JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP

Lessons from Chile

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CHAPTER THREE

CONSERVATIVE ACTIVISM IN THE HEYDAY OF DEMOCRACY, 1964–1973

In the previous chapter, I sketched the historical construction of the judicial role in Chile around the ideal of "apoliticism." I described the development of the institutional ideology that forbade judges to interfere in "political" questions, and I explained how the structural reforms of the 1920s, while enhancing judicial independence and professionalism, empowered the conservative judicial elite and, thereby, served to perpetuate nineteenth-century understandings of "law" and "politics" within the institution. In the decades that followed, Chilean judges hence displayed very conservative (that is, predemocratic and politically illiberal) professional attitudes and practices, even as the country as a whole underwent a process of significant democratization.[1]

In this chapter, which covers the years 1964–1973, I defend that claim through an analysis of judicial behavior in civil and political rights cases, archival records, and interview material. My objectives are twofold. First, I seek to demonstrate that the substantive role of the judiciary in Chilean politics did not change radically with the advent of the Pinochet regime. Indeed, during the years leading up to the military

[1] Increased literacy rates and the full incorporation of women into the suffrage beginning in 1952, as well as general population growth, had led to a rapid electoral expansion. From a total electorate of some 500,000 persons in 1938, the voting population leapt to 2,500,000 by 1963. A major part of the electorate consisted of rural and urban laborers, who accounted for some 70 percent of the economically active population. See Drake 1978: 17 and 21–22, cite at 21. See also Aylwin et al. 1996: 248–249.

coup, when Chile was considered one of the most democratic countries in the world,[2] its courts played a role in the system that was quite illiberal and undemocratic. As in the past, judges generally deferred to the executive in the area of civil and political rights, leaving individual citizens at the mercy of the state. Although some judges, particularly at the Supreme Court level, began taking stands in defense of citizens' rights, they did so almost exclusively in cases involving conservative interests. The courts thus manifested a weak and inconsistent commitment to rights protection, as well as to the principle of equality before the law central to both liberalism and democracy.

Second, I attempt to show that this judicial performance was significantly shaped and constrained by institutional variables. Although there was a minority of judges who had personal ties and commitments to the political Right, my argument is that the striking bias of the judiciary as a whole can only be satisfactorily explained by institutional factors. The institutional structure of the judiciary, in which the Supreme Court exercised control over judicial discipline and promotion, gave strong incentives for judges to emulate or otherwise curry favor with their superiors. Judges learned that the best way to ascend the judicial hierarchy was to conform to the professional standards modeled by the institutional elders. Although these standards were occasionally enforced by the Supreme Court, my claim is that their normative power alone served to keep many judges "in line." In other words, it was not only the institutional structure but also the institutional ideology of the judiciary that shaped judicial behavior. Above all, this institutional ideology held that the judicial role was and must remain completely apolitical. As shown in Chapter 2, this consigned judges to a largely passive role in public law cases.[3] In the 1964–1973 period, however, the Supreme Court engaged in and endorsed the active defense of traditional (understood to be timeless, natural, and apolitical) interests and values against what it labeled the "political" machinations of the Frei and especially the Allende governments. Any judges who sympathized or cooperated with the Allende government were thus cast as unprofessional "political" actors, whereas those who challenged the government were painted to be dutiful defenders of the "rule of law."

[2] Refer to the Introduction to this volume.

[3] Though, as further demonstrated in Chapter 2, it permitted significant activism in private law matters (esp. property and contract).

I should underscore two points before proceeding. The first is that I am not seeking to pin blame on judges as individuals for playing a largely illiberal and undemocratic role in this period. Although one of my objectives in this chapter (as in others) is to illuminate the nature of that role, and although I am ultimately critical thereof, I am not seeking to condemn the judges for not having made alternative choices. Indeed, the larger point of this book is that judges' views were constituted and their choices constrained by institutional factors that were not of their own making. I mean to show that given the institutional setting in which they functioned, their behavior was not outrageous, but rather logical and quite predictable. Second, and relatedly, I am not seeking to paint the judges in this chapter as the villains, and the Frei and Allende administrations as the heroes. Although my focus is on illiberal and undemocratic *judicial* behavior, I am not claiming that the behavior of other political actors as this time was always, or even generally, liberal democratic. Indeed, the long-standing abuse and perversion of professed liberal ideals on the part of the traditional elite had provoked a political reaction, not just in Chile, but in all of Latin America, against liberalism in this period (Borón 1993). Thus, this chapter should in no way be read as a clear-cut story of good, liberal-democratic politicians versus evil, illiberal and antidemocratic judges. The moral of the story is, ultimately, one that points to a need for judicial reform, but not exactly of the sort that the progressives of the late 1960s and early 1970s envisioned.

THE JUDICIAL ROLE IN THE FREI AND ALLENDE YEARS

The election of Christian Democrat Eduardo Frei Montalva in 1964 marked a decisive victory for progressive forces in the Chilean polity.[4] Frei, whose campaign promised a "Revolution in Liberty," emerged with 56 percent of the vote and a clear mandate for socioeconomic reform.[5] As president, Frei instituted a major agrarian reform, increased public housing, and encouraged rural unionization and mass-level political activity (see Loveman 1988; Collier and Slater 1996; Gazmuri 2000).

[4] By "progressive," I mean those committed to promoting greater equality between citizens.

[5] Frei owed his triumph to an electoral alliance with the Right, designed to prevent a win by the Socialist-Communist coalition (the FRAP).

While eschewing Marxism, he nonetheless supported a quite radical redistribution of wealth and power in Chile.

Six years later, a majority of the electorate remained committed to social change,[6] but was strongly divided over the form and pace that change should take. Moreover, they faced ever fiercer opposition from the right-wing minority. The 1970 election was hence a tight three-way contest between the candidates of the Left, Center, and Right. Despite threats from the far Right and the now well-documented U.S. covert intervention,[7] the left-wing candidate, Socialist Salvador Allende Gossens, garnered a plurality of the popular vote (36.2 percent). With support from the Christian Democrats, he was subsequently confirmed by Congress as President of the Republic. Allende attempted to pursue a legal path to socialism via the acceleration of agrarian reform and, in the name of the proletariat, state takeover of major industries. Unlike Frei, however, he lacked majority support in Congress for most of his program, and so he sought to implement many of his policies using special powers reserved (by law) to the executive. As time went by, many of his supporters took matters into their own hands. The tactics of both the extreme Left and the extreme Right grew ever more radical (Garcés 1973; Sigmund 1977; Valenzuela 1978).

During these years of rapid change and social conflict, the public paid great attention to how the courts resolved important cases brought before them. Despite significant public critiques of the formal legal system (Novoa 1964), the discourse of law remained a powerful one in Chilean political life, and it was important for most players in the system to be able to claim that the law was on their side (Arriagada 1974; Cea 1978). For the government, such a claim had traditionally been easy to make. First, the political system was heavily presidentialist; that is, it concentrated much decision-making power in the hands of the executive (Silva Cimma 1977; Faundez 1997). Moreover, and as noted in the previous chapter, the courts had historically deferred to and upheld the absolute authority of the executive, on the grounds that judges had no authority to intervene in "politics." Thus,

[6] The platform of the Christian Democratic candidate, Radomiro Tomic, was, in many ways, indistinguishable from that of Socialist Salvador Allende.

[7] See Documents of ITT published in *El Mercurio*, April 2 and 3, 1972; United States Senate, Senate Resolution 21, *Hearings by the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Vol 7: Covert Action* (Dec. 4 and 5, 1975); and Kornbluh 2004.

Table 3.1. Decisions in civil and political rights cases, 1964–1973

	Pro-Left		Pro-Right		
	Appellate	Supreme	Appellate	Supreme	Total
Pro-State	7	1	7	3	18
Pro-Individual	2	0	5	7	14
Subtotal	9	1	12	10	–
Total	10		22		32

Presidents Frei and Allende both expected the courts to rule in their favor.[8]

Instead, during this period Chilean judges demonstrated an increasingly strong willingness to challenge the executive in the name of the civil and political rights of individual citizens. However, they extended such rights protection very unevenly, actively defending conservative values and interests but reverting to positivist and even formalist reasoning in cases involving defendants of the ideological Left. When the Left called attention to this practice, the Supreme Court claimed that such critiques were motivated by narrow "political" passions, which audaciously challenged the sober and objective reasoning of the courts. The judges and their supporters portrayed themselves as servants of transcendent and immutable principles and public values, while they accused their critics of engaging in *politiquería* (petty partisan politics).

My independent analysis of the thirty-two civil and political rights cases published for the period, however, reveals that the critics were right.[9] As Table 3.1 shows, decisions at the appellate and high court levels were more than twice as likely to go in favor of right-wing interests

[8] In a 1972 interview, Eduardo Novoa, Allende's legal advisor, expressed indignance at the fact that the judiciary was now claiming it had power to review administrative acts, claiming that the courts were "intervening in materials that the law itself says cannot be reviewed by them." See Gonzaléz Bermejo and Vaccaro 1972: 32. Silva Cimma supports this view (1977: 170–173).

[9] I coded these cases on two variables: whether the ruling favored left-wing or right-wing parties and interests, and whether the ruling came down on the side of the state or the individual. The polarization of the period made the political coding quite straightforward, as, with good knowledge of the context, it was easy to determine whether the decision involved a victory or a defeat for the Left and the Right, respectively.

as in favor of left-wing interests.[10] Moreover, if one isolates the Supreme Court outcomes, the decisions were ten times as likely to favor the Right.

Perhaps most striking, though, is the difference within the group of decisions that could be categorized as "pro-individual rights." In contrast to the eighteen pro-state decisions, which were almost evenly split in terms of the political side they benefited, the fourteen decisions that upheld individual rights were made almost exclusively in favor of members of the political Right. Specifically, twelve of the pro-individual rights decisions (or 86 percent) were also "pro-Right," whereas only two (or 14 percent) were "pro-Left." This severe imbalance in rights protection belies any professed commitment on the part of judges to democratic rule of law principles.

Before proceeding with my explanation for this behavior, I offer a few examples to illustrate the pattern. I begin with a landmark case of 1967, in which the Supreme Court ruled that a lower court had the authority to review presidential decrees for constitutionality and to apply or refuse to apply the decree based on that review.[11] The ruling, in the case *Juez de Letras de Melipilla con S.E. el Presidente de la República*, was a dramatic break from the judiciary's traditional deference to presidential authority on questions of public law. In the past, this deference had held even in cases (such as this one) involving a "decree of insistence," a legal instrument allowing a decree to go forth, despite legal objections, with the official assent of all cabinet members.[12]

The case arose in November 9, 1966, when the Frei administration seized the estate of a landowner whose employees had illegally struck. Arguing that, by the Law of Internal State Security,[13] it had the right to take over the management of any industry or market essential to

[10] I did not include lower courts because, for most of these cases, the first instance was at the appellate level.

[11] This case was widely cited in my interviews with legal scholars as one of the most important and influential of the period.

[12] In Chile, presidential decrees are automatically reviewed for legality and constitutionality by the Comptroller General. However, the "decree of insistence" was a widely accepted and frequently exercised instrument used to overrule the Comptroller in the country's strongly presidential system (Silva Cimma 1977; Cea 1978: 36). For example, President Ibañez issued 355 such decrees between 1952 and 1958.

[13] The Law of Internal State Security (*Ley de Seguridad Interior del Estado*, no. 12.927), written in 1958, moderated and replaced the harsher Law for the Permanent Defense of Democracy passed under President González-Videla in 1948. See details in note 18.

the national defense, to the supply of basic goods to the population, or to the public utility, the government issued a decree ordering the resumption of work on the estate and appointing an *interventor* to take over temporary administration of the estate.[14] When the Comptroller General ruled the decree unconstitutional, the government responded with a decree of insistence. In response, the owner of the estate filed a suit with the local judge, claiming infringement of his property rights, and the local judge found in his favor on grounds that the government's decree did in fact exceed the limits of constitutionality. Claiming that the judge had no legitimate power to challenge the executive in this way, the government brought the case before the Supreme Court.

In a dramatic assertion of judicial power, the Court ruled that the local judge was fully competent to rule as he had in the case. The Court invoked the duty of the judiciary "to protect the fundamental rights of the human person," even in cases where the constitution seemed to give the last word to the executive.[15] As one justice wrote in a concurring opinion:

> To deny the courts the right to hear property disputes or *recursos de amparo*, which the affected parties bring when their essential rights are threatened by an illegal decree or an abusive act of authority, would be to disregard the primordial obligation that the judiciary has to render justice and to secure respect for the rights of the inhabitants which the law submits to its protection and care.[16]

[14] It should be noted that this practice, of ordering workers back to work by decree and assigning a government official to manage the farm until the conflict was settled, was officially legalized as an article of the Agrarian Reform Law, which passed in July 1967 (eight months after this particular conflict). The provision could be used, as it sometimes was, to repress illegal strikes, or "as a pretext to place a governmental representative in the farm and begin organizing the *campesinos* for expropriation of the property." This latter application of the provision was occasional under President Frei and became routine under President Allende (Loveman 1976: 258–259, 271, and 282).

[15] *RDJ* 64 (1967) 2.1: 109–120. *RDJ* refers to the *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales*.

[16] *RDJ* 64 (1967) 2.1: 109–120. There was a dissenting group of five justices in the case, including two of the three that had been appointed by President Frei (Juan Pomés and Rafael Retamal). The dissent was grounded in the traditional separation of powers argument, holding that judges had no place reviewing executive decisions involving questions of domestic order and security.

The Court thus endorsed the idea that judges had the authority and the duty to defend constitutional rights. It did so, however, in a case that directly challenged the prerogative of the Frei government, taking a stand in favor of traditional property rights even as the whole concept of property was being rethought and redefined, with majority support, by the country's elected leaders.[17] Moreover, because the decision departed from the deference that the courts had traditionally shown toward the government, the decision appeared to reflect a bias in favor of conservative forces.

This perception was enhanced by the judiciary's inconsistent treatment of two suits brought by the Frei government which were quite similar in their general facts. Both cases involved alleged violations of the Law of Internal State Security, which extended significant powers to the president to preserve societal order, broadly defined.[18] In the first case, the defendants were members of the right-wing National Party who, in the national and international press, had attacked the "weak and vacillating" foreign policy of the Frei government, and whose party platform called for the imposition of a "regime of iron authority" to stem the "period of disorder" that the Frei government had initiated. In the second case, the defendant was Socialist Party senator Carlos Altamirano, who had given a speech at an academic conference in which he at once

[17] Indeed, in January 1967, the Frei administration had succeeded in getting a constitutional amendment passed changing the article guaranteeing the right to property to allow government expropriation in the interest of society with less rigid terms of indemnization. For more information on the legal aspects of the agrarian reform and its treatment by the judiciary, see Thome 1971; Henríquez 1980.

[18] The 1958 Law of Internal State Security established specific penalties for "those who incite or induce subversion of public order or an uprising against, resistance to, or overthrow of the constituted government; those who perform similar acts with respect to the Armed Forces or the *Carabineros*, to incite them to indiscipline or to disobey the orders of the legitimate authorities; those who meet to propose the overthrow of the constituted government or to conspire against its stability; those who form private militias; and military personnel who disobey orders given by the constituted government." It also declared it a crime to spread or foment theories intended to destroy or alter by violent means the social order or the republican and democratic form of government, as well as to engage in acts intended to spread tendentious or false information for the purpose of harming the democratic and republican order, the constitutional order, or the security of the country. Finally, the law also sanctioned public offense to the symbols of the nation or to the constituted authorities and acts that disrupted or destroyed public services (Organization of American States 1985: 177–178).

criticized the Frei government and suggested that Cuba offered a good model for Chile to follow.[19]

In the National Party case, the Frei administration had arrested three PN leaders on grounds that they had "gravely offended the patriotic sentiment," "propagated tendentious and false information designed to perturb the security of the country," "insulted and defamed the President and the Minister of Foreign Relations," and "incited subversion of public order" – all violations of the Law of Internal State Security.[20] The three PN members[21] promptly filed a *recurso de amparo* in the Santiago Appeals Court.[22]

In an unusual "after hours" decision,[23] the appellate judges ruled (3–0) to uphold the writ on the grounds that "the existence of facts which themselves present the characteristics of the specific crimes [imputed]" had not been established. On appeal six days later, the Supreme Court upheld the appeals court ruling, stating that:

> within the freedom to express opinions without prior censorship, which the Constitution guarantees to all the inhabitants of the Republic, political parties have the right to express publicly the judgment which the acts of the Government deserve and to criticize its actions, unless these opinions constitute an incitation to subversion . . . or an insult to His Excellency, the President of the Republic or to his Cabinet Ministers, *which in the present case has not been established from their text*. Nor has there been grave offense to patriotic sentiment, an offense . . . *which must be a matter of fact and not simply of simple declarations*.[24]

[19] Because Altamirano enjoyed senatorial immunity, his prosecution had to proceed in two steps: first, the government had to convince the courts to remove his immunity (*desafuero*), and only then could he be tried for the alleged crimes.

[20] Cabinet minister Bernardo Leighton stated, "It is evident that the party is trying to create a climate of alteration of our democratic regime." Quoted in *El Mercurio*, September 3, 1967, p. 43.

[21] The individuals were Victor García Garzena, Sergio Onofre Jarpa, and Alfredo Alcaino Barros.

[22] The case is referred to as *García Garzena, Victor y otros* (*recurso de amparo*), and the appellate and Supreme Court decisions were issued on September 2 and September 8, 1967, respectively.

[23] The court had never before convened on a Saturday afternoon to decide a specific case (personal communication with Chilean law professor Felipe González, May 23, 1996).

[24] From text of the case as presented in *RDJ* 64 (1967) 2.4: 266–272, my italics. The ruling was six to one, with the dissent from Frei appointee, Rafael Retamal.

Thus, the courts clearly saw fit the evaluation of the facts of the case against the claims of the government, and were willing to take a stand in defense of the constitutional right of free expression. The PN members were immediately released from custody.[25]

By contrast, in the Altamirano case, *Carlos Altamirano O.*, the same courts abandoned any commitment to the constitutional protection of free speech and put no challenge to the government's charge that the Socialist senator had violated the Law of Internal State Security by insulting the president and propagating violence. In the first phase of the prosecution, the Santiago Court of Appeals voted (in plenary) to revoke the senator's immunity on the sole grounds of insults to the president.[26] On appeal, the Supreme Court (also in plenary) unanimously upheld that ruling and gave new life to the charge of propagating violence. The high court made reference to the entire document from which the libelous and subversive lines were extracted to show that the senator's intention was to celebrate and encourage the emulation of the Cuban revolutionary model, which clearly and unapologetically involved violence.

Two months later, a Santiago Appeals Court judge, specially appointed by the Supreme Court, convicted Altamirano on the charges for which his immunity had been revoked. The ruling stated that "[t]he constitutional precept that consecrates the freedom of expression without previous censorship has left free the determination of the cases in which people incur responsibility for crimes and abuses committed in the exercise thereof to the law, such that it *is incumbent upon the legislator, and not upon the judge*, who is limited simply to applying it, *to prevent that right from being unjustifiably spoiled*. The legislator makes a political appraisal; the judge, a juridical one."[27] In other words, the judge argued that legal limits to the constitutionally protected freedom of expression were not subject to judicial evaluation. In contrast to that in the

[25] Eight months later, the charge itself was ruled upon by the Santiago Appeals Court, which claimed that if the Supreme Court had found no grounds for detention of the accused in the habeas corpus decision, then the case itself had to be definitively closed. See *RDJ* 65 (1968) 2.4: 95–99.

[26] The vote was thirteen to one. The dissenter was Abraham Poblete (an Alessandri appointee). Interestingly, the court did not find sufficient grounds to revoke Altamirano's immunity in the case pressed by the military. However, they were overruled by the Supreme Court, with only one dissent from Eduardo Ortiz (an Alessandri appointee). See *RDJ* 64 (1967) 2.4: 276–281.

[27] *RDJ* 64 (1967) 2.4: 272–276, emphasis added.

National Party case, this ruling placed special emphasis on the textual legal limits to the freedom of speech and on the limited responsibility of the judiciary to defend against these. The courts thus sent the message that aggressive right-wing speech was legitimate dissent, protected by the constitution, but aggressive left-wing speech was not.[28]

In similar political rights cases under President Allende, the courts, led by the Supreme Court, also ruled in favor of the political Right, extending protection to individuals critical of the executive but not to those critical of the opposition in Congress. For example, when the Allende government prosecuted far-right journalist Rafael Otero for public libel and an attack on public order (i.e., violations of the Law of Internal State Security),[29] the Supreme Court ruled that Otero had not demonstrated any libelous intent nor any intent to disrupt public order. Overruling the appellate court, which had sided with the government, the Court argued that it was incumbent upon judges to conduct an evaluation of not simply the words and phrases used by the defendant but also the background and purpose which motivated the use of those words and phrases.[30] In other words, they asserted the power, indeed the duty, of the courts to weigh carefully the subjective aspects of such a case, rather than simply to accept the analysis of the plaintiff (in this case, the executive).[31]

[28] The courts also ruled against left-wing journalists in two other cases of the period: *Contra Raul Pizarro Illanes y otro*, which denied *amparo* (habeas corpus) to the director of *El Clarín*, on grounds that he had abused his freedom of expression by publishing articles that contained libelous statements against an appellate judge; and *Contra Jorge Insunza Becker*, in which the appellate court revoked the immunity of Deputy Insunza for libel against the police (*Carabineros*) when he was director of the Communist newspaper, *El Siglo*. See also the contrast in treatment of two cases involving threats to national security from the far Right and the far Left (*RDJ* 66 (1969) 2.4: 302–305; *RDJ* 67 (1970) 2.4: 112–120).

[29] In an official letter sent to President Allende to request authorization for a national radio and television station, Otero had made a statement implying that Allende's decisions were subordinated to instructions from a Cuban diplomat, an implication which, in the view of the government, constituted a public libel and an attack on public order. The case was *Contra Rafael Otero Echeverría*, *RDJ* 68 (1971) 2.4: 77–81.

[30] *RDJ* 68 (1971) 2.4: 77–81. The ruling was six to one, with Eduardo Varas, an Ibáñez appointee, dissenting.

[31] Interestingly, though, the Court would not go so far as to rule the Law of Internal State Security's limits on free speech unconstitutional, even when Otero's lawyers brought such a charge. See *RDJ* 68 (1971) 2.4: 292–296.

By contrast, a few weeks later, the Santiago Appeals Court denied that it had the power to review the subjective aspects of a similar case, brought by four opposition congressmen against the director and owner of *Puro Chile*, a pro-Allende newspaper. Arguing that the text of the Law of Internal State Security bound them to render a conviction, the court confirmed the guilty ruling handed down by a specially appointed judge.[32] In other words, the appellate judges ignored the jurisprudential reasoning articulated by their superiors only a few weeks before, but followed their ideological lead. They found that in implicating the congressmen in question (Francisco Bulnes, Julio Durán, Jorge Lavandero and Raúl Morales) in various unseemly and even criminal acts,[33] as well as using derogatory terms to describe or refer to them, the newspaper had committed repeated acts of "defamation and contumelious insult" against public authorities. The intent to offend was clear, they argued, from the paper's word choice; journalists, as "professionals who are supposed to know what their social function is, and to what legal limits and ethics they are subject" should know better. Thus, it was clear that the paper had deliberately sought, without sufficient proof, to discredit the congressmen, and, in so doing, had committed a crime against public order. "It is the law itself which presumes that such acts in some way alter public order. Thus, it is not appropriate for the judge to contradict the explicit text of the law," read the decision.[34] It thus departed from the more activist perspective proffered by the Supreme Court in the Otero case.

[32] The director of the newspaper was sentenced to 541 days of internal relegation and to pay the costs of his trial, and the owner was ordered to pay fines amounting to 8,000 escudos plus related legal fees.

[33] The paper had published copies of documents that it claimed showed the involvement of the congressmen in the "campaign of terror" to prevent Allende from assuming the presidency, including the assassination of constitutionalist General René Schneider in 1970. It should be noted that the articles in question all appeared between July and December of 1970, and that one of the congressman, Raúl Morales, had been under official suspicion of involvement in the assassination until the Supreme Court, in a highly controversial ruling, dismissed charges against him on January 4, 1971. The paper had also targeted one of the men for alleged marital and sexual improprieties.

[34] *RDJ* 68 (1971) 2.4: 46–56 at 50, 52, and 53. In the first instance, the decision (*Contra José Antonio Gómez López*) was rendered by appellate court justice, Rubén Galecio, and then confirmed by Santiago appeals court judges, Marcos Aburto, Antonio Raveau, and (substitute judge) Jorge Barros.

The *Puro Chile* decision also departed from the Chilean judiciary's historical definition of public order as defined by and in relation to the executive.[35] In this case, the newspaper in question was clearly aligned with the Allende government, and so its articles were obviously not written to upset the public order as defined and upheld by the executive. The courts, however, determined that the notion of public order included the authority of other powers of the state, and that it could be disturbed *even when* the executive deemed it under control. In this sense, the ruling did represent a more assertive judicial stance.[36]

Over the course of 1972 and 1973, relations between the Supreme Court and Allende's Popular Unity government grew increasingly acrimonious. In situations in which citizens carried out illegal, and sometimes destructive or violent, seizures of farms or factories,[37] Allende's policy was to prohibit the police from executing judicial commands to use force against the perpetrators (Arriagada 1974: 251).[38] Judges and many lawyers interpreted this as general disrespect for the law, and an attack on judicial independence and power (*Libro Blanco* 1973; Arriagada 1974; Echeverría and Frei 1974; Silva Cimma 1977; Cea 1978; Soto Kloss and Aróstica 1993). In addition, Allende permitted unprecedented acts of protest against the judiciary (Athey 1978),[39] and the language used to critique the judges in the pro-Allende press was often crass and offensive (Echeverría and Frei 1974; Gardner 1980). However, it was equally true that the Supreme Court applied much

[35] See Chapter 2 of this volume, as well as Mera, González, and Vargas 1988: 35.

[36] The courts also challenged the government's monopoly on questions of order in the case *Juan Cembrano Perasso y otros (recurso de amparo)*, June 26, 1973, in which they deemed the police raid of a new television station at the University of Chile (in which some weapons were found) to be "arbitrary and illegal." At the appellate level, *amparo* was granted by Marcos Aburto, Osvaldo Erbetta, and Gustavo Chamorro. The decision was confirmed in the Supreme Court by José María Eyzaguirre, Luis Maldonado, Victor M. Rivas, Enrique Correa, and José Arancibia. See *Fallos del Mes* No. 176 (July 1973):107–108.

[37] Although such illegal takeovers were not officially promoted by the Allende government, "factions of the Popular Unity coalition actively encouraged [them], and the Allende government acquiesced in and took advantage of the process to further its own attempts at structural change through the [existing law]" (Gardner 1980: 174).

[38] *RDJ* 70 (1973). The minority within the UP coalition that favored the insurrectional route to socialism thus gained the upper hand via "the tactic of *faits accomplis* and using coercion . . . against the very government" (Cea 1978: xxv).

[39] *RDJ* 70 (1973).

stricter standards to and launched far more criticisms of the Allende government than they had against any previous administration (DeVylder 1974; Athey 1978; Kaufman 1988). Moreover, when Allende supporters pointed this out, the Supreme Court responded by reasserting their objectivity and dismissing the critics as impassioned, self-interested, ignorant, and unethical.[40]

The conflict between the judiciary and the executive came to a head in mid-1973, as "the court . . . moved away from an initial concern with specific legal violations to participation in a broader attempt to use juridical norms to discredit the government publicly" (Gardner 1980: 170). In his speech inaugurating the judicial year 1973, the new Supreme Court president, Enrique Urrutia Manzano, denounced the government's policy of discretionary enforcement of judicial orders as an assault on the Rule of Law:

> We understand the Rule of Law (*Estado de Derecho*) in a very simple way: that condition in which the law doesn't infringe upon the attributes constitutionally granted to the Public Power; in which the rights which the Constitution grants to the citizens are effective and not trampled underfoot, such that administrative officials honestly carry out their functions without altering the ends for which their offices were created and that they make use of their powers without fraud, and that, [any abuse is promptly punished.] Finally, and we emphasize this, giving it the greatest importance, by the Rule of Law, we mean that condition in which judicial rulings are duly carried out.[41]

Two and a half months later, in a now-famous memo sent to Allende on May 26, 1973, the Court stated forthrightly:

> This Supreme Court must bring to your attention, for the umpteenth time, the illegal attitude of the administrative authority in the illicit intromission in judicial affairs, as well as the obstruction of the national police in the carrying out of orders emanating from a criminal court, which according to the law, must be executed by that body without any impediment; all of which signifies an open persistence in rebelling against judicial resolutions, underestimating the alteration that such attitudes or omissions produce in the juridical order; moreover, this signifies not simply a crisis of the Rule of Law . . . but rather an urgent or imminent breakdown of law and order in the country.[42]

[40] *RDJ* 70 (1973):169–170.
[41] *RDJ* 70 (1973): xxiv.
[42] *RDJ* 70 (1973): 212.

An infuriated President Allende responded seventeen days later with a sharp letter inveighing against the Court for misrepresenting the legal conditions of the country and thereby contributing to the generation of a state of public disquiet. He claimed that it was the executive, not the judiciary, that was in charge of controlling public force and maintaining public order, and that, hence, the government had the prerogative to apply discretion in this sphere. He also expressed anger at the fact that in recent months, the Court had brought its criticisms of his government directly to the press, rather than taking up their concerns confidentially with his administration. In closing, he disputed the positivist defense that the Court had repeatedly offered to dismiss charges of class bias:

> such an argument ignores the fact that the laws are interpreted; and it is in the act of interpretation, in the meaning and reach which is given to the terms used in the [legal] texts, that the assessments of the judges are displayed, [and] underlying those is a concept of social relations and of the hierarchy of legal values.

The Court's concept in this regard, was at odds with the reality of the country, Allende claimed, and its inopportune public statements never "favored social peace or the re-establishment of democratic dialogue."[43]

The Court's embittered response to these allegations, dated June 25, 1973, was followed by official condemnations of the Allende administration by the leaders of the two houses of Congress, by the Bar Association, and by resolution of the Camara of Deputies.[44] In this dramatic statement, the Court expressed its outrage at what it saw, in Allende's previous memo, as "an attempt to submit the decision-making power of the judiciary to the political necessities of the government." It also curtly reminded the president that the Supreme Court "deserves respect from the other powers of the state" both out of constitutional duty and "because of its honor, deliberation, humanity and efficiency." Moreover, the Court insisted that it had the power and the duty to "contradict at times the most fervent desires of the executive" and that all administrative functionaries were legally bound to comply with the decisions of the judiciary. Finally, the Court rejected Allende's suggestion that

[43] *RDJ* 70 (1973): 225–226.

[44] It should be noted that the National Association of Magistrates, from which the pro-Allende forces had split off or been forced out (depending on the account), also officially registered its disapproval of the "attacks on the judiciary" on June 23, 1973. See Echeverría and Frei 1974: 160–162.

the courts of law should abandon legal formalism to pursue a particular brand of social justice in specific cases, a turn that they believed would be arbitrary and "even criminal."[45]

Indignant about the "disrespectful" tone in which it was written, Allende refused to respond to this memo.[46] However, by this time, so many voices were raised in a clamor against Allende's policies that his response mattered little.[47]

EXPLAINING THE JUDICIAL ROLE UNDER FREI AND ALLENDE

It should be clear from the preceding account that, despite judges' fervent and repeated claims to the contrary, the Chilean courts did not play a "neutral" or "apolitical" role in the nine years leading up to the military coup of September 11, 1973. Even as the majority of the population moved leftward on the political spectrum, the judiciary, under the direction of a powerful Supreme Court, threw its support squarely behind the country's most conservative sectors. In so doing, they antagonized the Left, emboldened the Right, and eroded the possibility that more moderate forces would prevail on either side of the burgeoning political battle.[48] The question is *why* did judges behave in this way?

Scholars of the American attitudinalist school would hypothesize that *personal policy preferences* explain the behavior of Chilean judges. Testing this hypothesis for the Chilean case is more challenging than for the United States for several reasons. First, Chilean judges, who enter the career right out of law school, are prohibited from affiliation with any political organization and from participating in public policy debates. Thus, generally speaking, there is little independent evidence of the political preferences of individual judges. Second, the judicial appointment process in Chile is much more bureaucratic and opaque

[45] *RDJ* 70 (1973): 226, 227–228, and 241.

[46] *RDJ* 70 (1973): 241.

[47] Echeverría and Frei note that "the importance of [the June 25 memo to President Allende from the Supreme Court], which has already been widely diffused, is unquestionable. First, because of the depth and seriousness of its contents and, second, because it emanated from an institution like the Supreme Court, head of one of the powers of the State" (1974: 24–25).

[48] As one prominent conservative lawyer declared approvingly, "Without the judiciary, there wouldn't have been a military coup in Chile" (Interview OL96–8, October 7, 1996, 15:30).

Table 3.2. Individual votes of supreme court justices, 1964–1973

	Favoring Left	Favoring Right	Total votes
Pre-Frei Appointees (n = 10)	13 (24%)	41 (76%)	54
Frei/Alende Appointees (n = 8)	10 (33%)	20 (67%)	30

than in the United States. As noted in Chapter 1, the President of the Republic does not nominate judges, as in the United States, but, rather, must choose appointees from nomination lists composed by the Supreme Court (for vacancies on the high court and all appellate courts) and by the appellate courts (for lower-court posts). Furthermore, before 1998, there was no congressional (or any other) involvement in the appointment process. Unlike in the United States, then, one cannot easily identify any given judge with a particular president or political party (and thereby infer his/her policy preferences). Finally, and relatedly, the press has traditionally given scant coverage to judicial appointments. Hence, one cannot even turn to journalistic accounts to code judges' political leanings.

In secondary sources, as well as in the course of my interviews, however, particular justices – namely, Israel Bórquez, Enrique Urrutia, José María Eyzaguirre, and Ricardo Martín – were repeatedly identified as having had clear right-wing ties and sympathies (Velasco 1986: 155, 166; Silva Cimma 2000: 321). Bórquez, in particular, was said to be rabidly right-wing. Not surprisingly, the individual voting records of these justices in the Supreme Court decisions I analyzed for this period reflect this: Bórquez voted for the Right at a ratio of 7:1, Urrutia at 6:1, Eyzaguirre at 6:1, and Martín 3:1. For these individuals, then – all of whom were appointed to the Supreme Court before Frei's election in 1964 – the attitudinalist explanation might suffice. Attitudinalism seems insufficient, however, to explain the behavior of all judges during this period, even all Supreme Court justices.

Table 3.2 offers for comparison the combined voting records of the ten justices appointed to the Supreme Court prior to 1964 (i.e., under more conservative presidents) and of the eight named between 1964 and 1973 (i.e., under the progressive presidents Frei and Allende). It shows that while the (ten) pre-1964 appointees (including the individuals named in the previous paragraph) accounted for almost two-thirds of all the votes cast in this sample during the 1964–1973 period, and although 76 percent of those votes were pro-Right, it would be incorrect to

attribute the bias to this group alone. Indeed, the (eight) post-1964 appointees, who might have been expected to be less conservative, voted pro-Right a full 67 percent of the time, not dramatically less than the pre-1964 group. Moreover, if one takes only the votes cast after Allende's election, the two groups supported the Right at the same rate (61 percent).

Interestingly, at the appellate level, where the vast majority of judges had risen to their posts before 1964 (i.e., before the Frei presidency), the overall voting patterns were somewhat less biased in favor of the Right. Appellate court judges cast pro-Left votes 42 percent of the time, as compared to only 27 percent for the Supreme Court. Indeed, more striking than the political bent of the vote pattern at the appellate court level is the bias in favor of the state: Appellate judges voted on the side of the state in 73 percent of all instances, compared to the Supreme Court justices, who did so 54 percent of the time. I will return to this latter point, but suffice it to say here that any clear (exogenous) "attitudinalist" effects appear to be limited to a vocal minority on the Supreme Court.

Seeking to explain why many judges not associated with the political Right came to close ranks with their more conservative brethren, critics on the Chilean Left have attributed the perceived bias in judicial decision making to *class loyalty*. They claim that judges ruled in favor of property owners and right-wing politicians and journalists because of their common place in the traditional social hierarchy – that is, because of their shared social ties and interests with the country's elite (Novoa 1993 [1970]). Although this may have been the case for a small minority of judges, my research revealed that, in fact, by the 1960s, the judiciary was no longer a bastion of the oligarchy, but was, rather, solidly middle class. In the nineteenth century, judges had come mostly from elite families, but with the "professionalization" of the state in the 1920s, the judiciary became much more open to nonelite aspirants.[49]

This was evident not only in secondary sources (de Ramón 1999; Couso 2002: 177; Dezalay and Garth 2002: 226) but also in the social

[49] As in much of the public administration in Chile, the Freemasons, who were generally associated with the middle class (Lomnitz and Melnick 2000), had a strong presence in the judiciary. Indeed, according to a number of my interviewees, the unspoken agreement had long been that in judicial promotions, there should always be some parity between Catholics and Masons.

Table 3.3. Social background of high court judges*

Respondent	High school	Father's occupation	Landowning	Lived abroad
1	Upper Middle Class	Farmer	Yes	No
2	Middle Class	Municipal Employee	Yes**	No
3	Middle Class	Attorney	No	No
4	Middle Class	Military	No	No
5	Lower Middle Class	Navy Pharmacist	No	No
6	Lower Middle Class	Public Servant	No	No
7	Lower Middle Class	Judge	No	No
8	Upper Middle Class	Farmer	Yes	Yes
9	Upper Middle Class	Doctor	No	No
10	Middle Class	Merchant	No	No
11	Middle Class	Mechanic	No	No
12	Lower Middle Class	Miner	No	No
13	Middle Class	Accountant	Yes**	No
14	Upper Class	(Not Given)	(Not Given)	Yes
15	Upper Middle Class	Merchant	No	No
16	Upper Class	Diplomat	Yes	Yes
17	Middle Class	Attorney	No	No
18	Lower Middle Class	Farmer	No	No
19	Lower Middle Class	Policeman	Yes**	No
20	Middle Class	Attorney	No	No
21	Middle Class	Merchant	No	No
22	Lower Middle Class	Merchant	Yes**	No
23	Lower Middle Class	Public Employee	No	No
24	Middle Class	Merchant	No	No
25	Middle Class	Accountant	Yes**	No
26	Upper Middle Class	Farmer	Yes	No
27	Upper Middle Class	Dentist	Yes	No
28	Lower Middle Class	Policeman	No	Yes
29	Middle Class	Attorney	Yes	No
30	Middle Class	Merchant	No	No

* Information obtained in written questionnaire, returned by 83 percent of the judges in my sample.
** Respondent indicated that family owned land but, given his/her other responses or specific clarifications, such ownership would not classify him/her as a member of Chile's "landed elite."

background information that I gathered in my interviews with judges (see Table 3.3). This data, which included high school attended, father's occupation, mother's or maternal grandfather's occupation, and prior or present landholdings, showed that a full three-fourths of respondents came from lower-middle- to middle-class backgrounds, whereas only about one-fourth were of upper-middle- to upper-class extraction. Few judges came from landed families, most had fathers who were merchants

or public employees, and all but a handful attended lower-middle- to middle-class high schools (many of these public).[50]

Judges offered narratives of their career trajectories that underscored their economically modest backgrounds. Several noted that they chose the judicial profession after working in nonlettered posts in the judiciary to fund their studies. One mentioned that he had been an orphan, and would never have been able to go to university were it not for the free education system (Interview ACJ96-19, May 28, 1996, 13:00). Another explained that on finishing law school, he did not have the money to start an independent legal practice or the contacts to enter into a company as an in-house lawyer, where he would have been paid well. Thus, his options were either to go into a big law firm where he would be exploited for an indefinite number of years, or go into the judiciary, where the pay was low but the job was secure and one could work one's way up by merit (Interview FJ96-1, June 11, 1996, 9:00). Still others described having just scraped by early in their careers, when they earned very little money and had families to support (Interviews ACJ96-14, May 14, 1996, 14:30; ACJ96-10, May 9, 1996, 10:00; ACJ96-19, May 28, 1996, 13:00).[51]

Clearly, then, the bias of the judiciary cannot be attributed to class, at least not understood in objective terms. Some judges may have identified with the traditional elite, but my claim is that this identification was constructed *within* the institution. Seeking to please their superiors and move up in the judicial ranks, middle-class judges learned to "mimic the conduct and aristocratic demeanor of some of the elite judges who were still there when they began their careers" (Dezalay and Garth 2002: 226).[52] Indeed, precisely because they tended to be individuals without significant financial cushions or well-heeled social networks, they came to identify their own interests – in job security and social dignity – with those of the institution and its elite. Because the Allende government made no secret of its mistrust of the courts and sought significant reform of the judiciary, many judges reacted by throwing

[50] I am indebted to Javier Couso and Matías Larraín for helping me interpret the sociological data.

[51] In past decades, judges were some of the lowest-paid state employees. Unless they came from moneyed families, they couldn't expect to live anything but a modest middle-class lifestyle. Partially for this reason, in the 1950s and early 1960s, many judicial posts went unfilled because of the dearth of aspirants. In recent years, reformers have begun to attend to this problem (Vargas and Correa 1995).

[52] For a good (if disturbing) example of this behavior, see Silva Cimma 2000: 321–322.

their support to the Right (Velasco 1986: 153; Interview HRL96-8, October 17, 1996, 16:00).

In so doing, judges demonstrated that they were not necessarily bound by the legal positivist principles of strict fidelity to statutory law and deference to the legislator. As several of the examples discussed earlier illustrate, Chilean judges, particularly at the level of the Supreme Court, proved willing and able to appeal to constitutionalist principles and to use these to evaluate the legitimacy of government claims and policies. This dispels the idea that judicial behavior was driven primarily by *legal philosophy*.

The argument I offer, then, is that the conservative bias of Chilean courts during this period (and beyond) is best explained by the *institutional structure and ideology* of the judiciary. The *institutional structure* of the judiciary, in which the Supreme Court controlled discipline and promotion, gave incentives for judges to follow closely the examples set by their superiors. Given that most judges depended on the security of their posts and the promise of promotion to guarantee their livelihood and perhaps improve their social status, they had every reason to play along with those who controlled their careers, and even to absorb or adopt their perspectives. This structure served to reproduce a very conservative understanding of the judicial role, or what I am calling the *institutional ideology*. The core of this ideology was a belief that adjudication was and should remain strictly apolitical. In general, this meant that judges were to restrict themselves to a passive, subservient role vis-à-vis the executive, as emphasized in Chapter 2. But, under Frei, and particularly Allende, activism of a conservative nature was condoned and rewarded within the institution, since the judicial elite considered this to be a reaction against the (imminent or potential) "politicization" of law and justice and, therefore, not itself "political."[53] Judges who desired to increase their chances of promotion or simply to maintain their professional integrity (the two were not unrelated) thus had to take care to demonstrate their commitment to this particular brand of "apoliticism." At best, then, the institutional setting encouraged judges to avoid taking any stands at all against the government, to be quietist and deferential. At worst, it permitted and amplified the defense of conservative values and interests, while discouraging the expression of alternative perspectives.

[53] There are strong parallels here with the ideology of the Weimar-era judiciary in Germany, which produced a very similar pattern of rulings (see Kahn-Freund 1981).

Table 3.4. Individual votes of high court judges in rights cases, 1964–1973

	Appellate courts	Supreme court	Total
Pro-State	67	45	112
Pro-Individual Rights	25	39	64

In support of this claim, I cite first the strong statist tendency evident in the data. Most judges were clearly disinclined to challenge the reasoning of state officials in the name of individual rights. As Table 3.4 shows, at the appellate level, judges deferred to the executive at a rate of three to one. The tendency at the Supreme Court level was less strong but, overall, justices still favored the state slightly more than half the time.[54] Moreover, of the thirty-nine pro-rights votes by Supreme Court justices for the period, 59 percent were made by six individuals (one-third of the eighteen justices).[55] In other words, an activist minority skewed the overall results.[56] Most of the time, judges didn't consider it proper to interrogate the state's reasoning. As in the past, judges often claimed that they simply did not have jurisdiction to review the facts of the case before them and offer an independent evaluation to test the claims of elected officials.

Such a position was generally the safest for judges to take, particularly for those at the district and appellate levels. Many judges that I interviewed noted that if a judge had aspirations to get to the Supreme Court, it was best not to take professional risks. For instance, one retired judge spoke of a personal conversation he had had in the early 1970s

[54] Indeed, it is very interesting that when given the opportunity (in the case *Contra Rafael Otero Echeverría (recurso de inaplicabilidad)*, December 13, 1971), the Supreme Court refused (unanimously!) to rule portions of the Law of Internal State Security unconstitutional, even though the law clearly interfered with the liberty of expression and the individual who challenged the law's constitutionality was of the political Right.

[55] The individuals in question were Justices Bórquez, Eyzaguirre, Urrutia, Varas, Maldonado, and Rivas. The first four were pre-Frei appointees (and three of four noted conservatives), whereas the latter two were appointed under Frei.

[56] This was not at all the case at the appellate court level, where votes were much more evenly spread (and much more statist overall). Indeed, if one takes the votes of the activist Supreme Court judges as a percentage of the total votes at both levels, then 14 percent (one-seventh) of all judges account for 38 percent of all pro-rights votes.

with Supreme Court justice, José María Eyzaguirre, in which Eyzaguirre told him,

> If you want to get to the Supreme Court, the first thing you have to worry about is that your seat is stable, . . . that is, you need to avoid serious problems. When there are complications, don't burn yourself (*no se quema*). [Better to] wait, stall, declare yourself without jurisdiction, go on to another case. That's the basic thing; that's how you get to the Supreme Court. If you look at everyone on the Supreme Court, you see that those who are there don't commit themselves, don't let themselves get burnt (Interview FJ96-4, June 17, 1996, 12:30).

That other judges had absorbed this message was very clear. "In Chile, the obsequious judge is rewarded, not the best trained or the most intelligent. . . . Everyone prefers to take the comfortable position: avoid compromising oneself. And why? Because everyone wants to be promoted!" confessed one (Interview FJ96-2, June 13, 1996, 13:00). "All that a mediocre judicial employee has to do to be favorably evaluated is be very friendly with the Supreme Court and accept any kind of request that the Court makes," stated another; "In contrast, a judge who is very independent of such influence will surely not receive the same [positive] evaluation (Interview ACJ96-10, May 9, 1996, 10:00). "When the Court doesn't know a lower judge, they always give him a good evaluation . . . but those who take stands, those who are known for not being with this gentleman or that other, run risks," maintained a third (Interview FJ96-4, June 17, 1996, 12:30). "Like in the army, there is a certain 'verticality' in the organization of the judiciary," explained a fourth, "First instance judges don't make their voices heard because they think that the appellate court might intervene and critique them and the justices of the appellate courts don't intervene or make their voices heard because that could be the object of criticism by the Supreme Court" (Interview ACJ96-5, May 2, 1996, 18:00).[57]

My research into the judicial role under Frei and Allende indicated that these views were not unfounded, for the Supreme Court did flex its muscle on occasion, reminding wayward subordinates to stay in line. For example, when the newly formed National Association of Magistrates

[57] By contrast, several *abogados integrantes* interviewed for this work claimed that they were more independent than career judges because they did not have to worry about the disciplinary control of superiors (Interviews AI96-1, May 20, 1996, 10:30; AI96-2, June 12, 1996, 16:00; and AI96-3, June 19, 1996, 12:00.)

organized a strike in November of 1969,[58] the Supreme Court issued a declaration denouncing the organizers for usurping the Court's role as the unique representative of the judiciary before the government, and warning them that they were violating fundamental institutional norms.[59] The strikers subsequently added to their demands a modification of the judicial evaluation system, "which they considered a weapon used by the Supreme Court to pressure their subordinates" (Matus 1999: 209). This demand was not met, but its articulation is revealing of the perspective of lower court judges vis-à-vis the institutional structure.

Further evidence comes from the Allende period, when the Supreme Court president warned subordinates not to succumb to the political "proselytizing" of the Left, and spoke of "measures" that would be taken to avoid this.[60] The public reprimand and suspension of Judge Oscar Alvarez, who was an open supporter of the Allende administration, served to make this threat credible. The judge, Oscar Alvarez, of the La Serena Appeals Court, had been a member of the judiciary for nineteen years and had been serving on a commission of judges that worked closely with the Ministry of Justice under Allende to help draft bills on judicial reform.[61] The Supreme Court formally accused Alvarez of

[58] Frustrated with persistently low wages and weak administrative support, judicial personnel demanded a 60 percent increase in the judicial budget. The Supreme Court did not support the strike. Nonetheless, after six days, the strikers reached an accord with the government, agreeing to a 35 percent budget increase beyond the adjustment for inflation. In addition, the government agreed that the strike leaders should not be punished or suffer deductions in pay for work days lost.

[59] Records of the plenary sessions of the Supreme Court, Volume 15, October 27, 1969.

[60] See *RDJ* 69 (197) 1: xv.

[61] The Allende administration attempted to assert some influence on the judiciary by forming an advisory committee of sympathetic judicial personnel within the Ministry of Justice called the Comité de la Unidad Popular (CUP). These individuals were called upon to collaborate in the improvement of the judicial system, by finding ways to make it more representative of, sympathetic toward, and accessible to the popular classes. In addition to drafting proposals for legal changes, they also served as consultants in the judicial appointment process, informing the government on which judicial nominees might be most inclined to support UP legal interpretations and reforms. Although such an approach on the part of the executive to judicial appointments was certainly nothing new, the open and vocal participation of members of the judiciary in this process, selected so obviously for their ideological sympathies, was deemed bold and provocative (Interview ACJ96-2, May 6, 1996, 8:30). As one of the participants in the CUP put it, "A true 'dark legend' has been woven around this commission, that it disposed of extraordinary influence . . . but the truth was very different" (Interview FJ96-2, June 13, 1996, 13:00).

instructing the executive to fill a vacancy in his court, rather than notifying the Supreme Court (which handled nominations) that the post had gone unfilled. Alvarez claimed that these were trumped-up charges, for all he had done was notify the Minister of Justice, whose legitimate concern it was, that the post had remained vacant for five months. The true reason the Court sought to punish him, he argued, was because of his cooperation with the Allende administration in drawing up proposals to democratize the justice system. And indeed, Judge Alvarez and five of his colleagues who had served on Allende's judicial commission, had already been denounced to the Supreme Court by rightwing congressmen.[62] In the end, Alvarez was suspended for only five days,[63] but the action taken against him had a chilling effect on the rest of the judicial hierarchy. It became clear to lower-court judges that if they expressed excessive enthusiasm for Allende's reform proposals, they would be subject to disciplinary measures. As Alvarez claimed in a magazine interview, after this "what else could we do [but remain silent]?" (Harnecker and Vaccaro 1973: 29 and 32).[64]

The reluctance of judges to do anything that might cross their superiors was evident in the low level of participation in Allende's *audiencias populares* initiative. In order to put the judiciary at the service of ordinary people,[65] Allende had proposed, among other things, the creation of neighborhood courts to mediate or arbitrate community disputes that fell outside of the jurisdiction of the regular courts (see *Mensaje Presidencial*, May 21, 1971).[66] These courts were to be run by lay judges elected from the community, and the only requirement for office would be literacy (Spence 1979: 39; see also Soto and Aróstica 1993: 60). Faced with vehement opposition from both the Center and the Right

[62] Among the denouncers was Senator Raúl Morales Adriazola and lawyer Pablo Rodríguez Grez, both notorious members of the far Right.

[63] Although after the coup, the Supreme Court expelled him from the judiciary.

[64] In their presentation of his statements, the journalists who interviewed him claimed that Alvarez had fallen victim to the "legal dictatorship" exercised from the Supreme Court. They also noted that the situation in which he found himself was not surprising, given that the hierarchical structure of the judiciary "is the negation of democracy. This is the only [branch of the state] in which the maximum authorites are self-generating, have life tenure, and don't have to answer to anybody for their acts."

[65] Allende assumed the presidency having run on a platform that promised to replace "class justice" with "popular justice."

[66] For a fuller description of the UP stance on neighborhood courts, see Spence 1979: 41–45.

to this proposal, the Allende government suggested, as an alternative, that the Supreme Court encourage members of the judiciary to spend one day a week providing services in special *audiencias populares* (A.P.s) in poor neighborhoods. The Supreme Court acceded to the proposal in theory; however, the program engaged "an extremely low level of participation" (Soto and Aróstica 1993: 59). As Jack Spence explains, the institutional incentives within the judiciary simply did not favor participation in this project. Because the Supreme Court possessed such strong control over the careers of subordinate judges, conducting regular reviews of their performance, maintaining the right to dismiss them for bad behavior, and drafting the lists of nominees for promotions to higher-court positions, only a clear signal from the Supreme Court would effectively encourage participation of lower judges in this new program. "Given the benign views of any of the Supreme Court to the traditional system of justice and the lack of energy with which it promoted the idea of the A.P.s, it would not be hard for the lower court judges to assume that, at the least, no professional credit would come from participating in the A.P.s" (Spence 1979: 60–61).[67]

Moreover, it became increasingly clear that the Supreme Court was doing its best to give "professional credit" to those who followed its ideological lead. Interviewees claimed and archival research confirmed that, under Allende, the Supreme Court began stacking the nomination lists for vacancies in the higher courts with the most conservative candidates. As a former judge who had been part of the advisory committee to Allende's Ministry of Justice[68] explained, the nomination lists formed by the Supreme Court were so obviously stacked with conservatives that the administration ended up appointing the nominee who made the list based on seniority alone, even if that person lacked other qualifications (Interview FJ96-1, June 11, 1996, 9:00). My review of the plenary sessions of the Supreme Court for this period, in which the votes received by each candidate and the final nomination lists are recorded, confirmed this: Whereas under Frei, the government selected the nominee who made the list based on seniority only once, under Allende, the government appointed exclusively seniority-based nominees.[69]

[67] Indeed, "'volunteers for the A.P.s had to perform the additional tasks without cutting into their normal tasks" (Spence 1979: 97). For a discussion of how one of these A.P.s actually functioned, see Spence 1979: Ch. 4.

[68] Refer to note 61.

[69] Records of the plenary sessions of the Supreme Court, Vols. 14–18, covering years 1964–1973.

Independent evidence of the effects of institutional ideology from the period are more difficult to come by, since many of the actors from the period are long since deceased, and since no surveys or interview-based studies of judges were conducted during this period.[70] However, that this ideology was at work in the 1964–1973 period is supported by both judicial speeches and declarations from that era, as well as by a number of my interviews.

In his speeches inaugurating the judicial year in both 1970 and 1971, for example, then president of the Supreme Court Ramiro Méndez Brañas claimed that the Left's charge of class bias in the judiciary was unreasonable; judges could not be blamed for the outcomes of the cases they decided, as they simply applied the laws in force in the country.[71] Ironically, he felt so strongly about this that in 1970 he appeared with a fellow justice on a national television program to rebut the charge that the courts administered "class justice." In his 1972 speech, Méndez defended this action as an effort to protect the judiciary from insidious efforts from the Left to "politicize" the judicial system. Any remarks that he had made in the previous year's speech, he noted, were merely responses to the defamatory and often obscene attacks the judiciary had suffered, and were not "political" assertions. Judges should have the right to defend themselves without being accused of "taking sides" in current political battles, he argued. Judges neither desire nor are able to intervene in current politics, "because [such intervention] affects independence and impartiality, without which any concept of justice disappears." He thus issued a warning against those "outside influences that are attempting to infiltrate the administration of justice with their political proselytizing." The Supreme Court, he announced, would "adopt the appropriate measures to prevent members of the judiciary from listening" to such voices, bent on "destroying our crystalline tradition of respect for the rule of law." Finally, Méndez reiterated the opposition of the Supreme Court to Allende's proposal for neighborhood courts. Again, he claimed, this official expression of opposition was not "political," but rather technical. "Just as doctors opine on issues of public health or engineers on the problems of the nation's bridges and

[70] Indeed, as noted earlier, the judiciary in general received very little press coverage before the 1990s.

[71] See the speeches printed in the opening pages of *RDJ* 67 (1970) and 68 (1971). Note that in April of 1970, the plenary of the Supreme Court issued a collective statement reiterating Méndez's arguments (*El Mercurio*, 15 April, 1970, p. 25).

roads, it is the business of judges to opine on [juridical] matters," he asserted.[72]

As is evident in these statements and the acts that accompanied them, the Supreme Court made it clear to the rest of the judiciary, and to the public, that adjudication was and must remain apolitical. Judges that stuck with traditional legal interpretations, that ruled to protect the status quo, or that acted to defend the judiciary from critique were behaving appropriately, that is in a strictly professional-legal manner. Only those who demonstrated sympathy with or lent legitimacy to left-wing causes and critiques merited the derogatory "political" label. As one former judge explained, "In the judiciary, they always tell you, 'You are a judge; you can't get involved in politics,' and they accused those of us who were leftists [and were legal advisers to the Allende government] of meddling in politics. But the people of the Right who get involved in politics, by participating in television programs or writing press editorials [as several judges did under Allende], aren't 'meddling in politics because they're intervening in favor of the Right. In other words, to the degree that judges favor positions of the Right, they aren't being political!" (Interview FJ96-1, June 11, 1996, 9:00).[73]

Although it is impossible to separate the influence of ideational factors from that of more material structural incentives, my claim is that institutional structure alone does not provide the whole explanation for Chilean judicial behavior in this period or in those that followed. As Rogers Smith has argued, institutions are "not only fairly concrete organizations, . . . but also cognitive structures, such as patterns of rhetorical legitimation characteristic of certain traditions of political discourse," which give people functioning within them a sense of professional duty and integrity (1988: 91). Like individuals in any institutionalized setting, then, judges in Chile did not simply "ask the question 'how do I maximize my interests in this situation?' but instead 'what is the appropriate response to this situation given my position and responsibilities?'" (Koelble 1995: 233). And my claim is that the ideological premium on remaining apart from and above "politics" set clear parameters for acceptable professional conduct, leading judges either to defer, in the traditional manner, to the executive, or to take more active stands to defend (established) law and justice from "political" machinations.

[72] *RDJ* 69 (197) 1: xv and xvii.

[73] Similar sentiments were expressed by FJ96-2, June 13, 1996, 13:00, and FJ96-6, June 19, 1996, 20:00.

CONCLUSION

In sum, the reason that Chilean courts played such a conservative role in the period 1964–1973 is that institutional features of the judiciary – namely, the autonomous bureaucratic structure and the antipolitics professional ideology – encouraged and reproduced conservative and conformist behavior among judges. Although the personal conservatism of certain members of the Supreme Court is a relevant factor, it alone cannot explain judicial performance either during this period or in the seventeen years of dictatorship that followed. Indeed, my point has been to show that most Chilean judges were not born conservatives, committed to a right-wing agenda because of ties of blood, marriage, or childhood socialization. Rather, their conservative behavior was a response – sincere, strategic, or a bit of both – to institutional dynamics. Despite the high levels of independence and professionalism of the Chilean judiciary, the understandings and incentives transmitted and enforced within the institution rendered most judges unwilling or unable to take independent stands in defense of liberal-democratic principles – long before the military seized power.

CHAPTER FOUR

LEGITIMIZING AUTHORITARIANISM, 1973–1990

> *The dissolution or mass resignation of the Supreme Court would have been better from the point of view of clarifying what was happening in Chile. At least it would have been clear to the people, clear in the conscience of the country, and clear internationally. I think that one of the tremendous things that happened in Chile is that the dictatorship cloaked itself nationally and internationally with the legality that the judiciary gave it.*
>
> Chilean Human Rights Lawyer[1]

When the generals overthrew the Allende government and seized power on September 11, 1973, they did so in the name of the rule of law (*el estado de derecho*). In its first official statement justifying the coup, Edict No. 5 (*Bando No. 5*), the governing junta declared that the Allende administration had "placed itself outside the law on multiple occasions, resorting to arbitrary, dubious, ill-intentioned, and even flagrantly erroneous [legal] interpretations;" and had "repeatedly failed to observe the mutual respect which one power of the state owes to another." For these reasons, the Allende government had "fallen into flagrant illegitimacy," and the armed forces had "taken upon themselves the moral duty . . . of deposing the government, . . . [and] assuming power" with the objective of reestablishing "normal economic and social conditions in the country, with peace, tranquillity, and security for all."[2]

[1] Interview HRL96-5, August 2, 1996, 12:00.
[2] Cited in Loveman and Davies 1997: 181.

At first, many Chileans believed that the military was intervening on a temporary basis and would call elections within a few months. However, it soon became apparent that this was not the junta's intention. Although the new leaders claimed they had come to power to restore both order and Chilean national identity (*chilenidad*), their approach rejected the values of civilian politicians, particularly those who had been at the helm for the past ten years.[3] Indeed, for General Pinochet and his supporters, "liberal democracy was a showcase for irresponsible, selfish demagogues that had proven itself a failure" (Constable and Valenzuela 1991: 69).

With the goal of building a new, apolitical order, Pinochet thus "turned for inspiration to [nineteenth-century Chilean statebuilder] Diego Portales . . . who believed the best government was an 'impersonal' semidictatorship with limited concessions to popular representation" (Constable and Valenzuela 1991: 70).[4] In so doing, he "inevitably had recourse to that political group which represents the most conservative sectors of the Chilean society," a group that "thinks that it has no politics, and believes that it upholds the eternal interests of the Chilean nation, manifested in the institutions it has inherited from a previous century."[5] Among such institutions was the judiciary.

This chapter analyzes the political role of the judiciary during the years of the military regime, highlighting continuities with the preauthoritarian past. In particular, the chapter demonstrates how the institutional characteristics of the judiciary (its structure and ideology) facilitated judicial capitulation to and cooperation with the military regime. To begin, these institutional factors had produced a Supreme Court whose members, despite having been appointed in the majority (eight of thirteen) by the progressive governments of Eduardo Frei and Salvador Allende, were very conservative in their professional orientation. From the earliest days of the dictatorship, the high court justices demonstrated a clear willingness to support the military government's

[3] As Jorge Nef argued in 1974, "the military is attempting to convince the population that it is the incarnation of Derecho (not quite the same thing as 'law') and that they impartially rule in the name of eternal principles which transcend legality and other civilian formulas" (Nef 1974: 74).

[4] Loveman emphasizes the deliberate links drawn by leaders of the military regime between their political vision and Chile's Portalian legacy (1988: 312–313).

[5] *The Manchester Guardian* of October 6, 1973, cited in Nef 1974: 73.

"antipolitics" agenda (Loveman and Davies 1997). Second, the Supreme Court continued to hold tremendous power over the judicial hierarchy, through which it induced conservatism and conformity among appellate and district court judges. Not only did the Supreme Court quickly disqualify from service those judges that had demonstrated sympathy with the Allende administration, but it also set a tone for the judiciary in which anyone who questioned the legitimacy of the military regime's tactics was suspect of wanting to "politicize" justice and upset the rule of law. The Supreme Court continually discouraged any such efforts via the diversion of cases into the military justice system, the overturning of nonconformist decisions, and disciplinary action against the few judges who refused to fall in line. Their efforts were facilitated by the long-standing ideology of the Chilean judiciary, according to which judges were to remain "apolitical." Any judge desiring to preserve his/her professional integrity and standing needed to take care to demonstrate his/her fidelity to law alone, and law was to remain distinct from and superior to politics.

In this institutional setting, even democratic-minded judges were, with few exceptions, unwilling to take public principled stands in cases brought against authoritarian laws and practices. Challenging the decisions of the military junta, self-proclaimed guardians of the national interest, would both violate their professional duty to remain apolitical and imperil their chances of professional advancement. The Chilean judiciary thus not only failed to contribute to the defense of human rights when that defense was most needed, but it provided a mantle of legitimacy to the Pinochet regime. Far from reflecting and demanding respect for the liberal principles and practices that support democratic – or simply humane – politics, the judiciary, led by the Supreme Court, accepted, endorsed, and helped to perpetuate the brutal and often arbitrary rule of a privileged minority.

To make these points, this chapter is organized into three parts. Although there are many possible ways to break down the authoritarian period for analytical purposes, the logical division for any work focusing on legal aspects of the regime is around the 1980 Constitution. Thus, Part I of the chapter covers the period 1973–1980, when the 1925 Constitution was (nominally) still in place, and Part II discusses the 1981–1990 period, after the 1980 Constitution came into force. In both of these sections, I first offer an overview of the military government's laws and policies, highlighting those developments that were most relevant for the courts in deciding rights cases. This provides

a context for my discussion of the jurisprudential record in each period, in which I focus on habeas corpus and constitutional review decisions, as well as review of military court decisions (for the 1973–1980 period) and some other high profile human rights cases that don't fit in these other categories (for both periods). In Part III of the chapter, I provide an analysis of judicial behavior throughout the authoritarian era, discussing the evidence for the competing hypotheses presented in Chapter 1 and making the case for my institutional argument.

PART I

1973–1980: "THE RULE OF LAW SHOW"

THE MILITARY GOVERNMENT'S APPROACH TO LAW (1973–1980)

As noted in the introduction to this chapter, the armed forces seized power in 1973 in the name of the rule of law. However, it was clear from the start that although the generals often sought to rule *through* law, they did not rule *under* law.[6] Immediately after the coup had begun, they issued Decree Law No. 1, which announced that the governing junta would "guarantee the full effectiveness of the judiciary's attributes" and would "respect the Constitution and the laws of the Republic, *insofar as the country's present situation permits*" (see Frühling, Portales, and Varas 1982:85 [my emphasis]). As this last clause suggests, under the military regime in Chile, "policy was law and law was policy" (Gardner 1980: 272). Moreover, all policy (and hence all law) was rooted in national security doctrine, that is, in the belief that the primary mission of the armed forces, "singular representatives of the Nation and of the State" (Frühling 1982: 51; see also Munizaga 1988), was to protect society from internal "enemies."[7] Indeed, Pinochet used the war on communism to justify the regime's permanent restrictions on civil and political liberties, as well as the construction of a "new institutional order." In this war, anyone who was not with the armed forces was against them, and thus the military's definition of the enemy "grew broader by the day" (Constable and Valenzuela 1991: 38).

Torture was the major tool of repression for the military government. Both of the regime's secret police forces, the DINA (Directorate

[6] Barros characterizes the military government's approach as rule *by* law, as opposed to the rule *of* law (2002).

[7] National security doctrine generally refers to the ideology with which the United States trained Latin American militaries during the Cold War, broadening the military mission to maintaining internal social order (i.e., counterinsurgency) as well as to security from external threats. However, such a mission was not simply an import from abroad, as a number of works suggest. Indeed, the idea of the military as the guardian of the national interest and essence has a much longer history in Latin America. See particularly Frühling 1982 and Loveman and Davies 1997.

for National Intelligence), which operated until August 1977, and the CNI (National Center for Information), which replaced it, operated clandestine torture centers where tens of thousands of detainees, often kidnapped from their homes or off the streets, were subjected to a variety of barbaric treatments.[8] A total of 3,197 individuals were murdered or disappeared at the hands of state agents during the dictatorship,[9] and another 5,000 were disappeared for weeks and months, "provoking terror among their families and friends" (Verdugo 1990: 296). Between 1973 and 1975, the government detained 42,486 persons for political reasons, and from 1976 to 1988, it carried out 12,134 individual arrests and 26,431 collective arrests.[10]

Although the regime clearly targeted leftist groups that had supported Allende (first the MIR, then Socialists, and then Communists), nearly half of the victims of the regime had no formal political affiliation. They thus became targets of the government because of known or presumed political views, "guilt" by association, or just bad luck.[11] In addition, although "the vast majority of affluent and comfortable families were never touched by repression," the "harshest treatment of all was reserved for the most vulnerable supporters of Allende: small-town peasant and labor leaders who had no international contacts and no place to hide from official and personal vengeance" (Constable and Valenzuela 1991: 34 and 144).[12]

[8] Forms of torture included severe beatings, sequential rapes, cigarette burns, electric shock treatments (often on the genitals), near drowning, forced ingestion of urine and feces, the use of drugs like pentothal to inhibit resistance, and psychological tortures such as mock execution, forced witnessing or listening to the torture of others (including relatives), and threats of harassment of family members. See Organization of American States 1985: 90–91. The Chilean government finally issued an official report on torture in 2004, available online at http://www.latinamericanstudies.org/chile/informe.htm.

[9] This is the official figure of the National Corporation for Reparation and Reconciliation, which continued the work of the Rettig Commission from 1991 to 1996. From http://www.derechoschile.com/english/victims.htm, accessed October 5, 1999.

[10] From http://www.derechoschile.com/english/victims.htm, accessed October 5, 1999.

[11] See the table in the Ministerio Secretaria General de Gobierno de Chile 1991: Vol. II, 885, which states that 46 percent of victims were "not political activists" ("*sin militancia política*").

[12] See also Secretaria General de Gobierno de Chile 1991: Vol. II, 887, which gives a breakdown of victims according to occupation.

The regime sought to give formal legal cover to pursuit of this "enemy" by producing a constant stream of decree laws. Decree Laws Nos. 3 and 4, issued on September 11, 1973, and published on September 18,[13] declared the entire country to be in both a state of siege and a state of emergency. Decree Law No. 5, issued on September 12 and published on September 22, announced that the state of siege should be understood as a state of war, calling for the application of harsher penalties for certain political crimes. Moreover, it revised the Law of Internal State Security to establish the jurisdiction of military courts over violations of that law during wartime.[14] What this meant was that all those found guilty of the political crimes in question were to be considered traitors to the nation and sentenced accordingly (and oftentimes retroactively!) by courts whose members answered to the junta.[15] It was not until late 1974 that the state of war was pronounced officially over and not until 1978 that jurisdiction over political crimes was formally returned to ordinary courts (R. Garretón 1987: 36).

In the early months of the regime, the government issued several decree laws that would figure prominently in many rights cases brought before the courts. Decree Law No. 81, published on November 6, 1973, declared the government's power to expel citizens from the country. It required previous authorization for those exiled or expelled to re-enter the country, established punishment for clandestine entry, and gave jurisdiction for violations of the decree to military courts. On November 26, 1973, Decree Law No. 128 was published to clarify Decree Law No. 1. Decree Law No. 128 stated: "The Constituent Power and the Legislative Power are exercised by the governing junta through decree laws with the signature of all of its members and when these former deem it appropriate, with the signature of relevant cabinet ministers. The dispositions of the decree laws which modify the Constitution will form part of its text and should be considered incorporated therein." With respect to the judiciary, Decree Law No. 128 provided that the

[13] Because of the prominence of formalism in Chilean legal reasoning, the date on which any given law is published in the *Diario Oficial*, the government's official record, is of great significance for legal reasoning.

[14] Previously, such violations fell under the jurisdiction of an appellate court judge. See the text of the decree law in Frühling, Portales, and Varas 1982: 126–127.

[15] On the exercise and expansion of military justice under the Pinochet regime more generally, see Organization of American States 1985: 175–192; López Dawson 1995a; Pereira 2005: Ch. 4.

courts would discharge their functions in the manner and with the independence and authority specified in the Constitution of 1925.

The next year, after the Supreme Court signaled, in a constitutional review decision,[16] that it would not automatically consider decree laws to be tacit amendments to the Constitution, the military government issued Decree Law No. 788. This decree, published in December 1974, declared explicitly that any previous decree laws found to conflict with the 1925 Constitution were to be considered amendments thereof.[17] It also stated that future decree laws intended to modify the Constitution would be issued as express exercises of the junta's constituent power. This rendered it technically impossible to challenge in court the constitutionality of any early military regime legislation, and it meant that, until the enactment of Constitutional Act No. 3 in September 1976, "there was no specific instrument that embodied all the rights [allegedly] protected, since the exercise of those rights had to be adapted to the decrees of the political power" (Organization of American States 1985: 26).

Several other decree laws issued in 1974 had crucial consequences for future legal battles. On January 17, 1974, Decree Law No. 247 declared that to be legally binding in Chile, international treaties must not only be signed and ratified, but also officially promulgated and published in the *Diario Oficial*. Clearly responding to appeals by human rights lawyers to international human rights treaties, this decree had significant consequences for future judicial rulings. On June 18, 1974, the government published Decree Law No. 521, which created the DINA as a legal entity. This law was significant above all in that several of its provisions were explicitly "secret"; that is, they were published in a special issue of the *Diario Oficial* with (very) limited circulation.[18]

Decree Law No. 527, published June 26, 1974, reiterated the powers of the junta established in Decree Law No. 128 and specified the powers of the executive, exercised by the President of the Junta, General

[16] The case was *Federico Dunker Biggs*. For further discussion, see Barros 2002 at 96–97.

[17] Mónica Madariaga, who was Minister of Justice at the time, said the government privately called this the "Varsol law," referring to a household detergent (Constable and Valenzuela 1991: 128). Barros notes that Decree Law No. 788 "was totally at odds with the junta's stated commitment to restore the rule of law" (2002: 103).

[18] See "artículo único transitorio" in the text of the law, reproduced in Frühling, Portales, and Varas 1982: 100–101.

Pinochet.[19] It gave him the exclusive power to declare a state of siege in one or more parts of the country "in case of danger of foreign attack or of invasion" (Frühling, Portales, and Varas 1982: 88). Crucially, this decree added the words "danger of" and "or of invasion" to a clause that was otherwise taken *verbatim* from the 1925 Constitution. This allowed Pinochet to perpetuate indefinitely the state of siege, despite the relative peace and order that had been established within the country. Because of the vagueness of the terms "danger" and "invasion," Pinochet had only to assert that the communist threat was alive and well and clandestinely organized within Chile in order to have legal cover for the permanent restriction on civil and political rights. This prerogative was further codified and extended by Decree Law No. 640, of September 10, 1974, which specified different "regimes of emergency" in accordance with different types of threat to public order. Decree Law No. 640 also extended wartime procedure and punishment to all but one of the various degrees of the state of siege, meaning that military tribunals would continue to have jurisdiction over most civilian political crimes.[20]

It should be noted that, with these decree laws, the state of siege took on characteristics unprecedented in Chile. Based on Pinochet's subjective perception and exclusive interpretation of any threat to "national security," a state of siege could be declared for the entire national territory, for any length of time, and with no restrictions on its renewal. This, particularly in combination with the expanded internal powers of the military and the existence of the secret police, meant that basic civil and political rights such as the right to life and physical integrity, due process, the inviolability of the home, and the freedoms of expression, of the press, and of assembly, had very restricted formal legal protection and were routinely and grossly violated.[21]

As criticisms from the human rights community, both domestic and international, mounted,[22] the military pronounced, in September 1976,

[19] The decree pronounced Pinochet the "Supreme Chief of the Nation." Six months later, he forced the junta to sign another decree that officially made him President of the Republic.

[20] From an analysis by the staff of the *Vicaría de la Solidaridad*, on file at the Fundación de Documentación y Archivo de la Vicaría de la Solidaridad (FDAVS). See also Organization of American States 1985: 29–30.

[21] From the *Vicaría* analysis mentioned in the previous note.

[22] The DINA made 1976 a particularly bad public relations year for the regime. In mid-July, Spanish diplomat Carmelo Soria was found dead inside his car in Santiago's Mapocho River. The government claimed the ECLA employee had had an accident

four "Constitutional Acts" designed to demonstrate the regime's alleged commitment to the rule of law, democracy, and "Christian humanism." Constitutional Act No. One was devoted to the Council of State, a high-level advisory body composed of former presidents of the Republic and prominent persons appointed by Pinochet.[23] The Council's main role was to review and approve the new Constitution then being drafted. Act No. Two repealed Chapter I of the 1925 Constitution and replaced it with the structure of the state which had been established by decree laws after the coup. Act No. Three listed and explained the rights of the human person, very similar to those found in the 1925 Constitution, and asserted that these are prior to the rights of the state. However, it also incorporated a set of "constitutional duties," including the duty to "help preserve national security" and the duty to "obey the orders that are given by the constituted authorities, in accordance with their attributions."

In addition to stipulating the remedy of *amparo* (habeas corpus), Constitutional Act No. Three also established a new mechanism for the judicial defense of civil and political rights: the writ of protection (*recurso de protección*). A petition for a writ of protection could be filed in an appellate court by any individual or group which believed that a third party, public or private, had violated one or more of their civil or political rights. It required that the court issue a ruling within forty-eight hours, and allowed for an appeal to the Supreme Court. As one analyst observes, this new writ effectively expanded the judiciary's power of constitutional review, for it explicitly authorized judges to "assume

and driven himself into the river, but evidence of foul play was abundant. In early August, two well-known Christian Democratic human rights lawyers were kidnapped and expelled from the country. The details that these distinguished individuals offered of the experience in their legal battle to return to Chile made an important impression on public opinion. Perhaps most dramatic, however, was the assassination of Allende's Defense Minister, Orlando Letelier, carried out in Washington, DC, on September 21, 1976. A car bomb planted by DINA agents killed both Letelier and a young colleague, Ronni Moffitt, and significantly strained Chile's relations with the U.S. government.

[23] Former Presidents Jorge Alessandri and Gabriel González Videla both participated in the Council of State, but Eduardo Frei Montalva refused. Alessandri resigned from the Council after Pinochet and his advisors reversed many of the changes he and the other Council members had made to the draft of the 1980 Constitution. However, he did not make the reasons for his resignation public at the time, nor did he openly oppose the Constitution in the 1980 plebiscite. See Cavallo, Salazar and Sepúlveda 1997.

an active, dynamic, creative and imaginative role," and "adopt all the provisions [they] deem necessary to re-establish the rule of law (*el imperio de Derecho*), ensuring proper protection to the affected party" (Soto 1986).

It should be noted, however, that Constitutional Act No. Four placed additional and significant formal limitations on the rights and remedies so augustly proclaimed in Act No. Three. It established four new classes of states of emergency and catalogued the restrictions that the president could place on citizens' rights during such states. In addition, Article 6 empowered the president to suspend the right to personal freedom and the right of assembly, and to restrict freedom of opinion and of association when "he deems it essential for preventing subversion." Article 13 extended the period during which a person could be detained without being brought before a court to ten days. And Article 14 stated that both the *recurso de amparo* and the *recurso de protección* "will only be viable [in states of emergency] insofar as they are compatible with the legal requirements of such situations" (Organization of American States 1985: 26–31).[24]

Moreover, within months of the publication of the Constitutional Acts, the government issued Decree Law No. 1,684, declaring unequivocally that the *recurso de protección* was inadmissible (*improcedente*), under any circumstances, during a state of emergency. The decree, issued "without consulting the Council of State, the Constitutional Commission, or the legislative committees of the junta" (Valenzuela 1995: 48), was announced on the same day (January 28, 1977) that the government forcibly shut down the Christian Democratic–owned Radio Balmaceda. The shutdown came as part of the move to repress the Christian Democratic Party and eliminate the possibility that the future of the regime would be controlled by the political Center. On its heels came Decree Law No. 1,967, of March 11, 1977, which dissolved all those parties that had previously only been "in recess" (Constable and Valenzuela 1991: 129; Cavallo, Salazar, and Sepúlveda 1997: 159–160).[25]

[24] For one analyst, the four Acts read together "like a tongue-in-cheek Orwellian invention" (Loveman 1988: 322).

[25] Note that all Marxist parties or movements were banned by Decree Law No. 77, of October 13, 1973, whereas Decree Law No. 78, issued four days later, declared all other parties or movements in recess.

In December 1977, the U.N. General Assembly, for the fourth time in as many years, condemned Chile for human rights abuses.[26] Pinochet was furious, and in reaction, decided to call a plebiscite on his rule. Preparation for the "National Consultation" was rushed and lacking in even the most basic legal foundation.[27] There were no voter registration rolls, no electoral court, and virtually no opposition press coverage. The vote was held "under the state of siege, without organized political parties, [and] with severe restrictions on the right to assembly and the freedom of information" (Organization of American States 1985: 269). Asked whether they "support President Pinochet in his defense of the dignity of Chile" and the construction of a new institutional order, voters could check a Chilean flag to vote "yes" or a black box to vote "no." Blank ballots were counted as "yes," and Pinochet declared victory with an alleged 75 percent of the vote (Organization of American States 1985; Constable and Valenzuela 1991; Angell 1993). Buoyed by his victory, Pinochet proceeded to detain and then internally banish a series of Christian Democratic figures who had publicly denounced the "consultation" (Badilla 1990a: 32).

Meanwhile, however, the United States had stepped up pressure on the regime to investigate the army's alleged involvement in the Washington, DC, murder (by car bombing) of Orlando Letelier.[28] On April 8, 1978, the government acceded to the United States' extradition request for the civilian DINA agent, Michael Vernon Townley, and on April 17, after a brief but tenacious resistance, agent Townley confessed his participation in the crime to U.S. prosecutors, claiming that he had acted on the orders of his superiors in the DINA, who themselves answered directly to Pinochet.[29]

In the midst of this crisis, Pinochet named a trusted aide, Sergio Fernández, to the Ministry of the Interior. Just one week later, Minister Fernández oversaw the promulgation of the now infamous amnesty law. Decree Law No. 2,191, of April 19, 1978, offered an official amnesty

[26] The vote in 1977, very similar to previous years, was ninety-six to fourteen, with twenty-five abstentions.

[27] Indeed, this is why, at the advice of Jaime Guzmán, the general called the referendum a "consultation," which was more informal and thus did not have to meet the same legal standards as a "plebiscite." (Organization of American States 1985: 269; Cavallo, Salazar, and Sepúlveda 1997: 181).

[28] On the Letelier assassination, see Matus and Artaza 1996.

[29] "La Farsa de la Justicia," *ANALISIS*, extraordinary edition, September 1991, 26.

for all "authors, accomplices, or concealers" of politically connected crimes committed between September 11, 1973, and March 10, 1978.[30] Whereas the law was clearly designed to benefit military and police officials who had perpetrated innumerable human rights abuses since the coup, and to reassure them in the wake of the anxiety caused by the active American investigation of the Letelier case, it also offered amnesty to several hundred leftist prisoners.[31] The government thus presented the amnesty law as a gesture of humanitarian goodwill designed to promote national reconciliation.[32]

THE JUDICIAL RESPONSE TO MILITARY LAW AND POLICY (1973–1980)

As the preceding account demonstrates, Chile's military government was keenly attentive to questions of formal legality, seeking to portray itself, however disingenuously, as committed to the rule of law. To bolster this image, of course, the junta needed the support of the judiciary, whose dignity and independence it pledged to (and did, at least formally) respect. To the dismay of democracy and human rights supporters, the judges gave them exactly what they were looking for.

Immediately following the coup, the President of the Supreme Court, Enrique Urrutia Manzano, expressed, in the name of Chile's administration of justice, his "most intimate satisfaction" with the new government's pledge to respect and enforce the decisions of the judiciary. The entire Court, transported to the court building in a military bus, ratified this statement (*El Mercurio*, September 13, 1973). On September 18, one week following the coup, the Supreme Court justices were among a handful of high-ranking state officials to attend a religious ceremony to bless the new government (Cavallo, Salazar, and Sepúlveda 1997: 19). On September 25, the members of the junta paid a special visit to the Supreme Court, during which the President of the Court hailed them for "all of their historic and juridic value," claiming that the activities

[30] Pinochet had declared an end to the state of siege on March 10, 1978. However, it had been immediately replaced with a state of emergency, which offered little change in the formal protection of civil and political rights.

[31] On release, however, most of these were sent directly into exile (Constable and Valenzuela 1991: 130).

[32] Note that eight months earlier, the DINA had been dissolved and replaced by the CNI, marking the government's effort to reign in the activities of the secret police forces.

of the justice system would now be "not only respected, but dignified." With no reference to the alleged state of war or state of siege which had been declared, he wished the *de facto* authorities, "the best of success in your actions, for the well-being of our fellow citizens and for the country as a whole" (R. Garretón n.d.: 13).

These were the first of many acts through which the judiciary offered public legitimation of the military regime and influenced the public's perception of the entire judiciary as obsequious to the will of the junta.[33] Moreover, as the atrocities of the security forces became known and the willingness of the Pinochet government to twist, evade, or simply rewrite the law to its benefit became obvious, the judiciary's acceptance, passive or active, of the regime's illegalities stood in stark contrast to the strong and vocal stance it had taken against the Allende government.

The following sections summarize judicial performance in four areas central to the rule of law and rights protection: habeas corpus, or as it is known in Chile, *amparo*; Supreme Court review of military court decisions; constitutional review of laws (*inaplicabilidad por inconstitucionalidad*); and the constitutional review mechanism introduced by the military government in 1976 with the explicit goal of protecting certain rights, the *recurso de protección*.

Habeas Corpus (*Amparo*)

Perhaps the most notorious category of judicial decisions under Pinochet is that of habeas corpus, or as it is known in Chile, *amparo*. As Barros (2002: 141) notes, "Personal liberty was sacrosanct in the many texts that form Chile's constitutional and legal tradition – under no circumstance could an individual be deprived of his or her freedom without legal justification." On coming to power, the junta did nothing formally to alter these norms. Yet, according to a 1985 report of the Inter-American Commission of Human Rights, Chilean courts accepted only ten of the fifty-four hundred *recursos de amparo* filed by human rights lawyers between 1973 and 1983 (Constable and Valenzuela 1991: 122). In the remaining seven years of the military regime, only twenty more such *recursos* prospered, leaving the total at thirty out of almost nine thousand (Rigby 2001: 92, n. 34). This means that the courts only

[33] Another important moment came on June 27, 1974, when Urrutia Manzano participated in the stealthily planned ceremony to declare Pinochet "Supreme Chief of the Nation." Urrutia himself placed the presidential sash on the general (Cavallo, Salazar, and Sepúlveda 1997: 31–32).

Table 4.1. Published decisions in *amparo* cases, 1973–1980

	Apellate court	Supreme court
Amparo Granted	3	0
Amparo Denied	15	19

challenged the legality of the military regime's detentions in *two or three tenths of a percent* of cases.

My own sample, consisting of published decisions in *amparo* cases from the 1973–1980 period, looks good by comparison: in three of thirty-seven total decisions (or 8 percent), *amparo* was granted (see Table 4.1). However, in all three cases, the decision was subsequently overturned by the Supreme Court, which itself accepted zero such petitions. Therefore, no citizen secured even formal judicial protection.[34]

The pattern of behavior in habeas corpus decisions was reminiscent of that of the 1930s and 1940s discussed in Chapter 2. As in that earlier period, the courts took extraordinarily long to process *amparo* petitions, in many cases a month or more, despite the fact that they were legally obligated to rule on them within twenty-four hours.[35] In some cases, the Supreme Court added formalistic impediments to filing such writs, although the law designed the writ to be totally informal and easy to file.[36] In most cases, the courts didn't challenge the legality of detention orders issued under the state of exception, nor did judges use their powers to check that detainees were being treated lawfully, either by visiting detention centers or demanding that individual detainees be brought before the court.[37] Complaints of torture thus went ignored or

[34] I fully acknowledge the probable ineffectiveness of the *amparo* under a police state (Barros 2002), but the point is that the judiciary never even attempted to defend the most basic legal principles and procedures.

[35] In mid-1980, when human rights lawyers at the *Vicaría de la Solidaridad* asked the Supreme Court to instruct appellate courts to rule on writs of habeas corpus within twenty-four hours, as mandated by law, the Court sent a memo asking that they do so only "insofar as the relevant paperwork is in order and as the evidence permits." In other words, "the highest court in the land gave express authorization to the inferior courts to disregard the express text of the law" (R. Garretón 1989: 20).

[36] See, for example, *Hernán Santos Pérez*, 28 April, 1978; *Fallos del Mes* No. 234: 87–88.

[37] See, for example, *Luis Alejandro Fuentes Díaz*, April 8, 1975, *Fallos del Mes* No. 197: 31, or *Luis Corvalán Lepe*, July 30, 1974, *Fallos del Mes* No. 188: 132.

uninvestigated, and confessions offered under torture were accepted. Moreover, if no decree ordering an individual's arrest could be proven to have been issued, judges ruled that the person must not have been detained, and denied *amparo* on the grounds that the writ had been filed on insufficient evidence or with the intention of causing concern or alarm (Amnesty International 1986). In other words, from the beginning, the decisions of the high courts, and especially the Supreme Court, reflected a willingness "not simply to accept the government's version of things, but to go out of their way to eliminate all possibility of studying the merit of the cases and [instead] to justify the government" (Interview HRL96–8, October 17, 1996, 16:00).

On September 14, 1973, for example, a former official of the Frei government, Bernardo Leighton, submitted a *recurso de amparo* by telephone for seven Popular Unity leaders being held "in some regiment." The police claimed the individuals in question were not in their custody, and that they didn't have contact with the Ministry of Interior. Nonetheless, the Santiago Appeals Court quickly rejected the writ, arguing that since the country was clearly under a state of siege, the executive could legally detain people in places other than jails for common criminals.[38] This decision clearly overlooked several legal facts. First, Article 72 of the 1925 Constitution specified that a declaration of state of siege can only be made by the president in cases of external attack, or by Congress in cases of internal disturbance, and that even during a state of siege the constitutional rights of public officials must be maintained.[39] Moreover, the decree declaring the state of siege had not yet been published in the *Diario Oficial*, meaning that technically it was not yet law when the decision was issued.[40] Worst of all, the court issued the decision without even having seen an arrest warrant, thereby signalling that in a state of siege anybody could be arrested at any time by any official for any reason (R. Garretón 1987: 32–33). Despite all of

[38] *ANALISIS*, special edition, November 1982, 60.

[39] These rights were laid out in Article 33 of the 1925 Constitution: "No Deputy or Senator from the day of his election can be indicted, prosecuted, or arrested, except in a case *in flagrante delicto*, unless the Court of Appeals of the respective jurisdiction, in open session, has previously authorized the indictment by declaring that there exist grounds for prosecution by declaring that there exist grounds for prosecution. From this decision an appeal may be taken to the Supreme Court."

[40] In addition, the Court mistakenly cited Decree Law No. 1 rather than Decree Law No. 3 in the decision, the latter of which actually declared the state of siege.

this, the Supreme Court confirmed the decision and set a crucial and disheartening precedent for the months and years to follow.

Even the kidnapping and forced exile of two prominent centrist lawyers, Jaime Castillo and Eugenio Velasco, around which a large percentage of the legal community rallied, seemed not to sway judicial authorities. On August 6, 1976, Castillo and Velasco were seized from their workplaces by DINA operatives – Velasco in the court building itself. The agents transported them directly to the airport, from which they were flown immediately to Buenos Aires. That same day, lawyers filed *recursos de amparo* on their behalf, and the Santiago Appeals Court accepted a petition requesting that their expulsion be suspended until the *recursos* had been resolved. By that time, however, Castillo and Velasco had already arrived in Argentina.

Ten days later, the Santiago Appeals Court heard arguments from both the lawyers, represented by (future President) Patricio Aylwin and Juan Agustín Figueroa, and from the government, represented by (future Minister of Justice) Hugo Rosende. The following day, the court rejected the writs by a vote of two to one.[41] As Velasco himself explains, "the heart of their reasoning [was] that Decree Law 81 [of 1973], which authorized the junta to expel Chileans, didn't require that any explanation or justification be given regarding why the persons affected by the measure 'constitute a danger for national security'" (Velasco 1986: 136). The petitioners' lawyers had argued that according to both the Constitution and the International Covenant on Civil and Political Rights, to which Chile was a signatory, the executive did not have the right to expel Chileans from the country, even under a state of siege.[42] Moreover, even if Decree Law No. 81 was accepted as legitimate, the government had not abided by its requisites: Castillo and Velasco had not been presented with a decree signed by the Minister of the Interior offering a justification for their expulsion (*un decreto fundado*), nor had they been allowed to "choose freely their country of destination."[43] The majority appeals court decision rejected both sets of arguments,

[41] Judges Eduardo Araya and Sergio Dunlop argued the expulsion was legal and legitimate. Judge Rubén Galecio dissented.

[42] Note that having been ratified by thirty-five countries, the Covenant had become binding as of March 23, 1976.

[43] These arguments were accepted and strongly asserted in the dissent of Rubén Galecio Gómez.

recognizing Decree Law No. 788 over and above the Constitution and any international treaty, and asserting, in traditional fashion, that judges did not have the right to evaluate or question the reasoning of the executive for its actions under a state of siege.[44]

The case was immediately appealed to the Supreme Court, which subsequently received a number of letters: one signed by ten respected law professors from a variety of political backgrounds, another signed by former President Eduardo Frei Montalva and three hundred other leading intellectuals and former political leaders, and a third from the nation's religious leaders.[45] Despite this lobbying, on August 25, 1976, the Court upheld the appeals court decision,[46] arguing, first, that the International Covenant on Civil and Political Rights couldn't apply because it had never been promulgated and published in the *Diario Oficial*, as required by Decree Law No. 247 of January 17, 1974.[47] Second, the Court asserted that it did, in fact, have the right to "ponder the justification given for the decree of expulsion," since this was "indispensable to resolving the acceptability of a petition for habeas corpus"; however, without further explanation, it stated that "this had been done."[48] This latter argument outraged the two exiles and the legal community supporting them, for it invoked the need for scrutinizing the rationality of the expulsions, yet accepted the expulsions on the basis of no scrutiny whatsoever (Velasco 1986: 170–171). The Court seemed simply to have accepted the government's argument that the reasons behind the expulsions were a matter of national security, and that a ruling in favor of Castillo and Velasco "could create problems of public order" (Cavallo, Salazar, and Sepúlveda 1997: 113). Indeed, the president of the Supreme Court, José María Eyzaguirre, stated,

[44] The full text of the decision was reprinted in the monthly report of the *Vicaría de la Solidaridad* for July 1976, on file at the FDAVS.

[45] The public statement of the religious leaders outraged the editors of the newspapers supporting the regime. Both *El Mercurio* and *La Segunda* denounced the illegitimate meddling of the ecclesiasts in the judicial process (Velasco 1986: 148–149).

[46] The case was decided unanimously by Justices Eyzaguirre, Erbetta, Correa, Retamal, and Pomés.

[47] Ever trying to improve his image abroad, Pinochet promulgated the treaty on November 30, 1976, via Decree Law No. 778 but, crucially, did *not* have the decree law published in the *Diario Oficial*.

[48] See the monthly report of the *Vicaría de la Solidaridad* for August 1976, on file at the FDAVS. The decision is also discussed in Detzner 1988 and Velasco 1986.

"I don't believe Velasco is a terrorist, but he is acting against other legal dispositions," such as the "political recess."[49]

Review of Military Court Decisions

The willingness of the Supreme Court to abandon established legal principles and procedures and, thereby, extend carte blanche to the military's "war on terror," was also evident in its abdication of review power over the decisions of military tribunals. Its first major decision in this regard was issued soon after the coup, in a *recurso de queja* brought against the members of a Valparaíso war tribunal for for their life sentence against an alleged leftist spy.[50] On November 13, 1973, the Court not only refused the appeal but also renounced altogether its power to review the decisions of wartime military courts. The decision argued that because Decree Law Nos. 3 and 5 had declared the country to be in a state of war, the Military Code of Justice was in effect and war tribunals were in operation. It was the general in charge of the territory in question who had the exclusive power to approve, revoke, or modify the decisions of the wartime tribunals and discipline its members. The Court claimed that, "for obvious reasons," it could not exercise jurisdictional power over the military line of command, and thus could not intervene to alter the decision.[51]

The Supreme Court handed down this ruling despite the fact that it had traditionally exercised – and, indeed, jealously demanded – supervision over all of the nation's tribunals, including wartime military tribunals.[52] In 1882, during the War of the Pacific, for example, the Supreme Court had annulled a sentence handed down by the General in Chief of the Chilean Occupying Army in Peru (Tavolari 1995: 79).[53] This power was so widely accepted that "even some high officials

[49] See monthly report of the *Vicaría de la Solidaridad* for August 1976, on file at the FDAVS.

[50] The defendant was Juan Fernando Silva Riveros.

[51] See *Fallos del Mes* No. 180: 222–225. The decision was rendered by the first chamber of the Supreme Court, whose members were Eduardo Ortiz, Rafael Retamal, Luis Maldonado, Victor M. Rivas, Enrique Munita, and Osvaldo Salas.

[52] This power was stipulated in Article 86 of the 1925 Constitution, as well as in Article 53 and Article 98, No. 5 of the Judicial Code.

[53] As law professor Daniel Schweitzer stated, "The interpretation and application that [legal] doctrine and jurisprudence, especially that of the Supreme Court, had always given such precepts was, until November of 1973, invariable, both before and after the writing of the *Ley Orgánica* [*de Tribunales*]; before and after the constitutional

of the armed forces were alarmed" by the Court's decision to renounce it (Velasco 1986: 156).

The Court stuck firmly to its position, however, reiterating it in the months and years that followed. In a nearly identical case brought by Sergio Roubillard González against the members of the Arica war tribunal in August 1974, a completely different set of justices used identical reasoning to conclude again that the Supreme Court lacked jurisdiction over wartime tribunals.[54] This time, however, there was one dissent, that of future Supreme Court president, José Maria Eyzaguirre. Eyzaguirre argued that Article 74 of the Military Justice Code, which grants broad powers to the commander-in-chief for the full exercise of military jurisdiction, cannot take precedence over the Constitution. The Constitution, he reminded his colleagues, states that the Supreme Court has review power over all the courts of the country, "without any differentiation or exception," and "in case of a contradiction between the [Military Justice Code and the Constitution], this Court must apply [the latter]."[55]

Unfortunately, Eyzaguirre was alone in his legal interpretation,[56] and the result was that several thousand Chileans were subjected to trial by tribunals whose judges "often had no legal training and who were mid-level officials, filled with hatred and with the desire to demonstrate their 'toughness' in order to earn merit in the eyes of the junta" (Velasco 1986: 156).[57] Between 1973 and 1976, approximately two hundred individuals were sentenced to death and executed, and thousands of others received harsh, disproportionate prison sentences (Luque 1984: 26–29; see also Ministerio Secretaría General de Gobierno de Chile 1991: Vol. I, Ch. 3; Pereira 2005). Long after the state of war was formally declared to have ended, the concepts of "potential states of war" and of the "internal enemy" persisted in the doctrine of National Security,

reforms of 1874; under the 1833 Constitution as well as under the 1925 Constitution . . . " (1975: 6).

[54] *Sergio Roubillard González* (*queja*), August 21, 1974, *Fallos del Mes* No. 189: 156–157.

[55] Eyzaguirre was clearly aware of the legal aberrations occurring in the war tribunals, for later, in session 251 of the Commission in charge of drafting the new (1980) constitution (October 19, 1976), he admitted that the military courts had handed down some "dreadful" decisions (Tavolari 1995: 79).

[56] In October 1977, Rafael Retamal reversed his 1973 position and dissented, but also was alone in doing so.

[57] Pereira reports that the average acquittal rate in Chile's military courts was only 12.42 percent (2005: 267).

which was incorporated into the 1980 Constitution. Claiming what was among the broadest jurisdiction in the world, Chile's military justice system tried approximately four civilians for every military defendant, without basic due process (Verdugo 1990; see also López 1995a; Pereira 2005). Moreover, the military courts shielded members of the armed forces and their civilian collaborators from prosecution. As Barros notes, "Montesquieu's description of justice in despotic regimes – 'the prince himself can judge' – applies to the war tribunals, since justice was being dispensed by officers hierarchically subordinate to the commanders in chief, who were creating the law" (2002: 138). The Supreme Court's abdication of its jurisdiction over appeals of decisions by wartime tribunals, and its willingness to hand cases over to the military justice system on demand, thus permitted, under a patina of formal legality, a practice that was fundamentally at odds with even the most basic definition of the rule of law.

Constitutional Review (*Inaplicabilidad por Inconstitucionalidad*)

As noted earlier, on coming to power, the junta left the 1925 Constitution in place, leaving it theoretically possible for citizens to challenge in court the constitutionality of military government policies. In some areas of the law, the Supreme Court did stand by the Constitution, at least early on.[58] Although the junta had established, in Decree Law No. 128, that it had both legislative and constituent powers, the government did not always make clear when it was exercising which of these powers. In several rent and labor law cases, the Supreme Court thus asserted its continued acceptance of the 1925 Constitution as a controlling document, and its own power to declare part or all of a decree law unconstitutional (Precht 1987).[59]

The Court never came close to doing this in more politically sensitive cases, however. In my sample from the 1973–1980 period, the justices rejected the petition for *inconstitucionalidad* in twenty-nine of thirty-two instances, and the three accepted were not particularly sensitive

[58] This made the judges more vulnerable to critique. As one analyst argues, if the Court was willing and able to stand up in defense of judicial review via the *recurso de inaplicabilidad*, "what reason would there be for not doing the same with the writ of habeas corpus, which has such an honorable and long tradition and is as important and essential, if not more so, than the former" (Amunátegui 1989: 11)?

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

cases. Despite the fact that human rights lawyers constantly appealed to the Constitution in their defense of regime victims, the justices never embraced these ready examples of more liberal reasoning. Indeed, in December 1974, when the junta issued Decree Law No. 788, stating that all previous decree laws in contradiction with the Constitution should be considered modifications thereof, the Court quickly accepted the proposition.[60] In subsequent *recursos de inaplicabilidad* and in other cases in which arguments were presented regarding the unconstitutionality of early decree laws, the Court stated simply that any decree law issued between September 11, 1973, and the day that Decree Law No. 788 was issued could not conflict with the 1925 Constitution, as "it must be necessarily accepted that [these laws] have had and have the quality of tacit and partial modifications" to the Constitution.[61] That Decree Law No. 788 itself made a mockery of the Constitution, judicial review, and the rule of law seemed either to elude or simply not to bother the justices.[62]

Later, when the regime issued the four Constitutional Acts to replace the 1925 Constitution, the justices waffled on the effects of Decree Law No. 788. When lawyers attempted to argue that the provisions in Decree Law Nos. 81 and 604 (regarding expulsion) were in conflict with the protections offered by Constitutional Act No. Three and should be declared unconstitutional, the Supreme Court declared that Decree Law Nos. 81 and 604 had acquired constitutional rank via Decree Law No. 788 and thus could only complement and not conflict with other constitutional precepts. When defense lawyers accepted that Decree Law Nos. 81 and 604 had, by means of Decree Law No. 788, modified the 1925 Constitution, and argued that they should thus be considered

[60] Decree Law No. 788 was issued while a *recurso de inaplicabilidad* filed by former Senator Renán Fuentealba was pending before the Supreme Court. Fuentealba's lawyers were arguing that his expulsion, based on Decree Law No. 81, was unconstitutional.

[61] *Luis Corvalán Lepe* (*amparo*), *Fallos del Mes* No. 203: 202–205. See also *Alfonso Salvat M.* (*inaplicabilidad*), January 8, 1975, *Fallos del Mes* No. 194: 300–303, where sixteen similar decisions are also listed, and *Luis Fernández Fernández* (*inaplicabilidad*), March 11, 1977, *Fallos del Mes* No. 220: 1–5.

[62] Note that subsequent to the publication of the four "Constitutional Acts" in September 1976, the Court began deferring many rulings on the constitutionality of laws issued previous to the Acts to lower courts, arguing that such cases were simply a matter of the supercession or survival of laws. See, for example, *Empresa Nacional de Electricidad S.A.* (*inaplicabilidad*), June 9, 1978, *Fallos del Mes* No. 235: 116–124. See also Precht 1987.

to have been tacitly repealed and replaced by the Constitutional Acts, the Court claimed that Decree Law No. 81 and 604 had *not* in fact acquired constitutional rank and were thus simply laws which helped to clarify the provisions of the Constitutional Acts.[63] The justices seemed determined to give the military government a constitutional blessing to defend "national security."

It should be noted, however, that in doing so, the Court was simply continuing a longstanding pattern in inapplicability rulings, one that predated the authoritarian regime (see Couso 2002: 177). As discussed in Chapter 2, although the 1925 Constitution gave the judiciary specific new powers to check the excesses of the other branches, judges chose only to assert this power in cases related to property rights. In more traditional "public law" cases, the Courts tended to circumscribe their own authority and defer to the executive. "Both before and after the coup, . . . the Supreme Court's review did not uphold the spirit, values, nor principles of the constitution" (Barros 2002: 112).

The New Constitutional Review Mechanism: *Recurso de Protección*

In the late 1970s, the courts were presented with some of the first *recursos de protección*, which had been created by the Constitutional Acts of September 1976. As noted earlier, the *recurso de protección* offered the courts a new and explicit means to defend individual rights. However, Decree Law No. 1,684, published on January 31, 1977, had declared the writ inadmissible (*improcedente*) during states of emergency. Sometimes the courts interpreted Decree Law No. 1,684 sweepingly, arguing that it precluded them from ruling on the substance of any petitions for writs of protection. In these instances they rejected the petitions outright.[64]

[63] See, for example, *María Eugenia Soto Verscheure y otro* (*amparo*), March 20, 1980, *RDJ* 77 (1980) 2.4:37–38; *David Benavente G.* (*amparo*), July 8, 1980, *Fallos del Mes* No. 260: 208–209; *Silvia Costa Espinoza* (*amparo*), July 8, 1980, *Fallos del Mes* No. 260: 206–208; *José Ormeño V.* (*amparo*), August 5, 1980, *Fallos del Mes* No. 261: 254–257; *Rosaura Mendoza C.* (*amparo*), December 31, 1980, *Fallos del Mes* No. 265: 445–448; *Andrés Zaldívar Larraín* (*amparo*), January 26, 1981, *Fallos del Mes* No. 266: 499–505.

[64] See, for example, *José Mora Escalona* (*protección*), June 1, 1977, *Fallos del Mes* No. 223: 122–123, *Ricardo Cifuentes Iturra* (*protección*), September 8, 1977, *Fallos del Mes* No. 226: 240–241, *Ormeño e hijos Ltda.* (*protección*), March 10, 1980, *RDJ* 77 (1980) 2.1: 15–16, all Supreme Court decisions; and *Fernando Palma Montenegro*

Other times, though, the courts argued that Decree Law No. 1,684 only applied to writs involving the rights which were explicitly subject to restrictions under states of emergency (speech, association, assembly, etc.); thus, petitions filed to protect the right to life or the right to property, for example, were admissible even under a state of emergency and had to be ruled on on their merits.[65]

Unfortunately, this more liberal interpretation did not produce greater judicial protection for regime opponents. In the case of *José Miguel Benado Medwinsky*, for example, the petitioner filed a *recurso de protección* to "restore the rule of law" and have the courts send help to "save the life" of a CNI prisoner who claimed he was being tortured.[66] In the first instance, the Santiago Appeals Court (Judges Cereceda, Ossa, and Alvarez) rejected the petition on grounds that it was inadmissible in a state of emergency. In an unusual twist, the Supreme Court (Justices Retamal, Maldonado, Rivas, Correa, and Urrutia) reviewed the decision and remanded the case to the Appeals Court, arguing that although a *recurso de protección* could not be brought against an arrest under a state of exception, torture was not authorized by such an exception, and, hence, the Appeals Court was obliged to rule of the merits of the case. Rather than seize the opportunity to assert its authority in cases involving bodily integrity, the Appeals Court swiftly ended the matter by declaring that the petitioner had already attempted to get protection via the *recurso de amparo*, and was denied at both the appellate and Supreme Court levels; thus, there was nothing further to investigate.[67]

(*protección*), December 18, 1980, *RDJ* 77 (1980) 2.2: 138–140 (Santiago Appeals Court).

[65] See, for example, *Rubén Waisman Davidovich* (*protección*), July 10, 1980, *RDJ* 77 (1980) 2.2: 82–85; *José Miguel Benado Medwinsky* (*protección*), August 13, 1980, *RDJ* 77 (1980) 2.4: 124–126; *Aída del Carmen Cerro Saavedra* (*protección*) October 13, 1980, *RDJ* 77 (1980) 2.2: 178–186.

[66] September 12, 1980, *RDJ* 2.4: 180–184.

[67] A reverse process occurred in the case of *Emilio Filippi Murato y otros* (*protección*), October 17, 1980 (*RDJ* 77 (1980) 2.1: 131–135). In this case, the Supreme Court overruled the Santiago Appeals Court (Judges Libedinsky, Gálvez, and Faúndez), which had accepted a *recurso de protección* filed by an opposition press agency denied authorization for a new publication. The appellate judges argued that the military officer in charge of a territory under a state of emergency did not have the right to deny this authorization. The Supreme Court, however, contended that the Law of Internal State Security authorized military leaders to issue any orders deemed necessary to maintain public order, including limitation or suspension of the freedom of press.

High-Profile Public Law Cases

No analysis of the role of the judiciary in the authoritarian period would be complete without a discussion of some of the era's most high-profile cases, many of which carried over into the new democratic regime after 1990. It should be noted, however, both here and later in this chapter (1981–1990 section), that only some of these decisions were published in the country's jurisprudential journals. Therefore, the discussion of these cases is based primarily on information from the archives of the *Vicaría de la Solidaridad* (the human rights organization sponsored by the Catholic Church), press accounts, books published after 1990, and, where possible, the published decisions themselves. My objective in presenting these is twofold: to provide specific information on how the courts dealt with cases of which the mass public was very aware, and to introduce legal issues and debates that continued to be of central relevance in the postauthoritarian period.

At the end of 1978, the earth-shaking discovery of fifteen cadavers, apparently buried alive in an old mine oven at Lonquén, held promise that, at last, the Supreme Court might recognize and take action regarding the disappeared. On December 1, representatives from the *Vicaría de la Solidaridad* held a meeting with the new president of the Supreme Court, Israel Bórquez, who reacted by saying he was "tired of the fabrications of the Church." Despite his negative reaction, they finally persuaded him to raise the issue to the plenary of the Court. The report presented to the Court was carefully crafted so as to keep the exact location of the discovery secret. The greatest fear of human rights defenders was that the DINA would get access to the information and somehow destroy the evidence (Atria 1989 Vol. II: 153). The Court thus ordered the local judge, Juana Godoy, to confirm the report.

Five days later, after the bodies had been exhumed, the Court appointed Santiago Appeals Court judge Adolfo Bañados Cuadra as *ministro en visita* to the case. Bañados began his investigation immediately. Meanwhile, the Minister of the Interior declared that the government did not "discard the possibility that, in the struggle that inevitably had to be waged after September 11, 1973, in order to repel attacks by armed groups and destroy an organized subversion with the magnitude of a civil war, there could have been people of that side who died without being opportunely identified." In addition, *El Mercurio* editorialized that the public should understand clearly "the unfortunately inevitable character of past repressive acts" that were not crimes but were simply "the carrying out of military duties, in a period of

commotion and conflict which was very much like a civil war." For his part, Bañados clarified that "there had not been a war in Chile" (P. Verdugo 1990: 154).

Within four months, Bañados had completed his investigation, concluding that the bodies corresponded to fifteen individuals from Isla de Maipo who had been murdered in a single act on or about October 7, 1973, and for which police Captain Lautaro Castro and his subordinates appeared responsible. Because uniformed personnel were thus clearly implicated in the crime, Bañados declared himself without jurisdiction and passed the case to the Santiago military court. In August 1979, in a statement explicitly recognizing the guilt of eight policemen in the crime, the military judge, general Enrique Morel Donoso, applied the 1978 Amnesty Law and definitively closed the case.

When the Martial Court upheld the definitive closure of the case, lawyers for the victim's families filed a *recurso de queja* with the Supreme Court, arguing that the provisions of the 1949 Geneva Conventions, to which Chile was a signatory, trumped the amnesty law and obligated the country to prosecute war crimes. Not only had the junta declared the country to be in a "state of war" between September 1973 and September 1974, but the Supreme Court itself had invoked this reason to abdicate jurisdiction over military tribunals. Thus, the acts committed by military officials during this period were subject to the regulations established by the Geneva Conventions, and the country had the duty to try and to punish those accused of violating these regulations.[68] Without entering into a substantive analysis of this argument, the Court rejected the *recurso de queja*.

The Supreme Court also overturned a decision of the Martial Court that had given a small victory to the relatives of Lonquén's victims. On his closure of the case, the first-instance military judge had ordered the removal of the victims' remains from the morgue where they were kept during the investigation. Even as family members were in church awaiting the release of the bodies for a funeral service, the judge had the remains whisked off and buried in a common grave in the Isla de Maipo cemetery. The families thus filed a disciplinary action (*recurso de queja*) against him, which was upheld by the Martial Court. On appeal, however, the Supreme Court overturned the decision, arguing that legally the victims had not been individually identified for the purposes of

[68] See the monthly report of the *Vicaría de la Solidaridad* for November 1979, on file at the FDAVS and Pacheco 1985.

burial, and that thus no mistake or abuse had been committed by the military judge (Pacheco 1985; P. Verdugo 1990: 166–168).[69]

For the families of the victims of Lonquén, then, justice had not been served. However, Judge Bañados had proven that horrific crimes had been committed by military personnel and then covered up by the government, and, moreover, that with a decided effort, the truth about such crimes could be discovered. For many, he was thus the "exception that proved the rule" about judicial passivity toward and, hence, complicity in the brutality of military rule.

Bañados's conduct contrasted particularly strongly with that of the Supreme Court in another politically transcendent case decided in 1979: the request from the United States for the extradition of the suspects in the Letelier murder. As noted above, in early 1978 the United States had begun formal inquiries into the Letelier case in Chile. On determining that DINA agents were inculpated in the case, the appellate judge specially appointed to the case had declared a lack of jurisdiction and handed the investigation over to the military justice system. On August 1, 1978, however, on the basis of the confession offered by Michael Vernon Townley (mentioned earlier), the Federal Grand Jury of the District of Columbia was able to indict Townley, five Cubans, and three members of the Chilean army on charges of conspiracy and the first-degree murder of Orlando Letelier and Ronni Moffitt. On September 20, the United States thus formally requested the extradition of General Manuel Contreras, Colonel Pedro Espinoza, and Captain Armando Fernández Larios.

The first extradition decision was handled by Israel Bórquez, who assumed the presidency of the Supreme Court in March of 1979.[70] On May 14, 1979, insisting that the government had not dictated any part of the decision to him, he rejected the extradition request. His decision hinged on the claim that a confession obtained via a plea bargain in

[69] See also the monthly report of the *Vicaría de la Solidaridad* for November 1979, on file at the FDAVS.

[70] Soon after his appointment, Bórquez shocked the public by telling journalists that he was "fed up" with hearing about the disappeared ("*lo tenían curco*"). When asked to comment on the U.S. grand jury indictment of DINA officials for the murder of Orlando Letelier, he quipped that a bunch of "little colored people" had been selected for the grand jury, "perhaps to hide the blush" that the indictment should have provoked. The derogatory remark only served to exacerbate the friction between the U.S. and Chilean governments (Luque and Collyer 1986: 26).

the United States was not legally valid in Chile, that is, it did not meet the allegedly strict standards regarding confessions in Chilean law. As a result, there was not enough well-founded evidence to try Contreras, Espinoza, and Fernández in the United States.[71] Bórquez did, however, note the need for further investigation by the military courts into "some of the absurd or counter-factual contradictions" established during his investigation.

Four months later, on October 1, 1979, the first chamber of the Supreme Court upheld Bórquez's decision. Although the Court pointed to specific falsehoods in the testimonies of the suspects and other witnesses, as well as the "absurd" or "suspicious" quality of certain facts surrounding the case, the justices claimed that these could only constitute "suspicions" and not "well-founded evidence" of guilt.[72] Extradition was denied and the case was then passed to the military justice system under the name of "Documental falsehood and other." At the end of 1980, a military court quietly issued a decision absolving the military officers of all wrongdoing. The ruling was based almost entirely on the reasoning of the Supreme Court extradition decision.[73]

Summary, 1973–1980

During the first seven and a half years of authoritarian rule, then, the decisions of Chile's high courts overwhelmingly favored the perspectives and policies of the regime's leadership. Most decisions appeared to reflect an acceptance of the government's argument that concentrated, unchecked power was necessary to save Chile from the permanent communist threat. Gone were the concerns, articulated during the Frei-Allende years, for Chile's "crystalline tradition of the rule of law"[74] or "the primordial obligation that the judiciary has to render justice

[71] Bórquez reached this conclusion without any analysis of American law regarding plea bargains, and almost laughably, he issued this claim at a time when procedural violations were the norm in Chile. See Jaime Castillo's prologue in Matus and Artaza 1996: 5–6.

[72] Decisions reprinted in *RDJ* 76 (1979) 2.4: 356–437. See also Matus and Artaza 1996: 222, and note that the decision became the backbone of Contreras's defense in later years.

[73] Castillo's prologue in Matus and Artaza 1996 (1, 5–7) notes that one of the military judges in charge of the case for several years turned out to be a former member of the DINA and a close friend of General Contreras.

[74] *RDJ* 69 (197) 1: xv.

and to secure respect for [citizens'] rights."[75] Rather than take stands in defense of liberal principles, the courts "tied their own hands and submitted themselves to the sad 'rule of law show.' . . . Indeed, they adopted a political position of support for the dictatorship and against Chilean Law" (Velasco 1986: 159).

[75] *RDJ* 64 (1967) 2.1: 109.

PART II

1981–1990: THE "NEW INSTITUTIONAL ORDER"

THE MILITARY GOVERNMENT'S APPROACH TO LAW (1981–1990)

In early August 1980, the military government announced the completion of the text of a new Constitution and issued Decree Law No. 3,465, convoking a national plebiscite to approve it.[76] Although Pinochet himself had argued, before the 1978 "consultation," that a formal plebiscite required electoral registers, this time he did not bother with such technicalities. All that would be required to vote was the presentation of one's identity card, even an expired one, and those who had voted would have their right thumb stamped with (allegedly) indelible ink. Once again, blank ballots would be counted as "yes" votes. Christian Democratic leaders struggled to organize a movement against the plebiscite, which they deemed blatantly illegal and even violent. However, they were unable to garner the support of the moderate Right, whose leaders feared what might happen should the "no" vote win. Moreover, opposition leaders found themselves prohibited, politically and/or economically, from presenting their arguments on television and on most radio stations (see Cavallo, Salazar, and Sepúlveda 1997: 322–332).

The plebiscite was thus characterized by fraud, intimidation, and the fear of expressing opposition. Official government statistics claimed 93.1 percent participation, with 67 percent in favor, 30 percent against, and the rest null or void. However, the opposition noted irregularities in the appointment and work of polling officers, and in the use of indelible ink to prevent voting fraud. They also established that in at least nine provinces, more than 100 percent of the population voted, and in some municipalities, the numbers voting increased by over 80 or 90 percent from 1978 (Organization of American States 1985: 271–272, 333–336; Angell 1993: 187). Despite these challenges, Pinochet trumpeted victory, and on March 11, 1981, the new Constitution became the law of the land.

[76] For a thoroughly researched discussion of the factors leading to the development of the 1980 Constitution, see Barros 2002.

The new charter was called the "Constitution of Liberty" after the book by neoliberal economist and philosopher Friedrich von Hayek. However, although the document enshrined "liberal" (here meaning free-market or libertarian) economic rights, it also sanctified antiliberal political and cultural values and practices. Not only did it "institutionalize antipolitics and anti-Marxism," but it also "explicitly emphasized the role of the patriarchal family as the basic unit of a hierarchically organized society" (Loveman 1988: 343). Like the Constitutional Acts before it, the 1980 Constitution combined noble clauses "guaranteeing" important civil liberties and protections with others that severely limited these protections. In the name of Christian values, patriotism, and "national security," the document strengthened or formalized the state's repressive powers. It was, as two analysts put it, "a masterpiece of legal obfuscation" (Constable and Valenzuela 1991: 137).

The 1980 Constitution was composed of 120 permanent articles and 34 "transitional" articles, which combined to exaggerate the powers of the president and to give extensive privileges to the armed forces. Until the new Congress was convened in 1990, the governing junta was to continue to function as the legislature. The junta retained the power to amend the constitution, but all amendments would have to be approved via plebiscite. Political parties remained banned until such time as the junta issued a new law regarding their organization.[77]

Although many of the Constitution's permanent articles were not to take effect until after 1989,[78] when elections would be held, some became effective immediately. Article 19 presented citizens' constitutional rights. The article's first section or "number" guaranteed the right to life and to physical and psychological integrity, and prohibited torture (*todo apremio ilegítimo*). Its number three promised the equal protection of the law and basic standards of due process. Number four protected the "private and public life and the honor of the individual and his family" against libel. Number five established the inviolability of the home.

[77] This summary of the 1980 Constitution is based on the *Constitución Politica de la República de Chile, Texto aprobado por la H. Junta de Gobierno y que está sujeta a aprobación por plebiscito del día 11 de Septiembre de 1980*.

[78] Because some of these articles were the subject of reform in 1989, and because their impact came after the transition, the most significant of these will be discussed in the next chapter.

Number eight allowed for the state to restrict some rights in order to protect the environment and the individual's right to live in a clean environment. The right to property, detailed in number twenty-four, eliminated the state's promise, made via amendment to the 1925 Constitution under President Frei Montalva, "to seek a suitable distribution of property," and established strict regulations regarding regulatory takings. Article 20 allowed for the defense of all of these rights via the *recurso de protección*.

Although the basic civil and political rights of the 1925 Constitution were preserved, they were severely qualified by other provisions in the document. For example, Articles 23 and 57 together prohibited formal cooperation between parties and politicians, on the one hand, and labor and community organizations, on the other. Article 22 made it every citizens' duty to "honor the fatherland, defend its sovereignty, and contribute to the preservation of national security and the essential values of the Chilean tradition." And Articles 39–41 established four states of constitutional exception which authorized temporary suspension of basic civil and political rights.

Article 40 empowered the president to decree two different states of exception simultaneously. Article 41, No. 3 suspended the *recurso de amparo* and the *recurso de protección* against measures taken by virtue of the state of siege and the state of emergency, respectively. It also explicitly prohibited the courts from reviewing the criteria invoked by the executive to justify actions taken in virtue of the states of exception. Article 41, No. 7 stated that exile orders would remain in force even after the expiration of the state of exception under which they were issued, and stipulated that in order for an exiled individual to reenter the country, the government must issue a decree explicitly nullifying the previous prohibition on that individual's return.

Article 8 declared unconstitutional all parties and movements that propagate "doctrines which attack the family, support violence, or hold a concept of society or the state that is totalitarian or based on class struggle." Individuals accused of violating the article were to be judged by the (newly created) Constitutional Tribunal and, if found guilty, would be prohibited from all participation in public life for ten years. Article 9 established that any individual found guilty of terrorism would be banned from public life for at least fifteen years. Article 90 established that it was the mission of the armed forces to "guarantee the institutional order of the republic."

As just mentioned, the charter (re-)created the Constitutional Tribunal, a body separate from the ordinary judiciary, which had seen a previous, and inglorious, incarnation in the Allende years.[79] As in this previous period, the Tribunal was charged uniquely with abstract (and *a priori*) review of legislation; that is, at the official request of the president or of one-quarter of the members of either house of Congress (or under the military regime, the junta), the Tribunal was to review the constitutionality of draft laws, decrees with the force of law, ordinary decrees referred by the Comptroller General, constitutional reforms, and international treaties.[80] Article 81 provided that the Tribunal's members would consist of three acting Supreme Court justices, selected by the Court itself, and four lawyers, one appointed by the President of the Republic, one by an absolute majority of the Senate (before 1990, the junta), and two by the National Security Council. The constitution stipulated that the members appointed by the president and the junta/Senate must have served as *abogados integrantes* in the Supreme Court for at least three consecutive years. Members would serve eight-year, staggered terms. In sum, the majority of the Tribunal's members was appointed directly by the government, and did not enjoy the secure and lengthy tenure of ordinary judges. Although one might thus expect the Tribunal to be even more subservient to the government than the Supreme Court, the contrary proved true (as will be discussed later).

In the chapter on the judiciary, meanwhile, Article 79 explicitly excluded wartime military courts from Supreme Court supervision. This meant that the Supreme Court was now officially prohibited from reviewing decisions made in some of the most sensitive political cases. Otherwise, however, the Constitution greatly increased the formal

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

[80] Note that the formal role of Chile's Constitutional Tribunal was similar to that of the French *Conseil Constitutionnel*, which is more of a legislative than a judicial body. These institutions exercise what is known as abstract and principal review, meaning the constitutionality of the law is considered in and of itself, apart from any concrete case, and the case is brought to the court uniquely for that purpose by a constitutionally designated party (see Cappelletti 1971).

power of the Supreme Court.[81] The Constitution provided that, beginning in 1989, the Court would elect three of the nine designated senators, two of these from their own ranks; three of the seven members of the Constitutional Tribunal, all from their own ranks; and four of the five members of the Electoral Tribunal, three from their own ranks. In addition, the president of the Supreme Court would hold one of the eight voting positions on the National Security Council (COSENA).[82] The COSENA, for its part, was empowered not only to issue resolutions regarding matters of internal and external state security but also to elect two members of the Constitutional Tribunal and four designated senators.

The Constitution also tightened the political control that higher court judges could exercise over their subordinates. Specfically, Article 75 gave the higher courts more discretion over promotions by practically eliminating the principle of seniority. Whereas under the 1925 Constitution, two nominees on the list of five presented to the executive had to be selected on the basis of seniority alone, the 1980 Constitution required that only one nominee be selected for seniority and stipulated that such an individual have an impeccable evaluation record. The Constitution applied the same rule to nomination lists for district level judgeships.

Added to all of these permanent provisions, the Constitution also included twenty-nine transitional articles to remain in effect for eight years, until the first elections were held. The most radical of these was transitional Article 24, which created a new type of state of emergency, totally the prerogative of the president. The article stated that if "acts of violence aimed at altering the public order are committed or if there is a danger that the public peace will be disturbed," the president could unilaterally declare a state of exception. In such cases, the president was permitted the following powers:

a. to order the arrest of people for up to five days in their own homes or in other places which are not jails, and up to twenty days in cases of "terrorist acts";

[81] In addition to the formal powers listed here, it should be recalled that the introduction of the *recurso de protección* had given both the appellate courts and the Supreme Court a powerful new mechanism of judicial review.

[82] The other seven belong to the president of the republic, the president of the Senate, the heads of the three branches of the armed forces and the head of the national police, and the Comptroller General.

b. to restrict the right to assembly and the freedom of information, the latter only by withholding authorization for new publications;
c. to prohibit entrance into national territory or expel from the country those who propagate the doctrines prohibited by Article 8 of the Constitution, those who are affiliated with or have the reputation of being activists for such doctrines, and those who carry out acts contrary to the interests of Chile or constitute a danger for internal peace; and
d. to order the internal banishment of certain people to a domestic urban locality for up to three months.

The article also declared that "measures adopted by virtue of this disposition will not be subject to any remedy (*recurso*), except that of reconsideration by the authority that ordered them." In other words, the only remedy available to those who believed their rights had been violated in such cases was a request for grace from the president, and thus, on a strict formalist interpretation, the right to habeas corpus was "effectively abolished" (Valenzuela 1995: 52).

From March 11, 1981, forward, Pinochet kept the country perpetually under both a state of emergency (Articles 39–41) and a state of danger (transitory Article 24). He also declared a state of siege twice, once during the popular protests in late 1984 and once after the attempt on his life in September 1986. Under this constitutional cover, repression of political opposition continued. Between the day the new Constitution went into effect and March 11, 1990, human rights organizations registered more than six thousand incidents of torture and cruel treatment, meaning that approximately three people per day were affected.[83] The *Central Nacional de Información* (CNI) continued, in somewhat modified form, the DINA's work of stamping out leftist subversion through torture and assassination.[84] To squelch political mobilization in urban

[83] The ratio of torture cases and cases of cruel treatment is approximately 1:5 According to the same source, all political prisoners were tortured (López Dawson 1995b: 57).

[84] This effort was fueled by the reemergence of the MIR in 1980 and the formation of the *Frente Patriotico Manuel Rodríguez* (FPMR), a guerrilla organization formed by members of the Communist Party, in December 1983. After the 1980 plebiscite, the Communist Party had officially adopted a platform endorsing violence ("all forms of resistance") to bring down the Pinochet regime. "In essence, the Communists had decided that the only sensible recourse to Pinochet's attempt to institutionalize an undemocratic, exclusionary regime was popular rebellion" (Oppenheim 1993: 178). See also Cavallo, Salazar, and Sepúlveda 1997.

shantytowns, the government carried out recurrent night-time raids (*allanamientos*), "combined police-military operations in which entire *poblaciones* [poor neighborhoods] were sealed off and all the men were at least temporarily detained while their papers were checked and their houses searched." Displaying "a complete disregard for even the minimal rights of the urban poor," the government thus cultivated fear among the general population (Oxhorn 1995: 218).[85]

THE JUDICIAL RESPONSE TO MILITARY LAW AND POLICY (1981–1990)

Until March 11, 1981, when the new Constitution went into effect, the work of the courts was still formally governed by the 1925 Constitution, albeit modified by the 1976 Constitutional Acts and other controversial decrees. After March 11, 1981, the courts no longer had the option of appealing to the principles of the 1925 Constitution, at least not as principles of positive law. As Loveman (1988: 342) puts it, the new Constitution "marked the end of the *ad hoc* emergency decrees, defined the institutional character of 'protected democracy,' and established a new juridical framework for national life. Government policy now derived from a constitutional process apparently sanctioned by a majority of the Chilean electorate. Future changes in process or policy depended on modification or elimination of this new legal system" (Loveman 1988: 342).

Judges, for their part, faced a choice, as they always do (Cover 1975), between mechanically applying individual articles of the constitution, which gave only the façade of liberal democracy, or striving to give real meaning to the new "higher law" through a more holistic and substantive interpretation. Consistent with their past performance, all but a handful opted for the former approach, continuing to justify the expansive police powers of the military government, to abdicate constitutional control of legislation, and to offer little protection to the many victims

[85] In the early 1980s, the Latin American Institute on Mental Health and Human Rights (ILAS) estimated that at least 10 percent of the Chilean population was affected by a repressive situation, which could include arrests, threats, the imprisonment, disappearance, or death of a relative, or expulsion from school, work, or the country. Of these individuals, some two hundred thousand were suffering extreme trauma as the result of torture, detention in a prison camp, or exile. From http://www.derechoschile.com/english/victims.htm, accessed October 5, 1999.

of repression. As in the past, judges demonstrated flexibility and creativity in defense of the regime's policies. When faced with protecting the rights of the opposition, or with the possibility of promoting liberal-democratic principles and practices, however, they generally claimed that the laws tied their hands. With discourse that echoed that of the government, many judges, especially those on the Supreme Court, made clear that there were virtually no limits on the "reason of state."

Strikingly, this judicial performance persisted despite the fact that societal challenges to the legitimacy of the authoritarian regime multiplied throughout the 1980s, providing ample opportunities for judges to ally with dissidents to critique the regime's twisted legality. In May 1983, in the wake of the economic crash,[86] national protests broke out and continued monthly for the next five months. The government responded with varying levels of repression. The explosion of protests transformed opposition journalists, whom the government had previously licensed to publish news magazines, into "bothersome witnesses."[87] In the years that followed, the opposition press thus waged an almost constant battle with the government. Judges, however, remained on the sidelines.

By August 1983, former leaders of the political Center, along with some "renovated" leftists, had formed the Democratic Alliance (*Alianza Democrática* or AD), which called for Pinochet's resignation, a constitutional convention, and an expedited transition to democracy. This group rejected the use of violence, and somewhat warily agreed to negotiate with the government, through the civilian Minister of the Interior, Sergio Onofre Jarpa. This political opening proved short-lived, however. On the fifth national day of protest (September 8, 1983), despite Jarpa's promises to the contrary, the police fiercely repressed the demonstrations

[86] From 1977 to 1981, Chile's economy had grown at an average annual rate of more than 7 percent. The government boasted of having brought about "the Chilean Miracle," despite the fact that unemployment remained over 15 percent and Chile's foreign indebtedness surged. In 1982, a dramatic drop in copper prices and a sudden devaluation of the peso led to a severe economic crisis. Several private banks collapsed and were taken over by the government. Unemployment reached record levels, and family incomes dropped by almost a third. The economy experienced a modest recovery between 1984 and 1986, but, by 1987, household shares of income were comparable to that of the late 1960s (Loveman 1988: 346–349; Falcoff 1989: 301–302).

[87] "Prensa: Censura y Represión," *ANALISIS* (September 7–13, 1987), 60.

(Otano 1995; Cavallo, Salazar, and Sepúlveda 1997). Judges continued to comply with the regime.

Over the course of 1984, Pinochet revamped his cabinet with regime hardliners and clamped down on the opposition. His government tightened its leash on the press, broadened legislation defining and punishing terrorism, and expanded the scope of military justice and protections for military personnel (Jiles 1984; Ministerio Secretaría General 1991: 95). Supreme Court President Rafael Retamal, often a lone dissenter in these years, made a brave effort to critique the regime's tactics.[88] But, in short order, his colleagues met in plenary to denounce his statements and distance themselves therefrom. Moreover, the justices took the unprecedented action of signing an official censure against their president, arguing that the speech he had made "could lend itself to interpretations of a political nature, [and] the law prohibits justices from engaging in politics" (Matus 1999:143).[89]

Despite setbacks, the regime's opposition continued to organize. In August 1985, eleven political groups signed the "National Accord for a Transition to Full Democracy." They called for an end to the states of exception, an end to exile, and constitutional reforms to eliminate the central elements of the 1980 Constitution (economic neoliberalism, national security doctrine, and "protected democracy"). The regime's claim to majority support was becoming increasingly dubious.

Perhaps for this reason, other legal actors began to show some mettle and take stands in defense of liberal democratic/rule of law principles. In 1985, for example, the Constitutional Tribunal issued the first of a series of crucial decisions that set basic standards for free and fair elections in the 1988 plebiscite and beyond.[90] Appealing to the overall structure and spirit of the fundamental law, which both guaranteed political rights and outlined a return to democracy, the Tribunal insisted on the

[88] See, for example, *RDJ* 81 (1984) 1: vii–x.

[89] In July 1984, the Court issued an official prohibition of demonstrations or meetings in or around any of the nation's court buildings (Records of the Plenary of the Supreme Court, Vol. 22).

[90] Subsequent decisions included that of October 1, 1986, that revised the law on electoral registers, that of March 7, 1987, which reduced the constraints on political party organization, and that of April 1988, which set campaign standards and required clear dates for the 1988 plebiscite and for the presidential and parliamentary elections that might follow (and did, as Pinochet lost the plebiscite). See *Fallos del Tribunal Constitucional*, 1993.

establishment of an independent electoral commission – the *Tribunal Calificador de Elecciones* or TRICEL – for the 1988 plebiscite. According to transitory Article 11 of the Constitution, the TRICEL was to begin operating "on the appropriate date" for "the first election of senators and deputies." The bill that the junta presented to the Constitutional Tribunal for review thus established that the TRICEL would begin to function in December 1989. However, Tribunal member Eugenio Valenzuela – who was, it should be noted, one of the four members directly appointed by the junta – appealed to the spirit rather than letter of the law, arguing that if the Constitution itself recognized the existence of a "public electoral system," then there was no reason to exempt the 1988 plebiscite, which would inaugurate the transition process, from the rules of such a system. Valenzuela was able to persuade three other Tribunal members, including two members from the Supreme Court, Luis Maldonado and José María Eyzaguirre, to vote with him. On September 24, the Tribunal thus issued a 4–3 ruling, and the government was forced to revise the legislation.[91]

In 1986, the national bar organization (*Colegio de Abogados*), which had officially supported the military regime in its early years, began publicly criticizing the country's legal situation. In July of that year, the first national congress of lawyers under dictatorship issued a statement declaring that the rule of law did not exist in Chile; that the 1980 Constitution was illegitimate; and that nobody could be obligated to obey unjust laws. The lawyers thus resolved to "assume the moral and patriotic duty of promoting, from this moment, political and social democracy and the exercise of rights and liberties that are universally consecrated." The jurists also strongly criticized the country's judges, contending that "a diligent and responsible judicial labor would have avoided or reduced the impunity of the many crimes which have gone without punishment, saving many lives, [and] avoiding exile, disappearances, torture, and other suffering" (Oliva 1986).

In response to such criticism, which only increased in subsequent months, the Supreme Court offered explanations grounded in formalist reasoning. The justices argued that "we apply the law, which is written reason." If there exists any "silence, obscurity, contradiction, or insufficiency in the law, it falls to other sources to decide and respond." The Civil Code "establishes that when the meaning of the law is clear, [the

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

judge] will not ignore its literal meaning on the pretext of consulting its spirit." Thus, they claimed, it would appear that "some people believe that the fulfillment of a legal mandate merits censure" (*El Mercurio*, July 8, 1987: 1).

To demonstrate how this dismissive attitude played itself out in the jurisprudence of this period, the following sections summarize judicial performance in three of the four areas discussed for the 1973–1980 period: habeas corpus, or *amparo*; *recursos de protección*; and *inaplicabilidad por inconstitucionalidad*. In addition, I offer a discussion of the most high-profile, and hence most politically salient, cases of the 1981–1990 period.

Habeas Corpus (*Amparo*)

The situation surrounding *recursos de amparo* in the 1981–1990 period remained miserable. As Roberto Garretón reports, only in ten to twelve cases out of ten thousand did the courts order the CNI to bring a detained person to the court (n.d.: 42). Once again, my limited sample of all published decisions from the 1981–1990 period looks good by comparison: the courts granted habeas corpus petitions in seven of sixty-two total decisions (or 11 percent). However, since five of these were at the appellate level, and subsequently appealed, the number of cases in which individuals actually received judicial protection is only *two*. Notably, one of these involved a right-wing lawyer who had been cited (but, crucially, *not* detained) for public libel against one of the witnesses in the Letelier case. The courts ordered that the charges be dropped.[92] The other case involved high-profile members of the Christian Democratic Party who had been arrested on grounds that, by participating in a peaceful protest, they had violated the Law of Internal State Security. Both the Santiago Appeals Court and the Supreme Court held that their "respectful and non-violent social dissidence" did not constitute incitement to subversion of the established order, and that therefore, they must be released.[93]

These isolated rulings, along with the individual dissents that became increasingly common in such cases (twenty-three instances in the sixty-two cases in my sample), indicated that there was an awareness of and concern about rights abuses among some judges. Yet only a few judges

[92] *Contra Carlos Cruz Coke-Ossa, RDJ* 78 (1981) 2.4:152–160.

[93] *Gabriel Valdés Subercaseaux; Jorge Lavandero Illanes, y otros, RDJ* 80 (1983) 2.4: 79–84.

Table 4.2. Individual votes of judges in published *amparo* cases, 1973–1990*

	Appellate court	Supreme court
Votes to Grant	24 (27%)	30 (15%)
Votes to Deny	65 (73%)	175 (85%)

* Votes of substitute judges (*abogados integrantes*) not included. They accounted for 17 percent of the total votes and sided overwhelmingly (95 percent) with the government.

were willing to take stands in defense of rights principles. Table 4.2 gives the total of individual votes to grant or deny *amparo*, both at the Supreme and appellate levels, in my 1973–1990 sample (the vast majority of which came after 1981).

The numbers look relatively good, especially at the appellate level, until one gets inside them. For the Supreme Court, it was two justices that accounted for more than half of all the votes to grant *amparo*: Rafael Retamal with eight and Enrique Correa with ten votes, respectively. A full fourteen of the twenty Supreme Court justices (or 70 percent) that served under the authoritarian regime never cast a single vote to grant *amparo* (at least not in the published cases). At the appellate level, a single judge, Carlos Cerda Fernández, of the Santiago Appeals Court, accounts for nine of the twenty-four votes (or 38 percent) to grant *amparo*. Thirty-two of the forty-four appellate judges (or 73 percent) whose names appeared in the published cases never cast a single vote to grant *amparo*.

Indeed, in general, the courts remained very passive in the face of the regime's abuses. After the new constitution went into effect, the government issued arrest and exile orders citing either permanent Article 41 or transitory Article 24. In cases in which the government's order was based on Article 41, the courts generally referenced the clause that prohibited judicial review of the executive's criteria to justify actions taken in virtue of the states of exception.[94] In cases in which the administrative act was based on transitory Article 24, the courts often simply

[94] See, for example, *Ricardo Aníbal Ríos Crocco* (*amparo*), December 9, 1986, *RDJ* 83 (1986) 2.4: 200–203; *Ana María Torres Gutiérrez* (*amparo*), March 16, 1985, *RDJ* 82 (1985) 2.4: 67–72. Also see related cases: *Héctor Hugo Cuevas Sandoval* (*amparo*), November 17, 1983, *Fallos del Mes* No. 300: 687–689; *Tomás Fernando Inostroza Catalán* (*amparo*), December 26, 1983, *RDJ* 80 (1983) 2.4: 138–148; *Raúl Alejandro Pinochet Ruiz-Tagle* (*amparo*), March 26, 1984, *Fallos del Mes* No. 304: 41–43.

declared the writs inadmissible, citing the clause that stated that the only remedy available in such cases was reconsideration by the authority that issued the order.[95] Other times, judges claimed that the writs were admissible, but that the courts were limited to verifying that the arrest or expulsion orders had met formal requirements (i.e., had been issued and were being carried out according to the strict letter of the law).[96]

Moreover, because the Supreme Court accepted the CNI's argument that the quarters of the secret police were also military sites to which all civilians had restricted access, the appellate courts were obligated to rely on the "good faith" of the CNI to cooperate in judicial investigations. Not surprisingly, such good faith was not forthcoming. Although in 1980 the Supreme Court had advised the country's appellate courts to solicit reports on detentions from whichever government organ appeared responsible for them, the CNI, like the DINA before it, had insisted that the courts direct all inquiries on detainments to the Ministry of the Interior. In May of 1982, the Supreme Court wrote to President Pinochet protesting the lack of cooperation from the CNI in a case before the Santiago Appeals Court. Pinochet apologized, expressing his government's commitment to the "total reestablishment of the

[95] See *Manuel Ramón Almeyda Medina* (*amparo*), June 25, 1981, *RDJ* 78 (1981) 2.4: 83–85; *Gerardo Antonio Espinoza* (*amparo*), July 30, 1981, *Fallos del Mes* No. 272: 308–310; *Héctor Hugo Cuevas Salvador* (*amparo*), January 21, 1983, *RDJ* 80 (1983) 2.5: 9–12; *Cristián Castillo Echeverría* (*amparo*), April 26, 1984, *Fallos del Mes* No. 305: 146–147; *Alfredo Joignant Muñoz* (*amparo*), July 18, 1984, *Fallos del Mes* No. 308: 363–364; *Benedicto Enrique Figueroa Puentes* (*amparo*), August 22, 1984, *RDJ* 81 (1984) 2.4: 122–134; *José Miguel Insulza Salinas* (*amparo*), September 3, 1984, *Fallos del Mes* No. 310: 457–463; *Alejandro Abarca Cáceres y otro* (*amparo*), November 7, 1984, *RDJ* 81 (1984), 2.4: 240–244; *Roberto Tognarelli Barragan* (*amparo*), November 15, 1984, *RDJ* 81 (1984) 2.4: 255–266; *Fernando Salvador Arraño Oyarzún* (*amparo*), September 22, 1986, *RDJ* 83 (1986) 2.4: 219–220; *Edelmira Avila López* (*amparo*), May 28, 1987, *RDJ* 84 (1987) 2.4: 63–64.

[96] See *Martín Hernández Vásquez* (*amparo*), June 10, 1981, *RDJ* 78 (1981) 2.4: 93–94; *Carlos Podlech Micheaud* (*amparo*), January 11, 1983, *Gaceta Jurídica* 31: 34–38; *María Julieta Campusano Chávez* (*amparo*), June 14, 1984, *Fallos del Mes* No. 307: 275–280; *Francisco Márquez Pommiez* (*amparo*), January 14, 1985, *RDJ* 82 (1985) 2.4: 102–106; *Oscar Delfín Moya Muñoz* (*amparo*), April 22, 1986, *Fallos del Mes* No. 329: 169–170; *Leopoldo Ortega Rodríguez* (*amparo*), May 7, 1986, *RDJ* 83 (1986) 2.4: 43–45; *José Miguel Varas Morel* (*amparo*), July 29, 1988, *RDJ* 85 (1988) 2.4: 85–87. See also the Supreme Court's rulings in the Jaime Insunza and Leopoldo Ortega case, July 9, 1984, discussed in the the monthly report of the *Vicaría de la Solidaridad* for July 1984, on file at the FDAVS, 15–19.

rule of law," and promised that it wouldn't happen again.[97] In late 1986, after the courts of San Miguel, Concepción, and Valdivia all complained that the CNI had refused to cooperate with judicial officials and had even sent false or misleading information designed to obstruct justice, the Supreme Court sent another memo to the government. Once again, Pinochet responded by expressing "the profound disturbance that these events caused him" and indicating that he had instructed the Ministries of the Interior and of Defense "to reiterate to [the CNI] orders to proceed at all times in strict accordance to the Constitution and the Laws" (Tavolari 1995: 77; R. Garretón n.d.: 42).[98] Clearly, Pinochet, like Allende before him, was allowing his police force to use discretion in complying with judicial orders. However, these few, polite memos were the only public objections that the Supreme Court raised to the legal abuses of the military regime (Tavolari 1995: 77).

Constitutional Review I: *Recursos de Protección*

Because the *recurso de protección* had been in existence for five years, and because it was given even greater permanence by the 1980 Constitution, after 1981 Chileans increasingly employed this mechanism to claim their rights before the courts (appellate and Supreme). The following summary is based on an analysis of 118 published decisions in *protección* cases involving civil and political rights cases (excluding property) for the 1981–1990 period.[99] Of these, the courts voted to grant the writ in thirty instances, or approximately 25 percent of the cases. However, as I will explain further below, in ten of these cases the ruling actually favored the state or community over the individual, and those that did favor the individual did so only to the extent that the regime's own legal text provided explicitly for this.

As with the *recurso de amparo*, the courts used varying criteria for admitting *recursos de protección*. (Recall that the Constitution stated that the petition for *protección* was inadmissible in a state of emergency.) Sometimes judges claimed that the petition was inadmissible

[97] Records of the Plenary of the Supreme Court, Vol. 22. See also monthly report of the *Vicaría de la Solidaridad* for May 1982, on file at the FDAVS, 33–35.

[98] Records of the Plenary of the Supreme Court, Vol. 24.

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

only if the right or rights in questions were among those that could be restricted under a state of emergency.[100] Other times, they claimed that the petition was admissible if the constitutionally permitted restrictions were exceeded.[101] In addition, judges employed shifting standards regarding whether or not the petitioner was required to identify the offending party specifically or individually in order to secure a writ from the court.[102]

Substantively, decisions on *recursos de protección* tended not to challenge the administrative acts of the regime, although in the rare cases in which the regime's own legislation put some limit on the government, the courts did police the limit. Judges ruled that university rectors had the right to expel students from their institutions for participating in illegal demonstrations, and that wartime tribunals were legally empowered to judge specified acts committed by civilians. In other words, individuals judged by such entities could not claim that their rights to equality before the law and/or due process were infringed.[103] Courts also ruled that the government's cancellation of the "legal personality" (*personalidad jurídica*) of the Hare Krishna – making it impossible for the group to conduct legal transactions as an entity – was not a violation of the freedom of religion, and that the armed forces did not violate

[100] See, for example, *María Angélica Ditzel Marín* (*protección*), June 2, 1981, *RDJ* 79 (1981) 2.5: 77–83.

[101] See, for example, *Sociedad Publicitaría y de Servicios Informativos Ltda. con Ministro del Interior* (*protección*), January 5, 1983, *RDJ* 80 (1983) 2.5: 3–7; *Sociedad Editora La República Limitada, Editora de la Revista Cauce contra Director de DINACOS* (*protección*), June 11, 1984, *Gaceta Jurídica* 48: 44–47.

[102] Compare *Juna Morello Peralta* (*protección*), December 28, 1983, *Fallos del Mes* No. 301: 785–787, *Consejo Regional de Concepción del Colegio de Periodistas de Chile A. G.* (*protección*), March 25, 1985, *RDJ* 82 (1985) 2.5: 6–10, *Sindicato de Pilotos Lan* (*protección*), February 20, 1985, *Gaceta Jurídica* 56: 36–37, and *Wilhelmus Van Der Berg Verstrepen* (*protección*), March 29, 1988, *Fallos del Mes* No. 352: 32–35, on the one hand, to *Gustavo Villalobos y otros* (*protección*), April 9, 1985, *Gaceta Jurídica* 58: 46–49, *Carmen Hales* (*protección*), May 10, 1985, *Gaceta Jurídica* 58: 9–52, *Estudiantes de la Universidad Playa Ancha* (*protección*), August 7, 1986, *RDJ* 83 (1986) 2.5: 62–65, on the other.

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

the individual's right to association by prohibiting their members from belonging to the Free Masons.[104]

In cases involving the right to assembly, the courts held both the government and the public to the rules of the regime; that is, they upheld the rule that all meetings held in public places had to have previous government authorization but declared that the government could not require authorization for nonpolitical gatherings held in private locales.[105]

Freedom of expression and the press was another area in which the courts did not allow the government to stretch its own (limited) boundaries. For example, judges reminded the government that the Constitution prohibited prior censorship under a state of emergency (although it allowed it under a state of siege), and ruled that the retraction of previous authorization for publication, as well as the indefinite postponement of a decision on such authorization were also unconstitutional.[106] However, they also ruled that police harassment of journalists, in the form of covert infiltration of a reporting site, forced removal of journalists from a news scene, or seizure of journalistic equipment, did not constitute a violation of freedom of the press.[107] In addition, they endorsed the argument that hunger strikes were illegitimate forms of protest on the grounds that they violated the strikers' own right to life.[108]

In sum, in *recurso de protección* cases, judges were sometimes willing to check specific administrative acts via adhesion to the letter of the law, but proved unwilling to challenge the regime's illiberal policies

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

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

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

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

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

by seeking out a democratic spirit in the 1980 Constitution.[109] Their approach to interpretation in *recursos de protección* was thus far from the "active, dynamic, creative and imaginative" role that one prominent (and politically conservative) legal scholar proclaimed it should be (Soto 1986).

Constitutional Review II: *Inaplicabilidad por Inconstitucionalidad*

When presented with *recursos de inaplicabilidad por inconstitucionalidad* brought against laws issued after the 1980 Constitution, the Supreme Court offered interpretations that placed almost no limit on the power of the government to restrict or eliminate individual rights. In my sample of the sixteen published decisions from this period, the Court found constitutional violations in only two cases, both involving a law, passed by the junta, that sought to resolve, in favor of the state, disputes dating to the agrarian reform (Frei-Allende period).[110] In these cases, the Court argued that the law violated Article 73, paragraph 1 of the 1980 constitution, which states that the power to resolve civil and criminal disputes belongs exclusively to the judiciary, and that neither the president nor the Congress can, in any circumstances, revise the content of judicial decisions or revive cases that have closed. As in the past, the Court jealously guarded its authority over civil law matters and the traditional strict separation of powers; when traditional matters of public law were in question, however, the Court refused to challenge the executive.

For example, the Constitution required a "supermajority" (*quórum calificado*) to pass legislation establishing the death penalty for any crime. However, the Court rejected the argument that the governing junta could not form such a supermajority, holding that the constitutional provisions regarding legislative procedure would only apply after a new Congress had been elected in 1989. Until that time, then, the junta could issue virtually any law it pleased, as it maintained both legislative and constituent powers.[111]

[109] As noted earlier, some dissenters, as well as members of the Constitutional Tribunal, proved this was possible.

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

[111] See *Hugo Jorge Marchant Moya* (*inaplicabilidad*), November 10, 1986, *RDJ* 83 (1986) 2.5: 139–144.

In another *inaplicabilidad* case, the Court argued that the state had the perfect right to limit the freedom of assembly in the interest of public order, the common good, and the security of the state. Therefore, despite the fact that the Constitution guaranteed the right "to gather peacefully without prior permission and without arms," a law penalizing "those who without authorization foment or convoke public collective acts in the streets, plazas and other public places and those who promote or incite demonstrations of any other type which allow or facilitate the alteration of public tranquility" could not be considered unconstitutional. In a decision largely justifying the expansive police powers of the military regime, the Court found that there were no constitutional limits to the restrictions the government could place on public assembly if the government assessed that the public gatherings in question "altered public tranquility" or otherwise threatened the rights of other members of the society.[112]

Similarly, in a *recurso de inaplicabilidad* brought against the inclusion of "apology for terrorism" as a terrorist act in Decree Law No. 18,314, the Court ruled that the government had the broad and exclusive constitutional right to determine what qualified as a terrorist act and how such an act should be punished.[113] And in another case in which the vagueness of a law limiting the freedom of expression and the freedom of press was challenged, the Court ruled that it was sufficient for the law to signal that "all acts in violation of measures taken by virtue of the president's extraordinary powers" were to be met with specified penalties. In other words, the Court gave the president free reign to determine, as a state of "emergency" unfolded, precisely which acts were violations of the public order and merited the sanctions previously established by law. Moreover, the Court declared that the administrative acts issued under such conditions, that is, those that "complemented" or clarified the law, could not be challenged via a *recurso de inaplicabilidad*, as the petition could only be brought against *laws*, not other administrative edicts.[114]

[112] *Rodolfo Seguel Molina y otros* (*inaplicabilidad*), January 28, 1986, *Fallos del Mes* No. 326, 980–992. Note that Justice Retamal dissented.

[113] *Clodomiro Almeyda Medina* (*inaplicabilidad*), January 26, 1988, *Fallos del Mes* No. 350: 1013–1019. It should be noted that the charge against Almeyda was based on statements he made to the press during his years in exile. In the end, he was sentenced to 541 days in prison.

[114] *Emilio Filippi Murato* (*inaplicabilidad*), October 7, 1988, *RDJ* 85 (1988) 2.5: 241–245.

A final example of the Court's leniency toward the government in a *recurso de inaplicabilidad* is the decision in a 1985 case challenging the constitutionality of Decree Law No. 3,655. This decree had expanded wartime military jurisdiction, procedure, and punishments to cover cases of violence against members of the police and armed forces.[115] In this case, the plaintiff claimed that since Decree Law No. 3,655 had been published after the 1980 Constitution, and since it was a law relating to the organization and attributions of the judiciary, it should have been reviewed by the Court before becoming effective, as Article 74 of the 1980 Constitution established. Because the government had not sent the law to the Court for review, its application could not be considered constitutional. In their decision, however, the justices applied a looser standard than they had in the past regarding the requirement of publication for laws to go into effect. The justices claimed that although the law had not been published until March 17, 1981, it had been issued on March 10, 1981. The constitutional status of Decree Law No. 3,655 was thus to be determined in the same way as that of other laws issued before the 1980 Constitution.[116]

Since 1978, however, the Supreme Court had consistently abdicated its power to review the constitutionality of laws issued before new constitutional provisions. The high court's official stance was that the status of decree laws issued prior to the day that the 1980 Constitution went into effect should be determined by lower court judges in concrete cases. From 1981 to 1990, the Court held that because what was at issue in such cases was simply the survival of the laws or their supercession by the Constitution, it was not the role of the Supreme Court to decide whether or not the Constitution had rendered the previous laws null and void. This was something any judge should be able to determine.[117]

[115] Decree Law No. 3,655 declared that henceforth cases of violence against members of the police and armed forces would be tried in wartime military tribunals according to wartime procedure and with the application of wartime (i.e., heightened) punishments. Decree Law No. 17,983 of March 28, 1981, clarified that until 1989, the governing junta would continue to exercise both constituent and legislative powers (reiterating transitory Article 28), and explained how bills would be processed in the government.

[116] *Hugo Jorge Marchant Moya* (*inaplicabilidad*), January 29, 1985, *RDJ* 82 (1985) 2.4: 51–59. Note that justices Retamal, Erbetta, and Meersohn dissented in this case.

[117] See, for example, *José Guerra Bastías* (*inaplicabilidad*), December 31, 1985, *Fallos del Mes* No. 325: 865–867. Again, Retamal and Erbetta dissented. For other examples, see Precht 1987.

The Court also consistently abdicated its power to determine whether the military government's laws had been passed according to constitutional procedural standards, that is, to review laws for formal constitutionality. The justices offered two arguments for this. First, they claimed that a ruling of formal unconstitutionality was a form of abstract review (i.e., unconnected to any concrete case or controversy), and as such did not fall within the power of the Supreme Court.[118] Second, they argued that if procedural errors had been made in passing a bill into law, then the law was simply null and void, that is, it was not a law at all. Since no *recurso de inaplicabilidad* could be brought against something that was not a law, it was the responsibility not of the Supreme Court but of lower-court judges to determine this nonexistence and reject or ignore the faulty disposition in any given case before them.[119] On many issues of constitutional review, then, the Supreme Court justices passed the buck to their subordinates, who, as one analyst notes, "obviously avoided any pronouncement" on such matters (R. Garretón n.d.: 69). As this book elucidates, judges who had been socialized into a professional ideology of antipolitics and whose career prospects were largely in the hands of the conservative Supreme Court were hardly disposed to review matters which their superiors saw no reason to challenge.[120]

High-Profile Public Law Cases

In late March 1985, Chileans were stunned by the brutal roadside murder, by throat-slashing, of three members of the Communist Party. Santiago Appeals Court judge José Cánovas was assigned as *ministro en visita* to the case. Despite death threats, Cánovas was able, in the space of three months, to accumulate a file of some one thousand pages on what became known as the *degollados* (slit-throats) case. Based on a report from the CNI, the judge pinpointed an intelligence unit of the national police (*Carabineros*) called DICOMCAR as the main group of suspects.

[118] See *Sociedad Agrícola y Maderera Neltume Limitada* (*inaplicabilidad*), April 19, 1985, *RDJ* 82 (1985) 2.5: 86–104; and *Jaime Bunster Iñíguez y otros* (*inaplicabilidad*), January 29, 1987, *RDJ* 84 (1987) 2.5: 23–30.

[119] See *Arnoldo Wünkhaus Ried* (*inaplicabilidad*), October 13, 1987, *Fallos del Mes* No. 347: 682–684; *Alvaro Zúñiga Benavides y otros* (*inaplicabilidad*), June 15, 1988, *RDJ* 85 (1988) 2.5: 97–109.

[120] Precht says that lower court judges "seem to have viewed this transfer of jurisdiction . . . as a 'poisoned gift'" (1987: 101).

Displeased with his rapid progress in the investigation, the government urged his removal from case, but the president of the Supreme Court, Rafael Retamal, insisted that he persevere.

On July 30, certain that the crime had been committed by members of the armed forces, Cánovas declared himself without jurisdiction and attempted to pass the case to a military court. Before doing so, however, he issued preliminary indictments and arrest orders on high-ranking police officers. His findings were so damning that their publication rocked the government. "For the first time since the military coup, a member of the judiciary had accused the regime's security forces of a crime."[121] Leading police officials, including junta member César Mendoza, announced their retirement. Not wanting to see the armed forces implicated institutionally in the crimes in question, or to risk having the government accused of cover-up, the government ordered the military courts to refuse jurisdiction on the grounds that the crimes were acts of terrorism (i.e., they fell under the Anti-Terrorist Law).[122] The Supreme Court thus voted to keep Cánovas on. One month later, after indicting more people, Cánovas again attempted to pass the case to the military court, but the Supreme Court ruled a second time to keep the case in Cánovas's hands.[123]

In November 1985, the Santiago Appeals Court released two of the suspects. The following January, the Supreme Court declared there were insufficient grounds for indictment of four more, including DICOMCAR chiefs Luis Fontaine and Julio Omar Michea. The Court reached this conclusion after spending less than a day reviewing the two-thousand-page court record compiled by Cánovas.[124] The decision provoked a strong reaction from the National Bar Association, whose president, Raúl Rettig, resigned in protest. Frustrated by his superiors, Cánovas applied temporary closure to the case. Given that "the higher

[121] From http://derechoschile.com/english/dissidence.htm, accessed October 5, 1999.

[122] The junta had issued Law 18,314, the "Anti-Terrorist Law," on May 17, 1984, as part of the crackdown against the opposition. The law defined terrorist acts in very broad terms and established harsh penalties for both direct and indirect participation. In this case, the government sought to prosecute the crime as an isolated act of "terrorism," so the murders could be pinned on (alleged) rogue elements that acted outside of official orders.

[123] Monthly report of the *Vicaría de la Solidaridad* for August 1985, on file at the FDAVS, 27–38.

[124] Monthly report of the *Vicaría de la Solidaridad* for January–February 1986, on file at the FDAVS, 23–9.

courts have decided" that there is insufficient evidence to accuse a specific person as author, accomplice, or concealer of the crime, Cánovas announced that it was "impossible, for now, to continue the investigation."[125] He retired from the judiciary on March 28, 1989, leaving the unsolved case behind him (see also Cánovas 1988; Caucoto and Salazar 1994).

Although his efforts were frustrated by his superiors, Judge Cánovas's investigation had not been in vain. The detention of one of the individuals he indicted, the civilian Miguel Estay Reyno, allowed another *ministro en visita*, Judge Carlos Cerda Fernández, to subpeona him for testimony.[126] Judge Cerda was investigating a case involving thirteen communists who disappeared in 1976. The case had been briefly investigated by another appellate judge but closed for lack of evidence in 1977. Cerda, a persistent dissenter in these years, had pursued the investigation in earnest and concluded that it was not "excessive repressive zeal" on the part of a few individuals that had caused the 1976 disappearances, as the government maintained. Rather, the disappearances were the methodical work of an organization whose mission was to exterminate the Communist Party, a branch of the DINA known as the *Comando Conjunto Antisubversivo*. On August 14, 1986, Cerda thus indicted forty people, all but eight of whom were members of the armed forces.

The indictment provoked a rapid reaction from defense lawyers, who filed several judicial petitions to paralyze the case. The following month, the Santiago Appeals Court upheld a *recurso de queja*, ordering Cerda to apply the amnesty law and close the case definitively. On October 6, the Supreme Court ratified the decision. Cerda refused and, as will be discussed later, was suspended for two months with half his pay. In Cerda's absence, the high court's order fell upon the judge who temporarily replaced him in the case. This judge complied with his superiors and closed the case definitively (P. Verdugo 1990: 306–309).[127]

Judge Cerda was the first judge to articulate explicitly the thesis that amnesty could not be applied until guilty verdicts had been determined.

[125] Monthly report of the *Vicaría de la Solidaridad* for January–February 1987, on file at the FDAVS, 56–8.

[126] Monthly report of the *Vicaría de la Solidaridad* for November 1985, on file at the FDAVS, 51–52.

[127] Monthly report of the *Vicaría de la Solidaridad* for August 1986, on file at the FDAVS, 19–24.

Before this, many first instance judges had closed disappearance cases on the basis of amnesty, but the appeals courts, including (notably) the Martial Court, had always amended the decisions such that the closure was only temporary, that is, such that the cases could be re-opened should new evidence arise. After the Supreme Court ordered definitive closure in this case, however, and punished Cerda for challenging their interpretation of the law, most courts began applying amnesty immediately to cases involving political crimes committed before March 1978 (P. Verdugo 1990: 310–311; Brett 1992: 101).

In July 1986, during a national strike called by the *Asamblea de la Civilidad*, two student demonstrators, both nineteen years of age, were doused with gasoline and burned alive by a military patrol. Rodrígo Rojas Denegri, son of a Chilean exile and resident of Washington, DC, died four days after the incident. His friend Carmen Gloria Quintana Arancibia was severely disfigured. The government deflected denunciations of the crime by labeling them part of a communist conspiracy to distort the international image of Chile, and attempted to portray the youths as victims of their own terrorist plot. When this tactic failed, the government asserted that the event had been an "accident" (P. Verdugo 1986).

Initial investigations into the crime were conducted by district-level judges. However, amidst public uproar over the case and strong reactions from the U.S. government, the Santiago Appeals Court voted to appoint a *ministro en visita*. The appointed judge, Alberto Echavarría, accepted the government's "accident" thesis. He concluded that the crime consisted only of manslaughter, for which a lone individual, Pedro Fernández Dittus, was responsible. He based his resolution solely on the testimony offered by the soldiers who were suspects in the case, neglecting or ignoring altogether the contrary evidence offered by civilian eye witnesses and the victims themselves.[128] The case thus passed to the military courts (P. Verdugo 1986: 15 and 125–127).

Three weeks later, in an unprecedented ruling, the Martial Court revised Echavarría's decision, charging the head of the patrol unit with "unnecessary violence resulting in death and serious injury." In other words, the Martial Court increased the severity of the charge against the soldier (Collyer 1986). The case then passed to a military tribunal, which finally issued a verdict in August 1989. Fernández

[128] Rojas had made a declaration to the judge in the hospital before he died.

was given a suspended prison sentence of three hundred days (Brett 1992).[129]

In January 1988, another Santiago Appeals Court judge, Arnoldo Dreyse, shocked the public by sentencing national labor leaders Manuel Bustos and Arturo Martínez to a year and a half in prison, and their colleague Moisés Labraña to sixty-one days in prison, for violating the clause of the Law of Internal State Security prohibiting all strikes that "disturb public order or produce perturbations in public services." The defendants had in fact called a general strike for October 7, 1987, but it had been, by all accounts, a failure. The labor minister had even submitted a report for the case in which he stated categorically that there had been no paralyzation of activities. Nonetheless, in the decision, Judge Dreyse argued that the defendants had "convoked a paralyzation of work and of every manner of activities all over the country," which "effectively . . . was characterized by violence, the sowing of hate, the stench of resentment, as well as a series of offensive and dangerous demonstrations in public [places], which intensely altered the proper and normal tranquility of the entire country." Moreover, he referred to the organizers as a "subversive narcotrafficking-terrorist spectre" that had called a national strike by "communists, hippies, common delinquents, [and] traffickers of ideas or of drugs."

The defendants and their lawyers were appalled at this inappropriate and offensive language, and they filed a series of appeals against the decision.[130] The panel of judges of the Santiago Appeals Court that processed the appeal overturned the conviction, arguing that the intention of the defendants had not been to disrupt production or disturb public order but simply to demand higher wages. In other words, the judges argued that the strike had been a legal form of protest and a legitimate attempt to influence public policy.[131] In August 1988, however, the Supreme Court overturned this decision and sentenced Bustos and Martínez to a year and a half of internal banishment. The high court argued that any form of union activity other than collective bargaining was illegal and constituted a violation of the Law of Internal State

[129] In January 1991, the Martial Court absolved him of any offense against Carmen Quintana.

[130] Monthly report of the *Vicaría de la Solidaridad* for February 1988, on file at the FDAVS, 58–64.

[131] Ibid., 64–65.

Security. The decision also included a "reminder" to Judge Dreyse that resolutions must be written "with juridical language and with seriousness, without making allusions or using phrases that are unrelated to the issue in question."[132] The Court did not, however, find Dreyse's improprieties grave enough to require official sanction.

In August 1989, in the wake of constitutional reforms that were part of a strong momentum toward formal democracy, the Supreme Court ruled on a *recurso de casación* filed by the families of ten of the Communist Party members whose disappearance had been investigated by Carlos Cerda. Building on the points made by Judge Cerda in his refusal to close the case, lawyers for the family argued that amnesty could not be applied until the investigation had been completed; that kidnapping and conspiracy were ongoing crimes not contained within the time period covered by the amnesty law (Decree Law No. 2,191); that amnesty could only be applied subjectively, that is to individual perpetrators, and not objectively to crimes; and, in any case, that the Geneva Conventions of 1949 obligated the Chilean state to prosecute those responsible for crimes committed during a state of civil war. In short, the victims' lawyers contended that "the national amnesty is rendered null and void in regard to acts which international law qualifies as criminal."[133]

The Supreme Court[134] rejected all of these arguments, emphasizing two points: first, that the courts were obligated to apply and conform with all laws issued by the legislator; and, second, that since amnesty had the effect of "erasing" the crime, "leaving its perpetrator in the same situation as he would be in if he hadn't committed it," there was, in effect, nothing to investigate in cases covered by the amnesty law. In short, judges had no choice legally but to close all such cases definitively. In addition, the justices referred to a 1931 decision of the Court that described amnesty as the "forgetting of the past," which aimed at "conserving social harmony." Amnesty is "a law of public interest" whose legal effects are "broader and more satisfactory than absolution."

[132] *Ministerio del Interior* (*queja*), August 17, 1988, *Fallos del Mes* No. 358: 598–601.

[133] *Miguel Estay Reyno* (*casación forma y fondo criminal*), August 11, 1989, *Fallos del Mes* No. 369: 489–505 at 495–496. This is the same argument put forth by the lawyers for the victims in the Lonquén case, discussed earlier.

[134] The unanimous decision was rendered by Justices Ulloa, Zúñiga, and Cereceda, and *abogados integrantes* Ricardo Martín and Juan Colombo.

Appeals in cases covered by the amnesty law were thus pointless.[135] With this reasoning, the Court ordered Carlos Cerda, once again, to permanently close the case. Cerda again refused, and applied only temporary closure. Not only did this signify his assessment that some new piece of evidence would allow future reactiviation of the case, but it also reflected his hope that the Court's stance would change with the transition to democracy (Otano 1992). As the next chapter will show, however, Chile's high court justices were not inclined to promote a transition to greater liberality after the transition to civilian rule. Cerda would remain an isolated modeler of liberal principles and practices.

Summary, 1981–1990

With the official state of war long since ended, a new constitution established, and an increasingly strong public movement for democratization in evidence, one might have expected the behavior of Chilean judges to change after 1981. What the preceding account shows, however, is that while there was "a kind of awakening of conscience among some judges," and, "in isolated cases, a willingness to go further than they had up until then" (Interview HRL96-1, July 4, 1996, 11:00), the overwhelming pattern in judicial decision making was passivity, deference to the executive, and an apparent commitment to order over liberty. Although both the organized Bar and the regime's own Constitutional Tribunal used their professional prestige and institutional weight to help move the country in a liberal-democratic direction, the judiciary continued to display "a willingness to collaborate that bordered on the abject" (Constable and Valenzuela 1991: 134). I turn now to the question of why this behavior persisted.

[135] *Miguel Estay Reyno* (*casación forma y fondo criminal*), August 11, 1989, *Fallos del Mes* No. 369: 489–505 at 497–505. In fact, the justices were contradicting much past jurisprudence regarding amnesty. Before the 1973 coup, the courts had held that amnesty erased the criminal punishment but not the offending act itself; amnestied offenders remained liable for the civil damages caused by their actions. See *Marcos Chamúdez contra Alberto Gamboa Soto*, October 13, 1965, *Fallos del Mes* No. 83: 252–253 and *Alberto Gamboa S.* (*inaplicabilidad*), December 7, 1966, *RDJ* 63 (1966) 2.4: 359–366.

PART III

EXPLAINING THE JUDICIAL ROLE UNDER PINOCHET, 1973–1990

REGIME-RELATED FACTORS

In any analysis of judicial behavior under authoritarianism, the first and most obvious hypothesis is that regime-related factors – that is, direct or indirect interference with the courts by the government – explain outcomes. Thus, I begin with a discussion of the evidence for this hypothesis. My argument is that although the military government did use a variety of tactics to make its will known to judges, and changed some rules along the way to strengthen its influence in the judiciary, an explanation that attributed judicial behavior in Chile from 1973 to 1990 solely or primarily to fear of and manipulation by the government would overlook crucial elements of the picture.

To begin, I must emphasize that judicial independence was, on the whole, respected under the authoritarian regime.[136] For reasons explained in Chapter 1, the military government had incentives to refrain from direct interference with judicial functioning. Not only does such an approach have appeal for authoritarian leaders in general (Toharia 1975; Tate 1993; Moustafa 2007), but it was of particular importance in the Chilean case, as one of the central reasons the generals offered for staging the coup was to restore the rule of law. The military did not shut down the ordinary courts even temporarily, nor did they replace sitting judges with their own people. On the contrary, they pledged immediately to respect judicial independence, and received, in return, the blessing of the full Supreme Court.

In the interviews I conducted in 1995–1996, judges generally maintained that they had not been subjected to threats or other types of interference from the military government, insisting on the continuity of judicial independence across time.[137] A full twenty-four of the

[136] The exception to this was the regime's treatment of the labor courts, which, it should be noted, went unopposed by the Supreme Court. See Palma González 1998.

[137] Moreover, interviews with retired judges, lawyers, and law professors generally confirmed the idea that the judiciary was, at least at the time of the coup, basically free from the kind of corruption and manipulation common in other Latin American

thirty-six acting high court judges interviewed, or two-thirds, insisted that they had always enjoyed formal independence in their decision making. In fact, some were emphatic about this point: "The military government was very respectful of the judiciary. We never received pressure of any sort from the government" (Interview SCJ96-5, May 23, 1996, 14:00). "We had perfect independence, in all cases. We remained unscathed (*incólume*)"(Interview SCJ96-8, June 11, 1996, 13:30). "I would be lying if I told you I received any pressure at all. The judges were respected, before the transition and after. There has always been independence" (Interview ACJ96-8, May 8, 1996, 15:00). "I even had to judge in cases of people who had held posts in the Allende government, and *never, never, never* did I receive any influence of any kind, either direct or indirect, from the [military] government. Rather, they let me act as I saw fit, and when you talked to other colleagues, they said the same thing" (Interview ACJ96-3, April 29, 1996, 13:00). In short, as one put it, "The judiciary has always remained independent, unshakable (*inquebrantable*)" (Interview SCJ96-14, June 27, 1996, 18:20).[138]

This is not to deny the clear evidence of more subtle forms of pressure or manipulation brought to bear by the military government on the judiciary. Although my review of the records of the plenary sessions of the Supreme Court revealed no instance in which promotions were dictated by the government, nor even any cases in which the Ministry of Justice rejected a list of nominees proposed by the Court, they did indicate that some of the early investigations into judicial behavior, as well as some transfers during the authoritarian regime, were made at the recommendation of the Ministry of Justice (see esp. Vols. 18 and 22).[139] Furthermore, although the new military leaders did not themselves

countries. Indeed, this is why criticisms of the judges' behavior under Pinochet are so strong: People believed in the independence of the judiciary and therefore had high expectations of it.

[138] Similarly, Enrique Correa Labra, who dissented in many human rights cases under Pinochet and served as president of the Supreme Court under Aylwin, "affirmed categorically that the judiciary had enjoyed 'total and absolute' independence under the military government" (Brett 1992: 219).

[139] The case could easily be made, however, that such indirect steering of the judiciary was nothing new. The executive is, for obvious reasons, always going to attempt to exert whatever influence possible on judicial selection and tenure. The organization of the CUP under Allende is one such example. Moreover, Chilean law had long authorized the president to oversee the conduct of judges, although the power to evaluate and remove judges was given exclusively to the Supreme Court (see esp. Article 72, No. 4 and Article 85 of the 1925 Constitution).

conduct a purge of the judiciary, they did pass some laws making it easier for the Supreme Court to dismiss potential troublemakers. Decree Law Nos. 169 and 170, published on December 6, 1973, modified both Article 323 of the Judicial Code and Article 85 of the 1925 Constitution, allowing judicial employees to be removed from service for an annual evaluation of "poor performance" by a simple majority (rather than the previous requirement of two-thirds) vote of the Supreme Court. The vote was to be secret, and the justices were under no obligation to give reasons for the negative evaluation. These decrees facilitated the internal purge conducted by the Supreme Court in January 1974.[140]

In the 1980s, rather less subtle pressure was brought to bear by Pinochet's ideological ally, Hugo Rosende, who was sworn in as the new Minister of Justice in January 1984. Rosende was reportedly obsessed with judges' ideological leanings, and made it clear to the Court that he wanted appointees who "will never meddle in politics," with "politics defined, of course, as the politics of dissidence" (Matus 1999: 180). In 1984, he oversaw the expansion of the Supreme Court from thirteen to seventeen members, which allowed at least one hardline regime supporter, Hernán Cereceda, to rise to the high court. Cereceda allegedly became the main informant for the government on the opinions and activities of judicial personnel (Matus 1999: 158). In 1989, in the wake of Pinochet's loss in the (October 5, 1988) plebiscite, Rosende succeeded in getting the junta to approve what became known as the "candy law" (*ley de caramelo*).[141] The legislation was so called because it allowed justices over seventy-five to retire within ninety days with a sweet financial deal. Seven justices took advantage of the offer, allowing the military regime to make seven new appointments to the Court, albeit drawn (as always) from nomination lists proposed by the Court itself.[142]

[140] The internal purge of the judiciary is discussed later in this chapter. Note that these changes were later reversed, first by a modification of the content of Decree Law No. 169 and then with the 1980 Constitution.

[141] This was Decree Law No. 18,805 of June 17, 1989. In addition, just before the transition, the military government added a line to the Judicial Code to prevent those who had been fired from the judiciary from serving as *abogados integrantes*, and to prohibit the future impeachment of government officials for behavior under the military regime.

[142] Democrats accused the government of stacking the Court. However, the editors of *El Mercurio* justified the move, arguing that in passing the law the military government "not only operated legally and legitimately, but also was able to anticipate an eventual

There is thus, not surprisingly, some evidence that the military government tried to exert some control over the judiciary, although the means it used were mostly indirect. Although there were certainly instances in which the government brought direct pressure to bear in specific cases,[143] Chile's did not become a system of "telephone justice." Indeed, as explained earlier, the military government wanted to preserve its image of respect for law and courts, and, thus, rather than interfere in the judicial process, its leaders preferred simply to restrict the scope of jurisdiction of the ordinary courts and expand that of those tribunals over which they (thought they) had more direct control, namely, the military courts and (later) the Constitutional Tribunal. Like governments before and after theirs, they did their best to influence judicial selection and tenure, but they did so within the limits of the established system, in which the Supreme Court continued to play the dominant role.

POLITICAL ATTITUDES AND PREFERENCES

As some observers have noted, the military government did not really need to intervene in the judicial system, because "the Supreme Court was at their service" (Interview HRL96-4, July 23, 1996, 10:00). Given the Court's immediate endorsement of the coup, and their persistently faithful, often vigorous, enforcement of the authoritarian regime's laws

attack against the judicial order of the Republic." In their view, the Supreme Court had not been altered: "It is the same, in spirit and even in part of its membership, as that which in a plenary resolution on June 25, 1973, warned the Marxist President of the moment: 'As long as the judiciary is not erased from the Constitution, its independence will never be abrogated'" (*El Mercurio*, September 28, 1989).

[143] One famous example is the *Apsi* case of 1983, in which one chamber of the Supreme Court initially accepted, but then, in an unprecedented "clarifying decision," reversed and rejected a *recurso de protección* on behalf of the editors of the magazine. In this case, the government was attempting to shut down the publication on charges that it had violated the terms of its initial authorization, which restricted it to coverage of international politics. The Court first argued that this complete suspension violated the constitutional protection of free expression. Three weeks later, under clear pressure from the government, three of five justices modified their positions and argued that, while the government could not shut *Apsi* down altogether, it could insist that it cease coverage of domestic politics. See *Sociedad Publicitaria y de Servicios Informativos Ltda. con Ministro del Interior (protección)*, *RDJ* 80 (1983) 2.5: 3–9.

and policies, it is tempting to conclude that judicial cooperation with the military government was a function of shared political attitudes and policy preferences.

The human rights lawyers I interviewed clearly believed political attitudes were a key factor. As one argued, "I think there was an ideological commitment on the part of the judges – at least of the Supreme Court – with the military government. . . . They thought that the military government was doing the right thing and they felt comfortable in that schema" (Interview HRL96-4, July 23, 1996, 10:00). Most members of the high court "embraced the doctrine of national security," explained another (Interview HRL96-1, July 4, 1996, 11:00). One human rights lawyer recounted the reaction that the president of the Supreme Court at the time of the coup, Enrique Urrutia Manzano, had to his explanation of what human rights lawyers were attempting to accomplish: "He said to me more than once, 'Well, what do you want us to do, if the problem here is either they kill us or we kill them?' You see, it was a complete war mentality!" In another case, in which this lawyer was arguing in defense of a group of disappeared peasants, the president of the chamber called him to the bench and said he did not understand what the lawyer was asking for. "I said, 'we want you to help us locate them!' And the judge said, 'but all these people must be dead!' So you see, they knew what was happening, but they thought it was justified. [Their attitude was that] the military had saved them from communism, so if they killed a few thousand people, [they weren't going to] make problems for them" (Interview HRL96-5, August 2, 1996, 12:00).[144]

Some of the judges I interviewed also emphasized the importance of political preferences. One judge charged, "It was the composition of the Supreme Court – people of the extreme Right, in some cases – which explains the behavior of the judiciary under the military regime. It was a question of shared values" (Interview ACJ96-4, May 2, 1996, 9:00). "The coup was theirs (*El golpe era de ellos*)," affirmed another (Interview ACJ96-12, May 9, 1996, 18:30). A few of them "were ultra-partisans of the military regime; they were in their glory! [And] as long as they kept quiet, they had everything, any favor, they wanted," explained

[144] Thus, as the lawyer recounted, "One had the feeling that for the justices, one was a pain, bringing problems, bothering them. . . . Sometimes they'd fall asleep during your arguments! They had a thousand ways of showing that you were disagreeable to them, that you were bringing up issues which annoyed them."

one retired judge (Interview FJ96-4, June 17, 1996, 12:30). "You have to understand the mentality of these people: that human rights are necessarily associated with Marxism, the U.N. is Marxist, the Church is Marxist, and Chile is the only pure, orderly place, an example for the whole world" (Interview AC2, May 6, 1996, 8:30). Thus, as one appellate judge stated in a 1990 magazine interview, "I wouldn't speak of interference [by the military government in the judiciary]. . . . There wasn't interference, but rather a sort of romance, like walking hand in hand" (Rojas 1990).

Notwithstanding these statements, there is evidence that the judiciary was not, at the individual level, monolithic in its enthusiasm for the authoritarian regime. Not only do the statements just cited, as well as the decision data presented earlier, indicate that at least some judges did not sympathize with the Pinochet regime, but the fact that the military government deemed it necessary, even back in 1973, to issue Decree Laws 169 and 170 reveals that the generals were not convinced that they could count on unified and unfailing judicial support, even from the Supreme Court itself. That they sought to restrict the jurisdiction of the ordinary courts, preferring to have politically sensitive cases tried in military courts, or later, the Constitutional Court, also indicates a general lack of confidence that ordinary judges were and would remain solidly behind them.

There is at least some evidence from the period that the military leaders were right to be cautious. In the mid-1980s, a group of younger judges led by Hernán Correa de la Cerda and centered in the newly created appellate court of San Miguel[145] began meeting to read and critically analyze judicial decisions. Eventually, these magistrates produced a "letter of reflection," in which they listed the complaints that citizens had made of the judiciary.[146] Although these judges refused to identify themselves with any movement or political party, and never went public with their views, "it was clear that the changes they aspired to would not come about under dictatorship" (Matus 1999:147). Clearly,

[145] The new appellate court was created in 1980 to relieve the caseload of the Santiago Appeals Court.

[146] Several interviewees mentioned this document, but none would allow me access to it. In 1986, this group succeeded in getting their candidate, San Miguel appellate judge Germán Hermosilla, elected to the presidency of the National Association of Magistrates.

then, there existed a pro-democratic contingent, however timid, within the judiciary during the dictatorship.

Moreover, my indirect probing of judges' political views in 1996 interviews revealed *Pinochetistas* to be in the distinct minority.[147] In fact, only six acting high court (AHC) judges demonstrated themselves to be clearly approving of Pinochet's rule, or ideologically aligned with the military regime.[148] These judges made statements such as: "The constitution of 1980 politically organized the country perfectly;" (Interview SCJ96-1, May 16, 1996, 16:00) or "Sure, the military regime leaders committed excesses, but that was a necessary evil. It was like amputating a leg to save the patient. The same thing has happened in every country" (Interview SCJ96-8, June 11, 1996, 13:30). One even greeted me by saying:

> It's good you came now and not before. There were 11,000 armed men in the streets; it was going to be another Cuba! Under Allende, no human rights were respected. They attacked every one, the right to property, even the right to life, and then they come complaining about human rights after the coup! And they carried out a tremendous propaganda campaign in the U.S., all those people in exile. Marxists are great at propaganda. (Interview SCJ96-5, May 23, 1996, 14:00)

[147] All of these judges had served under the authoritarian regime, and many of them under Frei and/or Allende, as well. Most of them spoke quite freely about how the regime changes of the past thirty years had affected their work. In addition, they were open about their views on issues such as whether the Allende regime had destroyed the rule of law, or whether the critique made of the judiciary in the *Rettig Report* was fair or unfair (see Chapter 5). Only a few (four) AHC judges refused to answer these questions on the grounds that they were "political." I was thus able to categorize the judges into three groups: antidemocratic, or clearly sympathetic with the Pinochet project; democratic, or clearly at odds with the Pinochet regime and articulate about the nature of democratic politics; and ambiguous, or offering statements which made me uncomfortable classifying them in one of the other two groups. Within this third category, I did separate those whose responses were more democratic from those that were less so.

[148] In general, clearly pro-military regime judges were very forthcoming with their political views. Contrary to what I expected, it was they who generally raised political issues in the interview, before I got to the explicitly political questions. It is interesting that they, like most of the Right in Chile, were proud of and totally unrepentant about military rule. It was, rather, the democrats who walked on eggshells and felt the need to apologize for or whisper their beliefs. This problem was analyzed and critiqued in Moulián 1996.

Among other things, this group fully approved of the existing extent of military jurisdiction.[149] As one explained, the military should judge any and all cases involving their personnel, because they need to "maximally strengthen the principle of authority and discipline." And, in cases in which civilians put in question the honor of the military, "the Army has the right to defend itself" (Interview SCJ96-5, May 23, 1996, 14:00).

In contrast to this group, fourteen AHC judges made it clear that they were ideologically at odds with the military regime and well aware of the historical and international standards of democracy.[150] "I was always against the dictatorship. I've always been against any type of dictatorship, whether of the left or of the right. I like democracy, legitimate authorities elected by the people, not those imposed by force," expressed one of these (Interview ACJ96-8, May 8, 1996, 15:00). These judges strongly insisted that there was *no* rule of law under the military regime, as the executive clearly answered to no one. "Of course not! The military government itself was illegal!" quipped one (Interview ACJ96-17, May 17, 1996, 13:00). Several of these judges felt the judiciary very well could have done more to defend human rights and the rule of law under Pinochet. As one argued, judges are representatives of the people, and in this capacity, many judges failed, for "they did not defend the essential [*lo esencial*]" (Interview ACJ96-2, June 10, 1996, 9:00). In addition, these judges strongly rejected the extant scope of military court jurisdiction. As one stated, "The military tribunals have never had the necessary impartiality and independence, and this came to a crisis point in the military regime. . . . Obviously the decisions and the knowledge of the matter were controlled from above; not one military judge could act without first consulting [his superiors]. I'm for eliminating military courts altogether, or as far as possible allowing military

[149] At the time of my interviews, any crimes committed by military personnel, as well as any illegal acts affecting military personnel, committed on military property, or "threatening" the institution of the military, still fell under the jurisdiction of military courts. Thus, a vast majority of those tried in military courts continued to be civilians, whereas military personnel enjoyed special treatment (*fuero*) in the justice system, all of which violated the constitutional principle of equality before the law. See López Dawson 1995a.

[150] I use the term "historical and international standards of democracy" because the *Pinochetistas* often attempt to apply the term "democracy" to the regime they created. Such "new speak," the systematic use of terms such as liberty and democracy to describe their polar opposites, was common to a number of Latin American military regimes in the 1970s, as noted by Alberto Ciria (1986: 57–69).

crimes to be tried by [ordinary] courts of law" (Interview ACJ96-10, May 9, 1996, 10:00).

Finally, there were those (sixteen) AHC judges "in between," who asserted differing levels of disagreement with and distance from the Pinochet regime, but didn't articulate a clear democratic ideology in the course of the interview. Those whom I categorized as ambiguous but antidemocratic leaning were those like the judge who, on the one hand, approved of the military's promotion of Portalian values and asserted that the 1980 constitution was written by a commission of people of "all political tendencies," but, on the other hand, said, "I can't conceive of an authority that sends people to death, and from what I saw, that is what happened" (Interview SCJ96-3, May 20, 1996, 8:30).[151] Also in this category was a judge who claimed he disapproved of "the repression [under the military regime] which didn't respect any norm whatsoever," yet admitted to going along with the regime so as to be promoted (Interview SCJ96-13, June 20, 1996, 11:00), and another who generally used Chilean right-wing discourse, but who expressed strong disapproval of the extent of military court jurisdiction (Interview ACJ96-3, April 29, 1996, 13:00). Those who fall under the rubric of 'ambiguous but more democratically inclined' are those who, for example, justified the military intervention because of the "civil war," on the one hand, but asserted support for and admiration of President Aylwin (1990–1994), on the other (Interview SCJ96-7, June 5, 1996, 18:00), or those who never explicitly articulated a fully democratic vision, but who made it clear they were opposed to the present extent of military court jurisdiction or made references to international human rights treaties (Interviews ACJ96-11, May 9, 1996, 13:00; ACJ7, May 7, 1996, 12:30).

In summary, then, of the thirty-six AHC judges I interviewed in 1996, fourteen can be deemed clearly democratic, six of authoritarian persuasion, and sixteen somewhere in between, with about nine of these making more democratic statements, and seven offering more dubiously democratic responses. This, together with other evidence presented here and in Chapter 3, suggests that an explanation that attributes judicial complicity with the military regime uniquely or even primarily to uniform policy preferences on the part of judges cannot stand.

The claim I advance, then, is not that political preferences had nothing to do with judicial performance under the authoritarian regime, but

[151] As noted earlier, the 1980 constitution was written by a small group of very conservative lawyers who were Pinochet loyalists, and not by a pluralistic commission.

rather that any real "romance" between judges and military leaders was restricted to a powerful bloc on the Supreme Court (led by justices like Bórquez and Urrutia), as well as some zealots in the inferior ranks, whom the former were able to reward through promotion (e.g., Cereceda, Dreyse). Most judges, I contend, were not personally enamored of or committed to the military regime, particularly as time wore on, but they had neither the professional understandings nor incentives to resist authoritarian laws and policies. It was the institutional structure and ideology of the judiciary that rendered them handmaidens of the military rulers.

LEGAL PHILOSOPHY

Before proceeding with my discussion of institutional factors, I must address one other argument that has sometimes been advanced to explain the failure of judges to resist undemocratic rulers,[152] namely, that positivist legal philosophy renders judges insensitive to the substantive content of the laws they apply, and unconcerned about the outcomes of their decisions (Dyzenhaus 1991). As mentioned earlier, Chilean judges did take shelter behind positivist defenses, washing their hands of any responsibility for the brutality and longevity of the authoritarian regime. Yet, as one human rights lawyer protested, the claim that they were only applying the law "is not true, because they rendered decisions that favored the government even against the laws, against norms, against principles!" (Interview HRL96-8, October 17, 1996, 16:00).[153] And, as another remarked, "Judges are very faithful to the letter of the law when it suits their ideas" (Interview FJ96-1, June 11, 1996, 9:00)!

The decision data reported earlier support these claims. From 1973 to 1980, judges ignored long-standing legal norms on habeas corpus and review of military tribunal decisions, granting unchecked discretion to the military in the "antisubversive war." Furthermore, judges put up no protest as the junta proceeded to gut the 1925 Constitution, issuing blanket decrees to amend or supersede any provision that might stand in its way. After 1981, when the regime's new constitution went into effect, judges adhered to the letter of the law, but in a manner that maximized the government's discretion to determine when public order was

[152] I do not address the class-based argument here, as the relevant data was presented in Chapter 3.

[153] R. Garretón makes this same point (n.d.: 79).

threatened and, therefore, when constitutional rights could be suspended. In other words, rather than emphasizing those parts of the Constitution that set limits on the exercise of power, the courts perpetually ignored or denied them in favor of the vague clauses which extended executive discretion. Hence, it seems inappropriate – even generous – to attribute judicial behavior in Pinochet's Chile to a professional commitment to legal positivism.

Moreover, my 1996 interviews revealed that a significant number of AHC judges (twenty-three of thirty-six) recognized, at some level, that the judicial decision-making process is not simply "mechanical," as a plain-fact positivist would have it. This view cut across the political lines discussed earlier. Some interviewees spoke openly about how, with experience, they had become less formalistic (Interviews SCJ96-4, May 23, 1996, 11:00; SCJ96-10, June 11, 1996, 18:30; SCJ96-12, June 18, 1996, 18:00; ACJ96-17, May 17, 1996, 13:00), how they grounded their interpretation in the "grand principles of the Chilean system" and in the "national conscience" (Interview SCJ96-5, May 23, 1996, 14:00) or how they had "become conscious of the need to democratize, equalize, or mold (*formar*) society" (Interview SCJ96-6, May 24, 1996, 12:00). One claimed that "Justice is a social concept, and it's natural that one's sense of justice evolves over time. The judge is very sensitive to what is happening in society; he can't divorce himself from society; he is part of it. [And, although] the judges are very much bound by the law, the law always leaves room for interpretation" (Interview SCJ96-7, June 5, 1996, 18:00). Others explained: "[In deciding cases,] one isn't worried about the norms; rather, one searches for the intuitive criteria of justice, and then attempts to reaffirm or justify this in the legal precepts" (Interview SCJ96-10, June 11, 1996, 18:30). "The basic objective of the judge is to render justice . . . and the work of the judge is precisely a work which can even involve creation . . . in the search for that interpretation which represents the general understanding of the community" (Interview ACJ96-6, May 6, 1996, 11:00). "If I believe that the application of the law produces injustice, I don't apply it, or rather, I interpret it to conform to the side of justice" (Interview ACJ96-13, May 10, 1996, 12:00). One judge confessed that his interpretation of the law changed as conditions, such as the level of crime or the degree of pollution in Santiago, changed around him (Interview ACJ96-1, April 26, 1996, 18:00). Another even argued that "interpretations which conflict with the law are in style" (Interview SCJ96-12, June 18, 1996, 18:00).

Thus, it is not legal positivism *per se* that accounts for judicial behavior in Chile. However, part of the explanation does appear to rest in the related, and broader, professional ideology of apoliticism, which, as I have explained in previous chapters and will further sustain later, was transmitted and enforced within the judiciary. The premium on "apoliticism" within the institution meant not that judges ignored altogether the choices they faced in adjudication,[154] or felt some absolute fidelity to the letter of legal text; rather, it meant that, when it came to public law, judges were expected to lend unquestioning support to the executive. The support could be passive or active, but the key was to refrain from second-guessing "political" decisions and, thereby, to stay out of politics. In the case of the military government, this was even more pronounced, I argue, as the military presented its rule as a (superior) *alternative to* politics.

INSTITUTIONAL STRUCTURE AND IDEOLOGY

I turn thus to the development of my institutional argument, which has two parts: one structural and the other ideological. The discussion that follows treats them separately, but I should emphasize that the two were, as in the past, mutually reinforcing.

Evidence of the effects of internal control, that is, of what I am calling the *institutional structure*, on judges is overwhelming. It came up again and again in my interviews – cited by nineteen of thirty-six AHC judges, as well as by all the retired and lower court judges I interviewed[155] – and was clear in the discipline and promotion record as well. As one judge noted, under the military regime, "there were different conceptions of what was happening, but the Supreme Court was very powerful over the hierarchy and controlled the responses" (Interview SC96-7, June 5, 1996, 18:00).

The first and most obvious way in which the Court acted to bring the judicial ranks in line after the coup was through an internal purge of avowed and suspected Allende sympathizers in January 1974. With the legal path prepared by Decree Law Nos. 169 and 170, discussed earlier,

[154] Indeed, as Correa notes, in many areas of the law, such as marriage nullification, debt readjustment, and the attenuating circumstances of criminal responsibility, judges have long shown themselves to be creative, flexible, and equity-minded (1992: 90).

[155] I have interspersed quotes from these interviews throughout the book. In addition to those found in this section, see those in Chapters 3 and 5.

the Supreme Court used its power to dismiss or force the retirement of an estimated 12 percent of judicial employees, among them approximately forty judges.[156] For the most part, this was done via poor evaluations for their performance in 1973, although some "early retirements" were achieved via a transfer of "troublemakers" to undesirable (geographically isolated) posts (Interview FJ96-5, June 18, 1996 12:00).[157] All of the members of the CUP, the judicial advisory committee to Allende, were dismissed. One of these individuals remarked in an interview, "Isn't it clear that the Supreme Court [removed us all] for political reasons? For the Supreme Court, it's legitimate for any of their members to make political declarations, and during the military government they did so, but a simple judge isn't allowed that right" (Interview FJ96-2, June 13, 1996, 13:00).

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

> I remember as the plebiscite approached, people were talking about it, and naturally within a logic of the 'yes' vote, as if it were impossible to think that someone there would consider voting 'no.' And I was afraid, I *broke out in a sweat* worrying that someone would ask me which way I was going to vote. Nobody asked me, because nobody thought I was for the 'no,' but if

[156] The exact numbers here are difficult to come by. I tabulated these figures using a list of names and posts from a support group for judges expelled for political reasons, checked against the official evaluations ledger at the Supreme Court. However, because of all the possible extenuating circumstances, it is difficult to confirm the exact number. It is interesting to note, however, that out of 260 judges evaluated for their performance during 1973, 82 were put on the "satisfactory" list, or list 2 (out of four), which is basically a slap on the wrist, or a "tomato," as one judge called it. This figure is more than twice the average for list 2 in other years.

[157] These are documented in the records of the plenary of the Supreme Court, Vol. 18.

> they had asked me, I probably would've been booted from the judiciary – and that is no exaggeration – for my answer. (Interview AC96-2, May 6, 1996, 8:30)

This fear was not unfounded. In 1983, after Santiago Appeals Court judge and longtime president of the National Association of Magistrates, Sergio Dunlop, made some mild criticisms of the judicial retirement system, the Supreme Court responded first by giving him a warning and then putting him on list 2 (of four) in the annual evaluations. Dunlop, who had been a fierce opponent of Allende, thus resigned from the judiciary in 1983 and became a loud critic of the institution. In public statements over the following years, Dunlop contended that the institutional structure of the judiciary was such that only those willing to "remain prudently silent" could find their way to the top (Constable and Valenzuela 1991: 131). "Although judges have tenure," he argued, "in reality their careers depend on the members of the Supreme Court" and those judges that take stands at odds with that of the Supreme Court become "marked." As regards the role of the judiciary under the military regime he stated: "Those who lead [the institution] are those who must signal the standards and the direction to take. . . . The Supreme Court justices could have acted peacefully defending a different interpretation without having anything happen to them" (Interview in *La Epoca*, May 9, 1989, 12–13).

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

Lower-court judges observed and took note of Retamal's actions and their consequences. When conferences on human rights began in the mid-1980s, some lower court judges attended, but, as one related, "you couldn't let your superiors know you were participating in such acts" (Interview LCJ96-1, April 25, 1996, 11:00). During this period "lower-court judges were paranoid about being poorly evaluated or expelled

from the judiciary if they let slip some commentary or did something which their superiors in the Supreme Court or the government wouldn't like" (Matus 1999: 148). And, indeed, the San Miguel judges who met privately to produce the "letter of reflection," noted earlier, were subsequently informed in their yearly evaluations that they "had received votes in favor of putting them on list two." This served as "a signal that their names would not figure on the nomination lists for future promotion" (Matus 1999: 159–160).

More open critics of the regime, meanwhile, suffered more serious repercussions. As noted earlier, in August 1986, Santiago Appeals Court judge, Carlos Cerda Fernández, concluded his tenacious and thorough investigation of the 1976 disappearance of thirteen communist leaders and indicted forty people, including thirty-two members of the armed forces. Having reached this point in the investigation (*sumario*), most expected Cerda either to apply amnesty to close the case or to hand it over to the military courts. However, Cerda announced that he would do neither. He grounded his decision on the brief presented for the case by ex-Minister of Justice, Monica Madariaga, the very author of the 1978 amnesty law. Madariaga, whose views on the human rights issue had changed radically since her tenure as minister, maintained that amnesty was a "social pardon," which could not be applied until the truth about the crime had been established, and the guilt of the perpetrators declared.[158] On appeal, both the Santiago Appeals Court and the Supreme Court rejected this argument. The high court overturned the indictments and ordered Cerda to apply the amnesty law to close the case. Cerda responded that to do so would be "evidently contrary to law (*derecho*)" and that thus, according to Article 226 of the Penal Code, he had the right to refuse the order of his superiors. This act outraged the members of the Court, and, in an extraordinary plenary session, they suspended Cerda from the judiciary for two months with only half pay.[159] On learning of the sanction, Cerda stated, "My actions are in keeping with the oath of allegiance to justice, truth, and peace which judges swear to when they take their offices."[160]

[158] Monthly report of the *Vicaría de la Solidaridad* for August 1986, on file at the FDAVS, 21–22. See also, P. Verdugo 1991.

[159] Monthly report of the *Vicaría de la Solidaridad* for October 1986, on file at the FDAVS, 55–59. Interestingly, the president of the Court, Rafael Retamal, was absent from the meeting.

[160] From http://derechoschile.com/english/dissidence.htm, accessed October 5, 1999.

Approximately a year and a half later, in May 1988, the Supreme Court censured another judge, René García Villegas, for having included a statement "disrespectful of military justice" in an official resolution. García, the judge of the twenty-first criminal court of Santiago, had taken on the investigation of more than forty cases of torture committed in his jurisdiction between 1985 and 1989, including one case for which he indicted eight CNI agents. In a November 1987 interview with opposition newspaper, *La Epoca*, García declared, "Torture is always criminal, even if the highest reasons of state are invoked" (*La Epoca*, November 15, 1987: 17–18). He was thus averse to renouncing jurisdiction over crimes committed by the regime's security forces, and in a March 1988 resolution contesting the military's claim to jurisdiction over such cases, he bluntly stated as much. The offending passage read, "As has been evident in previous cases, once the investigations that civilian judges have undertaken related to reported crimes presumably committed by security agents are handed over to the military justice system, they become definitively paralyzed and abandoned, resulting in impunity for those incriminated."[161] For this, as well as for "declarations made to the press about similar cases," the Supreme Court issued García a formal reprimand.

On October 24, 1988, the Court sanctioned García again, this time with fifteen days' suspension at half salary, for having "gotten involved in politics." García's alleged impropriety consisted in a statement offered in a radio interview with Radio Exterior de España that "Torture is practiced in Chile." The excerpt had been used, allegedly without García's authorization, in the public campaign for the "no" vote in the October 5 plebiscite. In annual evaluations for both 1988 and 1989, the Court thus ranked García in list three for "incompetent performance," forcing his resignation from the bench on January 25, 1990.[162] The Court also sanctioned several appellate court judges, including the head of the National Judicial Association, Germán Hermosilla, for having expressed their solidarity with García during his suspension. The punishment was "duly reflected in their annual assessment" (Brett 1992: 232).

[161] Monthly report of the *Vicaría de la Solidaridad* for March 1988, on file at the FDAVS, 78–81.

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

Institutional structure thus goes a long way to explaining why even democratic-minded judges refused to take public stands, personal or professional, against the authoritarian regime. As I noted in Chapter 3, most judges came from very modest social backgrounds, and had chosen the judicial career because it was respectable and secure.[163] They were thus largely predisposed to be risk-averse when it came to professional matters. Once on the judicial career ladder, this tendency was reinforced by the "reverential fear" of the Supreme Court. Judges learned quickly that the best way to get ahead was to avoid making waves, and thereby "avoid getting burnt" by their superiors (Interview FJ96-4, June 17, 1996, 12:30).[164] Although this pattern was evident under the previous democratic regime, it was even more marked under military rule, when the Supreme Court took punitive action against any judge that dared challenge their wisdom and authority.

Of course, fear of punishment and career sabotage by superiors cannot explain the behavior of the Supreme Court judges themselves, who, having reached the pinnacle of the hierarchy, were untouchable within the system. As noted earlier, personal attitudes and preferences were clearly at work in some cases, and the military government did its best to create opportunities for its most devoted supporters to rise in the ranks. But it would be a mistake to treat judicial attitudes and preferences as entirely exogenous to the institution. Supreme Court justices reached their posts after having spent forty or more years in an institutional setting that discouraged creative, innovative, and independent decision making. Those who succeeded in rising in the ranks were not those with bold or fresh perspectives, but rather those who best emulated and pleased their superiors, that is, those who demonstrated conservatism and conformity.

The parallels between this pattern of professional socialization and that of the Chilean military are pronounced. According to Constable and Valenzuela, the typical military officer is characterized by loyalty, discipline, and circumspection, and the "desired military mold" is "competent and plodding, rather than brilliant." Those seeking to reach the rank of general should (as did Pinochet) do "just well enough to advance, but not so well as to arouse suspicion" (1991: 48). Indeed, one of my

[163] Carlos Cerda was an at least partial exception to this, as was Juan Guzmán, who features in Chapter 5.

[164] Refer to Chapter 3.

interviewees claimed, "what happens to judges is something like what happens to Chilean military men. They are brainwashed. And he who is independent, intelligent, [and] brave *won't be* promoted. They will bother him and will most likely brand him a 'communist' so that he will be marginalized from the judiciary" (Interview FJ96-2, 13 June, 1996, 13:00). Thus, it could hardly be expected that Chile's Supreme Court justices would, in general, possess the skills and initiative necessary to stand up to the authoritarian leaders.

Moreover, the Supreme Court judges, like all members of the judiciary, were socialized from day one to believe that, to be professional, judges must remain "apolitical." This understanding is what I have labeled the *institutional ideology* of the judiciary, and it was evident in judicial discourse throughout the authoritarian era. What made it particularly relevant in this period, I argue, is the fact that the military government itself claimed to be above politics. On the view that it was politicians, with support from democratic civil society, that had caused the socioeconomic debacle of the Allende years, the generals had seized power with the explicit mission of depoliticizing the country (Nef 1974; Valenzuela 1995; Loveman and Davies 1997). Thus, questioning the policies of the military regime was, by the regime's own definition, political and dangerous, while supporting the military was apolitical, patriotic, and noble. My claim is that the judiciary's traditional commitment to apoliticism fed perfectly into this "antipolitics" project. To prove their commitment to law (and order) over politics (and disorder) judges either refrained from challenging the military's policies or outright endorsed them.

As I noted in Chapter 3, it is difficult to document the independent effect of this ideology on judicial behavior, particularly under the authoritarian regime when Supreme Court justices invoked it to threaten their subordinates or to justify punishing them. Nonetheless, taken together with the evidence I will offer in Chapter 5, as well as the pre-1973 pattern presented in the previous chapters, the examples that follow suggest that for many judges, deferring to the (self-proclaimed "apolitical") military government need not have been a conscious strategic choice but was simply a matter of abiding by professional expectations.

In early 1974, in his speech inaugurating the judicial term, Supreme Court president Enrique Urrutia Manzano explicitly reminded judges of their professional duty to eschew politics. He explained that two months earlier the Supreme Court had transferred or removed from office a number of employees who had participated openly in politics

under Allende. He argued that this was necessary in order to guard "the full independence of the judiciary, and that, in consequence, any participation whatsoever of employees in partisan proselytizing impaired the administration of justice and deserved condemnation." Later in the address, he boasted of the active role taken by the Supreme Court against the Allende government, and of its official endorsement of the coup on September 12, 1973, which he clearly viewed as something other than political behavior. In contrast to the Allende government, he argued, the military government had fully respected the judiciary as the symbol of Chilean law and justice. He closed by calling on his audience to aid in the "reconstruction of the Republic . . . with the objective of making a better Chile, to which, with a healthy, prudent, opportune, and disinterested administration of justice, the judiciary could contribute so much."[165]

Urrutia thus contrasted the prejudicial, illegitimate politicking of the Allende government and its judicial sympathizers with the impartial, professional, and patriotic action of the Supreme Court. Because the military, too, acted out of "impartiality, professionalism, and patriotism" (Nef 1974; Munizaga 1988),[166] it was both logical and completely legitimate for the judiciary to cooperate with the military government in the "construction of a better Chile." It was thus clear that "the courts should be at the service of the new legality that the military power was creating and at the service of the entire process that began with the coup" (Interview with HRL96-5, August 2, 1996) and that those who would critique or disregard that position might throw into question their professional integrity and fitness for judicial service.

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

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

democratic principles, is playing "politics" and thereby betraying his lack of professionalism. In such an ideological environment, it is unsurprising that most judges would remain quietest and deferential.

CONCLUSION

To summarize, a complete and accurate explanation of judicial performance under the Pinochet regime requires an understanding of the institutional setting in which judges functioned. On coming to power, the military government did not install its own judges, nor did it subsequently interfere in the judicial decision making process. Nonetheless, the judiciary threw its support behind the regime and lent it a mantle of legal legitimacy for seventeen years and beyond. Even when other juridical actors, such as the bar association and the Constitutional Tribunal, began to take stands that challenged and limited the government's prerogatives, the judiciary remained at the service of the regime. Only a few brave individuals broke ranks with their brethren to take public stands against authoritarianism, and these individuals were duly punished by the Supreme Court. My argument, then, is that the longstanding institutional features of the judiciary, namely, its autonomous bureaucratic structure and its ideology of apoliticism, gave it a conservative bias that made it an ideal ally for the military regime. The effective policing of the judicial hierarchy by the Supreme Court, as well as the constant reinforcement of the notion that to take independent or unconventional stands was to behave in an illegitimate "political" manner, ensured that all but the most exceptional judges would refrain from asserting themselves in defense of liberal democratic principles and practices.