



**Judges beyond Politics in  
Democracy and Dictatorship**  
*Lessons from Chile*

**LISA HILBINK**

CAMBRIDGE STUDIES IN LAW AND SOCIETY

JUDGES BEYOND  
POLITICS IN  
DEMOCRACY AND  
DICTATORSHIP

Lessons from Chile

**Lisa Hilbink**

*University of Minnesota, Twin Cities*



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To Dad,  
    *who gave me my sense of justice,*  
and to Mom,  
    *who devoted her life to peace.*

## JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP

Why did Chilean judges, trained under and appointed by democratic governments, facilitate and condone the illiberal, antidemocratic, and antilegal policies of the Pinochet regime? Challenging the common assumption that adjudication in nondemocratic settings is fundamentally different and less puzzling than it is in democratic regimes, this book offers a longitudinal analysis of judicial behavior, demonstrating striking continuity in judicial performance across regimes in Chile. The work explores the relevance of judges' personal policy preferences, social class, and legal philosophy but argues that institutional factors best account for the persistent failure of judges to take stands in defense of rights and rule of law principles. Specifically, the institutional structure and ideology of the Chilean judiciary, grounded in the ideal of judicial apoliticism, furnished judges with professional understandings and incentives that left them unequipped and disinclined to take stands in defense of liberal democratic principles before, during, and after the authoritarian interlude.

Lisa Hilbink is a two-time Fulbright grantee to Chile and Spain. From 2000 to 2003, she was Post-Doctoral Fellow in the Princeton University Society of Fellows and Lecturer at the Woodrow Wilson School of Public and International Affairs. Her doctoral thesis, on which this book is based, won the Best Dissertation Award for 1999/2000 from the Western Political Science Association. Dr. Hilbink is a member of the American Political Science Association, the Law and Society Association, and the Latin American Studies Association. She is now Assistant Professor at the University of Minnesota, Twin Cities.

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## INTRODUCTION

On September 11, 1973, General Augusto Pinochet helped to lead the overthrow of one of Latin America's most celebrated democratic regimes. As part of the coup, Chile's military leaders bombed the presidential palace, shut down the Congress, closed or banned political parties, and purged the state bureaucracy. They left the courts, however, completely untouched. In the face of state terror, Chilean human rights defenders thus placed their hopes in the judiciary as the only branch of the democratic state left intact.

To the dismay of justice seekers, Chilean judges cooperated fully with authoritarian regime in the months and years that followed. Not only did the courts grant the military government nearly complete autonomy to pursue its "war" against Marxism, but they also offered repeated legal justification of the regime's expansive police powers. Judges unquestioningly accepted the explanations offered by the government regarding the fate of the disappeared and readily implemented arbitrary decrees, secret laws, and policies that violated the country's legal codes. The Supreme Court, mouthpiece of the judiciary, publicly endorsed General Pinochet's seizure of power and declared that writs of habeas corpus disrupted the Court's ability to deal with the "urgent matters of its jurisdiction." Indeed, of the more than fifty-four hundred habeas corpus petitions filed by human rights lawyers between 1973 and 1983, the courts rejected all but ten (Constable and Valenzuela 1991: 122). Moreover, the Supreme Court unilaterally abdicated both its review power over decisions of military tribunals and its constitutional review

power.<sup>1</sup> Throughout, the justices insisted that the military government was restoring the rule of law, even as the generals made a mockery of the Constitution. Even after civilian rule had been restored, judges continued to endorse the legal edifice constructed by the leaders of the authoritarian regime (including the military's self-amnesty), and left largely unchallenged the principles and values embodied therein.<sup>2</sup>

This performance – which extended from passive capitulation to outright collaboration in authoritarian rule – demands explanation at several levels. To begin, such judicial behavior, in any context, shocks the moral conscience. As with antebellum American judges who applied the Fugitive Slave Laws, German judges who implemented Nazi law, or South African judges who imparted legal legitimacy to apartheid (Cover 1975; Müller 1991; Dyzenhaus 1991; Osiel 1995), one is driven to ask how and why professionals charged with administering justice could turn a blind eye to – or worse, offer justification for – state-sponsored (and often arbitrary) degradation, repression, and brutality. Such behavior is at odds both with (Western) society's moral expectations for professionals, in general, and for judges, in particular. As Paul Camenisch has argued, professionals are “bearers of a public trust, bestowed upon them in the form of a professional degree and title, and endowing them with a monopoly in the provision of a service which is crucial to society.” They have “significant power which can be used either for great societal benefit or to considerable societal harm,” and thus “they can rightly be accused of failure not only when they use their power, influence and expertise for the wrong purposes, purposes which are positively harmful, but also when they fail to use them for the proper purposes, or even fail to do so with sufficient energy and perseverance” (Camenisch 1983: 15 and 17). Like physicians who provided their professional services to the regime's torturers, then, judges who offered legal endorsement of state-sponsored brutality opened themselves up to ethical critique. But of course *judges* are subject to particular scrutiny because, as professionals, they are trained and take oaths to administer *justice*, or at least to uphold the constitution and the laws, which contain principles

<sup>1</sup> For the official critique of the conduct of the judiciary under the military regime, see Ministerio Secretaría General 1991: Vol. 1, Ch. 4.

<sup>2</sup> This only began to change in the late 1990s, following institutional reform and the detention of General Pinochet in London. The extent and limits of this change will be discussed in Chapter 5.



of justice. The judges in Pinochet's Chile had been trained and appointed under a democratic regime and had taken an oath to uphold the constitution of that regime, which provided a host of liberal and democratic protections. Why was it that they so easily ignored that oath and supported, sometimes passively, other times actively, the illiberal, antidemocratic, and *anti-legal* agenda of the military government?

This question becomes even weightier when considered in light of Chile's political culture and history. In a continent plagued by political violence and instability, pre-Pinochet Chile had often been touted as "exceptional" (Valenzuela 1989: 160 and 172).<sup>3</sup> Whereas the political histories of other countries in the region often featured "brutal, distorted, manipulated, political institutions and pseudo-liberal democratic regimes" (Diamond and Linz 1989: 20) and "[an absence of] traditions of participation, contestation, and toleration of dissent" (Waisman 1989: 63), Chile stood out for its "high level of party competition and popular participation, open and fair elections, and strong respect for democratic freedoms" (Valenzuela 1989: 160; see also Valenzuela and Valenzuela 1983). In fact, a 1965 index that ranked countries in terms of democratic performance placed Chile in the top 15 percent, above the United States, France, Italy, and West Germany (Bollen 1980).<sup>4</sup> Chile also boasted a "strong historical tradition of respect for the rule of law and a constitutional framework of presidential government" (Valenzuela 1995: 31). In contrast to Brazil or Mexico, where the law is very unevenly applied across the territory, or to Argentina, which is notorious for its systemic corruption, Chile has long distinguished itself by its rule-bound and orderly society. As one prominent Chilean social scientist argued in 1974: "One of the most characteristic political realities of Chile is the importance of legality as a superior standard [*instancia*] to which all behaviors and the resolution of conflicts between people and institutions are referred. . . . Legality is the foundation of the government's legitimacy" (Arriagada 1974: 122).<sup>5</sup> Why

<sup>3</sup> See also Blakemore (1993), who notes that, in the nineteenth century, Chile was considered "the England of Latin America"; and Dahl (1971), in which Chile figures as a prominent case of successful democratic development.

<sup>4</sup> For a more critical perspective on Chile's "democratic exceptionalism," see Loveman and Lira (2002).

<sup>5</sup> Similarly, Chilean constitutional lawyer José Luis Cea (1978: 6) notes that at the conclusion of the 1960s, "the Chilean population, by and large, had been educated in respect for the principle of legality, which it had internalized as its own. In accordance