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50 YEARS AFTER THE 1973 COUP IN CHILE: ANALYSIS OF THE PROCESSES OF TRANSITION TO DEMOCRACY AND TRANSITIONAL JUSTICE*

Hugo Rojas Corral*

ABSTRACT

After 17 years of military dictatorship (1973–1990), Chile recovered its democracy peacefully and electorally and continues to transition to democracy today. In its first part, this article offers an overview of the main features of the political transition to democracy in Chile. The second part presents the achievements and pending challenges in the field of transitional justice—that is, in the search for truth, memory, reparation, justice, and guarantees of non-repetition. This analytical matrix can be useful for the construction of evaluations and the elaboration of strategic political planning in other countries seeking to move toward full democracy. To ensure that the human rights of the population are *Never Again* violated, it is necessary to both identify and understand the main lessons of the mistakes of the past as well as to continue promoting legal, political, and institutional changes in the transitional process in which Chile is currently engaged. Along with recognizing victims, the main challenge that remains is to

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foster a democratic culture committed to the rule of law and respect for human rights in all sectors of society.

INTRODUCTION

11 September 2023 marked 50 years since the coup d'état by the armed forces that brought an abrupt end to the government of Salvador Allende and a long tradition of democratic-republican life in Chile. After the coup, the country was governed for 17 years by the iron fist of the military junta and its repressive agencies.¹ Congress was shut down, political parties were banned for years, trade unions were repressed², the center-left sectors were severely persecuted, more than 200,000 Chileans lived in exile, and the media was censored.³ The judiciary failed to intervene on behalf of those who demanded justice for the human rights violations and crimes against humanity.⁴

The long, dark night of the dictatorship ended under the terms set out in the transitional rules of the 1980 Constitution: by holding a plebiscite in 1988 in which the population was consulted on whether or not it accepted that the candidate appointed by the military junta (Augusto Pinochet) would be President for another eight years.⁵ The results were unexpected for the dictatorship: 56% of voters were against it, while the remaining 44% were

¹ PABLO POLICZER, *THE RISE AND FALL OF REPRESSION IN CHILE* (2009).

² LIBERTAD SINDICAL Y DERECHOS HUMANOS: ANÁLISIS DE LOS INFORMES DEL COMITÉ DE LIBERTAD SINDICAL DE LA OIT (1973–1990) (Elizabeth Lira and Hugo Rojas eds., 2009); Hugo Rojas, *The Recognition of Victims of Human Rights Violations in Chile. An Analysis of the Complaints of the Chilean Labor Unions Presented to the International Labor Organization during Pinochet's Dictatorship*, in *LATIN AMERICA BETWEEN CONFLICT AND RECONCILIATION* 163–77 (Martin Leiner & Susan Flämig eds., 2012).

³ KRISTIN SORENSEN, *MEDIA, MEMORY, AND HUMAN RIGHTS IN CHILE* 3 (2009).

⁴ LISA HILBINK, *JUECES Y POLÍTICA EN DEMOCRACIA Y DICTADURA: LECCIONES DESDE CHILE* Ch. 4 (2014).

⁵ Juan Linz & Alfred Stepan, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* Ch. 4 (1996).

in favor of Pinochet remaining in office.⁶ As a consequence of the result of the 1988 plebiscite, presidential elections were held at the end of 1989. Thus, 1990 saw the beginning of a long journey of transition to democracy that has not yet ended. After almost 34 years of this transition, and the Chilean transition being a paradigmatic case for transitology studies, it is of academic interest to understand why Chilean society has been unable to move on to the next phase of democratic consolidation. Thus, the first part of this article aims to explain both the main achievements and difficulties of the political process of transition to democracy in Chile, which began in 1990 through elections once democracy had been restored peacefully after 17 years of military dictatorship.

The second part of this article offers a review of the progress made in the transitional justice agenda and identifies the main challenges that remain. To understand the transitional justice process carried out in Chile, an analytical distinction is made between what has happened in each of the five following elements of transitional justice: truth, reparation, memory, justice, and guarantees of non-repetition. Just as the Chilean case is of interest in the field of studies on transitions to democracy, it is equally interesting as a paradigmatic case of transitional justice. The lessons from the Chilean experience may be valuable for other societies that are in authoritarian regimes and that hope to move toward a transition to democracy. It may also be valuable for societies in democratic transitions that need to analyze the developments of their respective transitional justice processes. The more popular support there is for the measures or mechanisms commonly used in the pursuit of transitional justice, the more likely it is that the pace and intensity of the whole process will increase. Certainly, a virtuous balance needs to be struck between the social support

⁶ INSTITUTO NACIONAL DEMÓCRATA PARA ASUNTOS INTERNACIONALES, *LA TRANSICIÓN CHILENA HACIA LA DEMOCRACIA: EL PLEBISCITO PRESIDENCIAL DE 1988* (1989), https://www.ndi.org/sites/default/files/257_cl_transition_spa.pdf [<https://perma.cc/8DT5-CFE5>].

and legitimacy of transitional justice on one hand, and the governability of the country on the other. This research may also be of interest to comparative researchers, as it offers an analytical matrix that facilitates the observation and monitoring of ongoing transitional justice processes.

I. ANALYSIS OF THE TRANSITION TO DEMOCRACY IN CHILE

A. *Political Challenges of Transitions to Democracy*

The transition from an authoritarian or totalitarian regime to a democratic regime is far more complex than one might think at first glance. It may even be the case that there is no clear specific milestone that allows citizens to understand that a new political era has begun in the country. For example, in Brazil, it is still debated as to when the military dictatorship began and ended.⁷ Beyond reaching a broad consensus on the dates, from a cultural point of view, a transition to democracy really begins to have social significance when a broad sector of the population is aware that a new political stage has begun and is aimed at advancing towards the establishment of a democratic regime. During transitions, citizens may find themselves in a grey area in which remnants of the past persist, coexisting with new authorities, institutions, and processes that should be more democratic than those that preceded them. In transitions, citizens visualize that the political regime in which they find themselves is more democratic than the previous one and probably project its improvement or consolidation in the future.

Transitions to democracy are characterized by periods of adjustment and change at the institutional level.⁸ But it is a mistake to concentrate solely on

⁷ Maria Celina D'Araujo, *Taking Stock (with discomfort) of the Military Dictatorship Fifty Years after the 1964 Coup: A Bibliographical Essay*, 9 BRAZILIAN POL. SCI. REV. 3, 143–63 (2015).

⁸ Mario Fernández, *Instituciones y democratización: el caso de Chile desde 1990*, EL PRESIDENCIALISMO RENOVADO: INSTITUCIONES Y CAMBIO POLÍTICO EN AMÉRICA LATINA 269–86 (Dieter Nohlen & Mario Fernández eds., 1998).

the analysis of what happens in the sphere of public institutions. In a transition to democracy, reforms in social subsystems—political, legal, economic, cultural, and social—are combined simultaneously. Specialists studying each of these dimensions or subsystems can carry out separate assessments and analyses, identifying causalities and evaluating the impact of one subsystem on another, etc. At the socio-cultural level it is important to understand how citizens would answer four questions:

- 1) Does society understand that it is moving from an authoritarian era to a democratic transition?
- 2) Is society enthusiastic about this new political stage or nostalgic for the past?
- 3) Is society supporting the changes occurring in the transition or, on the contrary, is it resisting these changes?
- 4) Does society consider the pace of transition to be too slow or too fast?

Political transitions are times of change and movement that can be disorienting for citizens. It is therefore very important that the political objectives of transitions are properly communicated to the population. The five main policy questions and challenges that both political leaders and citizens need to consider in transitions to democracy are as follows:

- 1) How can the threats of a possible regression to the previous era be minimized? It is important to bear in mind that not all sectors will support a process of transition to democracy, and criticism could even become generalized to the point of derailing the democratic process, leading to a return to a new cycle of violence and authoritarianism.
- 2) How can the population be assured that progress is being made toward peace and respect for human rights within the framework of the rule of law? It is not possible to advance towards social reconciliation of the different sectors of the population without the prior search for major common agreements in the field of transitional justice and human rights.

3) How can the traumatic past be dealt with wisely and responsibly? A sense of revenge or a sense of having entered an era of arbitrary reprisals must be avoided at all costs, and all measures proposed to deal with the painful legacies of the past must have broad political consensus.

4) How can most political sectors be involved in moving forward together to overcome the various obstacles to transition? For this to happen within a framework of civic friendship, periodic elections must be transparent and competitive, otherwise the democratic process will be discredited. The fact that democracy has been restored does not necessarily mean that the quality of that democracy is adequate or on the right track. It is entirely possible that the emerging democracy may have numerous weaknesses and may even be distorted into a regime where international standards of human rights, rule of law, and democracy are not respected. It is not enough to establish democratic institutions and periodic elections. The fundamental challenge is to move towards an increasingly democratic culture in all sectors of society, and thus to move from a representative democracy to an increasingly participatory democracy.

5) How can economic growth be ensured, and corruption prevented? Transitions can be delegitimized if citizens perceive the authorities and bureaucracy to be corrupt. Just as economic growth and human development are great allies of transitional processes, economic crises can derail a transition. Taking on these important challenges requires strategic planning toward a political transition, as the cost of improvising on these issues may be too high.

B. Characteristics of the Chilean Transition to Democracy

In the plebiscite of 5 October 1988, 56% of Chileans rejected Augusto Pinochet's proposal to stay in power for another eight years. In December 1989, democratic elections were held, and the candidate of the center-left coalition called Concertación de Partidos por la Democracia (Concertation of Parties for Democracy) won. On 11 March 1990, Pinochet handed over the presidential sash to the first President of the transition to democracy,

Patricio Aylwin. In the 33 years since, the country has held seven other free, transparent, and competitive presidential elections.

A first feature of the Chilean transition is that it has been an “agreed process” even before it began and has been the subject of multiple negotiations between political leaders for more than 30 years.⁹ This means that the process has had to be conducted with margins of flexibility and contingency, despite the solid foundations of democratically-entrenched structures. Based on the Chilean experience, political leaders can be advised not to wait for the transition to begin before starting cross-sectoral negotiations.¹⁰ To move towards a shared and inclusive future, it is preferable to reach a broad consensus among different political sectors, particularly if the transition to democracy is likely to be a long one. Once Pinochet was electorally defeated in 1988,¹¹ legal-political teams from the Concertación and Renovación Nacional parties (center-right party) negotiated a set of proposed reforms to the 1980 Constitution that were later revised by the military junta. The citizenry validated the proposals, which were approved by 85.7% of the votes, in the plebiscite of 30 July 1989. As a result, the introduction of constitutional reforms dissolved some of the authoritarian enclaves that had persisted during the years of transition.¹² The success of these initial multi-sectoral negotiations was later replicated in what is called the “politics of consensus,” which has been the trend in

⁹ Paulo Hidalgo & Marcelo Fuentes Villarroel, *El Ciclo Político de la Concertación* (1990–2010), 11 ENCRUCIJADA AMERICANA 1, 55–64 (2019), <https://dialnet.unirioja.es/servlet/articulo?codigo=7055632> [https://perma.cc/4N9W-G2GT].

¹⁰ Edgardo Boeninger, *El caso chileno*, in REFORMA POLÍTICA Y CONSOLIDACIÓN DEMOCRÁTICA. EUROPA Y AMÉRICA LATINA 256–62 (Dieter Nohlen & Aldo Solari eds., 1988).

¹¹ JOAQUÍN FERNANDOIS, LA DEMOCRACIA EN CHILE: TRAYECTORIAS DE SÍSIFO Ch. 12 (2020).

¹² See Law No. 18825, published on Aug. 17, 1989, DIARIO OFICIAL [D.O.] (Chile).

more than three decades of transition in Chile.¹³ This means that political-institutional reforms have been gradual and generally publicly formulated to the extent that there are broad agreements between the main political parties.¹⁴ In part, this has been due to the high quorum required to pass constitutional amendments or major laws under the 1980 Constitution.¹⁵ These high quorums were exploited by the right-wing parties who, in practice, were the ones who decided whether substantive reforms to the political system would be approved. Thus, they did not allow the neo-liberal model imposed during the dictatorship to be replaced, nor did they allow modifications to be introduced that would allow for a more solidarity-based market economy.

A second feature of the Chilean transition is its long duration.¹⁶ It might surprise and even demotivate any outside observer that a political transition has been spread over more than three decades, as common sense would lead one to think that the transition process should be entrusted to a particular generation. In Chile, the unique character of the transition being “intergenerational” creates even more complex challenges due to the constant change of political actors at the different negotiation tables that

¹³ HUMAN RIGHTS WATCH, HUMAN RIGHTS AND THE “POLITICS OF AGREEMENTS”: CHILE DURING PRESIDENT AYLWIN’S FIRST YEAR (1991); LUIS GARRIDO-VERGARA, SPECIES OF CAPITAL IN THE POLITICAL ELITE: WHO RULES IN CHILE? (2020).

¹⁴ A good example of this is the 2005 political negotiations, which led to a significant set of reforms to the 1980 Constitution after its approval in Congress. In retrospect, perhaps it would have been better if such reforms had been consulted in a mandatory ratifying plebiscite.

¹⁵ For decades, two-thirds or three-fifths of parliamentarians in both chambers (Deputies and Senators) were required to reform constitutional norms, depending on the chapter; however, the Constitution was amended in 2022, reducing the quorum for constitutional reform to four-sevenths of sitting parliamentarians in both chambers (Deputies and Senators). *See* Law No. 21481 (2022).

¹⁶ In the opposite opinion, MANUEL ANTONIO GARRETÓN, DEL POSTMODERNISMO A LA SOCIEDAD DEMOCRÁTICA: GLOBALIZACIÓN Y POLÍTICA EN EL BICENTENARIO 77–82 (2007).

have taken place over the years.¹⁷ In this regard, the recommendation that can be made from Chile is to control the initial impulsiveness that can be generated at the beginning of a transition and to arm oneself with patience because it may be a process that will take many more years than expected. In Chile, it was necessary to ensure governability, economic stability, and democratic robustness, and thus move towards the approval of gradual reforms.¹⁸ Those leading a political transition must act prudently and responsibly, and this sometimes implies taking such unpopular decisions as demobilizing the citizenry, so that the transition can be carried out in an orderly and peaceful manner. Non-democratic sectors often seek arguments to criticize the new democratic authorities, as if the authoritarian past were better than the emerging democracy. It is therefore a mistake to give the opposition arguments about the lack of political leadership and governability of the new democratic authorities. This recommendation is especially valuable in cases where authoritarian enclaves are numerous or where the legal-political framework constructed in authoritarian regimes implies an enormous effort to reform constitutional norms and laws. For example, this is what will happen in countries such as Cuba or Venezuela where the technical teams of their respective transitions will have to review the main norms—those issued by the previous and current authoritarian governments—one by one.

A third characteristic that is often mentioned is that the Chilean transition has been “successful.”¹⁹ Such a statement needs to be formulated

¹⁷ Eugenio Tironi, *Carta a un viejo concertacionista*, EL MERCURIO (Sept. 7, 2011), at A3; Patricio Fernández, *El descontento chileno y los hijos de la democracia*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/es/2016/12/12/espanol/opinion/el-descontento-chileno-y-los-hijos-de-la-democracia.html> [<https://perma.cc/7LZ8-GX5A>].

¹⁸ JOAQUÍN FERMANDOIS, LA DEMOCRACIA EN CHILE: TRAYECTORIAS DE SÍSIFO Ch. 13 (2020).

¹⁹ Genaro Arriagada, *El éxito de la transición de Chile: de una intensa polarización a una democracia estable*, in TRANSICIONES DEMOCRÁTICAS: ENSEÑANZAS DE LÍDERES POLÍTICOS 83–94 (Sergio Bitar & Abraham F. Lowenthal eds., 2016).

cautiously.²⁰ A quick review of the literature on transitions, as well as their economic and political dimensions, suggests that the Chilean transition is a good example to consider. For more than three decades in Chile, there have been no coups or civil wars, elections have taken place regularly, and there has been alternation in power. Economic performance is also impressive, and poverty has declined both considerably and persistently.²¹ Chile has successfully integrated into the global economy, has signed numerous free-trade agreements, and has responsibly adopted and managed macroeconomic policies.²² This does not mean that the population is happy with the political-economic model in Chile, though.²³ In October 2019, Chilean society crackled with rage, protesting massively in the country's main cities; the social mobilization only ended after the approval of the "Pact for Social Peace and a New Constitution" as well as the restrictions of the global pandemic.²⁴ Chilean society has been unable to close the

²⁰ Manuel Antonio Garretón, *LA SOCIEDAD EN QUE VIVI(RE)MOS: INTRODUCCIÓN SOCIOLÓGICA AL CAMBIO DE SIGLO* Ch. 6 (2000).

²¹ Silvia Borzutzky, Claudia Sanhueza & Kirsten Sehnbruch, *Reducción de la pobreza: ¿De deuda social a un estado de bienestar?*, *EL BALANCE: POLÍTICA Y POLÍTICAS DE LA CONCERTACIÓN 1990–2010* 211–28 (Kirsten Sehnbruch & Peter M. Siavelis eds., 2014).

²² Óscar Landerretche, *La política económica y la ideología de la estabilidad*, *EL BALANCE: POLÍTICA Y POLÍTICAS DE LA CONCERTACIÓN 1990–2010* 169–90 (Kirsten Sehnbruch & Peter M. Siavelis eds., 2014); Óscar Landerretche, *Construyendo solvencia fiscal: el éxito macroeconómico de la Concertación*, in *LA PARADOJA APARENTE. EQUIDAD Y EFICIENCIA: RESOLVIENDO EL DILEMA* 83–137 (Patricio Meller ed., 2005).

²³ TOMAS MOULIAN, *CHILE ACTUAL: ANATOMIA DE UN MITO* (1997); FERNANDO ATRIA, GUILLERMO LARRAÍN, JOSÉ MIGUEL BENAVENTE, JAVIER COUSO & ALFREDO JOIGNANT, *EL OTRO MODELO: DEL ORDEN NEOLIBERAL AL RÉGIMEN DE LO PÚBLICO* (2013); ALBERTO MAYOL, *NO AL LUCRO: DE LA CRISIS DEL MODELO A LA NUEVA ERA POLÍTICA* (2012); César Guzmán-Concha, *Chilean Neoliberalism under Scrutiny: Class, Power, and Conflict are Back in Town*, *LATIN AMERICAN RSCH. REV.*, <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E19F30B3173AE6D6D35AC9448D004396/S0023879100003708a.pdf/chilean-neoliberalism-under-scrutiny-class-power-and-conflict-are-back-in-town.pdf> [https://perma.cc/TTE4-LHPU].

²⁴ See, e.g., CARLOS RUIZ ENCINA, *OCTUBRE CHILENO. LA IRRUPCIÓN DE UN NUEVO PUEBLO [CHILEAN OCTOBER: THE EMERGENCE OF A NEW PUEBLO]* (2020); CARLOS PEÑA, *PENSAR EL MALESTAR. LA CRISIS DE OCTUBRE Y LA CUESTIÓN CONSTITUCIONAL [THINK ABOUT THE DISCOMFORT. THE OCTOBER CRISIS AND THE CONSTITUTIONAL*

transition cycle and has already had three failed constitutional processes (2014–18, 2021–22, and 2023).

C. Key Factors in Chile's Transition to Democracy

Transitions are processes that cannot be left adrift under the cloak of improvisation and lack of strategic-political planning; “political leadership” is crucial to bringing the process to a successful conclusion.²⁵ For this reason, the wisdom and prudence of the country’s highest authorities is essential. For example, the first President of the Chilean transition, Patricio Aylwin, set out to advance towards “national reconciliation;”²⁶ the second President, Eduardo Frei, called on the country to join the path of “modernisation;”²⁷ the third, Ricardo Lagos, aspired to “growth with equity,”²⁸ and thereby increase opportunities for the most vulnerable or unprotected sectors. However, it is not enough to identify an inclusive narrative and effective leadership; transitions also require the intertwined action of activists and promoters of the process, spread across numerous public and civil society bodies. Transitions depend on the cross-cutting support network that is built and fostered by common goals. At the end of the day, leaders and ordinary citizens alike must feel committed to the

QUESTION] (2020); DANAE MLYNARZ, *EL PUEBLO EN MOVIMIENTO: DEL MALESTAR AL ESTALLIDO* [THE PEOPLE IN MOTION: FROM UNREST TO OUTBREAK] (2020).

²⁵ Yeves Leterme, *Prefacio* [Preface] to *TRANSICIONES DEMOCRÁTICAS: ENSEÑANZAS DE LÍDERES POLÍTICOS* [Democratic Transitions: Conversations with World Leaders] 17–18 (Sergio Bitar & Abraham F. Lowenthal eds., 2016); Sergio Bitar & Abraham F. Lowenthal, *Introducción* [Introduction] to *TRANSICIONES DEMOCRÁTICAS: ENSEÑANZAS DE LÍDERES POLÍTICOS* 21–22 (2016).

²⁶ RAFAEL OTANO, *CRÓNICA DE LA TRANSICIÓN* (2024); ASCANIO CAVALLO, *LA HISTORIA OCULTA DE LA TRANSICIÓN* (1998); SILVIA BORZUTZKY, *HUMAN RIGHTS POLICIES IN CHILE. THE UNFINISHED STRUGGLE FOR TRUTH AND JUSTICE* 57–87 (2017).

²⁷ PAULO HIDALGO, *EL CICLO POLÍTICO DE LA CONCERTACIÓN* (1990–2010) 117 (2011).

²⁸ ASCANIO CAVALLO AND ROCÍO MONTES, *LA HISTORIA OCULTA DE LA DÉCADA SOCIALISTA* (2022).

democracy they are rebuilding and solidifying daily, eventually consolidating it by ensuring genuine spaces for democratic participation.

Another variable that must be considered is the political institutional design, as it can affect the course of the transition. Social actions and political interventions take place in a field previously established by the Constitution and laws. The improvement of democracy is only possible to the extent that the actions of political leaders and social actors respect existing Constitutional and legal rules as well as the rule of law. That is why political leaders must be mindful of the scope of their actions and ensure that they do not transgress or encroach on the powers of other authorities, no matter how well-intentioned they may be. There is a need for an atonement between the decisions of political leaders and the priorities and perceptions of ordinary people. Rather than defining or shaping political processes, leaders only have the capacity to guide the course and intensity of transitions to democracy. Citizens can rebel against decisions taken by political leaders and challenge them publicly, affecting their performance in the political arena. In the Chilean case, for example, there were authoritarian enclaves that lasted too long; Pinochet remained Commander-in-Chief of the army until March 1998 and then joined the Senate as a lifetime Senator.²⁹ The democratically elected authorities learned to live with General Pinochet's stubbornness and permanent threat and had to continue to respect the Constitution. It was also uncomfortable to govern with an electoral system that took 25 years to reform, moving from a binominal to a proportional electoral model.³⁰ Changes to the judiciary

²⁹ Borzutzky, *supra* note 26, at 102–3.

³⁰ Between 1989 and 2015 the Chilean electoral system was binominal, which affected minority sectors and over-represented the largest political coalitions, particularly the right wing, as it only needed to secure one-third of the votes in each district to obtain one of the two parliamentary seats per district. After several years of negotiations, Law No. 20840 was finally passed, replacing the binominal electoral system with a proportional electoral system. *See* Law No. 20840, *Sustituye El Sistema Electoral Binominal Por Uno De Carácter Proporcional Inclusivo Y Fortalece La Representatividad Del Congreso Nacional* [Replaces the Binominal Electoral System With One of an Inclusive

also took too long and dedication, as the judges' disregard for the human rights violations committed during the dictatorship required adjustments not only to the procedural rules but also to the judicial culture.³¹

The importance of economic growth as a factor in the success of a transition has already been mentioned. Such growth must not only be sustained, but it must also be equitable.³² A transitional process may cease to be a priority for the population if the economy declines or if people's incomes are insufficient to cover basic needs. One of the pending problems in Chile relates to the mechanisms that have been used to measure poverty. It could be that the instruments are not entirely adequate and that the threshold for defining whether a person is poor is too low. This is particularly worrying in a neo-liberal state that privileges the principle of subsidiarity instead of opting for the configuration of a welfare state that offers higher levels of social protection. It is almost common sense in today's Chile to say that, in the three decades of transition to democracy, the percentage of the population in poverty was reduced from half to only a tenth. If this is so, then the question arises as to the quality of the instruments being used to measure poverty and whether they are sufficiently rigorous. It seems that the mechanisms used in Chile to measure poverty set very low thresholds, whereas the possibilities of satisfying basic needs and having an adequate standard of living require higher incomes and both a social and a welfare state, which, so far, has been impossible to build.

Proportional Nature and Strengthens the Representativeness of the National Congress], Apr. 27, 2015, DIARIO OFICIAL [D.O.] (Chile).

³¹ Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 L. & SOC. INQUIRY 99, 135 (2010).

³² José Manuel Ahumada & Andrés Solimano, *The Chilean Economic Model and Its Subordinate Democracy*, in PINOCHET'S ECONOMIC ACCOMPLICES: AN UNEQUAL COUNTRY BY FORCE 93–108 (Juan Pablo Bohoslavsky, Karinna Fernández & Sebastián Smart eds., 2020).

Another key factor that cannot be ignored relates to how abuses committed under the previous authoritarian regime are dealt with. According to the United Nations Security Council, transitional justice is understood as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation.”³³ The achievements and challenges in the transitional justice process are intimately related to how society understands the process of transition to democracy. For example, under the military dictatorship of Augusto Pinochet, state agents systematically, pervasively, and institutionally violated the human rights of the population—mainly for ideological reasons.³⁴ Dealing adequately and frankly with that stormy past was not a simple matter and, to this day, demands persist for 1) truth; 2) justice; 3) reparations; 4) memories; and 5) guarantees of non-repetition so that the human rights of citizens are *Never Again* violated. In the following section, the light and shadows of the transitional justice process in Chile are explained, identifying the advances and pending challenges in each of the five elements of transitional justice.

II. ANALYSIS OF THE TRANSITIONAL JUSTICE PROCESS IN CHILE

A. *Search for Truth*

In these 33 years of transition, the State of Chile has officially recognized 43,234 victims of human rights violations: 3,216 disappeared and politically

³³ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

³⁴ INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN 96 [Report of the National Commission of Truth and Reconciliation] (1991) <https://bibliotecadigital.indh.cl/items/edb83a4d-9121-48ee-8e66-09fe31e926fe> [<https://perma.cc/GV5L-QGTZ>]; INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA 172 [Report of the National Commission on Political Imprisonment and Torture] (2004) <https://bibliotecadigital.indh.cl/bitstreams/76dbc03b-a81d-45b6-bb14-9c3e65cf15ab/download> [<https://perma.cc/5EYG-X4WG>].

executed detainees, and 40,018 surviving victims of political imprisonment or torture.³⁵ This has been recorded by the official bodies that have been set up to compile and qualify such records: the Truth and Reconciliation Commission (1990–1991); the National Corporation for Reparation and Reconciliation (1992–1997); the Human Rights Dialogue Table (1999–2000); the Political Prisoners and Torture Commission (2003–2005); and the Presidential Advisory Commission for the Qualification of Disappeared Detainees, Politically Executed and Victims of Political Prisoners and Torture (2010–2011).³⁶ Of the total number of disappeared (1,469), the State of Chile has been able to identify the remains of 307 of them, but the bodies of 1,162 people have yet to be identified.³⁷ Given that this is an important pending debt and that it keeps deep wounds open in the victims' relatives, preventing them from performing the funeral rite and affecting the mourning for their disappeared loved ones,³⁸ President Gabriel Boric

³⁵ HUGO ROJAS, PAST HUMAN RIGHTS VIOLATIONS AND THE QUESTION OF INDIFFERENCE: THE CASE OF CHILE 11 (2022).

³⁶ HUGO ROJAS & MIRIAM SHAFTOE, HUMAN RIGHTS AND TRANSITIONAL JUSTICE IN CHILE 41 (2022).

³⁷ MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, ACTUALIZACIÓN NÓMINA DE VÍCTIMAS DE DESAPARICIÓN FORZADA, CALIFICADAS EN LOS INFORMES DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, CORPORACIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN, Y COMISIÓN PRESIDENCIAL ASESORA PARA LA CALIFICACIÓN DE DETENIDOS DESAPARECIDOS, EJECUTADOS POLÍTICOS Y VÍCTIMAS DE PRISIÓN POLÍTICA Y TORTURA [LIST UPDATE OF VICTIMS OF FORCED DISAPPEARANCE, QUALIFIED IN THE REPORTS OF THE NATIONAL TRUTH AND RECONCILIATION COMMISSION, NATIONAL CORPORATION FOR REPARATION AND RECONCILIATION, AND PRESIDENTIAL ADVISORY COMMISSION FOR THE CLASSIFICATION OF DISAPPEARED DETAINEES, POLITICALLY EXECUTED PERSONS AND VICTIMS OF POLITICAL IMPRISONMENT AND TORTURE] (2022), <https://web.archive.org/web/20220619175918/https://pdh.minjusticia.gob.cl/wp-content/uploads/2022/03/Actualizacio%CC%81n-Cifra-de-Detenidos-Desaparecidos.pdf> [<https://perma.cc/D3VX-8RKL>].

³⁸ MARÍA ISABEL CASTILLO VERGARA, EL (IM)POSIBLE PROCESO DE DUELO. FAMILIARES DE DETENIDOS DESAPARECIDOS: VIOLENCIA POLÍTICA, TRAUMA Y MEMORIA [The (im)possible grieving process. Relatives of missing detainees: political violence, trauma, and memory] (2013); Rocío Norambuena Avilés, *Identification of Skeletal Remains of People Detained Disappeared and Persons Executed for Political Reasons, and Personal Integrity of the Relatives*, 3 LAT. AM. LEGAL STUD. 77 (2018).

announced the “National Search Plan: Truth and Justice” on 30 August 2023.³⁹

Court rulings have also been important in the search for the truth. For example, the higher courts of justice in Chile (Supreme Court and Courts of Appeal) have referred in their judgments to 862 absent victims (412 disappeared and 450 politically executed) and to the commission of serious crimes against 228 surviving victims.⁴⁰ What has happened in the justice sector regarding human rights convictions and pending trials is explained in more detail below.

Journalistic and documentary investigations, publication of autobiographies and testimonies of victims, academic research, commemorative events at sites of memory, etc., are some of the devices through which activists and those interested in human rights have sought to disseminate part of the truth about the horrors of the dictatorship. In addition to the search for and identification of the skeletal remains of the victims of enforced disappearance, some important challenges remain:

1. The diaspora and the social consequences of Chilean exile are not sufficiently researched or understood by Chilean society.
2. The state has set up truth commissions to investigate the most serious crimes, but many other situations of violence remain uninvestigated. For example, mass raids on towns, beatings and arrests in the streets, the participation of civilians in acts of state terrorism, politically motivated dismissals and labor persecution,

³⁹ The design of this Plan has been formulated with the participation of the victims’ families. *See Plan Nacional de Búsqueda: Verdad y Justicia* [National Search Plan: Truth and Justice], MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS (2024), <https://www.derechoshumanos.gob.cl/plan-nacional-de-busqueda/> [<https://perma.cc/N782-MMFW>].

⁴⁰ Cath Collins and Andrea Ordóñez, *Conversar con el pasado, transformar este presente: Justicia transicional como justicia constituyente* [Conversing with the past, transforming this present: Transitional justice as constituent justice], in CENTRO DE DERECHOS HUMANOS, *INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2021* [Annual Report on Human Rights in Chile 2021] 66 (Francisca Vargas ed., 2021).

ensorship, and intervention in the media, etc. have not been investigated.

3. Testimonies given before truth commissions remain confidential, which has affected the dissemination and socialization of victims' statements. For example, Article 15 of Law No. 19,992 (2004) establishes that statements before the Political Prisoners and Torture Commission must remain confidential until 2054.

4. Further official investigations are needed into the extent of the abuses committed against Indigenous peoples, and, in particular, the state repression that was committed in rural areas.⁴¹

5. To this day it has been impossible to access or know the registration systems and archives of the armed forces and secret police or repressive bodies of the dictatorship. These archives surely contain relevant information for the clarification of the atrocities. There are comparative experiences that show notable progress in this area, as in the cases of Germany, Spain, and Uruguay, among many others. Despite the passage of time and the limited results achieved to date in Chile, it is necessary to find as many records of the repressive agencies as possible, whether they are kept in institutional vaults or private safes.

6. Citizen awareness of the magnitude of human rights violations remains low. For example, 30% of Chilean adults say they know

⁴¹ ALEJANDRO SAAVEDRA PELÁEZ, *LOS MAPUCHE EN LA SOCIEDAD CHILENA ACTUAL* (2022); MARTÍN CORREA CABRERA, *LA REVANCHA: GOLPE EN LA ARAUCANÍA* (2023). For example, the recent report of the Commission for the Clarification of Truth, Coexistence, and Non-Repetition in Colombia (2022) offers new developments on the notion of “collective reparations” for Indigenous peoples, which could be used by other countries. The lessons learned in Colombia regarding the forced displacement of Indigenous and rural populations could also be used by other countries that have experienced agrarian reform and counter-reform and State repression in rural areas. Unfortunately, the voices and demands of victims living in rural or isolated areas are often invisible in transitional justice processes because they are in territories far from the main cities, in addition to the discrimination they have suffered for centuries.

nothing or very little about the dictatorship, and 7% do not answer when asked if they know about the dictatorship.⁴²

B. *Reparation for Victims and their Families*

In the Chilean transition, numerous material and symbolic reparation mechanisms have been implemented to benefit both the victims and their families.⁴³ This would not have been possible without commitments by the various transitional governments to accommodate (1) the relatives of the victims of enforced disappearance, (2) surviving victims of torture and political imprisonment, and (3) the survivors' families. Chile has slowly learned the importance of involving victims in all decisions regarding reparation measures for the damages caused by human rights violations to ensure that these measures are both comprehensive and timely.⁴⁴ In the beginning, this was not always the case, and some of the reparation measures were established by authorities and public officials without consulting the victims. In the last decade, the debate on reparation issues has become quite technical, especially when it comes to establishing pension amounts, where economic language takes precedence over political language. This observation may be valuable for other countries in transition because it is often the case that human rights experts are so preoccupied with knowing the truth and seeing that justice is done that, they are unfamiliar with the language of economics and public finance. This is

⁴² “58% of Chileans say they know a lot or a little about the 1973 coup d’état. Thirty-two percent say they know little or nothing, while 19% do not answer... There is more knowledge about the dictatorship than about the coup d’état (58%), 63% say they know a lot and quite a lot about the dictatorship of Augusto Pinochet, while 30% say they know little or nothing about it. Seven percent did not answer”. *Chile a la Sombra de Pinochet: la Opinión Pública Sobre la “Era de Pinochet” 1973-2023* [Chile in the Shadow of Pinochet: Public opinion about the “Pinochet Era” 1973-2023], MARKET OPINION RSCH. INTERNACIONAL 5, 7 (2023), <http://morichile.cl/wp-content/uploads/2023/05/Chile-a-la-sombra-de-Pinochet.pdf> [<https://perma.cc/Q3JT-XAAG>].

⁴³ ELIZABETH LIRA & BRIAN LOVEMAN, *POLÍTICAS DE REPARACIÓN: CHILE 1990–2004* [REPARATION POLITICS: CHILE 1990–2004] (2005).

⁴⁴ Rojas & Shaftoe, *supra* note 36, at 13.

relevant because it implies that human rights entrepreneurs must also be concerned with mastering the technical language of public finance. In that sphere, economists and engineers may be less sensitive to the transitional justice agenda than victims and activists expect, thus making the proactive involvement of all disciplines in the transitional justice process an important challenge.

In terms of reparations for the victims in Chile, some of the main achievements are as follows:

1. Following the 1991 Report of the Truth and Reparation Commission (which identified cases of disappearance, political execution, and torture resulting in death), the victims' families have received monthly pensions from the State as compensation.⁴⁵

2. The National Office of Return promoted initiatives that supported the return of 52,557 people who were living in exile in 70 different countries.⁴⁶

3. The Programme for the Recognition of the Politically Exonerated benefited 86,208 people who lost their jobs for political reasons.⁴⁷

4. In the early 1990s, the Programme for Reparation and Comprehensive Health Care (PRAIS) was created,⁴⁸ which has assisted more than 800,000 victims and their families in physical and psychological health to this day.

5. Since the Report of the Political Prisoners and Torture Commission was published in 2004, the State has granted monthly

⁴⁵ See Law No. 19,123 (1992).

⁴⁶ *Id.* 99–100 (2022).

⁴⁷ *Id.*

⁴⁸ Elizabeth Lira, *Reflections on Rehabilitation as a Form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT'L HUM. RTS. L. REV. 194 (2016).

pensions and other benefits in support of the victims recognized in that report.⁴⁹

6. Symbolic measures, including the creation of the Museum of Memory and Human Rights in 2010 as well as state funding for various memory sites.⁵⁰

It is worth insisting on symbolic measures such as public apologies and other initiatives that vindicate the dignity of the victims. Public funds to compensate victims may be meager, but this does not mean that the efforts shown by public officials are irrelevant to victims. What really matters is that victims feel recognized by the State and the society to which they belong; victims want every effort to be made to welcome and compensate them. It would also be valuable to expand the notion of reparation to the collective level because discussions on reparations may not be sufficient if they are only at the individual level. This is particularly relevant for Indigenous communities that were violated during the dictatorship, as well as the settlements of rural communities that benefited from the agrarian reform (1967–73) and were subsequently expelled from their land during the agrarian counter-reform process that took place in the mid-1970s.⁵¹

⁴⁹ See Law No. 19992, Establece Pension De Reparacion y Otorga Otros Beneficios A Favor De Las Personas Que Indica [Establishes Repair Pension and Grants Other Benefits in Favor of the People Indicated], Dec. 17, 2004, DIARIO OFICIAL [D.O.].

⁵⁰ Rojas & Shaftoe, *supra* note 36, at 117–25.

⁵¹ Chile was one of the Latin American countries where a land reform law was passed in the 1960s, given the concentration of agricultural land in the hands of the economic elite since colonial times. Between 1967 and 1973, the state expropriated 10 million hectares intending to transfer them to rural settlements and peasants, which not only produced profound transformations in social relations in rural areas but also generated the fury of the large landowners (*latifundistas*). BRIAN LOVEMAN AND ELIZABETH LIRA, LOS CAMPESINOS “EXONERADOS DE LA TIERRA”. LEYES Y POLÍTICAS DE REPARACIÓN Y CLIENTELISMO POLÍTICO EN CHILE [Peasants “exonerated from the land”: laws and policies of reparation and political clientelism in Chile] (2021); see also PATRICIA RICHARDS, RACISMO: EL MODELO CHILENO Y EL MULTICULTURALISMO NEOLIBERAL BAJO LA CONCERTACIÓN 1990–2010 [Racism: the Chilean model and neoliberal multiculturalism under Concertación, 1990–2010] (2016).

C. *Memory and Commemoration*

Chile lacks a shared memory of its recent past.⁵² Rather, a variety of collective memories coexist, offering interpretative frameworks through which people know or remember the meaning of past events. Some of these memories are antagonistic, as in the case of the memories of the victims and the memories of the perpetrators as well as nostalgics of the dictatorship. As the issue of human rights violations remains controversial, there are sectors of the population that either have received little information or are not interested in learning about what happened. An important challenge, then, is for all sectors to condemn the human rights violations that occurred during the dictatorship, which requires that these issues be adequately addressed in the school curriculum and popular culture. According to Elizabeth Jelin, the role that memory entrepreneurs can play in this matter remains essential⁵³; otherwise, there is a risk that these issues will be forgotten or continue to cause division.

Thanks to the efforts of private initiatives—especially by victims, their families, and human rights groups—it has been possible to preserve and promote several sites of memory that are currently used for ceremonies and commemorative events.⁵⁴ More than 40 of these sites have been granted national historic heritage status by the National Monuments Council and should therefore be safeguarded by both the state and civil society.⁵⁵

⁵² STEVE STERN, *BATTLING FOR HEARTS AND MINDS: MEMORY STRUGGLES IN PINOCHET'S CHILE, 1973–1988* (2019); Ludmila Diakova, *Historical memory and political polarization in Chile*, 12 *LAT. AM.* 61 (2019).

⁵³ ELIZABETH JELIN, *LOS TRABAJOS DE LA MEMORIA* 48 (2002).

⁵⁴ YAEL ZALIASNIK, *MEMORIALES VIVOS. PAISAJES PARA NO OLVIDAR* (2022).

⁵⁵ Rodrigo Suárez, Daniela Accatino & Hugo Rojas, *Guía práctica para el uso de documentos de archivo en la declaración de Ex Centros de Detención Política y Tortura como Monumento Histórico en Chile* [Practical guide for the use of archival documents in the declaration of Former Political Detention and Torture Centers as Historical Monuments in Chile], in *PROGRAMA INTERDISCIPLINAR DE INVESTIGACIÓN EN MEMORIA Y DERECHOS HUMANOS (UNIVERSIDAD ALBERTO HURTADO)* [Interdisciplinary Research Program in Memory and Human Rights (Alberto Hurtado University)], DOCUMENTO DE TRABAJO DEL PROGRAMA INTERDISCIPLINAR DE

However, it is essential that special legislation for sites of memory be passed to ensure their protection, funding, and management, as is the case in countries such as Argentina and Uruguay.⁵⁶ At present, memory sites in Chile are still in a fragile situation, even though some of them have been declared national historical heritage, as it is clear that human rights organizations require permanent financial support to recover and preserve such places.

In addition to sites and testimonies, a central element for the intergenerational transmission of memory is the access to and use that can be made of the original records, archives, and documents of the time, as they are evidence containing reliable information about cases of human rights violations and life stories.⁵⁷ To date, Chile does not have an “Archive of Repression” that is available to the interested public. Rather, records and databases are scattered across multiple public institutions (e.g. Documentation Centre of the Museum of Memory and Human Rights, Human Rights Programme of the Human Rights Sub-Secretariat, Archive of the Human Rights Brigade of the Investigations Police, Forensic Medical Service, National Institute of Human Rights, Judicial Archive, University of Chile, etc.) and civil society (e.g. Documentation Centre and Archive of the Vicariate of Solidarity Foundation, Human Rights Commission, Villa Grimaldi Peace Park, Londres 38, Christian Churches’ Welfare Foundation, Corporation for the Promotion and Defence of People’s Rights, Foundation for the Protection of Children Harmed by States of Emergency, etc.).⁵⁸

INVESTIGACIÓN EN MEMORIA Y DERECHOS HUMANOS DE LA UNIVERSIDAD ALBERTO HURTADO NO. 7 [Working Document of the Interdisciplinary Research Program on Memory and Human Rights of the Alberto Hurtado University No. 7] 8 (2022), <https://derecho.uahurtado.cl/web2021/wp-content/uploads/2023/03/guiasitioshistoricos.pdf> [<https://perma.cc/D9QM-4LN5>].

⁵⁶ Martha Escariz Oñate, *Regulation of Memorial Sites in the Southern Cone: A Critical Analysis and a Proposal for Chile*, 10 LAT. AM. LEGAL STUD. 1 (2022).

⁵⁷ *Id.*

⁵⁸ See Brandi Townsend & Loreto López, GUÍA DE ARCHIVOS DE MEMORIA Y DERECHOS HUMANOS EN CHILE [Guide to Memory Archives and Human Rights in

In addition to promoting the protection, physical safekeeping, and socialization of these archives through the enactment of a Human Rights Archives Law, it would be advisable to take advantage of new technologies and computer advances to organize, systematize, standardize, and analyze these as well as other available databases.⁵⁹

D. *Justice and Punishment of Those Responsible*

During the dictatorship and up to the arrest of Augusto Pinochet in London on 16 October 1998,⁶⁰ the vast majority of the legal actions brought on behalf of the victims were rejected by the courts.⁶¹ Between 1973 and 1998, “impunity” prevailed for the human rights violations committed during the dictatorship in all but the most exceptional circumstances.⁶² The search for justice has persisted in more than three decades of transition to democracy, and lawyers for victims and their families have had to overcome all kinds of obstacles in court cases and the judicial culture.

During the transition to democracy, it was necessary to introduce numerous reforms in the administration of justice and the judicial culture. In this way, the long-standing legal and judicial obstacles established during the dictatorship that prevented justice were gradually overcome.⁶³ Slowly, judicial interpretations of the constitutional and legal norms and

Chile] (2017), <https://www.memoriayderechoshumanosuah.org/publicaciones/guia-de-archivos-de-memoria-y-derechos-humanos-en-chile/> [https://perma.cc/2XEL-J3V2]; CARLA PEÑALOZA PALMA, *EL CAMINO DE LA MEMORIA. DE LA REPRESIÓN A LA JUSTICIA EN CHILE, 1973–2013* [THE ROAD OF REMEMBRANCE. FROM REPRESSION TO JUSTICE IN CHILE, 1973-2013] (2015).

⁵⁹ Hugo Rojas, *Desafíos de la justicia transicional en América Latina*, 28 *REVISTA DE DERECHO DE LA UNIVERSIDAD CATÓLICA DEL URUGUAY*, 7–8 (2023).

⁶⁰ INSTITUTE OF LATIN AMERICAN STUDIES, *THE PINOCHET CASE: ORIGINS, PROGRESS AND IMPLICATIONS*, (Madeleine Davis ed., 2003).

⁶¹ Borzutzky, *supra* note 26, at 71–83.

⁶² *Id.* In the years of the dictatorship, nearly 9,000 habeas corpus were rejected in the Courts of Appeal, and in the first eight years of the transition, the judiciary handed down a dozen convictions in cases of human rights violations committed after 1973.

⁶³ Rojas & Shaftoe, *supra* note 36, at 136–52.

international treaties ratified by Chile became more receptive to the arguments put forward by the lawyers of victims and their relatives.⁶⁴ For example, it took many years for the judiciary to change its interpretation of the 1978 Amnesty Decree Law and stop applying it.⁶⁵ But it was also necessary to incorporate new judges into the judiciary, and for the judiciary to pay increasing attention to international law, especially the jurisprudence of the Inter-American Court of Human Rights.⁶⁶ The transition saw the creation of the Judicial Academy as well as new education and training programs for judges and officials.⁶⁷ The adoption of the new Code of Criminal Procedure in 2000 created substantive change by absolutely reforming the criminal procedure system.⁶⁸ This legislation made it possible to abandon the outdated inquisitorial model and instead adopt the adversarial model, which has the best results in Latin America.⁶⁹

⁶⁴ In 1989, Article 5 of the 1980 Constitution was amended, making international human rights law mandatory in the Chilean legal system. According to Article 5 § 2 of the 1980 Constitution, international human rights treaties have the status of constitutional norms.

⁶⁵ See Decree-Law No. 2,191 (1978). The dictatorship approved this Decree-Law to ensure impunity for State agents who participated in the commission of human rights violations between September 1973 and April 1978. Then, the courts again and again closed the cases if the facts under investigation occurred within that time frame. It was not until the 1990s that judges challenged the application of the Amnesty Decree Law, arguing that it was contrary to the Inter-American human rights law. At present, this debate has been settled, both the Inter-American Court of Human Rights and the Chilean courts have indicated in their judgments that self-amnesty laws cannot be invoked in cases of crimes against humanity.

⁶⁶ CLAUDIO NASH, CATALINA MILOS, ANDRÉS NOGUEIRA & CONSTANZA NÚÑEZ, *DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS EN CHILE: RECEPCIÓN Y APLICACIÓN EN EL ÁMBITO INTERNO* (2012).

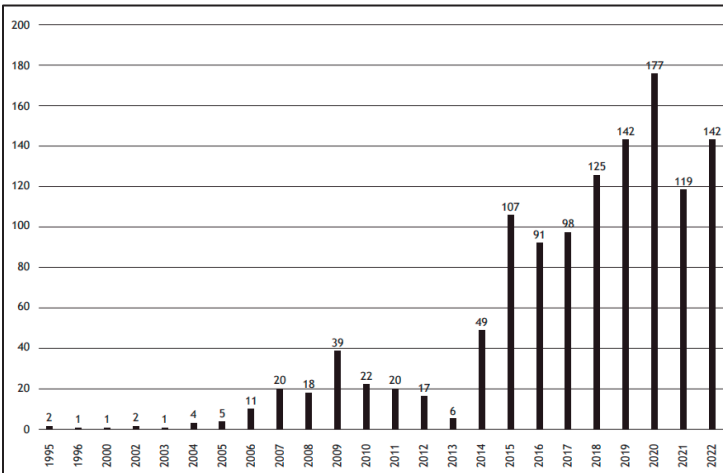
⁶⁷ See Law No. 19,345 (1994).

⁶⁸ MARÍA INÉS HORVITZ AND JULIÁN LÓPEZ, *DERECHO PROCESAL PENAL CHILENO* (2002). See Law No. 19,519 (1997), Law No. 19,640 (1999), Law No. 19,665 (2000), Law No. 19,696 (2000), Law No. 19,718 (2001), Law No. 19,708 (2001).

⁶⁹ Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOY. U. CHI. INT'L L. REV. 253, 253–69 (2005).

As of December 2022, the courts had handed down 1,313 convictions in cases of human rights violations.⁷⁰ The sentences concern 1,330 former law enforcement officers, of whom 1,154 have been sentenced to prison terms.⁷¹ The Chilean Supreme Court has handed down 510 judgments in human rights cases, the Courts of Appeal 547, the criminal courts 153, and the civil courts 84.⁷² To date, the judgments have mentioned a total of 2,191 victims.⁷³ Figure 1 shows, on one hand, the slow evolution of the number of sentences issued in the years of transition and, on the other, the growing trend in the last decade (which accounts for 86.6% of all sentences).

FIGURE 1. Judicial sentences during the years of transition to democracy in cases of human rights violations committed during the dictatorship.



Source: Barthou (2023), 43.

⁷⁰ Carlos Barthou Polette, *Para la Memoria Social de Chile*, in *LA JUSTICIA EN LA BALANZA: PROCESOS, JUICIOS Y CONDENAS POR VIOLACIONES DE LOS DERECHOS HUMANOS ACONTECIDOS EN CHILE ENTRE 1973 Y 1990*, 38, 38–55 (Carlos Barthou Polette ed., 3rd ed. 2023).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The first challenge is to speed up the pending human rights cases being heard by the courts. As perpetrators, accomplices, and witnesses age and pass away, “biological impunity” may, unfortunately, prevail. For example, at present, only a dozen judges are conducting the judicial investigations of 2,040 pending trials with varying degrees of progress.⁷⁴ Although the fact that the courts regularly hand down guilty verdicts against former state agents, the victims, and their families have had to wait much longer than is reasonable to find them guilty. Half a century has passed since the commission of human rights violations and the victims and their families persist in the search for justice, despite all the denials, difficulties, and forgetfulness in Chilean society.

A second challenge is to increase the number of people convicted of human rights violations, whether former members of the armed forces or civilians.⁷⁵ For example, between 1990 and 2015, 1,373 state officials or former state agents were investigated, prosecuted, accused, and or convicted for human rights violations, 117 of whom were serving custodial sentences in 2015 in a specially designated prison facility known as Punta Peuco.⁷⁶ The creation of a prison specially created for the execution of the sentences of those convicted of human rights violations during the dictatorship was a controversial issue in the 1990s. There are arguments to question such a decision, although political negotiations prevailed to prevent common criminals from sharing the same spaces as those convicted of human rights violations.

⁷⁴ José Carvajal Vega, *Las huellas en el Poder Judicial a 50 años del Golpe*, LA TERCERA (Jul. 29, 2023), <https://www.latercera.com/la-tercera-pm/noticia/las-huellas-en-el-poder-judicial-a-50-anos-del-golpe/Z3SKKBXSRBSFHNNMW5VVNU37M/> [https://perma.cc/8E6Q-MVF4].

⁷⁵ Regarding civilian involvement, for example, see Karinna Fernández & Magdalena Garcés, *Los casos de Pesquera Arauco y Colonia Dignidad*, in *COMPLICIDAD ECONÓMICA CON LA DICTADURA CHILENA: UN PAÍS DESIGUAL A LA FUERZA* 389, 389–404 (Juan Pablo Bohoslavsky, Karinna Fernández & Sebastián Smart eds., 2019).

⁷⁶ Rojas & Shaftoe, *supra* note 36, at 149.

E. *Guarantees of Non-Repetition*

To ensure that human rights are *Never Again* violated, the theory and practice of transitional justice recommend the approval of institutional and cultural reforms that promote the fundamental rights of the population. To strengthen the rule of law and democracy in Chile, a series of substantive institutional reforms have been adopted over the last three decades. Some of the most important guarantees of non-repetition are as follows:

1. Since December 2000, the criminal procedure reform gradually came into force in the country.⁷⁷

2. In 2010, President Michelle Bachelet inaugurated the Museum of Memory and Human Rights.⁷⁸

3. The National Institute for Human Rights was established in 2010.⁷⁹

4. In 2016, the Under-Secretariat for Human Rights was created.⁸⁰

5. The First National Human Rights Plan was adopted in 2017 (2018–2021),⁸¹ and the Second National Human Rights Plan is currently in force (2022–2025).⁸²

⁷⁷ Blanco, *supra* note 69, at 253–69.

⁷⁸ See Decree No. 242, Ministry of Justice (2010).

⁷⁹ Law No. 20405, Del Instituto Nacional de Derechos Humanos [National Institute of Human Rights], Nov. 24, 2009, DIARIO OFICIAL [D.O.] (Chile).

⁸⁰ Law No. 20885, Crea la Subsecretaría de Derechos Humanos y Adecúa la Ley Orgánica del Ministerio de Justicia [Creates the Undersecretariat for Human Rights and adapts the Organic Law of the Ministry of Justice], Dec. 16, 2015, DIARIO OFICIAL [D.O.] (Chile).

⁸¹ MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, PRIMER PLAN NACIONAL DE DERECHOS HUMANOS (2018), <https://www.planderechoshumanos.gob.cl/doc/GEN/PlanDDHH20182021.pdf> [<https://perma.cc/327T-8RAB>].

⁸² MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, PNDH, 2° PLAN NACIONAL DE DERECHOS HUMANOS (2022), https://www.planderechoshumanos.gob.cl/doc/GEN/2do_PDDHH_2022_30ene2023.pdf [<https://perma.cc/M2BX-Q8AR>].

6. In 2018, the Office of the Ombudsman for Children’s Rights was created.⁸³

7. The establishment of the Committee for the Prevention of Torture was approved in 2019.⁸⁴

However, the violence unleashed in the so-called “social explosion” (*estallido social*) that occurred between 18 October 2019 and 17 March 2020⁸⁵ shows that all these institutional changes were insufficient to prevent further human rights violations in turbulent times.⁸⁶ The fact that democracy was restored in 1990 does not mean that all civil servants immediately changed their attitudes and began to value human rights. Within the different State agencies, people nostalgic for the dictatorship have had to co-exist with officials who promote democracy and human rights, which has not always been collaborative or harmonious. Moving towards a culture of human rights in the civil service is a long-term task that requires communication campaigns, ongoing education courses, and proactive leadership within all public institutions. This is an issue that deserves to be monitored regularly, especially within the Armed Forces and

⁸³ Law No. 21067, Crea la Defensoría de los Derechos de la Niñez [Establishes the Office of the Ombudsperson for Children’s Rights], Jan. 22, 2018, DIARIO OFICIAL [D.O.] (Chile).

⁸⁴ Law No. 21154, Designa al Instituto Nacional de Derechos Humanos Como el Mecanismo Nacional de Prevención Contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes [Designates the National Human Rights Institute as the National Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.], Apr. 18, 2019, DIARIO OFICIAL [D.O.] (Chile).

⁸⁵ MANUEL CANALES, *Octubre*, in LA PREGUNTA DE OCTUBRE: FUNDACIÓN, APOGEO Y CRISIS DEL CHILE NEOLIBERAL (2022). On October 18, 2019, the most violent acts of the Chilean transition took place, with most of Santiago’s Metro stations destroyed or damaged, in addition to damage to private and public property. To deal with the disorder and street vandalism, President Sebastián Piñera decreed a constitutional state of emergency. On March 17, 2020, President Piñera decreed a new Constitutional state of emergency, this time to establish restrictions on citizens’ freedoms due to the global pandemic.

⁸⁶ Hugo Rojas, *Chile at the Crossroads: From the 2019 Social Explosion to a New Constitution*, 20 SEATTLE J. SOC. JUST. 981, 1018 (2022).

Police, since they are agents who, in moments of social effervescence or tension, can easily repress the population, ignoring their fundamental rights.

A culture of human rights and democracy promotion also needs to be encouraged in civil society.⁸⁷ From the results of the 2013 Bicentennial National Survey, it can be affirmed that only 37.77% of Chilean adults assign importance to human rights and transitional justice, 27.79% are hostile to human rights, 16.02% are indifferent, and the remaining 18.41% adopt ambivalent positions on these issues.⁸⁸ For 62.22% of Chilean adults, the transitional justice agenda for human rights violations during the dictatorship is an uncomfortable issue, so they dodge the debate, prefer to give it up by turning the page, deny the horrors of the past, or prefer to forget.⁸⁹ Ten years after that measurement, a recent survey corroborates the worrying lack of commitment to democracy and the rule of law on the part of more than a third of the citizenry.⁹⁰ For example, 36% believe that the military “were right to carry out the coup d’état” of 11 September 1973, while 41% say they “are never right,” and the remaining 23% do not know or do not answer.⁹¹ Thus, there is currently no consensus in Chilean society on the importance of dealing adequately and honestly with the horrors of the past. To reverse this situation, it is essential to design and implement strategies to incorporate the debates on Chile’s recent past—including

⁸⁷ To make decisive progress in the field of transitional justice, it is necessary to pay increasing attention to a task that is extremely complex and impossible to control and that relates to what happens in the realm of “popular culture”. If transitional justice issues in general terms are part of the content of the different media and the treatment given to them is appropriate, this can contribute to the public assigning them more importance and even making them a priority.

⁸⁸ Rojas, *supra* note 35, at 65–95.

⁸⁹ *Id.*

⁹⁰ MARKET OPINION RSCH. INTERNACIONAL, CHILE A LA SOMBRA DE PINOCHET: LA OPINIÓN PÚBLICA SOBRE LA “ERA DE PINOCHET” 1973–2023, <https://morichile.cl/wp-content/uploads/2023/05/Chile-a-la-sombra-de-Pinochet.pdf> [<https://perma.cc/YJB3-GN2D>].

⁹¹ *Id.*

human rights violations and transitional justice—in schools and universities, and the media as well as popular culture in general.

Perhaps the two most persistent and enduring legacies of the Pinochet dictatorship in Chilean society are the 1980 Constitution—imposed under the dictatorship after a plebiscite without the minimum electoral guarantees,⁹² and the neo-liberal economic model—also imposed during the dictatorship⁹³—which has endured through the different governments of the transition.⁹⁴ It is true that both have been subject to reformulation and numerous adjustments, but, strictly speaking, they are the two structural pieces that shape and articulate the functioning of Chile’s legal, political, and economic systems to this day.⁹⁵

III. CONCLUSIONS AND FINAL THOUGHTS

It might strike an outside observer that Chilean society, more than three decades after regaining its democracy, is still in the midst of a long process of transition to democracy. Just as it has been impossible to move toward a phase of robust consolidation of the democratic system, a deep democratic culture has not been achieved in all sectors of the population either. In part, this has been due to a set of authoritarian enclaves and political bolts established during the years of dictatorship that have required arduous and protracted multi-party negotiations to repeal or gradually reform. But it is

⁹² CLAUDIO FUENTES, *EL FRAUDE* (2013).

⁹³ EUGENIO TIRONI, *AUTORITARISMO, MODERNIZACIÓN Y MARGINALIDAD: EL CASO DE CHILE 1973–1990* Ch. 5 (2000); CARLOS HUNEUS, *EL RÉGIMEN DE PINOCHET* (2000).

⁹⁴ JOSÉ JOAQUÍN BRUNNER, *BIENVENIDOS A LA MODERNIDAD* 101–56 (1994).

⁹⁵ FENANDO ATRIA, GUILLERMO LARRAÍN, JOSÉ MIGUEL BENAVENTE, JAVIER COUSO & ALFREDO JOIGNANT, *EL OTRO MODELO: DEL ORDEN NEOLIBERAL AL RÉGIMEN DE LO PÚBLICO* (2013); Samuel Tschorne, *¿Qué queda del problema constitucional? Las (sin)razones del proceso constituyente*, *EL DILEMA CONSTITUCIONAL: UNA APROXIMACIÓN INSTITUCIONAL AL PROCESO CONSTITUYENTE* 23–53 (Diego Gil, Guillermo Jiménez & Pablo Marshall eds., 2023).

also important to bear in mind that a culture of impunity persists in Chile that has been deeply rooted since the origins of its republican history.⁹⁶

This article has provided an overview of the transition to democracy and the transitional justice process in Chile from 1990 to 2023. It has addressed the main achievements and pending challenges in the five elements of transitional justice; truth, justice, memory, reparation, and guarantees of non-repetition. Only based on clear and indubitable diagnoses is it possible to establish political-strategic designs that contribute to removing unresolved obstacles or difficulties.

From its years of transition to democracy, Chile can boast very notable achievements. In the field of human rights, it is fair to recognize that the main achievements have been mainly due to not only the persistence of victims and their families as well as human rights associations and activists who have braided their actions in the field of transitional justice, but also political leaders and public officials who have been receptive to the demands of victims and their families. Otherwise, the quest for truth, reparation, memory, justice, and guarantees of non-repetition would not have emerged and prospered in these three uninterrupted decades of transition to democracy.

The Chilean experience suggests that carrying out a transitional justice process can take several decades and become an intergenerational challenge. This is partly because not all sectors of society agree on the need to address the aftermath of a stormy past in a timely and comprehensive manner. Advocates for further progress in the field of transitional justice have had to overcome numerous obstacles from those sectors that are hostile, indifferent, ambivalent, or cynical to human rights—who do not have strong convictions about democracy or the rule of law.

⁹⁶ ELIZABETH LIRA & BRIAN LOVEMAN, *PODER JUDICIAL Y CONFLICTOS POLÍTICOS (CHILE: 1925–1958)* (2014).

As it is a common occurrence that the transitional justice agenda must face and overcome resistance from those who agreed with or tolerated the commission of human rights violations in authoritarian times, it is essential that the measures adopted to understand, punish, repair, and remember the wounds and pain of the victims have social legitimacy and are publicly debated.

The recent human rights violations that occurred during the social uprising of 2019 forced us to question both the quality and density of the Chilean experience of transitional justice. Guarantees of non-repetition need to be further strengthened, and it is crucial to advance toward a culture of human rights in all social sectors, both public and private institutions, and especially in the cultures within the police and the armed forces.

Finally, Figure 2 summarises the main achievements of the more than three decades of transition to democracy in Chile and the pending challenges in the transitional justice process still underway.

FIGURE 2. Matrix for analyzing achievements and challenges in the five elements of transitional justice in Chile.

	Truth	Reparation	Memory	Justice	Guarantees
<i>Achievements</i>	Truth and Reconciliation Commission Political Imprisonment and Torture Commission Judicial Sentences Documentaries Biographies and testimonies Journalistic research	Pensions National Return Office Programme for the Recognition of Political Exonerated Persons [Programa de Reconocimiento al Exonerado Político] Programme for Reparation and Comprehensive Health Care (PRAIS) Valech scholarships Museum of Memory and Human Rights	Memory sites Declaration of National Historic Heritage Museum of Memory and Human Rights Archives and records	1,313 court rulings 1,330 perpetrators identified 1,154 perpetrators convicted Civil justice and compensation for damages	Museum of Memory and Human Rights National Human Rights Plan Under-Secretariat for Human Rights Committee for the Prevention of Torture Office of the Ombudsman for Children's Rights Criminal Procedure Reform

<i>Pending Challenges</i>	<p>Enforced disappearances</p> <p>Exile</p> <p>Secrecy of statements in truth commissions</p> <p>Repression in rural areas</p> <p>Archives of armed forces and secret police</p> <p>Socialization of the truth</p>	<p>Collective reparations</p> <p>Reparations for Indigenous peoples and peasants</p> <p>Public apologies</p>	<p>Multiplicity of memories</p> <p>Sites of Memory</p> <p>Law</p> <p>Law on Archives of Repression</p> <p>School Curriculum</p>	<p>2,040 pending trials</p> <p>Increase the number of people convicted of human rights violations, including civilians</p> <p>Biological impunity</p>	<p>Human rights culture</p> <p>Democratic culture</p> <p>School curriculum</p> <p>New Constitution</p> <p>Authoritarian enclaves</p>
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