JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP

Lessons from Chile

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CHAPTER ONE

THE JUDICIARY, THE RULE OF LAW, AND DEMOCRACY: ASPIRATIONS AND IMPEDIMENTS

This book examines how and why Chilean judges trained and appointed under democratic governments lent such robust support to the Pinochet regime. Although the analysis has obvious relevance for Chileans and scholars of Chile, it was motivated by and speaks to much broader theoretical concerns. Comparative politics theorizing on democratization has recently begun emphasizing the need for the rule of law to support and sustain democracy, and the need for judicial reform as a primary means of building the rule of law (Linz and Stepan 1996; Frühling 1998; Hammergren 1998; Domingo 1999; Prillaman 2000; Zakaria 2003). However, there remains relatively little description in the literature, much less empirical analysis, of how the judiciary functions (or has functioned) in most democratizing countries, and especially not in Latin America.[1] Thus, it is still unclear what precisely about judicial institutions requires reform in such countries, or what the limits of institutional reform might be. Meanwhile, in the American public law literature, abundant analysis of judicial functioning, particularly at the Supreme Court level, has produced heated debates regarding if and how institutions affect judicial behavior. However, these debates are greatly limited by an almost exclusive focus on the American case. This book thus brings theoretical concepts and debates from

[1] This is slowly changing as a new generation of scholars addresses this lacuna for the Latin American region. See, for example, Arantes 1997; Domingo 2000; Popkin 2000; Chavez 2004; Helmke 2005; Staton 2004; Sieder, Schjolden, and Angell 2005; Finkel forthcoming.

public law to bear on comparative politics theories of democratization, and contributes empirical insights from a comparative (non-U.S.) case to address theoretical debates in public law. In the mode of new institutionalist analysis, it seeks to explain how institutional attributes of the judiciary contributed to judges' antidemocratic performance in Chile. Based on the findings, it then takes a first step toward answering the general question of under what institutional conditions judges might be more likely to question and challenge undemocratic and/or illiberal governmental action, and to promote the liberal principles and practices that, I will argue, make democracy meaningful.

THE JUDICIAL ROLE IN DEMOCRACY AND DEMOCRATIZATION

During the past twenty years, theories of democracy and democratization have come to a growing consensus around the value of the liberal concepts of rights and the rule of law. Whereas in the past, some democratic theorists, particularly those on the Left, tended to reject these concepts as either irrelevant to or in fundamental tension with democracy, today many explicitly acknowledge the rule of law and rights protection as either supportive of or integral to any meaningful democracy (Laclau and Mouffe 1985; Bobbio 1987; Held 1987; Habermas 1996; Shapiro 1996; Touraine 1997). Having observed (or experienced) the outcome of government unfettered by law, previous skeptics have (re)valorized the idea of governance in accordance with key legal principles such as consistency, security, continuity, public accountability, and due process (Hutchinson 1999). Scholars across the political spectrum now agree that a healthy democracy requires that "the acts of agencies and officials of all kinds are subject to the principle of legality, [that] procedures are available to interested persons to test the legality of governmental action [and that there is] an appropriate remedy [applied] when the act in question fails to pass the test" (Merryman 1985: 141). Moreover, most scholars now reject the idea of a harmonious collective will common in some earlier theories of democracy and accept the permanence of conflicts and antagonisms.[2] Recognizing the diversity that (increasingly)

[2] Prominent democratic theorists such as Robert Dahl (1971) and Giovanni Sartori (1962) have long argued this view, but they are now joined by others who previously rejected it.

characterizes modern societies, they emphasize the need to limit the power of governing coalitions so as to protect dissent, promote debate, and safeguard the fundamental interests of individuals and groups within the opposition (Mouffe 1993: 104-5; Holmes 1995: Ch. 1; Touraine 1997: 28). In other words, today's democratic theorists argue not only that there must be restraints on the routine conduct of government officials, but also on lawmaking itself (Dyzenhaus 1999; Tamanaha 2002).

At a minimum, democratic theorists argue that to function properly the democratic process requires respect for citizens' basic political rights (Dean 1967; Ely 1980). These include the right to vote for almost all adults, the right to run for office, the right to free expression (including criticism of any and all aspects of government), the right to alternative sources of information, and the right to associate and assemble peacefully (Dahl 1989: 220). As Stephen Holmes (1988: 233) writes, "democracy is government by public discussion, not simply the enforcement of the will of the majority. . . . Consent is meaningless without institutional guarantees of unpunished dissent [and] popular sovereignty is meaningless without rules organizing and protecting public debate." Without the protection of what Carlos Nino (1996: 201) calls "a priori rights" (those that are preconditions for free political participation), the democratic process loses its validity.

Some scholars argue for more than this procedural minimum, holding that with the values of autonomy and human dignity at its core, the modern ideal of democracy necessarily involves guarantees of certain substantive individual rights.[3] Voters may empower leaders to represent and lead them, but, whether their party wins this time around or not, they expect the government to respect their inherent dignity, that is, to show equal concern and respect for those whose lives it can affect (Beatty 1994: 19–23).[4] Although such authors disagree about which rights are fundamental – that is, about what is necessary to preserve individual dignity – they are united in the belief that there are some rights that must be protected from or promoted by the democratic process. In other words, some policies, no matter how much popular democratic support they have, are illegitimate because of the harm they

[3] By substantive rights, I mean those not directly related to the democratic process. Note that such rights can be either "negative" or "positive." See Dworkin 1978; Kateb 1992; Touraine 1997.

[4] This is also the general argument of Dworkin (1978).

cause to some, and potentially all, citizens.[5] Liberal theorists generally agree that laws and practices violative of bodily integrity, due process, free religious belief and practice, or private, consensual sexual expression have no place in a democracy.[6] Liberals disagree, however, about what, if any, limits are appropriate for socioeconomic policy: Some (the libertarians) believe restrictions on private property and commerce are illegitimate (e.g., Nozick 1974), whereas others (those sharing socialist concerns) hold that such restrictions are required in order to ensure basic subsistence and equality of opportunity for all citizens (e.g., Rawls 1971; Sen 1999).[7]

This emphasis on substantive rights protection is reflected in contemporary popular understandings and expectations of democracy around the world. In Western Europe, for example, scholars speak of a "second democratic revolution," driven by a new consciousness on the part of citizens of their rights and a growing demand that government enforce respect for these rights. This revolution "from sovereignty to justiciability" entails a move away from a focus on political will and majority power toward an emphasis on (constitutional) law and the protection of minorities (Garapon 1999: 44; Toharia 2001: 29–30). Similarly, in both Latin America and Eastern Europe, the latest wave of democratization was as much about securing fundamental rights as it was about restoring elections and the democratic process. As Elizabeth Jelin and Eric Hershberg (1996: 3) explain, in Latin America in the 1980s, "basic human and civil rights became the center of political activism and intellectual preoccupation. Calling on the state to guarantee and protect individual rights, and insisting that public officials be held accountable for their actions, social actors articulated new demands that were pivotal to the process of rebuilding democratic institutions, or, in some countries, of constructing such institutions for the very first time." Likewise, in Eastern Europe, many citizens understood democracy's promise to be that individual dignity would, at last, be respected and protected by

[5] Many liberals would argue that these restrictions must apply to legislation affecting noncitizens as well.

[6] As Judith Shklar (1987: 2) argues, "Government must resort to an excess of violence when it attempts to effectively control religious belief and practice, consensual sex, and expressions of public opinion." See also Kateb 1992; Holmes 1995.

[7] Using slightly different reasoning, Judith Shklar argues that legally guaranteed proprietorship "cannot be unlimited, because it is the creature of the law in the first place, and also because it serves a public purpose – the dispersion of power" (1989: 31).

the government. Kim Lane Scheppele (2001: 32) notes that in Hungary in the 1990s, "it was common . . . for [citizens] to say that something was 'undemocratic' when it violated basic rights." Democracy "was not associated with republicanism or elections" but rather "with a substantive set of rights to be treated decently and with respect."

Both in theory and in the popular imagination, then, the rule of law and respect for rights (however defined) is central to the legitimacy and fairness of a democratic regime (Beatty 1994: 3).[8] And although courts are not the only institutions responsible for defending rights (Tushnet 1999; Whittington 2003), scholars and citizens of new democracies have increasingly turned their attention – and hopes – to the judiciary.

This focus on courts derives in part from an analysis of democratic weakness (past or present) as resulting from the excessive concentration of power in the legislature and/or the executive in many countries.[9] In this view, there have not been enough healthy mechanisms of "horizontal accountability" to keep elected officials within legal and constitutional bounds. Although regular, free, and fair elections and freedom of the media and assembly may be present in many countries, allowing for what Guillermo O'Donnell (1999: 39) calls "vertical accountability," there is often an absence or serious weakness of "state agencies that are authorized and willing to oversee, control, redress, and/or sanction unlawful actions of other state agencies [or actors]." The development of a strong and independent judiciary, as perhaps the most crucial of a network of overseeing agencies, is thus viewed as an important means to advance the rule of law, protect constitutional rights, and thereby strengthen a democratic (or polyarchic) regime.

The emphasis on courts also can be attributed to a positive perception of the role of the judiciary in American democracy, in general, and in the U.S. "rights revolution" (Epp 1998), in particular.[10] As several authors have noted, a global "judicial turn" began in Europe after World

[8] As Murphy argues, whereas the strain between (liberal) constitutionalist and democratic theory "is always real and often serious," they are both grounded in a commitment to protecting human dignity and "to an extent, the two theories need each other" (1993: 6).

[9] In presidentialist systems, such as those of Latin America, excessive executive power is the general concern; in parliamentary systems, in which the legislature produces the executive, the concern is often expressed in terms of unchecked parliamentary sovereignty.

[10] The significance of the judicial role in the expansion of rights in the United States has, of course, been challenged. See, for example, Rosenberg 1991.

War II, as a result of, among other things, the emergence of the highly juridical United States as "an ideal to be emulated" (Cappelletti 1971; Vallinder 1994: 97). This has been enhanced by disillusionment in many countries with political parties and legislatures – that is, with politicians, in general. As elected officials are increasingly viewed as narrowly partisan, corrupt, or simply incapable of protecting citizens' rights and interests, people in many societies are turning to judges as an alternative (Garapon 1996; Toharia 2001: 30–31).[11]

Equally if not more important in this judicial turn has been the work of national and cross-national organizations in promoting human rights. As David Beatty (1994: 3) points out, "For ordinary people, invoking the authority of law [has become] one of the most obvious ways of ensuring [that] the power of the [democratic] state would not be abused in the way which made colonial, fascistic, and communist governments so notorious in the past." Indeed, "a human rights revolution, rising from the ashes of 20th century horrors," has put pressure on "courts outside of the United States to create expansive protections for rights" (Scheppele 2000: 2).

Yet just because there is demand or hope for judicial rights protection in many countries today does not mean that citizens of such countries will necessarily find their judges to be responsive to their rights claims. Despite the faith of some authors in judges as the guardians of human rights, and despite diverse examples of judges taking important stands in defense of liberal-democratic principles, it is simply not the case that judges will always "tend to operate on behalf of internationally-recognized norms of human dignity" (Ackerman 1997: 790–791). As the literature on judicial complicity in undemocratic or illiberal rule attests, and many other cases of judicial passivity indicate, judges are not necessarily responsive to citizens' rights claims, and in some cases may work explicitly against them (Cover 1975; Dyzenhaus 1991; Müller 1991).

SO WHY BOTHER WITH JUDGES?

Not all democratically committed theorists agree that an empowered judiciary is necessary to securing rights. Indeed, the recent international embrace of judicial review has emerged after more than a century and a

[11] Also, as many analysts have pointed out, it may be convenient for politicians to delegate unpopular or particularly controversial decisions to the courts.

half of suspicion of, in not outright scorn for, the idea in many countries outside the United States.[12] Even in the United States, proponents of judicial review have always had to defend themselves against accusations that they are hostile to popular sovereignty. Because judicial review (at least as practiced at the federal level in the United States) empowers unelected, tenured officials to overrule legislative majorities, it is said to pose a "counter-majoritarian difficulty," which requires justification in a democratic system.[13]

Some deny that such justification is possible. For example, political theorist Jeremy Waldron (1999) argues that it is inconsistent to demand respect for individual moral autonomy (as in rights theory), but to mistrust the exercise of that moral autonomy through the democratic process. Because definitions of and relationships between rights can never be settled definitively, any liberal society will have the difficult task of resolving such matters; but to delegate this task to a small, unelected, tenured set of individuals (high court judges) is an affront to the most basic principle of democracy: political equality. Majoritarian (or "radical") democrats such as Waldron accept that rights protection, even beyond that necessary to the democratic process – is integral to democracy. What they object to is the delegation of the power to define and protect rights to an unelected (and hence unaccountable) elite.[14] Like Jacksonian democrats in the nineteenth-century United States, their view is that if the constitution does not provide clear answers regarding how to define and balance rights, then why should judges, rather than elected representatives, be the ones to exercise that important discretion (Dahl 1957; Rosenberg 1991; Mandel 1994; Kennedy 1997; Tushnet 1999; Hirschl 2004)?

Four main points can be made in defense of a significant role for judges. First, the primary empirical referent for radical democrats is often the U.S. Supreme Court, which has particular institutional

[12] Note that I follow C. Neal Tate in defining judicial review broadly, as the judicial practice of reviewing legislation or administrative acts for their adherence to a set of rules or standards, express or implied, in the constitution or other laws. See Tate 1992: 3–13. See also Cappelletti 1985 and Stone 1992.

[13] As Bruce Ackerman notes, Alexander Bickel's "counter-majoritarian difficulty" is "the starting point for contemporary analysis of judicial review" (1984: 1014). See Bickel 1962.

[14] Waldron characterizes the U.S. Supreme Court as "a nine man junta clad in black robes and surrounded by law clerks" (1999: 309). See also Sartori 1962 and Dahl 2001.

characteristics – such as appointment, tenure, standing, and decision rules – that may be particularly inappropriate or problematic from a democratic standpoint. For example, the small size and (related) limited diversity of the U.S. Supreme Court and the fact that decisions can turn on the vote of one individual (in five to four rulings), are especially galling to anyone committed to political equality. However, these characteristics are not universal, and different institutional rules might improve the democratic legitimacy of such a court (see Hilbink 2006).

Second, although Waldron is correct in his view that judges will inevitably come to their office with the same combination of self-interest and principle as do legislators, he, too, quickly dismisses the idea that although they perhaps are no better than legislators at making difficult policy decisions, judges *are* different in important ways. They generally have different training and different institutional constraints and incentives shaping the way they approach their work than do legislators (Rubin 1991; Peretti 1999). In particular, the fact that they are not subject to popular election may (under the right institutional conditions) allow them to make more sincere, principled decisions (Eisgruber 2001). Viewed negatively, the participation of such judges in the policy/lawmaking process provides a check on the will of the majority; but viewed positively, it offers an additional and distinct channel for political voice and deliberation, which might, as the Federalists hoped, encourage moderation and promote more principled and/or more inclusive policy (Bellamy 1996; Hutchinson 1999; Peretti 1999).

This more positive view is not just theoretical. Catalina Smulovitz (1995) writes that in Argentina after 1983, judicialization became an alternative recourse for articulating and institutionalizing political demands, demands that politicians could ignore or postpone indefinitely, but that courts, because of the rules that govern them, could not.[15] Moreover, as Heinz Klug (2000: 160–161) argues in reference to the South African case, a properly structured and enabled constitutional court can provide "a unique institutional mechanism for the management of [what otherwise appear to be] irreconcilable political conflicts." He explains that "[u]nlike the executive and the legislature which are viewed as dominated by particular, even if frequently changing political interests," the South African Constitutional Court serves as a forum in which opposing forces can "imagine the possibility of achieving, at least

[15] A similar point is made for European cases in Giles and Lancaster 1989, Shapiro and Stone 1994, and Scheppele 2001 and 2003.

in part, their particular vision within the terms of the Constitution," while also "shap[ing] these imaginings through the creation of external reference points [namely international human rights standards] which delegitimize incompatible alternatives or visions" (Klug 2000: 177).

A third and related argument against the radical democratic view is that allowing courts constitutional jurisdiction helps to encourage a "culture of justification," which is by some accounts the essence of the rule of law. In an effort to transcend the standoff between radical democrats (such as Waldron, or others inspired by Jeremy Bentham) and liberal neutralists (such as Ronald Dworkin), legal theorist David Dyzenhaus has recently argued that the rule of law should be reconceived as *the rule of a culture of justification* (Dyzenhaus 1999), that is, as a system in which "government is subject to the constraints of principles [which are internal to the idea of law itself] such as fairness, reasonableness, and equality of treatment" (Dyzenhaus 1998: 152). Without requiring a commitment to any more specific set of liberal principles, as in Dworkinian theory, one can still admit and find virtue in a system that involves "controls [that] operate in the very determination of what law is" (Dyzenhaus 1999: 7). Stephen Macedo highlights this virtue in the American case:

> Constitutionalism is about the individual's right to challenge governmental acts in independent courts of law . . . requiring officials to justify their acts in publicly reasonable constitutional terms. . . . The power of courts stands for the special form of respect we pay to those on the losing side of electoral struggles and legislative battles, and those who feel victimized by officials executing the law. The courts embody (not alone, but most dramatically) a common determination to accompany the application of power with reasons, a regulative desire to govern ourselves reasonably. (1988: 255)

A final point to be made against the radical democrats is that their case offers little insight into or hope about how to construct and nurture a culture of respect for rights if it is not already well established. They emphasize that without a liberal political culture[16] and a "right" public political understanding, both rights and democracy are in peril (Waldron 1999: 308). As Robert Dahl argues, the preservation of rights and liberties "can depend only on the beliefs and cultures shared by its political, legal, and cultural elites and by the citizens to whom these

[16] "Liberal" here meaning grounded in a belief in the moral autonomy and integrity – that is, the equal moral worth – of each individual.

elites are responsive" (2001: 99).[17] Not only will shared "norms, beliefs, and habits . . . provide support for the institutions in good times and bad," but they will also "inevitably" provide for the expansion of the "sphere of rights, liberties, and opportunities" (Dahl 2001: 138).

Although I agree that without a measure of republican virtue and a spirit of liberty among both rulers and ruled, formal institutions are likely to function perversely and bills of rights to serve as no more than "parchment barriers," I reject the implication that the only way to achieve greater rights protection is by changing an entire national "culture." No culture is monolithic. In most modern societies, liberal beliefs and republican virtue fluctuate, or are shared unevenly by different sectors of the population at different times. Moreover, courts do not merely reflect but also help construct culture, particularly in transitional periods (Teitel 2000: 4 and 23). As H.L.A. Hart famously argued:

> A society is a something in process – in process of becoming. It has always within it . . . seeds of dissension. And it has also within it forces making for moderation and mutual accommodation. The question – the relevant question – is whether the courts have a significant contribution to make in pushing . . . society in the direction of moderation – not by themselves; of course they can't save us by themselves; but in combination with other institutions. Once the question is put that way, the answer, it seems to me, has to be yes.[18]

As this quote suggests, courts *alone* cannot prevent tyranny or secure greater respect for rights.[19] Nonetheless, it is possible for judges to contribute positively to the construction of a more liberal regime and,

[17] Similarly, Waldron contends that rights are "respected more on account of the prevalence of a spirit of liberty among the people and their representatives – a political culture of mutual respect – than as a result of formal declarations or other institutional arrangements" (1999: 308).

[18] Cited in Karst and Rosenn 1975: 98.

[19] Indeed, Charles Epp has shown that responsive judges are only one of the variables necessary for a "rights revolution" to take place. Along with constitutional promises (bills of rights), responsive judges do present *opportunities* for legal mobilization, but a broad and successful transition to a regime of expanded individual rights protection requires "a support structure of rights-advocacy lawyers, rights-advocacy organizations, and sources of financing." This structure can provide consistent support for "widespread and sustained litigation," as well as for action aimed at securing the governmental and societal cooperation necessary for implementation of judicial decisions (Epp 1998: 8–9, 18).

hence, a more meaningful and sustainable democracy (Epp 1998; Stone Sweet 2000; Teitel 2000; Scheppele 2001). As Allan Hutchinson argues, courts should be understood "as democratic institutions which have a vital and complementary role to play in the continuous process of discussion and reflection about what democracy means and demands" (1999: 218).[20] The question is: under what conditions are judges likely to be willing and able to play this role?

This book addresses this question through the analysis of a negative example, Chile, where judges were, with few exceptions, *un*willing or *un*able to take stands in favor of liberal democratic principles. The idea is that if we can understand the sources of undesirable judicial behavior, we can, by inference, generate hypotheses about the conditions that might allow for more positive outcomes in other times and places (see Osiel 1995: 487–488).

THE ROOTS OF JUDICIAL BEHAVIOR IN GENERAL

Most of the existing literature on judicial behavior, whether normative or empirical in orientation, focuses on the United States, and in particular on the U.S. Supreme Court. A small subfield of comparative judicial studies does exist, but it has, until recently, remained rather isolated from the larger debates in both public law and comparative politics. Most studies have tended to concentrate on the high court of a single nation, and have not followed a common methodology or research agenda (e.g., Kommers 1976; Paterson 1982; Stone 1992; Jacobsohn 1993; Tate and Haynie 1993; Edelman 1994; Volcansek 2000). The past fifteen to twenty years have seen efforts to encourage more systematic and cumulative cross-national research, but progress in this regard has thus far been slow.[21] Indeed, it remains the case that even comparative political scientists "know precious little about the judicial and legal

[20] Peretti 1999 makes a similar argument.

[21] John R. Schmidhauser (1987) was one of the first such efforts. Since then, a few edited volumes have begun to examine issues such as judicial review and judicial activism or policy making from a comparative perspective, and some journals have recently devoted issues to judicial politics in different countries (1987). See, for example, Waltman and Holland 1988; Holland 1991; Jackson and Tate 1992; Tate and Vallinder 1995; Kenney, Reisinger, and Reitz 1999; *West European Politics* 15:3 (July 1992); *Comparative Political Studies* 26:4 (January 1994); *International Political Science Review* 15:2 (1994).

systems in countries outside the United States" (Gibson, Caldeira, and Baird 1998: 343).[22]

With most scholars focused narrowly on the U.S. Supreme Court, the debate on judicial behavior[23] was polarized for many years between "legalists," or those who attributed case outcomes to the content of laws and legal norms, and "political jurisprudence" scholars, or those who explain judicial decision making as a function of variables outside of and unrelated to the law. In general, lawyers fell into the former category, and social scientists into the latter.[24]

Until quite recently, the dominant model within the political jurisprudence school, at least within political science, was the attitudinal model (Schubert 1965; Schubert 1974; Rohde and Spaeth 1976; Segal and Spaeth 1993). As the name implies, the attitudinal model argues that the behavior (votes) of U.S. Supreme Court justices directly reflects their individual policy preferences – preferences that precede their arrival on the bench. According to this model, developed most fully by Harold Spaeth and Jeffrey Segal, judges are only concerned with achieving their preferred policy outcomes, not with making good or consistent law. Even strong legal norms such as *stare decisis* have minimal influence on the way justices vote (Spaeth and Segal 1999; Howard and Segal 2002).

The gradual accretion of studies on other courts in the United States (appellate, trial, and state courts), as well as the move into the study of courts by analysts of legislative and executive politics, however, has given rise to a new focus in judicial studies. Challenging the idea that policy preferences get translated directly into judicial decisions, many

[22] A study of the articles published in *Comparative Politics*, *Comparative Political Studies*, and *World Politics* between 1982 and 1997 indicates that, of 727 articles published, only 9 dealt with courts. The author of the study notes that even these articles would have been absent if *CPS* had not published its 1994 special issue on courts. See Hull 1999: 121, 124.

[23] For a good discussion of the history of judicial behavior studies, on which this account also relies, see Maveety 2003b.

[24] The divide between lawyers and social scientists on this issue is not completely rigid. Political jurisprudence has its roots in legal realism, originated by lawyers such as Oliver Wendell Holmes, Karl Llewllyn, and Jerome Frank in the early twentieth century, and their views regarding the sources of judicial behavior are shared by legal scholars in the contemporary Critical Legal Studies movement. Also, although few social scientists would fall into the purely "legalist" category, many scholars have and continue to argue for the importance of certain legal and judicial norms in judicial decision making.

theorists now argue for the importance of strategic calculation in judicial decision making and of the influence of institutional context on such calculation.[25] The primary advocates of this approach are Lee Epstein and Jack Knight, who tout this development as a veritable revolution in judicial studies (1998). Citing roots in Walter Murphy's *Elements of Judicial Strategy*, they advocate the adoption of a strategic approach to unify the field, an approach based in three basic assumptions: (1) judges make goal-oriented decisions, and act "'intentionally and optimally' toward a specific objective"; (2) in the decision-making process, judges consider the preferences of other actors and their likely actions and reactions; and (3) judges' actions will be structured by the institutional context, both formal (laws) and informal (norms and conventions), in which they function (Epstein and Knight 1998: 9–18). Because of this last assumption, Epstein and Knight can be considered part of the "new institutionalism" movement in political science (which is, in fact, not so new [see Gillman 2004; Melnick 2005]).[26] Identifying themselves as and allying with rational choice theorists in political science and economics, however, they represent only one vein of institutionalist theory in judicial studies (and in political science as a whole).

Another notable group of judicial scholars, the "historical institutionalists," also emphasizes the important influence of institutions in their analyses of judicial functioning, but they do not accept the idea that judges (or other actors) always and everywhere act "intentionally and optimally" to achieve their goals. Moreover, they place more emphasis on the need to identify, through close historical and ethnographic research, what the various goals of potentially strategic actors might be, rather than positing those in advance (e.g., Smith 1988; Gillman 1993; Kahn 1994; Gillman and Clayton 1999). As Cornell Clayton and Howard Gillman emphasize, another difference between rational choice and historical institutionalist judicial scholars is that the latter tend to "resist[] the . . . tendency to reduce courts to individual, quantifiable units of analysis and instead seek[] to emphasize the cognitive structures that attach courts and judges in general to culture and society" (1999: 4).

[25] On this shift, see Baum 1997; Epstein and Knight 2000.

[26] Interestingly, neoinstitutionalism has become so influential that even the standard-bearers of attitudinalism, Spaeth and Segal now emphasize the unique institutional context that permits the sincere expression of policy preferences on the U.S. Supreme Court (1999: 18).

In contrast to the attitudinalists and other theorists of the behavioralist movement, both rational choice institutionalists (or strategic approach scholars) and historical institutionalists agree that judicial norms and legal traditions (i.e., variables that are endogenous to the legal system) can shape judicial behavior. The difference is that historical institutionalists argue that these variables *both* "constitute and constrain judicial attitudes and motivations" (Clayton and Gillman 1999: 4), whereas rational choicers only see them as potential constraints on previously existing goals (Maveety 2003b: 26–27).

This book offers an explanation that bridges these two perspectives. On the one hand, it argues that strategic calculations, shaped heavily by institutional characteristics (both formal and informal), are an important part of the explanation for judicial behavior in Chile. It thus provides (further) evidence that judicial behavior, like all human behavior, has an important strategic element. Furthermore, it generates hypotheses about the way particular institutional characteristics, in any context, are likely to channel judicial behavior. On the other hand, the book also emphasizes the ways that institutional factors shape judicial identity and, thereby, *constitute* the goals that judges have, rather than simply constraining the achievement of preexisting goals. Moreover, to support the argument, the book brings to bear data that are primarily historical and interpretive. The argument is based on an inductive analysis, both quantitative and qualitative, of all the civil and political rights decisions published for this period, of the record of other official judicial acts and speeches, and of semistructured interviews with judges and lawyers. Information on the history of the judiciary and the context of judicial decision making during the focus period provides a broader understanding of the role that the judiciary, as an institution, has played in the Chilean political system over time.[27] Finally, the study fits in the historical institutionalist mold in that it was motivated by and seeks to address explicitly normative concerns about judicial behavior. I chose the topic of this book out of a deep interest in and concern for democratization in Chile and other developing countries,

[27] As Rogers Smith argues, historical institutionalists in the field of public law attempt to "recognize [the] historical roots" of inherited legal principles and institutions "and attend carefully to the role – great or small – they have played politically, attempting to judge their characteristic tendencies, strengths, and weaknesses in the crucible of social life" (1988: 105).

where scholars, citizens, and policy makers are still trying to figure out what has gone wrong in the past and what kinds of changes might help promote a better – that is, a more stable and meaningfully democratic – future. This book thus speaks not only and not primarily to American judicial behavior scholars but also to scholars of comparative politics concerned about promoting a supportive role for judges in emerging and established democracies alike.

JUDICIAL BEHAVIOR IN ILLIBERAL CONTEXTS: SPECIFIC HYPOTHESES

Although there exist some well-known and high-quality works analyzing judicial capitulation to or complicity in authoritarian regimes, they are few compared to the number of works on judicial behavior in general. In this section, then, I present possible explanations for the performance of Chilean judges under Pinochet as derived from analyses of judicial behavior in both democratic and nondemocratic cases. These explanations fall into four main categories: regime-related, attitudinalist, class-based, and legal theory. I will discuss each in general and as it applies to the Chilean case, arguing that although each has partial explanatory power, an institutional explanation more accurately and completely accounts for judicial performance under authoritarianism in Chile.

The Regime-Related Explanation

The first and most obvious possible explanation for judicial capitulation to authoritarian rule in any country is that authoritarian leaders manipulated the courts, through either purges, threats, or jurisdictional restrictions. Obviously, when judges are handpicked by regime leaders, or cowed by fear for their personal safety or economic security, one cannot expect significant resistance.[28] However, as in Chile, authoritarian leaders sometimes see benefits to respecting the independence of the courts: If they leave the courts alone, they can deflect charges that they have no respect for the law.[29] Instead, as José Juan Toharia argues

[28] Even with purges, however, resistance is still possible. See, for example, Osiel 1995; Solomon 1996; and Helmke 2005.

[29] For an excellent summary of the various motivations authoritarian rulers can have for respecting or granting judicial independence, see Moustafa 2007.

with reference to Spain under Franco, authoritarian leaders are likely to pursue the strategy of allowing judicial independence and impartiality while restricting jurisdiction (1974–1975). C. Neal Tate concurs, noting that the "objective would be to leave the courts with only routine, non-threatening decisions to make, preserving their utility, but reserving the important and threatening litigation for decision by more controllable agencies, e.g., military courts" (1993: 318). He adds, however, that "there is no guarantee that these tactics will be successful. If, in spite of the establishment of parallel courts, regular courts continue to accept cases which fall within the special jurisdiction of the parallel courts, and challenges denying the parallel courts' jurisdiction in cases they have begun to hear, the strategy will fail. Similarly, if the courts entertain challenges to the validity of the crisis decrees and regulations, then the strategy will fail" (Tate 1993: 319; see also Osiel 1995).[30]

In Chile, the Pinochet regime pursued the strategy of restricting civilian jurisdiction, expanding military jurisdiction to levels comparable only to Francoist Spain. However, even before the strategy was formalized into law, human rights lawyers brought challenges to its constitutionality, challenges which the courts repeatedly rejected. Indeed, it was the judges themselves who tended to interpret their own role very narrowly, abdicating the authority they had to reign in the state's police powers or protect constitutional rights. My analysis of judicial decisions 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.[31] Furthermore, both archival sources and interviews with judges, lawyers, and legal academics pointed more to institutional factors than to regime-related factors as explanations for judicial performance across time. It cannot be said, then, that regime-related variables offer a straightforward or complete explanation for judicial behavior in Pinochet's Chile.

[30] Tate notes that in the face of judicial resistance, the only option left to a crisis regime is coercion, which the judiciary obviously has no means to resist. However, by resorting to coercive treatment of judges, the regime "vividly illustrates the hollowness of its professed respect for constitutionality" (1993: 319), or as Dyzenhaus puts it, forces the regime into a "rule of law dilemma" (1998: 159).

[31] The continuity of judicial behavior in Chile across regimes calls into question theories that hold that they key to the assertion of judicial authority is diffuse political power or party alternation (e.g., Ginsburg 2003; Ramseyer and Rasmussen 2003).

The Attitudinal Explanation

With regime-related variables 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 judicial complicity was a function of ideological sympathy and/or a lack of individual moral integrity (e.g., Pozo 1983: 9–10; Luque and Collyer 1986: 23–27).

My research revealed that individual political attitudes are part of the explanation; alone, however, they cannot account for the sustained and highly uniform behavior of judges throughout the institution. To begin, the research showed that not all nor even a clear majority of judges in the hierarchy personally approved of the political values and practices of the Pinochet regime. Crucially, however, at the time of the coup in 1973, a powerful bloc of Supreme Court justices *did* sympathize ideologically with the military leaders. This was important because of the power the Supreme Court exercised over the rest of the judicial hierarchy. The Court controlled discipline and promotions within the judiciary, and thus 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 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 on the Court had been 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, and as I will demonstrate in subsequent chapters, 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. In addition, having been socialized into the ideology of the institution, even judges who maintained private doubts or concerns about authoritarian policies were not compelled by their professional understandings or role conceptions to take stands against the military regime. Thus, although there were also conjunctural factors at work, and although 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, in which 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. Because, 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 (Kairys 1982; Unger 1986; Kennedy 1997; Hirschl 2004).

The first point against this argument as it applies to Chile is that many lawyers and politicians who proved 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, my research showed that, 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). Analysis of the background information I collected in my interviews, such as father's occupation, high school attended, and family landholdings, revealed that almost 80 percent of respondents came from lower-middle to middle-class backgrounds, whereas only a small minority were of upper-middle to upper-class extraction. 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 (Couso 2002: 177). Thus, most judges serving in the 1970s and 1980s did not come from social backgrounds that would *necessarily* incline them to support a conservative social and political agenda.[32]

The class background of most judges does factor as part of the explanation, but in a way that only makes sense within the judiciary's institutional context. The judicial career in Chile was structured such that it attracted individuals who were not part of the traditional sociopolitical elite, who needed a dependable income, and who could only improve their social standing by rising in the judicial hierarchy. As noted in the previous section, promotion within the judicial hierarchy required pleasing or submitting to one's superiors. The institutional features of the judiciary were thus unlikely to attract individuals with a predisposition to take creative or independent stands in the first place, much less to make nonconformity an attractive option on the job, regardless of the wider political context.

The Legal Theory Explanation

A final possible explanation, 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,[33] 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

[32] Moreover, as Rueschemeyer, Stephens, and Stephens emphasize, all class interests are inevitably socially constructed (1992: especially 53–57). See also Scott (1985) at 43.

[33] Legal positivist philosophy asserts that there is no necessary connection between legal validity and moral defensibility. A valid (and hence binding) law is one enacted consistently with the society's rule of recognition, that is, with the settled practice determining the procedures by which norms become laws. Rule application, that is, adjudication, should respect ordinary linguistic practice and legislative history. A particularly strong version of positivism, formalism, refers to the judicial inclination to apply canonical rules in a mechanical fashion, irrespective of the purposes and policies underlying them. It thus denies the possibility of judicial discretion. Textualism, or the judicial practice of referring strictly to the text of a law in the practice of interpretation, is a manifestation of formalism.

principles of the legal system (Fuller 1958; Cover 1975; Dyzenhaus 1991; Dubber 1993; Ott and Buob 1993). Judges who work under legal positivist assumptions, or what David Dyzenhaus 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 (1991). 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,[34] 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; Raz 1979; MacCormick 1993). In other words, judicial reasoning in accordance with "higher law" will not meet liberal standards of justice when the "higher law" itself is not politically liberal (as in Nazi Germany, apartheid South Africa, or Chile under Pinochet's 1980 Constitution).

As I will explain in the next chapter, 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 1980; Squella 1988 and 1994). My research partially confirmed this, revealing a widespread tendency on the part of judges to use a "plain fact approach" – or at least a plain fact justification – in adjudication. In decisions, judges frequently insisted that they had no choice but to defer to the executive or legislature, and in interviews, most judges emphasized that they were duty-bound to remain "apolitical."

However, both case analysis and interviews also revealed that (at least some) judges were willing and able to appeal to principles beyond the letter of law, *so long as the outcome favored or restored the (conservative) status quo*. In other words, although there did seem to be a general tendency among judges to avoid evaluating the legitimacy of government policy, some did deem it appropriate to review and even challenge the actions

[34] Natural law philosophy is based on the view that there is an inherent, or conceptual, connection between law and morality. In the strong version of natural law theory, no rule can be legally binding unless it is also morally defensible. In the weaker version, the understanding is that it is socially desirable for judges, in hard cases, to look beyond a rule's wording and the specific intention of its authors, to more general moral principles embedded in the fabric of legal doctrine.

of the sitting government when those actions somehow threatened the traditional social order (i.e., under Presidents Frei and Allende). These judges did not consider such activism "political," but viewed it rather as an appropriate, professional response to administrations that promoted radical social change.[35] In turn, they did not consider judicial support for the Pinochet regime (whether passive or active) "political," as Pinochet himself pledged to rid the country of "politics" and to restore the country's traditional values.

My claim, then, is that there was an "antipolitics" ideology at work in the Chilean judiciary, but one that cannot be understood as a simple function of legal positivism. Unlike "plain fact" positivists, judges could and sometimes did publicly assess the legitimacy of executive and legislative acts. However, they did so only when the resultant rulings favored or restored the *status quo*, and could thus bear a mantle of "apoliticism." To take principled stands in defense of those who *challenged* the traditional order, by contrast, was deemed "political" and unprofessional. This understanding was transmitted and reinforced by the autonomous, bureaucratic institutional structure of the Chilean judiciary, where the Supreme Court both defined what it meant to be "apolitical" and policed the understanding within the judicial ranks. Any judge who desired to be respected by colleagues and to rise in the career had to be careful to avoid appearing "political." The best career strategy – or for some simply the best way to fulfill one's role as a judge – was thus to avoid taking any stands at all, as passivity would never be interpreted as "political" behavior.

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 offer 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.

[35] For a similar argument regarding the judiciary in Weimar Germany, see Kahn-Freund 1981.

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 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. Although there have been some changes to the structure in recent years, the following describes it accurately from the late 1920s until 1997:[36] 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 which appeared by right of seniority,[37]

[36] Recent changes will be discussed in Chapter 5.

[37] 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 evaluations record.

but the other three that the Court chose by plenary vote. The MJ made its appointment from this list.[38]

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.[39] The Supreme Court has the ultimate responsibility to oversee 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.[40] Before 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 above, a List Three rating served as a stark warning (as two consecutive years on List Three meant dismissal), and a List Four rating meant immediate removal.[41] The formal criteria of evaluation were still the same ("efficiency, zeal, and morality"), but because the justices (as before) did not have to justify the evaluations in any way

[38] I reviewed all the minutes of the plenary sessions from 1964 through the late 1990s (I couldn't access those after 1998), 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. Those who worked in the Allende administration, in particular, felt that the Court had intentionally stacked the list with more conservative judges. Their response was thus to name the individual who appeared on the list by seniority, regardless of his technical qualifications.

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

[40] 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.

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

(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 ("apolitical") institutional structure, I argue, gave 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 the career, 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.

I am not the first to make this observation. Several prominent Chilean scholars have called attention to the corporatist nature of the judiciary and have noted (and lamented) the lack of internal judicial independence (Frühling 1980 and 1984; Correa 1993; Peña 1994). My work confirms and builds on their insights, providing systematic empirical evidence for a thirty-five-year period covering both democratic and authoritarian regimes.

The second part of my argument, regarding the institutional ideology of the judiciary, also owes something to Chilean analysts. As mentioned earlier, many prominent Chilean legal scholars have emphasized the positivist or formalist legal culture that prevails in their country, and in which judges are trained and function (Novoa 1964; Lowenstein 1978; Cúneo 1980; Squella 1988 and 1994; Correa 1990; Correa and Montero 1992). Legal education has traditionally been done in the exegetic method (memorization of codes), such that students learn "the law," but are not encouraged to examine and critique the reasoning behind it, nor even to learn how law functions in practice. Students, including judges, are taught to think of law in purely bookish and technical terms, and, importantly, they are taught that the only legitimate source of law is the legislator; the role of the judge is merely to apply the law in accordance with the rules of interpretation outlined in the Civil Code. Judges are expressly prohibited from engaging in partisan political activities.[42] All of this positivist indoctrination is so strong,

[42] See the *Código Orgánico de Tribunales*, article 323.

the argument goes, that judges come to think of their work in almost mechanical, or formalist, terms. They seek to apply the written law "regardless of the consequences or the specific circumstances of the case," and they eschew any analysis based on general principles (Cea 1978). Thus, under the dictatorship they were able to apply authoritarian policies without reserve because it was simply not a part of their role perception to assess the legitimacy of legislation nor to recognize and accept responsibility for the outcomes of their decisions.

My research showed, however, that some Chilean judges were in fact quite able to (and did) think of their work in nonformalist terms, and that they were willing to depart from the letter of statutory law both before and after 1973. As subsequent chapters will demonstrate, when left-wing presidents sought to exercise (longstanding legal) executive prerogatives to advance their reform agendas, the courts proved cognizant and capable of invoking constitutionalist principles to check government excesses. Notwithstanding this, my research also showed that a taboo against "political" behavior was clearly at work within the institution. To understand the significance of this norm, it is necessary to explain how the term "political" was defined within the institution and how that definition was maintained.

As I show in Chapter 2, the definitions of the "political" and the "judicial" were established in the nineteenth century, when Chilean statebuilders 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 to 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 emulated their own professional, if not also personal, attitudes and practices. At

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

the same time, they had, through the evaluations system, an effective means of deterring dissent. In the decades that followed, the judiciary thus remained quietist in the face of abuses of public power.

This behavior changed, however, when the progressive governments of Eduardo Frei and Salvador Allende began using executive power to challenge the sanctity of private property (the traditional judicial domain) and the social order that this concept supported. Led by the Supreme Court, judges began invoking rights principles to defend traditional values and interests. Yet they did not understand this activism to be "political." Judicial authorities reserved the term "political" to delegitimize the activities of the few judges who publicly demonstrated sympathy with or defense of the ascendant Left. Likewise, following the military coup, the judicial elite applied the label "political" to the expression of criticism or opposition to Pinochet's self-proclaimed "apolitical" (and clearly pro-private property) regime.[44]

In contrast to many Chilean authors, then, who tend to portray the country's judges as small-minded, bureaucratic automatons, focused only on their corporate interests and seemingly oblivious to the content of the laws they applied,[45] I contend that there was a more substantive ideology at work. The "antipolitics" ideology of the institution embodied and served to perpetuate traditional, nineteenth-century views of sociopolitical legitimacy. Judicial defense of these views, and the interests that stood behind them, was considered "neutral" and professional – that is, purely legal – whereas even a principled defense of other views, or the interests that stood behind them, was considered "political" and hence *un*professional.[46]

My argument is that, in combination, the structural and ideological features of the Chilean judiciary effectively served to mobilize bias (Thelen and Steinmo 1992: 10) – specifically, a conservative bias. These features allowed and supported the expression of traditional, conservative juridicopolitical views by actors in the institution, while discouraging and sanctioning the development and expression of alternative views. Because of the institutional structure, the primary, and in some ways, exclusive "audience" or "reference group" for judges was

[44] On the "antipolitics" of the authoritarian regime, see Loveman and Davies 1997 and Munizaga 1988.

[45] See especially Correa (1993) for a focus on the origins and implications of this concept of judicial independence. See also Vaughn 1993.

[46] On a similar phenomenon in the U.S. case, see Sunstein 1987.

the Supreme Court, whose members were not representative of the diversity in the wider polity.[47] They were clearly more conservative than the majority of society, in part because of the way the same institutional features had shaped their views. Given the power they bore over their subordinates' careers, it is clear that the expression of alternative juridicopolitical views was severely constrained. The institutional ideology also helped to preclude the expression of alternative views because it equated professionalism with apoliticism. To behave professionally, so as to merit respect from peers and secure success in the career, meant to remain above "politics," or at least to appear to do so. This meant that passivity was prized, in general, and activism was only deemed acceptable when it was aimed at preserving or restoring the sociopolitical status quo. With this prevailing understanding of professionalism in the institution, and with the conservative Supreme Court monitoring adherence to this understanding, it is no wonder that Chile's judges offered little resistance to the abusive policies of the Pinochet regime.[48]

To summarize, then, the central claim of this book is that the institutional features of the Chilean judiciary promoted a conservative bias among judges, which in turn explains why the judges offered such little

[47] I borrow the idea of "audience" from Schattschneider (1960) and the notion of judicial "reference groups" from Guarnieri and Pederzoli (2002). The claim fits nicely within the framework of Baum 2006.

[48] This argument bears some resemblance to that of Müller (1991), which explores how and why judges and lawyers cooperated so fully with the Hitler regime. Müller attributes this behavior to both "intellectual affinity between [traditional German] conservatives and Nazis" and the "loyalty to state leadership" (rather than to the law) or "fixation on government [which characterized] such a large part of the [German] judiciary" (1991: 294 and 297). Moreover, he suggests that these qualities were institutionally cultivated. From 1878 forward, and despite formal independence from the government,

> judges could be dismissed at any time during their [12–20] year training and assistantship [i.e., prior to being granted an official judgeship]. This period offered ample opportunity to observe the candidates, to remove those elements associated with the opposition, and to suppress every liberal tendency. The only candidates who survived this ceaseless scrutiny were those who were loyal and compliant to a particularly high degree – those who, in other words, accepted the social and political order unconditionally. (1991: 6)

The major difference, of course, is that in Germany, it was the Ministry of Justice (i.e., the government) that controlled judges' careers, not the judicial elite itself, as in Chile and other cases discussed in Chapter 6.

resistance to the undemocratic and illiberal regime of General Pinochet. Both the role conception into which judges were socialized and the incentive structure in which they functioned discouraged them from taking principled liberal-democratic stands, before, during, and after the authoritarian period.

CHAPTER TWO

THE INSTITUTIONAL CONSTRUCTION OF THE JUDICIAL ROLE IN CHILE

The Chilean judiciary,[1] in its basic institutional structure, is the oldest in Latin America. In 1974, the Supreme Court celebrated "150 years of uninterrupted institutional life" (*Sesquicentenario de la Corte* 1974), making it by at least one account "the most stable institution in Chile" (Bravo Lira 1990: 36). In a region known for its political and institutional instability, this is certainly remarkable. Yet, as this book reveals, this century and a half of stability did not come without a price. Indeed, as Chile evolved from a quasi-authoritarian republic (in the 1830s) to one of the world's most vibrant democracies (in the 1960s), the judiciary proved to be not merely stable but sclerotic.

This chapter begins to make this point by offering a brief history of the institutional development and political role of Chile's judiciary from the dawn of the republic to 1964 (the year my primary analysis begins). My objective is to show that long before General Pinochet arrived on the scene, the stage was set for judicial cooperation with his regime. As I will explain, nineteenth-century Chilean statebuilders and twentieth-century reformers constructed the judiciary around the ideal of "apoliticism." This institutional construction, in which judges were, first, ideologically and, later, structurally, separated from political life, discouraged independent thinking and innovation, and, instead, reproduced conservatism and conformity. Judges had neither the professional

[1] Throughout the book, I use the term "judiciary" as a translation of the Spanish "*poder judicial*," referring to the court system.

understandings nor incentives to do anything but accept and emulate the traditional perspectives and practices of the institutional elders. Thus, although the judiciary was, by the mid-twentieth century, staffed largely by members of the emergent middle class and boasted high levels of independence and professionalism,[2] judges were largely unwilling or unable to take stands in defense of liberal and democratic principles. Indeed, as I will show in this and subsequent chapters, whether under democratic or authoritarian regimes – that is, despite dramatic changes in the political and legal context in which they functioned – the courts were remarkably consistent in the values and interests they defended or left defenseless. In short, the extremely "stable" institutional setting in which judges learned and practiced their vocation rendered their performance extremely – and tragically – "stable" as well.

LAW AND COURTS IN COLONIAL TIMES AND IN EARLY INDEPENDENCE

Before proceeding with a discussion of the judiciary's institutional and political trajectory in Chile's republican era, it is important to establish what preceded it and what those who constructed the Chilean judiciary were attempting to accomplish. Chile, like all the newly independent states of Spanish America in the early nineteenth century, emerged from a colonial era whose legal system was characterized by privilege, jurisdictional divisions, morally oriented legal interpretation, and the union of administrative and judicial authority. In the medieval Castilian tradition, the administration of justice was considered the highest attribute of sovereignty; the essence of royal authority was the granting of grace and favor. As J. H. Parry notes, "The principal task of government was considered to be that of adjudicating between competing interests, rather than that of deliberately planning and constructing a new society" (1966: 194). Therefore, the principal organ of government was the judicial tribunal (Phelan 1967: 122).

[2] The term "judicial independence," as used here and throughout this book, refers to freedom from partisan manipulation of judicial decision making through control of judicial discipline and tenure or interference with the decisional process (see Brinks 2005).

Members of different estates were subject to the jurisdiction of the same courts.[3] However, there was no equality before the law because "the rights, privileges, and obligations of each person came from the functional corporations and the estate to which he belonged . . . the social status of a culprit influenced the nature of his punishment" (Phelan 1967: 213) .[4] Moreover, conflicts involving the church, military, and commercial entities were resolved according to separate rules and in separate tribunals (*fueros*). Decisions of the ecclesiastic tribunals could be appealed to the *Real Audiencia*, but in general, the perspectives and interests of the Audiencia coincided with those of the church.

The dominant legal philosophy of the period was church-backed natural law. Legal argumentation was fundamentally morally oriented, and gave scant attention to the literal content of legal rules. Indeed, "the empire was governed by several codes of law which often conflicted with one another" (Parry 1966: 193). Thus, legal analyses focused on the purposes to be attained by the rules and on the overarching goals of the legislator (Frühling 1984: 9–10).

After the declaration of Chile's independence in 1810, the leaders of the young republic agreed on the illegitimacy of the principles that had undergirded colonial rule but could reach no consensus on what should replace them. Thus, during the first two decades of Chilean independence, constitutions were written and rewritten as leaders grappled with the grand ideals of the Enlightenment and the realities of state- and

[3] As in the rest of colonial Spanish America, subjects could bring conflicts before three to four levels of authorities, the first being the local *alcalde* (mayor) or the *corregidor* (provincial governor) and the last being the *Consejo Real y Supremo de las Indias* in distant Spain, which ruled only on civil cases. The *Consejo* was established in 1524, had ten to fifteen members, and responded directly to the king. The *Real Audiencia*, which was composed of approximately four magistrates, served as the highest court of appeal within the colony, and the court of last resort in criminal cases. The *Real Audiencia* also could send one of its members as a *juez de comisión* to investigate serious or notorious crimes in the outlying provinces. The members of the *Audiencia* were appointed by the king on the basis of aristocratic patronage, academic training, and previous experience. The mission of the *Real Audiencia* was to see that the activity of the government remained within the boundaries of the Law, or more broadly, to link the colonies to the king (Parry 1966: Ch. 10; Karst and Rosenn 1975; Phelan 1967; Frühling 1984: 7–8).

[4] Punishments were generally physical for the poor and financial for the rich. Phelan notes that, in other colonies, banishment to remote and isolated Chile was viewed as one of the worst punishments possible!

nation-building. "The new republic drifted from one makeshift political experiment to the next" (Collier 1993: 3) as "armies, rebellions, and bandits [moved in succession] across the country" (Loveman 1988: 119).[5]

The mantle of liberalism was claimed by all of the postindependence contenders for power, but the interpretations given to it varied tremendously (Collier 1967: Ch. 4; Frühling 1984: 14; Jocelyn-Holt 1999). As Brian Loveman and Elizabeth Lira put it, "although it was 'liberty' for which they fought, it wasn't obvious for which liberty they were fighting, nor the liberty of whom or for what. The loyalties were divided and confused" (1999: 62). The elite of the period may have held liberalism to be "the paradigm of modernity, the latest and most worthy of imitation in Western civilization," but they also "demonstrated the necessity of adapting [its] principles to the reality of the country, to the feeling and conscience of a national identity with which they were preoccupied" (Cea 1987: 25).[6]

The aspiration to liberalism was evident in the 1823 Constitution and the 1824 *Reglamento de Administración de Justicia*. These founding documents offered liberal protections against torture and self-incrimination, for the presumption of innocence, and for no punishment without trial, among others.[7] They also gave the Supreme Court "directive, correctional, economic, and moral oversight of all of the courts of the nation,"[8]

[5] In the meantime, both a (national) court of appeals and a Supreme Court (the *Supremo Tribunal de Justicia*) were created to replace the *Real Audiencia*, while the *alcaldes* continued to serve as first instance judges. Because the earliest constitutions focused almost exclusively on the executive and legislature and said almost nothing about the judiciary, Spanish laws regarding judicial organization continued to function, as did all the laws from the colonial period "with the exception of those in conflict with the present liberal system of government" (López Dawson 1986: 39). Moreover, from 1814 to 1817, Spanish judicial institutions were reinstated.

[6] As Iván Jaksic puts it, "the efforts to define the nature of republican institutions in accordance with liberal ideology often clashed, during these years, with a strong tendency to continue the Bourbon tradition of centralized administration" (2001: 95).

[7] Indeed, "every Chilean constitution of the [revolutionary] period contained a section, however small, guaranteeing individuals against legal injustices and detailing their legal rights" (Collier 1967: 157). On the founding generation's interest in rights generally, see Kinsbrunner 1973.

[8] These laws also established the judicial hierarchy which more or less remains today, with the Supreme Court at the top, the court(s) of appeals under them, and the departmental and instructing judges (first instance) below them. However, the

as well as the duty to "protect, realize, and stake claims before the other powers for individual and judicial rights (*garantías*)" (*Sesquicentenario de la Corte* 1974).[9] However, as Raúl Tavolari notes, the 1823 Constitution also charged the Senate with protecting and defending these rights, such that it was unclear which body (the Supreme Court or the Senate) should exercise this function in any given case (1995: 51–52).

Moreover, the prevailing concern of the period increasingly became order rather than liberty. Ideological struggles and civil turmoil had been the hallmark of the country since independence. Many early statesmen expressed their unease and even "horror" at the disorder that plagued the young nation (Jocelyn-Holt 1997: 79–80). Rather than liberalism, they thus turned increasingly to republicanism as a guiding philosophy. They emphasized that in order to tame the passions that had engendered the violence of these early years, virtue had to be cultivated among the citizenry. And in their view, the path to a virtuous republic rested in law, which, when properly enforced, could transform customs (Jocelyn-Holt 1997: 84; Jaksic 2001: 179). Leaders such as Mariano Egaña and Andrés Bello "were convinced that if certainty in the interpretation of legal rules was ensured, political stability and economic progress would follow" (Frühling 1984: 16).[10] They thus set out to construct a legal regime that would offer generality and predictability, at least for those citizens who "mattered" socially, and thereby promote social and political stability.[11] Influenced by perspectives and models from Europe,[12] they advocated legal codification and the creation of a faithful judicial bureaucracy. It was only after 1833, however, that they were able to realize this project (Jaksic 2001: 158).

alcaldes retained the functions of the last group in departments where there was no legally trained judge.

[9] These have remained the fundamental attributes of the Supreme Court ever since, and thus it celebrated its sesquicentennial in 1974.

[10] See, for example, Andrés Bello's essay, "Observance of the Laws" (Jaksic 1997: 261–269).

[11] Thus, for example, by 1824 the law established that all economically significant civil cases and all criminal cases involving serious penalties had to be adjudicated by legally trained judges outside the political administration (Frühling 1984: 23 and 26).

[12] Bello, for example, spent nineteen years (1810–1829) in London, where he was exposed to the work of Jeremy Bentham. Much of Bentham's thought was too radical for Bello's taste, however. Instead, he sympathized with and "absorbed much of the anti-Jacobin tenets of the Holland House reformers who embraced the views of Edmund Burke" (Jaksic 2001: 99).

LAW AND COURTS UNDER THE PORTALIAN REPUBLIC

The 1833 Constitution, which ushered in the era known as the Portalian Republic, after statesman Diego Portales,[13] aimed above all at establishing a strong, effective, and stable government. The express purpose of the Constitution was to bring political disturbances and partisan fluctuations to an end (see Collier 1967: 333; Frühling 1984: 19; Loveman 1988: 124). Like Bello and Egaña, Portales wanted public tranquillity, which would allow business to flourish, and he believed that this could only be achieved via "a strong government, centralizing, whose men are true models of virtue and patriotism, and [that can] set the citizens on the road of order and virtues" (Kinsbrunner 1973: 61). Only in the distant future, when the people had become sufficiently virtuous, could the government be completely liberal and free (Kinsbrunner 1973: 61; Collier 1967: 339).

Thus, although a measure of popular representation was secured via limited suffrage,[14] the idea of equality before the law was ensconced in the Constitution,[15] and a number of liberal rights were formally protected,[16] the real emphasis of the era, both legal and practical, was on limiting challenges to executive authority and maintaining order.[17]

[13] Brian Loveman notes that although "Portales played almost no official role in elaborating the Constitution of 1833 . . . the centralized, authoritarian character of the constitution owed as much to Portales as to its principal author, Mariano Egaña" (1988). Jay Kinsbrunner directly challenges this view in his *Diego Portales: Interpretive Essays on the Man and Times* (1967). Simon Collier claims that Andrés Bello "was consulted in private about the draft of the constitution" and "may even have had a hand in the final editing" (1967: 332). Iván Jaksic confirms this, noting, "there can be little doubt of Bello's participation" (Jaksic 2001: 103).

[14] The vote was granted to all literate males over twenty-five (or twenty-one if married) who enjoyed a certain economic status (property, invested capital, income). This limited suffrage was, internationally speaking, quite normal for the period.

[15] The 1833 Constitution, Article 12, Number 1 established that "There are no privileged classes in Chile."

[16] See the 1833 Constitution, Article 12, Numbers 2–7, which protected the right to labor, the right to movement within the national territory, the inviolability of property, the right to petition authorities, and freedom of expression. Note that freedom of religion and freedom of political association were not protected, and freedom from arbitrary arrest was not an absolute guarantee. See also Lastarria 1856: 37.

[17] "The liberal ideology which lay at the heart of the Chilean revolution was rejected in practice by the Portales regime, while Mariano Egaña and others led a conscious retreat from liberal doctrine" (Collier 1967: 358).

In addition to veto power, emergency powers, and extraordinary powers to govern by decree, then, the President of the Republic also was given strong control over the judiciary. Although the president could not appoint judges at will,[18] he was empowered to oversee the prompt and adequate administration of justice, as well as the official behavior of judges.

As a result, the principles of judicial tenure and independence took on quite restricted meanings in practice. Twice in the 1830s, the president used his power to suspend or fire members of the higher courts when their decisions did not reflect the interests of the government (Frühling 1984: 21).[19] And in 1837, in the midst of a war with Bolivia and Peru, President Joaquín Prieto and his Minister of War and the Interior, Diego Portales, decreed that such political crimes as treason, sedition, uprising, and conspiracy would not be judged by the ordinary courts, but by permanent councils of war established in the capital of each province. The councils of war included one member of the judiciary, namely, the local judge of the respective province, and two military officials appointed by the president. They could apply any penalties they deemed appropriate, including death, and their decisions and sentences could not be appealed. Consequently, "those who 'disturbed public order' or were 'disrespectful toward the government' faced banishment or even execution" (Loveman 1988: 127; Loveman and Lira 1999: 57). These special war tribunals functioned until 1839, when they were dissolved by law (Frühling 1984: 21).

It was not only the exaggerated powers of the president that restricted the judicial role in politics during this period. The 1833 Constitution neither recognized the judiciary as a full state power, nor gave it powers of judicial review (Articles 108–114). Instead, it assigned Congress

[18] Article 82, No. 7 of the 1833 Constitution established that the President of the Republic was to appoint judges from lists of nominees prepared by the Council of State, a body composed of two cabinet ministers, two members of the Supreme Court, an ecclesiastic, a general of the army or navy, a chief of some office of the treasury, two former cabinet ministers or diplomats, and two former provincial officials. Nominations were to be based on the proposals of the five-member Supreme Court, which submitted biannual reviews of judicial functionaries, although for many years, the Council could add its own names to the list and the President of the Republic could demand one (and only one) alternative list.

[19] Frühling notes that in "the most notorious" of these cases, the president fired members of the Martial Court for their decision *not* to impose the death penalty on a general who had plotted to start a revolution in 1836.

the power of general interpretation of the Constitution, following the French model of parliamentary sovereignty.[20] When Congress was not in session, a "conservative commission," composed of seven senators, elected by their peers, was to "oversee the observance of the constitution and the laws" (Kinsbrunner 1967: 60).[21] Although habeas corpus was to be enforced by the courts, the law left the details of this procedure unspecified and unresolved until the adoption of the Law of Organization and Attributes of the Tribunals in 1875. The Constitution further limited the reach of the courts by granting jurisdiction in contentious administrative cases (conflicts derived from contracts entered into either by the government itself or by its agents) to the Council of State (Article 104).[22] The defenders of this article of the Constitution argued that the judiciary should not interfere with the highest interests of society, which only the government could represent (Frühling 1984: 22).

Moreover, scholarly legal doctrine from this period through 1925 consistently emphasized the duty of the courts to apply the letter of the law and denied them even the power to question laws passed by unconstitutional methods (Bertelsen 1969). Andrés Bello, author of the Chilean Civil Code and founder of the University of Chile, was instrumental in propagating this positivist conception of the judicial role.[23] Between 1830 and 1837, Bello published more than fifty articles on the administration of justice in the official government publication, *El Araucano* (Bravo Lira 1991: 56). In these articles, he advocated procedural reforms of the judiciary that would tightly control its decision making. He argued:

> Often a law may seem unjust to a judge: he can believe that it is a rash one; he can find his opinion buttressed by doctrines that seem to him to be worthy of respect, and it may be that his idea is not mistaken. Yet he cannot act against that law, nor can he ignore it, for if judges were able to do so, decisions would no longer be ruled by law but by the magistrate's private opinions.

[20] On this model, refer to Cappelletti 1971 and Merryman 1985.

[21] Kinsbrunner emphasizes the check that the legislature placed on the executive from early on, but Lastarria notes that the conservative commission was never convened (1856: 89). Frühling (1984) argues that because of the permanent practices of electoral intervention by the administration, the president managed to get his will echoed in Congress.

[22] On the composition of the Council of State, see note 18.

[23] For a definition of legal positivism, see Chapter 1.

Thus, he stated, "the judge is the slave of the law, . . . he has no power over it."[24] Under Bello's influence, many laws were passed in the 1840s and 1850s detailing the procedure that judges had to follow in deciding cases before them. The Civil Code of 1855, which is still in force today, made clear that judges could not interpret the laws according to their spirit or purpose when their literal content was clear (Article 19). It also declared that usage and custom were not sources of law to be considered by the interpreter, unless otherwise specified by law (Article 2) (Frühling 1984: 29–30).[25]

It should be noted, however, that Bello's legal positivism had a different inspiration than that associated with Enlightenment thinkers and propagated after the Revolution in France. As noted earlier, Bello and his followers were concerned above all with securing order and stability in Chile (see Jaksic 1997: xlvii).[26] Their greatest fear was not that judges would subvert the popular will or inflict arbitrary and inhumane punishment on citizens[27] but, rather, that they would use their individual discretion to favor particular parties in different cases, thereby dividing and eroding the authority of the state and sowing the seeds of anarchy and chaos.[28] In order to support the construction of the new republican state, law needed to serve the authority of the government. Above all, then, it had to be clear, uniform, and predictable. To allow judicial discretion in the application of the law would be to divide sovereignty and

[24] From "Observance of the Laws" (Jaksic 1997: 266). As Enrique Navarro Beltrán notes, Bello also frequently sustained that judges are mere delegates of the executive (1988: 85).

[25] This was not unique to Chile, but was the judicial role constructed in all of Latin America, following the Napoleonic model. See, for example, Adelman 1999.

[26] Jaksic emphasizes Bello's anti-Jacobin views and his belief in the importance of continuity with Spanish traditions (2001: Ch. 3 and Ch. 6).

[27] Frühling notes that Mariano Egaña, who studied the French and English legal systems in the 1820s, wrote to his father that democracy was the greatest enemy that America had (1984: 16). He was particularly worried about factionalism, anarchy, and their potential effects on economy. Jaksic writes that as Director of the Colegio de Santiago in the 1830s, Bello included works by Bentham, Locke, and Rousseau in the law curriculum, but "mainly to refute them" (2001: 110).

[28] Bello's arrival in Chile "was punctuated by a civil war resulting from political experimentation along republican lines in the 1820s. Order, it appeared to him and others in Chile, could only be ensured by a political system that provided for strong executive powers, limited the number of elected offices . . . and discouraged popular mobilization" (Jaksic 1997: xlviii).

to introduce conflict into the heart of public authority.[29] This would lead to an erosion of order and the eruption of civil war, which would make freedom and progress impossible.[30]

On this Hobbesian logic, Andrés Bello and his fellow statesmen thus constructed a justice system based on legal codification and strict judicial restraint. Judges were to be slaves *not* to the law as the product of democratic deliberation and the guarantee against government oppression but, rather, to "the law," which, having proven its value over centuries in Rome, Spain, and the New World colonies, would be incorporated into the country's codes drafted by Bello and others, and would, through its qualities of timelessness and neutrality, inspire respect and obedience among the citizenry.[31]

Diego Portales, meanwhile, shared the objectives of order and stability but held that the key to a just and effective rule of law rested in the judges themselves:

> there is no good law if it is not carefully upheld; we contend that good agents (*encargados*) make good laws, since it is with the same laws that both good and bad justice is administered. . . . [T]hey may make excuses for themselves with the confusion and discord of the laws; but they would have to confess that this is purely a pretext . . . (Bravo Lira 1991: 54).[32]

For the most part, the quality of the "agents" was guaranteed by the fact that judges came from the same elite families and legal-political circles that presidents did (see Garth and Dezalay 1997; Gil 1966: 127). However, as noted earlier, Portales and his followers had no qualms about intervening in the judiciary to ensure that judges would be "good

[29] Useful to understanding this logic is Michael P. Zuckert's (1994) account of the Hobbesian rule of law. See also Herzog 1989: Ch. 4.

[30] Mariano Egaña, for example "called for 'inexorable laws' to contain disorder and to set up a supreme and unquestionable executive authority." In 1824, he stated, "I am certain that nothing would discredit us more than constant alterations in our laws" (Collier 1967: 336 and 340). Bello shared this view, which was part of his more general philosophy on the importance of clarity and unity in both language (grammar) and law (Jaksic 2001: 153–154).

[31] Indeed, codification in Chile can be described accurately as the pruning and organization of existing (i.e., Spanish) law, with relatively minor innovations (Jaksic 2001: 161–174). Interestingly, José Luis Cea claims the Spanish influence was so profound that even by 1970, "Chile had not succeeded in building what might properly be called a native legal culture" (1978: 15).

[32] Jocelyn-Holt emphasizes Portales's skepticism about law (1997: 156).

agents" of the sovereign will, as interpreted (above all) by the executive. As one contemporary Chilean constitutional law scholar has put it, "The authority [i.e., the executive] was to operate within the laws, but [only] to the extent that these gave him broad powers to impose order." In essence, this meant that presidential power could not be controlled by juridical means (Cea 1987: 26–27).

In the first half of the nineteenth century, then, a legalism evolved in Chile that combined the legal positivist principles of Andrés Bello with the authoritarian intervention and limitations inspired by Diego Portales. Law thus had far less to do with liberty, equality, and popular sovereignty than with order, clarity, and stability; and judges, as "slaves of the law," were charged with serving and upholding order and stability above all. In the mind of the country's political elite, to question the state's authority (which was concentrated in the executive) was to court anarchy. Judges were accordingly discouraged from articulating any legal interpretations at odds with those of the president. Consequently, "Judicial protection of citizens against government action was virtually unknown in the 19th century, even in cases where citizens were supposedly protected by habeas corpus. . . . Judges depended on the executive for appointments, and faced intimidation when they were not creatures of the president" (Loveman 1993: 393). In addition, it should be noted that although the system did progress toward some level of legal generality, this generality did not extend to citizens of the lower social strata. Landlords continued to administer justice on their estates and, until 1875, minor civil disputes of all sorts were adjudicated by delegates from the government who were not required to follow a specific set of procedural rules. As Hugo Frühling puts it, "the ideology of an harmonious order formed by contract transaction was constantly challenged by a rural and urban reality of authoritarian and hierarchical domination of the masses" (1984: 37; see also Blakemore 1993; Drake 1993). In practice, then, legal formalism coexisted with multiple forms of discretion.

LAW AND COURTS BEFORE AND DURING THE PARLIAMENTARY REPUBLIC

In the second half of the nineteenth century, the pattern described here continued, although divisions among the elite did bring about some important legal changes. Diego Portales was assassinated in 1837 and

soon thereafter, rival members of the elite began to critique and reform the government structure he had created. The authoritarian domination of the executive was gradually replaced with the supremacy of the legislature, and the jurisdiction of ordinary courts was expanded via the abolition of ecclesiastical, military, and commercial *fueros*. Such changes resulted primarily from the struggle of different elite groups seeking to protect their economic or religious interests from state intervention (Frühling 1984: 47; Cea 1987).

Among the constitutional reforms passed between 1871 and 1874 were limitation of the president to one term, congressional approval of the cabinet, and restriction of the president's exceptional powers. In addition, an electoral reform divested the control of elections from municipal governments, which were controlled by the executive, and gave the power of election oversight to juntas of the wealthiest taxpayers in each district. The vote was made secret and new rules nearly tripled the electorate (Frühling 1984: 48–50).[33] All of this greatly enhanced the power of political parties vis-à-vis the president.

In 1875, the Law of Organization and Attributes of the Tribunals (LOAT) clarified and consolidated the jurisdiction of the ordinary courts.[34] It increased the Supreme Court from five to seven justices and specified the Court's duties to include review (*casación*) of legal appeals of appellate court decisions and decision-making power over writs of habeas corpus and extradition requests. In addition, the LOAT established the judicial career, meaning that judges were expected to start as district-level judges and move up the hierarchy to appellate courts, and possibly even the Supreme Court, based on their performance (as evaluated by their superiors and members of government responsible for judicial appointment) (Illanes Benítez 1966: 309–18; López Dawson 1986). Finally, the LOAT dramatically circumscribed the jurisdiction of military tribunals, such that they could only judge infringements of military laws by military men, and reduced the competence of ecclesiastic courts in civil matters to recognizing the validity or nullity of

[33] See also the discussion in Loveman and Lira 1999: 199–201. They emphasize the liberal reformist spirit that characterized the 1870s and 1880s, noting the important liberalization of penal law in the form of the 1874 Penal Code, and highlight the fact that the period 1861 to 1891 was the longest period in Chilean history in which no state of constitutional exception was declared.

[34] It should be noted that this law, with minor modifications, governed judicial organization and practice until 1942, when the Organic Code of the Tribunals was written to replace it. The 1942 Code remains in force today.

Catholic marriages.[35] Commercial courts, or *consulados*, had for their part been abolished in 1866.

In 1889, under the presidency of reformer José Manuel Balmaceda, another law established new and stricter requirements of seniority and competence for judicial appointment, and curbed executive power to intervene in the judicial selection process. From this point forward, the president was required to appoint judges from a list of only three names drawn up by the Council of State, which itself had to select nominees from larger lists submitted by the nation's high courts. The law also regulated the president's ability to review sentences and to suspend judges, establishing formal complaint and accusation procedures, and it required that any temporary (substitute) judicial appointments made by the president be reviewed by the Council of State (de Ramón 1989).

Chilean historian Armando de Ramón contends that all of these changes, along with the expansion of judicial personnel in the 1870s and 1880s, infused the country's judiciary with a cadre of highly professional, respectable, and potentially innovative men (de Ramón 1989). According to several Chilean analysts, it was during this period that the principle of the separation of powers became institutionalized and the judiciary gained legitimacy (Frühling 1984: 58).[36] However, as Frühling notes, "lack of access to the judicial system and the fact that minor disputes were adjudicated in a much more informal way" meant that the poorer strata of the population identified very little with the law on the books (1984: 59). It was not until 1901 that a judgeship was established in each department of more than thirty thousand inhabitants, and in less populated places, administrative resolution of conflicts was still the norm (Henríquez 1980).

Moreover, following the civil war of 1891,[37] the victorious oligarchical parties conducted a major purge of the judiciary, replacing 80–86 percent of Balmaceda's potential innovators by 1893 (de Ramón

[35] This ended in 1884 with the Law of Civil Marriage, which granted power of adjudication to ordinary courts. See Frühling 1984: 56–57.

[36] Garth and Dezalay argue that the legitimacy of the law in Chile, both before and long after such reforms, was "itself tied to the families behind the law, meaning in turn that this legitimacy also rested relatively less on specialized professional knowledge" (1997: 20). This would seem to challenge to some extent the idea that the judiciary rose (and fell) in prestige along with the Balmacedist reforms.

[37] For a summary of the various factors that precipitated the civil war, see Loveman 1988: 176–187.

1989: 38). The new members of the judicial corps, both immediately and over the following thirty years, were by all accounts chosen more for their partisan loyalties than for their professional merits.[38] Under the "parliamentary republic" established by the victors of the civil war (namely, leaders of the traditional oligarchical parties), a prebendal system governed appointments in the public administration, the army, and the judiciary (Gil 1966: 128; Cumplido and Frühling 1980: 71–113).[39] Although this system was resisted in some quarters, especially in the army, opposition from within the judiciary was minimal. This was due in part to the positivist ideology that attributed a merely passive and subordinate role to the judges and, no doubt, to the fact that the new appointees shared social ties and ideological sympathies with the party elites (Cumplido and Frühling 1980).[40]

During the parliamentary republic, then, constitutional practices and interpretations produced the hegemony of the Congress, rendering constitutional amendment unnecessary. With a disempowered president, and the judiciary at its service, the oligarchy was thus able to use the state to its particular benefit. As a result, the judiciary, which had been a rather prestigious, albeit quite powerless, institution in the 1870s and 1880s, became by the 1920s the object of disdain, at least among certain sectors of the population.[41] As one journal article put it in 1919, "There is no older, more persistent, or more hypocritical lie than that which praises the judiciary."[42] In 1925, the poet Vicente Huidobro stated the matter more bluntly:

> The Chilean justice system would make one laugh if it didn't make one cry. [It is] a justice system which carries in one tray of the scales the truth and in the other, a cheese, [with] the scales tipping toward the side of the cheese. Our justice system is a putrid abscess which pollutes the air and makes the

[38] In addition, the Supreme Court was expanded twice during this period, to ten members in 1902 and to thirteen members in 1918 (Pérez-Barros Ramírez 1984).

[39] It should be noted that the nitrate boom of the late nineteenth century enriched the Chilean state and made the expansion of the bureaucracy possible; however, the posts therein were filled almost exclusively by partisan appointees.

[40] Scholarly doctrine continued to espouse the positivist principles advocated by Bello earlier in the century. On this, see Bertelsen 1969.

[41] Gil goes so far as to say that during this period Chilean tribunals fell rapidly "from a position among the most highly considered courts of Latin America . . . to being the least respected" (1966: 128).

[42] Cited in de Ramón 1989: 34.

> atmosphere unbreatheable. Harsh and inflexible for those on the bottom, soft and smiling with those at the top. Our justice system is rotten and must be cleaned out entirely . . . [43]

In sum, although the 1870s and 1880s saw the curbing of presidential prerogatives over the courts, the unification of jurisdiction, and some efforts to "professionalize" the judiciary,[44] the era of the parliamentary republic (1891–1924), characterized by prebendal manipulation of state agencies, ensured that none of the previous reforms would lead to any sort of judicial challenge to the legal understandings of the ruling oligarchs. Judges continued to defer almost completely to the authority of the conservative legislators.[45] Thus, as new social sectors began organizing and questioning the legitimacy of the oligarchical regime as a whole, the prostrate judiciary drew increasing scorn. And so the opportunity was ripe for a major change when social upheaval and a series of military interventions brought an end to the parliamentary republic.

THE JUDICIARY IN CONSTITUTIONAL TRANSITION AND DICTATORSHIP

As many analysts have noted, nineteenth- and early-twentieth-century politics in Chile was basically an "aristocratic game" in which the oligarchical parties (the Liberals and the Conservatives) took turns in office, largely ignoring the social changes that were planting the seeds of major challenges to their hegemony (see Cea 1987; Blakemore 1993; Garth and Dezalay 1997).[46] But by 1920, the "social question" had become too big to ignore. The middle and working classes had organized and were demanding new protection and representation from the state.

[43] Cited in Mariana Aylwin, et al. 1996: 274.

[44] By "professionalization" I mean the creation of a "merit-based" bureaucracy, in which members move up the ranks of a hierarchy based on some combination of seniority and performance, and are thus (ostensibly) less beholden and/or vulnerable to the whims of governing politicians.

[45] As Gil writes, under the parliamentary republic, the "allegiance of judges was given to the political parties to which they owed their appointments, just as it had formerly been given to the chief executive in the preceding period" (1966: 128).

[46] For details on the numerous pro-labor proposals that were rejected by the Congress between 1890 and 1924, see Remmer 1984.

The social and political agitation came to a head under the presidency of Arturo Alessandri Palma (elected in 1920), leading to a standoff between the Liberal president and the Conservative Congress and to the first of a series of military coups on September 11, 1924. From 1924 to 1932, different factions of the military, periodically in alliance with Alessandri and for a time led by strongman Carlos Ibáñez (1927–1931), revamped the Chilean political system, introducing a new constitution to shift the balance of power from the Congress back to the president and instituting a new role for the state in the economy.[47] They thus launched the era of the "developmental state."

Part of the effort to establish this new activist state entailed the "professionalization" of the civil service and other state agencies.[48] In view of the fragility of the political and social consensus of the period, the reformers, mostly lawyers themselves, had a special sensitivity to the need for ensuring, at least formally, the independence and impartiality of the courts (Frühling 1984: 101). To this end, the new Constitution (of 1925) placed the power of nomination for judicial vacancies completely in the hands of the judiciary; that is, it formally ended government intervention in judicial nominations. From 1925 forward, the Supreme Court itself drew up the five-person lists of nominees for vacancies in its own ranks, as well as the lists of three for openings on any court of appeals. Appellate courts, in turn, became responsible for composing the lists of three nominees for any open first instance judgeship in their district.[49] The President of the Republic was to select appointees from these lists and could not remove them from their posts except by a formal impeachment process. The Supreme Court, by contrast, retained the right, on a two-thirds vote of its membership, to remove any judge for "bad behavior." An internal evaluation system, instituted in 1927, made the threat of removal more serious by giving the Court the power to review and classify (in lists of descending merit) all judicial employees for the efficiency, zeal and morality

[47] On the politics of this transitional period, see Stanton 1997.

[48] For my definition of professionalization, see note 44. On the economic and political reasons behind this drive for professionalization, see Sánchez Noguera 1991: 27–38.

[49] The 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.

of their work every three years. (This was changed to once yearly in 1971.)[50]

The 1925 Constitution also made the judiciary officially a power of the state and gave the Supreme Court the power of judicial review for the first time. Although a ruling on unconstitutionality only applied to the case in question (i.e., only had *inter partes* effects), it was a major innovation (Gil 1966: 125).[51] On appeal from a party in a case before any court in the country (*recurso de inaplicabilidad por inconstitucionalidad*), the Supreme Court could now declare any law inapplicable because of either unconstitutional procedure in the passage of the law or unconstitutional content of the law. In addition, the Constitution gave the judiciary the power to decree the immediate liberty of those detained or imprisoned with infractions of constitutional principles, and, by eliminating the conservative commission of the Senate and the Council of State, it placed the protection of essential rights and constitutional guarantees definitively in the courts.[52] Finally, the Constitution mandated the creation (via supplemental laws) of administrative courts to handle conflicts arising between citizens and state agencies.[53]

[50] One historical note: from 1924 to 1937, Supreme Court membership was reduced to eleven, ostensibly for fiscal reasons. However, it was restored to thirteen members in 1937 and remained at that number until 1984.

[51] Bertelsen notes that in discussions of the commission which drafted the 1925 Constitution, Alessandri argued that judicial review with *erga omnes* effects (i.e., applying to all cases involving the same law) would be "dangerous" (1969). However, he did propose that courts at all levels be given the power to declare unconstitutionality, a proposal which was not accepted by his colleagues, who feared this would threaten legal uniformity and certainty. See also Frühling 1984.

[52] The 1925 Constitution did set some limits on rights guarantees, however, namely by providing for states of exception in the case of both internal commotion and external threat of war (Art. 44, secs. 12, 13 and Art. 72, sec. 17).

[53] Despite the fact that five bills intended to create these tribunals were introduced in Congress between 1927 and 1970, the requisite law was never enacted (Cea 1978: 27). However, later statutes granted the ordinary civil courts the power of revising certain administrative measures (Frühling 1984; Navarro Beltrán 1988). Note that the 1925 Constitution also created the Electoral Qualification Tribunal, which was to determine the facts and render judgments regarding the probity of all congressional and presidential elections. The tribunal was composed of two sitting Supreme Court justices, one appellate justice from Santiago, and two former presidents or vice presidents of the Senate and the House of Deputies. Its membership was to be renewed every four years.

The formal powers of the judiciary, and especially the high courts of the nation, thus increased substantially with the adoption of the 1925 Constitution. At first glance, the granting of such powers seems rather surprising, given the lack of prestige from which the judiciary was suffering at the end of the parliamentary republic. However, such a change makes sense once one recalls the political conditions surrounding the drafting of the new constitution. As Kimberly Stanton explains, Alessandri and the military agreed to have a handpicked comission draft the 1925 Constitution "due to shared fears that an assembly would produce the wrong results." Their fear was at least partly due to the results of an independent (i.e., unofficial) "constituent congress" held previously by professionals and intellectuals which was deemed to have a "communist tint" (Stanton 1997: 7). The members of the appointed commission, particularly those in the critical subcommittee led by Alessandri himself, were products of an elite strongly anchored in the legal sphere. This elite believed fully in the law, although as Bryant Garth and Yves Dezalay point out, this faith derived more from the extended family relationships around the law and legal institutions than from a respect for the autonomy of law.[54] Moreover, this commission – not surprisingly – saw a need for controls on expanded state activity (Frühling 1984: 101).[55] Thus, Alessandri and his associates made the constitution a controlling document for the first time in the history of the republic, granting the Supreme Court the explicit (albeit limited) power of judicial review. At the same time, they attempted to insulate the judiciary from future political intervention and manipulation. In other words, just as the lower classes were beginning to exercise significant influence in the formal political sphere, the traditional elite embraced the ideas of judicial review and judicial independence.[56] Had the new Constitution been drafted by a constituent assembly, rather

[54] Garth and Dezalay explain that "the law school, especially at the University of Chile, provided a place where the members of elite families who needed to have a profession could mix with the sons and daughters of economically successful immigrants and then form alliances that could be used in political parties and activities" (1997: 8).

[55] To this end, the *Contraloría General de la República* was also created in 1927 (and then given constitutional status in a 1943 amendment) with the mission of controlling the legality of state acts. The *Contraloría* supervises the use of public funds and reviews the legality and constitutionality of executive decrees.

[56] The strengthening of judicial independence and the introduction of judicial review in Chile at this time support Ran Hirschl's "hegemonic preservation" thesis (2004).

than by a small, self-appointed elite, the structure and powers attributed to the judiciary might well have been quite different.[57]

In addition, to the extent that leaders of the period located any problem in the judiciary, they identified this in specific personnel, whom the new rules of judicial selection, plus a measure of strong-arming, would either reform or eliminate. In this sense, they followed in the footsteps of Diego Portales. In 1927, Colonel Carlos Ibáñez (then Minister of the Interior, but soon to have himself elected president) initiated a purge to rid the judiciary of those judges he viewed as most venal and corrupt.[58] Acting on his orders, the Minister of Justice explained,

> Few services of the state require more attention from the government than our administration of justice. Various are the factors that, aggravated by the passage of time, without the proper response, and counting on the country's patience, have created a heavy atmosphere of lenience and even impurity around the magistrate, [which is] swayed by political interests, but haughty and stubborn in its relations with the other powers of the state. (de Ramón 1989: 53)

At least one Chilean analyst argues that this was the ideal moment to carry out a thorough housecleaning in the judiciary, removing what he believes were (in the vast majority) conservative lackeys of the oligarchy that had appointed them (de Ramón 1989: 53).[59] However, the effort escalated into a full-blown confrontation between the executive and a faction of the Supreme Court, which balked at the brutal and illegal procedure being followed to remove judicial employees.[60] The whole affair ended with the deportation of the president of the Supreme Court

[57] Henríquez notes the irony of making all laws subordinate to the control of a document drafted by such a small, self-appointed elite (1988: 130). Also note that in the plebiscite held to ratify the 1925 Constitution, more than half of eligible voters abstained, citing as one of their reasons the fact that the document had not been prepared by a constituent assembly. See Verdugo, Pfeffer, and Nogueira 1994: 22–23.

[58] For an excellent account of this effort, and its aftermath, see Sánchez Noguera 1991. Note that Ibáñez held himself out as the savior that would rescue the entire Chilean public administration from the corruption into which it had sunk.

[59] Few would disagree that the judiciary at this time was filled with political appointees and was widely perceived as corrupted. See Gil 1966, as well as Sánchez Noguera 1991 who cites numerous newspaper articles from that period.

[60] Sánchez Noguera writes that "The governmental initiatives were viewed [by the judges] as an usurpation of [their] exclusive prerogatives and as the imposition of new political ideals on a branch of the state that had nothing to do with them" (1991: 47).

(brother of the President of the Republic), the forced resignation of four of his supporters, and the expulsion of a handful of other judges.[61] Meanwhile, most of their colleagues kept silent and waited out the storm.

The sociopolitical and ideological composition of the judiciary thus remained basically the same as it had been for at least thirty-five years, with those at the top of the hierarchy vested with more power than ever over their subordinates. Moreover, having witnessed the fate of those who had stood up to Ibáñez before he became president, it was unlikely that any ideological innovators in the judicial ranks would assert themselves under his subsequent four-year dictatorship, which was characterized by labor repression, widespread censorship, restricted political party activity, and torture, imprisonment, and exile of the political opposition.[62]

Indeed, the jurisprudential record of the period overwhelmingly reveals judicial passivity and submissiveness to the executive. Francisco Cumplido and Hugo Frühling summarize the jurisprudence of the years 1924–1932 as generally renouncing the power of courts to determine the validity of laws declared by *de facto* powers, thereby granting them official legitimacy. In other words, just as they would after 1973, the courts held the laws of the various *de facto* governments of the period to be of equal validity to those of representative governments. Moreover, judicial leaders asserted that ruptures of the constitutional order need not affect the functioning of the judiciary, thereby delinking the legitimacy of the judiciary from the democratic system (Cumplido and Frühling 1980).

Exemplary is the 1927 Supreme Court ruling in a case challenging the constitutionality of a "decree with the force of law,"[63] which argued

[61] Although this was viewed as scandalous by many in the traditional elite, it was, in fact, minor compared to the purges that Ibáñez carried out in other areas of the public administration.

[62] For primary evidence regarding how members of the judiciary perceived and reacted to the attack by the Ibáñez dictatorship, see passages from the sessions of the 1931 investagory commission on the acts of the dictatorship cited in Lira and Loveman 2006.

[63] In Chilean law, a "decree with the force of law" is a decree issued by the executive on matters constitutionally reserved to the parliament. Such decrees require express and previous delegation *by law* of powers by the parliament to the president. Many legal scholars contest the constitutionality of such decrees, but between 1925 and 1967, the mechanism was used 23 times (Cea 1978: 127, note 5).

that although in theory, a law based on the assumption of extraordinary powers by the president contradicts constitutional norms, "it is necessary to recognize that the respect for and carrying out of these norms depends on factors of political or social order which are in any case out of the scope of a strictly juridical pronouncement."[64] In other words, the Court argued that under certain circumstances, the law on the books was irrelevant, and, furthermore, that judges had no business questioning the executive's decision to suspend legal rules for "reasons of state;" to do so was considered "political" and thereby inappropriate to the judicial role.

The idea that the judiciary is somehow separate from the democratic constitutional order was evidenced in a statement made by president of the Supreme Court, Braulio Moreno, in the inaugural speech of the 1925 judicial year. In that speech, he claimed that even if the replacement of one junta by another is a "serious break in the nation's regime, it must be kept in mind that guarantees of respect for the independence of the judiciary were given."[65] In other words, from the perspective of the judiciary, law transcended politics, even the most fundamental of politics: regime change. Basic legal principles, as embodied in Chile's legal codes, remained the same under democratic or authoritarian governments, and so long as the experts on those codes – the judges – were left free to apply them, the rule of law, and the order and stability it engendered, would prevail. An independent judiciary thus had no necessary connection to democracy.

The judiciary's lack of vocational identification with or commitment to any overarching democratic principles is also manifest in the ineffectiveness of habeas corpus during this period. Although the intense social and political agitation of these years led to frequent citizen petitions for the writ, the courts found numerous ways to stall and circumvent their duties in this area. The situation became so serious that three prominent lawyers (Daniel Schweitzer, Jorge Jiles, and Luis Naveillán) issued a formal request to the Supreme Court for an *auto acordado* to regulate the processing of habeas corpus (*recurso de amparo*) cases.[66] They noted that in 1924, 1925, and 1930–1932, judges had found "a thousand subtle

[64] Cited in Bertelsen 1969: 157.
[65] Cited in Cumplido and Frühling 1980: 104.
[66] An *auto acordado* is an official statement issued by the plenary of the Supreme Court which clarifies some procedure internal to the judiciary not specified in the Code of the Tribunals or other laws.

maneuvers" to avoid carrying out and applying legal measures related to the writs, constantly feigning ignorance regarding the obligation to decide a case within twenty-four hours (or, in exceptional cases, within six days), and demanding successive reports "as if it were their duty to try those who are denied their liberty rather than to stop the abusive detention of individuals." This had led to unacceptable delays (months and even years) in the processing of the petitions, and the Supreme Court had adopted no resolutions to impede other authorities from disobeying, leaving unresolved, or frustrating the resolution of cases of alleged arbitrary arrest and detention (Tavolari 1995: 64–65).[67]

Yet another testimony to the quietism and lack of democratic commitment of the judiciary during this period is a 1932 book by an appellate court judge who was expelled from the judiciary by his superiors. The book, entitled *The Dwarves of Liberty*, condemned the judiciary, and especially the Supreme Court, for its submissiveness and lack of independent spirit. The author claimed that the tight hierarchical structure of the judiciary bred docility and submissiveness, and rewarded flattery over competence. He argued that conservative politicians sought to grant ever more autonomy over appointments to the judiciary because "they continue to believe that the science of legislation is nothing more than a problem of pen, paper, power, and will." In his view, however, giving more such power to the Supreme Court was the worst error possible, as such an arrangement fed "inconfessable and ignoble instincts" among the superiors and exacerbated the "ego-massaging and obsequiousness" of the inferiors. In lieu of the three-year qualifications by the Supreme Court, he argued for public (i.e., citizen) evaluations of judicial performance and suggested that election of judges would be the best means of attracting dynamic and upright people to the judiciary (Labarca Fuentes 1932: 104 and 101).

To summarize, then, leaders of this transitional period in Chilean political development recognized the need to reform the judiciary.

[67] In response, the Court thus issued an *auto acordado* on December 19, 1932, eliminating administrative requirements to resolve habeas corpus writs and calling on the appellate courts to adopt the measures authorized by law to sanction public employees not in compliance with judicial orders. Their statement read, "It should not be possible to leave a person's liberty in the hands of a functionary who is remiss or maliciously guilty on his fulfillment of [such] an obligation." This commitment was sadly forgotten again after 1973. See Chapters 5 and 6.

However, they attributed the judiciary's lack of prestige to the corruption of a few key members, and seemed to believe that new rules designed to "professionalize" the institution (the internal qualifications system and high court control of judicial nominations), along with a targeted purge of ideological enemies, would restore the courts' image of independence and impartiality in the eyes of the public.[68] Thus, rather than allowing emergent political groups to participate in any redefinition of law and the judicial role, they reinforced the ideological and institutional tendencies cultivated in and around the judiciary in the mid-nineteenth century.

As a result, even as the new Constitution granted the judiciary, and especially the Supreme Court, important new powers, innovation in the judicial role was rendered highly unlikely by three factors: the overall continuity in judicial personnel from the parliamentary era; the increased control of the Supreme Court over the judicial hierarchy; and the authoritarian context in which the new powers were introduced. All of these factors preserved and strengthened the traditional, conservative hegemony in the judiciary. So far as the populist strongman Ibáñez was concerned, the resultant passivity of the judiciary was surely very welcome. However, what it meant for wider society was that at this critical juncture in Chilean political development, the gulf between the rule of law and democracy expanded.

THE DEVELOPMENT OF CONSERVATIVE JUDICIAL ACTIVISM FROM 1932 TO THE 1960S

From 1932 until 1973, Chile underwent a process of significant social democratization. The electorate shifted leftward, forcing the gradual decline of the nineteenth-century conservative parties. New political parties of the Center and Left, with strong ties to groups in civil society, established themselves as major contenders in the political game,

[68] José Luis Cea notes that Alessandri and company put emphasis on "juridico-formal" issues rather than on sociopolitical problems, the latter of which would have been difficult to solve given the lack of agreement on their causes (1987: 30). Note the similarity of this approach to that of Andrés Bello and associates in the nineteenth century: In both periods, the political elite believed that well-crafted laws, imposed from above and faithfully applied by an "apolitical" judiciary, could produce social harmony.

and even the Right produced somewhat reformist candidates.[69] As noted earlier, a new, active role for the state in the economy had been forged by Alessandri and Ibáñez with the aim of promoting and guiding industrialization and advancing socioeconomic justice. As the decades progressed, both the number of state agencies and their mandates expanded dramatically, including administrative bodies and special tribunals established to channel social and political conflicts away from the nineteenth-century-minded ordinary courts (see Frühling 1984; Correa 1993).

Even Alessandri and Ibáñez, in their efforts to address labor conflicts and general unrest, had avoided the judiciary. In late 1924, for example, Alessandri had established special tribunals of conciliation and arbitration presided over by a representative of the executive branch, a representative of the employees, and a representative of the employers, none of whom required legal expertise. These tribunals had jurisdiction over lawsuits brought by workers or employers related to collective or individual labor contracts and to other issues regulated by labor legislation, and they were given "imperium," that is, the power to demand police assistance to enforce their decisions. In 1931, Ibáñez had replaced these (via decree) with formal labor tribunals staffed by legally trained judges. However, the Minister of Social Welfare was in charge of their appointment, and their decisions could be appealed to new appellate labor courts, staffed by one appellate court judge, one representative of the employers, and one representative of the employees. The decisions of these latter could not be appealed to the Supreme Court and any complaints regarding the behavior of the judges were to be directed to the Ministry of Social Welfare. As the 1931 Labor Code stated in Article 573, "there can be no appeal against the sentences of the labor courts" (Frühling 1984: 122 and 126).[70]

[69] For more on this period, see Drake 1978; Cea 1987; Drake 1993; Aylwin et al. 1996.

[70] A similar approach was used in the implementation of agricultural reform, which began in 1962 under President Jorge Alessandri Rodríguez (son of Arturo Alesssandri). New autonomous executive organs were created to carry out the reform, the most important of which were the Corporation for the Agrarian Reform (CORA), which was in charge of realizing expropriations and redistribution of land, and the Institute of Farming Development (INDAP), which provided technical and financial assistance. Special agrarian tribunals, composed of one judge, one representative of the property holders, and one representative of the President of the Republic, were conceived to deal with reform-related conflicts in the first instance. Unlike the

The labor tribunals quickly came under attack from lawyers and newspapers generally aligned with the interests of the employers. They claimed that the labor tribunals were biased against the employers and tended to abuse their discretionary faculties. This critique was indirectly supported by the Supreme Court, which asserted that it had been robbed of its rightful jurisdiction in labor matters. Thus, in 1933, the government reassigned "directive, corrrectional, and economic jurisdiction" over the labor courts to the Supreme Court.[71] This modification was not meant to create a "third instance" for labor conflicts. Article 573 of the Labor Code was still in force, prohibiting the use of the *recurso de casación* (an appeal based on the contestation of a lower court's application or interpretation of law) against decisions of the labor courts (see Novoa 1993: 310–312). All that the change signified was that the Supreme Court could review labor cases for possible misconduct by labor judges.

However, the Supreme Court found a covertly activist means of imposing its traditional, conservative perspective on both case outcomes and general legal interpretation (Henríquez 1980: 112–16). On reclaiming disciplinary control over labor courts, the Supreme Court launched a practice of accepting *recursos de queja*, exceptional appeals against a "mistake or abuse by the judge," as if they were simple appeals (*recursos de apelación*).[72] The Court thereby acquired final interpretive power over, first, labor legislation and, later, other areas of the law. Interestingly, while in 1930, *recursos de queja* constituted less than 10 percent of cases seen by the Supreme Court, by 1933, they had become a third, and by the late 1960s, they were nearly half of all the cases on the high court's docket (Henríquez 1980: 112).[73] The Court

labor courts, however, they were from their inception to be subject to the supervision of both the respective appellate courts and the Supreme Court. These courts were actually not convoked until 1965, after the election of Eduardo Frei Montalva, when the pace of the reform was stepped up dramatically. See Henríquez 1980.

[71] Later, in the early 1940s, a law was passed requiring that all labor appeals courts be staffed by full-time members of the judiciary (Frühling 1984: 128 and 131–132). See also Henríquez 1980: 24.

[72] In 1965, the Supreme Court adopted an *auto-acordado* formally making the *recurso de queja* more like a *recurso de apelación*.

[73] This practice was extended into and exacerbated in the 1970s and 1980s. See Valenzuela Somarriva 1990: 137–169.

clearly used the *recurso de queja* as a way of asserting control over legal interpretation and case outcomes rather than as a means of disciplining judges. Rarely did it apply the sanctions associated with the acceptance of a *recurso de queja*.[74] Although lower judges thus did not suffer from immediate sanctions, their authority was significantly circumscribed.

Through such discretionary power, the Chilean judiciary opposed the government's actions toward more social justice and egalitarianism from the 1930s forward.[75] In general, judges took a very traditional stance regarding the protection of private property and freedom of contract, and justified their decisions in formalistic language. As a representative example, Chilean lawyer and political scientist Hugo Frühling cites a 1957 case involving 1954 rent legislation designed to protect tenants from unreasonable rent charges and eviction.[76] In this case, the Santiago Court of Appeals ruled in favor of the landlord, claiming that the tenant did not prove he had fulfilled all his contractual obligations (i.e., that had paid all rent on time), even though he had no outstanding debt with the landlord. The court further argued that because the legislation "gravely affects the right to property and the autonomy of will by interfering with and annulling freedom of contract, the judge has to carefully and clearly take into account the wording of the law so that he does not commit excesses to augment these defects." As Frühling notes in regards to this case, "It is obvious that the Court did not think in terms of interpreting the law in accordance with its [the law's] stated objective, i.e., to protect tenants' right to live in a house as long as they paid the rent and complied with their contractual obligations. Rather, the Court considered limitations on freedom of contract as exceptions or partial departures from principles of law the deviation from which should be viewed with care and even suspicion" (Frühling 1984: 172, 186, and 188). Although the courts "couldn't go against the thrust of the governmental policies which were supported by the electorate," they "seemed determined to preserve a sphere of autonomy free

[74] These sanctions consisted of fines and/or suspensions, which affected the offending judge's yearly evaluation and hence his (or her) ability to rise in the hierarchy.

[75] There are obvious parallels here to the Lochner era in the United States (see Gillman 1993), and to the Weimar period in Germany (see Kahn-Freund 1981). Whereas in the United States, however, institutional factors permitted the judiciary to adjust to the new political reality of the New Deal era, in Chile, as in Germany, the "civil service" judiciary remained hostile to "the development of the law through social conflict [and change]" (Kahn-Freund 1981: 178).

[76] The case is *Fuentes viuda de Fuenzalida vs. Cuadra Pinto, Dario* (1957).

from sometimes capricious . . . legislative intervention" (Frühling 1984: 195).[77]

Such determination was not evident in public law cases, however. Although the 1925 Constitution had given the judiciary new and specific powers to check the excesses of the other branches of the state, judges chose only to assert this power, and even then in limited ways, in cases related to property rights. In cases involving alleged violations of civil and political rights, such as habeas corpus, due process, freedom of expression, freedom of association, and freedom of assembly, the courts time and again deferred to, and hence upheld, the absolute authority of the executive.

To begin, the judiciary gave the legislative branches free reign to declare constitutional states of exception *preventively*, that is, to restrict or suspend constitutional liberties as a response to a potential, rather than established, internal threat.[78] The 1925 Constitution allowed for the declaration of a state of siege in cases of either foreign attack or "internal commotion," and permitted the passage of legislation limiting basic civil and political rights "when supreme need for the defense of the state, preservation of the constitutional regime, or internal peace may so demand."[79] A state of siege and laws restricting constitutional rights were only to be declared by Congress, although the president was authorized to declare a state of siege if Congress was not in session, in which case an ending date had to be established.[80] Under a constitutional state of exception, the president was permitted to subject persons to house arrest or detention in places other than jails for common criminals, to censure the press, to impede the circulation of printed matter that tended to alter the public order or subvert the constitutional regime, and to search homes without warrants (Loveman

[77] Novoa also offers examples in which the Supreme Court applied rent control laws so rigidly that they dismissed the claims of the renters, even when the amounts charged clearly exceeded legal limits (1993).

[78] Loveman notes that between 1933 and 1958, "sixteen separate laws imposed almost four years of these regimes of exception on the country. This did not include at least a dozen states of siege [declared by decree] during the same years" (1993: 352).

[79] Because both a state of siege and legislation granting the government "extraordinary faculties" usually went hand in hand, some consider them to be a single institution. See, for example, Caffarena de Jiles 1957.

[80] See Article 44, No. 13, and Article 72, No. 17 of the 1925 Constitution. In practice, however, the president found ways to bypass Congress. See Mera, González, and Vargas 1987b.

1993: 352; see also Caffarena de Jiles 1957; Mera, González, and Vargas 1987b). In cases brought before it, the Supreme Court never challenged the interpretation of the government regarding threats to public order, nor sought to establish the meaning of the concept of internal commotion.[81] When a petition for habeas corpus (*recurso de amparo*) was brought against a detention or expulsion during a constitutional state of exception, the Court consistently declared that it lacked the authority to question either the government's motives for a given detention or to evaluate the facts upon which it was ordered. In one case, the Court went so far as to assert that the President had no obligation to specify cause for detention (Frühling 1984: 258).[82] The justices grounded these decisions in a narrow and controversial interpretation of the separation of powers, claiming that actions taken by the administration under a state of siege were "political" matters in which the strictly legal actors of the judiciary were prohibited from interfering (Mera, González, and Vargas 1987b; Verdugo 1989).

In 1936, the Valparaiso Court of Appeals ruled that preventive detentions ordered under a state of siege decreed by the president immediately expired once Congress reconvened, but the Supreme Court reversed the decision. In an extraordinarily formalist move, the Court argued that because the Constitution stated (Article 72, number 17) that a presidential siege decree will become a legislative bill in the subsequent session of Congress, the state of siege can be neither repealed nor amended except via the processing of the bill.[83] A few days later, the Court ruled in another *recurso de amparo* that the Valparaiso Court's decision had been unsound because an automatic expiration

[81] This was even true under the (second, and this time elected) administration of Carlos Ibáñez (1952–1958), who made frequent and cynical use of the state of siege. (I thank Brian Loveman for this point.)

[82] Frühling is referring to the *Santiago Wilson* case of 1936. Caffarena de Jiles, writing in 1957, notes that between 1930 and 1957, there were forty-four months, twenty-nine days of constitutional exception, and asks "Has there really been 'internal commotion' every time an estado de sitio was declared? . . . Why do our courts fall in the grave error of sustaining that they don't have the power to review the orders of detention that the president issues during states of exception, thereby misunderstanding their fundamental mission of being the bulwark of constitutional guarantees?" (Caffarena de Jiles 1957: 24 and 26).

[83] *José Donoso y Otros (amparo)*, treated by Frühling 1984: 240. Frühling notes that the appellate court decision had been striking, for it invoked the spirit of the Constitution and the need to better enhance and protect rights.

of the state of siege would cause uncertainty and thus endanger public order.[84]

Similarly, in a 1948 *recurso de inaplicabilidad por inconstitucionalidad* brought against a law passed by Congress that imposed a state of exception, the Supreme Court ruled that "the need or convenience for enacting such a law is to be solely assessed by the legislative branch."[85] Here again the Court argued that there were areas of legislative decision making that, due to their "political" (as opposed to "strictly legal") nature, could not be reviewed by the courts, despite the fact that the legislature was supposed to act in accordance with certain constitutional standards. The Court accordingly gave Congress and the executive free reign to invoke "reasons of state," however vaguely or weakly justified, to impose a state of exception and to restrict individual rights.

Concomitantly, the courts consistently limited their own scope of power to interpret laws of internal security. The most notorious of these was the 1948 "Law for the Permanent Defense of Democracy," passed under the presidency of Gabriel González Videla. The law prohibited "the existence, organization, action and propaganda, oral, written, or via any other medium, of the Communist Party, and, in general, of any association, entity, party, faction or movement, which pursues the implantation in the Republic of a regime opposed to democracy or which threatens the sovereignty of the country."[86] It also simultaneously modified, in an authoritarian direction, a host of other laws related to political expression and organization (see Loveman and Lira 2002: 139–161). As the Chilean legal scholar Felipe González notes, the law was vague and sweeping in its wording and called for harsh, disproportionate penalties, even for the mere act of organizing. Nonetheless, in cases in which aspects of this law were challenged, the courts upheld its application, dismissing constitutional guarantees as a source for the adequate interpretation of the law, refusing to analyze whether or not the act in question was a genuine threat to internal security or public order, and ignoring the issue of intention on the part of the accused to harm the juridical goods protected by the law (González 1989: 20). In a 1949 *recurso de inaplicabilidad por inconstitucionalidad* brought

[84] The second case was *Anibal Jara* (*amparo*). See Frühling 1984: 241–242.
[85] The case was *Juana Mardones (inaplicabilidad)*, discussed in Frühling1984: 243.
[86] It should be noted that these types of laws were common throughout Latin America during this period.

against the Law for the Permanent Defense of Democracy, for example, the Supreme Court ruled that the text of the law "complements" and hence does not "contradict" the Constitution.[87] Thus, in a case in which it "had the opportunity to establish a criterion in these matters, and more than this, could have perfectly assumed its role as a state power," the Court "limited itself to considerations of a formal nature, restricting itself in its field of action" (Mera, González, and Vargas 1987a: 10).

In subsequent *recursos de amparo* related to this law, courts (appellate and Supreme) invoked Article 4 of the1925 Constitution, which stated that no magistrate, person, or group of persons could attribute to himself any authority or rights other than those expressly conferred to him by the laws. As they had in the past, then, they asserted that the principle of the separation of powers prohibited the judiciary from examining alleged executive branch violations of citizens' personal liberties (Mera, González, and Vargas 1987a: 10). In one case, they even went so far as to say that detentions ordered in the exercise of emergency powers were "untouchable orders."[88]

In public law cases, then, the tendency of the Chilean courts was to circumscribe their own authority. Even after 1958, when the Law for the Permanent Defense of Democracy was repealed and a new and substantially less authoritarian Law of Internal State Security (*Ley* 12.927) was adopted, the courts continued with this jurisprudential line. The wording of the legal text was far less important than the (institutionally rooted) attitude of the courts in shaping legal outcomes.[89] Through their unwillingness to review, evaluate, and (when appropriate) challenge the decisions and acts of the executive in such cases, they demonstrated themselves to possess a greater commitment to public order than to individual citizen rights. Because this stance was very different from the more activist stance they took in defending individual property rights, their claims to apoliticism began to ring hollow with much of the public.

[87] The case, *Frías contra Zañartu*, is mentioned in González 1989: 20; Bertelsen 1969.

[88] The 1949 case was *Graciela Alvarez (amparo)*, noted in Frühling 1984: 258; Mera, González, and Vargas 1987b: 65; Caffarena de Jiles 1957.

[89] This is the conclusion of González in "Modelos Legislativos" (1989). See also the discussion of the Supreme Court's approach to *recursos de inaplicabilidad por inconstitucionalidad* in Valenzuela Somarriva 1990.

CONCLUSION

By tracing the institutional development of the Chilean judiciary from the end of the colonial period through the mid-twentieth century, this chapter has uncovered the historical roots of judicial performance under the Pinochet regime. Not only has it illuminated the origins and nature of the institutional features to which I attribute outcomes in my focus period (1964–2000), but it has also identified some patterns in judicial behavior that were to recur in later years. The chapter thus provides the foundation for the argument I will build in subsequent chapters: that the performance of the Chilean judiciary under Pinochet was not simply a function of regime-related factors, judges' personal political preferences, class loyalties, or legal philosophy, but was rather the result of long-standing institutional dynamics that gave the courts a conservative bias.

As I have shown, from the birth of the republic in the early nineteenth century, Chilean leaders were concerned with the need to build a rule of law, upheld by "apolitical" judges. Judges were trained to be dutiful "slaves of the law," but in a context in which law, at least public law, was understood as the will of the executive. Rather than defend legal principles embodied in the constitution, or in the idea of constitutionalism, then, judges were expected to defer to the other ("political") branches of government. To do otherwise would be to tread on forbidden "political" ground and to threaten the rule of law.

Whereas during most of the nineteenth century fidelity to this narrow role was ensured through executive intervention in judicial appointment and discipline, by the end of the 1930s institutional reforms had safely insulated judges from executive and legislative manipulation, and judicial tenure became secure. The judiciary became an autonomous bureaucracy in which judges were both structurally and ideologically separated from the politics of the elected branches. Judges were thus not only expected but allowed and able to base their decisions on their understanding of the law, rather than on ("political") signals from non-judicial actors.[90]

[90] Indeed, to the extent that elected officials anticipated judicial challenges to their policies – namely, in the areas of property and contract regulation – they sought not to manipulate the courts, but to circumvent the judiciary through the creation of special tribunals or administrative agencies under their control.

Yet as my review of the literature on judicial performance in the post-1932 period indicates, the enhanced independence, professionalism, and formal authority of the judiciary did not produce politically neutral judges. Indeed, judges used their newly secured autonomy not to uphold faithfully the positive law but, rather, to defend private property and contract from increasing levels of state regulation, and, in the area of public law, to give elected officials free reign to maintain order. They held quite consistently to a strict separation of powers doctrine, according to which legal oversight of the private sphere constituted the core and exclusive "judicial" function, while questioning of executive or legislative decisions on questions of public law was inappropriate meddling in "political" matters.

The argument that I will make and defend in the chapters that follow is that judicial behavior before, during, and after the Pinochet regime (that is, from the mid-1960s through the 1990s) can be best explained by the institutional variables identified above. My claim is that the structural reforms of the 1920s served to freeze in a nineteenth-century understanding of law, society, and the judicial role. The rigid hierarchy established by these reforms empowered conservatives on the higher courts, and in particular the Supreme Court, to reinforce and reproduce their own views through discipline and promotions within the institution. Thus, even as the country underwent significant social and political democratization, reflected in and advanced by the elected branches of the state, the courts remained grounded in and committed to predemocratic and in many ways illiberal understandings of sociopolitical organization and legal legitimacy. Otherwise put, judges of the 1960s, 1970s, and 1980s did indeed have a conservative bias, but it was a bias that was constructed and maintained by factors endogenous to the institution.