

The Constitution of Tyranny: Res Publica  
and Authoritarian Politics in Latin America

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This paper was prepared for presentation at the  
Conference on "Res Publica: East and West" to be held in  
Dubrovnik, Yugoslavia, October 10-14, 1988. This is a Draft  
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"The most important task for the ruler of any community is the establishment of peaceful unity. ... the welfare and safety of a multitude formed into a society lies in the preservation of its unity, which is called peace."

St. Thomas Aquinas

All our moral powers will not suffice to save our infant republic from this chaos unless we fuse the mass of the people, the government, the legislation, and the national spirit into a single united body.

Simon Bolivar

...when power has been obtained not through one's own will, or personal political ambition but by a moral, historical, and patriotic imperative, the exercise of authority only makes sense in the strict compliance with moral duty.

Gen. Augusto Pinochet, 1975

From the time of Spanish conquest and the constitution of empire in the Western Hemisphere in the fifteenth and sixteenth centuries, the legal and moral foundations of Latin American society rest on the fundamental premise that the State, through governmental policy and administration, is

responsible for defining and achieving the "common good". In this sacred mission, derived from the delegation of heavenly authority to secular princes, the State must not be blocked by private interests or individual claims, nor must private property or private economic activity be allowed to interfere with the ultimate mission: providing for the common welfare. With society conceived in the Thomistic tradition as a unified, organic, hierarchical, functionally specialized system of relations regulated by the "natural" direction of the State/rulers, private interest and individual "rights" must be subordinated to the common welfare in order to achieve social peace and harmony. (Morse, 1974; Dealy, 1968, 1974; Wiarda, 1974; Madden, 1930; Lewy, 1960; Hamilton, 1963). From its inception, thus, Latin American society has been state-centered, with both popular and elite expectations focused on state initiative, even when the reality of daily life demanded circumvention of state generated policy and regulation.

The Spanish monarchy, and subsequently the governments of Latin America in the nineteenth and twentieth centuries, rested at the apex of a political and social system in which private and group activity depended for legitimacy upon the sanction or authorization of government policymakers; monopoly of political authority allowed for concession of

permission for social, economic, and "private" activities, always subject to the discretion of the State. With all natural resources vested initially in the State as its patrimony, and ultimate responsibility for moral education and social morality also vested in the State, only those generic "rights" given to individuals by God--as defined by theologians and interpreted by the State itself--restrained the scope and character of public policy. In dramatic contrast to a theory of politics and society premised upon the inalienable rights of individual human beings and the design of a limited government (Federalist 10, 51; Ostrom, 1987), the Hispano-Catholic tradition presumes a comprehensive, relatively unlimited, and patrimonial role for the State in order to achieve the moral equivalent of a "City of God" through political organization and administration.

In this tradition, politics as understood in pluralist, polyarchical polities (Dahl, 1971, 1971; Lijphart, 1984; ) is viewed as inimical, rather than essential, to the development and implementation of public policy. Where the core of the political mission of the State lies in defining and implementing the common good, politics consists largely of administration of the patrimonial realm. This requires regulation of almost all spheres of human behavior. The result, almost uniformly, is the operation of a

concessionaire State, with all behavior not specifically authorized either illegal or questionable. At any time, if the common welfare as interpreted by incumbent policymakers requires, previously granted concessions may be withdrawn; generally permitted behavior may be proscribed and castigated. Inasmuch as the State directs and regulates society for a higher moral purpose, opposition to State policy and regulation is easily interpreted as immoral, that is, heretical or subversive behavior. Under these circumstances, political demand-making and even public discussion of concerns about public policy, unless very carefully conforming to "legitimate", typically supplicatory, patterns and channels, may be defined as moral transgressions, punishable as affronts to high moral purpose and authority.

In this sense, public discussion of public policy, challenges to constituted authority through autonomous, private, individual or interest group activity may represent a cancerous invasion of the political organism; such a threat may require drastic surgical removal--in the first centuries of imperial rule through inquisition and in more "modern" times through "methods of drastic social self-defense". (Pinochet, 1975).

Long after most Latin American rulers ceased claiming divine origins for their authority--and even after the most tyrannical of presidents sought legitimacy in the will of "the people" albeit through fraudulent elections or plebiscites, or through creative vote counting--basic assumptions concerning the role, character and operation of the State were conserved. These assumptions included an essentially monistic, centralized, intolerant, and comprehensive commitment to defining and implementing the "common good", along with a simultaneous rejection of the moral legitimacy of "private interest." Only those private interests, organizations and activities directed toward or compatible with the common good may be authorized; all others may be prohibited, restricted or regulated.

Under these conditions, politics in Latin America frequently exhibits a ferocious secular religiousity. Non-authorized beliefs, public expression, patterns of behavior and organization, or even more horrific, challenges to the moral/political order are treated as heresies--with the heretics subjected to banishment, inquisition, incarceration, torture or extirpation. Public policy is identified with moral prescription; challenges to governmental decisions viewed as moral delinquency; and proposals of political reform or constitutional revision as

mortal sin—labelled political subversion or counterrevolutionary activity, depending upon the ideological vision of the incumbent regime.

This outcome of teleological politics was clearly predicted by Toqueville as he viewed the results of the French Revolution, a movement that shattered the old tyranny of monarchy while simultaneously engendering a new tyranny of bloody revolution followed by centralized bureaucratic "republicanism." As Toqueville anticipated, when "the State", personified by public officials, a ruling party, or personalist caudillo presumes a directive and moral mission, rather than a more humble representative and pragmatic stewardship,

"it is not the people who predominate...but those who know what is good for the people, a happy distinction which allows men to act in the name of nations without consulting them and to claim their gratitude while their rights are being trampled underfoot. ...it is a discovery of modern days that there are such things as legitimate tyranny and holy injustice, provided they are exercised in the name of the people" (Toqueville, I: 416-417).

Tyranny founded on monarchical absolutism could yield to the tyranny of majoritarian republicanism. A key feature of both entailed presumptions of a moralizing mission for the State and "the hundred arms of a centralized bureaucracy." (Jacoby, 1973: 118). Perhaps the most explicit expression of this

antagonism toward even a very limited amount of "political space" for alternative visions or opposition was a decree of Frederick II of Prussia in 1784, whose spirit, if not literal terms, was shared by the absolute monarchies and the authoritarian revolutionaries:

A private individual is not entitled to pass judgment on the actions, proceedings, laws, decrees, and instructions of the sovereigns and their courts, their state servants, collegia and tribunals. He may not find fault with them publicly, or make known or distribute any such information which may have come to his knowledge. A private individual is incapable of passing judgment because he lacks full knowledge of the circumstances and motives.

(Jurgen Habermas, as cited  
by Jacoby; 1973:35)

As Toquevllle's observations make clear, this phenomenon of institutionalized political intolerance is not limited to the nations of Latin America. Likewise, it is not pervasive at all times and places within Latin America. However, concerted efforts to constitute more pluralistic and democratic societies in Latin America during the nineteenth and twentieth centuries repeatedly challenged both traditional and modern versions of authoritarianism of diverse ideological rationale. Notwithstanding almost two centuries of political strife, in part dedicated to overcoming the philosophical, political, and race/class legacies of Spanish colonialism of the region, the propensity toward a State-centered,



centralized, hierarchical and non-egalitarian society, vulnerable to political messianism, has survived in most of Latin America. These characteristics of Latin American society and polity transcend traditional left-right ideological cleavages within the region and seem always a danger to manifest themselves--even after years of relatively "open" political competition and apparent democratization, as evidenced by the tragedies of Uruguay and Chile after 1973 (Loveman, 1988; Schoultz, 1981) Latin American Bureau (LAB), 1980) as well as the even more hideous events of the "dirty war" in Argentina after 1976 (Rock, 1987, Corradi, 1987, Hunca Was. 1987 ).

In some respects the Marxist regime of Cuba's Fidel Castro and, increasingly, the Sandinista regime in Nicaragua in the late 1980s share in this tradition of political intolerance, expressed in Cuba in the notion "with the revolution anything, against the revolution, nothing.\* The Cuban constitution of 1976 prohibits activities "contrary to the existence and objectives of the Socialist state or contrary to the decision of the Cuban people to build socialism and communism" (Art. 61). In revolutionary Nicaragua, though taking into account the dramatic challenges to maintaining political liberties while under external attack, a tendency toward restrictions upon the opposition

and perpetuation of dominance by the governing party became ever more evident in the post 1986 period. Thus, in late August 1988, President Daniel Ortega reiterated that "The principles of the Popular Sandinist Revolution, [achieved] at the cost of much blood in the struggle against the dictatorship of Somoza, and more blood in the struggle against the aggression of the Yankee enemy of humanity, symbolized by Reagan with all his tenebrous and terrorist plans against Nicaragua, are not negotiable." (Barricada, August 23, 1988). Ortega reminded the internal opposition that "rightists, those who would sell out the fatherland (vendepatrias ) and traitors," could expect no modification in the Sandinistas commitment to advance the Popular Sandinist Revolution.

In a political system where government authority is charged with implementing a teleological project defined as the "common good", all behavior, ranging from artistic expression to job absenteeism is potentially subject to governmental regulation, control, or manipulation, because all behavior is potentially political behavior. Education of youth is also explicitly ideological and moralizing, dedicated to catechizing and dissemination of the dominant social "truth". Again this holds for authoritarian systems of the ideological right and left. General Pinochet's Chile

required that education "be imbued with a common spirit, identified with national values, with the Christian cultural tradition, and with the historical project of the Chilean nation" (Deerete de Educacion, 1892, November 21, 1973). Fidel Castro's revolutionary Cuba expects that "Our teachers must be an example of socialist morality; they must resolutely oppose any deviation from the new set of values created by the Revolution. The teacher must be a permanent student of Marxism-Leninism. He or she must be well informed on national and International events; and must be in the forefront of today's ideological struggle" (Fidel Castro, cited in Grandma Weekly Review, July 19, 1981). And in "democratic" Colombia in the mid 1960s, the constitution declared "The State shall have...the supreme inspection and supervision of institutions of learning, public and private, in order to ensure the fulfilment of the social purposes of culture and the best intellectual, moral and physical development of students" (Art. 41).

Ultimately, where there are no inalienable rights, where the common good requires subordination or elimination of private rights, where the scope and content of the res publica. Or as more commonly expressed in Latin American writing, the limits of espacio politico ["political space"] expands or contracts at the discretion of the government in

power, tyranny is never far away. Indeed a propensity toward tyranny is inherent in the constitutional foundations of such a system. King Alfonso the Wise of Spain instructed his subjects that "Liberty is a power that every man naturally has of doing whatever he wishes, so long as force, law, or custom do not take it away" (Las siete partidas del...). The Chilean constitution of 1980 declares that all Chilean citizens have liberty of conscience and the right to freely practice all religions "not contrary to morality, good behavior, and public order." (Article 19).

The remainder of this paper explores the relationship between teleological politics, *res publica* or "political space", and authoritarian politics in Latin America. After an introductory consideration of the concept of res publica/"political space" and democracy, the paper focuses upon constitutional and political restrictions on "political space" in Latin America, with examples drawn from several Latin American experiences for illustrative purposes.

#### Res Publica, Political Democracy, and Authoritarianism

The idea of political democracy is very old. The most common English language definition of the Greek word from which the modern concept derives is "government by the

people.\* This vague normative definition of democracy provides no guidance as to how "the people" should govern, which people should govern, and what limits, if any, should exist on "government by the people" in regard to individual members of any polity. Thus systems of government as different as Eastern European "peoples' democracies" and British-type "cabinet government", both relying ostensibly upon majoritarian principles, and a range of systems in which majoritarian principles are modified by more or less severe limits on incumbent governments, all claim to be democratic.

Direct rule "by the people" is very rare. If the ideal of democracy is that "all who are affected by a decision should have the chance to participate in making that decision, either directly or through chosen representatives," (Lewis, 1965), it is much more common for elected or selected decision makers to act upon the behalf of individuals or constituencies than for direct participation to occur. Among many other reasons, the size of modern nations, the volume and complexity of decisions, and the time constraints of individuals make direct rule impractical. However, in some cases direct rule by the people is retained in specific circumstances through plebiscite or referendum type procedures in which particular decisions are made by all voting citizens.

None of these general and abstract characteristics of democracy provide any precise guidance in terms of the process or content of democratic politics or public policy. Lijphart (1984), following Dahl (1971), distinguishes between two major types of democratic systems: majoritarian and consensus, and compares the patterns of democratic decision-making in these two types of democratic systems. Both Dahl's earlier discussions of "polyarchy" and Lijphart's more recent work identify democracy with a system of inclusionary and competitive politics wherein most citizens are eligible to participate in elections and hold public office, organize and join autonomous associations (labor unions, political parties, religious organizations, and a variety of interest groups or private associations. These private associations include sports or recreational clubs, artistic or literary groups, and a wide range of other private voluntary associations. In addition citizens have access to alternative sources of information, uncontrolled by government direction or censorship. In such a system alternation in control of government offices, and therefore of policymaking and administration, occurs through fair and free elections, in which leaders of contesting political parties or other expressions of alternative political programs and policies compete for public support. Democratic

politics, in this respect, depends upon public contestation over ideas and policies, in an open public realm, or res publica. Democratization of politics consists of movement in the direction of a more fully open public realm, broader opportunities for political participation and for autonomous private spheres of action. This implies both more inclusionary procedures (absence of restrictions on participation with regard to age, race, religious preference, class, property holdings or political ideology) and more opportunity for public contestation (absence of restrictions on access to/content of mass media, on types and sources of political opposition, and upon types of private expression or behavior, e.g. artistic and literary production, religious and family practices, or even "private" enterprise. Inasmuch as neither inclusionary politics nor public contestation are inherently immune to potential governmental or "private" efforts to limit the extent of open political action, democratic politics also implies effective limitations upon, and remedy against, usurpation or abuse of governmental authority.

In a majoritarian system "majority rule" is the basic principle, with minority interests serving as a tolerated opposition or appositions. In the consensual model of democracy, majority rule is variously constrained by

structural and customary limits on decision-making by public officials, such as separation of powers, federalism, electoral systems guaranteeing minority representation (for example, proportional representation, multi-member legislative districts) and constitutional restrictions on the discretion of majority decision-making (for example, protections of private property, guarantees of religious freedom, protection against press censorship) or the realities of multiparty systems in which no single party or other political group can obtain majority status by itself. In either case, unless individuals and minority groups have potential recourse in the event of violation of "basic rights", however these are initially defined constitutionally, the realm of res publica may be quickly and drastically reduced or practically eliminated by tyrannical majorities or elites (whether military officers, counterrevolutionary civilians, or revolutionary parties/movements) claiming to represent a temporary or teleological political project.

A very strong version of the consensual interpretation of democracy identifies limits on majoritarian decision-making through specified proscriptions of government action as the central challenge to democratic politics. Thus, Ernst-Joachim Mestmaecker suggested in a forum in Peru,



sponsored by the Instituto Libertad y Democracia, that "In a free society, the primordial task of law is to limit and control the power of the state and of social groups, with the end of preserving and protecting individual liberty. ...The power of all public authorities, including representative assemblies, should be limited by firm rules that no one has the power to change or eliminate to serve special interests." (1981, p. 59). This interpretation is radically different from the traditional Hispano-Catholic vision of the role of the State; it also goes somewhat beyond the Hadisonian interpretation of limited government in the Federalist Papers by practically dismissing any fundamental concern with a "common welfare" whenever there is tension between private "right" and public "good". There is also a threat to democracy and res publica in the deification of radical libertarian visions of individualism which prevent collective action for any sort of common welfare while protecting a very small minority, whether economic, social or political, against the basic needs of a large majority of the members of a society.

Obviously, it is not possible in the abstract and a priori to specify a universally valid resolution of the tension between protection of individual rights and liberties and the requirement for collective action in order to

encourage development of human potential and provide for minimally decent living standards for most members of human societies. However, whether a highly individualistic version of consensual democracy or a more majoritarian version of democracy is adopted, recognizing that a variety of particular arrangements might exist on a rather extensive continuum from highly individualistic and consensual to rigorously majoritarian, democracy is, in the words of Lijphart, both "a recent and rare phenomenon" (1984). Since 1945, democracy in this sense has been continuously practiced without interruption in only 21 of the world's nations. Other nations have operated as democracies for certain periods of time since 1945--but not in an uninterrupted fashion. Single party and dominant one-party systems are excluded, as are other systems in which social pluralism (private voluntary organization and action), public contestation, and media autonomy are significantly restricted. That is, democracy does not exist where res publica, understood as open "political and social space" is greatly reduced or practically eliminated.

See Table 1 below

**TWENTY-TWO DEMOCRATIC REGIMES**

**TABLE -1. The World's Democracies, January 1980**

<i>Continuously democratic since about World War II:</i>	<i>Other democratic countries:</i>	
Australia	Bahamas	Nauru
Austria	Barbados	Nigeria
Belgium	Botswana	Papua New Guinea
Canada	Colombia	Portugal
Denmark	Costa Rica	St. Lucia
Finland	Dominica	St. Vincent
France	Dominican Republic	Solomon Islands
West Germany	Ecuador	Spain
Iceland	Fiji	Sri Lanka
Ireland	Gambia	Surinam
Israel	Greece	Trinidad and Tobago
Italy	India	Turkey
Japan	Jamaica	Tuvalu
Luxembourg	Kiribati	Upper Volta
Netherlands	Malta	Venezuela
New Zealand		
Norway		
Sweden		
Switzerland		
United Kingdom		
United States		

Source: Adapted from Raymond D. Gastil. *Freedom in the World: Political Rights and Civil Liberties 1980* (New York: Freedom House, 1980), p. 27.

<sup>14</sup> Arend Lijphart Democracies Yale University Press 1984 p. 33

No Latin American nation can claim that even these relatively broad attributes of democracy have been institutionalized since World War II until the present. Approximations have occurred in Costa Rica since 1948; in Venezuela and Colombia (with severe reservations in the Colombian case) since 1958; in Chile and Uruguay for extended periods from the 1930s until 1973; and for other Latin American countries for lesser periods of time.

In enumerating "the world's democracies" in 1980, Lipjhart lists no Latin American country which has continuously sustained democratic government since 1945 and only five which appeared to function as democracies in that year. Subsequently, of course, this number increased with the transition from military to civilian "democratic" governments in Peru, Argentina, Bolivia, Brazil, Uruguay, El Salvador, Honduras, Ecuador, and Guatemala. However, the recent "return to democracy" in a number of Latin American nations bears some resemblance to earlier periods of military withdrawal from direct or indirect management of the State or passage from civilian-authoritarian regimes supported by the military to elected civilian governments. To a certain extent these "transitions" represent an effective utilization of highly restrictive elections by discredited regimes, in the face of almost irresistible international and/or domestic

pressures, to extricate themselves from the immediate exigencies of power (debt crisis, economic breakdown, or, in the Argentine case, loss of all credibility after the disastrous war in 1932 against Great Britain)--rather than any long term commitment to democratization or democracy. The title of a recent book on Argentina well expressed this phenomenon: Golpes militares y salidas electorales ( Military Coups and Electoral Extractions) (Luna, 1983). Thus, recent events in the region hardly guarantee a permanent expansion of the res publica or any institutionalization of political democracy.

#### Res publica and Latin American Constitutional Traditions

In the period after independence from Spain the new republics of Latin America experienced decades of intermittent civil war, with the opposing personalist elite factions frequently espousing "liberal" or "conservative", "centralist" or "federalist" doctrines. Constitutions--more than 100 by 1850-- were written and discarded, rewritten, revised, and scrapped. Violence and military domination became the effective determinant of governmental rule; military expenditures consumed the greater share of the paltry budgets of the new nations (Lynch, 1973? Graham, 1972?)

Halperin-Donghi, 1973). Cynicism concerning the utility of constitutional principles pervaded Latin American society. The great leader of the independence movements of northern South America, Simon Bolivar, reiterated that "the excellence of government is not in its theory, its form or its mechanism, but in being appropriate to the nature and character of the nation to which it is applied" (Moron, 1963). In Chile, the most famous leader of the independence struggle, Bernardo O'Higgins, believed that with a people like the Chileans it was necessary "to confer good upon them by force" (Loveman, 1979,1988) and Diego Portales, credited with creating the conservative "Portalian state" in Chile, urged formation of a "strong, centralizing government, in order to set the citizens on the straight path of order and virtue" (Loveman, 1979, 136). Even more skeptical of the value of constitutional/structural design for government than Bolivar, Portales wrote to a friend in 1834; "One can never understand lawyers and, carajo: what use are constitutions and bits of paper unless to remedy an evil that one knows to exist, or is about to exist...? An accursed law, then, [if it] prevents the government from going ahead freely at the opportune moment" (cited in Collier, 1967s 345).

In the violent and chaotic ambience of the post-independence decades in Latin America, constitutions became promises for the future, programs of action, fleeting philosophical exercises rather than designs for government on the model proposed by the framers of the constitution of the United States of America to the north. Lacking any significant tradition of federalism, local autonomy, representative government, or political participation (apart from attempting to influence particular decisions of judges or administrators through monetary or other inducements), proclamations of liberal, federalist, or republican constitutions were less important than the daily struggle to capture the State apparatus which determined the enforcement or nonenforcement of regulations, awarding of government contracts, and distribution of concessions and privilege. With the Spanish gone, the legitimacy of political power had disappeared, but the economic rewards of coup d'etat and political domination expanded dramatically. The stakes of political conflict increased while theoretical constitutional protections for regime opponents typically evaporated even where they supposedly existed. Nevertheless, constitutions were important; they were appealed to in efforts to legitimate personalist rule and to sanctify usurpation of power. They contained provisions for states of

constitutional exception", ("states of siege", "states of emergency") which legalized suspension of whatever rights citizens had been extended and, correlatively, removed "temporarily" any limits on government authority apparently manifested in the very same constitution.

The new republics followed in the Spanish imperial tradition which supposed that all problems of society were to be solved through appropriate legislation imposed by the State. If defects were noted in the eventual outcome, still further decrees and regulations would resolve the remaining (or ensuing) problems. Even the most "liberal" of constitutions tended to recognize the need for "emergency powers" or states of constitutional exception that removed any restrictions upon State action which might impede the attainment of the "common good." Necessity of State, maintenance of public order, and protection against immoral doctrine or behavior took precedence over any individual rights or liberties enumerated in the constitutions of the Latin American nations.

Only slowly during the nineteenth century did the domain of res publica expand, with adoption of religious toleration, evolution of more diverse forms of artistic and public expression, development of modern political parties, labor unions, and interest groups, and expansion of electoral



and other forms of political participation. By the early twentieth century all Latin American constitutions proclaimed that citizens enjoyed basic political rights and liberties, modelled typically on the U.S. or French constitutions, with a borrowing also from other European and British practices. However, even as certain formal rights and liberties were proclaimed in the numerous constitutions and constitutional revisions, constitutional limitations on the extent of political space/res publica remained the rule rather than the exception.

The most basic manner in which these constitutional limitations were enshrined involved "states of constitutional exception". This feature of the Latin American constitutional tradition has survived into the twentieth century and is a key element in practically every present day Latin American constitution.

The most common version of the ubiquitous "state of constitutional exception" involves a "state of siege" (estado del sitio) clause in the national constitution. In addition, variations on the theme, designated by more or less severe curtailment of individual liberties and political expression (right of association, right of assembly, right to strike, censorship of the press and other media) may be called "states of commotion", "states of natural disaster", states

of catastrophe", "serious disturbance of public order" and so on. Whatever the precise wording of these states of constitutional exception, they authorize the executive or legislative branches of government, sometimes with subsequent ratification by the non-initiating branch and sometimes without, to suspend basic constitutional rights in all or part of the national territory for some specified period of time. For example, according to the constitution of the Dominican Republic in the mid-1960s (Art. 38 (7)) a state of siege could be proclaimed in the event of disturbance of the public peace or public disorder. The state of siege suspends "wherever the foregoing exist, and for their duration, the human rights proclaimed [in the constitution]". In extreme cases, for example in Chile from 1973-1988, permanent states of constitutional exception of varying severity prevail without interruption. In the mildest of cases, for example in Costa Rica since 1950, only a declaration by the executive of a "state of national defense" approved by a two-thirds vote of the legislature, permits suspension of specified constitutional rights (freedom of internal movement in the country; sanctity of the home; inviolability of private documents and correspondence; right of assembly; right to public expression of opinions; right to publish opinions without prior censorship; right to access to public offices

to seek information of public interest; prohibition against detention without probable cause of a crime having been committed and without a Judicial order) (Article 121,7)). Whereas there is great variety throughout the region in the specific nomenclature for states of constitutional exception, and the specific conditions under which they may be constitutionally instituted, the examples below suffice to illustrate the general patterns and range of this constitutional tradition in the region:

#### States of Constitutional Exception

<u>Country</u>	<u>Nomenclature</u>
Bolivia	State of Siege (Art. 111, 1967 Constitution) (Note: Specifies cases of grave danger caused by internal disorder or international war; may not exceed 90 days without <b>legislative approval</b> )
Brazil	Federal Intervention (in the states) State of Siege (Article 155, 1969 as amended; provides for state of siege for 180s days and extension of this period if conditions making the state of siege necessary persist) (Notes Brazil is [1988] currently in the process of constitutional revision)
Chile	internal or external war internal commotion emergency

public calamity

(Note: Depending upon which of these states of constitutional exception exists, the president may declare a "state of assembly"; "state of siege"; "state of emergency"; or "state of catastrophe"--each with different procedures and different rights or liberties suspended. (Arts. 39, 40, 41,))

Colombia

Disturbance of Public Order  
State of Siege (Art. 121, 1960)

Costa Rica

State of National Defense  
(Arts. 121, 140, 1949 as amended to 1988). (Note: Requires legislative action or confirmation of executive action by legislature)

El Salvador

Suspend and reestablish constitutional guarantees  
(Arts. 27, 175, 1962) (Note: Requires legislative action by two-thirds vote; specifies war, invasion, rebellion, sedition, catastrophe epidemic, or other general disaster, or serious disturbances of the public order. Art. 177 further gives military tribunals jurisdiction in cases of treason, sedition, rebellion, espionage, and "other offenses against the peace or independence of the state or - against the law of nations"

Honduras

Suspension of constitutional guarantees. (Art. 107) (Note: Specifies invasion of the national territory, serious disturbances of the peace, epidemic, or other general disaster)

Venezuela

State of Emergency (Arts. 240-244). (Note; Specifies emergency, commotion that might perturb the peace of the Republic, or grave circumstances affecting social or economic life).

In addition to provision for states of constitutional exception, a number of Latin American constitutions specifically limit the extent of "political space" and character of res publica. In some cases this involves constitutional limitations upon the political participation of designated individuals or groups. For example, the Brazilian constitution, as amended in 1969, specifically restricted the political rights, including voting and candidacy of particular individuals, as well as of a number of political parties. The Chilean constitution of 1980 prohibits "organizations? movements, or political parties" which threaten the family, advocate violence or [are based upon] a conception of society or the state or the juridical order of a totalitarian character or founded in class conflict (Art. 8). It further proscribes all associations •contrary to morality, public order and State security" (Art. 19 (15)).

The Honduran constitution proclaims that "freedom of association is guaranteed provided it is not contrary to the security of the state or to good customs" (Art. 88),

Similarly, constitutional restrictions upon artistic expression, publication and the mass media potentially reduce the extent of the open political realm. In the case of the Chilean constitution, for example, the declaration of states of constitutional exception also permits prior censorship and restrictions on public expression, along with censorship of private correspondence. Similar provisions were to be found in the amended (1969) Brazilian constitution.

In summary, then, it is clear that the constitutional tradition of Latin America, to the present, provides relatively fragile guarantees for an institutionalized res publica. The minimal requisite conditions for inclusionary politics with relatively open public contestation regarding alternative policies and alternative candidates for public office are hostage to the constitutional discretion of incumbent policymakers--most particularly under a variety of constitutionally established "states of constitutional exception".

States of constitutional exception, however, are not the only constitutional foundations of tyranny in many Latin American constitutions. Two further key features of most

(but not all) Latin American constitutional systems are (1) a lack of judicial protection of individual and group rights against official abuse, that is lack of efficient judicial remedy, and (2) a constitutionally enshrined and historically "ratified" role of the military services as guarantors of the domestic political order. In their own ways, each of these features further mitigates against authentic democratization in the Latin American region.

Lack of Judicial Remedy.

The Latin American legal tradition is generally derived from the civil law system, originating in Roman-Spanish-French legal codes and practices. Unlike the common law tradition, stare decisis and judicial precedent are less important in Latin America than precise application of specialized regulations, codes, and general legislation to particular cases. Civil codes, commercial codes, labor codes, and specialized codes and courts for military and ecclesiastical personnel emphasize appropriate application of detailed regulations and rules to the case before judges. Even where the right of judicial review of legislative or executive action exists, it is typically limited to the individual case under consideration (though there are exceptions to this rule in the region). While Mexican law has developed the distinctive writ of amparo or "protection".

(Art. 103, 1917; Law of Amparo. 1936) to provide individual citizens judicial remedy against official abuse or excesses of authority when constitutional rights are violated,, even in Mexico there is no generalized judicial review as to •constitutionality" of legislative or executive action .(Tena Ramirez, 1959; Burgoa, 1944). The result of this system is a backlog of thousands of individual petitions for writs of amparo, subject to the quirks and corruption of the administration of "justice" in Mexico.

Inasmuch as the states of constitutional exception clauses, discussed above, provide legal bases for suspension of individual guarantees, establishment of curfews, restrictions on travel and public assembly, detention without court orders, censorship of the press and other media, and postponement or cancellation of elections, it is difficult to imagine judicial remedy for violation of rights that have been constitutionally suspended. Moreover, the widely recognized offense of desacato (disrespect for or insults toward public officials--with different nomenclature and definitions from country to country) significantly restricts the legitimate exercise of public expression of discontent with official action.



With rare exception, then, (for example, judicial review in Venezuela according to Art. 215 (3,4,6) which provides for declaration of nullity of national and state legislation and executive action contrary to the constitution and, in Costa Rica, where legislative and executive acts may be declared unconstitutional by a two-thirds vote of the Supreme Court justices (Art. 10) ) the availability and extent of judicial remedies in most Latin American political systems offer scant guarantee of sustaining res publca. or even for upholding minimal judicial autonomy. In some cases judicial review is explicitly precluded. For example the constitution of Ecuador during the 1960s declared "Congress alone has jurisdiction to declare whether a law or legislative decree is or is not unconstitutional" (Art. S3 (21)). Moreover, judicial practice is usually subject to relatively high levels of corruption and political influence, making the judiciary far from an independent source of protection for constitutional or legislated rights. Within the Latin American constitutional tradition, enhancing judicial autonomy and its relative authority in relation to executive and legislative power is difficult; without such enhancement institutionalization and preservation of democratic politics is even more difficult.

#### The Role of the Military

The reality of militarism and military participation in the political life of the Latin American nations is a commonplace (Loveman and Davies, 1978, 1989; Lieuwen, 1960; Johnson, 1964). Less frequently recognized is that most Latin American constitutions specifically assign to military institutions the duty of protecting the constitutional order and assuring domestic tranquility and peace. Thus, social reforms or populist rhetoric may be interpreted by military leaders as threats to national security and constitutional order. Under these conditions military coup or other intervention is not only plausible but represents a moral duty. This is also true if elected officials or incumbent governments exceed their authority--as interpreted by military officers--or adopt programs that seem inimical to the common welfare or to the "national security" as broadly conceived by military elites. In short, the military institutions are often constitutionally defined, and certainly define themselves, as a sort of "court of last resort" in which judicial review is accomplished with tanks and bayonets. The following justifications of military intervention and ouster of elected governments are illustrative:

Hugo Banzer, Bolivia, 1971.

...The mission of the military in Bolivia today, apart from its specific functions of maintaining the internal peace and defending the national sovereignty, has been expanded in scope; to be the unifying and cementing factor of the nation. The role that the Armed Forces played in the patriotic uprising of August has conferred upon them the perfect right of protecting the national institutions and has in fact confirmed their status as the tutelar institution.

Argentina, 1976. Radio Announcement by Three Commanding Generals of the Armed Forces.

The Armed Forces have assumed direction of the State in fulfillment of their unrenounceable obligation. They do so only after calm meditation about the irreparable consequences to the destiny of the nation that would be caused by the adoption of a different stance. This decision is aimed at ending misrule, corruption, and the subversive scourge.... It is a decision for the Fatherland....

Chile. "The Reasons of the Junta". 1973

... the armed forces have taken upon themselves the moral duty, which the country imposes upon them, of deposing the government, which, although legitimate in the early exercise of its power, has since fallen into flagrant illegitimacy, assuming power for ourselves only for so long as circumstances so demand and counting on the support of the vast majority, ail of which, before God and history, justifies our action; and hence whatever regulations, norms, and instructions we may think fit to lay down for the attainment of our objectives aimed at the common good and the maximum patriotic interest....

Clauses in Latin American constitutions providing support for such military visions are included in the charters of countries considered functioning democracies, such as Venezuela, or military dictatorships (which call themselves democracies) such as Chile. In Venezuela the armed forces

are "organized by the State to assure the national defense, the stability of democratic institutions, and respect for the constitution and the laws [of the nation]" (Art. 132). The 1980 constitution of Chile assigns the military and security forces the task of "guaranteeing the institutional order of the Republic" (Art. 90). In Brazil the historical role of the military as the "moderating power" included the constitutional duty to "defend the fatherland, and guarantee the constituted authorities, law and order" (Art. 91). This role has recently been reaffirmed in the draft constitution adopted as part of the democratization process in 1988. Only in Costa Rica, where unique historical circumstances and adroit leadership allowed abolition of the armed forces after the civil war of 1948, are the military institutions constitutionally eliminated as a factor in national politics (Figueres, 1987; Melendez, 1987, Monge Alfaro, 1982; Ocontrillo, 1982). Article 12 of the Costa Rican Constitution reads: "Se proscribire el ejército como institución permanente. Para la vigilancia y conservación del orden público. habrá las fuerzas de policía necesarias." (The army is prohibited as a permanent institution. For the vigilance and conservation of public order there will be the necessary police forces). This unique circumstance in a nation of approximately three million people eliminates military

expenditures as well as the threat of militarization of politics; it contributes to the highest levels of public services and education in the Central American region,, However, it has not been emulated in the rest of Latin America, nor is such emulation likely.

Indeed, the tradition of military participation in politics in Latin America and high levels of influence in national policymaking was greatly reinforced by international events after 1959. The success of the Cuban Revolution and the subsequent emphasis in United States' foreign policy on counterinsurgency and preventing the spread of Cuban influence (Loveman and Davies, 1978; 1989) gave the region's armed forces new influence and new resources. Militarization of politics and focus upon internal security prompted new legislation--sometimes "constitutional" and other times so-called "institutional acts", "laws of state security" or other embellishments upon existant states of constitutional exception--which, in turn, "legalized" further repression and diminution of the res publica. Called generically by some authors "bureaucratic authoritarian states" (O'Donnell, 1973; Collier, ed. 1979), the militarized tyrannies of the period 1964-1980s routinized and institutionalized government terrorisms, torture, and "disappearances" of opponents with the rationale of combatting subversion and international

communism. (Fruhling, 1988; Schoultz, 1981; 1987). In all cases, however, the military elites claimed to be acting in accord with their constitutional mission to uphold national institutions and traditions. Even where this was patently inconsistent with reality, a constitutional basis for the military assertions existed, and civilian support for the military coups and ensuing militarization of policymaking was apparent. Indeed, in Brazil (1964), Uruguay, Chile (1973) and Argentina (1976) widespread support for military initiatives existed prior to and during the early period after the coups that established the military dictatorships in these countries.

In practice it is extremely difficult to reduce or eliminate the extensive influence and participation of the Latin American military institutions in policymaking. Historical circumstances have allowed development of alternative, but seemingly effective, institutional restraints upon the military services in few cases. Abolition of the armed services, the Costa Rican remedy, is not a likely scenario in the rest of the region. Constitutional restraints on military participation in politics and redefinition of the military mission, combined with significant long term reforms in military education and career socialization, seem a more likely though insecure

option. Whatever the practical remedy, however, democratization of Latin American politics requires change in the historical and constitutional definition of the role of the armed forces in Latin American society.

### Centralized Power and Local Politics

A further constraint upon expansion of res publica and democratization in Latin America is the lack of effective regional or local governmental institutions. Even in political systems formally designed as federalist, (e.g. Mexico, Venezuela, Brazil) the overwhelming dominance of centralized State institutions inhibits possibilities of local solutions to local problems, that is, prevents self-government and the opportunity for autonomous political action.

More than three centuries of Spanish colonial administration left the new nations of Latin America in the early nineteenth century without strong institutions for local policymaking and administration. Municipal councils (cabildos, avuntareientos) appeared soon after Columbus' first voyage to the Caribbean, but deliberate policies of the Crown prevented the evolution of colonial legislatures (cortes) and restricted the authority of the cabildos. Notwithstanding

the gap between royal policy and local implementation, detailed regulations and instructions for city planning and administration shaped the physical and administrative development of Spanish American colonial towns. Each cabildo possessed a collection of rights and liberties (fueros) granted by the Crown. This set of fueros, usually a collection of decrees and concessions rather than a single document, was an analogue to a town charter. Ultimately, however, the authority of the cabildo stemmed from the laws and decrees of the Crown for local government, from custom, and from the specific agreements (capitulaciones) reached between the monarch and the founders of particular towns.

In general, the town councils could legislate on all matters of local interest provided their acts were in general harmony with Castilian law. However, the ultimate validity of all local action depended upon approval by royal officials. Moreover, the chief colonial administrators (viceroys) could initiate municipal reforms, thereby preempting local action. Such preemption could include definition and enumeration of municipal government positions, administration of price controls, regulation of weights and measures and even detailed instructions regarding the work routines of municipal clerks.



Over time, Spanish colonial policy gradually undermined the autonomy of the cabildo. Erosion of local authority accompanied severe limitations on local sources of revenue. Inability of local officials to meet commitments to provide services and to finance the pageantry and public festivals associated with welcoming new royal officials added a pretext for further royal control over local administration. Requirements for annual audits of local accounts by royal officials and approval by these officials of "extraordinary" expenditures by the cabildos became the rule.

Corruption in local administration was common, adding still further pressures for centralized supervision or intervention. In the seventeenth century, the practice of selling government positions was extended to most municipal offices. By the eighteenth century many of the councilmanic (regidor) positions were in the possession of private families, title passing from father to son upon payment to the royal treasury of a specified fee. Council sessions were held in private and the regidores sworn to secrecy. Thus, in addition to a tradition of centralized authority and weak local institutions, local politics and administration offered little opportunity for public discussion or political participation.

This tradition persisted in the post independence period and into the twentieth century in most of the region. Perhaps most importantly, local revenues depended--and continue to depend--almost entirely upon budget appropriations from the central government. In supposed federal systems such as Mexico and Venezuela, as well as in Brazil, it is rare for less than 90 percent of local revenues to originate in central government "subsidies" or revenue-sharing allocations. In the formally centralized systems, likewise, local governments lack independent sources of revenue as well as authority for planning capital expenditures or even daily "local" administration.

Severe restrictions upon local initiative results in critical dilemmas for most Latin American nations. The overwhelming responsibility of the centralized institutions of the State for the common welfare makes national policymakers responsible for all policy failures, from lack of bridges to poor garbage collection and sewer services. Lacking resources and capabilities to provide for the common welfare, the national political system, nonetheless, is offered no relief by the potential for local or regional problem-solving and autonomous citizen action. Assertions of total control and authority, where such control is impossible and such authority impotent in the face of overwhelming policy

challenges facing the Latin American nations in such matters as public health, housing, employment, food supply, transportation, and resource management, is a design for failure. It is also a foundation for tyranny, as policymakers respond to inevitable citizen protest and alienation with the crudest of policy instruments: coercion, detentions, murders, and State terrorism.

Lack of effective, autonomous regional and local institutions thus reinforces the constitutional foundations of tyranny in the region as well as the bias toward authoritarian, centralized patterns of policymaking and administration. It discourages expansion of public contestation, competitive politics, and the potential for error correction inherent in a more democratic political process. Failure to expand "political space" at the regional and local levels, inhibits significantly the potential for institutionalization of res publica as a basic element in Latin American politics.

#### Prospects for Institutionalization of Res Publica

In the early 1980s most of the military regimes established after 1964 gave way to civilian, elected governments. For a variety of reasons the military regimes

were ousted or chose incremental extrication from direct governmental responsibility (Loveman and Davies, 1980). Almost everywhere this extrication coincided with new constitutions or modification of existing constitutions and new electoral legislation. These new constitutions and electoral laws reintroduced party politics, social and civil liberties, a relatively free media and press, and a new commitment to democratization. Specific attention to avoiding the human rights abuses of the past was given by the new generation of Latin American political leaders. Thus, for example, President Alfonsín in Argentina declared:

Democracy is not a luxury. It is the most essential condition.

. . . We all know that, in addition to free elections,, what makes a system democratic is the form in which power is exercised and the subordination of governments to institutional and electoral controls.

Put another way, democracy not only requires respect for majority decisions, but also respect for minorities, and the functioning of a number of controls and precautions which limit and allow correction of the errors of government policymakers. . . a President is elected with limited authority, subject to norms and controls; representatives are elected to legislate, but never to exceed the limits of a higher authority, the Constitution.

President Raul Alfonsín in La Cuestión Argentina first published in 1980, reprinted in 1984.

President Alfonsín's vision confronts the reality of economic crisis and political vulnerability. As in the rest of Latin America, the constitutional foundations of tyranny

(or the potential for tyranny) remain embedded in Argentine institutions. Control over the military remains fragile, autonomy and authority of the judiciary remains questionable, and local government remains weak.

Consolidation of political democracy and institutionalization of *res publica*, founded upon a supportive political culture and widespread consensus, can only develop over a long period of time. The current civilian governments in Argentina, Brazil, Uruguay, Ecuador, Peru, Bolivia and parts of Central America and the Caribbean are a first step, but only a first step, in that direction. Reversal of the process will surely occur in some cases, if not in all, under the stress of economic crisis and the reality of political and ideological fragmentation. The constitutional foundations of tyranny have survived the military regimes of the last two decades; the fundamental redesign of political institutions requisite to long term democratization and the power to implement such a redesign has not yet been achieved.

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