military and police personnel. This made it possible for the Chilean military junta to apply existing constitutional provisions, existing national security laws, and existing articles of the Military Code of Justice to repress opposition.

Like the Brazilians, the Chilean junta also amended existing

provisions through edicts (*bandos*) and decrees, but it did not have to expand the already expansive scope of military jurisdiction over civilians and it did not have to purge the Supreme Court or the court system more generally, though it did offer incentives for judges who wished to retire, thereby permitting appointment of even more reliable magistrates. (This was in marked contrast to the only other, if shorter-term, 20<sup>th</sup> century Chilean dictatorship installed by Carlos Ibáñez, 1927-31, which *began* with a purge of the Supreme Court!).

Moreover, the Chilean military junta did not usually “usurp” judicial authority (114) or “seize” judicial authority (115)—it exercised *and exceeded* the authority of military courts in a draconian fashion, usually failing to follow the procedures required for proper trials in accord with the Military Code of Justice. The junta and the military tribunals abused judicial authority; they acted illegally and despotically—but they did not invent the authority of military courts over civilians (as occurred in Brazil’s institutional acts) that depended on a military code that dated from 1839 and from legislation as recent as the 1972 arms control law approved by Salvador Allende’s Popular Unity coalition.

Beyond the long-ago history of military jurisdiction over civilians, including the first use of *consejos de guerra* to repress and execute (on the gallows) civilian opposition by Joaquín Prieto and Diego Portales in the mid-1830s (Loveman, 2001) the Chilean Supreme Court, in addition to its historical tendency to self-circumscribe its jurisdiction, whether in the name of “separation of powers” or in the name of internal security and public order, enthusiastically supported the 1973 military coup, refused to protect citizens and residents against illegal arrest, detention, torture, murder, and disappearance by the military regime (Mera, et.al, 1987, Hilbink, 1999, 2003). The Court almost always refused serious investigation regarding requests for writs of habeas corpus seeking the whereabouts of the “disappeared,” choosing, rather, to accept the

word of junta officials and civilian ministers who claimed that the persons in question had not been detained by the government. This remained the case until the mid-1980s, despite widespread knowledge of clandestine detention and torture centers.

The Chilean Supreme Court justices (and almost all appeals court justices) collaborated, some actively, some passively, with the military regime; there was no need to shut down the Court—as would occur in Argentina after 1976—or to “pack” it and modify its jurisdiction as occurred in Brazil with Institutional Act 2 and the subsequent constitutional reforms (1967, 1969). In fact, most of the Supreme Court justices who served during the military period would not retire for more than a decade after return to civilian rule. Moreover, many of them continued to resist reform of the judicial system; some publicly criticized the 1991 Rettig Commission report that faulted the judiciary for its failure to defend civil liberties and human rights in Chile under the dictatorship.

Pereira is absolutely correct that deep-rooted institutions and political practices influenced the 1973-1990 Chilean military regime’s relationship with the judicial branch. But it is difficult to imagine a “better” integration and consensus between military and judicial elites than that which existed in Chile in 1973. Unlike the Brazilian case, the Chilean Court ruled no act of the junta unconstitutional; it refused even to review military court decisions. In contrast, as indicated above, the Brazilian junta imposed institutional acts (constitutional reforms) in part to overcome judicial efforts, even if limited, to constrain the military’s policies and repression.

In the Argentine case, Pereira is more on target regarding lack of integration and consensus between the military and some judicial elites –though initially Argentine judges generally supported the coup and Argentine jurisprudence on *de facto* regimes clearly advantaged the military junta (Sánchez Viamonte, 1957). The judicial system had experienced repeated and extensive intervention

by the executive branch since the 1940s. A Peronist-dominated congress (1946) impeached several Supreme Court judges; after that time incoming governments regularly forced judges to resign with regime change, whether by coup or election. On the other hand, judges sometimes asserted some autonomy, or at least moved away from the incumbent regimes as they weakened or faced overthrow. Overall, “over the past fifty years, the Court has been dismissed en masse six times and the majority on the Court has been replaced fully nine times” but usually in “particular settings of political change, namely regime change” (Helmke, 2005). And, as Pereira demonstrates, the Argentine military in 1976 perceived themselves as victims of victors’ justice in the recent past due to the amnesties granted to “subversives” in the 1973-76 period.

Under such circumstances it would not be likely for the judicial system, particularly the Supreme Court, to protect citizens’ rights and liberties –especially because the 1976 junta went even beyond its predecessors. On the first day of the coup, the junta purged the Supreme Court, the Attorney General’s office, and the provincial high courts (128).

Of course, the Argentine military junta in 1976 did not have to invent a juridical state of siege where no real war existed (though it did rely on this constitutional mechanism dating from 1853), as in the Chilean case. From 1970 to 1976 escalating violence in the country included attacks on military barracks and police stations. In addition, right-wing paramilitary violence (the Triple-A, connected to the government) targeted leftist movements and labor leaders for assassination.

If in Chile, in 1973, the supposed “state of war” declared by the military junta found the left with no effective military forces to use against the dictatorship, across the Andes the *Montoneros* in 1970 kidnapped, “tried” and executed ex-president and army general Pedro Aramburu and political violence continued unabated into the

mid-1970s, with the return of ex-president Juan Domingo Perón. After Perón's death (1974), political violence (not just rhetoric about violence, as in Chile) bloodied the country. Virtual anarchy reigned.

General Ramón Díaz Bessone's *Guerra revolucionaria en la Argentina, 1959-1978* (1986, 1988) compared the subversive movement in Argentina to the revolutionary wars in Cuba and Nicaragua. He concluded that "the Montoneros' documents leave no room for doubt that they were at war with the national state, against its institutions, and particularly its armed forces" (Cited by Donald Hodges, 1991: 94). Díaz Bessone surely stretches the analogy between the Cuban insurrection, the Sandinista insurrection, and the chaotic political violence in Argentina. Nevertheless, this military 'state of mind' came to be shared by many Argentine civilians who supported the coup in 1976 and provided the social foundations for the military coup and the dictatorship. Interestingly, despite the relative lack of such violence in Chile, the social and political polarization preceding the 1973 coup and the penetration of "National Security Doctrine" within the Chilean military permitted the Chilean junta to adopt a discourse of threat and national salvation quite similar to the Argentines even without an effective leftist *military* challenge to the regime.

By the early 1970s, the Montoneros and the EDP were at war with the armed forces; the EDP attacked a military post in the capital in September, 1973 and invaded the base at Aisle in Buenos Aires province in January 1974. Battles were also fought in the rural areas and mountains. Thus proceeded the counter-revolutionary 'dirty war' that inaugurated a fierce campaign of state terrorism, torture, concentration camps and disappearances. Pereira is correct that institutional failure helps to explain the radical and extra-judicial dirty war (195), also that the National Penal Court (1971) –a new creation abolished in 1973 by the returning Peronistas- was viewed as a failure by the military and their supporters. But the failure of the

court did not precipitate the military's decision to "fight a war against 'subversion'" (125). That decision had already been made—as early as the mid-1960s—with the influence of French officers with service in Algeria who began in the 1950s instructing Argentine military personnel in counter-insurgency techniques based on the "Battle of Algiers."

Argentines were among the first students of French state-terrorist tactics, followed by Brazilians, and others. Pereira is correct that failure of the National Penal Court, or its abolition and the return of Peronismo, was important in the lead up to the dirty war. But so too was the inculcation of anti-terrorist (dirty war) tactics in the military long before 1976, the existence of *real* insurgency, and counterrevolutionary "dirty war" in Argentina (unlike the Chilean case, where the armed left before 1973 was minuscule and without significant *military* initiative), and the encouragement given to the military regime by the United States after 1976.

The Argentine Junta closed down the Supreme Court, as Pereira indicates (128) but not so much because there was no relationship between the military and the court system, but rather because a prior decision had been made to carry out a French-style dirty war against an "enemy" that was both real and militarized (if likely already defeated by 1976). Likewise, as Pereira accurately insists, the Argentine military sought to prevent future amnesties to guerrillas who would return to the fight—as had occurred after 1973. And, crucially, the Argentine Supreme Court had been closed, intervened, and packed on various occasions *coinciding with regime change* since the 1940s. Regime change in Argentina meant loss of independence and purges of the judicial system whether civilian governments replaced military juntas or vice versa. No such tradition existed in Chile—with the exception of the Ibáñez dictatorship (1927-31).

As Pereira writes, the evolution of civil-military relations and

of military institutions—or, more generally, an approach that takes into account the development of Argentine, Chilean, and Brazilian judicial institutions and political culture—offers great insight into what happened in these three countries from the 1960s into the 1990s. However, a deeper look at this evolution would have enriched his book. In a way, this is a burdensome criticism; no book can do it all. Still, the central argument regarding “consensus” and “integration” of judicial and military elites requires more attention to the *particular* institutions and *particular* history under the microscope.

Likewise, other variables need focused attention to understand the modalities of repression by the military regimes in Brazil, Argentina, and Chile, including the diffusion and permeation of French and U.S. military national security doctrine, cold war U.S. military “assistance” programs, the creation and implementation of Operation Condor (McSherry, 1997, 2005), a regional clandestine “anti-terrorist” network created by southern cone militaries (barely mentioned by Pereira in passing, 24), and *the nature of the enemy* encountered by the military governments in each country.

Argentina, like Uruguay (1973), had experienced significant and prolonged political violence carried out by organized urban guerrillas proclaiming revolutionary ideologies. Brazil and Chile faced less menacing military threats from the left at the time of the coups (1964, 1973) notwithstanding propagandistic claims in both countries that plans existed by the parties and movements of the left to massacre military and civilian leaders. In practice, however, the political left in Brazil and Chile did not represent a serious military challenge for the juntas that took power (1973, 1976). Moreover, members of the judicial branch of government in Brazil and Chile publicly supported the coups. In addition to the institutional patterns Pereira identifies, these two dimensions explain the different modalities of political injustice as well as the ongoing relationships

between the military regimes and the judicial systems in these dictatorial experiences. Nevertheless, Brazilian judicial dissidence greatly exceeded that in Chile (which was virtually absent) and so too did judicial dissidence in Argentina (which was largely irrelevant).

My comments make clear that I found Pereira's book provocative and innovative. He has done important theoretical and empirical work for anyone interested in the inner workings of authoritarian regimes and the constraints that an effective, functioning, judiciary might provide in times of dictatorship. In some places I find that he has stretched too far theoretically; in others I find that he has not done quite enough deep institutional history of the countries he chose to study. Still, his final words ring true as a warning to us all: "State violence, politically manipulated legality, and gross injustice are ever-present dangers in all political regimes" (200).



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