The Politics of Judicial Reform in the Democratic Transition: An Analysis of the Chilean Case

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Abstract. This article examines the difficulties faced by the civilian administrations that replaced the 17-year old military government of General Augusto Pinochet in their efforts to dismantle the authoritarian enclaves established in the 1980 constitution. Its focus is on the analysis of the strategies pursued by these democratic governments in their quest to reform one such enclave: the judicial power, more specifically, the efforts at replacing some of the members of, as well as taking away some of the political powers of the Supreme Court in order to restore the balance of powers characteristic of a democratic political system.

Introduction

The literature on the transition to democracy in Chile highlights a series of legal and constitutional mechanisms left in place by the military regime (1973-1990) which constrain the democratic consolidation. These so-called "authoritarian enclaves" ensure the right-wing minority sectors' ability to defend the political system created by the 1980 constitution. They include: the guardianship role of the institutional order assigned to the armed forces, the national security council, and the judiciary; the autonomy of the military and judicial power; the electoral system that facilitates the over-representation of the conservative sectors in congress; the unelected "institutional senators"; and the quorums needed to reform the constitution itself.

The literature also agrees that the transition to civilian rule was the outcome of a difficult process of negotiation between opposition sectors and the government of the armed forces. The negotiated nature of the transition has meant, in turn, that the new democratic coalition that assumed power in March 1990, has had to govern in accordance with a political regime in which the notion of democracy is highly restricted. Today's democracy is "authoritarian, protected, integrating, and technical".[1] Or, as a conservative political commentator has recently reminded the citizenry: "Chile's is a civil-military regime, where the tasks of administering the government are now in civilian hands, yet power still resides elsewhere."[2]

Although the opposition agreed to the terms of the negotiations, there is every indication that it also considered the political responsibility of undertaking the reforms needed to consolidate a democracy which is qualitatively different from the one it had consented to administer. After all, denunciations of the many undemocratic features of the 1980 constitution were commonplace in the political opposition's discourses against the dictatorship.

Reforming the inherently undemocratic political regime presented the elected government with a crucial dilemma: how to accomplish the dismantling of the authoritarian institutional order, constitutionally protected by the armed forces, while preserving governance, stability, and the confidence of the international business community that had flocked to the country during the dictatorship? Or, what strategy could the new

government adopt which would not bring about another military intervention and thus end their attempts to create a more democratic polity?

Political realism suggests that the ruling coalition's best chances of success depended on concentrating its efforts on eroding the weaker flanks of the inherited authoritarian order. An all out confrontation with Pinochet, who remained as the commander-in-chief of the armed forces, was an strategy unlikely to succeed. It also had the potential to create some negative consequences for the government, given the popular support still enjoyed by the general and the military. An aggressive political campaign against the judiciary, on the other hand, appeared more promising.

Why target the judicial power? Mainly because, like the military, it has been endowed with enough constitutional and political powers to be able to guarantee the preservation of the authoritarian regime. If the latter was to be over-hauled, why not to start by undermining those areas perceived to be more susceptible to change and reform, less likely to successfully challenge the new government's legitimacy, and for which public support was deemed to be strong?

Reforming the judicial structure of the country, including the military court system, and in the process fostering democratic development, appeared as an attainable goal for the new government. It was felt it had a moral and ethical responsibility to respond to the just demands of those sectors which claimed that the judiciary be held accountable for its failure to uphold civil and political rights and its sanctioning of human rights abuses during the military government. There was also the long-felt need to transform the judiciary into a modern institution, more attuned to the significant economic changes that the country experienced under Pinochet, and which the civilian government had vowed to continue. There were utilitarian reasons, too. Modernization meant transforming the judiciary from an institution traditionally concerned with protecting the landed oligarchy's interests, into one that could better protect foreign and local investors, and financial and commercial sectors, now fully integrated into the global economy. Lastly, there was the need to modernize a century-old criminal justice system plagued by inefficiency, slowness, lack of professionalism and corruption.

A reform of the judiciary was needed in order to end the system of self-generation which had made the Supreme Court into an autonomous and unaccountable institution. Such reform would make possible for the government to achieve its goal of taking away the constitutional prerogatives that give the higher courts political attributes that distort the separation and balance of powers proper to liberal democracy. This meant considering some crucial questions before embarking on a campaign to reform the judiciary: how to proceed to reform an institution that had remained basically unchanged since its inception in the early 1800s?; what types of strategies to follow to ensure success in spite of the legal and political constraints that tied the government's hands?; what kinds of reactions could be expected from the Supreme Court, whose resistance to change was legendary?; what kind of support could the government muster from the conservative political opposition?; and how much opposition from the judiciary could the government absorb before the political conflict began to destabilize the transition to democracy?

In this paper, I argue that faced with apparently insurmountable obstacles, both congressional and institutional, the civilian government's success in reforming one of the authoritarian enclaves -the country's higher courts and the power they control- would depend on its ability to enlist the support of some members of the judicial power whose reform was being sought. That is, reform of the justice administration could not avoid dealing with the individuals whose responsibility it was to administer this system. Furthermore, a similar kind of support would be needed from some sectors of the right-wing political opposition. In other words, the government needed to identify, favour, and bring to its side those judges and politicians that it felt would be more receptive to the public calls for the reform of the judiciary. I also argue that in the short term, the new civilian government had little choice but to pursue a strategy similar to the one used by the military government. As Pinochet had staffed the courts with individuals with unquestionable support for the authoritarian regime, the new civilian government could use the same executive prerogative in appointing new

judges. In this manner, Pinochet's appointees would be replaced with judges with a more democratic and modern outlook, or who at least were more willing to acquiesce to some of the reforms. Finally, I argue that from the perspective of the members of the higher courts, breaking ranks and agreeing to support some of the government's reform initiatives can be seen as a tactical move. Guided by a quid pro quo approach, the loss of some of the court's members as well as some of its jurisdictional powers was deemed a fair price to pay for retaining those constitutional prerogatives which grant the higher courts significant political power within the present authoritarian framework.

The paper distinguishes two clearly differentiated approaches followed by the post-Pinochet governments. I argue that during the Patricio Aylwin administration (1990-1994), the chosen course of action was eminently political and confrontational. I attribute this to the fact that the new president was clearly motivated by his strong human rights background and high profile role in fighting the military dictatorship. This strategy was replaced during the second civilian government by what I would call a "friendly persuasion approach". This change of strategy is a result of the more conservative, technocratic, and less belligerent attitude of the Eduardo Frei Ruiz-Tagle administration (1994-2000). However, Frei benefitted from the groundwork of the first administration. The shift from confrontation to persuasion resulted in some degree of success in the quest to reform the judicial power. Although the strategies were strikingly different, they complemented each other: the first government's aggressive approach created a set of conditions which made it possible for the second administration to negotiate with high-court justices and thus bring to fruition some of the reforms sought by the civilian coalition.

I. A Contemporary View of the Chilean Judiciary

A few general remarks about the judiciary are in order to better contextualize and illustrate the characteristics of a power of state whose reform has been sought by various governments over the last four decades.

a) *Organization*. Chile's judicial system is highly centralized. Organizational, jurisdictional and disciplinary responsibilities reside in the Supreme Court, which is the highest jurisdictional instance of the judicial power.

The internal institutional structure of the judicial apparatus is hierarchical and vertical in nature. This hierarchical organization guarantees that lower judges and administrative personnel deemed to have failed to meet standards of merit and good behaviour would see their careers terminated by negative evaluations conducted annually by the Supreme Court.[3]

Members of the higher courts are not elected by the people; instead, the integration of the courts has been eminently self-generating. The judiciary also enjoyed a one-sided autonomy. It did not allow governments to interfere in its internal affairs, but it assumed a decisive role during crucial political times, as a defender of the status quo. The 1980 constitution granted the judiciary the maximum degree of independence from the other powers of the state. Like the armed forces, the judicial power developed into an autonomous corporative organization with a strong esprit de corps.

b) *Political orientation*. Chile's judiciary has a long history of conservative praxis. Its conservatism was seen by some as a reflection of democratic maturity, which gave republican institutions both stability and permanence. However, for a critical sector of society, the conservative ethos of the higher court magistrates, especially those in the Supreme Court, was interpreted as demonstration of an intrinsically reactionary behaviour (Garretón, 1973). The historical evidence shows that at times of political crisis, or of changes deemed to threaten the longstanding domination of the oligarchic sectors, the Supreme Court has tended to abandon any pre-conceived notion of political abstentionism, objectivity and non-partisanship. It has played an important political role in trying to influence the balance of power towards the most conservative sectors of society. Analyses of judicial decisions and behaviour support the view that a correspondence can be established between the adjudication of justice and the political process (*ibid.*). The

evidence also shows that the highest court's judges have predominantly held a particularistic, neo- patrimonial and elitist notion of politics and society.[4] Moreover, the highest tribunal has gone beyond its bureaucratic functions of exercising constitutional jurisdiction in those times when the judges perceived the government in power to pose a threat to the interests of the oligarchy or to the corporate interests of the judiciary. A similar commitment to uphold civil and political rights and to protect the victims of political repression or human rights abuses has been absent, especially if the victims were from a different ideological persuasion than that of the members of the higher courts. For example, by interpreting the constitution to justify their abandonment of responsibilities, as they did during the military government, the judges clearly engaged in a political analysis of the circumstances present in the country at the time (i. e.; accepting *prima facie* the declaration of state of war made by the armed forces when no such war existed in the country).

Sociologically, superior judges integrate themselves into the ruling sectors of society. This allows them to become part of the network of influence between lawyers, politicians, business, and the old traditional landed oligarchy. This neo-patrimonial structure network identifies the judicial bureaucracy as an institution based more on interpersonal relationships than on professionalism, universalism, achievement and objectivity (Cánovas, *op. cit.*; Valenzuela, 1991).

c) *The judiciary and social change.* Historical evidence also shows that the judiciary acted overwhelmingly to support and defend the very foundations of the country's capitalist economic regime. Conversely, there are no examples of the judiciary using its institutional powers to promote or foster a change of that regime. The very idea of the judiciary becoming a radical transformative force was simply not part of the collective consciousness, nor was it even given consideration by the higher courts themselves.

As Chile began to change in the 1960s, it became evident that the behaviour, quality, performance, and influence of the judiciary were characteristics of a long gone era. Members of the higher echelons of the judiciary considered their social, cultural, economic, and political conservatism a virtue rather than an obstacle to the changes the new governments and the people desired. Attempts to reform the judiciary under Christian-Democratic President Eduardo Frei Montalva (1964-1970) and Socialist President Salvador Allende (1970-1973) -so-called democratization of the judiciary- were opposed by the Supreme Court as politicization and instrumentalization of the courts, and as attempts to undermine judicial autonomy.

d) *Social origins of judges.* The fact that most judges are of middle class origin should in no way be construed as a denial of the inherent social conservatism they tend to exhibit in the performance of their duties. Social stratification analyses of Chilean middle strata consistently show that their social aspirations are to climb the social ladder on the one hand, while avoiding at all costs the risks of proletarianization, or the social improvement of the lower groups. It has been the combination of this social ambition and fear which has led these middle sectors to move to the conservative side when they felt threatened by social changes pushed by the lower elements of society. By predominantly identifying themselves as members of the middle strata, the implication is that this sector is endowed with a series of virtues lacking in the upper and lower sectors: achievement, moderation, modernity, democratic culture, observance of the rule of law, tolerance, rejection of extremisms of any sort, and so on. Again, the historical evidence of the middle sectors' behaviour leading up to and during the early years of the Pinochet dictatorship shows that such a view is a myth.

e) *The judiciary and the military dictatorship*. Throughout the dictatorship, the Supreme Court adopted an ad-hoc theory whereby human rights abuses fell under the doctrine of *raison d'etat*, which it had no right to challenge. The Supreme Court refused to enforce its constitutional prerogative of vigilance over all courts by declaring itself incompetent to review the sentences passed by courts martial and military tribunals. Throughout the worst periods of repression, there was rarely even an attempt to rationalize or explain in natural justice terms the courts' rejection

of the institution of habeas corpus. The directives emanating from the Supreme Court radiated into the courts of appeals which routinely rejected thousands of writs of habeas corpus. The behaviour of the higher courts is remarkable since, almost without exception, judges claim that they were not pressured by the military government.[5]

f) *The 1980 constitution and the judicial power*. High court justices hold a degree of authority not commensurate with the powers of congress, where popular sovereignty resides in a democracy. The independence and autonomy of the judiciary, its protection from political interference, and its responsibility to defend the authoritarian structures are guaranteed by the 1980 constitution. The Supreme Court's efficacy in protecting the authoritarian structure created by Pinochet lay in exercising a number of constitutional prerogatives of a political nature. They include appointing superior court judges to the Constitutional Tribunal, the Electoral Qualification Tribunal, the Regional Electoral Tribunals, the National Security Council, and the Senate. The attributes of the Constitutional Tribunal include the power to oversee the constitutionality of constitutional amendments, laws, government decrees, and calls for plebiscites. Unlike the judicial review cases before the Supreme Court which only apply to the case under scrutiny, its resolutions have a general effect. As well, it can declare the unconstitutionality of any organization or political party deemed to be in violation of the constitution. The Electoral Qualification Tribunal, in turn, is in charge of overseeing all presidential and congressional elections, with three of its five members being justices or former justices of the Supreme Court. Through the appointment of some of its members to the Regional Electoral Tribunals the judicial power is also directly engaged in deciding matters of political significance since it is their responsibility to oversee elections in labour unions and civil society organizations.

The Supreme Court also has representation in the National Security Council. Its president and the four commanders-in-chief of the armed forces hold a majority of votes, since the other voting members are only the President of the Republic and the President of the Senate. The National Security Council is a metapower organization whose main function is to convey to the President of the Republic, the Congress and the Constitutional Tribunal its opinion regarding "any deed, act, or matter which in its judgement gravely attempts against the foundations of the institutional order or which might affect the country's national security" (Article 96, paragraph b, of the Constitution).

Lastly, the Supreme Court appoints two former Supreme Court judges and one former Comptroller General to the Senate. Together with four former commanders-in-chief designated by the National Security Council, they hold enough votes to veto legislation aimed at reforming the institutional order or making the previous regime accountable for human rights abuses. General Pinochet's incorporation to the Senate reinforces the veto power of these "institutional senators" who, joined by elected right-wing senators, have controlled the upper chamber since 1990.

II. The Conflict Between the Judiciary and the Aylwin and Frei Governments

Aylwin's approach to the reform of the judiciary combined both a confrontational strategy on the one hand, and a circumspect and prudent strategy that appealed to high moral and ethical principles, on the other hand. The latter would allow the government to retreat if the political conjuncture was not propitious. The confrontational strategy would prove to be limited in its effects, as few comprehensive changes or reforms took place during Aylwin's tenure. Of the several conflicts of a political nature that arose between the government and the Supreme Court, it was the government that in the end appeared to back off, contributing to reinforce the public perception that despite the progress achieved in terms of good governance, the institutional order was still less than democratic. Yet, confrontation had a degree of success that could not be underestimated, since it allowed the government to locate the question of judicial reform on the centre stage of the political debate. As the degree of public acceptance

and the credibility of the judiciary bottomed out, greater societal and political demands validated Aylwin's claim that reforms could no longer be postponed.

This confrontational strategy was premised on the view within some sectors of the government that higher courts judges could be influenced by public pressure into accepting the reforms to the justice system. Aylwin and his Minister of Justice, Francisco Cumplido, shared many lawyers' and jurists' views that most judges were weak individuals, without the strength or fortitude to stand by their convictions.[6] This perception was fostered by the passivity and deference shown by the courts to the military government, as well as by the long tradition of sub-missiveness to authority promoted by the patrimonial nature of the judicial system. Aylwin's announced intention to introduce reforms was, however, met with strong opposition. The Supreme Court took a harsh and aggressive stand by denouncing the government's initiatives as demagogic attacks on the independence, autonomy, and moral rectitude of the judiciary. It was clear that most of its members had little or no intention of considering the announced legislative changes.

In his third week in office, Aylwin addressed a judges' conference. In his remarks, he cited public opinion polls, academic research studies, and the Supreme Court's President's own words to emphatically state that the administration of justice was experiencing "a grave crisis". He added that, "the judicial power does not behave as a truly independent power of state... it is perceived by many as another public service that 'administers justice' in a mechanic fashion, too close to the letter of the law, and too often docile to power influences" (Aylwin, P., 1992: 159-160). He then announced that in order to guarantee the independence and efficiency of the judiciary, he would create a National Council of Justice and a Judges' College. Two weeks later, Aylwin signed an executive order creating a Judicial Reform Commission in charge of preparing the draft of the constitutional amendments bill to be sent to Congress. Nine months later, the Commission's President, Manuel Guzmán Vial, submitted its report to the President. In it, a clear radiography of the Chilean judiciary was presented: "There is not doubt that judicial officials failed in their duty to protect basic rights... there are grounds to constitutionally accuse members of the judicial branch for noteworthy failures in their duties... but Parliament lost the power to oversee those situations which occurred previous to its installation. Many of those situations have unfortunately remained out of political reach" (FBIS-Lat-91-007, 10 January 1991, pp. 51-53).

Guzmán Vial then addressed the Gordian knot of Chile's judicial system; its self-generation:

"The self-generation of the judiciary has a major impact. If you were to compare the Chilean system of judicial appointments with that of other countries, you would come to the surprising conclusion that the Chilean system, insofar as Supreme Court appointments are concerned, is absolutely exceptional. The Chilean system has a connotation of 'self-generation' that is unique or exceptional in terms of comparative judicial law" (*ibid.*).

On the question of the judiciary's independence during the dictatorship, Guzmán Vial was even more blunt:

"The higher structure of the judicial branch has accommodated to the political-military power. Channels of communication have been created through which many of those appointed to the Supreme Court have been greatly influenced by political-military power... A judicial branch within the framework of an authoritarian government will in some way succumb to the pressure of the political government due to a normal reaction: fear. Fear that in some cases it may be important to submit" (*ibid.*).

Among the recommendations made by the Judicial Reform Commission was the creation of a National Council of Justice which would be in charge of appointing future judges, thus wrestling this attribute away from the Supreme Court, and effectively ending the system of self-generation. The constitutional reform bill was sent to Congress in April, 1991. It included the creation of the National Council of Justice, which would take part in appointing the justices of the Supreme Court while safeguarding the independence of the judiciary. It would also propose names of judges for the President's appointment. The bill included the provision that one third of

the Supreme Court members be lawyers from outside the judiciary. The number of Supreme Court judges would also be increased to 21. The council would be in charge of formulating policy and would be "heard in advance with respect to any proposed constitutional reform and, in general, any provisions that regulate the organization and powers of the courts of justice or that refer to procedural norms" (FBIS-Lat-91-084, 1 May 1991, p. 32).

In 1990, Aylwin had created the Commission of Truth and Reconciliation. Its role was to collect and analyse all available information on human rights violations from September 11, 1973 to March 11, 1990. On March 5, 1991, Aylwin announced the Commission's findings and recommendations.[7] He referred to the report's scathing denunciations of the judiciary: "The Commission says that the judicial branch did not react with enough energy in light of these acts. This produced a worsening of the process of systematic violations of human rights by not granting immediate protection for detained victims in cases that were denounced before the courts and by granting the repressive agents a growing certainty of impunity for their criminal actions" (FBIS-Lat-91-043, 5 March 1991, pp. 27-28). Aylwin added that "the judicial branch should be perfected so that it can effectively perform its role as guarantor of the essential rights of the people". But then, perhaps recognizing that the government's hands were effectively tied by the authoritarian enclaves, he warned that "we should not waste all of our efforts digging into wounds that cannot be healed". In a remarkable turn around, the President declared that all the information collected by the Commission was to be sent to both civilian and military courts in order to proceed with the corresponding investigations. That is, the same state agencies which were being blamed for the violations of human rights were now asked to do what they had failed to do in the past. Aylwin's decision to have the courts investigate human rights abuses left many observers perplexed. The president had limited choices, though. While in other countries, special tribunals could be set up to prosecute "systematic violations of human rights", the Chilean constitution explicitly forbids such a thing. Had President Aylwin dared to appoint such a special tribunal, the National Security Council and the Armed Forces would have had no problem overthrowing him for violating the constitution.

The Supreme Court's reactions to the President's statements and the findings of the report were swift, curt, and confrontational. First, the judges rejected the report which, they said, "passed judgements on the courts of justice in a passionate, tendentious, and thoughtless manner, as a result of irregular investigations and political prejudice that ended up placing judges at the same level of responsibility as those who actually committed human rights abuses" (FBIS-Lat-91-095, 16 May 1991, p. 29). Second, they denounced an intimidation campaign against the Supreme Court, as well as a plot to assassinate two justices. Third, the judges stated that the climate of animosity fostered by the government endangered the stability of the institutional order and the rule of law. Four, they threatened to take their concerns to the National Security Council. The justices' complaints were echoed by the opposition parties which jumped to the defence of the higher court. Right-wing members of parliament also alleged that there was a campaign to discredit the judicial branch; that Aylwin's statements constituted pressure at the highest level to influence court decisions; and that the government campaign seriously affected the institutional stability (FBIS-Lat-91-048, 12 March, 1991, pp. 22-23).

Aylwin responded that there was no government campaign against the judiciary, and called upon the Supreme Court to come forward with the evidence that a plot actually existed. As accusations between the government and the judicial power escalated, political tension increased when the armed forces were placed on a state of full alert following the publication of the Truth and Reconciliation Commission Report. To quash rumours of an impending coup, Justice Minister Cumplido announced on March 15, 1991 that the conflict between the executive and the Supreme Court had been overcome: "We consider that there is no institutional conflict. All the government branches, the National Congress, the President of the Republic and his cabinet, and the Supreme Court of Justice and all the courts are working normally and all court sentences are being served.

So, there is no need to think of an institutional crisis" (FBIS-Lat-91-052, 18 March 1991, p. 34).

The government had no choice but to retreat. The judges' statements and the movement of troops had an eerie similarity to the developments faced by Allende in 1973, which had culminated in the military intervention. In a twisted way, the conservative opposition's remarks reminded Aylwin of similar statements made by his Christian Democrat peers in parliament in August 1973, under his stern orders, which had contributed to legitimize the coup.

Confrontation arose again when the Supreme Court released its official response to the Truth and Reconciliation Commission Report. The Secretary-General of Government, Enrique Correa, stated that, "the conclusions of the Supreme Court essentially confirm the existence of serious human rights violations under the previous regime". Raúl Rettig, the Commission's Chair, added that, "the Commission believes that if the Supreme Court had adopted a different attitude, many of the unfortunate incidents caused by state violence would not have taken place". Hernán Vodanovic, a Socialist senator, joined in: "I dare label the Supreme Court's ruling frivolous, careless, and irresponsible. It is trying to conceal its responsibility through subterfuge and indirect reasoning, a responsibility it did not assume during the attacks on human rights under the past regime" (FBIS-Lat-91-098, 21 May 1991, pp. 23-24).
When arch-conservative Enrique Correa Labra was elected President of the Supreme Court in May 1991, the government's hopes of bringing about needed reforms with the support of the judiciary were dashed. Just before his election, Correa had stated that the government "was wrong", and that he was "completely against the reform of the judicial branch" (FBIS-Lat-91-052, 18 March 1991, p. 34). Correa's comments were unmistakably antagonistic. In expressing his opinion on the judicial reforms bill, and the creation of the National Council of Justice, he said: "I am absolutely against it; I hate it; I feel contempt for it" (FBIS-Lat-91-166, 27 August 1991, p. 40). As congress discussed the bill, and some right-wing members of the legislature expressed agreement with some of the reforms, Correa became more outspoken in his opposition as he insisted that the reforms threatened the judicial power's independence. The highest court, in turn, jumped to the defence of its president by issuing a public statement, indicating that "the opinion of the chief justice is supported by *almost* all members" who are supportive of his "public defence of the essential and exclusive attributes of the judiciary, particularly those regarding the autonomy of the judicial branch" (my italics; FBIS-Lat-92-009, 14 January 1992, p. 43). The statement was privately welcomed by those leading the reform movement, since it appeared to indicate that some members of the highest tribunal were breaking ranks with the hardliners within the court.
Later, while inaugurating the annual judicial session, Correa complained that "the interference of the president of the republic and of the senate in the appointment of Supreme Court members was unacceptable". The inference, of course, was that Aylwin was using his prerogative to replace members of the court with individuals who were willing to listen to the government's demands for changes to the judiciary. Aylwin had succeeded in passing law No. 19.121 in January 1992 which, like Pinochet had done in 1989, offered to buy out any judge 70 years old or older, who resigned his judgeship. Enticed by the compensation package, four Supreme Court judges had decided to take early retirement. This gave Aylwin a more interventionist role in the designation of their replacements. Aylwin politicized the appointment process by selecting judges who were willing to give consideration to the reforms, or, in the case of hardline conservatives, by signalling that the government was only reluctantly appointing them. Interviewed after his official speech, Correa let out his indignation against the government: "The government is wrong; we are right; all we need is more judges and we will resolve all the problems. There is no crisis, simply too much work."[8] Correa's contempt for the democratic government was highlighted by his absence from the traditional ceremony of the opening of parliament, when the President of the Republic gives his State of the

Nation's Address. Correa's mercurial temperament was later directed against the newspaper *El Mercurio* for an editorial on corruption in the judiciary, in November 1992. Criticism of the judiciary by the conservative newspaper was indicative that the higher court was winning the small battles, but it was losing the war. The Aylwin government, on the other hand, relished the fact that its campaign against the higher court was paying off, as the judiciary continued to lose credibility in the eyes of the public, including important conservative sectors of society.

At the same time, the Chamber of Deputies began impeachment procedures against three Supreme Court judges and the Army's Auditor-General. The impeachment partially succeeded when the Senate approved to destitute judge Hernán Cereceda, for "remarkable dereliction of duty". Cereceda, a member of the Constitutional Tribunal at the time, was removed from the Supreme Court not for the original charges, but for corruption. This congressional action was highly symbolic. First, it conveyed to the members of the higher courts the important message that they could not take for granted the support of the right-wing caucus. Second, it showed that the armour protecting the higher court had been pierced, and therefore, the aura of invincibility which had surrounded the Supreme Court for so long was coming to an end. Third, it sent a clear message to the judges about the seriousness of the government's efforts to reform the judicial power. Last but not least, the partial success of having a Supreme Court judge removed from the bench gave members of parliament not only a sense of accomplishment, but also an added incentive to use the impeachment procedures in the future.

Thus, in September 1996, the centre-left parties launched impeachment procedures against three other Supreme Court judges. In May 1997, the right-wing party, Democratic Independent Union (UDI), started its own constitutional impeachments against the President of the Supreme Court, Servando Jordán. None of these impeachments prospered, but they served the purpose of keeping the spotlight on the judiciary. Within the Supreme Court, Cereceda's destitution contributed to widening the rift between the judges. The hardliners were pushed further into a defensive position, as the moderates refused to support Cereceda's appeal against the Senate's resolution.

These events shifted the correlation of forces in Congress and inside the courts. The confrontational strategy had succeeded in breaking the esprit de corps among judges, and in dividing the conservative caucus. New voices emerged, with a new disposition to negotiate the scope and shape of reforms. In the end, however, Aylwin's efforts at reforming the judiciary were doomed, since his government lacked the quorum needed to pass the required constitutional amendments. Aylwin acknowledged the democratic forces' inability to remove the authoritarian enclaves that still restrict democracy: "Our democratic system, under our constitution, does not establish an appropriate balance among the government branches. I believe that all Chileans with a democratic tradition, are convinced of this. In the future, I hope that our efforts to improve the democratic system will include corrections so as to establish a better balance among the government branches" (FBIS-Lat-91-131, 9 July 1991, p. 34). Aylwin completed his four-year term without having really reformed the judiciary.

Aylwin's successor, Christian-Democrat Eduardo Frei Ruiz-Tagle, has been less committed to pursuing a confrontational approach with the armed forces and the judicial power. He made a lukewarm commitment to eliminate the authoritarian enclaves as long as it does not derail the economic model. His modernization of the judiciary has had less to do with the first administration's motives, and more with Chile's integration into the global economy. In the new global economic order, the modernization of the judiciary is being promoted by the World Bank and the International Monetary Fund to assure foreign investors that their interests will be protected by the rule of law, guarantees of due process, and a professional and uncorrupted judiciary.

Frei delegated responsibility to modernize the judiciary to his Minister of Justice, Soledad Alvear. Aware that the previous administration's strategy had polarized the terms of the reform debate without producing the much needed changes, Alvear chose to consult more often with the high court

judges, especially those who had been identified as more predisposed to collaborate with the government. She pursued a forceful, yet less antagonistic, approach to convince the judges that the reforms of the judicial power were inevitable, and that they would be carried out with or without their support. She made the judges realize that their opposition to the reforms had become futile, in view of the widespread support for the reforms among politicians and the public. She certainly benefitted from Aylwin's limited success in delegitimizing the judicial system. The credibility of the judicial power had plummeted, as polls and surveys showed.[9]

Moreover, divisions between hardliners and pragmatists within the courts had become more pronounced. The pragmatists had come to terms with the fact that they had no alternative but to join the reform movement or step aside. Hardliners, on the other hand, believed they were still well protected by the 1980 constitution, and by the political correlation of forces that makes amendments to the constitution an almost impossible task. The divisions became evident when judges Roberto Dávila and Mario Garrido appeared before the Chamber of Deputies' Commission of Constitution, Legislation and Justice, in July 1995. The judges left no doubt that theirs was a minority view within the Supreme Court. In their submissions, they clearly stated that their opinions on the reforms "did not represent the Supreme Court's official position nor the majority of its members".[10]

The schism within the highest court deepened in January 1996 when the members of the Supreme Court broke with tradition and failed to elect the senior member of the court, Servando Jordán, as its next president. Jordán succeeded in a second round, by a margin of 9 to 6, and only after an appeal by Judge Osvaldo Faúndez to uphold the timeless tradition. Opposition to Jordán was attributed to his strong resistance to reforms, an attitude that intensified during his tenure.[11]

Meaningful reforms of the justice system took place only in 1997. The code of criminal procedures was overhauled; the office of the attorney-general was established; the institution of public defender was enacted; and trial by jury, along the lines of the u. s. criminal justice system, was given legal recognition. These reforms make possible, for the first time, the participation of the people in the process of adjudicating justice. They are a first step on the road to wrestle away some of the powers that used to reside in a very archaic, highly formalistic and centralized judicial system. As well, they are a radical departure from a justice system in which the accused was presumed guilty, and the same individual acted as investigator, prosecutor, and sentencing judge. They also allow for greater public accountability of all judges who, before, were subjected only to the supervision of the higher courts. Their real impact will not be felt, however, until they go into effect in the year 2004. This delay in the implementation of the reforms is explained by the government as the time necessary to re-educate judges and court officials, not to mention the building of a whole new infrastructure.

Minister Alvear's efforts at reforming the Supreme Court, received unexpected assistance from the conservative sectors of the political opposition. In May 1997, the UDI announced impeachment procedures against Servando Jordán for dereliction in the performance of his duties. Jordán was accused of manipulating criminal procedures and granting bail to a wellknown Colombian criminal, who then fled the country. The accusation reinforced the public's perception that the justice system had become thoroughly corrupted and that it was no longer the respected and legitimate institution many believed it had been throughout the democratic life of the republic.

The impeachment was not intended to reform the Supreme Court's substantive political powers. UDI's action was motivated by the political gains it expected to reap in the December 1997 elections by presenting itself as the sole crusader against corruption. Its attack was not against the institution of the judiciary *per se*. Instead, it was against corrupted individuals who were undermining the credibility of an important ally in future political battles to defend the authoritarian institutional order. UDI pre-empted other political forces by presenting itself as the only party willing to fight the growing reports of corruption in the Aylwin and Frei

administrations.
Although impeachment procedures against Jordán failed, the Frei government was presented with a unique opportunity as most political parties agreed to some reforms of the judiciary. Right-wing National Renewal party agreed to reform the constitution in areas regarding the structure and composition of the Supreme Court thus paving the way for the removal of some of its members. In December 1997, a constitutional amendment radically altered the make-up of the highest tribunal. It ordered the immediate resignation of all high court judges 75 years old or older and reduced the president of the court's tenure to two years, prematurely ending Jordán's three-year appointment. Judges were given until January 1, 1998 to resign or risk losing their pension and retirement benefits. Compensation was offered to those who resigned voluntarily. Seven Supreme Court and two Court of Appeal judges accepted the compensation package. The number of Supreme Court justices was increased to twenty-one, with five of them being lawyers from outside the judiciary. The Senate was also given a role in the confirmation of superior court judges. As well, the number of candidates that the Supreme Court can suggest to the executive was increased from five to ten, giving the president a greater latitude in the selection process. By January 1998, the composition of the Supreme Court has been altered in a dramatic fashion by the incorporation of 11 new judges.
The Supreme Court suffered another setback in January 1998. Tradition was broken when the members of the court chose as its new president Judge Roberto Dávila, over senior Judge Osvaldo Faúndez. The new president had long been considered a supporter of the reforms, while Faúndez had expressed his opposition to them. The new president never worked as a judge in either lower or higher courts. His legal career was as a military prosecutor, until he became a Santiago Court of Appeals' rapporteur in 1969. He was appointed to the Supreme Court by Pinochet, and has regularly enforced the 1978 amnesty law. According to human rights lawyers, Dávila has sometimes expressed the view that the amnesty law must be interpreted before the files on human rights cases are closed, but he has done so only when he was a minority in the court.[12]
Dávila's election was a serious blow to the hardline faction in the court. Opponents to the reforms reacted bitterly. One judge, Germán Valenzuela, said that the reforms were evidence that the "judicial power has been captured by the executive"; that "the independence of the courts has been lost"; and that the Supreme Court has become "politicized" by the government.[13] Judge Faúndez added that "institutions without tradition are destined to die".[14]

Conclusions

The above discussion illustrates how in spite of the structural and institutional constraints faced by the civilian governments, there has been some success in the formidable task of reforming one of the authoritarian enclaves left behind by the military regime. The creation of a National Council of Justice, the incorporation of lawyers to the Supreme Court, and the more active role of the Executive and the Senate in the appointment of judges, constitute positive steps towards breaking down the neopatrimonial regime that allowed for the self-generation of the higher courts. To a degree, the judiciary's upper echelon has been dispossessed of the discretionary attributes it held over the judicial power's personnel. The appointment mechanisms have become more openly political contributing to break the esprit de corps among the judges. The solid opposition against the Aylwin government has waned as new justices show more receptivity to the legal initiatives regarding the modernization of the justice system.
Have these reforms contributed in any significant way to the dismantling of the authoritarian enclaves and to making Chile more democratic, as apologists of the current government like to maintain? I believe the answer to be categorically negative. The changes that have occurred have not addressed the question of the authoritarian enclaves. No amendment that would abrogate the essentially political attributes of the Supreme Court has

succeeded in Congress. The fact that these areas of concern have been barely touched by the reforms proves that the imbalance among the powers of state, that Aylwin decried so many times, remains in place. The overhaul of the Supreme Court does not mean that progressive, much less, leftist individuals, have come to replace the old conservative members of the higher court. Aylwin, and more so Frei, have appointed younger and more modern individuals, but whose social and ideological proclivities are closer to the conservative side of the political spectrum. Frei has been adamant in ignoring some very good candidates, including women, and has used his presidential prerogatives to reinforce the traditionally conservative outlook associated with the members of the superior courts of justice. Politically, it can be expected that the new members of the Supreme Court will continue to support procedural but not substantive changes regarding the role of the judiciary within the institutional structure inherited from the dictatorship. In doing so, the judicial power will continue to perform its constitutional responsibility of ensuring that the political system remains less than fully democratic. Conversely, the likelihood of having the courts re-open the hundreds of unresolved human rights cases is almost nil. As the former Minister of Justice Francisco Cumplido said, in referring to the new members of the Supreme Court, "we cannot be blind to the fact that the very same judges who today accede to the Supreme Court were the ones who, when they were in the lower courts of appeals, granted amnesty in many cases of human rights abuses".[15]

That said, it is important to acknowledge that the governments of the *Concertación* are likely to continue to be pressured by the majority of the public opinion into pushing for the reform of the institutional order. A clarion call that the Christian Democracy-Left coalition cannot ignore is the dismal voters' turnout during the mid-term congressional elections of December 1997. The more than one-third of voters who abstained, as well as the one million or so youth who refused to register in the Voters' Registry, has rightly been attributed to the public's disenchantment with the lukewarm efforts to change the undemocratic nature of the political system under the Frei administration. The waning interest in politics by so many Chileans essentially ensures the permanence of the institutional order created by Pinochet and, thus, the less than democratic nature of the political system.

NOTAS

[1] As defined by General Pinochet in his 1977 address known as the *Chacarillas Discourse*. There, Pinochet also mapped out the various stages of the transition towards his qualified form of democracy.

[2] See: "Transición pactada?" by Alfredo Jocelyn-Holt, *El Mercurio*, January 22, 1998.

[3] For a telling, although biased, account of these features of the judiciary see the memoirs written by a longstanding court of appeals' judge, José Cánovas (1987).

[4] In objecting to the introduction of oral trial in criminal matters, Supreme Court Judge Mario Garrido, appearing before the Chamber of Deputies's Commission of Constitution, Legislation and Justice on July 11, 1995, stated that his objection was mainly due to the fact that "the average man is obstinate in his ideas; he lies and is not used to speaking in public" [www.comis/constitu/prycod_penal/1630exp.txt]. A similar view is held by Judge Cánovas (see above) who, while remarkable in his criticisms of the higher courts does not seem to realize that his own account is equally disdainful of the common individual.

[5] Supreme Court judge, Marcos Libedinsky, has stated: "In general, the judiciary has been very conservative, under any type of government. It has always been conservative. It has a tendency to protect the government."

Quoted in *Derechos Humanos en Chile,* FASIC, January 1996, p. 1.

[6] As Cumplido notes, "the strategy was to 'provoke them,' with public criticisms so that, at the very least, they would be conscious that they could not continue to operate with the government's silence". Quoted in "Revolución en la Corte Suprema", article by Andrea Lagos, in *La Tercera*, January 11, 1998.

[7] See: *Report of the Chilean National Commission on Truth and Reconciliation*, two volumes; translated by Phillip Berryman, Center for Civil and Human Rights, Notre Dame Law School, Notre Dame, Indiana, 1993. Chapter Four is devoted to the analysis of the court's behaviour in the 1973-1990 period.

[8] FBIS-Lat-92-043, 4 March 1992, p. 31. Correa was not quite right in this regard since government funding for the judiciary had almost doubled under Aylwin. Yet, there had been no significant improvements in the quality, efficiency and speed in the administration of justice.

[9] Public confidence in the Chilean judicial system is estimated at 27 percent, according to a 1997 international survey conducted by the undp. Cited in *La Jornada*, October 9, 1997.

[10] See submissions by Judges Dávila and Garrido before the congressional Commission of Constitution, Legislation and Justice on July 11, 1995, [www.comis/constitu/prycod_penal/1630exp.txt].

[11] Sources in the Ministry of Justice considered that Jordán lacked leadership and political acumen to understand that under his tenure the authoritarian enclave represented by the Supreme Court would come to an end. He is portrayed as a divisive factor inside the court: "Jordán could have collaborated with the government and gone into history as the president who made possible the transition of the judicial power; yet, he chose to defend the status quo and to engage in 'small potatoes' battles with his peers." See: "El valle de los caídos", *Qué Pasa,* No. 1399, p. 3-9, February, 1998.

[12] See: "El fin de la era Rosende", by Jaime Ugalde, Rodrigo Manríquez, and Ceina Iberti, in *Qué Pasa*, No. 1396, January 13-18, 1998.

[13] See: "Germán Valenzuela Erazo: Gobierno se apoderó del poder judicial", in *La Tercera*, January 8, 1998.

[14] See: "Rota tradición: Ministro Dávila, nuevo presidente de Corte Suprema", in *El Mercurio*, January 6, 1998.

[15] Quoted in "Revolución en la Corte Suprema", by Andrea Lagos, in *La Tercera*, January 11, 1998.

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