

Fordham International Law Journal

Volume 16, Issue 3

1992

Article 1

Proposals for Judicial Reform in Chile

Robert G. Vaughn*

*

Copyright ©1992 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Proposals for Judicial Reform in Chile

Robert G. Vaughn

Abstract

This Article explores the implications of different proposals for reforms by emphasizing a perspective that relates the proposals to the performance of the judiciary during the military regime in Chile. Part I of this Article describes the role of the judiciary prior to the coup and discusses its response to the human rights abuses of the military regime. Part II presents the principal proposals for reform and discusses them against this historic background. Part III of this Article suggests that these proposals offer a more radical change in the role of the judiciary in Chile than an examination of the individual proposals might suggest.

ARTICLES

PROPOSALS FOR JUDICIAL REFORM IN CHILE*

*Robert G. Vaughn***

CONTENTS

Introduction	578
I. The Courts and the Military Government	579
A. The Judiciary Prior to the Coup.....	580
B. The Judiciary During the Military Regime	583
II. Proposals for Judicial Reform	588
A. General Proposals	588
1. Proposals Addressing Specific Failures of the Judiciary During the Military Regime ...	590
2. Proposals Addressing the Character of the Chilean Judiciary	593
B. Legislative Proposals	598
1. Proposals of the Transition Government....	598
2. The Reaction of the Supreme Court	599
C. The Importance of the Proposals	601
III. Implications of the Proposals	601
Conclusion	607

* This Article is based on research conducted while the author was the Co-Director of the Washington College of Law's Law Program in Chile in June and July 1991. The research was supported by the Washington College of Law's Alumni Development Fund whose support the author gratefully acknowledges. Too many lawyers, professors, and government officials helped the author in understanding judicial reform proposals in Chile to name fairly. Special appreciation, however, goes to Professor Jorge Correa Sutil, Professor of Law at the School of Law of the University of Diego Portales in Santiago, Chile and Secretary of the Commission on Truth and Reconciliation. This project rests heavily upon his advice, assistance, and generosity. The author also thanks Francisco Cumplido, the Minister of Justice of the Republic of Chile and Gisella von Mullenbrock, the Chief of Staff of the Ministry of Justice for their insights into judicial reform. Of course, none of the persons who assisted the author is responsible for any error that might appear in the Article nor does the Article necessarily reflect the views of any of these persons. The author acknowledges the assistance of Carlos Tornero and David Jaffe in research and in translating the Spanish materials.

** A. Allen King Scholar and Professor of Law, Washington College of Law, The American University.

INTRODUCTION

The independence of the nations of Eastern Europe, the fall of the Soviet Union and Soviet communism, the acceptance of free market principles, and the growing attraction of democracy to former Soviet dominated states have heralded momentous ideological and economic changes. Although receiving less attention, similar significant changes have occurred in South America. The fall of military governments as well as the rejection of planned economies have created a number of democratic, market-oriented states in the Southern Cone of South America.

The establishment of democratic governments in these states requires particular attention to the preservation of individual rights and liberties. In the United States, the judiciary has played an important role in this preservation of individual liberties. Not surprisingly, judicial reform has emerged as an important issue in South America. The proposals for judicial reform in Chile offer the opportunity to examine the context and content of a specific group of reforms. Examination of the proposals also highlights the attributes of the judiciary in the civil law countries of South America, attributes that influence the character and likely success of these reforms.

Proposals for judicial reform in Chile suggest a number of changes in Chile's judicial system. These changes address the composition, structure, training, procedure, and role of the Chilean judiciary, particularly the Chilean Supreme Court (the "Supreme Court" or "Court"), and respond to varying critiques of the judiciary. Viewed from one perspective, such reforms represent differing, often conflicting, visions of the judicial process.

Viewed from another perspective, however, these proposals reflect the political and legal context emerging from the military coup of 1973 and the inability of the courts to protect human rights and to preserve the liberties of Chileans during the repression that followed the coup. From this perspective, the proposals represent a more unified and consistent attempt to alter the characteristics and role of the judiciary in the democracy that will follow the transition government.

This Article explores the implications of these proposals for reform by emphasizing the second perspective that relates

the proposals to the performance of the judiciary during the military regime in Chile. Part I of this Article describes the role of the judiciary prior to the coup and discusses its response to the human rights abuses of the military regime. Part II presents the principal proposals for reform and discusses them against this historical background. Part III of this Article suggests that these proposals offer a more radical change in the role of the judiciary in Chile than an examination of the individual proposals might suggest. This Article concludes that a change in the role of the judiciary speaks to attempts at judicial reform elsewhere.

I. THE COURTS AND THE MILITARY GOVERNMENT

In 1973, a military coup ousted the elected government of Salvador Allende, ending one of the oldest democratic governments in South America. In the repression following the coup, thousands of Chileans were killed, tortured, imprisoned, or exiled.¹ For a variety of reasons, human rights advocates, under the protection of the Roman Catholic Church, sought to use the courts to publicize and prevent these violations.² The courts, particularly the Supreme Court, failed to restrain the military government.³ The failure of the judiciary forms the basis for much of the criticism of the judiciary as well as the proposals for its reform.

An examination of the role of the judiciary in Chilean society and the conduct of the judiciary prior to the coup provides

1. See generally INFORME RETTIG, INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN (Feb. 1991) [RETTIG REPORT BY THE NATIONAL COMMISSION ON TRUTH AND RECONCILIATION] [hereinafter INFORME]. A number of official and non-governmental organizations criticized the human rights record of the military government. See, e.g., AMNESTY INTERNATIONAL, CHILE: EVIDENCE OF TORTURE (1983); INTERNATIONAL COMMISSION OF ENQUIRY INTO THE CRIMES OF THE MILITARY JUNTA IN CHILE, THE CRIMES OF THE CHILEAN MILITARY JUNTA IN THE LIGHT OF CHILEAN LAW (1974); ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN CHILE (1985) [hereinafter OAS REPORT]; REPORT OF THE SPECIAL RAPORTEUR OF THE SITUATION OF HUMAN RIGHTS IN CHILE, U.N. ECONOMIC AND SOCIAL COUNCIL, U.N. Doc. A/34/583 (1979).

2. See generally, INFORME, *supra* note 1, at 443; Hugo Frühling, *Repressive Policies and Legal Dissent in Authoritarian Regimes: Chile 1973-1981*, 12 INT'L. J. SOC. L. 351 (1984); Alejandro Quezada, *El Poder Judicial y el Resguardo de los Derechos Basicos* [The Judicial Branch and the Protection of Basic Rights], MENSAJE, Apr. 1977, at 122-24.

3. See *infra* notes 22-49 and accompanying text (discussing the Chilean reaction and relationship to the national court system).

a basis for evaluating its performance during the military regime. This examination begins with some general observations about the judiciary in Chile and ends with a more specific discussion of the judicial system immediately prior to the coup.

A. *The Judiciary Prior to the Coup*

The Chilean judiciary shared the attributes of the judiciary in many civil law systems. Of these attributes, the two most important concerned the view of the judiciary as a state bureaucracy and the formalism of Chilean law. In Chile, a judicial career separates the judge from other legal actors and places the judge in a bureaucracy where appointment, assignment, pay, and promotion are controlled or significantly influenced by judges higher in the judicial hierarchy. The Supreme Court exercises personnel authority over the lower courts, including the evaluation of judges.⁴ In many ways the judiciary is a self-perpetuating bureaucracy. The concept of a judicial career makes seniority at various levels within the hierarchy an important element in advancement.⁵ Generally, members of the courts of appeal come from the trial level and members of the Supreme Court come from the senior members of the courts of appeal.⁶

Moreover, the Supreme Court, despite the power and influence of the President, plays a major role in the selection of members of the Court. The Supreme Court submits a list of five candidates (the "*quinas*") to the President.⁷ The President

4. *Código Organico de Tribunales* [Organic Code of Tribunals] § 4, art. 96 [hereinafter *Organic Code of Tribunals*]; Richard B. Cappalli, *Comparative South American Civil Procedure: A Chilean Perspective*, 21 U. MIAMI INTER-AM. L. REV. 239, 289 (1990) (discussing writ of grievance that provides disciplinary authority to Supreme Court).

5. Comisión de Estudios del Sistema Judicial Chileno, *Designación de Los Miembros de Los Tribunales Superiores de Justicia y Abogados Integrantes* [Designation of the Members of The Higher Courts of Justice and Integrated Attorneys] [hereinafter *Designation of the Members of Higher Courts*], in PROPOSICIONES PARA LA REFORMA JUDICIAL [PROPOSITIONS FOR JUDICIAL REFORM] 45-52 (Eugenio Valenzuela S. ed., 1991).

6. *Id.* at 45. Lawyers who have practiced twelve to fifteen years may be appointed, without judicial experience, to courts of appeal sitting in other than provincial capitals. Therefore, all of the members of the courts of appeal in the major cities in Chile must have served as lower court judges. *Organic Code of Tribunals*, *supra* note 4, arts. 284, 286. Members of the Supreme Court are selected from the courts of appeal in major cities, such as Santiago. Therefore, advancement to the Supreme Court is open primarily to those who had served as lower court judges.

7. Juan Ignacio Correa Amunátegui, *Por una Modernización del Poder Judicial* [For a

then fills the vacancy from that list of candidates.⁸ The combination of the importance of seniority in the judicial hierarchy and the role of the Supreme Court in selecting its own members⁹ insulates the judicial bureaucracy and, like all bureaucracies, permits the development of informal standards, rules, and practices that may vary from the more formal and articulated ones.¹⁰

Chilean law reflects the dominance of the civil code. In Chile, law consists of a set of norms that can be formally, almost mechanically, applied.¹¹ This tradition separates law from politics, philosophy, and ethics. Law is evaluated almost solely by its content rather than its effects.¹² By emphasizing the importance of formal norms and their mechanical application, it creates judges who perceive their law-making function as extremely limited.¹³

The dominance of the civil code in Chile, as in other civil law countries, reduces the importance of precedent.¹⁴ The weak influence of precedent ironically increases the discretion of judges by permitting varying applications of statutory provisions and emphasizes the supervision of lower courts by the Supreme Court. Through use of its personnel authority and the enforcement of informal rules, the Supreme Court can create many of the effects of precedent without the restraints that

Modernization of the Judiciary], in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5.

8. *Id.*

9. See generally Jorge Correa Sutil, *Formacion de Jueces para la Democracia* [*Formation of Judges for Democracy*], in FILOSOFIA DEL DERECHO Y DEMOCRACIA EN IBEROAMERICA, REVISTA DE CIENCIAS SOCIALES 271 (1991). Indeed, the Organic Code of Tribunals sets out no guidelines or procedures for selecting qualified applicants for judgeships. Also, the criteria for selection of candidates is vague: "[T]hose [candidates] interested should make evident those accomplishments which justify their merit" Organic Code of Tribunals, *supra* note 4, art. 279.

10. Professor Correa argues that the judiciary suffered from many of the pathologies of bureaucracy—concern with secrecy, isolation, belief in its own expertise, and a failure to consider the implications of its decisions. Jorge Correa Sutil, *supra* note 9.

11. *Id.*

12. *Id.*

13. *Id.*

14. Richard Cappalli, *supra* note 4, at 278-82 (discussing Chilean view of precedent showing little modification of traditional civil law rejection of precedent). "Chilean judges are little inclined to bend to the principles of equality, and the concept of precedent rarely appears in Chilean appellate decisions." *Id.* at 279.

reliance on precedent imposes.¹⁵

Chilean courts follow the models of procedure contained in the earliest civil codes.¹⁶ For example, judges operate in an inquisitorial rather than adversarial model.¹⁷ This model places the management and development of the case in the hands of the judge. As in some other civil law countries, the model relies primarily upon documentary rather than oral proof.¹⁸ It removes the case from control of the parties and distances the parties from the judicial process.

The Chilean judiciary consisted of a hierarchical state bureaucracy committed to a formalistic view of law relying upon an inquisitorial model of judicial behavior. A risk of such a judiciary is that it will develop informal standards of judicial behavior based upon the biases of those within the bureaucracy, particularly the Supreme Court.¹⁹ Therefore, formalism could be used most effectively to support a conservatism that restricts the scope of judicial action consistent with these biases. As an isolated bureaucracy, the procedural models of the civil law could further distance it from the majority of society and deprive it of the tasks likely to temper its biases and conservatism.

During the Allende administration, the courts functioned in an increasingly divisive environment, an environment in which the judiciary itself came under attack.²⁰ The ideological divisions in Chilean society seemed to require the selection of sides and the judiciary was perceived as conservative if not reactionary.²¹

During this period, the courts were seen as irrelevant to the lives of a vast majority of Chileans. Official attempts were made to modify procedure and to make the courts more accessible to Chileans of lower economic and social status.²² Also, a

15. Jorge Correa Sutil, *supra* note 9.

16. *Id.*

17. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 114 (1985).

18. *Id.*

19. Risk does not mean inevitability. Similarly structured judicial systems need not necessarily develop these characteristics but the structure so inclines them.

20. *La Corte Suprema Analizó Críticas A la Justicia* [*The Supreme Court Analyzes Criticisms of the Justice System*], *EL MERCURIO*, Apr. 15, 1970, at 25.

21. *See, e.g.*, *INFORME*, *supra* note 1, at 34, 37.

22. *See* JACK SPENCE, *SEARCH FOR JUSTICE: NEIGHBORHOOD COURTS IN ALLENDE'S*

variety of unofficial “neighborhood courts” arose in poorer areas including communities created by the seizure of lands.²³

The response of the courts to a number of actions of the Allende government, particularly those involving the seizure of private property, embroiled the judiciary in conflicts with that government.²⁴ In some instances, executive officials refused to follow or implement judgments and judicial orders.²⁵ Near the end of the Allende government and prior to the coup,²⁶ the Supreme Court denounced the elected government in terms so strong that the denunciation could have been interpreted, in the environment of the time, as a call for the overthrow of the government.²⁷

The Supreme Court certainly held legitimate concerns regarding the failure of government officials to follow the law as declared by the courts. The Supreme Court’s statements, however, subsequently permitted a contrast between its response to the actions of the Allende government and to the serious human rights violations of the military regime.

B. *The Judiciary During the Military Regime*

During the military regime, the judiciary, particularly the Supreme Court, failed to protect adequately persons seeking redress. The judiciary also appeared to condone the abuses of the military and created doubt that the judiciary would guard personal rights and liberties. These judgments, entered by the National Commission of Truth and Reconciliation, appointed by the transition government to study human rights abuses,²⁸ rest upon several grounds.

In its first decree, the military junta guaranteed the inde-

CHILE 65-68 (1979) (describing Audiencias Populares used by Allende administration to bring judicial services to larger segments of population). These Audiencias Populares were created by the Supreme Court. *Id.*

23. *Id.*; Comisión de Estudios del Sistema Judicial Chileno, *Juzgados de Paz Vecinal y Redistribución de Competencia* [Courts of Neighborhood Peace and Redistribution of Jurisdiction] [hereinafter *Courts of Neighborhood Peace*], in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5, at 77 (discussing courts of this period).

24. Luis Ribalta Puig, *La Denunciada Justicia de Clases* [The Denounced Class Justice System], EL MERCURIO, Apr. 21, 1970, at 3; INFORME, *supra* note 1, at 37.

25. INFORME, *supra* note 1, at 37.

26. *Id.* at 34.

27. *Id.* at 96.

28. *Id.* at VII (decree creating the Commission).

pendence of the judiciary.²⁹ The junta stated that any criticism that it had of the behavior of the courts would be taken to the Supreme Court in private.³⁰ The junta's treatment of the judiciary rested in part on a desire to establish the legitimacy of the regime, one of whose asserted grounds for action was to protect the rule of law.³¹ The respect of legal rules in Chilean society increased the importance of preserving the appearance of an independent judiciary.

Human rights advocates soon tested the effectiveness of the courts by bringing before them petitions for habeas corpus, petitions that would eventually number in the thousands. Attorneys turned to the judiciary, despite its reputation for conservatism, because these lawyers believed "that the judiciary was the last institutional remnant of the liberal-democratic state."³² Few of these petitions were granted³³ and the courts routinely accepted, at face value, official explanations that were seemingly incredible.³⁴

Although some dispute exists regarding the powers of the judiciary to examine the reasons for detentions during times of exception, the judiciary seemed passive in asserting any judicial role. In addition, the judiciary failed to apply principles more firmly established, including time limits for responding

29. *Id.* at 95 (discussing preserving powers and autonomy of judiciary in section three of Decree Law One).

30. *Id.* at 58, 95-96.

31. *Id.* at 96.

32. Hugo Frühling, *supra* note 2, at 359.

33. *Id.* at 359, 363-66; INFORME, *supra* note 1, at 97; see THE VICARIA OF SOLIDARITY, EXTENT OF WORK IN OVERALL FIGURES (1990) (describing the use of petitions for habeas corpus) (copy of report on file with *Fordham International Law Journal*).

34. Hugo Frühling, *supra* note 2, at 364 ("[T]he courts acted as if government officials were always telling the truth, particularly when they denied having detained somebody.") (citation omitted); Roberto Garretón Merino, *El Poder Judicial chileno y la violación de los Derechos Humanos [The Chilean Judiciary and the Violation of Human Rights]*, in PROYECTO DE CAPACITACIÓN, FORMACIÓN, PERFECCIONAMIENTO, Y POLÍTICA JUDICIAL: DOCUMENTOS Y MATERIALES [PROJECT OF PREPARATION, FORMATION, IMPROVEMENT, AND JUDICIAL POLICY: DOCUMENTS AND ESSAYS] 111, 120-30 (1990) [hereinafter *POLÍTICA JUDICIAL*]. The Director of the Vicaria of Solidarity, the principal human rights organization operating during the military regime, also noted that the courts did little to monitor or verify statements by government officials. Meeting with Rene Gonzalez, Director of the Vicaria of Solidarity, in Santiago, Chile (June 27, 1991) (meeting notes on file with *Fordham International Law Journal*) [hereinafter Meeting with the Director of the Vicaria of Solidarity]. For example, many writs were answered with the response that the individual had been released although the person was never seen again by friends or relatives. *Id.*

to writs, the requirement of proper delegations of authority to arresting officials, regulations regarding places of detention, and conditions of house arrest.³⁵

Moreover, the Supreme Court punished judges who sustained investigations of the regime's abuses of human rights. Perhaps the two best-known cases are those of judges Carlos Cerda and Rene Garcia Villegas. Carlos Cerda investigated the detention and disappearance of ten communist party members during the last months of 1976. The Supreme Court had accepted writs of habeas corpus filed on their behalf but adopted the government's official version that the individuals had fled to Argentina. Minister (Judge) Cerda reopened the investigation, and eventually indicted thirty-eight members of the armed forces involved in their disappearance.³⁶ During the investigations a number of threats to and attempts on his life were made and the Supreme Court attempted to halt the investigation³⁷ including issuing writs of protection ("*Recursos de Queja*") to enjoin Judge Cerda from "rough treatment" of military personnel who refused to comply with his orders.³⁸ Judge Villegas, who investigated allegations of torture by the military, suffered similar threats and harassments.³⁹ The Supreme Court eventually removed him from judicial office.⁴⁰

The junta assumed to itself both the constitutional and legislative authority of the state and used this power to change laws and provisions that stood in the way of military.⁴¹ Still, the judiciary failed to assert its own prerogatives⁴² and acqui-

35. Roberto Garretón Merino, *supra* note 34, at 124-25.

36. Pamela Jiles, *Fallo Histórico del Ministro Cerda* [Historic Judgment of Minister Cerda], ANALISIS, Aug. 19, 1986, at 7.

37. Maria Eugenia Camus, *Campaña Contra el Ministro Cerda* [Campaign Against Minister Cerda], ANALISIS, Apr. 15, 1986, at 20.

38. *Id.* at 21. Judge Cerda was sanctioned by the Supreme Court. See generally Jorge Correa Sutil, *A Proposition de Una Sancion*, GACETA JURIDICA, No. 76, at 3 (1986).

39. Patricia Politzer, *Rene Garcia Villegas, Juez del Crimen: Haré mi trabajo aunque me cueste la vida* [Rene Garcia Villegas, Criminal Judge: I Shall Do My Job Even If It Means My Life], LA EPOCA, Nov. 15, 1987, at 17; Juez Rene Garcia Villegas, *Se Me Acusa de Violar Prohibición a Jueces De Actuar en Política* [I am Accused of Violating Provisions of Judges Regarding Taking Part in Politics], EL MERCURIO, Sept. 14, 1988, at 5D. As suggested above, not all observers believed that Judge Villegas's dismissal was unrelated to his competence.

40. Rene Garcia Villegas, *supra* note 39, at 5D.

41. INFORME, *supra* note 1, at 42.

42. Pedro Aylwin Chiorrini, *Jurisdicción Penal Militar: Diagnóstico* [Diagnosis: Military Penal Jurisdiction], in POLÍTICA JUDICIAL, *supra* note 34, at 199.

esced to the creation of a system of military courts, over which the Supreme Court surrendered supervisory authority. By the end of the military regime, these military courts exercised jurisdiction over more civilians than military personnel.⁴³

Not only did the courts permit jurisdiction affecting the human rights of individuals to be separated from the functioning judiciary, but the Supreme Court commended the military for preserving the integrity of the judiciary.⁴⁴ Perhaps more harmful to the reputation of the judiciary were statements by the Supreme Court that denied the existence of human rights abuses in Chile and criticized the practice of filing writs of habeas corpus with the courts.⁴⁵

During the eighteen years of the military regime, General Pinochet appointed a substantial majority of the present members of the Supreme Court.⁴⁶ General Pinochet had used his authority over the civil service to remove persons with ideologically unacceptable beliefs and to appoint persons sympathetic to the regime.⁴⁷ Although not asserting the same authority over the courts, General Pinochet was unlikely to appoint individuals thought to be unwilling to support the regime.⁴⁸ Moreover, in 1984, the number of members of the Supreme Court was increased from thirteen to seventeen.⁴⁹

The military regime also made substantial use of "inte-

43. *Id.* at 204.

44. *Id.* at 230. As of 1974, the Supreme Court relinquished power over the military courts claiming that in times of war, military tribunals should not answer to any court. *Id.* This decision supported the exclusion of military tribunals during times of war from the Supreme Court's authority under Article 79 of the Constitution of 1980. *Id.* This unprecedented exclusion by the court denied civilians any recourse outside the military courts during much of the military rule. *Id.*

45. INFORME, *supra* note 1, at 96; see Supreme Court President, *Opening of the Judicial Year* (Mar. 1, 1975) (on file with *Fordham International Law Journal*).

46. Comisión de Estudios del Sistema Judicial Chileno, *Corte Suprema [Supreme Court]*, in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5, at 34. Fourteen of the 17 ministers (judges) of the Supreme Court were appointed by Pinochet; twelve of these ministers were appointed between 1985 and 1989. *Id.*

47. By decree, the military government provided that all public employees served at the confidence of the president, rendering most public employees temporary ones. OAS REPORT, *supra* note 1, at 12.

48. The readily apparent proposition that Pinochet had appointed such persons was also specifically articulated. Antonio Martínez, *Los "allegados" de la Justicia [The "Partisans" of the Judiciary]*, *Hoy*, Dec. 16-22, 1985, at 15.

49. Supreme Court of Chile, Response to Proposed Bill Regarding Reform of the Judicial Administration System 27 (Aug. 1991) [hereinafter Supreme Court Response].

grated lawyers," practicing attorneys who temporarily served in the absence of judges to hear cases in the courts of appeal and in the Supreme Court.⁵⁰ This practice increased General Pinochet's influence over the judiciary because the appointments of these "integrated lawyers" were limited to a period of two years subject to reappointment.⁵¹ This practice also created significant conflict of interest problems regarding "integrated attorneys" who themselves or whose firms continued to practice before the court in which they served.

The composition of the judiciary during this period also raised issues regarding nepotism. Relatives of members of the Supreme Court appeared prominently in other positions in the judiciary.⁵² The charges of nepotism reinforced the view of the judiciary as a closed, perhaps self-serving, bureaucracy.⁵³

Given the history of the judiciary and the performance of the judiciary during the military regime, the Supreme Court's first interpretations of amnesty laws further tarnished its image. The amnesty provisions barred punishment of uniformed persons involved in violations of human rights from September 1973 to March 1978.⁵⁴ The Supreme Court dismissed investigations of human rights abuses alleged to have occurred during this period, asserting that the amnesty provision not only barred punishment but prevented investigation of the abuses as well.⁵⁵ The Commission on Truth and Reconciliation found this interpretation antithetical to the general provisions of the criminal code that required investigation prior to the termination of criminal action even on the grounds of amnesty.⁵⁶ In addition, one of the judges sanctioned by the

50. Organic Code of Tribunals, *supra* note 4, art. 101. Integrated lawyers are appointed to work for appellate tribunals and for the Supreme Court. *Id.* The lawyers are placed on lists, presented to the Supreme Court, and then to the President of Chile, who decides who should become an integrated attorney. *Id.* art. 219.

51. *Id.*

52. Monica Gonzalez, *Hay Jueces de la Suprema que tienen 30 ó 40 Parientes Colocados en el Poder Judicial* [There are Judges in the Supreme Court that have 30 or 40 Relatives Employed in the Judicial Branch], LA EPOCA, May 9, 1989, at 12.

53. *Id.* at 13. Few commentators believe that the Chilean judiciary is corrupt in the sense of some Latin American judiciaries where bribery and favoritism play important roles in the judicial process. *Id.*

54. Decree Law No. 2191, *Código de Justicia Militar* [Code of Military Justice], DIARIO OFICIAL, Apr. 19, 1978.

55. INFORME, *supra* note 1, at 103.

56. *Id.*

Supreme Court had taken an opposing view and aggressively investigated allegations of abuse by military personnel.⁵⁷

Not surprisingly, given this history, one commonly held view of the judiciary saw it as an isolated hierarchy removed from the interests of the majority of the people that had used formalism to justify its conservative biases, causing it to ignore or to condone significant human rights abuses occurring during the military regime. This picture is permitted by the character of the Chilean judiciary prior to the coup and by the evidence of its performance during the military regime. Such a judiciary would seem ill-suited to serve a democratic government. Public opinion polls show that the judiciary is not highly regarded but rather distrusted by a sizeable portion of the population.⁵⁸ In addition, surveys of attorneys in Chile suggest that attorneys believe that judges represent less qualified law graduates and that the quality of the judiciary raises concerns.⁵⁹

II. PROPOSALS FOR JUDICIAL REFORM

A. General Proposals

A variety of proposals for judicial reform followed the in-

57. See *supra* notes 36-38 and accompanying text (discussing indictment of 38 members of armed forces).

58. Orlando Aqueveque, *Pocos Creen en la Independencia de los Tribunales* [*Few Believe in the Independence of the Judiciary*], *LA EPOCA*, Aug. 2, 1989, at 13. In the poll only 26% of Chileans responded that they believe that the judiciary is independent. *Id.* The lack of respect arises not so much from judicial corruption but from a distrust of the judiciary created by the performance of the judiciary during the military regime. *Id.*

59. Carlos Peña González, *Los Abogados y la Administración de Justicia: Resultados de una Encuesta Sobre el Funcionamiento del Poder Judicial* [*The Lawyers and the Administration of Justice: Results from a Poll on the Functioning of the Judiciary*], in *PROPOSICIONES PARA LA REFORMA JUDICIAL*, *supra* note 5, at 374.

Of course, salaries can influence the quality of persons attracted to the judiciary. Surprisingly, information on judicial salaries is difficult to obtain. The information is public in the sense it is passed by word of mouth and can be gleaned from Congress, from Associations of Magistrates, and from the Ministry of Public Works. Sources, however, are unwilling to have figures attributed to them. From a variety of sources, an estimate of a salary of approximately US\$22,000 a year for members of the Supreme Court seems reasonable. The US\$22,000 would represent the salary *after* deductions of approximately 22% for income tax, health, and retirement. Based on conversations with attorneys in Santiago, members of the largest law firms would expect to make several times this salary.

stallation of the transition government.⁶⁰ These proposals were presented by academics and members of the transition government as well as supporters of the Supreme Court. Therefore, these proposals range from those that seem technical or procedural to those changing more substantially the structure of the judiciary. At that time, the proposals of the Ministry of Justice embodied the government's view.⁶¹ This section examines these general proposals.

Because of the highly-charged and political character of some aspects of the debate, arguments are often couched in more neutral terms of judicial efficiency.⁶² The models relied upon are more likely to be European rather than North or South American.⁶³ At first, the proposals seem a welter of unrelated ideas motivated by varying political or practical goals. Just a brief listing of some of the suggestions conveys this impression. Some of the more commonly suggested reforms include increasing the size of the Supreme Court,⁶⁴ creating a national judicial council⁶⁵ similar to ones in Spain and Italy, establishing neighborhood courts to serve lower income citizens,⁶⁶ modifying procedures including changes in the appellate jurisdiction of the Supreme Court, providing less reliance

60. See, e.g., *infra* notes 76-90 (discussing proposals that address specific failures of judiciary during military regime).

61. Meeting with Francisco Cumplido, Minister of Justice of the Republic of Chile, at the Ministry of Justice (June 24, 1991) (notes of meeting on file with *Fordham International Law Journal*) [hereinafter Meeting with the Minister of Justice]. Among the most important items of reform mentioned by the Minister of Justice are creation of a judicial council, increasing the number of members of the Supreme Court, and changes in procedure, particularly greater use of oral presentations and provision of judicial service for poorer Chileans. *Id.* The national judicial council would assume many of the functions of the Supreme Court, including personnel authority of the lower courts. *Id.* Such a national council would also provide a voice for the judiciary in government. *Id.*

62. Comisión de Estudios del Sistema Judicial Chileno, *Análisis Crítico de Usos y Prácticas Judiciales y Eficiencia del Poder Judicial* [Critical Analysis of the Uses and Practices and Efficiency of the Judiciary], in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5, at 89.

63. Juan Ignacio Correa Amunátegui, *supra* note 7.

64. Designation of the Members of Higher Courts, *supra* note 5.

65. Comisión de Estudios del Sistema Judicial Chileno, *Consejo Nacional de La Justicia* [National Council of Justice] [hereinafter *National Council of Justice*], in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5, at 106.

66. *Id.* at 89; Nancy de la Fuente Hernández, *Perspectiva Judicial de la Administración de Justicia* [Perspective on the Administration of Justice], in JUSTICIA Y LIBERTAD EN CHILE [JUSTICE AND LIBERTY IN CHILE] 77 (Guillermo E. Martínez ed., 1992).

upon documentary evidence, creating informal procedures for certain classes of cases,⁶⁷ changing the nature of judicial careers,⁶⁸ altering evaluation standards and procedures for judges,⁶⁹ addressing the role of "integrated attorneys,"⁷⁰ setting maximum ages for judges,⁷¹ creating a judicial school,⁷² dividing the Supreme Court into more specialized divisions,⁷³ amending the Chilean concept of separation of powers,⁷⁴ and adding modern technology and other techniques to the management of the courts.⁷⁵

These proposals, however, possess considerable coherency. When examined against the history of the Chilean judiciary over the past two decades, the proposals form a body of suggestions directed to the failure of the courts in a time of crisis. They speak to different aspects of the problem. Some address more general characteristics of the judiciary that predisposed it to the role it played during the military regime. Others address more specific failures of the judiciary and of the Supreme Court during that period. The distinction usefully permits organization of the proposals from different perspectives and illustrates how these proposals struggle with the role of the judiciary in a democratic society dedicated to the preservation of human rights.

1. Proposals Addressing Specific Failures of the Judiciary During the Military Regime

Some of the proposals for reform of the judiciary identify

67. Mauricio Carvallo, *La Justicia Llega Tarde [Justice Arrives Late]*, HOY, July 25, 1988 at 29.

68. Jorge Correa Sutil, *supra* note 9.

69. *Id.*

70. *Abogados Integrantes Preocupan a los Colegios Profesionales [Integrated Lawyers Raise Concerns in the College of Professionals]*, LA TERCERA, Dec. 13, 1985, at 35.

71. Monica Gonzalez, *El Problema está en cómo se Generan los Jueces [The Problem Rests in How Judges are Chosen]*, LA EPOCA, Apr. 25, 1989, at 13.

72. Hernán Correa de la Cerda, *Proposiciones para una Escuela Judicial en Chile [Propositions for a Judicial School in Chile]*, in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5, at 275.

73. Designation of the Members of Higher Courts, *supra* note 5.

74. Separation of powers focuses more on the autonomy of a branch regarding its operations than it does on restricting the powers of other branches of government.

75. Gonzalo Pica Pemjean, *Informática Aplicada A La Gestión De Tribunales: La Experiencia Chilena [Information Pertinent to the Administration of the Courts: The Chilean Experience]*, in POLÍTICA JUDICIAL, *supra* note 34, at 329.

problems created during the military regime. Others tend to personalize the problems by focusing upon the composition of the Supreme Court. In these ways, the proposals can be viewed as seeking to address specific weaknesses of the judiciary that can be resolved within the present judiciary form.

The Pinochet regime vastly expanded the jurisdiction of the military courts. By one estimate, approximately ninety-five percent of the persons prosecuted in the military courts for non-military crimes were civilians.⁷⁶ These courts exercise such broad jurisdiction over civilians that military courts handle more civilian than military cases.⁷⁷ The lack of any constitutional provision limiting military court jurisdiction⁷⁸ and a variety of statutes giving criminal jurisdiction to those courts⁷⁹ creates a scope of military jurisdiction that now exceeds that in any other Latin American democracy.

Proposals regarding the military courts advocate changes that would radically modify the jurisdiction of those courts. For example, one set of proposals seeks to reduce substantially the jurisdiction of the courts.⁸⁰ Another set attempts to reassert supervision of military courts by civilian ones.⁸¹

These proposals would return criminal jurisdiction to civilian courts and, in so doing, remedy the difficulties created for a democratic government by this expansive military jurisdiction. They would reduce the perception of the military as an autonomous power within a democratic government and therefore have both practical and symbolic importance for the return to democracy.

Recent legislation addresses reduction in the jurisdiction

76. Pedro Aylwin Chiorrini, *supra* note 42, at 199.

77. *Id.* at 200.

78. *Id.* at 201.

79. *Id.* at 215-34.

80. These proposals seek to revise the military code to reduce its jurisdiction particularly in the most notorious provisions regarding "terrorist conduct," "control of arms," and "national security," used to bring civilians under military jurisdiction. Other reformers seek the goal of leaving the military courts with jurisdiction only over members of the armed forces. Mario Verdugo Marinkovic, *Jurisdicción Penal Militar: Proposiciones [Military Penal Jurisdiction: Propositions]*, in *POLÍTICA JUDICIAL*, *supra* note 34, at 293.

81. *Id.* The deference given to the military regime by the courts, particularly the Supreme Court, removed any supervisory authority of the military courts. *Id.* Supervisory jurisdiction over the military courts should be returned to civilian courts. *Id.* at 310.

of the military courts.⁸² The legislation, however, leaves a considerable scope for military jurisdiction and contains inconsistencies and ambiguities⁸³ that suggest the reduction in jurisdiction could have limited practical effect.⁸⁴

Some proposals confront the power of the conservatives that control the Supreme Court.⁸⁵ This group is viewed in some quarters as responsible for the failure of the judiciary to respond to the abuses of the military regime.⁸⁶ Moreover, a substantial majority of the members of the Supreme Court were appointed to the Court during the military regime⁸⁷ and lack legitimacy in the eyes of many. Not surprisingly, one prominent proposal seeks to add several members to the Court, diluting the power and influence of the conservatives on the Court.⁸⁸ Although justifications can be made for increasing the size of the Court, particularly if it were to be divided into divisions with specialized jurisdiction,⁸⁹ the proposal seems reminiscent of court-packing plans.

Other proposals would diminish the influence of the Supreme Court but seem less addressed to the conservatives

82. Ley No. 19.047, Publicada En El Diario Oficial 151, 14 de Febrero de 1991. The law seeks to limit the jurisdiction of military courts by restricting military jurisdiction to crimes committed by military personnel, crimes committed jointly by military personnel and civilians, and crimes with a distinctive military character. *Id.* The law also seeks to eliminate military jurisdiction for crimes committed by civilians in threatening, slandering, or offending any member of the armed forces. *Id.*

83. An analysis of the reform argues that Law No. 19.047 contains the same limitations as a law enacted in 1975, Law No. 12.927, and therefore Law No. 19.047 adds little. Also, a contradiction exists between Law No. 12.927 (and 19.047) and Article 3 of the Code of Military Justice. The contradiction would most likely be resolved in favor of No. 12.927 (and No. 19.047) under the civil law rule that the more specific statute governs. Another outcome is possible depending upon an interpretation that Article 3 is the more specific provision. CRISTOBAL EYZAGUIRRE B., LEYES CUMPLIDO: ANALISIS JURIDICO DE LA LEY NO. 19.047 [COMPLETED LAWS: LEGAL ANALYSIS OF LAW NO. 19.047] 151 (Ediarconosur Ltda., 1991).

84. The interpretative problem creates the possibility of continued abuse of military jurisdiction and suggests that Congress was cautious in adjusting the jurisdiction of the military courts.

85. Designation of the Members of Higher Courts, *supra* note 5.

86. *Id.*

87. *Id.*

88. *Id.* at 35. Increasing the number of justices on the Supreme Court was one of the priorities of the Ministry of Justice. Meeting with the Minister of Justice, *supra* note 61.

89. Designation of the Members of Higher Courts, *supra* note 5, at 36. At present, the Supreme Court sits in panels, but these panels, which vary in their membership, do not specialize in particular types of cases or appeals. *Id.*

now in control of the Court than to general alterations in the role and function of the Supreme Court. One narrow example recommends lowering the mandatory retirement age for judges on the Supreme Court.⁹⁰ More general examples, including recommendations for a national judicial council, are discussed in more detail in the following section.

These proposals seem motivated by the practical difficulties confronting the transition government and subsequent democratic governments in dealing with a Supreme Court dominated by conservatives, the majority of whose members were appointed by General Pinochet. The success of some programs of these governments may turn on the actions of the Supreme Court. These proposals are also important because they admit the importance of the attitudes and beliefs of those who serve in the judiciary, an admission that contradicts the prevailing formalistic view of the role of judges.

2. Proposals Addressing the Character of the Chilean Judiciary

Many of the proposals for reform address the character of the judiciary in Chile. Such proposals would alter some of the fundamental aspects of the judiciary, often drawing upon models from other civil law countries. Taken together, however, these proposals suggest a more radical reexamination of the assumptions underlying the judiciary and of the role of judges. A useful way of illustrating their importance is to organize them around the characteristics of the Chilean judiciary presented above.

The Chilean judiciary exists as a state bureaucracy regulated by a Supreme Court with extensive personnel powers — a bureaucracy that emphasizes seniority and appears isolated from society. As noted, such a bureaucracy has a tendency to develop its own standards and procedures that can conflict with more formal expectations regarding its role.

Many proposals focus upon the selection procedures for judges of the Supreme Court and for the courts of appeal. Some proposals outline changes in existing procedures, such as clear standards for the evaluation of judges by the Supreme

90. *Id.* at 56; Monica Gonzalez, *supra* note 71, at 13.

Court and a more open process of evaluation.⁹¹ Many other proposals, however, reduce the influence of the Supreme Court in selecting lower court judges. A common suggestion substitutes an external commission, variously composed,⁹² for the Supreme Court in the evaluation and recommendation of candidates for judicial appointment.⁹³ These proposals would not only reduce the authority of the Supreme Court but also would bring some outside influences to bear on the appointment of judges of the courts of appeal. As a result, the judiciary would become less of a hierarchical bureaucracy. Suggestions for greater involvement of the political branches, particularly the legislature, in the selection of Supreme Court judges⁹⁴ accompany the more detailed proposals regarding the selection of lower court judges.

The proposals display greater reluctance in displacing the disciplinary functions of the Supreme Court. Suggestions to place this authority in some outside body raise significant issues of judicial independence.⁹⁵ Therefore, the proposals seek to restrict the Supreme Court by imposing procedural and other requirements that limit its discretion in discipline.

The proposals also challenge the closed nature of a judicial career where advancement to the courts of appeal of major cities or to the Supreme Court requires prior service in the judiciary.⁹⁶ Although the proposals advocate restricting or eliminating the use of "integrated attorneys,"⁹⁷ these proposals recognize the importance of permitting persons outside the judiciary to compete for appointment to the courts of appeal. One proposal allows up to twenty percent of the members of the courts of appeal to consist of persons appointed from outside the judicial hierarchy.⁹⁸ These proposals do not ad-

91. Germán Herмосilla Arriagada, *Informe Sobre Los Procedimientos de Designación, Calificación y Ascenso de los Jueces y de Integración de los Tribunales Superiores: Situación Actual y Proposiciones* [*The Procedures by Which Judges are Designated, Qualified, and Promoted and Integration of the High Tribunals, the Current Situation and Proposals*], in *POLÍTICA JUDICIAL*, *supra* note 34, at 395.

92. Designation of the Members of Higher Courts, *supra* note 5, at 51 (describing possible composition of these tribunals).

93. *Id.* at 52.

94. *National Council of Justice*, *supra* note 65, at 130-31.

95. *Id.* at 133.

96. Organic Code of Tribunals, *supra* note 6, arts. 284, 286.

97. Germán Herмосilla Arriagada, *supra* note 91, at 408-09.

98. Designation of the Members of Higher Courts, *supra* note 5, at 57.

dress the Supreme Court and seem limited; they do, however, represent a significant break with a narrow conception of a judicial career and they would open the judiciary at the appellate levels to persons who had not begun their careers in the judiciary.⁹⁹

The judicial commission or national council of justice is an institutional reform often used to implement the proposals discussed above. Generally, such a commission patterned after similar commissions in Italy and Spain would play a role in the selection and perhaps in the evaluation and discipline of judges.¹⁰⁰ The commission could conduct judicial training and play a role in the administration of the courts, providing managerial direction and making fiscal recommendations.¹⁰¹ To an extent, the national council would assume some of the functions now exercised by the Ministry of Justice.¹⁰² The national council would be the institutional embodiment of the decision to reduce the role of the Supreme Court and to open the judiciary to other influences.

An important group of proposals concerns the extension of the judiciary to groups in Chilean society who now enjoy little access to the courts. Although these proposals could be viewed as somewhat distinct, addressing service of the courts to a wider population, these proposals also seek to expose the judiciary to other groups in society and to their problems and perspectives.¹⁰³ In this sense, these proposals fit easily with the ideas seeking to alter the character of the judiciary and contain a variety of institutional mechanisms to accomplish this goal.¹⁰⁴ Previous experience with the use of judges in neighborhood courts during the Allende government indicates that

99. See *supra* note 6. These proposals also could affect nepotism within the judiciary by reducing the importance of the initial appointment to the judiciary.

100. *National Council of Justice*, *supra* note 65, at 117.

101. *Id.* at 120-28.

102. *Id.* at 134. The Minister of Justice believed that such an institution would insure a voice for the judiciary in the government. Meeting with the Minister of Justice, *supra* note 61.

103. Jorge Correa Sutil, *supra* note 9, at 23.

104. *Courts of Neighborhood Peace*, *supra* note 23, at 82-89. One suggestion is to replace Local Police Tribunals, created in 1887 to deal with minor infractions. These police tribunals, not particularly effective, could be eliminated and their infrastructure used to establish neighborhood courts. Other suggestions propose less formal structures and the use of oral methods of presentation of evidence and arguments. *Id.* at 73.

the transition for the judiciary would not be easy,¹⁰⁵ but thereby demonstrates the importance of these services to changing the perspectives of judges.¹⁰⁶

The proposals indicate some concern with the judiciary's, particularly the Supreme Court's, use of formalism. The discussions of the appellate jurisdiction of the Supreme Court suggest that the Court has been too rigid in its application of jurisdictional requirements¹⁰⁷ and that its use of formalism has affected adversely its review functions.¹⁰⁸ Often repeated is the necessity that the judiciary take a broader view of the law involving human rights and personal liberty.¹⁰⁹ In a sense, the argument for a broader view recognizes that several approaches to interpretation are possible and advocates one that focuses more on provisions protecting human rights.

The proposals also begin to suggest that, at least in some very limited areas, precedent should be given greater weight by the courts. The writ of inapplicability is the principal example.¹¹⁰ Through this writ, the Supreme Court can declare that the application of a statute in a specific case violates the constitution.¹¹¹ The decision applies only to the individual case and

105. JACK SPENCE, *supra* note 22, at 74-80 (noting the unwillingness of judges to dispense with much of formality that distanced courts from poorer litigants and describing bureaucratic flavor of proceedings).

106. Because these activities compel judges to alter practices and perceptions, they can play an important role in educating judges about the problems of the poor and create a broader view of the function of the law and of the courts.

107. Hernán Correa de la Cerda, *supra* note 72, at 279.

108. Designation of Members of Higher Courts, *supra* note 5, at 32-33.

109. Carlos Cerda Fernández, *El Perfil del Juez [The Judge's Profile]*, in *POLÍTICA JUDICIAL*, *supra* note 34; Jorge Correa Sutil, *supra* note 9. There is also a call for broader interpretation of the law to consider the purposes of the law and the social and political context in which the rule will operate; judges are asked to consider the goals and effects of the law.

Although the Director of the Vicaria of Solidarity also emphasized the importance of the courts in protecting human rights, he believed that an important element of change in the judiciary was the termination of the self-perpetuating hierarchy of the judiciary by altering the nature of a judicial career by emphasizing merit in selection and promotion and by requiring additional education for judges. The Supreme Court should become an appellate body of last resort rather than a major political actor. As did many other Chileans, he expressed concern for the quality of the judiciary and was prepared to support salary increases for judges if such increases would improve the quality of persons appointed to the judiciary. Meeting with the Director of the Vicaria of Solidarity, *supra* note 34. For a discussion of judicial salaries, see *supra* note 59.

110. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 art. 80.

111. *Id.*

is not binding in other cases.¹¹² Although arguments could be made that, as a practical matter, such a holding acts as precedent,¹¹³ neither the Supreme Court nor the lower courts are bound by determinations regarding a writ of inapplicability. Some proposals recommend that when the Court has applied the writ three times in similar circumstances, finding the statute to be constitutional, such decisions should apply generally.¹¹⁴

This provision seems motivated by a desire to reduce the ability of the Supreme Court to interfere with legislation because the alternative proposal is to remove the writ of inapplicability from the Supreme Court's jurisdiction altogether.¹¹⁵ These concerns with formalism appear particularly significant in light of the importance attached to formalism in the Chilean judiciary. Such concerns, however, are limited compared to more general doubts about formalism.

The desire to modify the attitudes of judges, to somehow inculcate them with democratic values, runs through many of the proposals. Proposals for training of judges¹¹⁶ and for changes in legal education¹¹⁷ represent specific proposals directed to this goal. In addition, most of the proposals discussed thus far could be similarly interpreted: they seek to change the attitudes and beliefs that can arise in an isolated bureaucracy.

The emphasis on altering the attitude of judges represents the beginning of an important reassessment of the role of the judge. Implicitly, an emphasis on the attitudes of judges assumes that judges do not mechanically apply the law; it accepts that the opinions and beliefs of judges can significantly influ-

112. Eugenio Valenzuela Somarriva, *Labor Jurisdiccional de la Corte Suprema [Jurisdictional Duties of the Supreme Court]*, in PROPOSICIONES PARA LA REFORMA JUDICIAL, *supra* note 5.

113. *Id.* at 167. Attorneys could have an incentive to use the decision to advise clients acting in similar circumstances. The application of the writ provides a basis for predicting future action by the courts and therefore serves a function analogous to precedent. Also, the personnel authority of the Supreme Court over lower court judges increases the likelihood that these judges will be guided by the Supreme Court's action without regard to the formal rules of precedent.

114. *Id.* at 172.

115. *Id.* at 173.

116. Carlos Cerda Fernández, *supra* note 109, at 23-45.

117. Hernán Correa de la Cerda, *supra* note 72, at 277.

ence outcomes. Judges with democratic attitudes and beliefs can more effectively protect human rights than those who do not have democratic perspectives.

The recognition of the importance of judicial discretion may not seem particularly radical, but in the context of the Chilean judiciary this recognition challenges the dominance of formalism and echoes the hard won victories of American legal realists some five decades ago. Indeed, some Chilean commentators openly call for a rejection of the view that a judge mechanically applies the code.¹¹⁸ The history of the judiciary during the military regime demonstrates that the commitment of judges to democratic values is crucial.

B. *Legislative Proposals*

Many of the suggestions for reform are now contained in legislative proposals. These legislative proposals reflect firmly held views of the transition government regarding reform and have provoked a largely negative reaction from the Supreme Court.

1. Proposals of the Transition Government

Relying upon many of the general proposals for judicial reform, the transition government introduced legislation in 1991.¹¹⁹ The legislation addressed many of the proposals discussed above, including increasing the size of the Supreme Court,¹²⁰ creating a national judicial council,¹²¹ modifying certain court procedures,¹²² imposing restrictions on the hiring of

118. Designation of the Members of Higher Courts, *supra* note 5, at 32.

119. PROYECTO DE LEY SOBRE REFORMA AL SISTEMA DE ADMINISTRACION DE JUSTICIA [PROPOSED LAW REGARDING REFORM OF THE JUDICIAL ADMINISTRATION SYSTEM] (Apr. 1991).

120. *Id.* tit. II, art. 2 (21 members).

121. *Id.* tit. I. The National Council of Justice would consist of the President of the Supreme Court who would preside, two additional members of the Supreme Court, two members from the Courts of Appeal, the President of the National Association of Magistrates, two judges of the courts in Santiago, two Senators, one member from the National Board of the College of Lawyers, one member from the Boards of Colleges of Lawyers outside the Santiago metropolitan area, three members appointed by the President from a list provided by the Council of Rectors of universities with law schools at least ten years old.

122. *See, e.g., id.* tit. II (dividing the Supreme Court into four divisions with specialized jurisdiction).

relatives of judges,¹²³ altering evaluation standards for judges,¹²⁴ abolishing the use of "integrated attorneys,"¹²⁵ and establishing a judicial college.¹²⁶

The most important proposal would establish the National Council of Justice.¹²⁷ This proposal provides a mechanism to bring outside influences to bear on the judiciary, particularly in the selection of judges.¹²⁸ In submitting this legislation, President Aylwin articulated a view of the judiciary consistent with that underlying many of the general proposals. The judiciary is in severe crisis, lacking public respect and beset by delay in addition to being plagued by suspicions regarding its independence.¹²⁹ It is viewed as a public service acting by rote, too reliant on the letter of the law and docile to the influences of power.¹³⁰

According to the President, the response to this crisis requires the autonomy of a judiciary free from political influence but committed to a more expansive view of its role.¹³¹ The National Council of Justice is necessary to the true independence of the judiciary.¹³²

2. The Reaction of the Supreme Court

The Supreme Court responded negatively to most of the legislative proposals presented by the transition government.¹³³ The Court's most extensive criticism concerned the proposal to establish a National Council of Justice with powers to set judicial policy including the selection of judges. The Court believed that this body would be unconstitutional because it would interfere with the responsibility of the Supreme Court under the Constitution.¹³⁴ Based upon the experience

123. *Id.* tit. III.

124. *Id.*

125. *Id.*

126. *Id.* tit. VIII.

127. *Id.* tit. I.

128. *Id.*

129. President Patricio Aylwin, President of the Republic of Chile, Introductory Remarks upon remitting to the Chamber of Deputies for consideration the proposed law regarding Judicial Reform (Apr. 1, 1991).

130. *Id.*

131. *Id.*

132. *Id.*

133. Supreme Court Response, *supra* note 49.

134. *Id.* at 9.

from 1833 to 1925 with a State Council, seen by the Court as analogous to the National Council of Justice, the Court believed that the judicial selection process would become politicized and the judiciary demoralized.¹³⁵ The power of nomination of judges is inherent in the judiciary and the placement of that power in a National Council of Justice would infringe upon the hierarchical control of the judiciary upon which judicial independence stands.

The Court rests most of its criticism on the assertion that the reforms would undermine the independence of the judicial branch.¹³⁶ Ironically, the Supreme Court cites in support of its independence the first decree law of the military junta guaranteeing the judiciary's independence.¹³⁷ This citation, combined with an emphasis on the maintenance of hierarchical control, suggests a rather formal definition of independence.

Indeed, the transition government and the Supreme Court seem to view judicial independence in differing, perhaps inconsistent, ways. Contrasted to the Supreme Court's rather formal definition, the transition government emphasizes the lack of effectiveness of the judiciary in protecting individual rights. Therefore, both sides of the legislative debate base their argument on the concept of judicial independence.

The future of many of these proposals appears uncertain. Practical difficulties may prevent enactment even of those less controversial proposals regarding which there seems to be wide agreement. Many of the recommended changes, including alterations in the method of selection of judges and the creation of a national judicial council, require modification of the organic law of the courts.¹³⁸ A majority of the Supreme Court and four-sevenths of each house of parliament must approve modifications in the organic laws.¹³⁹ The Supreme Court, therefore, remains a significant obstacle to many of the reforms. In addition, the composition of the Senate makes attainment of the necessary majority unlikely without the assent

135. *Id.* at 5.

136. *Id.* at 3.

137. *Id.* at 8; *see supra* notes 28-59 and accompanying text (discussing judiciary during military regime).

138. Mario Verdugo Marinkovic, *supra* note 80; Meeting with the Minister of Justice, *supra* note 61.

139. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 art. 82.

of right-wing parties.¹⁴⁰

C. *The Importance of the Proposals*

Despite the difficulties ahead, the reform proposals frame the issues dominating the debate about the role of the judiciary. They offer insights to the future of the judiciary for they represent changes in the perceptions of the judiciary that are likely to guide discussion for several years.

Viewed from the perspective of the character of the Chilean judiciary, the proposals for judicial reform constitute a coherent body of recommendations. These recommendations seek to alter the character of the Chilean judiciary and in doing so challenge some of the underlying tenets of the civil law around which the Chilean system is constructed. The conduct of the judiciary during the military regime has forced a reassessment of the role of the judiciary. It seems unlikely that all of the conventions regarding the Chilean judiciary will survive that reassessment.

III. *IMPLICATIONS OF THE PROPOSALS*

The proposals for judicial reform in Chile speak to issues beyond modification of the Chilean judiciary. Particularly, the transition government and the Supreme Court have presented different visions of judicial independence. These proposals have implications for the attempts at judicial reform in Latin America, for the role of judiciaries in the transition to democracy, particularly in Latin America and in Eastern Europe, and for the role of the courts in preserving individual liberty.

Judicial reform in Latin America is closely related to the transition to democracy. For example, U.S.-sponsored judicial reform efforts were linked, particularly in Central America, to movements toward democracy.¹⁴¹ The judiciary was assumed to have a central role in protecting individual liberties, restoring popular faith in the processes of government, and limiting the abuses of the military and other autocratic groups only reluctantly or incompletely yielding power to civilian govern-

140. Meeting with the Minister of Justice, *supra* note 61.

141. UNITED STATES INTERNATIONAL DEVELOPMENT COOPERATION AGENCY, AGENCY FOR INTERNATIONAL DEVELOPMENT, PROJECT PAPER: REGIONAL ADMINISTRATION OF JUSTICE 1-2 (undated) [hereinafter REGIONAL ADMINISTRATION OF JUSTICE].

ments.¹⁴² A successful transition to democracy required sufficient judicial independence to permit the judiciary to fulfill its role in the transition.

Therefore, judicial reform in Latin America assumes that the establishment of democracy requires an independent judiciary. The experience in Chile cautions that judicial independence can be conceived in a variety of ways. Varying concepts of judicial independence identify different problems and suggest different solutions. Proposals for judicial reform in Chile illustrate the usefulness of individual case studies and emphasize the need for reforms specifically tailored to the conditions in which the judiciary of a country actually functions.

Although judicial independence can be conceived in many ways,¹⁴³ the experience in Chile suggests the usefulness of examining the concept of judicial independence. This examination, in the context of the reform proposals in Chile, offers

142. See generally KENNETH ANDERSON FOR THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, *MAXIMIZING DENIABILITY: THE JUSTICE SYSTEM AND HUMAN RIGHTS IN GUATEMALA* (1989) [hereinafter *MAXIMIZING DENIABILITY*]; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *UNDERWRITING INJUSTICE: AID AND EL SALVADOR'S JUDICIAL REFORM PROGRAM* (1989) [hereinafter *UNDERWRITING INJUSTICE*]; WORKSHOP REPORT OF CONFERENCE SPONSORED BY THE AMERICAN UNIVERSITY SCHOOL OF INTERNATIONAL SERVICE AND THE WASHINGTON OFFICE ON LATIN AMERICA, *ELUSIVE JUSTICE: THE U.S. ADMINISTRATION OF JUSTICE PROGRAM IN LATIN AMERICA* (1990) [hereinafter *ELUSIVE JUSTICE*].

143. Two U.N. documents address the independence of the judiciary: a 1985 action by the General Assembly endorsing standards developed at the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders—UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY A/RES/40/32 (Nov. 29, 1985)—and procedures for implementing these principles adopted by the Economic and Social Council and endorsed by the General Assembly in 1989—PROCEDURES OF THE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, GENERAL ASSEMBLY RESOLUTION 44/162 (Dec. 15, 1989).

These documents reflect activity both by the crime control committees of the United Nations and human rights organizations. Generally, the 20 principles address the need to guarantee the independence and impartiality of the judiciary and to free it from unwarranted interference. These principles also define a right to be tried before ordinary tribunals. Other principles concern freedom of expression and association within the judiciary, qualifications, selection, and training of judges including legal protection of their tenure, professional secrecy and immunity, and regulation of discipline, suspension and removal. Although these criteria emphasize operational independence, they are closely related to the preservation of individual and human rights. These documents as well as other related ones can be found in *Center for the Independence of Judges and Lawyers, The Independence of Judges and Lawyers: A Compilation of International Standards*, CENTER FOR THE INDEPENDENCE OF JUDGES AND LAWYERS BULLETIN (Apr.-Oct. 1990).

some lessons for judicial reform as part of a transition to democracy and demonstrates that efforts at judicial reform embody differing, occasionally conflicting, views of judicial independence.

The independence of a judiciary requires that it be able to function as a judiciary. It must be secure from physical violence and be able to resolve cases without fear of retaliation. In some Latin American countries, the intimidation of judges through threats and violence challenges this fundamental concept of judicial independence.¹⁴⁴ Intimidation can result from action by agents of the executive or by groups operating outside of the government. In either case, the unwillingness or inability of the executive to protect the judiciary can prevent the courts from operating as restraints on power.

Moreover, repressive regimes can intimidate judges with little or no physical violence. The fear of retaliation, a retaliation observed to have been applied to other groups in society, can effectively disable the judiciary. Astute judges adopt attitudes or approaches that reduce the risk of antagonizing government officials. Also, in a judicial bureaucracy, the attitudes of those senior in the hierarchy inordinately influence the values of the judiciary.

The operational independence of the judiciary can also be challenged in less dramatic ways. Courts without resources, judges without training, or a judiciary without the capability of resolving the disputes brought before it cannot implement the judicial power.¹⁴⁵ In some of Latin America, these challenges to judicial independence are as disabling as any physical or psychological attack on the judiciary.¹⁴⁶

These challenges to judicial independence represent external limitations on a judiciary. Although the effectiveness of these external forces may rely on intimidation and therefore changes in the behavior of judges, they interfere with the ability of the judiciary to implement the judicial function. The response to these challenges more likely focuses on the nature of the external limitations than on the judiciary. For example, the

144. ELUSIVE JUSTICE, *supra* note 142, at 20-22, 30-31, 40; MAXIMIZING DENIABILITY, *supra* note 142, at 9-10, 25, 53; UNDERWRITING INJUSTICE, *supra* note 142, at 3-14.

145. REGIONAL ADMINISTRATION OF JUSTICE, *supra* note 141, at 10-11.

146. *Id.*

characteristics of the executive rather than the characteristics of the judiciary may require modification.¹⁴⁷

To an extent, the Chilean experience fits this concept of judicial independence, based heavily on analysis of judicial failures in Central America. The Chilean judiciary failed to protect individual rights in those political cases where human rights abuses entrenched the power of the military government. The evidence would support the conclusion that the failure rested on the unwillingness of the military government to permit the courts to interfere with its policies and the example of repression applied to other groups and institutions.

In Central America, close connections seem to exist between the failure of the courts in "political cases" and the inability of the judiciary to resolve more ordinary disputes involving the civil and criminal law.¹⁴⁸ The judiciary is disabled by its own failures and by public distrust; this disability contributes to an expanding cycle of violence.

In Chile, the failure of the judiciary to provide protection from and redress against the military regime did not disable the courts nor is it clear that failure resulted solely from external restraint. Despite public opinion polls documenting widespread distrust and disdain for the judiciary¹⁴⁹ and the irrelevance of the judicial process to large number of Chileans,¹⁵⁰ the criminal justice system did not break down in Chile nor does Chilean culture seem less concerned with legality than before the coup. As discussed above the composition and attributes of the judiciary seem remarkably similar over the last twenty-five years.¹⁵¹ Indeed, the reform proposals address long-standing aspects of the Chilean judiciary.

This picture of an intact, functioning judiciary is belied by the extensive jurisdiction of the military courts.¹⁵² These courts exercised extensive jurisdiction over civilians during the

147. *Id.*

148. *Id.* at 1-2, 5-6; MAXIMIZING DENIABILITY, *supra* note 142, at 9-10.

149. *See supra* note 58 and accompanying text (discussing public opinion of judiciary).

150. *See supra* note 22 and accompanying text (discussing attempts to modify Chilean court system).

151. *See supra* notes 4-27 and accompanying text (discussing judiciary prior to coup).

152. *See supra* notes 44-45, 76-84 and accompanying text (discussing judiciary response to coup).

military regime, a jurisdiction that continues and speaks eloquently of the semi-autonomous status of the military in Chilean society.

These conflicting perspectives on the failure of the Chilean judiciary arise in part because the civilian courts in Chile never were agents of the repression. The complicity of the courts lay in acquiescence and inaction rather than in commission. The judiciary consciously distanced itself from the repression and in doing so sought to separate "political cases" from the ordinary work of the courts. To do so, the judiciary first acquiesced in the creation of military courts of broad jurisdiction and also denied writs of habeas corpus and other pleas for relief, pleas that would have brought it into conflict with the military regime.

In part, as noted above, this strategy played some role in preserving the ordinary functions of the courts. Additionally, however, this strategy purchased the antipathy of the majority of Chileans and suggests another perspective from which to examine the independence of the judiciary. The Chilean courts did enjoy independence, an independence guaranteed by the military. The judiciary operated throughout the military regime and the continuity and viability of the judiciary attests to its independence. The civil law system and the formalism of Chilean law helped preserve this independence.

The tradition of a limited role for judges permitted the judiciary to withdraw from the conflicts regarding human rights and individual liberties. The Chilean civil law system rests heavily upon the French Civil Code. In the context of the French Revolution, the formalism of the law and the restrictions on judges sought to protect democratic development from an unpopular judiciary closely connected with the ancient regime.¹⁵³ Ironically, in Chile, these techniques to preserve democracy prevented the courts from responding to the violation of democratic norms and allowed the courts to ignore significant human rights abuses.

The fear of courts in a democratic society continually inclines restrictions on the function of courts in order to protect

153. JOHN HENRY MERRYMAN & DAVID SCOTT CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 183-85 (1978) (citing JOHN PHILIPPE DAWSON, *THE ORACLES OF THE LAW* 369-71 (1968)).

democratic decision making. A formalistic model inculcating a narrow view of legality accomplishes such restrictions. This model, however, isolates the judiciary and reduces its ability to respond to abuses by the custodians or the usurpers of democratic forms. This model denies the judiciary a significant role in preserving individual rights and eventually undermines faith in the judiciary. In this context, little is gained by emphasizing the independence of the judiciary.

In Chile, the restrictions on the judiciary and its isolation may also have created judicial attitudes and beliefs inconsistent with, if not hostile to, democratic values. Once held by the Supreme Court, such beliefs and attitudes could easily become the values of the judiciary, ones difficult to change or to modify.

Even assuming that the judiciary were able to continue its ordinary activities, could it be called an independent judiciary? The Chilean experience and the proposals for reform force consideration of judicial independence in terms other than operational independence; they require a consideration of goals as well as techniques.

Despite the variety of proposals, the thrust of reform addresses the purpose of the judiciary. The judiciary must hold democratic values which a fair reading of the reform proposals equates with a desire to protect individual liberties and human rights and to serve a larger proportion of the population. The proposals themselves seem modest adjustments of the judicial system in response to failures of the judiciary during the military regime. The implications of the proposals, however, are radical.

Proposals for judicial reform regarding a transition to democracy can expect both too much and too little of the judiciary. Proposals that emphasize operational independence can place on the courts too much responsibility for democratic reform. On the other hand, the emphasis on operational independence can substitute autonomy for effectiveness in preserving human rights. The Chilean experience demonstrates that an autonomous judicial system can be ineffective in protecting human rights; it demonstrates that an autonomous judiciary may not be an independent one.¹⁵⁴

154. "When a judicial power loses its vision of its own historical mission as guar-

CONCLUSION

The proposals for judicial reform in Chile should be understood in the context of the performance of the judiciary during the military regime. The characteristics of the judiciary prior to the coup influenced that performance. The failure of the judiciary, particularly the Supreme Court, to protect human rights motivated a number of proposals for reform.

These proposals address a variety of issues and concerns. These proposals, however, suggest important changes in the conventions underlying the Chilean judiciary. Particularly, they challenge the formalism of Chilean law.

The Chilean experience tempers approaches to reform centered in Central America and requires an examination of the concept of judicial independence. The reform proposals in Chile address the inculcation of democratic values in an autonomous and viable judiciary. Chile offers a case study against which to evaluate judicial reforms in Latin America and in governments in transition to democracy.

antor of fundamental rights and considers its job to be simply the application of positivist norms, violations of human rights such as those that occurred during the military regime will occur." Jorge Correa Sutil, *supra* note 9, at 271.