

**From Quietism to Incipient Activism:
The Institutional and Ideational Roots of Rights Adjudication in Chile**

by

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I. Introduction

In the panorama of Latin American judicial politics, Chile's courts have been most notable for their deference and conservatism in rights cases. Neither the ordinary courts nor the Constitutional Tribunal have been historically inclined to take stands in defense of constitutional guarantees. In matters of public law, rather, the tradition has been one of detachment from the public realm, an almost solipsistic retrenchment from things 'political' that has deep historical roots, involving, among other things, a defensive reaction against intervention by the executive branch, which led the judiciary to seek out a reasonable degree of autonomy by confining their work to 'normal' judicial business, that is, the regular application of the legal codes to common civil and criminal cases.

Furthermore –as we have argued elsewhere—the Chilean courts have historically had a strong corporatist outlook that has contributed to their isolation from the rest of society, in a fashion analogous to the detachment that the country's armed forces have had from the civilian world. This corporatist outlook helps to explain the indifference of the Chilean courts toward the public debate that took place in Chile's society has had over the last couple of centuries. Furthermore, the corporatist and isolated position of the judiciary contributed to the formation of a professional culture that discouraged judges from getting involved in politically charged cases, which in turn conspired against the development of judicial assertiveness in rights cases.

Recently, however, signs of change in judicial attitudes and practices regarding rights have emerged in lower courts and in the Constitutional Tribunal (though far less so in the higher ranks of the ordinary courts). Some lower court judges, especially those in criminal courts, have begun taking independent and innovative stands in defense of fundamental rights, challenging their institutional superiors and clashing with elected officials. In the past three years, such young judges have earned public notoriety and, in some cases, condemnation for challenging the legal legitimacy of military jurisdiction, publicly debating politicians who seek to limit due process guarantees, and exposing and demanding action to correct inhumane conditions in the country's increasingly overcrowded prisons. They have also formed a professional association that organizes public lectures and discussions, and publishes essays and commentary (many of these critical) on theoretical and practical aspects of the judicial role, always emphasizing the guiding principles of a "democratic rule of law" (*Estado democrático de derecho*).

Meanwhile, the Constitutional Tribunal has entered the political thicket in an unprecedented manner, determining a number of hot-button policy issues. The transformation of the role played by the Constitutional Court reached a zenith in 2008 when it issued a number of extremely important (and polemical) decisions that have made this formerly unknown institution a very salient political actor. As a result of last year's decisions, a Court that during most of the transition to democracy (1990-2005) had a rather insignificant role is now considered a crucial actor in the political process. Indeed, even though during the 1990-2005 era the Constitutional Court did produce some rulings against the government, those were few and relatively unimportant. This explains why until 2008 most Chilean could not even distinguish the Constitutional Court from the ordinary judiciary (in particular the Supreme Court). This,

however, has changed dramatically, and most people now identify the Constitutional Court as an important policy player.

In this paper, we trace and analyze these recent developments in judicial activism in Chile—expressed both in the willingness to engage in rights adjudication at the level of the ordinary judiciary and in the readiness to void legislation at the level of the Constitutional Court—in order to then account for the sources of this remarkable shift. We argue that the observed changes can be attributed to a combination of institutional reforms and change in the ideational context in which judges operate.

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Together, these changes have affected the training, professional socialization and incentives of Chile's judges, so much so, that they are now more willing to challenge the elected branches in order to protect individual rights and engage in strong forms of judicial review of the constitutionality of law.

II. Judges and Rights in Chile: Historical Summary

In previous work, we have individually demonstrated that, despite their formal independence and relative professionalism (particularly when compared to many counterparts in the region), Chilean judges have historically been weakly defensive of rights and reluctant to use their powers of judicial review of the constitution (Hilbink 1999 and 2007; Couso 2002 and 2005). Across time and through significant regime change, courts have been overwhelmingly reticent to assert themselves to defend constitutional rights or to arbitrate constitutional conflicts between

the executive and the legislative branches, even though they have been authorized to do so since 1925. This reluctance to engage in an assertive exercise of judicial power happened both at the regular judiciary level and at the Constitutional Court. This was particularly noticeable in the case of the latter, since the Constitution of 1980 gave the Court very strong powers of control of the constitutionality of bills before their promulgation (in what is known as an ‘abstract’ and ‘a priori’ type of review). Indeed, as Couso (2002, 2003 & 2005) has demonstrated in previous work, the Constitutional Court was largely uninterested in exercising its important powers of review of constitutionality between 1990 and 2005, to the point that it was hardly known by the population and considered to be of little consequence by the political elites. As for the regular courts, on the few occasions that they actually defended rights during the 20th century, it was almost always to protect conservative (and often illiberal) interests.¹ And when it came to arbitration of inter-branch conflict, they simply refused to use their powers.

We have both attributed this to historical-institutional factors, albeit with some differences in emphasis and framing. Chilean state-builders constructed the judiciary to serve more as “ballast for the executive” than as a defense against the abuse of citizens’ rights (Adelman 1999: 292), and Chilean judges have generally been true to this role. From early in the country’s republican history, Chilean judges were trained to be “slaves of the law,” but in a context in which law, particularly public law, was understood as the will of the executive. Rather than defend legal principles embodied in the constitution, or in the idea of constitutionalism, then, in public law cases, judges were expected to defer to the other (“political”) branches of government. This message was reinforced with particular force in key historical contingencies where the courts found themselves brutally intervened by the executive

¹ For examples, and some rare exceptions, see Hilbink 2007.

power, as when the then Interior Minister General Carlos Ibáñez del Campo ordered the arrest of nothing less than the President of the Supreme Court and later dismissed much of the rest of the Court (an event that, incidentally, marked the inauguration of his dictatorship, in early 1927) (Couso 2002; Faúndez 2007). Subsequently, institutional reforms designed to insulate judges from political (that is, executive and legislative) control rendered the judiciary an autonomous bureaucracy in which conservative elites on the higher courts, and in particular the Supreme Court, were empowered to reinforce and reproduce their own views through discipline and promotions within the institution (Hilbink 1999 and 2007). The result was an institutional dynamic in which “lower judges feel beholden to upper judges and the judiciary as a whole bows to the executive” (Huneus 2006: 149). The understandings and incentives transmitted and enforced within the institution “overshadow legal texts, principles of justice, and even personal policy preferences” as guides for judicial behavior (Huneus 2006: 128), rendering judges generally unwilling or unable to take independent or innovative stands in defense of rights and rule of law principles (Hilbink 2007).²

To put this slightly differently, the institutional characteristics of the Chilean judiciary, which embodied and reproduced an essentially monarchical view of the judicial role (Vargas 2007: 103) and which had not been reformed in any significant way since the 1920s, encouraged judges to be primarily inward- and/or backward-looking. The hierarchical organization, which gave the superior courts broad, discretionary powers over the careers of their subordinates, created and maintained a “bureaucratic culture” (R. Correa 2004: 10) that “feeds the most

² As Fernando Atria (2007) puts it, the dominant understanding of the judicial role in Chile is “commissarial;” that is, rather than serving as autonomous professionals, dedicated to the appropriate application of the law to the cases before them (or, in the high court, to the clarification and uniformization of legal interpretation), lower-court judges function as deputies, servants, or soldiers of the Supreme Court, and the Supreme Court itself functions to keep its subordinates in line and (thereby) to preserve the integrity of the institution, which ultimately serves the executive.

conservative visions, discourages innovation, and renders judicial functionaries more attentive to their own interests than to those of the citizenry” (Vargas 2007: 102). This “organizational culture” has been transmitted and maintained over time “via the indoctrination of new members and the rejection of foreign intrusions” (Vargas 2007: 102), and because, until quite recently, there was no specialized judicial education and training, and judicial pay and prestige were relatively low, judges had neither the intellectual resources nor the socio-economic security and standing to assert themselves in defense of rights.

The traditional reluctance of Chile’s regular courts to engage with things deemed ‘political’ was particularly salient in the jurisprudence of the Supreme Court concerning ‘*recursos de inaplicabilidad*,’ a mechanism of concrete constitutional review (with only *inter partes* effects) introduced by the Constitution of 1925. Indeed, as the work of Brahm (1999) and Faúndez (2007) demonstrate, the Supreme Court consistently avoided declaring laws ‘inapplicable due to their unconstitutionality’ in cases brought by both the political Right and Left.

Enrique Brahm’s systematic analysis of the Court’s jurisprudence between 1925 and 1973 regarding constitutional challenges to laws regulating private property right brought by large landowners and industrialists shows that the Court was almost never willing to support these. This conservative legal historian laments this record arguing that the reluctance of the Court to defend property rights led to the prevalence of a property right regime he calls ‘property without liberty.’³

³ QUOTE TO BE ADDED TO FLESH THIS PAR. OUT.

While Brahm's account of the Supreme Court rejection of private property rights claims could lead some to suspect that this derived from an ideological bias of the Court against right-wing values, Julio Faúndez's research suggests otherwise. In his recent study of the role played by law and the courts throughout Chile's history (Faúndez 2007), he demonstrates that the refusal of the Supreme Court to defend civil and political liberties between 1925 and 1973 was not the result of political ideology (either right-wing or left-wing), but was instead the consequence of a judicial ideology which was both formalist and opposed to challenging the elected branches, even in the face of a constitutional rule mandating the Court to engage in the moderate type of judicial review of the constitution implied by the *recurso de inaplicabilidad*. In his words, "Given the Court's views on the supremacy of legislation and its approach to legal interpretation, it is not surprising that it did not fulfill its role as guardian of the constitution. The 1925 Constitution gave the Supreme Court the power to review the constitutionality of legislation, but the introduction of this procedure had little impact, as the Court invariably declined to use its newly acquired power(). Recently compiled statistics show that between 1925 and 1946, almost 90 percent of judicial review cases brought before the Court were dismissed, and this trend continued until the demise of the constitution in 1973" (Faúndez 2007: 132).

In sum, both at the level of the Supreme Court and at the level of the lower courts, historical-institutional and socialization factors contributed to the consolidation of a judiciary reluctant to challenge the elected branches in defense of the constitution and individual rights. In the case of the lower courts, this expressed itself mainly as submission to the preferences of their superiors (Hilbink 1999 and 2007; Huneus 2006; Correa 1993), while in the case of the Supreme Court deference to the 'political' branches was rooted in the fear of getting involved in the messy –and dangerous—world of politics (Couso 2005).

III. Making Change Possible: Institutional Reforms and a Shift in the Ideational Context

After the long military dictatorship that ruled Chile between 1973 and 1990, the courts came under fire from democratic political elites and the general public for their refusal to defend human rights under the dictatorship (see, e.g., **Informe Rettig 1991**). This strong criticism of the judicial role under the military regime, combined with and enhanced by a new and more general view in legal circles of the centrality of human rights and constitutionalism in a democratic legal system, led the new authorities to elaborate a plan of reform to the courts, which, despite strong initial resistance, the judiciary was unable to stop entirely (Correa 1999). As a consequence, since the mid-1990s, the Chilean judiciary has been the object of myriad reforms, many of them inspired by this broader ideological shift in academic and political circles regarding the role that courts should play in a modern, liberal-democratic polity. A dozen years on, this combination of ideational and institutional changes has opened the door to a shift in judicial behavior in Chile, both in the ordinary courts and in the Constitutional Tribunal. By giving judges new audiences and ideological allies, and by limiting some of the old institutional constraints and introducing other enabling mechanisms, these changes have altered the way at least some judges conceive their role and modified the strategic calculations they make on the job.

Institutional Reforms to the Ordinary Judiciary

As regards the ordinary judiciary, the relevant institutional changes have not been so much those aimed directly at the institutional structure or composition of the judiciary, but rather a combination of reforms designed to modernize the judiciary—that is, to improve the caliber and the capabilities of personnel, and the efficiency and effectiveness of judicial procedures. The

1997 reform to the Supreme Court, then, which introduced a new nomination system for Supreme Court justices, reserving five posts on the Court for lawyers from outside the judiciary and requiring ratification of any appointee by two-thirds of the Senate,⁴ did not usher in any dramatic changes. Although some hoped that this would allow for fresh faces, more outward- and more forward-looking, to diversify and shake up the high court, the fact that candidates for lateral entrance to the Court had to be nominated by the Court itself,⁵ and that the supra-majority Senate approval rule gave veto power of new nominees to the right-wing opposition, meant that this effect was quite watered down (R. Correa 2004; Fruhling and Martínez 2008: 23). Instead, four other more mundane or technical reforms are what have set the stage for a shift, albeit still incipient, in judicial behavior (see Vargas 2007: 112).

First, and perhaps most indirect in its effect, is the substantial increase in judicial salaries, particularly for those at the lower rungs of the hierarchy.⁶ Whereas in the early 1990s, the vast majority of lawyers had no interest in joining the judiciary, in part due to the abysmally low pay (Fruhling and Martínez 2008: 18), at present, “judges are among the best compensated professionals, particularly for those who are just starting out their professional careers” (Vargas 2007: 112). This means that the judiciary is no longer a last resort for successful law students, or a destination primarily for those who would have few options in the private sector.

Second, and related, the creation of the Judicial Academy, entrance to which is by competitive exam,⁷ has significantly improved both the quality and the professional preparation of judges.⁸ “The

⁴ The bill also expanded Supreme Court membership from seventeen to twenty-one, provided for the (comfortable) retirement of all judges over the age of seventy-five, and shortened the term of Supreme Court president from three to two years. The changes brought 11 new members to the court in the first year.

⁵ The Court itself conducted the competition for nominations to the “external” slots, meaning there was a strong likelihood they would choose lawyers they knew and trusted (i.e., that were similar to them).

⁶ Would be good to reference specific laws here, or a source with precise numbers.

⁷ Would like to have numbers re. how many take the exam and how many are admitted annually to AJ.

creation of the Judicial Academy has placed greater academic requirements on those seeking a judicial career and those seeking to move up within the judiciary” (Fruhling and Martínez 2008: 40). Moreover, “it has reduced substantially the influence of higher-ranking judges [both] in the selection of lawyers that join the judiciary” (R. Correa 2004: 8) and in determining who qualifies for promotion, since participation in professional development activities at the Academy offers more objective criteria for appointment and promotion decisions than existed prior to its creation. This means that the self-esteem and confidence of young magistrates “tends to be high and their intellectual sophistication and ability to craft arguments has increased” (Vargas 2007: 112). At the same time, judges aspiring to new or higher posts no longer have a dominant incentive to ingratiate themselves to superiors. They still don’t enjoy complete internal independence (higher courts still have the power to evaluate and discipline them, and thereby affect their careers), but having a more objective criterion for judicial appointment and advancement does mitigate the need to curry favor with superiors and the professional mentality that develops with this.

Third, the number of judges has increased dramatically (Fruhling and Martínez 2008: 37), particularly at the bottom of the hierarchy, such that “the judicial pyramid has flattened out enormously” (Vargas 2007: 112). While in 1999, there were only 376 first instance judges in Chile, by 2007, there were 1,290. In the same period, the number of appeals court judges only increased from 140 to 155. This means that in 1997 there were 2.7 first instance judges for every appeals court judge, whereas today there are 8.3 (and counting) (Vargas 2007: 112). This obviously reduces the likelihood of promotion for any given judge, and combined with the fact

⁸ “As of January 2008, 1,029 people had ‘graduated’ from the Judicial Academy’s training program, 80% of whom (824 employees) had careers in the judiciary” (Fruhling and Martínez 2008: 25).

that pay and prestige have improved so significantly at the first-instance level, junior judges now have far less reason to maintain a vertical gaze as they perform their functions (Flores interview; OTHERS).

Fourth, procedural reforms, most strikingly in criminal and constitutional jurisdictions,⁹ have placed new demands on and/or opportunities for judges to be more active, pro-active, and responsible in their role as guardians of the principles and integrity of the system (Vargas 2007: 112). Chile's criminal procedure reform, which was billed "the reform of the century," (J. Correa 1999: 308), involved the gradual transition (region by region, culminating in the capital) from a written, inquisitory system to an oral, adversarial one. In the former system, criminal court judges served both prosecutorial and judicial functions, overseeing the investigation of criminal charges, issuing indictments, and then, following the review of material submitted by the defense, ruling on guilt or innocence. The entire process was written and largely secret and was, in the view of the reformers, both hugely inefficient in terms of sanctioning crime and grossly abusive of the rights of the accused (J. Correa 1999: 308; Duce and Riego 2007). In the new triadic system, public prosecutors from the new *Ministerio Público* conduct the investigation and build the state's case, public defenders from the *Defensoría Pública* provide a professional defense, and two different categories of judges monitor the legality of the process and render decisions based on the evidence and legal arguments presented orally and publicly by the two sides (see Duce and Riego 2007). One kind of judge works in unipersonal pre-trial courts, known as *juzgados de garantía*. The *jueces de garantía* direct the pre-hearing and decide on various types of petitions from the public prosecutor or the defense, such as

⁹ A reform of the procedure in labor courts is currently underway, which has the potential for similar effects (UGARTE), and a civil procedure reform is in the works (CORRECT?).

preventive detention, bail, conditional release, or reparatory accords. In so doing, their explicit duty “is to ensure that the rights of suspects, victims and witnesses are respected.” The second type of judge works in collegial (three-person) criminal trial courts, the *juzgados de juicio oral*, which hear and decide the cases presented before them. (Fruhling and Martínez 2008: 28). They, too, are charged with making sure that convictions and sentencing are rendered in strict accordance with the due process guarantees of the constitution and the laws, and, in the interest of transparency and legitimacy, they are expected to offer clear and thorough reasoning for their decisions (Duce and Riego 2007: 375-397). In short, Chile’s new criminal procedure explicitly entrusts judges with protection of the rights intrinsic to a “democratic rule of law” (*Estado democrático de derecho*) (Duce and Riego 2007), and, through the adversarial structure, offers them routine opportunities to do so. Reforms to the structure and procedure of constitutional jurisdiction, elaborated below, have also meant that ordinary court judges with rights sensibilities enjoy new opportunities to question the constitutionality of legislative provisions that adversely affect the rights of citizens that appear in their courtrooms.

In sum, a variety of institutional reforms, most designed for purposes other than limiting the control of higher court judges over their subordinates or changing the dominant culture within the organization, have combined to give lower-court judges greater independence, better intellectual and material resources, and more opportunities to assert themselves in defense of rights. As one judge put it, as a result of the reforms, they have “a space [in which to act] that wasn’t there before” (Flores interview).

Institutional Reforms to the Constitutional Court

Institutional reform has also been a crucial factor facilitating the important shift in judicial behavior in and around the Constitutional Court. In a process of constitutional reform aimed at eliminating the last of the ‘authoritarian enclaves’ (Garretón, 1993) that had characterized the Constitution of 1980 (in particular, the existence of unelected senators and the fact that the heads of the Armed Forces could not be removed by the President), some critically important reforms to the Constitutional Court were approved in 2005. The most important were: a) the elimination within the membership of the Constitutional Court of judges from the Supreme Court, and their replacement by constitutional judges coming from the academic and political world; and b) the transfer from the Supreme Court to the Constitutional Court of the *recurso de inaplicabilidad*, which, in addition, gave lower-court judges and average citizens access to the latter for the first time.

With regard to the first factor, it should be stressed that until the 2005 reform, almost half of the Constitutional Court (three out of seven justices) was made up by acting members of the Supreme Court, who split their time in both courts. As a consequence, a fair portion of the Constitutional Court were judges deeply embedded in the traditional culture of the regular judiciary, one prone to quietism and averse to political conflict (as Hilbink (2007) and J. Correa (1993) have shown). In this context, the elimination of justices coming from the regular judiciary and their replacement by individuals coming from the academic and political worlds represented a major factor in the new –more activist—attitudes displayed by the Constitutional Court in all its jurisprudence after 2006, that is both the ‘abstract’ and ‘a priori’ review of the constitutionality of legislation and executive decrees that it has been engaged in since its creation (in 1980), as well as in the ‘concrete’ review jurisdiction represented by the ‘inaplicabilidad’ cases it has been deciding since the implementation of the 2005 reform (mid 2006).

The second crucial reform to the Constitutional Court—that is, the transfer of the *recurso de inaplicabilidad* from the Supreme Court to the Constitutional Court—meant that for the first time in its history, the latter became involved in concrete judicial review, that is, the power to decide actual cases and controversies (whereas before the reform, it could only engage in the ‘abstract’ review of the constitutionality of legislative bills and executive decrees). The importance of this element of the constitutional reform cannot be underestimated. In fact, the transfer of the *recurso de inaplicabilidad* to the Constitutional Court amounted to a major change in the standing rules of the latter, since it made it possible for ordinary citizens to get a ruling from the entity with the exclusive power to decide on the constitutionality of legislation. In other words, this part of the reform what amounts to a ‘popular action’ to a constitutional court that had heretofore been open only to elites (the President of the Republic, Parliament, the Comptroller General). Not only did this significantly increase the docket of the Constitutional Court, but the transfer to it of the *recurso de inaplicabilidad* also helped to make it much more visible to the population, because of the drama normally associated with actual cases as opposed to abstract review of legislative proposals.¹⁰

The transfer of the *recurso de inaplicabilidad* from the Supreme Court to the Constitutional Court and the change in standing rules also opened up a new opportunity for ordinary judges at any level to challenge the constitutionality of a law that affects a case before them. Whereas in the past, it was only parties to the case or the Supreme Court *de oficio* that

¹⁰ A paradigmatic example of the impact that ‘concrete review’ (actual cases) has had in the work of the Constitutional Court is a recent case in which an elderly woman asked the Court to declare unconstitutional a law that regulates the private health care system of Chile, which in her opinion was too biased towards the industry to the detriment of the clients. (The law allowed the private health care companies to unilaterally change the terms of the health care contract of those who turn 60 years old, typically imposing higher premiums or diminishing their coverage precisely at the age when they became more prone to illness). The fact that the petitioner could detail to the Court the great injustice that the operation of the law perpetrated in her personal situation represents a far cry from the detached, technocratic analysis of comparing constitutional clauses with abstract legislation.

could file a *recurso de inaplicabilidad*, any judge from the regular judiciary that thinks a law s/he must apply is unconstitutional can now send such a claim directly to the Constitutional Court, whose membership no longer includes any of their superiors from the Supreme Court. This new ability of lower court judges to get around the Supreme Court and appeal to an external body (and one which is actually above the Supreme Court when it comes to constitutional interpretation) means that a lonely judge at the bottom of the regular judiciary's hierarchy can now be crucial in getting a law declared unconstitutional without needing to persuade her superiors in the Supreme Court.¹¹

Shift in the Ideational Context

So far we have seen how structural reforms have opened up new possibilities for judicial activism. This however, is not the whole story. Indeed, just because judges have the independence, resources, and opportunities to assert themselves in defense of rights does not mean that they will be willing to do so (Woods 2008). We thus want to emphasize that the changes in judicial behavior that we highlight in this paper were made possible not simply by changes in the institutional context, but by the fact that these took place—indeed, in many cases were inspired by—a new ideational context that placed great emphasis on human rights and constitutionalism.

As Couso argues elsewhere (forthcoming, 2010), parallel to the structural reforms already noted, Chile's constitutional discourse has been undergoing a profound change over the last decade or so, one that it is also contributing to a more activist outlook in Chile's courts. The change in constitutional discourse we are referring to is the replacement of the traditional legal

¹¹ SOMEONE HAS ARGUED SOMETHING SIMILAR WITH REGARD TO LOWER-COURT NATIONAL JUDGES AND THE ECJ, IN EUROPE I THINK...NEED TO GET THE CITE.

positivism of Hans Kelsen with the so-called ‘neo-constitutionalism.’ This doctrine, which blends the constitutional theory of Ronald Dworkin with that of German legal scholar Robert Alexy, emphasizes the role of principles in constitutional adjudication and envisions a more activist role for judges at the service of human rights.

The transformation of Chile’s constitutional law discourse represents just one instance of a broader, Latin American movement away from formalism and towards a new understanding of both the content of constitutional law (heavily inspired by international human rights law) and the role that courts should play in democratic polities (active defense of constitutional rights through judicial review). The regional conversion to this new constitutional orthodoxy has been documented by López Medina (2006: 414-15), who writes:

The constitution used to be regarded as an organic document concerned with the regulation of the functions and roles of the different branches of government, but not as a bill of rights recognizing to the citizens fundamental rights that they could claim before the courts (...). Statutory law was (in this perspective) the main source of law. Judicial law was all but forbidden (...). By the 1980s, the law-centered political theory was in trouble. Citizens were skeptical of the convenience and legitimacy of statutory law. They started to look at the judiciary as a potential source of recognition of social, economic and cultural rights (...). Law is now full of principles that courts should apply when in clash with mere legal rules (...). Textualism and literalism have been replaced with a finalist understanding of interpretation, especially in constitutional adjudication, where constitutional clauses tend to be more open textured than in codified law.”

This new constitutional orthodoxy we have just described has been able to gain a fair degree of legitimacy within Chile's legal academia in recent years. This is not that surprising when one takes into account that the constitutional discourse of the countries that have historically served as the models for Chile's constitutional law scholarship (namely Spain, Germany and France) have all been completely transformed by the new constitutional orthodoxy of human rights-based constitutionalism (Sweet 2003). Indeed, a number of the judges whose decisions we highlight in this article have had post-graduate education in law in Europe or the US.

In parallel to the transformation of Chile's constitutional discourse there has also been a significant rise in the prestige of constitutional law as a legal subject, so much so that after having a rather marginal status throughout most of Chile's legal history, it is now attracting the best and the brightest law students, many of whom consider the possibility of becoming members of the Constitutional Court their most ambitious professional goal (Couso, forthcoming 2010). A non trivial effect of this much elevated status of constitutional law as a legal subject is that more self-assured and creative scholars are slowly arriving at the Constitutional Court, that is, individuals much more likely to engage in the kind of activism that is associated with 'rights revolution' and other forms of judicial activism.¹²

To summarize, what might be called a "new breed" of judges, professionally trained in the new paradigm just discussed, has entered both the lower levels of the ordinary courts and the

¹² The consolidation of this new orthodoxy is not yet complete, and there are important scholars such as Fernando Atria and Rodrigo Correa that are strongly against it (due to their adherence to neo-positivist doctrines), but as Atria himself acknowledges "the zeitgeist of our time is this neo-constitutional activist thought which has the Warren Court as its model" (oral exchange with Couso).

Constitutional Tribunal in Chile, and they have been enabled by certain institutional modifications to take a more assertive stance on rights, even in high-profile areas. At the level of the regular judiciary, the ideational shift we have been commenting upon has provided lower-courts judges intellectual support from legal academics of great prestige in Chile, as well as support from a newly valorized transnational legal community, which in turn has helped them resist the criticism from more traditionally-oriented high-court judges. This intellectual environment has encouraged some *jueces de garantía* to challenge traditional understandings of the constitution by the higher courts, and the institutional modifications discussed above have relaxed the hierarchical control over their careers, thus opening the door for more rights-oriented decisions. ADD PARALLEL SUMMARY FOR CON COURT

It is partly a question of generation; to be sure, most of the more assertive judges are under 50 years old. But it is important to emphasize that not all members of the younger generation share the same outlook; that is, not all belong to the same intellectual community (Woods 2008).

Many of those who are asserting themselves have obtained advanced degrees abroad (Europe or the United States) and/or have been trained by and are in frequent professional dialogue with jurists (judges or law professors) who have.

FN Interesting to note that more senior judges who have been unusually assertive, Carlos Cerda and Juan Guzmán, also took advanced degrees abroad.

IV. Rights Protection in Ordinary Courts

Since the transition to civilian rule in 1990, and particularly in the wake of Pinochet's detention in London in 1998, most of the international attention, popular or scholarly, paid to Chilean courts has focused on their treatment of human rights abuse cases from the authoritarian period (see, e.g., Pion-Berlin 2004; Collins 2006; Huneeus 2006). This article does not address those cases, but rather, seeks to assess and account for the judicial treatment of contemporary rights cases in the wake of the changes described in the previous section.

Ideally, we would offer a comprehensive primary analysis of judicial decisions in a complete universe of rights cases, or a random sample thereof, for a period before and after the reforms. Due to limitations of time, money, and data availability, however, we decided instead to limit the focus of this section to the judicial treatment of a narrow core of civil rights, and--at least for the March 2009 version of this paper--to rely largely on a combination of secondary studies and high-profile examples covered extensively in the media to demonstrate the (incipient) shift in judicial behavior in the ordinary courts. We want to be clear that our claim is *not* that the shift in judicial treatment of rights cases has been comprehensive across categories of rights and court levels, but rather, that the institutional and ideational changes discussed above have produced a level of judicial assertiveness in defense of some rights, led primarily by junior judges, that was unimaginable up through the very recent past. We also recognize and seek to account for the limits to this change.

In this section, then, we offer a portrait of recent behavior of ordinary court judges in cases involving core civil rights, such as bodily integrity, due process, and equality before the law; that is, we confine the discussion to cases in the criminal justice system, where the police

power of the state touches individual citizens in the most direct and palpable ways. Our decision to focus our empirical attention in this manner was not motivated uniquely by practical limitations, but also by theoretical concerns. As Brinks (2008: 9 and 10) notes, legal protection from the arbitrary use and abuse of police power “is one of the most basic promises of the rule of law in a liberal democracy, and one of the promises of Latin America’s transition back to democracy.” In practice, however, and “with public safety as the justification,” these rights are frequently ignored and trampled. Indeed, as crime rates, or at least the perception thereof,¹³ have increased in Latin America, the region’s democratically-elected governments, and the state agents that (in theory) serve them, have had increased incentives, pressures, or perceived justifications to exercise a *mano dura* against individuals who (are deemed to) threaten public security.¹⁴ An examination of the way that courts, as “the principal mechanism for identifying and redressing rights violations in a liberal democracy” (Brinks 2008: 11), treat cases involving the basic personal rights of ordinary citizens suspected, accused or convicted of committing crimes, is thus both important and timely. When state agents act to control, limit, or repress threats to public security, are Chilean judges willing and able to defend the equality of all citizens before the law, to protect basic personal rights, and to check abuses of executive authority? In what ways, if any, do they act to uphold “the idea that, in a democracy, everyone is entitled to respectful treatment and due process of law, even those who have no social standing or choose to break the law and prey on their fellow citizens” (Brinks 2008: 4)?

¹³ In some countries, the increase in crime is very real. **In Chile, however...MORE**

¹⁴ See O’Donnell (**YEARS**) for a discussion of the general weakness of the liberal aspect of polyarchy in Latin America and the historical roots of this weakness.

Police Violence

Following Brinks's (2008) lead, we would like to start with a discussion of how courts respond in cases involving police violence, and especially police killings, of ordinary citizens. However, there is not much to discuss in this regard in Chile for the simple reason that crimes committed by or against members of the Chilean armed forces, which include the police (the *Carabineros*), remain under the jurisdiction of military courts, staffed by military personnel subject to the institutional chain of command. This relic of the authoritarian regime, which formally ended in 1990, has been much criticized in the nearly twenty years since, but has not yet been reformed. Indeed, it wasn't until after the Inter-American Court of Human Rights ruled against Chile in the *Palamara Iribarne* case in November of 2005 that the government finally convened a commission of experts to write a new code of military justice. The commission submitted its report to the government in August 2008, but as of this writing, the reform is still pending.

The main criticisms of the military justice system are that its structure and procedure don't provide civilian defendants anything close to the due process guarantees of the civilian judiciary,¹⁵ particularly after the criminal procedure reforms discussed above, and that it serves to shield members of the armed forces, including the police, from prosecution for common crimes committed against civilians (see "Justicia Militar..." 2008). On this latter point, it would appear to be the case that, even in the face of rising charges of police violence (more than 6,000 cases brought before military tribunals in the central zone of Chile between 1990 and 2004 (Álvarez and Fuentes 2005: 1)), few police officers face judicial consequences. Data collected by Álvarez and Fuentes (2005: 4) show that 92.8% of the cases involving charges of police

¹⁵ SERÍA BUENO TENER DATOS SOBRE LA CANTIDAD DE CIVILES PROCESADOS POR TRIBUNALES MILITARES EN LA ÚLTIMA DÉCADA...MERA?

violence are dismissed without an indictment, and only 3.2% of the total cases end in conviction (compared to 36% in the new penal system, for those cases in which a suspect has been detained (VERA study)). In these cases, however, ordinary civilian judges have virtually no procedural opportunity to intervene on behalf of the victims, since the charges must be filed in military courts.

In cases where civilian defendants are accused of crimes against a police officer, by contrast, there is frequently some aspect of the case that is filed in ordinary criminal court--since an assault or other offense against a police officer often occurs while the police are trying to apprehend individuals in the midst of a criminal act. Civilian judges are thus sometimes presented with opportunities to challenge the jurisdictional competency of military courts over civilian defendants. Such challenges, called *contiendas de competencia*, are resolved by the Supreme Court. We have yet to obtain complete data on the circumstances that have led to such challenges, which lower courts have brought them, and how the Supreme Court has resolved them in recent years.¹⁶ However, one recent case that attracted significant professional, political, and media attention bears mention here.

The case arose in November of 2007 after a police officer was shot and killed (and another wounded) in an attempted bank robbery in Santiago, with the suspected involvement of people with ties to extreme-left political cells. Two of four perpetrators were subsequently arrested (Narváez and Rebolledo 2007). When the lawyer of one of the suspects filed a petition for *habeas corpus* on behalf of his client in civilian court, the presiding *juez de garantía*, Daniel Urrutia, claimed jurisdiction and presented a formal request to the designated military

¹⁶ WE WILL ATTEMPT TO GET THIS FOR A FUTURE VERSION OF THIS PAPER, BUT IT IS NOT CLEAR IT WILL BE FEASIBLE, DUE TO THE WAY THAT SUCH DECISIONS ARE ARCHIVED.

prosecutor, asking that he declare himself jurisdictionally incompetent to continue the investigation and that he turn the case over to the civilian system. Citing the *Palamara Iribarne* decision of the Inter-American Court of Human Rights, Urrutia argued that to try the murder case in the military justice system would violate the due process rights of all parties to the case and would signify that the Chilean state was failing to meet its obligations under the Inter-American Human Rights Convention (Narváez and Rebolledo 2007; **Justicia Militar** 2008). Not surprisingly, the military prosecutor roundly rejected the request, and the conflict passed, as a *contienda de competencia*, to the Supreme Court for resolution. On December 11, 2007, the penal chamber of the Supreme Court ruled unanimously against Urrutia and ordered that the case remain in the military justice system. Moreover, the decision contained a reproach against Urrutia for his criticisms of the military justice system (Carvajal 2007).

A few months later, in a separate case involving another *contienda de competencia* over a case with civilian defendants being tried in military court, Urrutia filed a request for review (*recurso de inaplicabilidad*) of the matter with the Constitutional Court.¹⁷ The Court declared the request technically admissible, and in October of 2008, heard arguments from both sides (Ayala 2008). Urrutia argued, through his lawyers, **que la aplicación de los artículos 5° N°3, 10,11, 70 – A, 405, 421 y 426 del Código de Justicia Militar vulnera, a lo menos, los artículos 76, 19 N°2 y 19 N°3, todos en relación al artículo 5°, inciso segundo, de la Constitución Política y diversas disposiciones de la Convención Americana sobre Derechos Humanos.** (need to translate this into plain English). The Constitutional Court rejected the challenge, however, on grounds that it was too general and abstract, and not clearly or specifically enough linked to the

¹⁷ NEED TO CLARIFY THE FACTS OF THIS CASE...IT IS COMPLICATED, INVOLVING WITHDRAWAL OF TESTIMONY BY A WITNESS AND OBSTRUCTION OF JUSTICE BY POLICE... I think that in this case, the appellate court had actually resolved in his favor...but need to verify.

results of a particular case before Judge Urrutia (“en la especie no se cuestiona la aplicación de determinadas y precisas normas legales, explicando cómo cada una de ellas produce efectos contrarios a la Carta, sino que se impugna genéricamente un elemento relevante de un sistema jurisdiccional, el penal militar”(considerando 7º, p. 9 of decisión, 24 November, 2008).

(STILL NEED TO ADD A CLOSING SENTENCE OR TWO HERE ABOUT THE SIGNIFICANCE OF THESE CHALLENGES, EVEN IF THEY WERE, ULTIMATELY REJECTED BY THE HIGHER COURTS.)

Criminal Due Process

As suggested in the preceding account of Judge Urrutia’s challenges to military justice, the criminal procedure reform, which finally went into effect in greater Santiago in 2005, was designed not only to make criminal trials faster and more efficient (which it clearly has, see **CITE**), but also to strengthen due process guarantees. One of the primary concerns of reform architects was the fact that a majority of individuals in Chile’s prisons in the 1980s and 90s had not been convicted; they were either detained and awaiting formal charges, or charged and waiting for their case to be processed (Duce and Riego, forthcoming: 4-5). Because the penal procedure system was cumbersome and slow, this meant that suspects could languish in prison for months or even years, only to be acquitted once the judge got around to it (Duce and Riego, forthcoming: 7). Even if convicted, they sometimes wound up being preventively imprisoned for a term longer than that which the law assigned for the crime in question. The problem, reformers argued, was that in the old, inquisitory system, individuals were not presumed innocent until proven guilty, particularly when they were detained for more serious crimes. Judges imposed preventive detention in an almost automatic way (based on the nature of the alleged crime or the

criminal history of the defendant), and because the public defense system was so weak (assigned to advanced law students, rather than specialized professionals), defendants had no viable recourse for challenging the legality or legitimacy of their detention. In the new system, this was supposed to change. Suspects and defendants are now to be presumed innocent, as the constitution requires, and the new *jueces de garantía* are charged with ensuring that all the actors in the system respect this principle, granting preventive detention on a case-by-case basis when there is well-founded cause to do so (Duce and Riego, forthcoming: 10-11)

The individuals who have become *jueces de garantía* and *jueces orales en lo penal* (as well as state prosecutors and public defenders) have thus been trained in a new paradigm in which respect for due process is paramount (Duce and Riego, forthcoming: 11). This does not mean that they are taught to ignore or dismiss the plight of victims or the risks to society that are part and parcel of any criminal justice system. It simply means that they are charged with balancing the public concern for safety with the individual rights of citizens accused of crimes. This is quite a change from the past, when the system had a different logic and judges, serving both prosecutorial and adjudicatory roles, had multiple incentives (and no disincentives) to keep almost any suspect to a serious crime under lock and key (Duce and Riego, forthcoming: 2-4 and 12).

How has this affected the way that judges behave in cases where due process rights are at issue? We do not yet have direct and comprehensive decision data on which to draw to answer this question, but we do have some secondary studies and some noteworthy examples that give a sense of how the judicial role in due process rights protection is evolving. To begin, assessments of how the new criminal procedure system is working reveal that *jueces de garantía* have

embraced and maintained the principles of the system, drastically reducing the percentage of prisoners that are preventively incarcerated (Baytelman and Duce 2003: 187-201; Duce and Riego forthcoming: 18-23). Although the percentages vary depending on the seriousness of the crime, with preventive detention being granted at about the same rate as in the past for crimes with sentences of five years prison or longer, the reform appears to have had “a very significant impact in terms of both the percentage of prisoners who have not been convicted and the absolute number of persons imprisoned preventively” (Duce and Riego, forthcoming: 25 and 27). Whereas in the old system, a majority of the prison population was provisional (i.e., was either waiting to be charged or was awaiting judgment in their case), by 2007, three-quarters of prisoners were convicted and serving formal sentences. Moreover, the numbers of individuals imprisoned but not yet charged dropped from about 10% of the total prison population before and during the mid-1990s to less than 1% in 2006, and to a low of 0.2% in 2008 (Duce and Riego, forthcoming: 22 and 32). Duce and Riego (forthcoming: 33) thus conclude that “little by little a culture of greater respect for individual liberty has installed itself” in the system.

However, there is also evidence that this new valorization of and commitment to due process rights is not comprehensive across cases or across levels of the judicial system. To begin, both available statistics and anecdotal evidence indicate that in cases involving more serious crimes, there is a tendency, among all judges, to grant preventive detention in an automatic fashion, without consideration for the particular facts of the case (Baytelman and Duce 2003: 194). Moreover, when decisions by *jueces de garantía* regarding preventive detention are

appealed, the appeals courts tend to rule “with criteria very much in line with the logic of the [old] inquisitory system” (Baytelman and Duce 2003: 194-5; Duce and Riego forthcoming: 34).¹⁸

There is, to be sure, a perception among the political class and the public that the *jueces de garantía* are excessively *garantista* and, hence, excessively lenient, letting dangerous criminals go free and putting society at risk in the name of individual rights. In recent years, journalists and politicians have thus launched attacks on these judges, and have capitalized on exceptional but highly publicized poor decisions to push through reforms to the “reform of the century.” Legislation in 2005 (Law 20,074) reduced the possible reasons to deny preventive detention, essentially seeking to limit the discretion of *jueces de garantía* (Duce and Riego forthcoming: 37). Three years later, Law 20,253, which was part of a broad political accord called the *agenda corta antidelincuencia* (or “short anti-crime agenda”), further sought to tie the hands of the *jueces de garantía* and effectively “to reintroduce a regime of inexcusability” like that of the past, despite the fact that this “would be frontally at odds with the constitutional dispositions that are in effect impeding [such] a regime” (Duce and Riego forthcoming: 39). In addition, Law 20, 253 mandated that when prosecutors appeal a decision by a *juez de garantía* denying a request for preventive detention, the defendant will remain incarcerated until the court of appeals renders its decision on the appeal. As Duce and Riego (forthcoming: 39-40) note, “This rule seeks to reinstall a traditional practice of the inquisitory system whereby it was the Court of Appeals and not the first instance judge that decided on preventive detention, assuming in general that these superior courts have criteria that are tougher and more tied to the inquisitory system in the sense of linking the prosecution of a person with his imprisonment.”

¹⁸ We hope in a future version of this article to have systematic data on this issue.

Interestingly, and in a major departure from the past, a number of *jueces de garantía* have not simply waited (perhaps in vain) for their superiors to come to their defense. Instead, they have openly refuted the charges launched against them, publicly debated the politicians that have targeted them, and legally challenged provisions of the reform before the Constitutional Tribunal. To do so, they have brought both sophisticated legal argument and empirical evidence to bear, and they have demonstrated a confidence and assertiveness that first-instance judges had almost never demonstrated before in Chile.

In July of 2007, for example, DISCUSS PUBLICATION OF LETTER IN EL MERCURIO INVITING RIGHT-WING SENATORS TO DEBATE THEM. CAME ARMED WITH STATISTICS. TELEVISED AND COVERED EXTENSIVELY IN THE PRESS.

Also, ZAPATA ON RED-TV talk show

Zapata interview September 24, 2008, RED TV: To combat the criticisms of the talk show host, she makes an analogy between a soccer game and the judicial process, and notes that even when people get upset with the referees for bad calls, they don't demand that the rules of the game be changed. "In law, there is a set of rules that governs the functioning of the system...and with this reform, we have decided that we want a system that functions according to the principles of a democratic rule of law. These are rules that everyone knows and has accepted, in advance, through the democratic legislative process, and those are the rules we play by." Later, she returns to the analogy to explain why a judge, like a referee, must treat each case individually, not letting what the "player" did in the previous game affect the way s/he treats the player in the current one. Host concedes at end that he, like many Chileans, had some serious misconceptions about how the system works and why it is designed as it is....

LASTLY, A NUMBER OF JUDGES HAVE BROUGHT CHALLENGES TO THE CONSTITUTIONAL COURT RE. THE AGENDA CORTA RULE THAT IN CASE OF A CHALLENGE TO A REFUSAL TO GRANT PREVENTIVE DETENTION, THE ACCUSED REMAINS IMPRISONED UNTIL THE APPELLATE COURT DECIDES...BUT COURT REJECTED.

Treatment of Prisoners

Worsening with CPP reform, massive increase in prison population (doubling in last decade, although half of all convictions do not result in prison sentences Baytelman interview RLD)

Partially because of the success of the criminal procedure reform, Chile is now the Latin American country with the second highest per capita incarceration rate (more than 200 prisoners per 100,000 inhabitants, surpassed only by Panama) (Jaramillo 2006 **MORE?**).

Role of judges in responding to this:

GOOD DATA FROM STIPPEL BOOK , showing that appellate court judges not very responsive to claims of abuse by prisoners (note that Gendarmeria is under civilian jurisdiction, unlike police).

HOWEVER, jueces de garantia have made several highly publicized visits to prisons and have issued very critical reports (Urrutia order, Fernando Guzmán-led group)

Appeals to the Constitutional Tribunal

We have already mentioned a number of instances in which ordinary judges have sent questions of unconstitutionality to the Constitutional Court. Here, then, we want to simply add a few lines placing these examples in **the broader context**.

Number of total requerimientos de inaplicabilidad brought by judges since 2006: 88, of which 75 were related to the tax code (not fundamental rights). Of the remaining 13, 11 were brought by either jueces de garantia (all discussed above) or jueces orales en lo penal

4 categories total...describe...all either declared inadmissible or rejected by TC, although some dissenting votes.

Collective Action by Judges

The pattern is clear here...most of these judges are the younger, better trained generation...

Not only have they done these individual acts, but they are acting collectively, too....

In 2006, a new judicial organization emerged in Chile called *Jurisdicción y Democracia* (Jurisdiction and Democracy, or JD).¹⁹ Its founders and members are of a new generation of judges who passed through the new Judicial Academy (which, as noted above, began functioning in 1996) and/or completed law degrees abroad (mostly in Spain). They entered the judiciary in the wake of the reforms detailed above, and they first began discussing the idea of forming the organization in late 2004, when they were brought together for the launching of the criminal procedure reform in Santiago (they had been named to newly created posts, but had some lag time between their appointment and the (delayed) opening of the new tribunals in mid-2005). Being mostly in the 35-45 year-old range, they shared a common experience of having grown up in dictatorship; and having passed through the new Judicial Academy, they shared a common professional training experience and a shared vision of what the judicial function should be. The association gelled when the Supreme Court sanctioned a number of these young judges for daring to speak their minds on matters of human rights (see Huneeus 2006).

The three premises upon which the organization is based are: first, that the role of the judge is to preserve and promote the fundamental rights of all persons with strict adherence to the law and to the constitution; second, that in order for the judge to fulfill this mandate, her independence must be guaranteed; and third, that the guarantee of independence must be

¹⁹ The information that follows is based on information from conversations with ten members of the group during a visits to Santiago in October 2008 and January 2009 (NAME THEM IN THE REFERENCES), as well as from the following websites: www.nuevajusticia.cl, www.jurisdiccionsydemocracia.cl, and www.iej.cl.

counterbalanced with efficient systems of accountability (Zapata 2007). In order to work for these goals, JD has organized professional seminars and public discussions around the themes of rights protection, judicial independence, and accountability. Their website (www.jurisdiccionydemocracia.cl) features academic essays and editorials on these themes, and advertises relevant events. In addition, some members of the group decided that the realization of their goals requires working through the existing judicial association, the National Association of Magistrates, which since its founding in the 1960s been focused almost exclusively on corporate concerns (that is, judicial salaries and official perks). They thus formed a sister organization known as *Nueva Justicia* (New Justice, or NJ), which runs candidates for the directorship of the Association at the regional and national levels. In 2006, NJ candidates won all five of the two-year posts in the regional directorate and three of nine at the national level. Rather than simply lobby for better pay and benefits for judicial employees, the NJ representatives have organized seminars and working groups on human rights and institutional reforms, and even held a ceremony paying homage to the judges who were purged from the judiciary by the Supreme Court after the 1973 coup.

In the view of the JD/NJ judges, the primary reason that Chile's judges have, to date, overwhelmingly failed to play a rights-protective role is that the built-in incentives of the judicial system actually prevent them from deciding cases in accordance with law. The problem, in their view, is not so much that judges have misunderstood law or interpreted it too narrowly (although, to be sure, these judges have a more expansive understanding of law than previous generations of judges, defining it not merely in terms of national codes, but in terms of the Constitution, international law, and principles internal to law itself); rather, the problem is that the vertical structure of the judiciary, in which highly discretionary control over the judicial

career is concentrated at the top (in the hands of the Supreme Court), leads judges to decide cases in accordance with criteria that have less to do with law than with career considerations. Judges do not enjoy a level of internal independence that allows them to decide cases “without fear (of punishment) or hope (of reward)” (Zapata 2008: 4). Instead, they are subjected to a whole host of mechanisms through which their institutional superiors “mold” them, discouraging independent decision making and orientation to the citizenry and “guiding” them toward conformity and deference, both to the judicial hierarchy and to the executive (Zapata 2008: 12-13). Thus, the organization of the judiciary in Chile “is not really in service of its systemic function: the juridical decision,” but, on the contrary, “interferes with this decision, distorting the process of selection of the legally relevant elements” (Zapata 2008: 15). The judges of JD/NJ thus have as their goal the cultivation of greater professionalism in the Chilean judiciary, through every means possible, such that judges might become more conscious of their professional duty to protect citizens’ rights and more able to decide in accordance with law and legal principles.

Limits to Change in the Ordinary Judiciary

Most of the judges of the regular judiciary still have a “very poor training in constitutional law” (Interviews),

Also...there is still fear and caution at work...an institutional culture that persists despite changes: Esto se produce por el tema de la prudencia, pues las personas tienen miedo de mostrarse muy desafiantes ante la Suprema (Flores interview)

Judges are keenly aware that the best way to ascend the judicial hierarchy is to conform to the professional standards modeled by the institutional elders. The effective policing of the judicial hierarchy by the Supreme Court, combined with the more subtle but pervasive ideology of the judiciary that casts the taking of independent legal stands as inappropriate and unprofessional (and perjoratively “political”), has worked to discourage most judges from identifying themselves with and drawing strength from a global community of judges committed to “a common enterprise of protecting human rights” (Slaughter 2004: 81).

It thus remains to be seen whether the dynamic and assertive judges of JD/NJ will be successful in promoting widespread change in the culture and practice of Chilean judges with respect to fundamental rights. To be sure, their very existence demonstrates to their peers and even their superiors that there is another way to understand and exercise the judicial role and that professional integrity and success need no longer hinge on conformity and conservatism. Yet they face tremendous resistance from those who rose in the institutional hierarchy playing by the traditional rules of the game and who are bothered, and perhaps even threatened, by the criticisms and challenges the JD/NJ judges have launched against the institutional status quo.²⁰

In order to succeed, then, especially in their goals involving institutional reform, the JD/NJ judges will need support from actors outside the judiciary, particularly from politicians (see Hilbink 2007b, on the conditions that made possible the success of a similar movement in

²⁰ Indeed, in a recent posting on the JD webpage, the editorial board concluded that the Association had proven to be “an irrelevant space for any process of structural change” (“Editorial: Hasta Luego”).

Spain). And for the time being, the JD/NJ judges are, in their own words, “political orphans.” Their key allies are in the academic world, but neither the Left nor the Right has particular interest at this juncture in promoting a more assertive judiciary.

V. Judicial Behavior on the Constitutional Tribunal

As has been the case with regard to Chile’s ordinary judiciary, over the last few years the country’s Constitutional Court has shown a clear shift from quietism to activism. Furthermore, it is possible to say that in the case of the latter, such a process has been even more pronounced than at the regular courts level. In fact, as we shall see below in this section, the change in the Constitutional Court’s behavior is rapidly transforming the role that this institution is playing in the country’s political system.

The impressive shift from deference to activism that can be detected in the Constitutional Court over the last few years can be traced back to a very specific moment, the constitutional reform of 2005 which we have commented above in Section III of this paper, which effected a major change in the membership of the Court as well as in its powers of judicial review (which were expanded to include the ‘concrete review’ mechanism of the *recurso de inaplicabilidad*). These institutional changes –coupled with the influence of the new constitutional orthodoxy of ‘human rights-based constitutionalism’ that is increasingly dominating Chilean constitutional discourse— has led to a more activist and politically influential Constitutional Court, which in 2008 was at the center of public controversy due to a series of highly visible and activist decisions. Indeed, in the three paradigmatic cases that we describe below, the Constitutional

Court abandoned its previously formalistic and exegetical way of interpreting the Constitution and started to move toward a more value-laden and rights-based interpretation. Furthermore, whereas in the past the Court ‘had decided not to decide’ in cases in which the political stakes were too high, in these sets of cases it was willing to decide even against the preferences of public opinion or against the government in very sensitive cases. A final element that shows that there is a ‘new Constitutional Court’ in place is the fact that for the first time in its history, the Court has cited International Human Rights Law in some of its decision, something which would have been unthinkable before the new constitutional orthodoxy was in place.

The first case that inaugurated this string of activist rulings was one concerning the constitutionality of the public distribution of the so-called ‘Morning After Pill’, in which a split Court decided to forbid the latter on the grounds that it was an abortive drug, and that abortion is unconstitutional in Chile’s 1980 Constitution. After the decision was announced, thousands of people went to the streets of Santiago to protest the decision, something without precedent in Chile’s legal history. Confronted with the decision, many legislators who had actually been involved in the 2005 reform that actually expanded the review powers of the Constitutional Court expressed their shock concerning the decision, with some even admitting that it was unconceivable that a few individuals could decide crucial issues in lieu of the people themselves.

The relevance of this decision cannot be understated. It was widely discussed in the Chilean media. In fact, it received more public attention than any other Constitutional Court decision, comparable perhaps to the string of decisions regarding Augusto Pinochet’s trials in the Supreme Court.

A few months later –in September 2008— the Constitutional Court again surprised the country with a new decision against an important government policy, with the declaration of unconstitutionality of an executive decree authorizing a loan from the Inter-American Development Bank (IDB) to finance the public transportation system of Santiago (the ‘Transantiago’), on the grounds that the Constitution did not allow the executive to get such loans without congressional approval. This decision, adopted in the midst of the worst public transportation crisis of Chile’s history (one that marked a great bulk of President Bachelet’s administration) represented a direct confrontation with the government by the Constitutional Court that would have been unthinkable before 2006.

The last decision that transformed 2008 in the year of the judicialization of Chilean politics was one involving an aging woman who felt discriminated against by legislation which allowed the (privately owned) health-care maintenance organizations to unilaterally raise the premiums of health.care plans. The Constitutional Court, citing International Human Rights Law , declared the law ‘non-applicable’, thus granting relief to the woman. The decision was heavily criticized by the health-care industry and by right-wing politicians and represents the first time ever that the Constituional Court rules in favor of so-called social and economic rights.

As we have stressed above, we attribute this change in the Constitutional Court’s jurisprudence to both institutional and ideational factors, but we can also speculate that there is an additional factor at play. As it happens, fairly soon after the 2005 reform to remove the last of the authoritarian enclaves from the 1980 Constitution, there has been an increasing fragmentation of the Chilean political landscape, particularly at the level of the ruling coalition, the ‘*Concertación de Partidos por la Democracia*’, which has experienced the resignation of

important senators and representatives, as well as unprecedented parliamentary indiscipline.²¹

This scenario of increased political fragmentation is compatible with models that suggest that the more fragmented the political landscape, the more willing the courts are to engage in judicial activism (Shapiro 1992; Kagan 1993; Ginsburg 2003). It is still too soon to corroborate this in the case of Chile's Constitutional Court, but in the future it will be worth studying this possibility further.

VI. Conclusion

The preceding analysis speaks to a broader question that motivates some of today's scholarly work in comparative judicial politics, namely, under what conditions are judges willing and able to take stands in defense of rights, that is, to challenge the executive and/or legislative branches in defense of constitutional principles and guarantees?

Kapizewski thesis (2007), judicial assertiveness and authority....

From this, Kapiszewski and Taylor 2008 p. 750: judicial power can be potential or active. Potential is jurisdiction and discretion, while active is assertiveness and authoritativeness. **“An assertive court is one that challenges powerful actors.”**

It is widely accepted that a **competitive political (i.e., democratic) system and a modicum of formal judicial independence are necessary conditions** for having judges willing to systematically stand in the defense of rights and exercise other types of judicial review of legislation.

But these are clearly not sufficient (I have text on this in my book and elsewhere that I can cut and paste)

Chile, for example, had a competitive political system both prior to 1973 and after 1990, and had both independent regular and constitutional courts, but these courts were nonetheless

²¹ The process we refer to started with the consolidation of a group of parliamentarians from the Concertación who called themselves 'discolos' (unruly) many of whom eventually left the coalition to form new political organization. As a result of this process the Concertación has left important senators and representatives and now face two different political parties with former members of it.

unequipped or disinclined to engage in rights protection or even arbitrate constitutional conflict until very recently.

To explain the observed shift in judicial behavior in Chile, then, there are four main contenders in the literature on judicial behavior:

1. **Social or legal mobilization arguments:** Pressure/support from outside/below acts on, changes, and/or triggers judicial assertiveness
2. **Attitudinal model:** personal policy preferences drive judicial decision making. In the established model, the attitudes are exogenous to the legal system; that is, they are preferences that the judges bring to the bench with them as a result of their upbringing and pre- or extra-professional education.
3. **Strategic/separation of powers arguments:** also focus on factors exogenous to the legal and judicial system. Judges have sincere policy preferences, generally taken to be exogenously formed, which they will seek to realize/impose in their decisions, if and when they believe they can “get away” with it; that is, when the political conditions are such that actors in the other branches are unable or unlikely to coordinate to overturn or gut judicial rulings, or (worse) retaliate against judges at an individual or institutional level. Most of these arguments center on partisan competition/alternation in power or diffusion/fragmentation of power.
4. **Institutional arguments:** focus on the understandings and incentives endogenous to the judicial and legal system that constitute and constrain judicial behavior.

Another way it has sometimes been framed is supply vs. demand...Supply-side assumes judges want to assert selves and will if they perceive they can get away with it (fragmentation, diffusion of power). Demand-side assumes it is pressure from below that sparks judicial action, that judges are just sitting there waiting to be activated. Too abstract and mechanical...

Alternatively, we could divide the possibilities into:

1. **Sincere vs. strategic motivations/considerations**
2. **Supply vs. demand triggers/conditions**
3. **External (exogenous) factors vs. factors internal (endogenous) to judicial and legal system**

Our argument in this paper combines and modifies some of the insights from the existing literature, and, crucially, adds a historical and sociological component, without which, we contend, the shift in judicial behavior we document in this paper (as well as the long-standing pattern that preceded it) could not be understood.

(As Brinks (2008: 28) argues, "To understand why judges or prosecutors take a more activist approach in one system than in another, we must look not only to their role in the process but also the incentives generated by the broader political context, as mediated by institutional design." Career incentives and susceptibility to public demands..exogenous and endogenous incentives)

SO....

We accept that judges' attitudes matter a great deal, but we reject the notion that attitudes are always or only exogenously determined. Professional training and socialization are very important. Something about intellectual resources (Woods) and audiences (Baum).

Similarly, we strongly agree that there is a strategic element to judicial reasoning. However, incentive structures are not always or only exogenous to the judiciary. Particularly for lower-court judges, and especially in an autonomous bureaucratic institutional setting such as Chile's, it is very important to understand what the incentives are internal to the judiciary that shape possibilities for and constraints on judicial assertiveness (and, obviously, how these change with institutional reform).

Finally, we contend that the literature has made a false distinction between "supply" and "demand" factors, since societal and ideational (bottom-up?) factors interact in complex ways with more strictly political and interest-drive/material (top-down) elements to produce outcomes.

Couso, forthcoming 2010. The new constitutional orthodoxy..is a very important factor in the supply-side of the story, because it socializes key legal actors (judges, lawyers, and law students) into new understandings of the nature and status of law, the courts, and the role of a judiciary in a democratic regime, ideologies which could later be mobilized to respond to demands of individuals and groups attempting to use the courts to further their policy preferences."

Woods 2008:

p. 194 “Judicial power cannot be understood without attention to the political sociology of intellectual developments within judicial communities.”

p. xii (p. 2 also) “the most important determining factor explaining when, why, and the manner in which national courts enter into the world of divisive politics is found in the intellectual or “judicial communities” with whom justices live, work, and think about the law on a daily basis....Given the right conditions, courts may use the new legal norms as the basis for answering questions of major national contention.”

p. 2 “informal intellectual communities...affect the ability and willingness of national high courts to enter into decision making on matters of national political contention”

p. 178 **“The nature and direction of court decisions will be largely influenced by the socioprofessional community of the judges or justices, that is, the people with whom they think and argue about the law on a daily basis.”**

p. 3 members of these judicial communities “share a similar or the same professionalization process, meaning that they were socialized into their profession through similar or identical institutions and job experience.” Not necessarily same class origins!

p. 26 “The norms uniting the members of the community are those at the broadest level—norms regarding the appropriate role of the judiciary in the political system, the rule of law, the most general direction that the legal system should take on citizen rights versus state authority, and the like. Within these broad areas, members may hold significantly different ideological positions... on specific issues...”

p. 7 is not equivalent to the entire bar...it is an activated, engaged subset

p. 15 “The particular tools that courts choose to use and the manner in which they use them will be determined in largest part by the legal norms being developed in the intellectual/normative context of the judicial community.”

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