RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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constitutionality of military government policies. In some areas of the law, the Supreme Court did stand by the 1925 Constitution, at least early on. While the junta had established, in Decree-Law (DL) 128, that it had both legislative and constituent powers, the government did not always make clear when it was exercising which of these powers. In several rent and labor law cases, the Supreme Court thus asserted both its continued acceptance of the 1925 Constitution as a controlling document, and its own power to declare part or all of a decree-law unconstitutional (Precht Pizarro 1987).[9]

The Court never came close to using this power in more politically sensitive cases, however. In my sample of published decisions from the 1973–1980 period, the justices rejected the petition for *inconstitucionalidad* in twenty-nine of thirty-two instances, and the three accepted were not particularly sensitive cases. Despite the fact that human rights lawyers constantly appealed to the Constitution in their defense of regime victims, the justices never embraced these ready examples of more liberal reasoning. Indeed, in December of 1974, when the junta issued Decree-Law 788, stating that all previous decree-laws in contradiction with the Constitution should be considered modifications thereof, the Court quickly accepted the proposition.[10] In subsequent *recursos de inaplicabilidad* and in other cases in which arguments were presented regarding the unconstitutionality of early decree laws, the Court stated simply that any decree-law issued between September 11, 1973, and the day that DL 788 was issued could not conflict with the 1925 Constitution, since "it must be necessarily accepted that [these laws] have had and have the quality of tacit and partial modifications" to the Constitution.[11] That DL 788 itself made a mockery of the Constitution, judicial review, and the rule of law seemed either to elude or simply not to bother the justices.

Later, after the regime's new constitution went into effect (1981), the Supreme Court offered interpretations that placed almost no limit on the power of the government to restrict or eliminate individual rights. In my sample of the sixteen published *inaplicabilidad* decisions from this period, the Court found constitutional violations in only two cases, both involving a law, passed by the junta, that sought to resolve, in favor of the state, disputes dating

[9] See for example the decision of July 24, 1974, in the case of *Federico Dunker Biggs*, *Fallos del Mes* No. 188: 118–121.

[10] DL 788 was issued while a *recurso de inaplicabilidad* filed by former Senator Renán Fuentealba was pending before the Supreme Court. Fuentealba's lawyers were arguing that his expulsion, based on DL 81, was unconstitutional.

[11] *Luis Corvalán Lepe* (*amparo*), *Fallos del Mes* No. 203: 202–205.

to the pre-authoritarian agrarian reform.[12] In these cases, the Court argued that the law violated article 73, paragraph 1 of the 1980 Constitution, which states that the power to resolve civil and criminal disputes belongs exclusively to the judiciary, and that neither the president nor the Congress can, in any circumstances, revise the content of judicial decisions or revive cases that have closed. Thus, the Court jealously guarded its authority over civil law matters and the traditional strict separation of powers; when matters of public law were in question, however, the Court refused to challenge the executive.[13]

The New Constitutional Review Mechanism: Recurso de Protección

In one of its Constitutional Acts of 1976, the military regime introduced a new mechanism for the judicial defense of civil and political rights: the writ of protection (*recurso de protección*). A petition for a writ of protection could be filed in an appellate court by any individual or group that believed that a third party, public or private, had violated one or more of their civil or political rights. It required that the court issue a ruling within 48 hours, and allowed for an appeal to the Supreme Court. This new petition was given greater permanence by the 1980 Constitution, and after 1981 Chileans increasingly employed this mechanism to claim their rights before the courts (appellate and Supreme). Of the 118 published decisions in *protección* cases involving civil and political rights cases (excluding property) for the 1981–1990 period,[14] the courts voted to grant the writ in 30 instances, or in approximately 25 percent of the cases. However, in ten of these cases the ruling actually favored the state or community over the individual, and those that did favor the individual did so only to the extent that the regime's own legal text provided explicitly for this.

In general, decisions on *recursos de protección* tended not to challenge the administrative acts of the regime. For example, judges ruled that university rectors had the right to expel students from their institutions for participating in illegal demonstrations, and that wartime tribunals were legally empowered to judge specified acts committed by civilians. In other words, individuals judged

[12] *Sociedad Agrícola y Maderera Neltume Limitada* (*inaplicabilidad*), April 19, 1985, *RDJ* 82 (1985) 2.5: 86–104; and *Jaime Bunster Iñíguez y otros* (*inaplicabilidad*), January 29, 1987, *RDJ* 84 (1987) 2.5:23–30. Note that in these same cases, the Court rejected the challenges based on formal/procedural unconstitutionality.

[13] For details on these cases, see Hilbink (2007, ch. 4).

[14] These include physical and psychological integrity, freedom of expression, freedom of assembly, freedom of conscience, freedom of association, equality before the law, freedom of labor, and the right to work and education.

by such entities could not claim that their rights to equality before the law and/or due process were infringed.[15] Courts also ruled that the government's cancellation of the "legal personality" (*personalidad jurídica*) of the Hare Krishna – making it impossible for the group to conduct legal transactions as an entity – was not a violation of the freedom of religion, and that the armed forces did not violate the individual's right to association by prohibiting their members from belonging to the Free Masons.[16]

In cases involving the right to assembly, the courts held both the government and the public to the rules of the regime; that is, they upheld the rule that all meetings held in public places had to have previous government authorization, but declared that the government could not require authorization for nonpolitical gatherings held in private locales.[17] Freedom of expression and the press was another area in which the courts did not allow the government to stretch its own (limited) boundaries. For example, judges reminded the government that the Constitution prohibited prior censorship under a state of emergency (though it allowed it under a state of siege), and ruled that the retraction of previous authorization for publication, as well as the indefinite postponement of a decision on such authorization, was also unconstitutional.[18] However, they also ruled that police harassment of journalists, in the form of covert infiltration of a reporting site, forced removal of journalists from a news scene, or seizure of journalistic equipment, did not constitute a violation of freedom of the press.[19] In addition, they endorsed the argument that hunger

[15] See *Raúl Acevedo Molina con Vicerrector Académico de la Universidad de Santiago* (*protección*), December 27, 1984, *RDJ* 81 (1984) 2.5:40–50; *Colón con Vice-rector Universidad de Santiago* (*protección*), March 20, 1985, *Gaceta Jurídica* 57:68–74; and *Jorge Donoso Quevedo y otro* (*protección*), May 8, 1984, *Fallos del Mes* No. 306:193–199.

[16] *Círculo Védico* (*protección*), March 12, 1984, *Fallos del Mes* No. 304:9–11; *Renato Verdugo Haz y otros* (*protección*), July 29, 1989, *Fallos del Mes* No. 368:366–371.

[17] See *Presidente del Consejo Regional del Colegio de Matronas y otros* (*protección*), March 17, 1986, *Fallos del Mes* No. 328:35–37, and *Luis Ibacache Silva y otros* (*protección*), March 20, 1986, *Fallos del Mes* No. 328:51–54.

[18] See *Sociedad Publicitaría y de Servicios Informativos Ltda. con Ministro del Interior* (*protección*), January 5, 1983, *RDJ* 80 (1983) 2.5:3–7; *Jorge Lavandero Illanes y otro* (*protección*), April 19, 1984, *Fallos del Mes* No. 305:107–115; *Sociedad Editora La República Limitada, Editora de la Revista Cauce contra Director de DINACOS* (*protección*), May 2, 1984, *RDJ* 81 (1984) 2.5:124–129 (which cites another case decided on the same grounds nine days later); *Sociedad Impresiones y Comunicaciones Ltda. con Ministro del Interior* (*protección*), March 31, 1986, *Gaceta Jurídica* 70:27–31

[19] See *Consejo Regional de Concepción del Colegio de Periodistas de Chile A.G.* (*protección*), March 25, 1985, *RDJ* 82 (1985) 2.5:6–10; *Mario Aravena Méndez* (*protección*), October 10, 1985, *Fallos del Mes* No. 323:667–671.

strikes were illegitimate forms of protest on the grounds that they violated the strikers' own right to life.[20]

In sum, in *recurso de protección* cases, judges were sometimes willing to check specific administrative acts via adherence to the letter of the law, but proved unwilling to challenge the regime's illiberal policies by seeking out a democratic spirit in the 1980 Constitution. Their approach to interpretation in *recursos de protección* was thus far from the "active, dynamic, creative and imaginative" role that one prominent (and conservative) legal scholar proclaimed it should be (Soto Kloss 1986).

CONTRASTING PERFORMANCE OF THE CONSTITUTIONAL TRIBUNAL

In stark and surprising contrast to the performance of the ordinary judiciary under Pinochet is that of the Constitutional Tribunal, an organ (re-)created by the 1980 Constitution as a body separate from the ordinary judiciary.[21] The Tribunal was charged uniquely with abstract review of legislation; that is, at the official request of the president or one-fourth of the members of either house of Congress (or under the military regime, the junta), the Tribunal was to review the constitutionality of draft laws, decrees with the force of law, ordinary decrees referred by the Comptroller General, constitutional reforms, and international treaties. The Tribunal was staffed by three acting Supreme Court justices, selected by the Court itself, and four lawyers, one appointed by the President of the Republic, one by an absolute majority of the Senate (before 1990, the junta), and two by the National Security Council (again, before 1990, the junta). The Constitution stipulated that the members appointed by the president and the junta/Senate must have served as substitute judges in the Supreme Court for at least three consecutive years. Members would serve eight-year, staggered terms. In sum, the majority of the Tribunal's members were appointed directly by the government, and did not enjoy the secure and lengthy tenure of ordinary judges. While one might thus expect the Tribunal to be even more subservient to the government than was the Supreme Court, the reverse proved true.

[20] *Fernando Rozas Vial y otros con Párroco de San Roque y otros (protección)*, August 9, 1984, *RDJ* 81 (1984) 2.5:161–165; Intendente de la Región de Atacama con Párroco de El Salvador, July 3, 1986, *RDJ* 83 (1986) 2.5:108–111.

[21] A Constitutional Tribunal was first established in 1970 by President Frei Montalva. It reviewed seventeen cases in the two years it operated, most of which were decided unanimously in favor of the executive. It was abolished shortly after the military coup. Its brief and largely unremarkable history is well captured in Silva Cimma (1977).

In 1985, for example, the Constitutional Tribunal issued the first of a series of crucial decisions that set basic standards for free and fair elections in the 1988 plebiscite and beyond.[22] Appealing to the overall structure and spirit of the fundamental law, which both guaranteed political rights and outlined a return to democracy, the Tribunal insisted on the establishment of an independent electoral commission – the *Tribunal Calificador de Elecciones* or TRICEL – for the 1988 plebiscite. According to transitory article 11 of the Constitution, the TRICEL was to begin operating "on the appropriate date" for "the first election of senators and deputies." The bill that the junta presented to the Constitutional Tribunal for review thus established that the TRICEL would begin to function in December of 1989. However, Tribunal member Eugenio Valenzuela – who was, it should be noted, one of the four members directly appointed by the junta – appealed to the spirit rather than letter of the law, arguing that if the Constitution itself recognized the existence of a "public electoral system," then there was no reason to exempt the 1988 plebiscite, which would inaugurate the transition process, from the rules of such a system. Valenzuela was able to persuade three other Tribunal members, including two members from the Supreme Court, to vote with him. The Tribunal thus issued a 4–3 ruling, and the government was forced to revise the legislation.[23]

POSSIBLE EXPLANATIONS FOR THE BEHAVIOR OF THE ORDINARY COURTS

If the Constitutional Tribunal was able to stand up to the military government, insist that it respect basic principles of legality, and hold it to its pledge to return the country to democracy, then why did ordinary courts remain so obsequious toward the regime?

Regime-Related Factors

In any analysis of judicial behavior under authoritarianism, the first and most obvious hypothesis is that regime-related factors – that is, direct or indirect interference with and manipulation of the courts by the government – explain

[22] Subsequent decisions included that of October 1, 1986, which revised the law on electoral registers; that of March 7, 1987, which reduced the constraints on political party organization; and that of April 1988, which set campaign standards and required clear dates for the 1988 plebiscite and for subsequent presidential and parliamentary elections. See *Fallos del Tribunal Constitucional Pronunciados entre el 23 de diciembre de 1985 y el 23 de junio de 1992* (Santiago: Editorial Jurídica, 1993).

[23] For an in-depth discussion of the significance of the Constitutional Tribunal in limiting the authoritarian government, see Barros (2002).

the outcomes. While Chile's military government did use a variety of tactics to make its will known to judges, and changed some rules along the way to strengthen its influence in the judiciary, an explanation that attributed judicial behavior in Chile from 1973–1990 solely or primarily to fear of and manipulation by the government would overlook crucial elements of the picture.

To begin, I must emphasize that judicial independence was, on the whole, respected under the authoritarian regime. In the interviews I conducted for this study, not only acting judges themselves but also retired judges, lawyers, and law professors from across the political spectrum maintained that the courts had not been subjected to threats or other types of interference from the military government, insisting upon the continuity of judicial autonomy across time.[24] Indeed, this is why criticisms of the judges' behavior under Pinochet are so strong in Chile: people believed in the independence of the judiciary and therefore had high expectations of it.

This is not to deny the clear evidence of more subtle forms of pressure brought to bear by the military government on the judiciary. While my review of the records of the plenary sessions of the Supreme Court revealed no instance in which judicial promotions were dictated by the government, nor even any cases where the Ministry of Justice rejected a list of nominees proposed by the Court, it did indicate that some of the early investigations into judicial behavior, as well as some transfers during the authoritarian regime, were made at the recommendation of the Ministry of Justice (see esp. Volumes 18 and 22).[25] Furthermore, while the new military leaders did not themselves conduct a purge of the judiciary, they did pass some laws making it easier for

[24] On three different research trips (one in 1996 and two in 2001), I conducted a total of 115 interviews with legal scholars and practitioners, former ministers of justice, and, most importantly, judges. In 1996, I interviewed thirty-six acting highcourt judges (fifteen of seventeen Supreme Court members and twenty-one members of the appellate courts of Santiago and San Miguel, which was two-thirds of the total in the Metropolitan Region) plus ten lower-court and/or former judges. In 2001, I interviewed fifteen highcourt judges, ten of whom I had interviewed in 1996. All interviews were semi-structured and lasted forty-five minutes to four hours. Through the interviews, I probed the judges' role conception, their political leanings, and their understandings of the institutional and/or political constraints that they were subjected to under different regimes and administrations. I sought to ask questions in the most open-ended way possible, so as not to lead the subjects or to put them on the defensive. Since interview responses cannot necessarily be taken at face value, I sought to triangulate and contextualize the responses through interviews with a variety of actors, and, where possible, through archival material.

[25] The case could easily be made, however, that such indirect steering of the judiciary was nothing new. The executive is, for obvious reasons, always going to attempt to exert whatever influence possible on judicial selection and tenure. Moreover, Chilean law had long authorized the president to oversee the conduct of judges, though the power to evaluate and remove judges

the Supreme Court to dismiss potential troublemakers. Decree-Laws 169 and 170, published on December 6, 1973, modified both article 323 of the Judicial Code and article 85 of the 1925 Constitution, allowing judicial employees to be removed from service for an annual evaluation of "poor performance" by a simple majority (rather than the previous requirement of two-thirds) vote of the Supreme Court. The vote was to be secret, and the justices were under no obligation to give reasons for the negative evaluation. These decrees facilitated the internal purge conducted by the Supreme Court in January of 1974 (discussed later).[26]

In the 1980s, rather less subtle pressure was brought to bear by Pinochet's ideological ally, Hugo Rosende, who was sworn in as the new Minister of Justice in January of 1984. Rosende was reportedly obsessed with judges' ideological leanings, and made it clear to the Court that he wanted appointees who "will never meddle in politics," with "politics defined, of course, as the politics of dissidence" (Matus Acuña 1999: 180). In 1984, he oversaw the expansion of the Supreme Court from thirteen to seventeen members, which allowed at least one hard-line regime supporter, Hernán Cereceda, to rise to the High Court. Cereceda allegedly became the main informant for the government on the opinions and activities of judicial personnel (Matus Acuña 1999: 158). In 1989, in the wake of Pinochet's loss in the (October 5, 1988) plebiscite, Rosende succeeded in getting the junta to approve what became known as the "candy law" (*ley de caramelo*).[27] The legislation was so called because it allowed justices over age seventy-five to retire within ninety days with a sweet financial deal. Seven justices took advantage of the offer, allowing the military regime to make seven new appointments to the Court, albeit drawn (as always) from nomination lists proposed by the Court itself.

There is thus, not surprisingly, some evidence that the military government tried to exert some control over the judiciary, although the means it used were mostly indirect. While certainly the government brought direct pressure to bear in specific cases,[28] Chile's judicial system did not become a system

was given exclusively to the Supreme Court (see esp. article 72, no. 4 and article 85 of the 1925 Constitution).

[26] Note that these changes were later reversed, first by a modification of the content of DL169 and then with the 1980 Constitution.

[27] This was DL 18,805 of June 17, 1989. In addition, just before the transition, the military government added a line to the Judicial Code to prevent those who had been fired from the judiciary from serving as substitute judges, and to prohibit the future impeachment of government officials for behavior under the military regime.

[28] One famous example is the *Apsi* case of 1983, in which one chamber of the Supreme Court initially accepted, but then, in an unprecedented "clarifying decision," reversed and rejected a *recurso de protección* on behalf of the editors of the magazine. See *Sociedad Publicitaria y de Servicios Informativos Ltda. con Ministro del Interior (protección)*, *RDJ* 80 (1983) 2.5:3–9.

of "telephone justice." Indeed, as explained above, the military government wanted to preserve its image of respect for law and courts, and thus, rather than interfere in the judicial process, its leaders preferred simply to restrict the scope of jurisdiction of the ordinary courts and expand that of tribunals over which they (thought they) had more direct control, namely the military courts and (later) the Constitutional Tribunal. Like governments before and after theirs, they did their best to influence judicial selection and tenure, but they did so within the limits of the established system, in which the Supreme Court continued to play the dominant role.

Moreover, it bears noting that it was the judges themselves who tended to interpret their own role very narrowly, abdicating early on the authority they had to rein in the state's police powers or protect constitutional rights, and later refusing to take advantage of opportunities to join with even moderate regime critics and push for liberalization. My analysis of judicial decisions in published civil and political rights cases for the period 1964–2000 revealed that this general pattern was evident long before the 1973 military coup, persisted through even the weakest moments of Pinochet's seventeen-year rule, and continued well after the transition to civilian rule in 1990 (see Hilbink 2007).

The Attitudinal Explanation

With regime-related variables thus thrown into question, many scholars of judicial behavior would immediately suspect that it was the judges' personal policy preferences that explain their support, implicit or explicit, for the Pinochet regime (e.g., Segal and Spaeth 1993). In this view, little resistance from the judiciary reflects little personal opposition to the government (whatever its stripe) on the part of judges. This has certainly been the popular interpretation of judicial behavior among Chileans. Many press articles, both during and after military rule, implied that judicial complicity was a function of ideological sympathy and/or a lack of individual moral integrity (e.g., Luque and Collyer 1986: 23–7; Pozo 1983: 9–10), and a number of the lawyers and judges I interviewed pointed to the right-wing attitudes of certain judges, particularly on the Supreme Court (see Hilbink 2007, ch. 4).

Nevertheless, there is evidence that the judiciary was not, at the individual level, monolithic in its enthusiasm for the authoritarian regime. To begin, the fact that the military government deemed it necessary to issue Decree-Laws 169 and 170 (see the earlier discussion) reveals that the generals were not convinced that they could count on unified and unfailing judicial support, even from the Supreme Court itself. That they sought to restrict the jurisdiction of the ordinary courts, preferring to have politically sensitive cases tried in military courts, or later, the Constitutional Tribunal, also indicates a general lack of

confidence that ordinary judges were and would remain solidly behind them. Moreover, my indirect probing of judges' political views in 1996 interviews revealed *Pinochetistas* to be in the distinct minority.[29] In fact, only six of the thirty-six acting High Court judges I interviewed demonstrated themselves to be clearly approving of Pinochet's rule, or ideologically aligned with the military regime.[30] By contrast, fourteen judges made it clear that they were ideologically at odds with the military regime and well aware of the historical and international standards of democracy.[31] Finally, there were sixteen judges "in between," who asserted differing levels of disagreement with and distance from the Pinochet regime, but didn't articulate a clear democratic ideology in the course of the interview (see Hilbink 2007, ch. 4).

What the interviews and other data (Hilbink 2007, ch. 3) suggest is not that political preferences had nothing to do with judicial performance under the authoritarian regime, but rather that any real romance between judges and military leaders was restricted to a powerful bloc on the Supreme Court, as well as some zealots in the inferior ranks, whom the former were able to reward through promotion. Most judges, I contend, were not personally enamored of or committed to the military regime, particularly as time wore on, but because the Supreme Court controlled discipline and promotions within the judiciary, any judge who aspired to rise in the judicial ranks had to curry favor with – or at least not invite scrutiny by – his or her superiors. A right-wing bias at the top of the judiciary thus meant a likely right-wing bias (even if only strategic) all the way down. In other words, the political bias of the Chilean judiciary cannot be understood as a simple function of individual-level attitudes; rather, institutional dynamics were also at play.

Moreover, the fact that a number of members of the 1973 Supreme Court sympathized with the Pinochet regime can itself be attributed, in part, to institutional factors. At the time of the coup, a majority of the justices had been

[29] All of these judges had served under the authoritarian regime, and many of them under Frei and/or Allende, as well. Most of them spoke quite freely about how the regime changes of the past thirty years had affected their work. In addition, they were open about their views on such issues as whether the Allende regime had destroyed the rule of law, or whether the critique made of the judiciary by the Truth Commission was fair or unfair. Only a few (four) acting High Court judges refused to answer these questions on the grounds that they were "political."

[30] In general, clearly pro-military regime judges were very forthcoming with their political views. Contrary to what I expected, it was they who generally raised political issues in the interview, before I got to the explicitly political questions. It is interesting that they, like most of the Right in Chile, were proud of and totally unrepentant about military rule. It was, rather, the democrats who walked on eggshells and felt the need to apologize for or whisper their beliefs.

[31] I use the term "historical and international standards of democracy," because the *Pinochetistas* often attempt to apply the term "democracy" to the regime they created.

appointed by the progressive presidents Eduardo Frei and Salvador Allende. Without understanding how the appointment process works in Chile, one might assume, then, that these justices would sympathize with and defend the mainly working-class and/or left-wing victims of the regime, and certainly not lend continuous support to the military regime. However, as I detail later, because the Supreme Court itself selects the nominees for appointments to its own ranks, the Court actually has more control over its ideological composition than the executive does, and the influence it exerts was and is conservatizing. While there were also conjunctural factors at work, and while some members of the Court would have certainly been right-wingers regardless, even the aspect of the explanation that appears most attitudinal, then, is itself partially institutional.

The Class-Based Explanation

Another possible (and related) explanation for judicial capitulation to authoritarianism, particularly in the Chilean case, where the military staged a coup against the socialist government of Salvador Allende, is that the judges were defending their class interests. This would be the obvious response from many critical legal theorists, who argue that courts *always* serve the interests of the powerful, whether under democratic or authoritarian regimes. Since, in many countries, judges do tend to come from elite backgrounds, and are thus socialized in similar family, community, and educational institutions, their approach to interpreting law and administering justice may well be a function, conscious or not, of class interests (Hirschl 2004; Kairys 1982; Unger 1986).

The first point against this argument as it applies to Chile is that many lawyers and politicians who proved to be ardent defenders of human rights, or at least critics of military rule, came from elite social backgrounds. Moreover, some lawyers and politicians who initially supported the coup later became fervent public critics of the military regime, whereas judges' behavior remained quite consistent over time.

Second, by the middle of the twentieth century, the Chilean judicial ranks were no longer filled with elites (as they had been in the nineteenth century). Because entry-level judicial posts were very low paying and not very prestigious, the judicial career attracted those who desired a stable income and career, rather than those who had the social connections or financial cushion to pursue a (potentially less secure) future in private legal practice. This was evident not only in secondary sources (Couso 2002: 177; de Ramón 1999; Dezalay and Garth 2002: 226) but also in the social background information

that I gathered in my interviews with judges. This data, which included high school attended; father's, mother's, or maternal grandfather's occupation; and prior or present land holdings, showed that a full three-quarters of respondents came from lower-middle to middle-class backgrounds, while only about one-quarter were of upper-middle to upper-class extraction. Few judges came from landed families; most had fathers who were merchants or public employees; and all but a handful attended lower-middle to middle-class high schools, many of these public (see Hilbink 2007: ch. 3).

Clearly, then, the bias of the Chilean judiciary cannot be attributed to class, at least not understood in objective terms. Some judges may have identified with the traditional elite, but my claim is that this identification was constructed *within* the institution. Seeking to please their superiors and move up in the judicial ranks, middle-class judges learned to "mimic the conduct and aristocratic demeanor of some of the elite judges who were still there when they began their careers" (Dezalay and Garth 2002: 226). Indeed, precisely because they tended to be individuals without significant financial cushions or well-heeled social networks, they came to identify their own interests – in job security and social dignity – with those of the institution and its elite.

The Legal Theory Explanation

A final possible explanation, then, and the one that has attracted the most attention from those troubled by judicial complicity in authoritarian regimes, is that the judges' professional understandings of the nature of law and adjudication rendered them unwilling or unable to hold regime leaders legally accountable for repressive acts and policies. The most common culprit is legal positivism, which analysts blame for leading judges to believe that their role is passive and mechanical; that is, that their function is to apply the letter of the law without concern for the outcomes of their decisions or for the preservation of general principles of the legal system (Cover 1975; Dyzenhaus 1991; Dubber 1993; Fuller 1958; Ott and Buob 1993). Judges who work under legal positivist assumptions, or what David Dyzenhaus (1991) calls "the plain fact approach," believe they have a professional duty to execute the will of the legislator(s), regardless of the law's content. This conviction incapacitates them in the face of "wicked law," and thereby renders them easy servants of authoritarianism. Defenders of legal positivism counter that the major alternative, natural law philosophy, offers no more security against tyranny and repression than does positivism, and in fact, may offer less. The "absolute values" shared by judges and used to interpret or even bypass the positive law may not be the ideal values that liberal humanist proponents envision, particularly in authoritarian

contexts (Hart 1958; MacCormick 1993; Raz 1979). In other words, judicial reasoning in accordance with "higher law" will not meet liberal standards of justice where the "higher law" itself is not politically liberal.

Chile's legal tradition since independence is strongly legal positivist, and many Chilean analysts have laid the blame for judicial complicity during the Pinochet years at the doorstep of legal positivism (Cea 1978; Cúneo Machiavello 1980; Squella 1994). However, while Chilean judges did take shelter behind positivist defenses, washing their hands of any responsibility for the brutality and longevity of the authoritarian regime, both case analysis and interviews revealed that judges were often willing and able to ignore or look beyond the letter of law, so long as the resultant rulings favored or restored the status quo, and could thus bear a mantle of "apoliticism."

As indicated earlier, from 1973–1980, judges ignored long-standing legal norms on habeas corpus and review of military tribunal decisions, granting unchecked discretion to the military in the "anti-subversive war." Furthermore, judges put up no protest as the junta proceeded to gut the 1925 Constitution, issuing blanket decrees to amend or supersede any provision that might stand in its way. After 1981, when the regime's new constitution went into effect, judges adhered to the letter of the law, but in a manner that maximized the government's discretion to determine when public order was threatened and, therefore, when constitutional rights could be suspended. In other words, rather than emphasizing those parts of the 1980 Constitution that set limits on the exercise of power, the courts perpetually ignored or denied them in favor of the vague clauses that extended executive discretion. It thus seems inappropriate – even generous – to attribute judicial behavior in Pinochet's Chile to a professional commitment to legal positivism.

Moreover, in interviews, a significant number of acting high court judges (twenty-three of thirty-six) openly recognized that the judicial decision-making process is not simply "mechanical," as a plain fact positivist would have it. Indeed, they admitted being guided by the grand principles of the Chilean system, the national conscience, or the general understanding of the community (see Hilbink 2007, ch. 4). This view cut across the political lines discussed above, although it was nearly always couched in a broader discourse of apoliticism.

Thus, it is not legal positivism *per se* that accounts for judicial behavior in Chile, though part of the explanation does appear to rest in the related, and broader, professional ideology of apoliticism, which was transmitted and enforced within the judiciary. The premium on "apoliticism" within the institution meant not that judges ignored altogether the choices they faced in adjudication, or felt some absolute fidelity to the letter of legal text; rather, it

meant that, when it came to public law, judges were expected to lend unquestioning support to the executive. The support could be passive or active, but the key was to refrain from second-guessing "political" decisions or from taking principled stands in defense of those who challenged the established order. In the case of the military government, this was even more pronounced, since the military presented its rule as a (superior) *alternative to* politics (Loveman and Davies 1989).

THE INSTITUTIONAL ARGUMENT

As is clear from the preceding discussion, each of the conventional explanations for judicial capitulation to authoritarian rule applies partially to the Chilean case, but none provides a completely satisfying account. I thus present as an alternative an institutional argument, which integrates some of the insights from the competing hypotheses and more accurately explains the phenomenon in Chile. Specifically, I argue that the institutional structure and ideology of the Chilean judiciary together rendered it highly unlikely that judges would be willing and/or able to take stands in defense of liberal and democratic principles.

The argument has two main elements: one structural, one ideological. When I refer to the institutional *structure*, I mean the formal rules that determine the relationship of judges to each other and to the other branches of the state, and that thereby offer incentives and disincentives for different kinds of behavior. Particularly important are the rules governing the judicial career; that is, rules regarding appointment, promotion, remuneration, and discipline. When I refer to the institutional *ideology*, I mean the understanding of the social role of the institution into which judges are socialized, the content of which is maintained through formal sanctions and informal norms within the institution.

The institutional structure of the Chilean judiciary can be described as that of a highly autonomous bureaucracy. While there have been some changes to the structure in recent years, the following describes it accurately from the late 1920s until 1997. Judges entered the career at the bottom rung, wherever there was a vacancy, and sought to work their way up the hierarchy. Salaries for district-level judges were very low, particularly compared to what lawyers could expect to earn in private practice. Yet tenure was generally secure, and a judge with a good record could hope to move up in rank (and hence pay) through appointment to a higher court. To do so, however, the judge had to curry favor with his or her superiors, who controlled the disciplinary process within the judiciary and played a dominant role in the appointment

and promotion process. Indeed, to enter the judiciary, an individual had first to approach the appellate court with jurisdiction over the district where a post was available. The appellate court composed a list of three candidates from which the Ministry of Justice (MJ) selected the appointee. To advance to the appellate level, the judge had to be nominated by the Supreme Court to appear on a similar list of three nominees from which the MJ made its appointment. Finally, to get to the Supreme Court itself, an appellate judge had to be nominated by the Court. The Court composed a list of five nominees, two of whom appeared by right of seniority,[32] but the other three whom the Court chose by plenary vote. The MJ made its appointment from this list.[33]

In choosing the nominees, the higher courts always referenced the judge's disciplinary record and the formal evaluations that the judges had received. The Judicial Code (which dates to 1943) defines internally punishable (i.e., noncriminal) judicial "faults and abuses" to include any expressions of disrespect for hierarchical superiors, or, in the case of appellate judges, any "abuse of the discretionary faculties that the law confers on them." The respective superiors have the duty to respond to all such "faults and abuses" and to choose the appropriate disciplinary measures, ranging from a private reprimand to suspension for months at half-pay.[34] The Supreme Court has the ultimate responsibility of overseeing the conduct of all the judges in the nation. To this end, the Court conducts regular performance evaluations for all judicial employees. These evaluations were triannual until 1971, when they became annual. The Supreme Court meets in January of each year to discuss the performance of every employee of the institution, from the most menial worker (e.g., the elevator operator) to the most senior appellate court judge.[35] Prior to 1971, judges were evaluated every three years on the "efficiency, zeal and morality" of their performance. In 1971, a four-list system was instituted: a List One rating meant good performance, a List Two signaled some dissatisfaction

[32] The 1925 Constitution specified that two individuals on the lists of five and one on the lists of three had to be chosen on the basis of seniority. The others were to be chosen on "merit," the meaning of which was left to the discretion of the superior court justices. This system remained in force until 1981. The 1980 Constitution established that only one of the nominees on any list be reserved for the individual with most seniority and added the requirement that said individual have an impeccable evaluation record.

[33] I reviewed all the minutes of the plenary sessions from 1964 through the late 1990s, and there was never an instance of the MJ rejecting the list of nominees and requesting that another be drafted. Moreover, when I interviewed former ministers of justice, they all grumbled about the fact that they frequently had to choose "the lesser of the evils" from the list; that is, it was clear that they felt constrained by the process.

[34] See *Código Orgánico de Tribunales*, articles 530–545.

[35] Evaluations of district-level employees are supposed to be based on reports provided by the respective appellate courts, but the Supreme Court still votes on them.

above, a List Three rating served as a stark warning (since two consecutive years on List Three meant dismissal), and a List Four rating meant immediate removal.[36] The formal criteria of evaluation were still the same ("efficiency, zeal, and morality"), but since the justices (as before) didn't have to justify the evaluations in any way (indeed, the votes were anonymous), subordinates had to be sure not to anger their superiors or, indeed, give them any reason to scrutinize or question their work.

This autonomous bureaucratic institutional structure provided strong incentives for judges to play, primarily if not exclusively, to the Supreme Court. Professional success was clearly linked to pleasing, or at least never upsetting, the institutional elders. From their earliest days in their careers, then, judges had to worry about how their superiors would perceive and assess their work. The likelihood that they would so worry was heightened by the fact that entry-level posts were very poorly compensated. Those who accepted them generally had low levels of financial independence, and thus relied on the security of the job and the promise of upward mobility within the judicial hierarchy. The incentives operating on judges thus encouraged conformity and reproduced conservatism within the institution.

Evidence of the effects of this institutional structure on judges is overwhelming. It came up again and again in my interviews – cited by nineteen of thirty-six acting High Court judges, as well as by all the retired and lower court judges I interviewed – and was clear in the discipline and promotion record as well. As one judge noted, under the military regime, "there were different conceptions of what was happening, but the Supreme Court was very powerful over the hierarchy and controlled the responses" (Interview SCJ96–7, June 5, 1996, 18:00).[37]

The first and most obvious way in which the Court acted to bring the judicial ranks in line after the coup was through an internal purge of avowed and suspected Allende sympathizers in January of 1974. With the legal path prepared by Decree- Laws 169 and 170, discussed earlier, the Supreme Court used its power to dismiss or force the retirement of an estimated 12 percent of

[36] See *Código Orgánico de Tribunales*, articles 270–277.

[37] Because interviewees were promised anonymity, I use a coding system that identifies subjects only by category and assigns them each a number that corresponds to the year and the (random) order in which I interviewed them. For example, the appellate court judge that I interviewed first in 2001 is identified as "ACJ01-1;" the seventh Supreme Court justice interviewed in 1996 as "SCJ96-7," and so on. The key to the categories is as follows: SCJ-Supreme Court Justice; ACJ-Appellate Court Judge; LCJ-Lower Court Judge; FJ-Former Judge; AI-Abogado Integrante; HRL-Human Rights Lawyer; and OL-Other Lawyer and/or Law Professor (includes Ministers of Justice).

judicial employees, among them approximately forty judges.[38] For the most part, this was done via poor evaluations for their performance in 1973, although some "early retirements" were achieved via a transfer of "troublemakers" to undesirable (geographically isolated) posts (Interview FJ96-5, June 18, 1996 12:00).[39]

Having observed the internal purge, judges "became afraid to do anything, even if they weren't in agreement with what was taking place" (Interview HRL96-1, July 4, 1996, 11:00). As one retired judge explained, "Because of the hierarchy, there exists a sort of reverential fear of the Supreme Court, such that even when they have a determined opinion on some issue, judges normally wind up resolving it in accordance with what the Supreme Court has ruled. There are very few cases, even under democracy, in which a subordinate judge has maintained his way of thinking on a given matter when the Court has ruled in a different way" (Interview FJ96-2, June 13, 1996, 13:00). Under the military regime, this pressure intensified. Recalling the mood set for the judiciary by the High Court before and around the plebiscite on the 1980 Constitution, one judge stated the following:

> I remember as the plebiscite approached, people were talking about it, and naturally within a logic of the "yes" vote, as if it were impossible to think that someone there would consider voting "no." And I was afraid, I *broke out in a sweat* worrying that someone would ask me which way I was going to vote. Nobody asked me, because nobody thought I was for the "no," but if they had asked me, I probably would've been booted from the judiciary – and that is no exaggeration – for my answer (Interview ACJ96-2, May 6, 1996, 8:30).

This fear was not unfounded. In 1983, after Santiago Appeals Court judge and long-time president of the National Association of Magistrates, Sergio Dunlop, made some mild criticisms of the judicial retirement system, the Supreme Court responded first by giving him a warning and then putting him on List Two (of four) in the annual evaluations.[40] Dunlop, who had been a fierce opponent of Allende, thus resigned from the judiciary in 1983 and

[38] The exact numbers here are difficult to come by. I tabulated these figures using a list of names and posts from a support group for judges expelled for political reasons, checked against the official evaluations ledger at the Supreme Court. However, because of all the possible extenuating circumstances, it is difficult to confirm the exact number. It is interesting to note, however, that out of 260 judges evaluated for their performance during 1973, 82 were put on the "satisfactory" list, or List Two (out of four), which is basically a slap on the wrist, or a "tomato," as one judge called it. This figure is more than twice the average for List Two in other years.

[39] These are documented in the records of the plenary of the Supreme Court, Volume 18.

[40] A List Two rating was a slap on the wrist, designed to put subordinate judges on alert that their behavior was displeasing to the Supreme Court.

became a loud critic of the institution. In public statements over the following years, Dunlop contended that the institutional structure of the judiciary was such that only those willing to "remain prudently silent" could find their way to the top (Constable and Valenzuela 1991: 131). "Although judges have tenure," he argued, "in reality their careers depend on the members of the Supreme Court," and those judges who take stands at odds with that of the Supreme Court become "marked." As regards the role of the judiciary under the military regime he stated, "Those who lead [the institution] are those who must signal the standards and the direction to take. . . . The Supreme Court justices could have acted peacefully defending a different interpretation without having anything happen to them" (Interview in *La Epoca*, May 9, 1989, 12–13).

This last statement began to appear increasingly valid as the 1980s progressed. Not only did the opposition begin organizing and dissenting ever more openly in the wider society, but elements within the regime began to suggest a need for democratic transition. As discussed earlier, the Constitutional Tribunal played an important role in pressing the government to reconstruct and respect certain democratic legal norms. The Supreme Court, however, did little to nothing in this regard. On the contrary, the Court as a whole actively discouraged judges from challenging or criticizing the military government. The justices even went so far as to censure the Court's own president, Rafael Retamal, when he expressed his disapproval of the regime's policies in 1984.

Lower court judges observed and took note of Retamal's actions and their consequences. When conferences on human rights began in the mid-eighties, some lower court judges attended, but as one related, "you couldn't let your superiors know you were participating in such acts" (Interview LCJ96-1, April 25, 1996, 11:00). During this period "lower court judges were paranoid about being poorly evaluated or expelled from the judiciary if they let slip some commentary or did something which their superiors in the Supreme Court or the government wouldn't like" (Matus 1999: 148). And, indeed, a group of judges who met privately to discuss rights issues in their work were subsequently informed in their yearly evaluations that they "had received votes in favor of putting them on List Two." This served as "a signal that their names would not figure on the nomination lists for future promotion" (Matus 1999: 159–160).

More open critics of the regime, meanwhile, suffered more serious repercussions. For example, when Santiago Appeals Court judge, Carlos Cerda Fernández, announced that he would not apply the amnesty law to a case of disappeared Communist leaders, nor turn over the case to the military courts, on grounds that to do so would be "evidently contrary to law (*derecho*)," the Supreme Court suspended him from the judiciary for two months with only

half-pay.[41] Approximately a year and a half later, in May of 1988, the Supreme Court censured another judge, René García Villegas, for refusing to renounce jurisdiction over crimes committed by the regime's security forces and including a statement "disrespectful of military justice" in an official resolution. Within months, the Court sanctioned García again, this time suspending him for fifteen days at half-salary, for having "gotten involved in politics." García's alleged impropriety consisted of a statement offered in a radio interview with Radio Exterior de España that "torture is practiced in Chile." The excerpt had been used, allegedly without García's authorization, in the public campaign for the "no" vote in the plebiscite on Pinochet's tenure as president. In annual evaluations for both 1988 and 1989, the Court thus ranked García in List Three for "incompetent performance," forcing his resignation from the bench on January 25, 1990.[42] The Court also sanctioned several appellate court judges, including the head of the National Judicial Association, Germán Hermosilla, for having expressed their solidarity with García during his suspension. The punishment was "duly reflected in their annual assessment" (Brett 1992: 232).

Institutional structure thus goes a long way to explaining why even democratic-minded judges refused to take public stands, personal or professional, against the authoritarian regime. As previously noted, most judges came from very modest social backgrounds, and had chosen the judicial career because it was respectable and secure. They were thus largely predisposed to be risk-averse when it came to professional matters. Once on the judicial career ladder, this tendency was reinforced by the "reverential fear" of the Supreme Court. Judges learned quickly that the best way to get ahead was to avoid making waves, and thereby "avoid getting burnt" by their superiors (Interview FJ96-4, June 17, 1996, 12:30).

Of course, fear of punishment and career sabotage by superiors cannot explain the behavior of the Supreme Court judges themselves, who, having reached the pinnacle of the hierarchy, were untouchable within the system. As noted above, personal attitudes and preferences were clearly at work in some cases, and the military government did its best to create opportunities for its most devoted supporters to rise in the ranks. But it would be a mistake to treat judicial attitudes and preferences as entirely exogenous to the institution. Supreme Court justices reached their posts after having spent forty or more years in an institutional setting that discouraged creative, innovative, and

[41] Monthly report of the Vicaría de la Solidaridad for October 1986, on file at the FDAVS, 55–59.

[42] "Supremazo Final contra Juez García," *ANALISIS* (January 15–21, 1990): 22–24. See also García's autobiography, *Soy Testigo* (1990).

independent decision making. Those who succeeded in rising in the ranks were not those with bold or fresh perspectives, but rather those who best emulated and pleased their superiors; that is, those who demonstrated conservatism and conformity.

The parallels between this pattern of professional socialization and that of the Chilean military are pronounced. According to Constable and Valenzuela (1991), the typical military officer is characterized by loyalty, discipline, and circumspection, and the "desired military mold" is "competent and plodding, rather than brilliant." Those seeking to reach the rank of general should (as did Pinochet) do "just well enough to advance, but not so well as to arouse suspicion"(1991: 48). Indeed, one of my interviewees claimed, "What happens to judges is something like what happens to Chilean military men. They are brainwashed. And he who is independent, intelligent, [and] brave *won't be* promoted. They will bother him and will most likely brand him a 'communist' so that he will be marginalized from the judiciary" (Interview FJ96-2, 13 June, 1996, 13:00). Thus, it could hardly be expected that Chile's Supreme Court justices would, in general, possess the skills and initiative necessary to stand up to the authoritarian leaders.

Moreover, the Supreme Court judges, like all members of the judiciary, were socialized from day one to believe that, to be professional, judges must remain "apolitical." This understanding is what I refer to as the institutional ideology of the judiciary, and it was evident in judicial discourse throughout the authoritarian era. As I elaborate elsewhere (Hilbink 2007, ch. 2), the definitions of the "political" and the "judicial" were established in the nineteenth century, when Chilean state-builders sought to achieve political stability through the "rule of law." To this end, they imposed a strict understanding of the separation of powers doctrine: judges handled private law (property and contract); politicians handled public law (public order and morality).[43] Judicial adherence to this division of authority was secured through partisan manipulation of the courts. In the constitutional overhaul of the 1920s, judicial independence was secured by eliminating the power of the executive to discipline and appoint judges, and transferring that power to the Supreme Court. In addition, the Court was given the power of judicial review for the first time. However, there was no purge of the judicial ranks, and legal and judicial training remained the same. Thus, nineteenth-century views regarding the legitimate scope of judicial (and political) authority were, effectively, frozen in the judiciary, as those at the top of the hierarchy (the Supreme Court justices) were newly empowered to promote to their own ranks those who best

[43] This interpretation is supported by Barros (2002: 112–114) and Couso (2002: 152).

emulated their own professional, if not also personal, attitudes and practices. At the same time, they had, through the evaluations system, an effective means of deterring dissent (see Hilbink 2007, ch. 2). In the decades that followed, the judiciary thus remained quietist in the face of abuses of public power, except when that power was used to alter private law matters (as under the progressive governments of Eduardo Frei and Salvador Allende; see Hilbink 2007, ch. 3).

What made this institutional ideology particularly relevant in the authoritarian period, I argue, is the fact that the military government itself claimed to be above politics. On the view that it was politicians, with support from democratic civil society, who had caused the socioeconomic debacle of the Allende years, the generals had seized power with the explicit mission of depoliticizing the country (Loveman and Davies 1989; Nef 1974; Valenzuela 1995). Thus, questioning the policies of the military regime was, by the regime's own definition, political and dangerous, while supporting the military was apolitical, patriotic, and noble. My claim is that the judiciary's traditional commitment to apoliticism fed perfectly into this "anti-politics" project. To prove their commitment to law (and order) over politics (and disorder), judges either refrained from challenging the military's policies or outright endorsed them.

It is difficult to document the independent effect of this ideology on judicial behavior, particularly under the authoritarian regime when Supreme Court justices invoked it to threaten their subordinates or to justify punishing them. Nonetheless, taken together with the evidence from before and after the authoritarian interlude (see Hilbink 2007, chs. 3 and 5), the examples that follow suggest that for many judges, deferring to the (self-proclaimed "apolitical") military government need not have been a conscious strategic choice, but was simply a matter of abiding by professional expectations.

In early 1974, in his speech inaugurating the judicial term, Supreme Court president Enrique Urrutia Manzano explicitly reminded judges of their professional duty to eschew politics. He explained that two months earlier the Supreme Court had transferred or removed from office a number of employees who had participated openly in politics under Allende. He argued that this was necessary to guard "the full independence of the judiciary, and that, in consequence, any participation whatsoever of employees in partisan proselytizing impaired the administration of justice and deserved condemnation." Later in the address, he boasted of the active role taken by the Supreme Court against the Allende government, and of its official endorsement of the coup on September 12, 1973, which he clearly viewed as something other than political behavior. In contrast to the Allende government, he argued, the military government had fully respected the judiciary as the symbol of Chilean law and

justice. He closed by calling upon his audience to aid in the "reconstruction of the Republic . . . with the objective of making a better Chile, to which, with a healthy, prudent, opportune, and disinterested administration of justice, the judiciary could contribute so much."[44]

Urrutia thus contrasted the prejudicial, illegitimate politicking of the Allende government and its judicial sympathizers with the impartial, professional, and patriotic action of the Supreme Court. Because the military, too, acted out of "impartiality, professionalism, and patriotism" (Munizaga 1988; Nef 1974),[45] it was both logical and completely legitimate for the judiciary to cooperate with the military government in the "construction of a better Chile." It was thus clear that "the courts should be at the service of the new legality that the military power was creating and at the service of the entire process that began with the coup" (Interview with HRL96-5, August 2, 1996) and that those who would critique or disregard that position might throw into question their professional integrity and fitness for judicial service.

This understanding was also articulated in the 1984 plenary censure of Supreme Court president Rafael Retamal, in which the justices reminded their colleague that judges were prohibited by law from engaging in politics. Likewise, the basis for the suspension and, ultimately, the dismissal, of Judge René García in 1988 was his having "gotten involved in politics." Both cases not only served to perpetuate the "reverential fear" of the Supreme Court discussed above but also to reinforce the notion that the good judge, the true professional, is one who goes along and plays along, who sides with tradition, unity, and order. By contrast, he who dares to challenge the forces of tradition, unity, and order, to speak up in defense of liberal or democratic principles, is playing "politics" and thereby betraying his lack of professionalism. In such an ideological environment, it is unsurprising that most judges would remain quietest and deferential.

In sum, the structural and ideological features of the Chilean judiciary, in combination, effectively served to mobilize bias (Thelen and Steinmo 1992: 10) – specifically, a conservative bias – among judges. These features allowed and supported the expression of traditional, conservative juridico-political views by actors in the institution, while discouraging and sanctioning the expression of alternative views. Because of the institutional structure, the primary, and in some ways, exclusive "audience" or "reference group" for judges was the Supreme Court, whose members were not representative of

[44] *RDJ* 71 (1974) 1: 18–21.
[45] Urrutia's position clearly acccepts this perspective.