THE ROLE OF JUDICIAL TRAINING AND PERFORMANCE APPRAISAL IN THE ORGANIZATIONAL REFORM OF JUDICIARIES: INSIGHTS FROM THE EXPERIENCE OF CHILE AND ENGLAND AND WALES

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ABSTRACT

This thesis addresses the following question: What is the role of judicial training (JT) and performance appraisal (PA) in the organizational reform of judiciaries? The research studies the effects of various JT and PA mechanisms upon models of judicial organization. In light of the great diversity of judicial systems and variable configurations of JT and PA, the research strategy is twofold: First, the study focuses on the judiciaries of Chile and England and Wales being representatives of contrasting judicial organizational traditions. Second, I use typologies of judicial organization to focus on the main organizational aspects of judiciaries only, reducing the complexity of multidimensional analysis.

After critically reviewing existing typologies of judicial organization, the thesis argues that these analytical constructs cannot fully explain contemporary changes in judiciaries, owing to their one-sided focus upon authority as a central organizational dimension. Rather, the thesis highlights the importance of the values and beliefs implicit in JT and PA arrangements in the normative evolution of the two judiciaries. The research employs a grounded theory methodology to uncover the organizational variables that underpin JT and PA arrangements in the two contexts, using them to develop a new typology, and to explain the role of these mechanisms in the organization of judiciaries.

The empirical data shows that JT and PA bear normative content that can influence the reform of judiciaries. The functioning of these mechanisms also expresses different conceptions of authority, organizational cultures, and levels and types of formalization. The thesis proposes an organizational typology to analyse the role of JT and PA in changes to judicial organization. The results help to: 1) explain reforms in judicial organizational models; 2) understand how JT and PA contribute to such processes of change, and 3) highlight the relevance of the *type of formalization* for the normative analysis of the resulting organizational models.

STATEMENT OF ORIGINALITY

I Alberto Merino Lefenda, confirm that the research included within this thesis is my own work, and has not been carried out in collaboration with others. The support received has been strictly limited to the feedback provided formally or informally by my supervisors, colleagues and fellow PhD students, based upon my own ideas previously presented to them by me.

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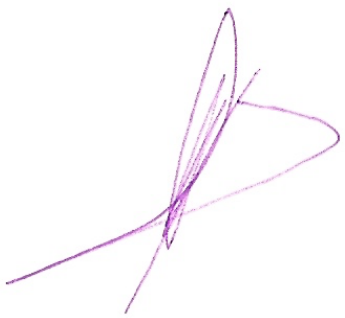

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CONTENTS

INTRODUCTION

Over the last twenty years judiciaries around the world have experienced dramatic organizational changes. The increasing complexity of the law and greater demands for accountability constitute common trends in most judiciaries. In response to these emerging challenges, judiciaries have adopted new organizational systems and mechanisms. More sophisticated recruitment procedures, transparent disciplinary arrangements, expanded and developed judicial training, new forms of individual and collective performance appraisal, management by objectives and total quality systems borrowed from the private sector are now common features in judiciaries around the world. These new systems are bringing significant changes to judicial organizations. Yet there is limited systematic knowledge of the impact of these new arrangements upon the dominant values of judiciaries and the structural and functional aspects of judicial organizations.

This thesis aims to shed light upon the effects of new systems on the organization of judiciaries, focusing particularly on two mechanisms that have not been thoroughly studied by scholars, at least in relation to judicial organizations: professional training and performance appraisal. The main question that the research addresses is the following: What is the role of judicial training and performance appraisal in the organizational reform of judiciaries? At first sight, the scope of research is relatively broad. There are many different judicial organizations and a wide range of judicial training and performance appraisal systems, making it difficult to elaborate worthwhile comparative judgements that go beyond the cataloguing of organizational phenomena. Consequently, to make the project manageable and to facilitate comparisons, the research outlines various approaches to judicial training and performance appraisal, and studies their effects in relation to patterns of judicial organization. In other words, the thesis analyses the changes to organizational models of judiciaries fostered by the use of new tools such as training and appraisal of judges.

The strategy for the study of judicial organizational patterns is twofold. First, the research focuses upon two jurisdictions that represent opposite and paradigmatic models of judicial organization, aiming to capture a range of variation between types of judiciaries. Accordingly, the thesis takes the judiciaries of Chile and England and Wales as empirical referents, considering that both organizations represent opposite institutional patterns that have been historically used to differentiate judiciaries, i.e. hierarchical and coordinate, bureaucratic and professional, or civilian and common law models, respectively. Moreover, both judiciaries have implemented new structures and systems for the training and appraisal of judges. Secondly, rather than attempting to encompass as

many judicial systems as possible, and use extensive data samples that may be beyond the scope of the project, the analysis is approached using typologies, which: "are especially useful for reducing complexity, reducing the number of types needed, aiding comparisons, and defining multidimensional concepts" (Bailey 1994, p.23). These theoretical constructs are based upon the selection and abstraction from reality of the main features and variables that differentiate types of judiciaries. Once identified, the types formed by a manageable set of attributes, may be used to draw comparisons between patterns or as a yardstick for comparison between ideal types and real cases. Likewise, typologies can be useful for testing hypotheses and for explaining changes according to the patterns synthesized by them. In summary, the thesis uses typologies to analyse the organization of the two judiciaries taken as empirical referents, aiming to determine the changes to organizational types or models fostered by judicial training and performance appraisal.

As a first step of the research, the thesis describes the history and main structural aspects of the judiciaries of Chile and England and Wales to demonstrate that, in historical perspective, these two organizations configure representative examples of the hierarchical/bureaucratic and coordinate/non bureaucratic models of judicial organization, following the typologies developed by Damaska (1986) and Guarnieri and Pederzoli (2002). However, as Chapter 1 explains, due to significant changes in the context and in the organization of judiciaries in the last decades, it is not clear that the same typologies can be used to understand such process and to characterize contemporary judiciaries. Therefore, the main aspects of judicial organization highlighted by such traditional typologies are reviewed in order to observe the impact of the new mechanisms upon such variables. If these typologies indeed capture the essence of judicial organization, then changes brought by judicial training and performance appraisal should be explicable according to their terms e.g. as new combinations of the attributes identified by these approaches. For example, if performance appraisal changes the structure of relationships between judges in England and Wales by introducing top-down control mechanisms, a tentative conclusion would be that certain models of performance appraisal might change coordinate-based systems into more hierarchical structures. Likewise, if a certain form of judicial training contributes somehow to weaken hierarchical relationships in Chile by fostering new kinds of relationships among judges and new approaches to decision-making, it could be tentatively concluded that judicial training can make hierarchical systems resemble certain aspects of coordinate structures.

After analysing the evolution of both judicial organizations in the light of typologies developed by Damaska (1986) and Guarnieri and Pederzoli (2002), the thesis claims that in Chile and England and Wales, organizational changes introduced in recent

years cannot be fully explained by traditional typologies focused upon structural aspects and various expressions of authority. Indeed, despite significant changes in judicial organizational patterns, the ethos of judiciaries remains within the paradigms described by Guarnieri and Pederzoli, and Damaska (Bell 2006, p.14). Accordingly, traditional typologies can be effective in describing the configuration of judiciaries, based on their broad structural aspects and historical distribution of authority. However, such accuracy only works at a certain level, as traditional typologies do not reflect, or explain, changes that do not modify the structure of judicial organizations, but may still affect their functioning. In fact, the judiciaries of Chile and England and Wales have introduced significant organizational reforms modifying the way they work. Nevertheless, as this thesis explains, both systems are still shaped by features of the hierarchical/bureaucratic and coordinate/non-bureaucratic, judicial models that have been historically prevalent in each case.

The conclusion that follows does not indicate that traditional typologies are inherently flawed, but rather, that their focus is too broad to provide an accurate perspective of more detailed changes. Consequently, such approaches can offer a macro-level view of the judicial structure, but do not provide a micro-level lens for analysing more specific changes that could be related but not necessarily dependent upon structural factors. This thesis claims that a more specific focus and a sharper scope are required to describe the influence of organizational systems such as judicial training and performance appraisal, on the structure, the functioning, and character of the judiciary. Indeed, the analysis of structural aspects as definitive of organizational design essentially misses "the processes and systems that connect and activate structural frameworks" (Greenwood & Hinings 1993, p.1054), by focusing upon: "tasks and positions, the formulation of rules and procedures; and the prescriptions of authority" (Ibid. p.1054). Such features are the equivalent of pillars, beams, and walls in a building, all of which are essential for its existence and functionality. Nevertheless, the size, safety, and speed of the lifts, the efficiency of the heating system, or the availability of air conditioning also determine to a great extent the use of the structure and the characteristics of the building. That is exactly what recruitment, training, or performance appraisal systems do in organizations, shaping organizational models beyond structural factors.

Structural typologies highlight the main categories of judicial organization by describing the roles attributed to judges and the criteria to distribute such roles, the structure of relationships between them, the rules of decision-making (e.g. Damaška 1986), and the criteria for the professionalization of judges (e.g. Guarnieri et al. 2002). However, these typologies do not distinguish subtler factors, such as the specific way in which roles are executed, or the way in which relationships between organizational

actors, professionalization systems, or the interpretation of rules actually work.. Therefore, the empirical work in this project intends not to describe organizational roles, authority structures, or professionalization criteria as structural typologies. Nor does it focus upon the influence of informal factors on judiciaries, as Bell (2006) highlights. Rather, assuming that organizational systems "connect and activate structural frameworks" (Greenwood & Hinings 1993, p.1054), the aim is to focus upon the effects of such systems on the functioning of judiciaries, and secondarily, on their structure.

The thesis claims that existing judicial typologies do not take into account the variables needed to explain the subtle effects of new organizational arrangements in the judiciaries of Chile and England and Wales. Hence the research aims to uncover such variables through the empirical study of the training and performance appraisal systems adopted in both contexts. The implicit assumption is that understanding the normative content of judicial training and performance appraisal mechanisms, their actual structure and functioning, and the reaction of judges to these mechanisms, will provide an understanding of some of the key organizational aspects of both judiciaries. In other words, judicial organizations in the two contexts are studied through the lens of two of their components, which either reinforce or modify organizational characteristics and features. As a consequence, such characteristics become visible to the researcher, including the normative elements at play i.e. the values, ideas and beliefs about organizations, and the implicit structural and functional attributes of the judiciaries under study.

The focus of the empirical enquiry is twofold. Firstly, the research explores the values, ideals, and beliefs that inspire judicial training and performance appraisal arrangements in Chile and England and Wales in order to understand changes in the normative patterns brought by these mechanisms. Such patterns are synthesized in terms of rationalities, borrowing from the work of scholars who have re-invigorated the Weberian approach to the analysis of organizations (see Kalberg 1980; Townley 2002). Secondly, the research studies the structures of training and performance appraisal in Chile and England and Wales, their functioning, and the reactions of judges to their application using grounded theory methods to identify the implicit organizational attributes and characteristics e.g. power relations, hierarchies, working dynamics, etc. As a result, a new perspective on the organization of both judiciaries emerges from the identification of such attributes, which the study then synthesizes in terms of organizational variables or categories, using them to form a new judicial typology.

Four organizational variables constitute the new typology: power distribution, organizational culture, level of formalization, and type of formalization. In turn, each variable represents a continuum from one pattern to its opposite e.g. the power

distribution dimension contains the vertical authority pattern at one end, and the opposing horizontal authority pattern at the other. The various combinations of these patterns form different types of judicial organization based upon judicial training and performance appraisal arrangements. In addition, the study of actual influences of judicial training and performance appraisal upon dominant organizational patterns in the contexts under study helps to explain current changes to such patterns e.g. from a low formalization pattern to its highly formalized opposite. Subsequently, the approach provides a perspective to the evolution of organizational models in Chile and England and Wales, processes in which the introduction of professional training and performance appraisal systems plays a relevant role. The research explores the analytical capacities of the typology further, revealing its actual and potential contribution to the study of judicial organizations. For that purpose, several hypotheses are presented and tested in relation to the outcome of specific training and appraisal arrangements, depending upon their normative content, their main features, and the context in which they are implemented.

The limited time and resources of the project impose limitations on the research strategy of the thesis. The focus on two opposing and representative types of judicial organization provides a reasonably wide view of different organizational models. Nevertheless, a broader sample of cases would inevitably have enriched the results, revealing organizational features not captured by this thesis, or reinforcing the accuracy of the inferences made throughout the study. Likewise, more interview data would also have provided a stronger base for the analytical work developed by the thesis. With regard to the typology proposed for the analysis of organizational phenomena, it is important to remember that it is based on the effects of two of the components of judicial organization only. Accordingly, it provides a perspective on judiciaries relying upon judicial training and performance appraisal as mechanisms that make visible relevant aspects of the organization in which they are applied. The thesis by no means pretends to provide a definitive understanding of the structure and functioning of judicial organizations, or a full description of the causes of their change. For that purpose, the analysis should consider in detail other elements such as recruitment mechanisms, disciplinary regulations, career structures, internal cultures and many others factors that intervene in complex processes of organizational change.

The thesis structure is as follows. Chapter One provides a framework for the research, explaining the theoretical background that guides the enquiry into the role of judicial training and performance appraisal in the organizational reform of judiciaries, based upon institutionalist accounts. Nevertheless, different institutional theories embody different views of the role of institutions (see Hall & Taylor 1996; Powell & DiMaggio 1991). Therefore, Chapter One briefly describes the institutionalist perspective, and

concludes that the *Institutional Logics* theory is the most suitable account for framing the research project. In addition, Chapter One describes the analytical tools used in the research process, justifying the use of typologies as helpful devices for the comparative study of organizational patterns. The main typological accounts available in the literature for the study of judiciaries are broadly explained in this part of the thesis, highlighting their focus upon authority as the central dimension of judicial organization. Subsequently, the Chapter describes the hierarchical/bureaucratic and the coordinate/non-bureaucratic ideal types, described by traditional judicial typologies. In turn, the history and structural aspects of the judiciaries of Chile and England and Wales are reviewed to argue that historically, both cases constitute representative examples of the hierarchical/bureaucratic and coordinate/non-bureaucratic models. Finally, the chapter briefly explains the use of grounded theory methods to guide the empirical enquiry, the analysis of data, and the development of a new judicial typology based upon such information.

Chapter Two studies the evolution of the judiciaries of Chile and England and Wales respectively, using the typologies of judicial organization reviewed in Chapter One. In both cases the research question asks whether or not these judicial typologies can be used as analytical tools to explain the role of judicial training and performance appraisal in the organizational reform of judiciaries. This part of the research argues that traditional typologies do not sufficiently explain the subtle processes of change that both representative judiciaries have experienced in recent years. This is because these analytical constructs overly focus upon power and authority as central organizational dimensions, overlooking other variables that might reflect more accurately on-going reforms of historical organizational patterns. The following chapters therefore focus upon the empirical identification and analysis of the additional variables needed for such a purpose.

Chapter Three asks to what extent it is possible to identify relevant variables of judicial organization by focusing upon the training and performance appraisal arrangements of judiciaries and, more specifically, what aspects of training and performance appraisal mechanisms should be studied for such a purpose. Following the Weberian idea of multi-faceted rationalities embodied in organizational arrangements (see Kalberg 1980; Townley 2002; Healy et al. 2010), and the "institutional logics perspective" (see Thornton & Ocasio 2008; Thornton et al. 2012; Greenwood et al. 2014), the chapter claims that it is possible to capture aspects of the normative evolution of judiciaries by studying the values, ideas, and beliefs implicit in judicial training and performance appraisal. Likewise, the study of the main components of such systems, their functioning, and the reactions of judges to their application reflects some of the main organizational attributes of judiciaries e.g. relationships between judges, work dynamics,

or power distribution, which can be used to identify variables and patterns of judicial organization. Based upon such assumptions, the chapter reviews the literature on judicial training and performance appraisal, and the main components and categories that can be used to classify and study such systems, in order to facilitate the empirical enquiry undertaken in subsequent chapters.

Chapter Four asks how it is possible to characterize the judicial training and performance appraisal systems in the judiciaries of Chile and England and Wales using the categories outlined in Chapter Three, and what is the influence of these systems over the normative evolution of both organizations. Accordingly, the chapter describes the main features of judicial training and performance appraisal arrangements in the two systems. Assuming that organizations are embedded in broader normative frameworks, the analysis focuses upon the significance that judicial training and performance appraisal have within their normative contexts. Accordingly, the dominant values, beliefs, and normative ideals of the judiciaries of Chile and England and Wales are interpreted in terms of multi-faceted and overlapping rationalities following studies based upon Weber's works on the topic (Kalberg 1980; Townley 2002; Healy et al. 2010). In turn, the rationalities implicit in the training and performance appraisal arrangements of both countries are explored and analysed in their context in order to understand the significance of these mechanisms for the normative frameworks of both judiciaries. The chapter concludes that judicial training and performance appraisal mechanisms might indeed contribute to change the dominant ideas, values, and beliefs of judiciaries, providing an analytical framework for the study of such changes.

Chapter Five inquires about the organizational variables that underlie judicial training and performance appraisal arrangements in Chile and England and Wales. The chapter uncovers relevant organizational variables or dimensions from the study of the structure, functioning, and reaction of judges to judicial training and performance appraisal arrangements. Accordingly, four central organizational categories are inferred inductively from the empirical study of such aspects: power distribution; organizational culture; level of formalization, and type of formalization. In turn, a typology of judicial organization based upon these variables identifies a total of 16 possible judicial types or models, including those that have characterized the historical organization of the judiciaries of Chile and England and Wales. Hence the typology offers a set of variables that might be used to explain the structural and functional changes linked to judicial training and performance appraisal systems, facilitating the understanding of deviations from historical organizational patterns revealed in the two cases under study.

Finally, Chapter Six builds on the findings in chapters Four and Five. Having established how judicial training and performance appraisal systems can contribute to

change the normative framework of judiciaries and reform the structure and functioning of these organizations, the typology used to illustrate the changes serves in this chapter to assess normatively the impact of such changes. The chapter explores some of the benefits and difficulties of the reforms fostered by training and appraisal arrangements, revealing the contribution of the approach, and providing a robust perspective upon the role of judicial training and performance appraisal in the organizational reform of judiciaries.

In sum, this thesis addresses some of the complexities of the processes of evolution that judicial organizations have experienced in most countries in the last couple of decades in the light of their expansion and the increasing pressures that they have faced. The diversification and internationalization of legal sources, public demands for accountability and judicial efficiency, and the growing interest of the media, the political realm, and the public generally in the performance of judicial systems are being addressed using new methods, mechanisms, and organizational systems. The case of the English and Welsh system is paradigmatic in this respect, characterized as it has been until recently by what has been termed a *cottage industry* model (Bell 2006, p.346), governed by the historical informality of the organization and management of the judiciary. Since the 1990's the English judiciary has evolved to become a larger, more diverse, and more structured organization which can no longer be managed as a *judicial family*. It is now clearly separated from other powers of the State, while a process of unification has brought together diverse judicial agencies under the same organizational umbrella. Moreover, the judiciary is now professionally managed, using complex administrative systems, procedures, and mechanisms in many key areas of judicial activity. In particular, judicial training has been adopted and taken increasingly seriously, while performance appraisal, once applied to tribunal members and fee-paid lower judges only, is now in the process of expansion. Similarly, but in a contrasting institutional setting, the judiciary of Chile, historically governed by the strong hierarchical, formalistic, and authoritarian leadership of the Supreme Court; has in recent years incorporated comprehensive judicial training, also reforming mechanisms used traditionally to preserve consistency and obedience, such as its performance evaluation system, in order to enhance the democratic outlook of the organization in a more demanding social and political context.

While broad processes of judicial evolution have been acknowledged and described by scholars in many countries, the effects of such processes are less well known. We can reasonably assume that new organizational mechanisms are transforming judiciaries. This work expands upon some of the theoretical bases of such an assumption, explaining how certain organizational systems, including those newly implemented, can be expected to shape judiciaries, transferring institutional influences to judges, and

affording them space to discuss, dispute, and eventually promote the reform of their organizations. However, understanding these processes is not an easy task, considering some of the complexities involved, such as the adoption of features that characterize private sector organizations following the New Public Management ideological wave, or the increasing cross-fertilization between different judicial systems. As a result, the categories used to differentiate and understand judiciaries in the past do not seem to be applicable in the new scenario. In such a context, this work offers a way to synthesize and organize the findings of the empirical study of judicial training and performance appraisal, through the identification of the organizational variables that emerge from the values, structure, and functioning of these mechanisms, and the views of judges about them. The ordering of such variables in the form of typologies helps us to understand and compare the increasingly hybrid judicial models that result from the proliferation of new organizational tools such as professional training and performance appraisal.

As a personal note regarding the motivation to do the research and write this thesis, I have to mention that I am currently a judge in Chile, having joined the judiciary more than 15 years ago, after finishing law studies. Consequently, I have been part of the changes experienced by the organization in the last years. In fact, I participated in one of the first initial training programmes offered by the Chilean Judicial Academy, joining the judiciary in a moment of great expansion, triggered by procedural reforms that brought hundreds of young judges to work in an organization that had a poor reputation and was heavily shaped by a conservative legal and political ideology. Therefore, the reader should take into account that my perspective to the research topic is internal and Chilean.

How much the research process has been influenced by my knowledge of the Chilean judiciary and my judicial experience cannot be accurately determined. However, it is clear that it has allowed me to identify organizational challenges that are not necessarily visible to the public. Particularly, I have been part of the debate about the hierarchical nature of the judiciary and the lack of internal independence of judges, reflected by the allegedly improper use of mechanisms such as performance evaluation and disciplinary measures, in spite of recent reforms. The application of such systems in the context of a new organization, formed by an increasing number of judges trained at the Judicial Academy, who are not necessarily responsive to traditional top-down influences, has produced an organizational conflict not yet solved. As a consequence, in the Chilean experience, it appears that both mechanisms: judicial training and performance appraisal have had a central role in the process of internal struggle and organizational change that the judiciary is experiencing. Nonetheless, the issue has not been studied in detail. In fact, scholars have not even acknowledged the existence of a significant process of reform in the way judges understand their role, relying on the

historical path dependence that supposedly has kept the judiciary within its traditional ideological limits (see Hilbink 2007; Huneeus 2010; Couso & Hilbink 2011). Besides, in the judiciary of England and Wales, despite the differences in every aspect with the Chilean judicial organization, there seems to be a common element: a process of important reforms in the last 20 years, in which the adoption of mechanisms such as judicial training and performance appraisal constitutes one of the landmarks of the *new judiciary*. Coincidently, the role and effects of these systems have not been studied in detail so far. Nonetheless, their application has generally been valued positively, despite the initial reluctance to introduce systems that are totally alien to the tradition of the English and Welsh judiciary. From the perspective of a practising judge and researcher, it is interesting to compare the processes, trying to determine the influence of new mechanisms upon processes of organizational reform in judiciaries. Moreover, the different outcomes in these two cases beg the question about the factors that may contribute to a balanced evolution of judicial organizations more generally.

Finally, on the practical side of the research process, my condition as a judge needs to be mentioned as relevant factor in the process of collecting empirical information. It facilitated the identification and contact of some key individual judges in Chile, who agreed to be interviewed for the purposes of the research without hesitation. Moreover, after receiving the authorization of the English Judicial Office to interview judges in England and Wales, I received also relevant advice about the judges to interview, while making contact and talking to them was not only easy but also a very rewarding process in which I was treated as colleague rather than an external observer. I am very grateful to every individual judge who agreed to be interviewed, not only for their openness but also for their kindness, expressed in details like allowing me to witness hearings from the bench, showing me around the premises, sharing lunch, providing me with relevant documents, answering all of my queries and overall, being truly interested about my judicial and research experience.

I. THEORETICAL AND METHODOLOGICAL FRAMEWORK

1. Introduction

The increasing use of judicial training, the adoption of measures to assess and enhance quality, the development of sophisticated accountability mechanisms, the implementation of managerial instruments for the recruitment of judges, and the use of performance appraisal in judiciaries, all testify to the efforts of judicial organizations to adapt in contexts of external and internal pressure. These new organizational mechanisms, widely applied in various judicial systems, represent the re-definition of legal cultures in terms of the dominant practices of judiciaries and the shared understandings with which legal communities invest such practices with meaning (see Bell 2006, pp.6–7). In other words, the new systems are re-shaping expectations of appropriate judicial practices, incorporating new ideas and standards for the organization and evaluation of judicial activity. Indeed, the introduction of new organizational mechanisms witnessed in the last couple of decades represents a step change in the culture and dominant practices of judiciaries. Such an outcome is particularly obvious in the judiciaries of Chile (see Couso & Hilbink 2011; Vargas 2007) and England and Wales (see Carnwath 2013; Hallett 2010; Malleson 1999), where a variety of organizational reforms have been recently implemented. On the one hand, this chapter explains the theoretical framework and subsequent assumptions that frame the research and the understanding of such a process of change. On the other hand, it presents the analytical tools that help us to extrapolate general conclusions from the empirical data.

While the overall significance of current organizational changes in judiciaries is uncontested, the understanding of such processes depends upon the theoretical lens used to explain organizational phenomena. Generally speaking, this thesis studies judicial organizations and the work of judges from an institutional perspective, which is distinctive and different from other possible approaches either personal or external. The institutional orientation focuses upon the judiciary as both an organization and a collective which has a distinct culture formed by the set of beliefs and attitudes that give shared meaning to judicial activity (Bell 2006, pp.2–6).

Like institutional accounts, the research assumes that organizational mechanisms such as judicial training and performance appraisal constitute instruments by which social practices become institutionalized within judiciaries, thus taken for granted, widely accepted, and resistant to change (Greenwood et al. 2008). Nevertheless, the way in which such a process of institutionalization is portrayed varies depending upon the

specific institutional approach. Generally speaking, institutional theories explain organizational phenomena i.e. organizational patterns and judicial behaviour, in relation to symbol systems, cognitive scripts, and moral templates that provide the frame of meaning guiding human action (Hall & Taylor 1996, p.947). From this perspective, the actions of judges are invested with meaning by the legal community through shared understandings (Bell 2006, p.7) based in institutional frameworks that shape the interests and actions of individuals (Powell & DiMaggio 1991, p.28). This study relies upon theories that, besides the influence of such top-down institutional templates, also highlight the active role of individuals and their social interactions to understand organizations and processes of institutionalization and change (e.g. Thornton et al. 2012; Greenwood et al. 2008; Hinings et al. 2004; Greenwood & Hinings 1993). Accordingly, although the concept of *institution* broadly refers to taken-for-granted social behaviour underpinned by normative systems and cognitive understandings (Greenwood et al. 2008, p.4), such systems and understandings can be adapted, contested, or disputed within organizations by internal actors.

Judicial training and performance appraisal systems are portrayed in this research not only as spaces for the top-down institutionalization of ideas, values, and beliefs, but also as arenas in which such normative templates can be discussed, adapted, or changed. Therefore, the empirical enquiry focuses upon aspects; that is, the identification of training and appraisal structures, methodologies, and underlying values; and the reactions and opinions of judges regarding these systems. The "institutional logics perspective" (Thornton et al. 2012) and the theory of institutional archetypes (Hinings et al. 2004; Greenwood & Hinings 1993) synthesize such ideas; consequently both approaches are briefly reviewed in this chapter.

With regard to the analytical tools used to reach conclusions, it is important to acknowledge the methodological difficulty implicit in the research topic. There are multiple systems for the training of judges and the appraisal of their performance, involving variable methods, procedures, and goals. Therefore, the classification and comparison of judiciaries based upon their training and appraisal mechanisms would probably deliver dozens of alternatives, making the elaboration of worthwhile conclusions particularly difficult. Accordingly, this study uses typologies to reduce the complexity resulting from the analysis of a multiplicity of cases and variables. Typologies as analytical devices offer the possibility of studying the role of judicial training and performance appraisal in the organization of judiciaries, based upon a synthesis of the main organizational variables implicit in training and appraisal arrangements, which can be used to differentiate systems and make comparisons. Moreover, the analysis in this case focuses upon two judiciaries only, which nevertheless

represent broader traditions of judicial organization characterized by well-established typologies developed by scholars (i.e. Damaška 1986; Guarnieri et al. 2002). The selection of these two cases as empirical referents serves to synthesize, as the research does not focus upon the many features of the enormous diversity of judiciaries around the world. Rather, the scope is narrower and therefore manageable, aiming to build an analytical perspective of types of judicial organization based upon the information extracted from two representative and contrasting cases.

This chapter outlines the theoretical sources and assumptions that inform the research. It provides the reasons underpinning the research strategy, justifying the decision to focus not only upon the specific structures for training and appraisal, the methodologies used, and the normative templates that these systems express; but also upon the role of individuals, their opinions, reactions, and visions concerning these systems. In addition, the chapter justifies the use of typologies as analytical tools, while the main typological approaches to judicial organizational analysis are also explained in order to contextualize the contribution of the thesis as a complement of such efforts, focusing specifically on the influence of new mechanisms and systems upon types or models of judicial organization. Finally, the chapter offers a brief methodological overview that explains the use of grounded theory methods to collect, organize, and analyse the empirical data used to obtain the conclusions of the thesis. A more detailed explanation of the empirical and comparative methods of this research is contained in Appendix 1.

2. The Institutional Orientation

2.1. Overview

The institutional focus of the study conforms to the broader analytical perspective in political science and sociology widely known as *institutionalism*. For the purpose of this work, I rely upon perspectives that address the tendency to overstate macro-level institutionalization processes of the so-called *new institutionalism,* obscuring the role of individual agency in organizational processes (see Hasselbladh & Kallinikos 2000*)*. Accordingly, the research aims to explain, in the context of judiciaries, the way in which institutions provide on the one hand constraints, through the system of rules that organizational mechanisms represent, and on the other opportunities for purposive action. More specifically, the thesis claims that organizational systems such as judicial training and performance appraisal contribute to the institutionalization of practices and shared

understandings among judges, in variable ways depending on the methodologies, structures and purposes of such systems, the context in which they are applied and the reaction of judges to their implementation. Importantly, the implementation of organizational systems such as judicial training and performance appraisal embody a normative content, which interacts with the dominant ideas, values and beliefs in a particular judiciary. Such interaction might foster organizational changes and evolution, but it could also promote resistance, conflict and unexpected effects. The study of both: top-down institutional influences and bottom-up contextual reactions, in relation to judicial training and performance appraisal, offers the opportunity to analyse the dynamics of institutionalization within judicial organizations, and the subsequent processes of organizational evolution. Indeed, both mechanisms explicitly aim to shape the role of judges and consequently, they carry information about what is expected from them in a particular context. At the same time, the way in which judges react to such influence, either adopting, resisting, bending or adapting practices and common beliefs, constitutes an opportunity to observe how institutional *templates for organizing* actually work.

The research strategy is particularly informed by theories of gradual and endogenous institutional change (Mahoney & Thelen 2010; Thelen 1999), the theory of organizational archetypes (Greenwood & Hinings 1988; Greenwood & Hinings 1993; Greenwood & Hinings 1996; Hinings et al. 2004), and the institutional logics perspective (Greenwood et al. 2014; Thornton et al. 2012; Thornton & Ocasio 2008). Following this group of theoretical insights, the thesis assumes that the changes brought by new organizational mechanisms applied in judiciaries depend not only upon the nature of such systems and the methodologies applied, but also upon the understanding that judges have about these mechanisms, the intra-organizational dynamics fostered by such organizational tools, and the use that judges actually make of them.

2.2 Institutions, Organizations, and Individuals

Despite the different approaches to the concept of institution, in the context of the research it is assumed that this idea refers to: "more-or-less taken-for-granted repetitive social behaviour that is underpinned by normative systems and cognitive understandings that give meaning to social exchange and thus enable self-reproducing social order" (Greenwood et al. 2008, p.4). As such, institutions exist at the level of: the individual e.g. the handshake in western societies; organizations; organizational fields, and the society itself; while the process in which these social behaviours take on a rule-like status is called *institutionalization*. The result entails that social practices become

institutionalized, thus taken for granted, widely accepted, and resistant to change.

The process of institutionalization has attracted the interest of institutional theorists (e.g. DiMaggio & Powell 1983), who have focused mainly upon patterns of diffusion of accepted practices amid institutional fields, which supposedly push organizations to resemble other organizations to secure social approval and legitimacy, becoming *isomorphic* (DiMaggio & Powell 1983, p.149; Greenwood et al. 2008, p.6), This macro-level focus has been criticized as a: "somewhat idealistic (i.e. a spillover of disembodied ideas) approach to rationalization" (Hasselbladh & Kallinikos 2000, p.699). Indeed, within the new institutionalism, the relationship between ideas, cognitive understandings, and normative systems, on the one hand, and specific organizational arrangements on the other, tends to be portrayed in terms of the diffusion of organizational schemes, assuming a: "relatively unproblematic adoption of these patterns by specific organizations" (Ibid. p.700). The present study departs from such approaches, assuming that the institutionalization of judicial practices resulting from the use of training and performance appraisal is a process of social construction in which judges play an active role. Accordingly, the study of institutionalization devices such as judicial training and performance appraisal, should consider the normative elements implicit in the various methodologies, structures and purposes of such systems, and the impact they have in a particular organizational context. The significance of this assumption for the research is that it guides the empirical enquiry, helping to place emphasis upon specific aspects of the process by which judicial practices become embedded or institutionalized in judiciaries. Accordingly, the study relies upon theoretical accounts that suggest specific ways by which broad institutional principles shape individual and organizational action e.g. focusing the attention of decision-makers (Thornton & Ocasio 2008, pp.111–114). Such mechanisms of institutionalization become influential in the context of social interactions. In particular, the literature has identified organizational decision-making, sense-making processes, and collective mobilization as spaces for such interactions in which the cultural elements that shape individual behaviour actually work (Thornton et al. 2012, p.96). The empirical enquiry, therefore, explores the spaces of decision-making, sense-making, and collective mobilization linked to judicial training and performance appraisal in the judiciaries of Chile and England and Wales in order to understand the significance of these mechanisms in the evolution of judicial practices and the institutionalization of new organizational dynamics.

The fact that the process of institutionalization occurs in spaces of social interaction among organizational actors, in this case judges, suggests that these actors play an active role in the social development of taken-for-granted practices. Therefore, the process cannot be portrayed purely in cognitive terms, as an automatic top-down

transference of cultural templates and scripts. Indeed: "in social interactions, actors rely on institutional logics and their constituent identities, goals, and schemas to *reproduce* and *transform* organizational identities and practices" (Thornton et al. 2012, p.96). The concept of institutional logics refers to the cultural aspects of institutions, the: "normative systems and cognitive understandings that give meaning to social exchange" (Greenwood et al. 2008, p.4). These normative systems and cognitive understandings constrain action and shape behaviour, but at the same time, such cultural frameworks might foster agency and change (Thornton & Ocasio 2008, p.101). From the point of view of the individual, this situation has been conceptualized as "embedded agency" (2008, p.103), meaning that agency is both enabled and constrained by institutional logics. From this point of view, cultural elements such as organizational identities, shared goals, and schemas for action draw the attention of agents, shaping social interactions and individual behaviour. However, institutional logics can be conflicting and contradictory, also providing agents with opportunities to exploit ambiguities. As a consequence, prevailing cultural logics may change, bend, or mutate through processes in which organizational actors play a role.

The importance of social interaction, as spaces in which institutional influences constrain or enable individual behaviour, highlights the relevance of organizational arrangements in shaping such interactions. In fact, institutional influences not only shape individual behaviour. These broad institutional influences also prescribe principles for organizing (Hinings et al. 2004, p.306), shaping social interactions accordingly. This study assumes that such institutional prescriptions constitute templates or *archetypes*, formed by organizational structures and systems that are consistent with underlying sets of ideas, values, and beliefs that delineate patterns of organization (Greenwood & Hinings 1993).

The theory of organizational archetypes analyses organizations in terms of types, assuming that the understanding of the parts within an organization can be obtained only by looking at the pattern that underlies the whole organizational design. From this perspective, an explanation of the ways in which judicial training and performance appraisal shape individual behaviour, *translating* institutional influences, needs to take into account the organizational models in which such processes operate. In turn, the patterns or models of organizational design are constituted by structures e.g. the structure for the distribution of authority and more generally, the structure of rules and roles within the organization; organizational systems e.g. human resource mechanisms such as performance appraisal schemes; and also a set of ideas, beliefs, and values embodied in such structures and systems (Greenwood & Hinings 1993, p.1055). The distinction is relevant because the emphasis in organizational classification has often been structural, focusing upon the differentiation of tasks and positions, the formulation of rules and

procedures, and the prescriptions of authority (Ibid. p.1054). Such orientation is particularly evident in the seminal studies of judicial organizations that this thesis analyses: Damaska's (1986) description of judicial types according to dimensions of authority, or Guarnieri and Pederzoli's (2002) typology, based upon the structure of roles and professionalization criteria within judiciaries. Their unquestionable contribution notwithstanding, the problem with these approaches is that structures are taken as definitive of organizational design, essentially missing the processes and systems that connect and activate structural frameworks (Greenwood & Hinings 1993, p.1054). The point can be illustrated by an example: Hierarchical organizations largely reflect patterns of top-down authority and a rather rigid structure of roles. However, the specific character of a hierarchical organization model also depends upon systems such as appraisal arrangements, which can have different purposes and configurations i.e. judgemental and developmental systems (Townley 1997) that may have the effect of either strengthening or weakening hierarchical relationships. As a consequence, such systems can be considered relevant elements of the organizational design, as they articulate structures and provide them with distinctive content or meaning.

In sum, the analysis in this thesis connects the different elements of organizational design, that is, values, structures of rules and roles, and organizational systems. For such a purpose, the methodologies of judicial training and performance appraisal used in Chile and England and Wales are studied in relation to their underlying values. In turn, the actual functioning of these systems is analysed in connection to their influence upon the structure and functioning of judiciaries and, more generally, upon models of judicial organization. The results uncover the dominant models of organizational design in the judiciaries under study, and the role that judicial training and performance appraisal mechanisms play in their configuration and evolution.

In conclusion, the research draws upon theoretical accounts, i.e. the institutional logics perspective and the theory of organizational archetypes, to explain the relationship between institutional and cultural frameworks, organizations, and individual action. According to these theories, broad top-down institutional influences provide templates that shape individual action, while the circumstances in which this process happens might simultaneously enable individuals to adapt, bend, or modify such institutional frameworks. These processes of co-existing top-down and bottom-up influences occur in sites of social interaction that organizations provide, in ways that vary depending upon their specific organizational configuration. The approach is appropriate for the research strategy adopted, highlighting the importance of studying not only organizational values, structures, methods and systems as fixed elements that merely conform to institutional prescriptions, but also their actual functioning, the role that individuals adopt in relation

to them, and the meaning they give to the different elements of the organizational design.

2.3. Institutional and Organizational Change

The theories used to frame the empirical work are well suited to the analysis of the evolving changes in Chile and England and Wales following the implementation of new organizational systems, including training and appraisal schemes. Indeed, both the institutional logics perspective (Thornton et al. 2012; Thornton & Ocasio 2008), and the theory of institutional archetypes (Hinings et al. 2004; Greenwood & Hinings 1996; Greenwood & Hinings 1993) rely upon the notion of *institutional contradictions* as triggers for change, that is, conflicts between alternative logics within a specific organization, or between the dominant values and beliefs on the one hand, and the organizational structures and systems on the other. (Thornton et al. 2012; Thornton & Ocasio 2008; Greenwood & Hinings 1993; Greenwood & Hinings 1996). In such situations of institutional ambiguity, organizational agents might exploit contradictions to pursue their particular interests.

From a novel perspective within the new institutionalism, Mahoney and Thelen (2010) also focus upon gradual endogenous changes in organizations. After acknowledging the fact that the leading approaches to institutional analysis (sociological, rational choice, and historical) focus upon the enduring character of institutions and face problems explaining change, they propose a model of institutional evolution based upon a power-distribution approach. Accordingly, organizations are portrayed as arenas for disputes among actors in a similar way to Greenwood and Hinings (1993). They claim that institutions inevitably raise tensions regarding the distribution of power. Therefore, one source of change consists in shifts in the balance of power, either for exogenous or endogenous reasons, as actors are in permanent tension to preserve or change the status quo (Mahoney and Thelen pp.10-14).

According to the previous theoretical accounts, change occurs in response to institutional pressures from different sources, whether external and internal. Internal organizational agents might actively participate in such processes of change, depending upon factors such as organizational power relationships (Greenwood et al. 2008, p.14), levels of commitment to organizational rules (Mahoney & Thelen 2010), and the exposure of institutional agents to new and different institutional logics (Thornton et al. 2012). In such situations, judicial training and appraisal mechanisms might be influential, for instance, providing judges with new sources of motivation and opportunities for organization, in ways that could alter power distribution patterns and levels of commitment to internal rules. Likewise, it is clear that both mechanisms may offer

opportunities for action to judges by exposing them to new influences e.g. from other judges or academics. Consequently, the agentive behaviour of judges can be linked in these ways to both training and appraisal systems. The present research aims to find and interpret empirical data accordingly, in an attempt to highlight the role of judicial training and performance appraisal as opportunities for judges to actively participate in the reform of their organizations, facilitating their exposure to new influences, providing opportunities for their organization and social interaction, and creating new sources of motivation.

	SOCIETAL INSTITUTIONS	
		Institutional prescriptions
	ORGANIZATIONAL ARCHETYPES ➔	Values Structure Organizational systems: E.G. Judicial training, performance appraisal 🡻
Top down and bottom up influences: organizational and institutional change	🡹🡻	Focus the attention of judges 🡻
Contingencies ➔	INDIVIDUAL ACTION Embedded agency	Activates: 🡸 Individual Goals and Professional Identities

Table 1: Theoretical framework. Top down institutional and organizational influences manifested, for example, in processes of training and performance appraisal, focus the attention of judges, activating their professional identities and individual goals. The contingencies that Judges face in these processes may also foster bottom up reactions, triggering processes of change.

3. The Use of Typologies for the Organizational Analysis of Judiciaries

3.1 Overview

Typologies as analytical tools are part of a long tradition in sociological studies, aiming to note homogeneous attributes in heterogeneous phenomena in order to enable the observer to perceive order in the infinite complexity of the universe (Winch 1947, p.68). Weber underscored the way in which conceptual typologies support analytical

work in the social sciences:

> An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct (Weber cited by Meyer et al. 1993, p.1179).

A typological approach can be particularly useful for the analysis of the influence that judicial training and performance appraisal exert upon models of judicial organization, given the methodological difficulties that the topic entails. Indeed, there are multiple training and appraisal systems involving variable methods, procedures, and goals. As a consequence, a classification of judiciaries based upon their training and appraisal mechanisms would probably deliver dozens of alternatives. Typologies have the advantage of reducing the complexity derived from the analysis of a multiplicity of cases, based upon a synthesis of the defining organizational variables implicit in training and appraisal arrangements, which can be used to differentiate among systems and make comparisons.

As a first step, I use Damaska's (1986) typological distinction between the hierarchical and coordinate ideals of officialdom, and Guarnieri and Pederzoli's (2002) bureaucratic and professional types of judicial organizations to put the judiciaries of Chile and England and Wales into historical perspective. By merging these accounts, the aim is to show that the two systems historically constitute representative examples of the hierarchical/bureaucratic type in the Chilean case, and the coordinate/non-bureaucratic type in the case of England and Wales. Accordingly, these two paradigmatic judicial models have represented opposite extremes in a continuum of judicial organization. Starting from this core idea, the use of judicial training and performance appraisal in both systems is analysed in order to observe some of the changes fostered by these mechanisms to the organizational models of the judiciaries in both countries, helping to develop broader conclusions and aiming to enrich the possibilities of comparative analysis.

3.2. Typologies of Judicial Organization

This section merges the typologies developed by Damaska (1986), and Guarnieri and Pederzoli (2002), to describe judicial organizations, highlighting not only the types of judiciaries identified by each account, but also the variables or dimensions upon which such types have been developed. The first thing to say is that Damaska's typology of

judicial organizations is part of a broader attempt to explain the differences between procedural forms in comparative perspective. The approach has been influential, as expressed by Twinning (1993), who claimed that Damaska's account: "is undoubtedly the most significant recent contribution in the English language to the comparative study of legal procedure" (p.391). The author develops, two pairs of ideal models in order to explain procedural forms. One of the two pairs refers to the organization of judiciaries, expressing two *ideals of officialdom*, that is, the *hierarchical* and the *coordinate* ideals (Damaška 1986, pp.3–15) which, combined with a second pair of ideal types, referred to systems of government, are used by the author to formulate hypotheses about the relationship between procedural arrangements and political structures. As this thesis is concerned with the organization of judiciaries, I will refer only to the former pair of ideal types.

The two ideals of officialdom developed by Damaska (1986) explicitly refer to the organization of authority as an overarching organizational dimension underpinning judicial models. In turn, authority is divided into three conceptual elements for the purpose of analysis: the attributes of officials; their relationship, and the manner in which they make decisions (Ibid p.16). The construction of the typology and the development of its categories are based upon theoretical assumptions. Indeed, no one would disagree with the idea that distribution of authority is a defining aspect of any organization.

Damaska's typology offers a useful set of tools for comparisons, following the distinction between the hierarchical and the coordinate ideal types. The former is based on the continental European *machinery of justice* and resembles the classical model of bureaucracy, based upon the professionalization of officials, long terms of office, strict hierarchical ordering into several echelons, concentration of authority at top, and decision-making based on logical-legal standards. On the other hand, the coordinate ideal, which Damaska acknowledges, does not exist in reality but reflects a historical tendency in the English judiciary based upon the opposite features along the same dimensions, that is, lay judges ordered without structures of subordination fostering personal decision-making according to non-technical, community-based standards (Damaška 1986, pp.16–28). In other words, Damaska identifies the categories of a continuum, which in one extreme has the hierarchical ideal, and in the opposite side, the coordinate type.

Guarnieri and Pederzoli (2002) developed the second typology used in this study to frame the research. It is based upon the description of central characteristics that distinguish judiciaries in the traditions of continental Europe and the Anglo world, claiming that, as an ideal-typical configuration, judiciaries in democratic countries can be placed on a continuum defined at either end by the *bureaucratic* or the *professional* types (Guarnieri, 2001). The distinction relies upon aspects such as professionalization

mechanisms and the guarantees of independence that judges have. However, these elements seem to be the consequence of a broader dimension also linked to authority, that is, the hierarchical/non-hierarchical character of the organizational structure. Consequently, it is clear that for both approaches to the analysis of judicial organizational patterns, authority is the basis of the typologies developed in each case.

By merging the accounts of Damaska and Guarnieri and Pederzoli, a coherent typology for the analysis of judiciaries can be discerned, based on a set of dimensions that form a continuum, with the hierarchical/bureaucratic type at one pole and the coordinate/non-bureaucratic at the other. The first dimension of this typology concerns the nature of the judicial corps and the mechanisms for the professionalization of judges. The judicial corps is "the socially and institutionally defined group to which a judge belongs and in which she operates" (Bell 2006, p.360), while professionalization entails: "a social process through which service producers (in this case judges) seek closure and distinction on the basis of claims to expertise in a given field of knowledge" (Rosen-Zvi, 2001). Aspects such as entry and recruitment, career and training arrangements characterize the configuration of the judicial corps, shaping the socialization of judges and their mutual values and ethics. On the one hand the hierarchical/bureaucratic type entails differentiation of functions among professionalized permanent and specialist officials, recruited at young age and trained within the organization, who are part of a common group characterized by its cohesion, and follow a long ascending career path, for the whole of their working life most likely. On the other hand, the coordinate/non-bureaucratic ideal is based on lay judges or lawyers who are part of the larger realm to which legal professionals belong. They are normally recruited after long experience as lawyers, for a specific position within the judiciary, and without prospect for advancement. There is no formal judicial career and generally, judges do not have professional training within the organization, while the judicial corps tends to be fragmented.

The second dimension concerns the relationship between judicial officials in terms of hierarchy, which "depends on the authority of position to confer legitimacy and status on what is being required of another" (Bell, 2006, p. 365). The hierarchical/bureaucratic ideal entails a strict ordering into several echelons, with authority concentrated at the top of the organization in order to reinforce order and uniformity. This logic requires decisions taken by lower judges be subject to superior review on a regular and comprehensive basis, producing a strict stratification in a chain of subordination where lower judges exercise little, if any, discretion. Besides, hierarchical superiors grant promotions according to formal criteria combining seniority and merit. In this context, the spectre of superior audits promotes an ethic of cooperation and the

dynamics of promotions contribute to a team spirit, as those officials who alter the harmonious functioning of the organization are likely to be bypassed for advancement. Hence judicial guarantees of independence tend to be weak. On the opposite side, in the coordinate/non-bureaucratic type, hierarchy is weak as authority is fragmented and distributed horizontally. There is no pressure for unity or uniformity, and judges have no prospect of promotions. Superior audits are exceptional events, in a context where some level of consistency and predictability in decision-making is achieved through coordination between roughly equal officials who adopt common guidelines and standards, and also upon external regulations e.g. legislation. Accordingly, judicial guarantees of independence and individual autonomy are stronger than in hierarchical models.

Finally, the third dimension of the typology concerns decision-making, which in hierarchical/bureaucratic ideal models is legalistic. Accordingly, officials are expected to make a particular decision when facts are found that are specified under a normative standard. In turn, such standards tend to be context-free and general, forming a complex network of abstract rules that governs the process of decision-making, making concrete aspects of cases or the consequences of decisions rather irrelevant. On the contrary, in the coordinate/non-hierarchical type decision-making relies mostly on the application of standards of substantive justice instead of technical norms (Damaska, 1986; Guarnieri et. al., 2002).

Dimensions	Hierarchical/bureaucratic type	Coordinate/non-bureaucratic type
Nature of the Judicial Corps and professionalization mechanisms	Recruitment at young age, formal or informal training within the organization, organizational cohesion, long ascending career	Recruitment after lengthy experience as lawyers, no specific training within the judiciary, tendency to organizational fragmentation, no career
Relationship between officials	Strict hierarchical ordering, subordination of lower judges, concentration of authority at the top, regular and comprehensive superior review of judicial decisions, promotions granted by	Weak hierarchy, officials are roughly equals, horizontal distribution of authority, superior audits are exceptional, no promotions, no pressure towards unity, some consistency achieved

	superiors, pressure towards unity and consistency.	through coordination and external regulations (legislation).
Decision-making	Technical procedure based on logical-legal standards, not on the particularities of concrete cases or the consequences of decisions	Based on community norms and standards of substantive justice

Table 2. The hierarchical/bureaucratic and the coordinate/non-bureaucratic ideal types of judicial organization.

The ideal types developed by Damaska (1986) and Guarnieri and Pederzoli (2002) do not describe specific cases but serve as analytical tools, abstracted and detached from reality, which are nevertheless grounded to a certain extent in empirical experience. In fact, the two extremes of the models represented by these typologies contain elements that historically synthesize the organizational patterns of the judiciaries of Chile and England and Wales, as this thesis claims. The next sections describe both organizations, putting into historical perspective the two judiciaries and the process of changes that in both cases has developed in the last few decades.

4. The Judiciary of Chile: a Hierarchical/Bureaucratic Model

4.1. Overview

The judiciary of Chile is a representative example of the hierarchical/bureaucratic ideal type, if analysed in historical perspective. Indeed, all the features of such theoretical construction were traditionally evident, if not exacerbated in the Chilean organization in the past. Nevertheless, after the dictatorship commanded by Augusto Pinochet, the organization started to change, in a process that is still developing and has not been fully acknowledged by scholars. This section explains the historical context of the organization, broadly describing the process of changes in the last decades. The structure of the organization and the career system in particular are explained in order to contextualize the current reforms.

4.2. The Historical Context

Deference to political authority was one of the distinctive elements of the Chilean

judiciary when it was organized following the independence of the country in 1810. The nascent Chilean republic relied upon a conservative political settlement, as a result of the fusion of colonial authoritarianism and republican constitutionalism. The system was strictly imposed through the concentration of power in the hands of the President of the republic in order to achieve political stability in the highly unstable post-independence context (Collier & Sater 2004, pp.54–60). Presidential powers also shaped the judiciary and consequently, from the beginning, adherence to the law was equated to the will of the Executive and enforced through direct political intervention in judicial appointments and discipline (Hilbink 2007, p.71). Under such conditions, paradoxically, an ideology of judicial apoliticism was introduced into the institution, despite the fact that judicial behaviour was strongly controlled by a conservative elite.

When social agitation began to modify the political sphere in the early 1920s, President Alessandri's government drafted a new constitution that changed the orientation of the state introducing major political reforms. Among other changes, the powers of the judiciary were notably reinforced, implementing for the first time judicial review attributions. As Hilbink (2007) argues, this was a strategic move to protect the status quo. Indeed, the constitution introduced simultaneous reforms to isolate the judiciary in the political scenario, reinforcing the powers of the Supreme Court over judicial organization in terms of recruitment, promotions, and top-down control attributions, strongly limiting influences external to the judiciary in all key areas of organizational development. In this way, a corporatist model was adopted, in the sense of a: "monopolistic, hierarchically ordered, officially recognized, clearly delimited association" (Schmitter, cited by Baccaro 2003, p.685). As a consequence, the judiciary became an autonomous bureaucracy that concentrated its power at the top, and was insulated from political influence just as conservative hegemony was coming to an end and a new political scenario was starting to develop (Hilbink 2007, pp.55–59). Paradoxically, the enhancement of the attributions of the Supreme Court did not diminish the traditional deferential orientation. This attitude persisted in the hands of a conservative judicial elite with strong attributions to reproduce such a pattern, controlling recruitments, careers, and performance of judges without external interference. Therefore, the reforms introduced by the 1925 Constitution to empower the judiciary served to: "freeze a nineteenth-century understanding of the law, society and the judicial role into the institution" (Hilbink 2007, p.226). Indeed, the judiciary was insulated from political debate while the conservative elite in the Supreme Court was heavily empowered to reproduce its own views through discipline and promotions (Ibid. 2007). As a result, the judiciary achieved a higher level of external independence and stability but in exchange the idea of internal independence was completely neglected. It is very clear that this corporatist turn isolated the institution from

social concerns and reinforced the apolitical pattern of judicial work (Couso & Hilbink 2011; Hilbink 2007; Vargas 2007). As a consequence, the judicial role was shaped as a technical rather than a political matter. Indeed, for the Chilean culture, courts were in charge of adjudication in conflicts between individuals rather than protecting rights or controlling political power, despite the fact that the judiciary had been equipped with judicial review attributions and habeas corpus mechanisms by the 1925 Constitution (Bordalí 2007; Hilbink 2007; Couso & Hilbink 2011).

The true face of the apolitical philosophy would be clear when the balance of political power changed in the country and, consequently, deference to political authority would not have the same meaning as before. In fact, in times of political agitation, the courts were quite able to change traditional attitudes in order to actively defend the status quo. Hilbink (2007) provides strong evidence showing that, particularly under the left wing governments of Frei and Allende, from 1964 to 1973 the Chilean courts repeatedly abandoned their deferential tradition and their legalistic approach to decision-making in order to challenge the government in cases in which principled reasoning and rights protection rhetoric -essentially concerning property rights- were used frequently (pp.75–78). Therefore, it is plausible to argue that, behind the apolitical ideology, there was a substantive conservative ideology at work, resulting from the combination of a hierarchical structure and the dominant apolitical ideology, mobilizing a conservative bias within the institution, which reproduced itself within the institution as a result of the structural characteristics of the institution (p.38).

When the military took power in 1973 inspired by conservative values and a strong right wing ethos, Parliament was closed by the dictatorship, but the judiciary remained untouched after dismissing around 10% of the judges, mainly in the lower echelons, on suspicion of being left wing supporters (Vargas & Duce 2000). Over the following seventeen years the judiciary lent the dictatorship a mantle of legal legitimacy, relying again upon its apolitical ideology and technical approach to decision making. Deference to political power, now in the hands of the military, was once more the accepted standard of judicial behaviour, as courts were reluctant, with limited exceptions, to take a stand in any way against authoritarianism and human rights violations (Hilbink 2007, p.176; Huneeus 2010).

During the administration of the first democratic president of Chile following Augusto Pinochet, that of Patricio Aylwin, the Rettig commission, as it was commonly known, was instituted to gather all the information possible concerning the extent of human rights violations during the dictatorship. Besides the results relating to victims, the Commission also included in its final report an opinion about the role of different public institutions in atrocities that included kidnapping, murder, illegal imprisonment, and

systematic torture of thousands of people. In the report, delivered in 1991, the Commission accused the judiciary, and particularly the Supreme Court, of being too passive in relation to the former executive's actions, and formalistic in the interpretation of the law during the dictatorship. Such attitudes had facilitated the action of security agents, contributing to the atmosphere of impunity that dominated Chile after witnessing the massive use of illegal repressive methods (Comisión Nacional de Verdad y Reconciliación 1991). The report made explicit what could have been a general impression about the role of the courts during the dictatorship and provoked a reaction in the Supreme Court, which issued a formal response to the Commission (see Corte Suprema de Justicia, Chile 1991). Accordingly, the Supreme Court defended its traditionally legalistic approach to the interpretation of the law and its general role in previous years. The importance of this fact must be highlighted as it fostered a public debate about the role of the courts in which only members of the military and extreme right wing supporters backed the Supreme Court (Atria 2003, p.56). As a consequence, the legal community, still shocked by the massive human rights violations, interpreted the Supreme Court's defence of formalism in the context of the human rights debate and consequently equated formalism, passivity, and deference, with negligence and indifference. This debate can be seen as one of the triggers of cultural change in the Chilean legal community, together with circumstances such as the detention of Pinochet in London, the legacy of the very few judges who had previously managed to indict military agents for their responsibility in human rights violations, and the designation of dedicated judges to investigate such cases (Fernández 2010).

Following the dictatorship many organizational reforms have been applied in the judiciary: the Judicial Academy was created, modifying the recruitment system in place and providing for the first time formal training to judges. The performance appraisal mechanism has been modified and new evaluation schemes have been implemented. Meanwhile, new judges started to behave according to new paradigms, in a significant process that has had impact on the whole of the organization, as this thesis explains in the following chapters, against the opinion of scholars who argue that the process cannot be seen as a fundamental shift in the dominant paradigms of the judiciary (See Couso & Hilbink 2011, Huneeus 2010).

4.3. The Structure of the Chilean Judiciary

It is clear that the hierarchical aspect of judicial organization has been dominant in the structure of the Chilean judiciary since the colonial period. After independence in 1810, the country inherited the Spanish monarchic configuration of the judicial system,

with one relevant exception: the republican ideal imposed the separation of powers, which made the judiciary formally autonomous from government. Nevertheless, as Aldunate (2001) claims, until present days, the monarchic ethos of the judiciary has remained, expressed in the pyramidal configuration of the system and particularly in the attributions that superior courts and specially the Supreme Court, exercise over the rest of the organization.

According to the Code for the Organization of the judiciary, *Código Orgánico de Tribunales,* the judicial system of Chile is a three-tier organization, governed by the Supreme Court, which historically has exercised full control over the rest of the judiciary. In fact, the Constitution of 1980 explicitly prescribes that the Supreme Court has the power to supervise, direct and correct all the courts of the country[1]. Accordingly, besides ruling in cases of appeal on points of law, the Court has also exercised extensive attributions in relation to judges, regarding recruitment, performance evaluation, promotions, discipline and administrative measures. Moreover, the extensive appeals system and the nature of written procedures traditionally allowed superior courts to keep close control over their subordinates, through the abusive use of the appeals scheme (Vargas & Duce 2000). Indeed, almost every judicial decision adopted in the course of the long written procedures that characterized the Chilean procedural law were subject to review by the Courts of Appeal or the Supreme Court. Accordingly, successive appeals allowed the superior courts to observe the actions of lower judges in detail, and not just the final rulings in cases they had to decide about, but also, in relation to every other decision taken in the course of proceedings. Moreover, in many cases there was no need of a formal appeal by any of the parties to allow superior judges to review the lower judges' performance in particular cases. The *consulta* or the *visitas* had that purpose. The former worked as an automatic review of the decision, without need of a formal appeal, while the latter entailed senior Appeals Courts or Supreme Court judges visiting a lower court to review any of the proceedings and eventually instruct the judge to take a particular decision in any case. Such systems facilitated an extensive surveillance of the judges' work, consequently giving the Supreme and Appeals Courts the tools to exercise broad attributions in areas of discipline, promotions, evaluations, leaves from work or any other aspect of the judicial work. Subsequently, superior judges enjoyed a very strong power to shape not only the work of judges, but also their behaviour and attitudes more generally (Vargas 2007; Vargas & Duce 2000, Aldunate Lizana 2001). In the last decades, a specialized office, the *Corporación Administrativa del Poder Judicial*, has supported the management attributions of superior courts, under the direction of a board

[1] Article 79 of the 1980 Constitution: *La Corte Suprema tiene la superintendencia directiva, correccional y económica de todos los tribunales de la nación.*

formed by senior judges and the Director of the *Corporación*. Noticeably, no lower judges take part in this directive board, reflecting the top-down power distribution pattern that has traditionally dominated the organization.

Perhaps the clearest example of the extent of the attributions of superior courts has been the use of the *recurso de queja*, which allows any party in a legal proceeding to make a disciplinary complaint against a judge, even based on the interpretation of the law proposed by her in a particular judicial decision. If the complaint is accepted by the superior court, then the decision matter of the complaint is modified, while disciplinary measures must be applied to the judge. This mechanism started to be used regularly by advocates, as decisions adopted in disciplinary proceeding had an immediate and strong effect on the case. Besides, decisions on these matters were normally adopted without great argumentation, making the exercise of these attributions rather arbitrary (Aldunate Lizana 2001).

In terms of number of judges in each tier, at the highest level, by the end of the dictatorship in 1988, the Supreme Court had 17 members, number increased in 1997 up to 21 members, in the context of various reforms introduced by legal statute 19.541. Such reforms also opened space for five external lawyers and academics with lengthy experience outside the judiciary to join the Supreme Court. The aim was to allow *fresh air* to enter the judiciary at the highest level, eventually promoting changes to the functioning of the organization from the top. Such purpose has not been fully accomplished, because the Court retained the power to propose candidates to fill these posts, hence tending to select lawyers who do not jeopardize the judicial status quo (Vargas 2007, Vargas & Duce 2000). With regards to the appointments procedure, in the past, a proposal by the Supreme Court itself followed by the Government's selection was the mechanism for the appointment of the highest rank judges of the country. The reform of 1997 added the agreement of the 2/3 of the members of the Senate as a further requirement, giving a strong veto power to the minorities in Parliament. Accordingly, the appointment of Supreme Court members relies on a political compromise, which tends to represent the views of the two major political coalitions of the country, generally ruling out candidates that may embody change in the judiciary.

The second tier of the judicial structure corresponds to the Courts of Appeals, formed by judges who are subordinates to the Supreme Court and work in one of the 17 Courts of Appeal that exist in the country. These Courts have a regional jurisdiction and exercise the power to rule in cases of appeals against decisions taken by the lower courts within their region. Courts of Appeal also have extensive attributions over the work of lower judges, similar to those that Supreme Court has over the whole of the judiciary. Accordingly, they do not just review judicial decisions, but also, they decide about the

career of the judges who adopt such decisions. Hence Courts of Appeals judges have been historically able to shape the character of judges by directly controlling promotions, discipline and administrative matters, based upon a close surveillance of the judges' performance. In terms of numbers, in 1997 the number of Appeals Courts judges was raised from 140 to 155, number that has remained stable until now, most of them working in the Courts of Santiago, San Miguel, Valparaíso and Concepción, the biggest cities of the country, where candidates to the Supreme Court are normally selected from.

Judges known generally as *jueces de primera instancia* constitute the third tier of the judicial structure. Mostly specialized courts form the lower judiciary, exercising jurisdiction on civil, criminal, family law and employment law. These courts are part of what is known as the judiciary, the *Poder Judicial*. Besides, courts that are not part of this judicial structure, also exercise jurisdiction in certain areas such as taxing or environmental law, still under the supervision of the Supreme Court. In terms of numbers, the lower judges within the judiciary were 376 in 1999. After the procedural reforms, in 2007 the number rose up to 1.290 judges (Vargas 2007) and has continued expanding slightly since then. Evidently, the increase in number has been significant in this tier, if compared with the higher levels of the organization, where increases have been modest. Decisions taken by judges at this level are reviewed in appeal by the same Courts of Appeals judges that appraise their performance annually and decide about aspects such as special leaves of absence, disciplinary measures and promotions. Hence there are strong incentives for lower judges to behave according to the conception of the judicial role imposed from the top, affecting the individual independence of the judge to decide cases according to facts and the law, and nothing else (Atria, 2007, Bordalí 2007, Horvitz 2007, Zapata, 2008).

4.4. The Career System in the Chilean Judiciary

In career judiciaries, judges are appointed to junior positions and promoted to senior positions at later stages. Tenure is not attached to a particular position but to the entire career, while transfers to courts of equal seniority are generally allowed (Groupa & Ginsburg 2011). The Chilean judiciary has been historically organized as an ascending career system. For that purpose, the judicial three-tier structure is in turn divided into categories to which judges and officers of the court belong. According to article 267 of the Code for the Organization of the Courts, category one corresponds to Supreme Court judges; category 2, to Court of Appeals judges; while lower judges are divided into categories 3, 4 and 5. Category 3 corresponds to judges who serve in courts located in cities where there is also a Court of Appeals, normally regional capital cities. Category 4

groups judges who serve in courts located in provincial capital cities; while category 5 is formed by judges who work in courts located in the *comunas*, that is, in the smallest administrative units of the country. There are two further categories, 6 and 7, to which officers of the courts who are not judges belong. These officials, known as *secretarios,* are lawyers who play a role in the administration of the court acting also as deputy judges, normally seeking for promotion to the higher categories where they can act as full time judges. A special type of officer of Courts of Appeals is the *relator*, who assists the work of judges at that level. *Relatores* are expected to have special skills, in terms of legal knowledge and capacity to work under pressure, in order to perform well in a very demanding job. Accordingly, they have been assimilated to the highest level of the lower judges, that is, the third category, despite the fact that they are normally rather young and do not have much previous judicial experience.

With regards to the career paths, there are basically two ways to progress from one section to another, in terms that can be considered a professional advancement i.e. with higher salaries and greater responsibilities. The first and most common is to be appointed as a *Secretario,* normally in categories 5, 6 or 7, at young age, and start seeking for promotion to a post as a judge, in the fifth category, then climb to the fourth, and finally to the third. These promotions usually entail moving from small and remote towns to the bigger cities of the country. Eventually after approximately 20 years it might be possible for some judges to progress to the second category as a Courts of Appeals judge. Normally, for the few judges of the Courts of Appeals who progress to the Supreme Court it takes between 15 to 20 years working in the second category of the judiciary to have that opportunity.

The second path is slightly different at the beginning of the career and provides those interested in becoming *relatores* of a Court of Appeals, the opportunity to enter the judiciary directly to the third category. From that point, their career path is exactly the same as the rest of the members of the judiciary.

Traditionally, to enter the judiciary, the legal requirements have been rather simple: Chilean nationality and a law degree held for one year. Therefore, young and inexperienced lawyers were normally attracted to the judiciary, where they would spend most of their professional life. Recruitment was mostly in charge of superior judges, who had the possibility to choose applicants who were known to them and who would not challenge the status quo. This pattern has changed with the introduction of the Judicial Academy and formal training requirements. Now, to enter the judiciary applicants must first approve an intensive training course, while they have to also approve courses to work in certain specialized jurisdictions, and to be promoted to the position of Court of Appeals' judge.

Promotions have been historically based on seniority and merit. The Code for the Organization of the Courts established the requirement that, in order to be promoted to the upper category, the applicant must have at least 3 years of experience in the lower category, unless there are no applicants that satisfy such requirement. In turn, merit has been traditionally measured through an individual performance appraisal scheme, in charge of superior judges, the *calificaciones*. Such a mechanism has been historically criticized for being technically unreliable, arbitrary and unfair (see Vargas & Duce 2000). Initially, it was based on the mere impression of superior judges regarding a few abstract categories, in which performance had to be marked from 1 to 7. In the process, appraisers were not obliged to justify the appraisal outcome and no measures were taken to address weaknesses observed in the performance of the appraisee. Since the 70's and particularly in the last couple of decades, various changes have been introduced to the appraisal scheme, aiming to enhance objectivity and fairness. Besides, participation in one training activity per year is now a requirement to obtain a good result in the performance appraisal scheme. The system is still matter of critique and debate, despite changes (see Zapata 2008), but it is worth noting that both merit as expressed by the appraisal system; and seniority are still the base for judicial promotions in Chile.

4.5. Taking Stock

A brief overview of the history and structure of the Chilean judiciary reflects its traditional hierarchical and bureaucratic character, expressed in a pyramidal configuration, in which judges were subordinates to those on the top and therefore, expected to behave strictly under their orders, instead of acting as independent officials in charge of delivering legally-based decisions according to their autonomous judgement. Strong career incentives worked historically to sustain such pattern. However, in recent years various reforms have been implemented, in procedures, management, wages, size of the judiciary, judicial training and also in the performance appraisal scheme. The extent of these changes, the outcome of the process and its effects upon the configuration, structure and functioning of the judiciary are not yet clear. Specialized scholars claim that the dominant organizational patterns have not been disrupted, despite incipient and isolated openings to new ideas in the context of an organization that is still strongly hierarchical and bureaucratic (see Huneeus 2010, Couso & Hilbink 2011). On the opposite side, other scholars have noted the drastic weakening of the judicial hierarchy following the reforms (Vargas 2007), in a way that the main component of a hierarchical organization i.e. top-down authority, would not be prevalent anymore. Hence the issue of the extent of changes in the Chilean judiciary is unsettled, begging the question about

whether the judiciary can still be characterized as a hierarchical/bureaucratic organization, or not.

5. The Judiciary of England and Wales: a Coordinate/Non-bureaucratic Model

5.1. Overview

The judiciary of England and Wales is a representative example of the Coordinate/non-bureaucratic ideal type, if analysed in historical perspective. In fact, Damaska (1986) explicitly states that the features of the coordinate ideal model are based on the observation of the English judiciary (p. 17). Evidently, the coordinate ideal type on its purity does not correspond exactly to the modern organization of the judiciary in England and Wales. However, its main principles have been historically prevalent. Indeed, the lack of a strong hierarchy, the rather fragmented structure and the absence of a judicial career all speak of a peculiar way of organizing the justice system, at odds with hierarchical models that developed in Continental Europe and afterwards in Latin America. Nevertheless, in the last couple of decades the context changed and the organization has implemented new organizational mechanisms to face new challenges. Judicial training was adopted, recruitment is now in charge of a specialized autonomous agency, and performance of judges is being appraised using mechanisms currently in expansion. Moreover, Courts and Tribunals have merged, as the judiciary adopts a new position in relation to other powers of the State. This section explains the historical context of the organization, broadly describing the process of changes in the last decades. The structure of the organization and the career of judges in particular are explained in order to contextualize current reforms.

5.2. The Historical Context

The evolution of English and Welsh judicial institutions has been shaped by two different but overlapping factors: First, the changing nature of the relationship between the Courts, the Executive and Parliament; and second, the evolution of the sources of law in the United Kingdom. The interplay between both elements has involved at least three stages in modern times:

a) Until approximately the mid 18th century, the prevalence of common law over legislation gave judges a pre-eminent place in society. The law was a matter for legal experts and this expertise was the province of members of the bench and bar, who were

few in number, sharing a common social class and legal training in the Inns of Court (Popkin 2007, pp.8–13). From an organizational point of view, there was no such thing as a judicial branch of government, but rather there were a variety of courts arising at different times within the State apparatus. Therefore, the structure of the judiciary was not unified and there was nothing like a supreme court at the apex of an independent judicial system (Popkin 2007, p.9).

In order to free judges from political interference, the Act of Settlement of 1701 represented an inarticulate effort to establish the kind of separation of powers that would later develop with greater clarity in America. However, at the time, the English preferred a balance of powers rather than separation, a choice that, despite its merits or critiques, makes it more difficult to argue for the structural independence of the judiciary (Stevens 2002, p.9). As a result, a subtle interlocking between law and politics was institutionalized, facilitated by the merging of judicial and political roles that had previously characterized the work of judges (Stevens 2002, pp.10–12).

The lack of organizational unity that characterized the judiciary and the prevalence of common law over legislation shaped an individualistic culture among judges. Accordingly, in order to play their role, judges could not rely upon the power of a strong organization or a judicial branch of government to back their decisions. Rather, their authority was sustained by the tradition of expertise of the bench and the bar, which judges worked to preserve (Popkin 2007).

b) The period from the 1750s until the 1960s was determined by the increasing importance of legislation as a legal source, undermining the traditional superiority of common law. Whilst the origins of parliamentary supremacy can be traced back to the beginning of the 1700s, political reforms that expanded the inclusiveness of the political system from the second half of the 19th century provided more legitimacy to democratic politics and legislation, outweighing the importance of the judiciary as a law-creating body. In addition, the incorporation of the working class in formal politics fostered the emergence of new demands, particularly in the area of labour relations, which had great impact on the configuration of the judicial character. Indeed, by the beginning of the 20th century, anti-labour decisions taken by the judiciary produced a lasting legacy of mistrust of judges by the political left that resulted in pushing judges out of politics (Popkin 2007, pp.20–21). The judicial outlook was shaped around a new paradigm of apolitical formalism, as a way to protect the judiciary from the changing context. Therefore: “the more judges could appear to have no control over the outcome of decisions, the less the newly empowered left could complain” (Stevens 2002, p.19).

The new judicial ideology encompassed the flourishing of utilitarian legal thought reflected in the work of Dicey and Austin’s positivism. Such an approach relied

upon a concept of the Rule of Law that was in turn based on pre-existing principles and mechanical formalism, leaving virtually no room for judicial discretion and creativity. In Dicey's terms, democracy was to be protected by acts of Parliament, not by judges (Stevens 2002, p.16). As a result, the principle of parliamentary supremacy would dominate British legal culture for decades to come, while the judiciary became a second order institution, compared to Parliament, particularly regarding public law. Following the official doctrine that judges should be upholders of the law rather than its makers, large areas of government were excluded from judicial scrutiny until the 1960s. During this long period of judicial passivity, judges became widely respected, as their status was enhanced. Distance from areas of political controversy gave the judiciary an apolitical image, while judges were insulated from public scrutiny (Malleson 1999, pp.8–9). It is clear that this rather naïve image of neutrality not only had an impact upon the public image of the judiciary. It also shaped the professional identity of judges around a hard version of self-restraint and deference to political power. As Stevens (2002) claims "British administrative law was to sleep for the next fifty years" (p.19) as reluctance of courts to exercise any control over the actions of political authorities made their role in public law irrelevant.

Judicial withdrawal from the political realm and the strength of judicial independence as a political principle discouraged any debate about the place of the judiciary in the structure of the State. In consequence, through a shared conviction of self-restraint and a strong sense of judicial independence, judges maintained their dual positions in the State apparatus.

c) The third period is shorter than the previous eras, but still significant. It begins in the 1960s and extends until the 1990s, driven by a new judicial perspective on the sources of the law. The limited focus upon crime, property, tort, and contract previously enhanced the public image of judges as neutral adjudicators who were not involved in ideological struggles. However, such an approach to the judicial role also involved a paradox. Besides apparent judicial neutrality and apoliticism, the legal system became increasingly irrelevant to the functioning of the country, while in the eyes of the public the judiciary began to appear out of touch with the challenges that Britain was facing (Stevens 2002, p.25).

In 1954 Lord Chancellor Kilmuir announced that the law should assist in the resolution of the great problems of the modern state, acknowledging that the social and political context were relevant to the application of the law[2]. Later, in 1962, Lord Denning as Master of the Rolls became an active publicist for the creative role of the

[2] This is a significantly different approach to that of Lord Chancellor Jowitt, who publicly stated that judges should take pride in not considering the needs of society (Stevens 2002, p.38)

judges (Stevens 2002, pp.34–35). Furthermore, in 1966 the House of Lords acknowledged its law-making role by holding that it was no longer bound by its earlier decisions. This episode opened a new era in the concept of the judicial role in which new questions would arise concerning the relationship of the judges with Parliament and the Executive (Malleson 1999, pp.10–11).

The process of change within the judiciary began to occur gradually though consistently thereafter. Sociological factors played a part, such as the societal change in the approach to authority, the reaction of new judges to the negative effects of judicial self-restraint in the 1950s, or the increasing financial success of the legal profession in the context of incipient globalization (Stevens 2002, pp.38–39). Equally important were the political factors that lay behind the changes such as the concern of a political left which had no illusions about judicial passivity (Popkin 2007, p.27). In fact, mistrust of the judiciary and its appearance of objectivity and passivity emerged with clarity in the 1970s, when Griffith (1997) publicly exposed the political side of judging and the conservative inclinations of judges[3].

Consonant with the British institutional history of gradual evolution and adaptation, in the face of the new social and political context courts and judges began to gradually acknowledge their law-creating role (see Reid 1972), developing new strategies in order to remain faithful to the principle of parliamentary sovereignty at the same time. A report of the Law Commission delivered in 1969 rejected purely literalist approaches to interpretation, adopting a *mischief* or purposive approach that would respect legislative intent without eliminating judicial discretion. In turn, consideration of legislative history would be deemed relevant as an interpretative tool by judicial decisions in the 1990s, opening new roads to legal interpretation (Popkin 2007, p.27). The roots of fictitious passivity and apoliticism began to be eroded in a way that decades later would uncover the need for new institutional arrangements. Indeed, once the political role of judges is acknowledged, the democratic status of the judiciary needs to be reviewed in this new light.

It is clear that, since the 1960s, English and Welsh judges began to play a much more active political role, particularly since the 1980s when consensus politics weakened. The lack of serious opposition to Margaret Thatcher's government and the decline in importance of other institutions such as Parliament and the Civil Service made the constitutional role of judges more important. The same happened under Tony Blair's government from 1997, emulating Thatcher's presidential style to the extent that the idea

3 The political character of the judicial role was highlighted by Griffith when pointing to the fact that an underlying commitment to the status quo was in itself a political position, an argument that was controversial when Griffith's book was first published (Malleson 1999, p.9).

of *elected dictatorship* has been used to describe this new type of government. In this context, the perceived democratic deficit pushed judges to counter-weight the undisputed power of the Executive, as the former Lord Chief Justice Lord Bingham acknowledged, claiming that judges become more assertive, active, and creative when political organs are less effective (Stevens 2002, p.147).

The increasing power of judges and their active political role became evident in the dispute over judicial review and the former Home Secretary Michael Howard's penal policy in the 1990s. Public debate on the issue focused upon the new judicial approach (Stevens 2002, pp.67–73), setting the scene for the discussion of the extent of parliamentary sovereignty, the balance of power in the UK, and judicial independence. Subsequently, in 2005 the Constitutional Reform Act introduced radical changes to the configuration of the judiciary, in the context of a newly implemented separation of powers. Besides becoming a branch of government, separated from parliament and the executive, the courts and tribunals merged, while many organizational reforms were introduced. New recruitment arrangements, the extensive use of judicial training and a system of performance appraisal in expansion, all constitute landmarks of this *new judiciary*.

5.3. The Structure of the Judiciary in England and Wales

The coordinate-type of organizational structure does not fully exist in reality these days, as modern judicial organizations need a certain level of hierarchy to secure minimum levels of consistency. Even in the Anglo American world, scholars have acknowledged the increasing bureaucratization of the judiciary in the last decades (see Fiss 1983). However, the historical antecedents of coordinate structures have been noticeable in the organization of the judiciary of England and Wales. The division of the judiciary into different corps reflects the historical lack of a formal hierarchy, at least in the way in which it is understood in the continental tradition. Accordingly, various judicial corps traditionally formed the judicial structure: the senior judiciary, the lower judiciary, the lay magistrates and tribunal members (Bell 2006, p. 299). In turn, senior judges i.e. Members of the House of Lords, Heads of Divisions, Court of Appeals Judges and High Court Judges, never had the power to directly impose their views from above, being prohibited from interfering in a judges' work in any way, except through the normal working of the appellate process. Hence lower judges i.e. Circuit and District Judges could not be considered subordinates to their superiors, as in the case of Chile. Instead, they were all part of a culture based on judicial individualism, which generally did not welcome organizational arrangements that could compromise the relationship

between individuality and judicial independence (Gee et al. 2015, p. 127).

Judicial freedom from hierarchical control emerges from the peculiar demands of adjudication for independence (Bell 1987), principle that in England and Wales was traditionally reflected by the lack of formal attributions of senior judges regarding the judicial life of lower judges, whose decisions they were in charge of reviewing through appeals. Accordingly, in England and Wales, the appellate process could not be portrayed as a surveillance mechanism to facilitate top-down control, as in Chile, but simply as a stage in the process of adjudication. In order to secure such functioning, promotions were historically very limited, while decisions about recruitment, selection, management of the organization or other aspects of importance for the professional life of judges, were in the hands of the Lord Chancellor. Nevertheless, the lack of a strong hierarchy or the pre-eminence of a culture of judicial individualism never allowed judges to function in a vacuum, with formal and informal rules reinforcing certain standards of performance (Gee et. al. 2015 p.128). Informal mechanisms worked particularly well in the professional judiciary, where common standards were clear to members of this small, cohesive and homogeneous club-like group, while deviation would attract peers' disapprobation (Malleson 1999, p. 199). Moreover, within the judiciary there has always been a certain degree of line management of District and Circuit Judges, by Presiding Judges, and of Senior Judges by Heads of Divisions, the Master of the Rolls and the Lord Chief Justice (Gee et. al. 2015, p. 138), revealing a certain degree of hierarchy in the management of the organization.

In terms of numbers, the judiciary has grown substantially in the last decades, rising from approximately 500 judges in the 1970's to 3011 in 1993, reaching a peak of 3770 in 2005 (Bell 2006, p. 300). In 2015 the number of judges in the courts was 3238 (Judicial Office 2015), considering full time and part-time judges. These numbers are considerably higher if lay Judges and Tribunal members are included.

As the judiciary has grown in size, becoming more professionalized, the Constitutional Reform of 2005 introduced structural changes to the judiciary, Accordingly, the leadership of the judiciary was transferred from the Lord Chancellor to the Lord Chief Justice, expressing with greater clarity a system of separation of powers, as the Lord Chancellor has become more an ordinary executive's Minister of Justice, rather than playing the "bizarre blend of executive, legislative and judicial roles" (Gee et. al., 2015, p. 32) that characterized the post historically. In turn, the relationship between the executive and the judiciary with regards to the administration of the courts has evolved to a form of partnership, expressed in the implementation of Her Majesty's Courts and Tribunals Service, HMCTS, which merges executive and judicial involvement in the administration of the Courts and Tribunals.

Other significant changes built upon a process that had already been developing in the last decades (see Malleson 1999). Clearly there is now a more formal top-down management structure based upon the delegation of powers from the Lord Chief Justice to other senior judges, such as the Heads of Division and the Senior Presiding Judge; and to lower judges as well e.g. Presiding Judges, Liaison judges, Chancery Supervising Judge, Chief Magistrates, Resident, Designated Civil and Family Judges (Lord Phillips 2008). Though judges with management responsibilities enjoy a great deal of discretion, they are clear that "if the senior judicial leadership felt that they were making mistakes, they would be told" (Gee et. al. 2015, p. 139), as a result of the increasing control from the top of the organization. In order to exercise the expanded powers of the Lord Chief Justice and the senior management team, in 2006 a judicial civil service was created: the Judicial Office, to pursue the goals determined by the Judicial Executive Board, an advisory body to the Lord Chief Justice, formed by senior Judges. Besides, the Judicial Council provides a *voice* to the wider judiciary, also advising the Lord Chief Justice in the administration of the courts. Clearly, the management structure that existed informally in the past is now formally established, as there is now a much clearer line of responsibility for performance, conduct and welfare (Gee et. al., p.149).

New managerial instruments have been introduced within the new structure, including an incipient system of collective appraisal to assess and compare the performance of courts. Likewise, individual performance appraisal started to be used before the constitutional changes, by the beginning of the 2000's, but only at the level of Tribunals and Deputy District Judges. Pilot projects for the expansion of individual performance appraisal have been carried out, reflecting the aim to consolidate a formal mechanism for the assessment of the work of judges. Remarkably, new autonomous agencies have been created in recent years to deal with crucial aspects of the administration of the courts: the Judicial Appointments Commission, which manages the processes to appoint judges; and the Judicial College, which provides professional training to both Court and Tribunal Judges.

Another remarkable change regards the once radical division of the judiciary into different corps, which has changed in the last years, particularly after the incorporation of Tribunals to the formal structure of the judiciary in 2010. In turn, the leadership of the Tribunals has been trusted to the Senior President of the Tribunals, whose responsibilities are similar to those of the Lord Chief Justice, also participating in the partnership with the executive for the administration of the judiciary. The Tribunals' service has been unified under the leadership of the Senior President, and has been restructured as a two-tier system: the First-tier and the Upper Tribunal, the latter mostly in charge of appeals.

In sum, the once fragmented structure has changed radically in the last years,

becoming increasingly unified, while the informal management of the organization has evolved rapidly to configure a much clearer top-down administration structure in a context of greater corporatism, in spite of the dominant culture of individualism.

5.4. A Career System in the Judiciary of England and Wales

Formal career paths did not exist in the history of the English and Welsh judiciary, where judges joined the organization after an initial career related to the legal professions and without a prospect for promotion. Such circumstances were traditionally understood as a condition of judicial independence, as the absence of a career ladder allegedly served to avoid improper influences upon judicial decision-making. However, in reality there was an informal line of promotion within the Senior judiciary, from the High Court to the Court of Appeal, and from there to the House of Lords; while promotion from lower ranks to higher posts was extremely rare (Gee et. al. 2015, p. 129). In fact, most of actual Court of Appeal and Supreme Court judges were promoted from the High Court, as it has been done traditionally. In turn, High Court judges have historically been selected from the most experienced QCs, with more than twenty years of practice outside the judiciary, and not from the lower ranks formed by circuit, district or tribunal judges. In the last years concern has been raised about the limited movement of judges between the different parts of the judiciary, particularly from lower to more senior branches, as the organization historically did not provide established career paths for judges to follow (House of Lords Select Committee on the Constitution 2012).

One of the most significant reforms to the organization of the judiciary in England and Wales was the implementation of the Judicial Appointments Commission (JAC), with a twofold statutory duty: to appoint the best eligible individuals to the judiciary, and to encourage the widest and most diverse pool of candidates. As regards the latter objective, structural changes have fostered greater opportunities for individuals to be appointed to the judiciary: the growth in number of both court and tribunal-based judiciary, the reform of the latter's structure, the broadening out of the eligibility criteria and the enabling of those eligible to apply earlier in their careers than ever before (Hallett 2010). Besides, in 2009 an Advisory Panel on Judicial Diversity was established to make recommendations to the Lord Chancellor on how to make progress to a more diverse judiciary. One of the recommendations of this panel was the identification of clear career paths across the courts and tribunals, so that people understand the range of opportunities within the judiciary. According to the panel, the concept of a judicial career in which career paths are identifiable and transparent, is key to achieving progress to a more diverse judiciary (Advisory Panel on Judicial Diversity 2010). Specific actions have been

taken by different agencies to configure such clear judicial career paths, in an on-going process permanently monitored by a task force formed to inform progress on judicial diversity (Judicial Diversity Taskforce 2011, 2013). Moreover, the Select Committee on the Constitution of the House of Lords, produced a report on judicial appointments, which reflects the adoption of a new career system in the judiciary:

> There should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions. Internal barriers to career progression and movement should, as minimum, be removed. There also needs to be a cultural change so that all those involved in appointments and deployment are willing to recognise and promote talented judges and enable them to progress to the senior levels of the judiciary (House of Lords Select Committee on the Constitution 2012, p. 56).

Despite the decisive change in progress, the concept of judicial career developed in England and Wales does not entail the adoption of a proper careerist system as in continental Europe and Latin America. Indeed, in England and Wales it has been argued repeatedly that the aim of changes is not to appoint young and inexperienced judges to be formed within the judiciary and spend the whole of their professional life in the organization. The new career system focuses specifically on identifying career paths and removing barriers to promotions, in a context of a wider pool of eligible applicants. In other words, experience practising outside the judiciary and appointments to the judiciary at a later stage are still valued as a positive feature, which the new scheme does not aim to modify (House of Lords Select Committee on the Constitution 2012). As a consequence, the new career model in the judiciary of England and Wales may be better portrayed as a hybrid judicial career (Garoupa & Ginsburg 2011) that provides opportunities for promotion, specifically aiming to enhance diversity.

The various alternatives for promotion that judges can take in the new organizational structure are explained by the judiciary in a detailed progression chart[4] explicitly including the opportunities for judges from the lower judiciary to apply to senior posts. Evidently, the formal acknowledgement of this possibility does not change by itself the nature of judicial careers, but it constitutes a significant step, to be complemented by the removal of eventual subjective barriers to ascending promotions that could still influence processes of judicial appointments.

5.5. Taking Stock

[4] Available at: https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/judicial-career-progression-chart/

The brief review of the history and structural configuration of the judiciary of England and Wales reveals that the historical antecedents of the coordinate type of organization have been prevalent in this case. Traditionally, the judiciary was fragmented, its hierarchy weak and mostly informal, in a way that individual independence of judges would not be interfered from *above.* Noticeably, the professional life of a judge did not depend on the opinion of the same judges who would directly review their work in the appellate process and consequently, there were no formal incentives to adjust decisions to the opinion of *superiors,* as in the Chilean case. Moreover, judges were normally recruited after a lengthy career outside the judiciary and they would not have a prospect for promotions, despite the possibility of ascending to the higher posts in the organizational structure that a few senior judges had in practice. In this organization, consistency was sustained by the homogeneity of a small group of judges who knew each other well, sharing a common perspective about the judicial role, and not by the hierarchical order.

In the last few years, many changes have happened in the judiciary of England and Wales. It has grown substantially; the judicial agencies once fragmented have been separated from other branches of government, while Courts and Tribunals have been unified under the same administrative umbrella. Besides, there are clearer lines of management and senior judges have gained administration attributions within this new structure, under the leadership of the Lord Chief Justice. New mechanisms have been adopted, such as formal training, while performance appraisal has been introduced timidly but is in the process of expanding. In turn, judicial appointments are now in charge of a new autonomous agency, configuring a trend towards a formal career system, through the identification of clear career paths for judges to apply to new posts across the judiciary, which is open to a wider pool of eligible applicants from different backgrounds. In this context, scholars have acknowledged the increasing corporatisation and formalisation of the judiciary (Bell 2006, Gee et. al. 2015) and consequently, as in the case of Chile but from the opposite perspective, the significant evolution of this judiciary begs the question about whether the coordinate and non-bureaucratic ideal type as envisaged by Damaska (1986) and Guarnieri and Pederzoli (2002) can be used accurately to describe this new organization.

6. Building Blocks of the Research

This chapter explains the theoretical framework guiding the research. The account reveals, in the first place, the institutional orientation of the study and the specific

perspective adopted. Particularly relevant for the research strategy and the focus of the empirical enquiry is to understand that organizational models are constituted by structures of rules and roles, and organizational systems such as decision-making and human resource arrangements, underpinned by sets of values, ideas, and beliefs about organizing. All of these elements are combined according to specific institutional prescriptions that consequently determine the configuration of organizational models. Such models provide spaces for social interactions e.g. judicial training and performance appraisal schemes, in which institutional influences are transferred to individuals, whose actions respond to such influences, either to comply with normative institutional frameworks, or to dispute, bend, or modify their content. This core idea guides the research in two ways. First, it supports the analytical perspective, focused upon the study of judiciaries in terms of organizational models. Second, it guides the empirical enquiry, which consequently studies the methods, structures, and regulations of judicial training and performance appraisal systems, and also the opinions and reactions of the individual judges whose actions are both constrained and enabled by these mechanisms, depending upon their configuration.

Regarding the use of typologies for the research, the chapter justifies the strategic decision to use these analytical tools as a way of reducing the complexity of studying a multiplicity of elements, variables, and dimensions. Typologies help to focus upon the main aspects of organizations, which, considered together, form ideal types. These theoretical constructs serve as a yardstick for comparison with real cases, facilitating comparisons between different systems, based upon the variables outlined by the specific typology. The chapter describes the main typological accounts used in the context of judicial organizations and explains the two paradigmatic organizational models that can be discerned by merging such accounts: the hierarchical/bureaucratic type and the coordinate/non-bureaucratic type. As explained following Damaska (1986) and Guarnieri and Pederzoli (2002), such ideal models constitute extreme poles in a continuum of judicial organization, based upon the distribution of authority as the main organizational dimension. Finally, the cases of the judiciaries of Chile and England and Wales are presented as representative historical examples of such ideal models, both constituting broad and contrasting organizational traditions.

Besides describing the history and main structural aspects of the judiciaries of Chile and England and Wales, the chapter discusses some of the changes that have occurred in both organizations in the last decades.

	CHILE HISTORICALLY	CHILE CURRENTLY	ENGLAND AND WALES HISTORICALLY	ENGLAND AND WALES CURRENTLY
ENTRY POINT	Bottom rung	Bottom rung, except 5 lateral appointments to Sup. Court	Lateral	Lateral
SELECTION	Proposal by higher courts. Selection from list of 3 by President of the Republic	No changes	Lord Chancellor, based upon informal consultation with the senior judiciary	Autonomous Judicial Appointments Commission
FIRST APPOINTMENT REQUIREMENTS	1 year law practice	-1 year law practice - Approval of one year formation program at the Judicial Academy	- Extensive experience practicing law.	- Extensive experience practicing law. - Meet requirements for the post. - Good results in competitive selection procedure.
PROFILE OF NEWLY APPOINTED JUDGES	-Young and inexperienced. Judges usually appointed after receiving law degree - Low academic profiles generally	-No changes in terms of experience of new judges. - Greater academic competence of new judges	- Usually successful barristers only would be appointed to the courts	- Wider pool of judicial candidates, including barristers and solicitors
PROMOTIONS	- Judges expected to be promoted in a 7 tier categorization - Strong incentives to seek promotion - Clear career path	- No changes to system. - Weakening of incentives to seek promotion - Promotion to 2nd category needs approval of course	- No formal career paths. - Promotions were very exceptional. -Informal career paths and promotions in higher positions only	- Incipient turn to career system - Variable career paths determined. - Multiple alternatives for promotions
STRUCTURE	Hierarchical. Supreme Court has extensive attributions to control the whole of the judiciary	No formal changes	- Coordinate. - Leadership by Lord Chancellor. -Informal organizational rules	Separation of powers - New judicial leaders (LCJ, SPT etc.) - New org. mechanisms

Table 3: Main structural aspects of the judiciaries of Chile and England and Wales

A brief review of the processes in both cases provides enough information to conclude that changes in these judiciaries are significant and could be modifying the character of the organization itself. This assertion raises the question as to whether the typologies reviewed previously can help us to explain these processes, which in both cases include the implementation, reform or expansion of mechanisms such as judicial training and performance appraisal. In other words, is the continuum that goes from

hierarchical/bureaucratic to coordinate/non-bureaucratic a helpful theoretical tool to explain such reforms? Is it the case that new organizational systems are making judiciaries move along the continuum, or rather are these tools insufficient to explain the significance of contemporary changes? The research addresses such questions using the historical configurations of the judiciaries of Chile and England and Wales as a yardstick to assess their evolution in recent years, or since the implementation of organizational reforms that include new approaches to judicial training and performance appraisal. The analysis in Chapter 2 focuses on the dimensions of judicial organization highlighted by Damaska (1986) and Guarnieri and Pederzoli (2002) and demonstrates that distinctions made by these typologies, based on authority as main organizational dimension do not wholly capture the complexities of contemporary organizational changes in the judiciaries under study. Accordingly, the role of judicial training and performance appraisal needs to be discerned in relation to subtler distinctions and not only as an expression of a certain form of authority distribution.

Subsequent chapters focus upon the empirical analysis of judicial training and performance appraisal in the two contexts under study, their main features, methodologies, and the internal dynamics linked to them. Thereafter, the study elaborates new categories or dimensions of organization implicit on these arrangements, and the underlying concepts that connect such categories. Such exercise enables the development of a new judicial organizational typology relying upon the information extracted from judicial training and performance appraisal arrangements, helping to understand the potential of these mechanisms as vehicles for organizational change and their influence in processes of organizational reform, depending on the specific arrangements adopted.

Theoretical framework:	Institutional logics, organizational archetypes: Organizational phenomena explained in relation to top-down institutional influences expressed in methods and structures for JT and PA; and also in relation to bottom-up contingent reactions of judges.	
Typologies of judicial organization:	Hierarchical/Bureaucratic	Coordinate/Non-bureaucratic
Representative Cases:	Chile	England and Wales
Changes in the last decades:	Growth in size, particularly at the bottom rung. Implementation of Judicial Academy. Changes to	Growth in size, unification of courts and tribunals, leadership transferred to Lord Chief justice,

	recruitment arrangements, procedural changes, weakening of the appellate system, reforms to the performance appraisal scheme, new attitudes in young judges, weakening of hierarchy?	delegation of management attributions to other senior judges and also to some lower judges, new appointments system, expansion of judicial training and performance appraisal, increasing corporatisation, change to a hierarchical model?
Methodological Problem:	Changes not explicable by traditional typologies. The role of JT and PA in the processes cannot be explained in relation to authority distribution only.	
Strategy:	Study of JT and PA methods and structures in both cases; and also reactions and opinions of judges (Top-down and bottom-up influences). Identification of implicit organizational dimensions or categories that can be extracted from data.	
Expected Result:	New typology based on JT and PA arrangements. It can be used to understand their influence in the process of changes and their significance as vehicles of change.	

Table 4: Building Blocks of the Research Process

7. Methods

This thesis uses typologies as a theoretical research method. Generally, typologies reflect overall patterns of organization formed by a set of defining criteria and attributes abstracted from reality. Hence the explicative capacities of any typology largely depend upon correct identification of the dimensions and categories used to group attributes of the object of study. In fact, researchers have long been concerned with finding the *right* set of characteristics for the classification of organizations (Bailey 1994, p.80; McKelvey 1982, pp.354–358), and this particular project can be included among such attempts. Specifically, this thesis claims that existing typologies of judicial organization do not identify the organizational categories that can help to explain the process of changes brought up by reforms that include the implementation of mechanisms such as judicial training and performance appraisal. Hence the effort of discovery focuses

upon elaborating empirically such organizational categories, embodied in the newly implemented judicial training and performance appraisal arrangements, in the contexts under study.

This project studies the influence of new systems and mechanisms in shaping organizational models, developing a new judicial typology for that purpose. In particular, the research focuses upon the functioning of judicial training and performance appraisal as independent variables to understand the dependent variables constituted by the organizational dimensions or categories that help to differentiate types of judiciaries. Accordingly, the empirical work is inductive. It focuses upon data related to the use of judicial training and performance appraisal in the two judiciaries under study in order to identify underlying concepts of organizational relevance in relation to aspects such us training methodologies, quality of training, social relationships developed as a result of training activities, formal and informal contents of training activities, influence of appraisal systems over day-to-day work, effects of the results of appraisal processes etc. The next step in the inductive process is to connect such concepts by developing categories that involve: "the grouping of putatively dissimilar but still allied concepts under a more abstract heading" (LaRossa 2005, p.843). Consequently, concepts extracted from data are grouped along dimensions of organizational relevance e.g. different forms of authority, either vertical or horizontal. Furthermore, the connections between resulting categories or dimensions, are studied to elaborate hypotheses regarding the organizational impact of judicial training and performance appraisal, and to develop a theoretical perspective upon the role of these mechanisms in relation to the organization of judiciaries.

The process described previously corresponds to the stages of a grounded theory approach (see Corbin & Strauss 1990; Strauss & Corbin 1994; Strauss & Corbin 1998; Martin & Turner 1986; LaRossa 2005; Suddaby 2006), which begins with the collection and analysis of empirical data to develop increasingly abstract concepts, finally elaborating a theoretical perspective by induction. It is important to note that, despite some relatively extreme versions of this approach, "grounded theory is not an excuse to ignore the literature" (Suddaby 2006, p.634) or previous theoretical knowledge, which provide a stimulus for research, facilitating the development of categories (Suddaby 2006, p.635). In this project, different institutional approaches to organizational analysis play such a role, providing the theoretical knowledge needed to guide the research. In fact, the study of the methodologies of judicial training and performance appraisal in the judiciaries of Chile and England and Wales focuses upon their implicit rationalities, following Weberian perspectives concerning the study of organizations (see Kalberg 1980; Townley 2002; Healy et al. 2010). Moreover, the study of the influence of judicial

training and performance appraisal on judicial behaviour is based upon the institutional logics theoretical perspective (see Thornton & Ocasio 2008; Thornton et al. 2012).

For the purpose of clarity, an expanded explanation of grounded theory methods is included in Appendix A, including a detailed description of the empirical and comparative methods used to collect and analyse data.

II. THE USE OF EXISTING TYPOLOGIES TO UNDERSTAND THE EVOLUTION OF THE JUDICIARIES OF CHILE AND ENGLAND AND WALES

1. Introduction

In light of the changes to judicial organization highlighted in the previous chapter, the purpose of this chapter is to explain in greater detail how the judiciary has been historically organized in Chile and England and Wales, and the processes of change in both countries as a result of the implementation of new organizational arrangements, including judicial training and performance appraisal. More specifically, the aim of the chapter is to determine whether this process can be explained using the existing judicial typologies developed by Damaska (1986) and Guarnieri and Pederzoli (2002). The analysis focuses upon the categories of judicial organization outlined by such typologies, using judicial ideal types as a yardstick for the assessment of changes to judicial organizational models fostered by contemporary reforms.

Initially, the study relies upon the ideal models of officialdom developed by Damaska (1986). The focus is placed mainly upon the three aspects that, according to this approach, distinguish hierarchical from coordinate ideals: First, the attributes or status of judges, based upon mechanisms for the professionalization of officials. Second, the structure of relationships and subordination between judges within the organization. Third, the characteristics of the decision-making process according to the prevalent rules that shape judicial adjudication. The analysis is complemented with elements developed by Guarnieri and Pederzoli (2002), following the distinction between bureaucratic and professional judicial institutions.

The study of the judiciaries of Chile and England and Wales aims to characterize the prevailing organizational patterns of both judiciaries in historical perspective by comparing its main features with the ideal types identified by Damaska (1986) and Guarnieri and Pederzoli (2002). In addition, the process of change that these organizations have experienced in recent years is also explored using the categories that these typologies offer to group the main organizational features of judiciaries.

In conclusion, this chapter presents a detailed picture of the judiciaries of Chile and England and Wales, the elements that have sustained and reproduced their organizational models, and the mechanisms that have eventually disrupted institutional dynamics, fostering change. The analysis shows that, in the context of contemporary reforms, traditional typologies of judicial organization do not offer sufficient elements to analyse the process that the judiciaries of Chile and England and Wales are currently

experiencing. Indeed, the ideal types used in this chapter to frame the study are based upon relevant organizational categories, which nevertheless, do not seem to capture the emerging features of these organizations. In other words, the changes occurring cannot be accurately explained by reference to the continuum that proceeds from hierarchical/bureaucratic organizations to coordinate/non-bureaucratic judiciaries. In fact, despite the great extension of changes, it cannot be said without risk of oversimplification that the Chilean judiciary is actually reinforcing the dominant organizational model, or rather, proceeds from a hierarchical pattern to a coordinate alternative. Likewise, in the case of England and Wales, despite the significance of changes, the process does not entail the adoption of a hierarchical/bureaucratic model, in the way seen in continental Europe or Latin America. Therefore, from a typological perspective, new categories are needed to characterize more accurately the types of judicial organizations that might be emerging as a consequence of recent reforms.

2. A Typological Approach to the Organization of the Chilean Judiciary

The study of the Chilean judiciary based upon the categories outlined by Damaska (1986) and Guarnieri and Pederzoli (2002) serves to identify the dominant organizational pattern by comparing the real case of the Chilean judiciary with ideal organizational types. After reviewing the main features of the Chilean judicial system, the results confirm the historically dominant organizational model of the institution, represented by a hierarchical/bureaucratic configuration. Nevertheless, it is also clear that the changes that this particular organization is currently experiencing cannot be explained by the same typologies, as new organizational features have become increasingly relevant, generating changes to organizational dimensions or variables that existing typologies of judiciaries do not express. Based upon Damaska's framework, this part of the study focuses upon the following analytical categories:

2.1 The Status and Attributes of Judges and Professionalization mechanisms in the Chilean Judiciary

2.1.1 *Recruitment and Permanency in Office*

The Chilean judicial system has been traditionally composed of: "professionalized permanent officials" (Damaska 1986, p.16). Long terms of office have worked as professionalizing mechanisms, creating space for "routinization and specialization" (ibid. p. 18) around a sphere of practice, while also developing a sense of

identity with other individuals in the same situation. The impact of permanency in office upon the status and attributes of Chilean judges needs to be assessed in combination with the bureaucratic mechanism of recruitment (Guarnieri et al. 2002) used traditionally in Chile. Such a system was historically based upon the appointment of young lawyers to serve posts in the lower echelons and normally in remote towns where judges had to experience a long period of adaptation to the institutional culture that would eventually allow advancement in the hierarchy (Vargas 2007, p.110). Furthermore, the process of recruitment and promotions relied heavily upon the intervention of superior courts, based on the proposal by the Appeals Court of three names to the Minister of Justice in each case, the Minister then choosing one to serve the post[5]. The recruitment and promotion system involved the participation of both the judicial hierarchy and the political authority. However, it is also clear that the selection of candidates to enter the judiciary, and to move up the hierarchy, was completely an attribution of the judiciary itself, and consequently, a pattern of co-optation or self-recruitment (Guarnieri et al. 2002, p.19) was visible as the judicial institution exercised direct control over the profile of nominees to judicial posts. Moreover, the legal requirements to become a judge before 1995 were not very demanding[6], affording great discretion to judicial authorities and reinforcing the self-recruitment pattern.

Professionalization mechanisms within the institution began to change with the implementation of the Judicial Academy in 1994. According to statute 19.346, the Academy is in charge of judicial education and of recruiting candidates to judicial posts, radically modifying the mechanisms used previously in both areas. A panel in charge of setting policies and guiding criteria for both judicial training and recruitment mechanisms governs this institution. Representatives of the judicial hierarchy and the political, legal-professional, and academic spheres form this panel, disrupting the strong corporatist features that heavily influenced recruitment and training in the tradition of the organization.

With regard to recruitment regulations, the Courts Organization Code, *Código Orgánico de Tribunales,* was modified by statute 19.346 introducing new requirements to candidates to judicial posts. Accordingly, besides holding a law degree, to enter the judiciary every candidate needs to be selected to do specialized studies at the Academy in a full time seven-month programme based upon intensive theoretical courses and internships in courts. The selection process is competitive and based upon academic records, legal knowledge tests, and psychological assessments. Once the programme is

5 According to article 284 of the *Código Orgánico de Tribunales,* before the reform introduced in 1995 by statute number 19.390.

6 The Judicial Organization Code allowed any lawyer to apply to posts in the lower echelons after one year from the date in which their law degree was obtained.

completed and approved, candidates are legally in a position to apply for judicial posts (Academia Judicial 2012a). By the end of the 1990s, the Judicial Academy was completely implemented, changing the pattern of recruitment. At the same time, judicial salaries were greatly increased during that decade (Vargas & Duce 2000), making the judiciary more interesting as a professional alternative for young lawyers.

Procedural reforms introduced mainly in the criminal justice system from 2000 demanded a great number of new judges and consequently the Judicial Academy had to implement many formation programmes to respond to this demand. Accordingly, during the 2000s there was a massive intake of young lawyers formally trained in an institution linked to the judiciary but governed by an academic ethos, and directed by a panel open to non-judicial members. Besides, traditional stability, good salaries, and the challenging professional tasks involved in the implementation of revolutionary changes to judicial procedures served to attract candidates. Likewise, transparent and objective procedures at the entry point to the judiciary helped to incentivize good students from law schools to apply to the judiciary, dramatically enhancing the academic profile of candidates to judicial posts (Couso & Hilbink 2011, p.109; Vargas 2011a, p.235).

2.1.2 *Judicial Training*

Guarnieri and Pederzoli (2002) highlight judicial training as a factor relevant to the status of judges and the professionalization of judicial officials. Indeed, training mechanisms can be relevant not only to develop judges' skills and legal background, but also to foster a sense of identity among those who share the same educational experience and subsequent professional culture (Damaška 1986, p.18). In Chile before 1995 there was no formal training system in place, despite some isolated efforts carried out by judges themselves to organize courses and specific training activities, normally in association with universities (Gálvez 1989). Internal initiatives to formalize a training structure failed repeatedly, owing to the lack of interest among political actors on the issue, revealing the irrelevance of the judiciary in the broader political scenario (González 2003).

Without a formal system of judicial education, the academic and intellectual background of judges was mainly shaped by their previous experience at law school. There were no incentives for experienced or prestigious lawyers to enter the judiciary as salaries were low compared to what lawyers in private practice could expect to earn, particularly in the lower echelons (Hilbink 2007, p.34). Also, judges had to enter the judiciary at the bottom rung, involving long periods of adaptation, normally in remote and unattractive places (Vargas 2007). As a consequence, candidates for the judiciary normally did not have previous working experience to complement their legal formation

(Correa 1989). Meanwhile their professional motivation was probably not linked to the level of salaries or prestige, but to the security of tenure and the expectations of moving up in the hierarchy by following a strict career pattern (Hilbink 2007, p.34).

The importance of undergraduate legal education for the judicial culture was critical, considering that it was until 1995 the main, if not the only, element that shaped the legal background of new appointees to the Chilean judiciary. Legal education in Chile was traditionally delivered through the old exegetic method that emphasizes more memorization than critical reasoning (Baraona González 2010; Hilbink 2007, p.36). Besides, the dominant approach to the understanding of law traditionally can be defined as a distorted vision of legal positivism that reduces the role of judges to the mere mechanical application of rules, following a strict deductive logic and lacking any attention to legal principles and human rights (González 2003, p.4). As a consequence, judges entering the judiciary were not only young and inexperienced, but also badly equipped to exercise critical reasoning and had a very poor understanding of legal theory, particularly regarding contemporary trends in the field. They were also imbued with a vision that reduced the judicial role to that of a simple-minded bureaucrat, and expected to work for long time in remote places for low wages, having to climb the organizational ladder to enhance their position. Such a judicial profile was compatible with the corporatist nature of the Chilean judicial institution noted by several scholars (Atria 2007; Couso & Hilbink 2011; González 2003; Hilbink 2007; Vargas 2007; Zapata 2008). Indeed, the elements that influenced the attributes and status of judges, that is, permanency in office and habitualization, self-recruitment patterns, and the poor professional and academic profiles of candidates to judicial posts, all suggest a process in which individuals were likely to be absorbed by the strongly hierarchical, isolated, and closed nature of the organization.

The Judicial Academy not only changed the recruitment pattern but also modified the training alternatives for judges. The informal adaptation process to which judges were traditionally subject was complemented by formal training in this new institution, which, besides providing initial training for candidates for judicial posts, is also in charge of continuing judicial education. For initial training and continuing education, the Academy employs academics from various universities, while qualified judges are normally called to participate in the academic teams designed for each activity (Academia Judicial 2012a; Academia Judicial 2012b). Such involvement of external academics has fostered a new kind of relationship between judges and the academic world. Apparently, academics now constitute a new reference group for judges, and consequently the inward-looking pattern according to which higher judges were the only reference for the rest of the judiciary, might have been disrupted to a certain extent. Evidently, the Judicial Academy offers a

new socialization space for judges that is not strictly judicial, but is also a link to the academic world, an environment to which judges seem to be increasingly responsive. This point can be illustrated by the opinion of judge Francisca Zapata (2011) when participating in an academic debate about the organization of the judiciary. Responding to Professor Héctor Hernández, who previously claimed that academic commentary concerning judicial decisions did not have an effect on judges, argued that, on the contrary, now judges feel ashamed when their decisions are a matter of grave academic critique, meaning that they currently care about the academic perspective on their work (p.115).

As a socialization mechanism, the Judicial Academy also enables judges to develop links between themselves. In fact, judges have courses and academic programmes where they can meet colleagues and discuss their jobs in a relaxed environment. Furthermore, judges have also been part of academic teams in this context and maybe this has facilitated the spread of alternative visions of the judicial work coming from within the institution. For example, some prominent members of the *Jurisdicción y Democracia* movement[7] are usually involved as tutors on courses, while historical leaders within the judiciary have been able to express their particular views on judging. Emblematic is the case of Judge Carlos Cerda, once almost dismissed from the judiciary and afterwards becoming an influential figure among young judges[8], and who permanently acts as a tutor for the Judicial Academy.

2.2 The Hierarchical Ordering of Judges

The second dimension in the structure of judicial authority according to Damaska (1986) concerns the kind of relationship between judges within the organization. In this regard, the Chilean judiciary has been traditionally representative of the hierarchical ideal model, characterized by a strict ordering of officials in which: "professionals are stratified in a chain of subordination […] and thus are under pressure toward unity and obedience" (p.21). Furthermore, organizational roles and levels of income and prestige were traditionally determined by a hierarchy of ranks that created great incentives to move up the career ladder based on seniority and merit, the latter being determined with discretion by superiors following a common pattern for bureaucratic judiciaries (Guarnieri et al.

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7 *Jurisdicción y Democracia* is an organization formed mainly by young judges trained by the Judicial Academy with a strong remit for institutional change and politically charged discourse. See www.jurisdiccionydemocracia.cl

8 The Jurisdicción y Democracia movement organized a tribute to Judge Cerda in 2006 remembering his role during the dictatorship. See http://jurisdiccionydemocracia.cl/hitos-relevantes/

2002, p.66).

2.2.1 *The Power of the Hierarchy*

During the 20th century, the Chilean judiciary was characterized as a unitary system in which the courts were part of a single structure and the Supreme Court exercised great power to control all aspects of judicial life. On the one hand, the judiciary was structured as a three-layer system in which almost every decision of the lower courts was open to revision by superior courts, the Supreme Court being the third stage in the process of judicial decision-making. On the other hand, the Supreme Court also had wide powers in terms of disciplinary attributions, administrative control, judicial performance appraisal, and promotion of judges (Vargas 2007). The system was governed by a "centripetal dynamic" (Guarnieri et al. 2002, p.81) characterized by strong decision-making at the top of the judicial pyramid and weak at the bottom, enforced by direct and indirect control over lower courts as a way of ensuring obedience and consistency. Almost every decision taken by lower judges in the course of the long inquisitorial processes was subject to revision by the same superiors that would appraise their performance and decide their promotions or disciplinary issues. Moreover, these attributions were normally exercised extensively and with discretion (Vargas 2007, p.111). For example, the performance appraisal mechanism used for the promotion and dismissal of judges was traditionally based on a yearly process of evaluation in which judges of the superior courts had to assess the performance of every single judge within their jurisdiction by rating them under very vague and general criteria, that is, efficiency, zeal, and morality; and without justifying their decisions by any means (Hilbink 2007, p.35).

This very hierarchical system provided weak guarantees of judicial independence, particularly in its internal aspect, consonant with the tendency among bureaucratic judiciaries (Guarnieri et al. 2002, p.67). History shows that anyone failing to abide by the ruling of their superiors would face personal consequences in the Chilean judiciary, as the cases of some prominent judges who challenged the Supreme Court during the military dictatorship attest. Hilbink (2007) explains in detail the way in which various judges were severely sanctioned during that period. Judge Sergio Dunlop for instance, was pushed to resign for being mildly critical of retirement arrangements. Once he left declared that only those who remained silent would find their way to the top of the hierarchy (p.170). In turn, judge René García was remarkably brave when investigating the crimes of security forces against left-wing militants, managing to indict eight CNI agents[9]. When

[9] CNI was the intelligence agency of the military during the dictatorship, and was responsible for some of the worst crimes of the period, including torture, kidnapping, and murder.

requested by the military courts to transfer the cases to them, he declined, stating that such a decision would entail impunity. For being disrespectful to military courts, García was formally sanctioned and afterwards, when declaring to the Spanish press that in Chile torture was a common practice, he was again sanctioned, this time suspended from office for getting *involved in politics*. Other judges, such as Germán Hermosilla, were also sanctioned because of this episode for having expressed solidarity to García (p.172).

The previous cases may seem anecdotal and indeed constitute just a few among many situations faced by judges, particularly during the dictatorship, but they reflect the way in which the Supreme Court exercised its attributions to control lower judges, following a pattern established long before but reinforced during those difficult years (Hilbink 2007, p.173). This pattern of top-down control was not limited to some emblematic cases or judges, but constituted the general dynamic within the institution, beyond the use of disciplinary measures and yearly performance evaluations. Indeed, it was also a common practice for superiors to give specific orders to judges on how to decide a case (Vargas & Duce 2000, p.3), facilitated by the tight surveillance system in place that allowed day-to-day control over most judicial work. The structure resembled that of Bentham's panopticon. Consequently, extreme measures such as suspensions or dismissals were not generally needed to enforce compliance, being limited to certain specific situations.

The case of Judge Cerda needs special attention, given its consequences for the evolution of the Chilean judiciary. In 1986 Cerda was a judge in the Santiago Appeals Court when he concluded an investigation of the disappearance of 13 communist leaders, indicting 32 members of the Army. At that point, he refused to apply the amnesty law self-issued by the dictatorship based on a new interpretation of the latter, pushing to continue the criminal process against the military officers involved. He was ordered by the Supreme Court to apply the amnesty law immediately, but again refused through a very shrewd piece of reasoning. The Supreme Court overturned the indictments, suspended Cerda for two months from office, and in the following annual process of performance appraisal ranked him in the lowest position. Only Cerda's begging for reconsideration saved him from dismissal (Hilbink 2007). Cerda's history was exceptional in the Chilean judiciary of the 1980s. He had pursued doctoral studies in France, was an academic in law and had published books and academic articles about the judicial role that could be considered counter-cultural in the Chilean judicial tradition. His profile and approach to judicial work were different to those promoted within the institution, demonstrating that, even in a highly hierarchical, monolithic, and oppressive institution such as Chile's at the time, there was space for alternative perspectives (Huneeus 2010). This fact is not merely anecdotal, as it can be inferred from the recent process of changes

in the organization, which cannot be attributed only to exogenous shocks or organizational reforms, but also to shifts in the approach to the judicial role inspired by views like Judge Cerda's.

Judge Cerda remained in his position at the Santiago Appeals Court for many years awaiting promotion. Following long political debates and negotiations, he was recently appointed as a member of the Supreme Court in 2014, after two previous nominations in the last decade, which were blocked by the right wing in Parliament. Despite political and legal considerations, there was a sense of injustice in not having one of the most experienced and influential judges in the country sitting in the highest court, as has been recognized by its president (Muñoz 2013). However, Cerda's recent appointment has not gone unnoticed in the public debate, generating an unusual discussion in the papers about his jurisprudence (see García 2014; García & Verdugo 2014; Matus 2014).

Following the Pinochet regime, the new democratic authorities attempted to introduce radical reforms to the organization of the judiciary. The debate about the role of the courts during the dictatorship fostered political initiatives oriented to modify the pattern of power distribution within the organization. During Patricio Aylwin's government (1990-1994), there were formal projects aimed at limiting the power of the Supreme Court through changes to its composition and through the creation of a Judicial Council, following a common trend among Southern European countries. These proposals elicited a strong response from the Supreme Court, using a discourse based upon judicial independence (Vargas & Duce 2000). In the end, the reform attempts did not thrive, since after the dictatorship, the right wing and even the military had strong veto powers in Parliament cannily envisaged by the Pinochet government (Valdivieso & Vargas 2002).

The political scenario required the *Concertación* governments to look for more subtle ways to introduce judicial reforms. Rather than focusing upon the structural configuration of the organization, different reforms were oriented to change the functioning of the judicial system (Vargas & Duce 2000) and to modernize the institution without altering its basic structure (Couso & Hilbink 2011, p.109). Therefore, while the hierarchy remained formally the same, a combination of elements contributed to weaken its character. Procedural changes, particularly in criminal justice, also wrought indirect effects upon the hierarchical organization. Indeed, the demand for hundreds of new judges to serve posts in the lower echelons of the judicial pyramid contributed to flatten the structure dramatically. The number of judges in lower courts increased from 376 in 1999 to 1,290 in 2007, whereas the increase in higher echelons was not significant (Vargas 2007, p.112). As a consequence, there are three times more judges than before in

lower courts, and promotion to higher courts has become much harder to achieve. This situation, and a substantial rise in salaries in lower echelons (see Vargas 2008), may have partially discouraged judges from seeking promotion as the only way to develop a professional career in the judiciary. Consequently, incentives to cater decisions to the perspective of superiors have clearly diminished (Couso & Hilbink 2011, p.109).

From a different perspective, procedural changes have been revolutionary. Basically, procedures changed from being based in long written inquisitorial proceedings to concentrated hearings according to adversarial principles. As a feature of these new procedures, the number of decisions of lower judges that are subject to appeal has diminished, limiting the extent of control exercised over judges' work, while the dynamics of oral proceedings has also contributed to such an effect, changing the surveillance structure previously in place and weakening the strong hierarchical relationship between judges from different echelons.

As regards discipline attributions and performance appraisal, the Supreme Court and the higher courts generally have retained their formal powers. However, in the last 20 years there has been an evolution oriented to achieve more objectivity and fairness through the standardization of procedures. For instance, before the 1990s reforms, judges were only informed of the outcome of the process of assessment in a very general way. Such a system did not allow them to know the specific areas being assessed, the reasons that justified an outcome, and the specific intervention of each superior judge in the process. Legal statute 19.390 was introduced in 1995 to modify the performance assessment system, without changing its basis. Accordingly, the intervention of superior judges in the process was specifically regulated along with the assessment criteria, while, as a transparency mechanism, the decision adopted by each superior judge had to be specifically justified. Despite the fact that these reforms reveal a well-intentioned approach to performance appraisal, the general opinion is that the system did not achieve good results. Lack of transparency was seen as a failure, while technically the system did not provide reliable results to distinguish good and bad performance. For example, it is widely known that superior judges did not really adopt the practice of justifying their performance assessment decisions. In fact, the new legal requirement began to be avoided by superior judges using pre-established sets of generic and meaningless phrases rather than proper arguments (Vargas & Duce 2000). In 2007 the Supreme Court complemented the legal regulations on performance appraisal, through *autoacordado*[10] 181-2007. The Court introduced new procedural measures aimed at the enforcement of

[10] *Autoacordado* is the name given in Chile to general instructions issued by superior courts to complement legal regulations in different issues, including legal proceedings, administrative matters, and disciplinary procedures among others.

transparency and effectiveness of the system. However, the output of the assessment mechanism has remained the same, being technically deficient and unreliable (Zapata 2008, p.257).

In the area of judicial discipline, the discretionary system exercised by superior judges based upon general legal regulations has been progressively changing in a still timid attempt to introduce objectivity into the system. In 2007 a new *autoacordado,* 129-2007, was issued to regulate the functioning of the system, according to which superior courts were able to apply punishments for judicial misconduct in quite a discretionary way. A procedure was regulated, enabling the exercise of defence, while the ideas and objections of judicial associations were also incorporated in a second *autoacordado,* 168-2007. In the same year, judicial ethics were also a matter of new regulation by the Supreme Court through *autoacordado* 262-2007, modifying previous regulations on the issue and limiting in particular the scope of the Ethics Commission of the Supreme Court created in 2003, which also had wide attributions to investigate the conduct of judges in obscure ways (Zapata 2008). All these reforms have been introduced by the Supreme Court as a way of regulating its own attributions and consequently can be interpreted as self-limiting. As such, the series of changes show a certain concern in the Court about the discretion that has governed the exercise of attributions in these areas. However, the results of the process are still matter of debate, basically because the reforms do not change the paradigms of the system but only the functioning of it, mostly guided by good will and not by technical criteria (see Zapata 2008).

Besides the traditional scheme of performance appraisal and its modifications, in 1998 a limited mechanism of performance-related pay was also introduced in the judiciary to benefit judges who were among the best 75% in the performance appraisal ranking, and were also part of the courts that had accomplished pre-defined performance targets (see Vargas 2008). The system was modified in 2007 by statute 20.224 as part of a general attempt by the government to introduce new management mechanisms in the public sector. Regarding the courts, the new system created a complex scheme introducing collective performance targets that each court needs to accomplish. The targets are worked out each year by a commission formed by a member of the Supreme Court, a representative of the Ministry of Justice, and two members of the judicial association, *Asociación de Magistrados*, elected by their peers, contributing to relax the prevalent top-down control pattern. A substantial economic reward is granted to all members of the courts that each year accomplish their targets, which consist mainly in quantitatively measurable aspects e.g. timeliness. Generally speaking, most of the courts accomplish these targets every year, demonstrating that they are not very demanding. In fact, in 2008 the level of accomplishment for the whole system was equivalent to 98%

(Arenas & Berner 2010, p.59), revealing that either the judiciary has an almost impeccable performance, or the assessment mechanism is either too limited or flawed.

In recent years, the Supreme Court has launched a new initiative to appraise the performance of judges and courts. It is called *Quality of Justice Indicator*, which aims to measure performance according to a comprehensive list of indicators, covering eight areas, including aspects such as transparency, efficiency, and access to courts, among other dimensions, which are measured quantitatively. Certain aspects, such as the quality of judicial sentences, are also measured using qualitative surveys, mainly applied to users of the justice system. The mechanism has been developed by a special unit of the administrative office of the judiciary, under the supervision of the Supreme Court, and seeks to provide a measurement of the key areas of judicial performance on a yearly basis, in order to compare the evolution of the quality of the work of courts (see Departamento de Desarrollo Institucional 2012; Muñoz 2012). Whilst the proposed assessment of judicial quality is mainly quantitative, some sensitive areas of judicial work, such as judicial argumentation, are also assessed using qualitative surveys in an attempt to cover not just the managerial aspects of the functioning of courts. In fact, the extensive size of the samples used, the large and comprehensive list of indicators, and the aim to use the system as a permanent quality-monitoring tool, all speak of a sophisticated approach to the assessment of judicial work. In turn, the use of different sources of information that do not depend upon superior judges contributes to introduce objectivity to the system and to slightly modify the traditional top-down approach based upon hierarchically oriented assessments of performance.

As the features of the hierarchical organization have progressively weakened, guarantees of individual independence have in fact strengthened, despite the vociferous discourse among groups of judges claiming greater autonomy (Vargas 2007, p.113). Such a phenomenon is reflected particularly by the emergence of new voices within the judiciary calling for changes in the organization and challenging the traditional attitudinal paradigms of the institution. The *Jurisdicción y Democracia* movement, J&D, was born informally in 2004, gathering a few young graduates of the Judicial Academy, most of them holding posts in the new criminal courts. The movement emerged from critical reflection about the organization of the judiciary, aiming for structural changes to preserve internal independence, and a new approach to the judicial role, basically with regard to individual rights protection and constitutional supremacy. Since 2004 the movement has grown steadily, being composed of around 175 judges from different jurisdictions (Jurisdicción & Democracia 2012). Moreover, it has managed to attract support from non-members, as the results of the 2012 elections to the *Asociación*

Nacional de Magistrados[11] *revealed.* Indeed, J&D participated actively in the process using a strong discourse of change, obtaining 45% of the votes and consequently electing four out of nine nominees to the board of the organization (El Mostrador 2012). In the following 2014 election process, J&D increased its support, electing five out of nine nominees, including the new president of the Association, Álvaro Flores, a judge from the labour courts with a reputation as a straightforward and polemic debater who participated in the first formation programme of the Judicial Academy (CNN Chile 2014).

Couso and Hilbink (2011) have described the new scenario as a paradigmatic, but still limited, shift towards a rights-based jurisprudence within the judiciary, since changes in rights adjudication are visible only regarding certain topics, basically the military-era human rights abuses and within the restricted sphere of action of young judges in lower courts. As a consequence, these authors are sceptical about the possibilities of a *revolution* forged by a minority from below, despite the notoriety of the new approach to the judicial role shown by this: "small group […] trained in the new paradigm and freed […] from the Supreme Court's top-down command" (ibid. p.116). However, judging by the results of the elections at the *Asociación de Magistrados,* this group can no longer be considered small, while its influence on the direction of the judicial debate is proving to be increasingly relevant. In fact, against the views of Couso and Hilbink (2011), there are visible changes prompted by the increasing awareness about the importance of internal independence, and not only among lower judges. It is now common to see senior judges demonstrate concern about this principle and committing to its protection (e.g. Dolmetsch 2009). To an extent, the process of evolution has been fostered by the persistent discourse of J&D members, inside and also outside the judiciary, claiming for the protection of internal judicial independence.

The evolution of J&D is itself a proof of the enhancement of guarantees of judicial independence within the institution. Indeed, despite some specific situations in which the superior courts have used their disciplinary attributions quite erratically to shape judicial behaviour and performance in the last years (see Zapata 2008), it is also clear that the current situation is completely different to that experienced historically by judges. Indeed, in recent years the Supreme Court has regulated its own attributions, while its performance seems consistent with such evolution towards self-restraint on disciplinary matters and top-down control. Such process at the top of the organization has occurred in parallel to the significant disruption of behavioural paradigms of the Chilean judiciary by judges grouped in J&D, as Couso and Hilbink (2011) acknowledged:

11 Founded in 1968 as a social, cultural and mutual benefit institution to which most of the Chilean judges are members, the *Asociación Nacional de Magistrados* is the traditional social organization of Chilean judges. See www.magistradosdechile.cl.

actively pushing for a rights-based jurisprudence, instead of a purely legalistic approach to adjudication; challenging the legitimacy of military jurisdiction; publicly debating politicians who seek to limit due process guarantees; exposing and demanding action to correct inhuman conditions in prisons; filing constitutional challenges to laws that in their view contravene constitutional principles; hosting public conferences; writing in newspapers and magazines, and appearing on television news coverage (p.116). Furthermore, these young judges have repeatedly criticized superior courts, claiming more individual independence, as Judge Francisca Zapata did through the press in 2007 in defence of a judge sanctioned by the Supreme Court (Molina 2007). Undoubtedly, J&D has played a role in the internal debate, which has been consistent with changes observed more generally, and also with the increased awareness about judicial independence in the judiciary as a whole.

Despite the lack of structural reforms, the Supreme Court has allowed a wider field of action to lower court judges, acknowledging the value of internal independence up to a certain extent. In fact, Professor Vargas (2007, 2011), a specialist in judicial studies, has expressed his concern, claiming that the Supreme Court has almost abandoned its control attributions. The envisioned problem is that, today, those judges who do not perform according to minimum quality standards face no consequences and do not feel the necessity to improve their working practices (Duce 2011, pp.196–197).

2.2.2 *The Effects of Hierarchy upon Institutional Consistency*

In spite of the weakness of internal judicial independence, the traditional hierarchical ordering achieved institutional consistency, promoting coherent judicial attitudes and performance in a way that could be regarded as positive (Vargas 2007, p.111). However, such consistency was based upon pressure for unity from the top of the hierarchy and relied upon a very poor understanding of the judicial role. Indeed, it reflected what Atria (2007) calls a *commissarial* approach, according to which lower judges are seen as delegates of their superiors just as civil servants are delegates of the Executive power. As a consequence, judges were not in a position to adjudicate following legal criteria or legally reasoned arguments alone. On the contrary, their decisions tended to reflect the will of superior judges, corporate interests, or the aim of improving their personal positions in the organizational structure. High levels of hierarchical pressure such as those observed traditionally in Chile tend to hamper initiative and exert a repressive influence on creative minds (Olsen 2006, p.11), making it difficult to achieve consistency on legitimate grounds, forcing judges to slavishly apply general rules according to the criteria fixed by superiors, and discouraging them from developing any form of institutional dialogue about the interpretation of the law. Hence the

individualistic processes that constitute the source of judicial legitimacy (Fiss 1983, p.1443) were severely corroded by this strong hierarchical organization through pressure towards unity.

Chilean judges traditionally resembled the image of the bureaucrat governed by rules that prohibit taking into account individual circumstances. As a consequence, historically, the common pathologies of bureaucracies (Fiss 1983) were clearly visible in the Chilean judicial institution, where a strong hierarchy and the corporatist outlook incentivized excessively rigid behaviour, discouraging individuality, creativity, and innovation (Vargas 2007, p.111). Moreover, the institutional pathology identified by Hannah Arendt regarding the moral character of bureaucrats and the corrosive effect of the organization on individual responsibility (Fiss 1983) was also visible, particularly during the dictatorship when judges did not control human rights violations, relying upon the technical and limited sphere of their office to reject thousands of habeas corpus writs, based on a restricted sense of individual responsibility for human rights protection, reflected in formalistic and indolent decisions (Comisión Nacional de Verdad y Reconciliación 1991; Fernández 2010; Huneeus 2010).

As a result of the process of institutional evolution, in the last 20 years the hierarchical structure has partially lost its traditional power as an organizational device, consequently, as Vargas (2007, p.113; 2011, pp.196–197) claims, there has been also a tendency to lose coherence in judicial behaviour. Indeed, while many judges remain tied to the old formalistic and discrete attitudinal paradigms, others have assumed a more activist behaviour expressed in many areas, including philosophical perspectives, legal reasoning, judicial opinion styles, relations with the press, lawyers, public opinion, academics, and the political world. In the faulty coercive Chilean judicial scenario described by Vargas (2011), the organizational structure might be losing its capacity to guide judicial performance and foster coherence among conflicting approaches to the judicial role that have emerged. At the same time, other mechanisms such as the new training structure that played a crucial role in allowing the emergence of alternative perspectives to judicial work, might also be failing to promote coherence in the way judges face their tasks (Vargas 2011a).

Whilst diversity should normally be welcomed as a positive value in organizations, a certain level of coherence in judicial attitudes and working practices is also needed to sustain legitimacy and efficiency. The lack of coherence in the Chilean case could be explained by the multiple and eventually discordant forces driving institutional evolution, the resulting absence of clear leadership towards change; and by the traditionally simplistic approach to law that has characterized not just the judiciary, but the whole legal culture. The sources of such superficiality have not changed. Despite

few exceptional initiatives, legal education is still based mainly upon memorization rather than critical analysis (Baraona González 2010; Coloma 2006; González 2003), while the legacy of the old exegetical school is still present, particularly in the judiciary. As Couso and Hilbink (2011) argue, despite procedural and institutional reforms that changed traditional paradigms, such as the emblematic reform in criminal justice towards individual rights protection, most of the judges: "remain unequipped and/or disinclined to develop a rights-based jurisprudence" (p.117).

On the other hand, new legal philosophies that inspire new attitudes do not necessarily reflect a generalized sophistication of the legal debate or a cultural turn to critical thinking, despite some remarkable exceptions, and in some cases could be the result of the uncritical adoption of new fashionable ideas. Some scholars have noticed signs of this situation in the judicial scenario. One of them, Juan Enrique Vargas, has claimed that there is a tendency among judges in the new criminal jurisdiction to apply mechanistically the recently introduced rights-protecting statutes, calling this phenomenon *hipergarantismo* (cited in Díaz & Duarte 2012). In other words, here is manifest the same historically short-sighted approach to the application of the law, but in the hands of new judges and in the context of a new and sophisticated procedure. Likewise, Couso (2011) claims that the reinforcement of judicial skills and basic knowledge around the following key areas is urgently needed: legal interpretation, an essential topic for judges that in Chile is almost neglected; judicial values such as independence, impartiality and loyalty to the law issued by Parliament, and critical thinking; implying that judges are insufficiently equipped to exercise their role in a context of greater autonomy.

2.3. Technical Decision-Making

The third dimension of the organization of judicial authority in Damaska's (1986) framework concerns the way in which judges approach decision-making, either based upon technical standards or general community norms (p.16). This category is required to understand the position of the judiciary in the broader political system. In Chile a logical-legalistic approach was dominant until the 1990s, consonant with the hierarchical ideal model, since judges were expected to decide according to a somewhat mechanical process of relating facts to norms, with no space for pragmatic distinctions based upon the particularities of each case. Such a method disregards the consequences of decisions, while its rationale is constituted by the idea of standardized justice, according to which legal standards must be applied, even if they generate negative results in a particular case.

This orientation is based upon a certain approach to legal positivism that has been prevalent in Chile since independence, assuming judges that their role should be passive and mechanical, involving the application of the letter of the law without any concern for the outcomes of their decisions or the preservation of the principles of the system (Hilbink 2007, pp.31–32). The origin of such an approach can be tracked back to Montesquieu's *De l'esprit des lois,* but according to a very basic understanding. Indeed, even Montesquieu's classic text opens space to some reasoned flexibility in the application of the law, despite the powerful image of judges as *bouche de la loi* offered by Montesquieu (Atria 2004). Furthermore, it is clear that modern positivism can be better portrayed according to the idea of *pragmatic legalism* explained by Damaska (1986, p.22) by which judges are expected to exercise their role technically, not mechanically, relying upon judicial skills to make subtle distinctions regarding the applicability of legal statutes in each case.

Chilean legal culture has failed to develop a serious debate on these issues, relying heavily and uncritically upon the influence of the French exegetical school during the 19th century and a rather simplistic understanding of Kelsen's legal positivism in the 20th century (Baraona González 2010). As a result, the role of judges has generally been seen in those terms, which were compatible with the hierarchical structure of the judiciary. Obviously, a mechanical idea of adjudication based upon rigid, non-creative, and thoughtless adherence to the letter of the law is functional to the strict hierarchical ordering of the organization, as it facilitates control from the top, where: "dominant views are formed […] to percolate down to lower officials (Damaška 1986, p.23). Furthermore, the fictitious and comprehensive idea of statutory law as an almost unique source of law and the dubious assumption of judicial neutrality promoted by this approach may have rhetorical strength, but also veils the full set of motivations behind judicial decisions. In the Chilean case particularly, the conservative bias dominant in the judiciary (Hilbink 2007) remained hidden behind the logical-legalistic approach to decision-making.

In the context of institutional evolution, it is not clear what paradigm currently guides Chilean judges regarding decision-making. The rather technical, logical-legalistic method traditionally prevalent is still present in the institution and is consequently seen by some scholars as an obsolete method to overcome (Baraona González 2010, pp.357–359), while even scholars within the positivistic tradition acknowledge the necessity of judges to adopt a non-mechanistic method to the application of the law (Atria 2004). On the other hand, it is also obvious that this passive, deferential, and parochial mode of adjudication has been disrupted by groups of judges, mainly in the lower echelons, who are pushing for a rights-oriented jurisprudence based upon the application of constitutional principles, backed by the relevant procedural reforms that enable them to

perform a new role and also by new ideologies that the legal culture as a whole has discovered in recent years (Couso & Hilbink 2011, pp.115–116). However, the paradigmatic but yet limited shift in decision-making is far from being wholly consistent as noted by Vargas (cited in Díaz & Duarte 2012; 2007), who has pointed to evidence of a mechanistic application of the new rights-protection legal statutes and to groups of judges claiming absolute autonomy to apply the law according to their personal conceptions, both aspects revealing a certain superficiality in the way the judicial role is exercised.

2.3.1. *Judicial Styles of Opinion*

As a consequence of the prevalent decision-making logic, judicial decisions in Chile were historically inspired by the old French tradition of presenting relatively bare-bones statements of law, facts, and reasoning, and generally laconic opinions as a way to project authority. Such a tradition reinforces the image of judges who do very little in the process of making law and whose main concern is to enforce statutory law. This approach to decision-making was dominant in France after the Revolution and during the 19th century, when it spread its influence over the Latin world. However, the French system soon adapted to indirectly acknowledge the creative role of judges in the evolution of the law, basically through informal institutions such as the *Rapports* and *Conclusions*, alongside the role played by academic commentary (Popkin 2007). Such evolution did not influence a Chilean judicial culture that remained attached to the tradition of formalistic judicial opinion. Therefore, judicial sentences were often written and presented to the public using technical and obscure language to expose the facts of the case, poor arguments, and a decision supposedly based upon the law and nothing else. As Vargas (2007) claims, during the 20th century the Chilean judiciary had not developed argumentative capacities, because justification of judicial decisions was simply not needed, either within the institution or to the public.

In recent years the evolution of judicial behaviour in Chile has become visible through new judicial opinion styles. While the tradition based upon laconic expression, poor arguments, and the use of a discrete institutional voice is still dominant, even in the newly implemented courts (Accatino Scagliotti 2006) it is also clear that many judges use rather novel styles to justify their decisions. For example, recently the press highlighted the style of Judge Luis Avilés, a prominent member of J&D, known for being straightforward and confrontational, as reflected in newspaper headlines referring to a case of high public interest in which Avilés publicly reprehended the prosecutors for using unacceptable arguments and relying upon some sort of *cheap sociology* to make their points (Labrín 2011). Another remarkable example of a rather personal style of

argumentation can be seen in a decision made by Judge Fernando Guzmán (Guzmán 2008), another member of J&D*,* who described his personal experience, feelings, and the evolution of his own thoughts about a certain issue, regretting his previous approach to the matter and publicly stated that he was wrong in the past to justify a very well-reasoned decision in the opposite direction.

2.3.2. *Judicial Creativity and Political Autonomy*

The typology of judicial roles proposed by Guarnieri and Pederzoli (2002) might be useful to assess the Chilean judges' approach to their work. Based upon the degrees of judicial creativity and political autonomy judges can be classified according to the following four types: executor; delegate; guardian, and political (p.70), as a way of understanding their role in the wider political context. In Chile, judges were generally expected -and incentivized by the institution- to defer to legislatures and political authorities, while at the same time creativity in the application of the law was not valued as positive, adherence to the letter of the law being a core value of the system. The *Corte Suprema*[12] (1991) made this clear when responding to the accusations against it contained in the report on human rights violations during the dictatorship delivered by the Rettig Comission[13], claiming that judges were supposed only to apply the law, not to create it, while the only way to determine the content of the law should be to follow its literal meaning. A different judicial attitude should be condemned as treason to the core of the judicial mission, according to which judges should behave as instruments of the law (pp.242–243).

The Supreme Court's statement is self-explanatory: The role of judges was the result of a combination of low political autonomy and low judicial creativity. Consequently, in the Chilean case, judges played a role as executors of law formulated by political authorities. Such a conception has many weaknesses, including its lack of realism about the way in which judges truly behave, while from a political point of view it does not reflect the contemporary relationship between courts and politics (Guarnieri et al. 2002, pp.70–71).

In recent years the category of executor judges, based upon low creativity and low political autonomy, has partially lost its prevalence in Chile, despite the fact that perhaps the majority of judges can still be described as uncreative and deferential to political authority. It seems that the system has not provided clear rules, guidance, or strong leadership to develop a consistent approach to the judicial role in the actual

12 Supreme Court of Chile

13 The Rettig Comission was formed during the government of Patricio Aylwin to gather information about human rights violations during the Pinochet dictatorship. It criticized strongly the role played by the judiciary during the military period.

context. Consequently, as there are still many executor-type judges, there are many others performing according to the pattern of the guardian-type, i.e. focused upon the protection of individual rights against the abuses of the political branches; or even the political-type, as Vargas (2007, p.113) claims, characterizing the latter according to high levels of creativity and political autonomy.

3. The Sources of Institutional Change in the Chilean Judiciary

Judicial apoliticism was historically the hegemonic self-understanding in the Chilean judiciary (Hilbink 2007). However, such an approach was constructed against alternative conceptions of the judicial role. In other words, even in monolithic hierarchical system such as the Chilean, there was not a single, coherent judicial view about law and judging (Huneeus 2010). Indeed, the dismissal of judges after the 1973 military coup (Vargas & Duce 2000), and particularly the role assumed by certain individual judges during the dictatorship, reveals that even in the most difficult periods there were alternative approaches to the judicial role. I have mentioned the case of Judge Cerda, who challenged the deferential paradigm by exercising control over abuses committed by agents of the state. He also made his approach explicit, developing a strong critique of the Chilean judiciary self-conception from a legal theory point of view, calling for a new attitude among judges, criticizing the legalistic and standardized justice approach prevalent in the institution (Cerda 1992). Such an understanding, marginalized during the dictatorship, would be more influential after the debate fostered by the Rettig Commission and the corporatist defence presented by the Supreme Court, when the legal community began to look at its practices and legal culture against a backdrop of massive human rights violations to which courts remained mostly passive and silent[14]. However, the role assumed by Cerda and other judges during the dictatorship and after did not have an immediate effect upon the institution. Despite the debate in Chile about the role of courts and initial attempts to modify the structure of the judiciary, Supreme Court judges appointed by Pinochet still exercised strict control over the organization.

Traditional approaches to institutional change point to exogenous shocks and environmental changes as the main sources of reform (see Mahoney & Thelen 2010). Whilst both elements are clearly visible in the Chilean experience, neither of them explains by itself the sources of institutional change. Indeed, return to democracy

14 The context of the debate would not allow conceptual sophistication in terms of the theoretical implications of each legal approach to the judicial role. A democratic and positivistic defence of formalism has been presented by leading Chilean scholar Fernando Atria. For his detailed opinion of the debate originated by the Rettig Commission report, see Atria, 2003.

following the Pinochet years entailed both an exogenous shock and a tremendous environmental change that, nevertheless, did not significantly modify institutional patterns. The judiciary remained for several years strongly hierarchical, conservative, and reluctant to engage in politically charged issues or to consistently protect individual rights (Couso & Hilbink 2011; Huneeus 2010). The detention of Pinochet in London in 1998 also qualifies as a strong exogenous shock, which activated investigations on human rights violations that had previously been paralysed, resulting in several high-ranking military officers going to prison. However, as Huneeus (2010) argues, in spite of the new attitude to human rights abuses committed in the military era, courts remained reluctant to change their traditional approach, consequently they did not generally adopt another approach to the judicial role, actually neglecting protection of individual rights in many areas that were not related to the specific topic of human rights violations. Huneeus (2010) concludes that the Pinochet episode allowed an opening for some "bounded activism" (p.129) exercised by specific judges who held alternative views.

Another element to consider is the adoption of fresh paradigms in the 1990's, concerning human rights and constitutional law. A neo-constitutionalist doctrine blending the theories of Dworkin, Alexy, and Ferrajoli, emphasizing the role of principles in constitutional adjudication, and envisioning a more activist role for judges displaced the traditionally prevalent Kelsenian approach (Couso & Hilbink 2011, p.106). However, neither the general neo-constitutionalist turn nor the counter-hegemonic actions regarding human rights cases were sufficient to modify the main features of the judicial institution. On the one hand, the ideological change in legal culture counted as an environmental change, and the Chilean judiciary survived many such changes during the 20th century without altering its institutional configuration. On the other hand, the fact that the logic used for human rights cases was not projected onto other areas proves that the mere visibility of alternative views about the judicial role would not change the institution.

According to Thelen (1999), understanding institutional change requires identifying patterns of institutional reproduction. Consequently, when such reproduction patterns are altered, it is likely that a process of institutional change may begin to develop. In the Chilean case, the stability of the judiciary was based upon a corporatist outlook that isolated the institution from social concerns, and strong hierarchical control from the top to enforce performance under an apolitical ideology and hidden conservatism, as Hilbink (2007) observes. Such mechanisms encapsulated and froze the understanding of the judicial role, acting as institutional reproduction devices. By the mid 1990s, the introduction of the Judicial Academy disrupted the corporatist feature to a certain extent regarding recruitment, training, and the background of judges, allowing alternative views within the institution to influence judicial training, while analogous

influences were introduced from the outside by academics infused in new legal paradigms. Procedural reforms and modernization measures such as the increase in judges' salaries also helped to disrupt the hierarchical component significantly enough to allow evolution to begin. Since then, the process has developed gradually and endogenously, differing with dominant explanations about institutional change (Mahoney & Thelen 2010).

The weakening of the hierarchical structure has led to a decrease in levels of regulation and coercion. Clearly, procedural reforms have lent greater discretion to judges. As an example, the new criminal justice procedure has a de-formalized structure based upon adversarial hearings regulated only in their general aspects, unlike the old regulations[15]. The same principle is applicable to evidence law, which was previously regulated in great detail, aiming to control even the internal rational processes of judging. New regulations impose the general requirement of assessing evidence according to the rules of logic and experiential principles, being stricter in argumentation requirements, which are not regularly fulfilled, owing to the difficulties involved in changing old practices (Accatino Scagliotti 2006, pp.15–18). More noticeable is the process of de-regulation of judicial activity regarding the old practice among superior judges of issuing specific instructions to lower judges, which are no longer visible. By contrast, following Vargas (see Duce 2011), what we see these days is the abandonment of old control attributions, which are not being replaced by other mechanisms. As a consequence, superior courts, including the Supreme Court, are losing their traditional leadership, as coercive mechanisms are being left behind, while more sophisticated guidance features have not been developed. For instance, the Supreme Court has failed to produce unifying precedents that might be used as clear and legitimate guidance for the rest of the judiciary (Couso, 2007).

4. Taking Stock

It is clear that the Chilean judiciary is undergoing a process of change in relation to the categories highlighted by Damaska (1986) to differentiate ideal models of judicial organization. Historically, the institution was organized as a bureaucracy composed of permanent officials recruited following an institutional co-optation pattern by the judiciary itself and mainly trained informally within the institution through long periods of adaptation. Previous professional experience was unusual, while studies were normally

15 See the *Código Procesal Penal,* the Criminal Justice Procedural Code of Chile.

limited to the experience at law school, a legal education shaped by a positivistic culture that did not foster critical thinking. Hierarchy was the main organizational device, based upon the concentration of attributions at the top, in terms of decision-making, discipline, and control. Formal and informal mechanisms were used to exercise pressure over lower judges, while following a career ladder within the institution was incentivized and heavily dependent upon compliance with institutional rules. Judges were only expected to execute the law, rather than participate in its creation or evolution, having also very little political autonomy to exercise their role, which was supposed to defer to political authorities. The judiciary as a bureaucratic organization also became autonomous in the sense that judges were both structurally and ideologically separated from politics, while judicial elites were empowered with extensive attributions that tended to discourage individuality and creativity among judges. Both aspects, political insulation and the strong hierarchical organization, fostered a corporatist outlook within the institution that consequently became inward-looking, superior judges being the main, if not the only, reference for lower judges. In such a context, the Supreme Court shaped the judicial culture, while alternative visions of the judicial role remained hidden. Until the 1990s, the Chilean judiciary relied upon the combination of an apolitical judicial ideology enforced through strong bureaucratic mechanisms, a corporatist outlook, and a simplistic approach to the judicial role based in the mechanistic formalization of judicial work. Judges were incentivized to defer to political authorities in a context that also fostered conservative bias. The judicial role was generally exercised in a limited way as judges were mostly seen as mere executors of the law, normally working under pressure from superiors who systematically discouraged creativity, innovation, and individual independence.

The historical configuration of the Chilean judiciary clearly reflected the hierarchical ideal model explained by Damaska (1986) and the bureaucratic paradigm, as presented by Guarnieri and Pederzoli (2002). Indeed, the organization was formed by a permanent corps of officials, professionalized in quite rudimentary ways and following a single career pattern. Moreover, they were ordered according to a hierarchical structure based upon straightforward top-down control mechanisms, which in turn shaped the role of judges as a technical and rather simplistic approach to adjudication. There was also clear congruence between the organizational mechanisms that characterized the judiciary on the one hand, and the ideas, beliefs, and values that inspired the model on the other. As a result, the system achieved stability and consistency for a long period, at the cost of neglecting internal independence to enforce deference, conservatism, and a discreet attitude among judges, thus making the judiciary notably passive and irrelevant in the broader political context.

The return to democracy after Pinochet fostered a process of reform that was

initially oriented to modify the functioning of the institution and not the structure. Accordingly, the introduction of managerial measures such as salary increases, the implementation of major procedural reforms, the massive intake of new judges, and the creation of the Judicial Academy, in charge of formation and selection of nominees to judicial posts, as well as judicial training; all contributed to disrupt the reproduction mechanisms that kept the judiciary on its historically rooted institutional path of corporatism, strict hierarchical control, and apolitical ideology. Alternative internal views of the judicial role and changes in the external legal culture were canalized into the judiciary through new mechanisms for social interaction, exerting influence over an increasing number of judges. As a result, hierarchy partially lost its power as an organizational device, internal judicial independence strengthened and judges are now able to exercise their role with broader discretion and autonomy. On the other hand, consistency and coherence in judicial behaviour have diminished. Accordingly, many judges remain tied to the old paradigms that incentivized mediocrity, while others have assumed disparate attitudes regarding decision-making, political activism, legal creativity, judicial opinion styles, relations with the public, the judicial hierarchy, and the broader political realm. The obsolescence of the old institutional means of control has not led to new or more sophisticated mechanisms of achieving coherence and generally enhancing judicial work. Moreover, the instruments that fostered new judicial approaches, including the implementation of judicial training have not been able to overcome major deficiencies in the formation of judges that could be at the root of the institutional difficulties, that is, generally weak knowledge of legal theory, fuzzy institutional values, and lack of critical thinking.

We should bear in mind that the evolution of the Chilean judiciary is an on-going process rather than a stable institutional situation. However, it is clear that the process of gradual change began to develop when the implementation of measures and mechanisms such as the Judicial Academy and procedural reforms disrupted the traditional means of institutional reproduction, weakening the hierarchical component of the organization. Uncertainty regarding the traditional rules of the institution was introduced simultaneously, allowing alternative and previously hidden perspectives to emerge gradually from within the organization. External forces such as ideological changes in the broader legal scenario also found in the judicial reforms a way of penetrating the institution, making judges more responsive to the influence of academia and the legal culture. The opening up of institutional dynamics caused by these reforms fostered the emergence of new institutional agents who began to organize themselves and develop their own agendas for institutional development. In such a context, contested views of the judicial role and the judicial institution can be seen to be the trigger of an internal dispute

for power that is driving institutional evolution in directions that are not yet clear.

5. A Typological Approach to the Organization of the Judiciary of England and Wales

Rather than focusing upon the complexities of contingent institutional evolution, Damaska (1986) uses typologies to uncover the inherited structures and historical antecedents of judicial models of organization in the western world.. Explicitly, Damaska acknowledges that the coordinate ideal model is rooted in the English tradition, while the hierarchical type finds its origins in the Continental system of justice. Similarly, Guarnieri and Pederzoli's (2002) ideal-model typology distinguishes between the bureaucratic and the professional ideals. The former is based upon the basic features of Continental European judicial systems, while the latter represents the main elements of the models of judicial organization in the English-based systems. In this section the study of the English and Welsh judiciary focuses on the categories identified by both typologies. If the dimensions or variables outlined by these approaches indeed reflect the core of judicial organization, the analysis of changes should help to explain processes of reform and the eventual adoption of a new organizational model.

5.1. The Attributes of Judges

The coordinate and professional ideal models of judiciaries consist of an organization formed by untrained and transitory officials who are not subject to professionalization mechanisms such as training or routinization. They are recruited for a specific purpose and as a consequence, institutional thinking tends to be rudimentary. Therefore, verdicts, judgements, and other authoritative determinations tend to remain highly personal and are not representative of an agency independent of the individuals comprising it. In order to develop reliable memory in such a fragile institutional realm, a caste of professionals who assist lay officials is likely to emerge in order to maintain levels of tenuous continuity within the apparatus of authority (Damaška 1986, pp.24–25). Following a similar approach, Guarnieri and Pederzoli (2002) developed the professional ideal model, acknowledging the contemporary evolution of actual judicial systems based upon the coordinate ideal. Professional judiciaries also include judges with prior professional legal experience, mainly as advocates. As a consequence, the influence of judges tends to be sourced outside the judiciary, while no mechanisms foster the professionalization of these officials with lengthy legal experience (pp.65–68).

The elements described have been present in the configuration of the judiciary in England and Wales, with variations depending on the area of the judiciary. Therefore, the first relevant distinction to be made concerns the different kinds of judges that the judicial system of England and Wales has had. Broadly speaking, the following categories of judges have co-existed in the organization, despite their very different outlooks:

a) The Lord Chancellor and the Law Lords.

What these judges had in common was that they had formal judicial capacities while forming part of the executive and legislative, respectively. They were also the highest judicial authorities in the country. Before 2005, the Lord Chancellor was the Head of the judiciary and as such held governing powers. He could also sit as a judge, and was a member of the Cabinet. On the other hand, the Law Lords formed the highest Court of Appeal in the country, while at the same time they were members of Parliament, and were allowed to act in that capacity. The Lord Chancellorship was always a party political appointment, and the incumbent could be dismissed or persuaded to resign by the Prime Minister. As a political appointee, there was no requirement that the incumbent should have held any prior judicial office in order to take the position, as was the case of Lord Irvine (Slapper & Kelly 2006, pp.222–24). Regarding the Law Lords, the Prime Minister also decided their appointment by advising the Crown on the matter. However, appointees to the House of Lords had to have previous judicial experience and legal qualifications to hold a post historically reserved to high-level judges with lengthy experience.

The interlocking legal and political nature of these roles exerted mixed influences upon the incumbents, creating some degree of confusion in recent times. For example, it has been claimed that the Lord Chancellor was historically in charge of a department of the executive with poor management. The reason for this has been attributed to the dual roles that prevented lord chancellors from fully managing their department by assuming a straightforward executive role. (The Politics of Judicial Independence in Britain's Changing Constitution Project 2013). The same confusion was evident in the case of the Law Lords following the *Pinochet* case (House of Lords 1999). Indeed, Lord Hoffmann's links to Amnesty International were not seen as an obstacle to the exercise of the judicial function in such a case, at least initially. Perhaps trust in the judicial tradition of passivity and the declaratory approach to the law allowed these judges who were based in Parliament, to play dual roles, political in certain realms and judicial in other situations, as if both aspects could be separated and isolated.

These concerns led to the constitutional reforms of 2005 separating the judicial functions more clearly from the other branches of government. Despite changes, there

remains a belief that the mixed nature of the roles of the Lord Chancellor and the Law Lords enabled these judges, particularly the former, to play a pivotal role in coordinating the three arms of government, especially in times of high tension (Davis 2012, p.7), strengthening the interests of justice inside the Cabinet (Carnwath 2013, p.4), and protecting judicial independence, alongside the force of conventions and shared political convictions (Woodhouse 2007). It is clear that the legal and political roles of the Law Lords and the Lord Chancellor gradually became more distinct and separate. In fact, the Law Lords developed the practice of abstaining from taking part in political debates, while Lords Chancellors had limited to a minimum their judicial functions (Sumption 2010, p.34). However, the sudden decision by Tony Blair's government to implement a formal separation of powers changed the evolutionary pace by introducing radical reforms. The Constitutional Reform Act 2005 made changes in five areas: First, it explicitly required the Lord Chancellor to protect the rule of law and the principle of judicial independence. Second, it abolished the Lord Chancellor's vestigial judicial functions. Third, it transferred the powers and functions of the Appellate Committee of the House of Lords to a new Supreme Court, physically and constitutionally separate from the legislature. Fourth, it created an independent Judicial Appointments Commission to select nominees to judicial posts, while the Lord Chancellor retained only the function of confirming or rejecting the proposed appointment of all judges, including tribunal judges, with the exception of special arrangements adopted in the case of Supreme Court Justices. Fifth, the Act set up a statutory procedure for disciplining and removing judges (Sumption 2010, pp.34–35). Obviously, the implementation of these changes had a massive impact on the role of the Lord Chancellor, whose judicial roles were abolished; and the Law Lords, who had to leave their seats in Parliament to form a new court.

b) Judges with a formal leadership role within the Judiciary.

Prior to the Constitutional reform of 2005, besides the role of the Lord Chancellor, a number of senior judges played leadership roles in different areas of judicial activity. The Lord Chief Justice, the Master of the Rolls, the President of the Family division of the High Court, the Vice Chancellor, and the Senior Presiding Judge for England and Wales; all had in common an organizational role in their respective divisions. The Crown, on the advice of the Lord Chancellor, selected them out of the higher ranks of the professional judges.

After 2005, the Lord Chief Justice formally became the head of the Judiciary of England and Wales, while the tasks that were previously undertaken by the Lord Chancellor were mostly transferred to the judges. In turn, as a Secretary of State, the Lord Chancellor retained certain administrative functions to ensure the effective work of the

courts. For coordination purposes, the Courts and Tribunals Service was created as a result of a partnership between the Lord Chancellor, the Lord Chief Justice, and the Senior President of the Tribunals. The work of this agency, in charge of supporting the administration of justice, is overseen by a Board headed by an independent Chair, working with executive, non-executive, and judicial members (Ministry of Justice 2012). The Lord Chief Justice exercises management responsibilities with the active involvement of the Judicial Executive Board, which groups the senior judges with leadership responsibilities, and the Judicial Council, which includes representatives of all areas of the judiciary. In terms of administrative arrangements, the Judicial Office was created to support the work of the Lord Chief Justice and the Senior President of the Tribunals regarding the government of the judiciary. Furthermore, new specialized agencies were created to deal with crucial aspects of judicial government, that is, recruitment, discipline, and training.

c) Professional courts judges.

Under this denomination, it is possible to include judges from different courts and echelons, including Lord Justices of Appeal, High Court judges, circuit judges, district judges, and Recorders. Despite their different hierarchies and outlooks, these judges corresponded to what was traditionally considered the judiciary. As such, they reflect the classic features of professionalism. They receive payment for their job, normally a salary but in the case of non-permanent appointments, a fee; requiring special legal qualifications to hold their posts. The shared legal culture of these judges, their social and educational profile, and their common origin as barristers, mainly QCs, made them historically a very homogeneous group (Bell 2006, p.346).

For about 700 years, or until the implementation of the Constitutional Reform Act of 2005, the power to appoint professional judges in the UK was vested in the Lord Chancellor. Eligibility criteria were stringent and the process was based upon *secret soundings*, a mechanism of anonymous consultation with unnamed sitting judges. Once appointed to a permanent post, judges were not allowed to return to private practice. As a result, the system produced an English judiciary formed almost exclusively of elderly white upper middle class males, drawn from the highest ranks of senior barristers. The elitist conformation influenced the public perception of judges as socially biased and out-of-touch (Maute 2007, p.389; Bell 2006, p.314).

The professional outlook of the judicial corps was traditionally developed outside the judiciary as a result of their common origin and cultural homogeneity as members of a small bar and an even smaller cohort of QC's. However, once appointed, these officials joined a: "club of able judges who would know each other quite well and had a general reputation for impartiality, integrity and effectiveness" (Bell 2006, p.346). Despite the

period of adaptation of part-time judges, such a small and reliable *judicial family* did not seem to need any formal and internal professionalization mechanism. They were already high standard professionals. Hence mechanisms such as judicial training were largely absent and began to be introduced timidly only in the last decades of the 20th century, not without opposition and strictly under judicial control (see Working Party on Judicial Studies and Information 1978).

As a result of the expansion of the judiciary in recent decades, the number of judges has increased significantly. The number and proportion of non-permanent fee-paid judges working at all levels of the organization is now noticeably significant, usually as a first step to applying for permanent appointments. In fact, around 60% of judicial posts are temporary posts (Bell 2006, p.311), delineating a peculiar, horizontal rather than ascending, career pattern. In addition, the number and responsibilities of circuit and district judges has also increased significantly, making these roles a lower judiciary, though not simply an entry-level judicial position, attracting applicants with a more diverse background compared to higher judges (Bell 2006, pp.309–310). These developments reflect not only the growth of the organization, but also its greater heterogeneity, putting the traditionally informal mechanisms of managing the judiciary under strain.

d) Lay judges.

The English legal system has relied heavily upon lay judges for centuries. The old justices of the peace evolved to form the Magistrates courts, which nowadays mainly have jurisdiction over criminal matters. The magistrates deal with about 95% of criminal offences, and the lay magistrates perform the main role in this work. Around 30,000 magistrates pass sentences for about 1.3 million offences each year. They do not receive payment but only travel, subsistence, and loss of earnings allowances, while their make-up is increasingly varied in terms of social, ethnic, occupation, age, gender, and other backgrounds (Gibson 2009, p.19).

e) Tribunal judges.

Besides the traditional system of courts, a large number of tribunals have been set up since 1945 under various acts of Parliament to rule upon the operation of the particular schemes established under those acts. Their underlying purpose has been to provide a specialist forum to deal with conflicts between an increasingly interventionist state and individuals. Tribunals deal with a wide range of conflicts in different areas such as employment, social security, immigration and asylum, education etc. For these purposes, they are usually made up of three members, either legally qualified or specialists in the area of the tribunal's jurisdiction. Despite their advantages in terms of speed, flexibility, cost, informality, expertise, accessibility and privacy; their disparate configuration and

dependence from administrative departments motivated a large review of the tribunals system at the end of the 1990s (Slapper & Kelly 2006, pp.408–20), which led to the unification of the tribunals system under the leadership of the Senior President of the Tribunals.

5.1.1. Recent Changes and their Impact upon the Attributes of Judges

As a result of progressive judicial expansion in power and size, the increasing need for a co-ordinated view led to increasing unification (Bradley 2008, p.486). The demarcation of the roles of the Lord Chancellor and the former Law Lords by the Constitutional reform of 2005 entails not only the implementation of formal separation of powers. It also represents a crucial move towards the unification of the judiciary by reinforcing the properly judicial outlook of the most senior judges, now the Lord Chief Justice and the members of the Supreme Court. Accordingly, the judiciary has formally adopted the structure of a branch of government to which judges belong exclusively. At the same time, the unified tribunals service was merged with the *uniform branch*,, massively enlarging the *judicial family*. Likewise, the magistracy is experiencing increasing professionalization (Davies 2005), while new organizational mechanisms have been either introduced or reinforced. Accordingly, new recruitment arrangements have been adopted, while judicial training, timidly introduced back in 1979, has expanded significantly.

As regards recruitment arrangements, the creation of the Judicial Appointments Commission (JAC) involved a significant change from an informal system of recruitment to a more formal and structured mechanism in charge of a supposedly neutral and autonomous agency. The Constitutional Reform Act created the JAC after a long period of debates and increasing formalization of the appointments process since the 1980s (Mackay 2010), following the recommendations of the Peach Report and the critical assessment of practices employed for the appointment of judges by the Commission for Judicial Appointments (Slapper & Kelly 2006, pp.244–45). The JAC is in charge of judicial selection, and its main task has been to maintain the quality of the English judiciary in the challenging context of judicial expansion, also increasing the diversity of judges. The underlying purpose is to enhance the democratic legitimacy of the judiciary by reflecting more of a cross-section of society in order to reinforce public trust and confidence in the justice system (House of Lords, Select Committee on the Constitution 2012, p.27). As a consequence of the aim of maintaining high levels of judicial quality, appointments based upon merit remains as the guiding principle of the strategy to enhance judicial diversity, which seeks to select the best candidates irrespective of race, gender, professional background, or any other consideration. Accordingly, the system has

been oriented to minimize barriers in the selection process and to encourage applications from the widest possible range of eligible candidates (Sumption 2010, pp.35–37).

The dominant approach based upon merit rejects any form of affirmative action, on the assumption that it would undermine the quality of appointed judges. Following this debatable point of view (see Malleson 2006), after twenty years, changes to the traditional lack of diversity have been slow, while proposals to implement positive action (see Malleson 2009; Rackley 2007; Feenan 2008) have not been considered as a way of breaking the status quo. A full set of recommendations to increase diversity was developed in 2010 by the Advisory Panel on Judicial Diversity, containing 53 recommendations to be applied as a package. Despite governmental support, the implementation of these recommendations has been slow so far, while the House of Lords insisted upon its full application (House of Lords, Select Committee on the Constitution 2012, p.29). The report produced by the Advisory Panel on Judicial Diversity involves consequences for the structure of the judiciary at large, as it recommends a fundamental shift, moving from a focus upon judicial appointments to the concept of judicial career. The implicit belief is that such a move will span roles in the courts and tribunals as one unified judiciary (Advisory Panel on Judicial Diversity 2010, p.18).

Of course, the appointments process has benefited from more transparency and openness since the JAC was implemented. However, the slow pace of change in the promotion of diversity, the generally timid approach to the issue and delay in the application of widely supported measures, all speak of certain failures that could be structural in nature. One possible explanation for this situation can be found in the excessive role that judges play in the JAC (see Gee et al. 2015). In fact, the appropriate level of involvement of lay people in the process has been discussed as a way of avoiding the problem of self-replication within the judiciary (House of Lords, Select Committee on the Constitution 2012, p.67), implicitly acknowledging that judicial control of the process can be problematic.

As regards judicial training, the traditional British system of justice, constituted according to the professional model of judicial organization (Guarnieri et al. 2002) did not have formal training structures. In principle, these mechanisms were not needed by the organization, considering that judges were generally experienced and highly educated lawyers. Such a view, and concerns about judicial independence, led to critiques and opposition to the implementation of the Judicial Studies Board and its training programme. However, the benefits of training fostered a gradual cultural change by which it became increasingly accepted within the judicial organization. The process was facilitated by the fact that the mechanisms involved in judicial training were kept within the control of the judiciary. External interference was ruled out, while standardization of

practices began to emerge through training and other mechanisms as a way of achieving greater levels of consistency in the context of a much bigger organization. Such an evolution raised concerns about its potential impact upon the culture of individualism, considered the basis of judicial independence in the British context (Malleson 1997).

The evolution and institutionalization of judicial training in recent years has been remarkable in England and Wales. From initial reluctance and mistrust, today it is widely accepted as a mechanism to enhance judicial quality. Indeed, after more than two decades in which the Justice Studies Board was in charge of training arrangements, the training structures were unified, following the merger of courts and tribunals, resulting in the implementation of the Judicial College in 2011. The new college provides induction training to new judicial post holders and continuing training for all judges. The idea that training must be provided by practising judges or under judicial direction is one of the main guiding principles of the Judicial College (Judicial College 2011). Therefore, the same issues raised in relation to the role of judges in the process of appointments should be taken into account when analysing the process of judicial training in England and Wales.

5.2. The Relationship Between Judicial Officials

Probably the main characteristic of the coordinate ideal type is the horizontal distribution of authority among roughly equal officials. In other words, a web without a spider sitting at its heart, in which positions of sub- and super-ordination are not sharply delineated, superior audits are exceptional and unsystematic events, and the apparatus of justice is shaped by the fragmentation of power and a certain degree of inconsistency (Damaska 1986, pp.25–27). The lack of a career structure is also a distinctive feature of coordinate models, particularly of the judiciary of England and Wales in which lateral appointment of judges to the higher levels of the organization has been a prevalent practice, contributing to reduce the pressure for advancement, thus weakening hierarchical relationships.

Traditionally, the judiciary of England and Wales has been a relatively unstructured collection of different agencies with diverse outlooks and configurations, formed by judges with clear differences in status, but with rather diffuse hierarchical relationships in terms of discipline, career control, accountability, or performance evaluation. In fact, such aspects of organizational life used to be managed informally by the Lord Chancellor, relying upon the small size of the judiciary and its cultural homogeneity. The same informality that dominated recruitment procedures was applied in areas such as discipline arrangements and performance appraisal, which were mainly

based upon peer pressure and the ethos of doing *the decent thing*, rather than formalized procedures (Bell 2006, p.323; Malleson 1999, p.199). Likewise, the judiciary was traditionally insulated from accountability, which was seen as conflicting with judicial independence (Malleson 1999), except in the tribunals, where the policies of the non-judicial structures of the State, to which tribunals belonged were applicable. Fee-paid and lay judges perhaps constitute another exception to this point, as they have always been subject to closer supervision, given the nature of their posts.

In the past, the government of the courts judiciary was based in long-standing traditions and informal arrangements, under the leadership of the Lord Chancellor who was able to be involved personally in the administration of such a small "club of able judges who would know each other quite well and had a general reputation for impartiality, integrity and effectiveness" (Bell 2006, p.346), while the rest of the judicial agencies had their own specific organizational arrangements. In such a homogeneous structure there was no need for the vertical reinforcement of consistency in attitudes, practices, or decision-making.

Certainly the organization, governance, and management of the judiciary have changed significantly in recent decades. Formally, the constitutional changes of 2005 aimed to reinforce judicial independence. However, the individual independence of judges has never been a real issue in England and Wales and consequently, structural independence in itself means little. The most significant changes, however, concern the new sense of collective identity and responsibility that emerged as the new arrangements began to be worked out. Indeed, the leadership of the judiciary entrusted to the Lord Chief Justice and the unification of the tribunals under the leadership of the Senior President were followed by the implementation of a series of joint arrangements and structures, starting with the Judicial Appointments Commission, HM Courts and Tribunals Service, the Courts and Tribunals Board, the Judicial Office, the Executive Boards, and the Judicial Conduct Investigation Office. Moreover, the Judges' Council was reshaped to include members from all the levels and structures of the new judiciary, while functional arrangements, such as the designation of court judges at all levels as ex officio tribunal judges, also fostered increasing levels of institutional unification. As a result, it seems that constitutional reforms have borne great significance for the work of judges, not so much from increasing independence but more from coming together (Carnwath 2013).

In the new organizational structure, the authority of the Lord Chief Justice is exercised with support and advice from many different bodies, some of them representative of the various levels of the judiciary e.g. the Judges' Council. Likewise, the Judicial Executive Board groups the senior judges and has attributions in policy

development within the judiciary, generally supporting the work of the Lord Chief Justice. In turn, the organization of work in more practical and day-to-day aspects, such as the deployment of judges, rests upon a structure formed by the Senior Presiding Judge, the presiding judges of the circuits, and finally the resident and designated judges, and the magistrates' liaison judges. All these roles entail extensive managerial attributions and are generally thought to be liaison points of the different units, with the judicial authorities, and other areas of the judiciary. Accordingly, they involve more coordination than the exercise of vertical authority. The brief description of the role of resident and designated judges in the judiciary's web site explains the nature of such roles. These judges are supposed "to meet with all levels of the judiciary to discuss and reach agreement" (Courts and Tribunals Judiciary 2014a), revealing that certain levels of autonomy are expected in the exercise of the roles, generally defined in terms of *leadership* rather than hierarchical authority. The difference between these two concepts is subtle but still significant in relation to the ways in which power is distributed and exercised in the organization (see Bell 2006, p.365).

It is also clear that the organization of the judiciary is much more regulated and formalized now. In fact, guidelines and formal descriptions regulate many areas of judicial administration. For example, judicial discipline procedures have been regulated in detail by agreement between the Lord Chief Justice and the Lord Chancellor (Lord Chief Justice 2013), while the Judges' Council drafted in 2013 the Guide to Judicial Conduct: "following extensive consultation with the judiciary" (Judiciary of England and Wales 2013, p.3). The traditional informality that dominated the relationships between judges has been left behind, as the power of the higher authorities is regulated and distributed among several bodies, some of them representative of different levels of the judiciary, while key areas of management have been entrusted to specialized autonomous bodies e.g. the Judicial Appointments Commission, in which views external to the judiciary are also represented.

As regards the specific mechanisms that shape internal relationships, performance appraisal constitutes the most novel mechanism by which the judiciary aims to assess judicial work, enhance quality, and be generally accountable to the public. Its implementation has been slow and timid, mirroring the introduction of judicial training. However, the expansion of judicial performance appraisal has been discussed and generally accepted under the condition that it should be judge-led, in order to preserve judicial independence (House of Lords, Select Committee on the Constitution 2012, p.56). In recent years, judicial performance appraisal has begun to be applied to a greater number of judges in different positions, reflecting the move towards an explicitly structured career judiciary (Advisory Panel on Judicial Diversity 2010). In fact, during

2014 a pilot performance appraisal scheme was implemented at the level of circuit judges, aiming to develop methods that could be extended to the whole of the organization (Gibb 2013). The way in which this mechanism can affect the organization of the judiciary is not yet clear and depends largely upon the specific methods and arrangements adopted.

Concerning discipline arrangements, which normally express the structure of authority within organizations, under the new regulations have been entrusted to the Lord Chief Justice in agreement with the Lord Chancellor as representative of the Executive. Whilst both authorities take discipline decisions jointly, they act upon the advice of either a nominated judge, an investigating judge, or a disciplinary panel formed by judges and non-judicial representatives, all of them in charge of investigating and dealing with complaints against judicial office holders (The Lord Chief Justice 2013). Accordingly, the use of vertical authority in these kinds of procedures is tempered by the role of these advisers, who might well have the same rank as the judge concerned, and by the need for agreement between the Lord Chief Justice and the Lord Chancellor.

5.3. Decision-Making

As regards the approach to decision-making, according to Stevens (2002), the dominant approach until the 1960s was shaped by the reluctance to engage in politically charged issues, while a declaratory understanding of the law influenced the performance of judges. Such an approach to the interpretation and creation of the law began to evolve in the last decades of the 20th century, reflecting the fact that judicial passivity itself entails a particular political perspective, while judges began to explicitly acknowledge their law-creating capacities within certain margins (see Reid 1972). The Human Rights Act of 1998 expanded the interpretative powers of judges significantly, leading to increasing levels of concern about the power of judges (see Gearty 2007), without denying that judges have a certain creative role even in the context of a traditional understanding of the law (see Bingham 2006). Clearly, in recent times judges have adopted a more purposive approach to the interpretation of the law, particularly in aspects of social policy and in non-party political areas of social controversy, while at the same time becoming more active in regulating the power of the Executive (Bell 2006, pp.334–340).

Changes regarding the way in which judges exercise their decision-making attributions have been gradual and not dramatic, despite the empowerment of the judiciary implicit in the Human Rights Act of 1998. As Gearty (2007) claims, judges have generally shown an impressive collective awareness of where they fit in the new

regime, based upon an institutional self-consciousness that has allowed them to exercise control over political power in areas of relative judicial competence, choosing at the same time *not to open their eyes* in broader areas of public policy. Perhaps, as a counterpart to this general attitude of self-restraint, Parliament has responded accordingly, in practice deferring to judicial decisions in the few cases when courts have declared the incompatibility between legislation and the Human Rights Act.

Interpreting the previous account from the perspective of Guarnieri and Pederzoli (2002), before the Human Rights Act of 1998 judges in England and Wales generally conformed to the ideal type of the *delegate* judge, where he or she exercises *interstitial* creativity within the space afforded by the political branches. The recent empowerment of judges has not provided space for the *political* judge that engages actively in policy-making. However, the changes brought by the Human Rights Act and the constitutional changes of 2005, seem to be pushing judges to gradually understand their role in terms of a more active commitment to the control of power of the political branches, even managing to exercise judicial review of legislation despite limited attributions in that regard, based upon a self-restrained approach. Accordingly, the *guardian* judge pattern outlined by Guarnieri and Pederzoli (2002) might be applicable to describe the current approach to their role of English and Welsh judges.

6. Sources of Change in the Judiciary of England and Wales

6.1. Overview

Most of the elements of the coordinate and professional ideals have been historically present in the British judiciary, despite its evolution. Clearly, the judiciary of England and Wales was always an organization formed by a small elite of professional peers in which hierarchical structures were weaker compared to Continental systems of justice. A significant component of lay judges complemented the judicial structure, characterized by the lack of organizational unity. The strong profile of candidates to professional judicial posts fostered the individual autonomy of judges. Likewise, the lack of formal professionalization mechanisms or strong hierarchical controls enabled judicial individualism to flourish within certain limits. Indeed, in the case of the British judiciary, the common origin of professional judges and their shared culture shaped outside the organization enabled them to maintain a club-like ethos. Therefore, the *judicial family* managed to integrate strong individuals in a coherent group while agencies that had a different outlook, such as the magistrates or the tribunals, were not integrated into the

main judicial body and consequently did not place disrupting pressures or influences on the system as a whole.

As the judges began to acknowledge the political nature of their role from the 1960s, their powers began to expand. At the same time, the European influence over British institutions became increasingly relevant, particularly regarding the constitutional position of the judiciary. Indeed, incorporation into the European Union in 1972 gave judges for the first time the possibility of evaluating parliamentary statutes. Moreover, in 1998 the Human Rights Act broadened judicial powers, notwithstanding the fact that it was enacted under the umbrella of the principle of parliamentary sovereignty. As a consequence, judicial attitudes evolved consistently towards the acceptance of the supremacy of European Law[18], the incipient spread of new evaluative standards, such as the principle of proportionality, and a generally more activist approach to judicial review of administrative acts and legislation (Tabarelli 2013). Membership of the European Union, particularly the incorporation of the European Convention on Human Rights into the domestic legal system in 1998, accelerated the process of judicial empowerment (Smith 2006, p.1), opening space for the emerging constitutional debate.

The Human Rights Act proposed a compromise between the doctrines of parliamentary sovereignty and the rule of law, based upon a balanced relation of mutual restraint between judges and Parliament (Bogdanor 2009) or some form of institutional dialogue (Davis 2012). Accordingly, the impact of the Act upon the extent of judicial power cannot be inferred only by looking at its provisions. An example is the fact that the courts were not given the power to render legislation invalid, but to issue a declaration of incompatibility between a piece of legislation and a right protected by the European Convention of Human Rights. While formally respecting the principle of parliamentary supremacy, such a mechanism at the same time places significant pressure upon Parliament when it faces a judicial declaration of incompatibility (Riel 2011, p.452). In fact, the government has never refused to present remedial measures in the light of such a situation, nor has Parliament refused to approve these measures (Tabarelli 2013, pp.346–47).

Apparently, the gradual process of judicial empowerment evolved as a result of progressive internal acknowledgement of the political nature of judging by the judges, and the external influences coming from Europe, which penetrated the whole of the political realm. In fact, the Labour Party had experienced an internal process of *Europeanization* since the 1980s (Featherstone 1999), which would become evident under Tony Blair's government and its policies towards the European Union (Bulmer &

18 European law supremacy was formally acknowledged in 1991 by the *Factortame* decision.

Burch 2004). The judicial expansion process also involved complex organizational considerations such as growth in the size of the institution. Between 1970 and 1995, the judiciary expanded from approximately 200 to 1800 judges. Therefore, the informal ways in which judges were appointed, trained, and scrutinized seemed to be no longer feasible. As a result, new mechanisms began to be adopted, formalizing the structure of the organization and changing the dominant individualistic culture (Malleson 1997).

6.2. The Importance of Critical Junctures

Contingent events also prompted the incremental process of reform:

a) The *Pinochet* case underscored the importance of the personal views of judges and the underlying political nature of judging. After this episode, it became clear that judges would need to develop a keener awareness of the political aspects of their activities (Malleson 2000) as the political side of judging was more visible to the public than ever before. The media and newspapers openly discussed the constitutional implications of the case, uncovering the inadequate character of certain arrangements in the new context, i.e. the appointments system and the role of the Lord Chancellor (Stevens 2002, pp.109–11). Indeed: "nothing […] so galvanised the issues relating to the independence of the judiciary and the separation of powers as the *Pinochet* case" (Stevens 2002, p.107).

b) In 2000 a decision of the European Court of Human Rights held that the British lack of separation of powers entailed a violation of the right to a fair and public hearing by an independent and impartial tribunal. This episode shows that a casual attitude to the separation of powers was no longer acceptable in Europe (Stevens 2002, pp.104–05).

c) Increasing conflicts between the judiciary and the executive, particularly after David Blunkett became Home Secretary in 2001, calling for a return to the old version of Dicey's parliamentary supremacy arguing that judges should not use the Human Rights Act to overrule the House of Commons (Stevens 2002, pp.133–34). The conflict between the Home Secretary and the courts had an effect on the Cabinet, thereby having an impact upon the whole constitutional structure of British institutions. As the head of the judiciary, the Lord Chancellor, Lord Irvine by that time, was also a member of the Cabinet, his relation with the Home Secretary was affected as a result of the virulent style of David Blunkett and his targeted assault upon the judiciary (Stevens 2002, p.134). The difficult relationship between the Home Secretary and the Lord Chancellor expanded its effects when Lord Irvine supported the judges against the government on controversial issues, such as sentencing and the administration of the courts. In both aspects, the Prime

Minister Tony Blair and his staff backed Blunkett's points of view, deepening the internal conflict within the Cabinet (Stevens 2002, pp.155–56). The dual role of the Lord Chancellor became highly untenable. Thus voices calling for a stronger version of the separation of powers became louder.

6.3. Making Sense of the Process of Change

A whole new context emerged from the progressive empowerment of the judiciary and from the tensions between judges and the Executive, the external influences and pressures, and the challenges of an increasingly complex organization. For the British institutional system, adaptation to the new scenario would have been the natural way to reconcile judicial independence and parliamentary sovereignty. In fact, the system had already evolved to reinforce judicial independence by virtue of convention, piecemeal legislation, and case law. Indeed, before the constitutional reforms, the Law Lords were already abstaining from taking part in politically controversial debates, while the surviving judicial functions of the Lord Chancellor were limited to sit on rare occasions in the Appellate Committee of the House of Lords. Similarly, appointment and judicial removal functions for some time had been evolving to formalize consultations with the senior judiciary (Sumption 2010, pp.33–34; Mackay 2010). Such an evolution encompasses the spirit of the British Constitution, which in many aspects makes: "the substance more admirable than the form" (Sumption 2010, p.34). In fact, judicial independence in England and Wales never relied upon organizational arrangements or legal regulations. On the contrary, shared convictions about the political relevance of the principle, the high status of judges, the force of conventions, and the rhetorical power of the idea of independence were enough to preserve the autonomy of a small group of judges who had common conceptions about judging (see Stevens 2002, pp.96–97).

In spite of the gradual evolution of the judiciary of England and Wales, Tony Blair's government decided to implement a form of separation of powers. The reform might have been prompted by the government's desire to *modernize* the Constitution and forge a step-change in adopting European institutional structures (Bulmer & Burch 2004). Perhaps in this case the intention was to resemble the accepted position of the judiciary in European systems, without altering the character of the institution. In fact, reforms were not oriented to change the outcomes of the system, but generally to make more explicable the democratic status of the Constitution and to facilitate the relationship between the government and the judiciary (The Politics of Judicial Independence in Britain's Changing Constitution Project 2013). The sudden and surprising announcement of the reform in 2003 without any previous consultation represented a strategic political move

and demonstrated poor reflection upon the nature of the change and its potential effects, guided by a simplistic interpretation of the separation of powers, which scarcely caught the nuances and historical influences on the British Constitution (Stevens 2002, p.156).

The effects of the increasing formalization, standardization, and unification of the organizational model of the judiciary and the new kinds of relationships between judges and political institutions constitute evolving issues of great importance. As the current Lord Chief Justice Lord Thomas (2008) made clear, to uphold the independence of each judge, new topics need special attention, including the appointment and promotion of judges, judicial training, protection of the image of justice, discipline and ethics, finance for the court and court administration, performance standards and performance management, and health and welfare (p.3). Indeed, the organizational model of the judiciary and the influence it exerts over judges largely depend upon the way in which such arrangements translate broad institutional logics into organizational rules and codes of appropriateness (see March & Olsen 2004).

7. Conclusion. Do existing typologies Explain Changes in the Judiciaries of Chile and England and Wales?

The question addressed throughout this chapter is whether it is possible to explain the organizational evolution of the judiciaries of Chile and England and Wales using existing typologies of judicial organization. Typologies can provide an interpretive guide to understand changes through the identification of the central variables that characterize organizations. The exercise entails a deliberate simplification, according to which the hypothetical meaning of ideal types is used as a yardstick to compare hypothesized and actual meanings of real organizational arrangements (see Thornton & Ocasio 2008, p.110). In this chapter, the organizational variables that characterize different models of judiciaries according to Damaska (1986) and Guarnieri & Pederzoli (2002) guided the study of the judiciary in Chile and England and Wales. These theoretical tools assign a particular meaning to certain combinations of the allegedly central variables that characterize judiciaries, i.e. the attributes of judges, the relationships between them and the decision-making rules. The hierarchical/bureaucratic models, on the one hand, and the coordinate/professional ideal types on the other, constitute "polar types" (Bailey 1994, p.5), reflecting extreme opposites along a continuum based upon such supposedly central variables of judicial organization. By analysing the changes along these variables or dimensions, it is possible to compare the coordinate/professional ideal type with the elements that, in reality, represent the historical pattern of judicial organization in

England and Wales, and the actual features of the judiciary in the context of current changes.

The study shows that the sets of variables outlined by existing typological approaches can be accurate in the description of historical features of the judiciaries of Chile England and Wales. However, owing to their focus upon structural features, these theoretical constructs are not sufficient to explain and shed light on the complexity of current changes. In the case of the Chilean judiciary, traditional authority-centred typologies are not adequate to explain its evolution or to enable meaningful comparisons with other contemporary judiciaries. Indeed, the hierarchical component of the organization has weakened, while professionalization mechanisms have become more sophisticated, all of which has produced a rather confusing approach to their role by judges. Consequently, changes in the dimensions or variables outlined by Damaska (1986) and Guarnieri & Pederzoli (2002) are evident. However, according to this thesis the judiciary of Chile should still be characterized as an example of a hierarchical and bureaucratic organization in which judges form a corps of permanent professionals ordered into hierarchical relationships, who are expected to decide cases according to technical standards. Moreover, it is not clear that changes in the organization can be defined as a new combination of the same structural dimensions of authority, or rather, as an evolution along the continuum that goes from bureaucratic to professional models. Perhaps the reason for this is that changes are not necessarily structural. Consequently, rather than changing authority structures, reforms have been more subtle, reflecting new ways in which authority is exercised, new forms of relationships among judges, or new ways of organizing judicial work, which cannot be captured by the broad distinctions made by traditional typologies. In fact, the Supreme Court is still the ruling authority in the Chilean judiciary, which concentrates power and attributions within the organization, exercising control over the whole of the organization, despite changes emerging from below. However, it is also clear that such authority does not have the same meaning and is not expressed through the same means as before, reflecting a gradual but consistent process of evolution.

Similarly, the study reveals that the judiciary of England and Wales is not simply evolving from one authority paradigm to the opposite, as changes are far more complex. Clearly the English and Welsh judiciary was historically rooted in coordinate and horizontal structures, constituting a representative example of the coordinate/non-bureaucratic ideal models outlined by Damaska (1986) and Guarnieri and Pederzoli (2002). Therefore, traditional typologies can be used to characterize this particular organization as predominantly formed by judges with lengthy experience outside the judiciary, in which authority was distributed horizontally, while community standards had

a great importance as a source of judicial decisions, despite the gradual increase in the relevance of formal legislation. In this organization, hierarchy was traditionally weak; career patterns were diffuse, and there was no substantial difference of status among judges. Recruitment arrangements were not fully controlled by judicial elites, as the process was in the hands of the Lord Chancellor, whose dual roles enabled an opening to the political world. Moreover, there was no apparent need for judicial training because judges were seen as highly skilled. For the same reason, there were no strong instruments to control judicial performance and the quality of the work of judges. Therefore, no formal mechanisms were applied to reinforce the internal culture, which was mostly shaped by the previous experience of judges as barristers. In fact, the common origin of judges enabled them to maintain adequate levels of consistency and to develop a club-like ethos, in spite of their robust individual backgrounds. In summary, the organization was characterized simultaneously by its informal arrangements and strong convictions about the core judicial values. In fact, the lack of separation of powers was never an impediment for judges to exercise their role with autonomy and without external interference. Arguably, only shared convictions in the British context about the importance of judicial independence prevented external influences from interfering with the work of judges, suggesting that more important than formal structures and organizational arrangements is the way in which such structures and arrangements actually work; and also that the functioning of organizational structures and systems relies to a great extent upon the power of convictions, values, and beliefs.

The process of institutional change that began to be implemented, particularly after the Constitutional Reform Act of 2005, displaced the existing rules regarding key aspects of institutional development. In the context of judicial expansion, the abolition of the Lord Chancellor's judicial office, the unification of the various judicial agencies, the formalization of internal structures to form a career judiciary, the implementation of the JAC and the new recruitment arrangements, and the consolidation of judicial training and performance appraisal constitute a decisive process of organizational change that may well embody a wholly new judiciary (see Malleson 1999). However, existing typologies fail to explain this process, essentially because the new arrangements do not necessarily express a structural shift in the organization of authority, or at least not in the way envisaged by existing typologies. Indeed, both approaches developed by Damaska (1986) and Guarnieri and Pederzoli (2002) explain the attributes of judges, their relationships, decision-making practices, and guarantees of independence as a result of arrangements that express either vertical or horizontal forms of authority. In turn, current changes in the judiciary of England and Wales show that certain organizational arrangements adopted might resemble bureaucratic structures without necessarily expressing vertical authority

patterns, revealing that the subtle effects of the reforms may not be related to the variables outlined by existing typologies.

New mechanisms and professionalization systems have been introduced in England and Wales to re-define the attributes and status of judges, departing from the traditionally informal and unstructured organization in which a few high-profile judges formed a consistent *family.* Likewise, relationships between judges are now influenced by mechanisms such as performance appraisal, while disciplinary procedures have a much more formal configuration than before. As a consequence, according to Damaska (1986) and Guarnieri and Pederzoli (2002, changes have had an evident impact upon the variables that distinguish types of judiciary. However, the reforms do not embody a shift towards vertical distribution of authority with concentration of power at the top of the organization, as it is characteristic of the hierarchical and bureaucratic ideal types.

Close look scrutiny of changes in England and Wales reveals that authority is distributed among various agencies and authorities, lacking the concentration of power of hierarchical systems and traditional bureaucracies. In fact, the highest court of appeal, consequently, the main jurisprudential authority, is the Supreme Court, which has no governing attributions over the rest of the judiciary. Those governing responsibilities rely upon various leaders and structures: The Lord Chief Justice, the Senior President of the Tribunals, and the Lord Chancellor, all from different positions in relation with the organization, share attributions in a balanced partnership. In fact, such a relationship has been formalized through the creation of HM Courts and Tribunals Service to support the work of courts and judges, governed by a board formed by non-judicial and judicial representatives from various levels of the organization. In turn, strong roles have been assigned to the Executive Boards that group the senior judicial leadership of courts and tribunals respectively, to advise the Lord Chief Justice and the Senior President of the Tribunals, and to participate in policy decisions. Moreover, to support the administrative work of the Lord Chief Justice and the Senior President of the Tribunals, a joint Judicial Office integrated by various professionals has been created. Furthermore, the Judges' Council was reshaped to include judges from all levels of the courts, tribunals, and magistrates, to represent the views of judges as a collective, advise the Lord Chief Justice, and to exercise certain levels of control over the recruitment process by appointing three members of the Appointments Commission. Some key aspects of organizational development have been entrusted by statute or delegation to specialized agencies, which are either autonomous or governed by balanced arrangements. Accordingly, recruitment is in the hands of the Judicial Appointments Commission, created as an independent agency under the Constitutional Reform Act of 2005, and formed by non-judicial and judicial representatives from different levels of the

organization. Likewise, the Judicial College integrates the training efforts of the courts and tribunals, reporting to the leadership of both agencies; while judicial discipline has been entrusted to the Judicial Conduct Investigation Office, which reports not only to the leaderships of the judicial branch but also to the Lord Chancellor.

The changes currently unfolding in the judiciary of England and Wales are not explicable by reference to authority as a main variable in the way envisaged by existing typologies, which differentiate hierarchical/bureaucratic from coordinate/non-bureaucratic organizations, depending upon the levels of concentration of hierarchical authority. Clearly, there is a hierarchy within the organization. However, the structure of the judiciary is not pyramidal like traditional bureaucracies. Instead, it has many relatively independent leaders who exercise their role in close partnership, involving other judges from various levels of the judiciary, and autonomous agencies such as the JAC. In fact, it could be the case that the actual arrangements may have distributed authority among a larger number of leaders than before, and with the participation of a greater number of judges from different levels of the organization. Therefore, the set of values and beliefs that characterize hierarchical bureaucracies do not underlie the new arrangements in England and Wales, which might be explained more accurately as the sophistication of coordination structures, rather than the development of systems responsive to top-down control.

In conclusion, the authority-centred typologies developed by Damaska (1986) and Guarnieri and Pederzoli (2002) accurately put into historical perspective the organizational model and the inherited structures that shape the evolution of the judiciaries of Chile and England and Wales. However, the focus of such typologies is not sharp enough to explain the influence of current changes in the organizational order. Changes have been significant in both cases: In Chile, the weakening of hierarchy, linked to managerial reforms and to the implementation of new organizational mechanisms such as judicial training; and in England and Wales, the reforms in the leadership structure, the merger between different judicial agencies, the implementation of new organizational mechanisms, and the adoption of formal separation of power; all constitute meaningful changes that in each case impact the variables outlined by existing typologies, i.e. the attributes of judges, and the relationships between them and decision-making rules. However, the outcome of such significant reforms is not a shift in the pattern of authority distribution within the judicial organization. Indeed, in Chile power is still concentrated in the hands of senior judges, particularly the Supreme Court, while in England and Wales, power is still distributed among many agencies and authorities, more horizontally than what could be expected in hierarchical settings. As a consequence, the process cannot be explained as an evolution along the continuum that proceeds from a

hierarchical to a coordinate model or vice-versa. The reason for this is that the changes do not modify the pattern of authority distribution that existing typologies highlight as the core organizational variable. Indeed, the effects are subtler, reflecting new attitudes in relation to hierarchical power in Chile; and increasingly formalized relationships between judges, as well as new ways to organize judicial work and to exercise authority, which are not necessarily hierarchical, in England and Wales..

From a typological point of view, the analysis of organizational reforms should determine the type or model of organization emerging from the process of change. According to this study, for that purpose it is important to focus not only upon the structural categories and the distribution of authority within the organization, but also upon the organizational systems and mechanisms that give meaning to such structures (Greenwood & Hinings 1993, p.1054). Consequently, to explain the evolution of the judiciary in typological terms, the main dimensions of organization need to be identified by looking not only to the formal distribution of power, but also to the mechanisms that have been implemented in recent years in order to extract the significance they have for the organization as a whole. In the following chapters, the study focuses specifically upon the structure and functioning of judicial training and performance appraisal and the values and beliefs they embody, in order to identify the organizational variables that these mechanisms express and the role they play in the reform of the judiciaries of Chile and England and Wales.

III. MODELS OF JUDICIAL ORGANIZATION THROUGH THE LENS OF JUDICIAL TRAINING AND PERFORMANCE APPRAISAL

1. Introduction

This thesis claims that typologies can be useful analytical tools to explore the impact of mechanisms such as judicial training and performance appraisal, on the organizational model of judiciaries. For that purpose, variables beyond the distribution of authority should be considered, in relation to factors such as working dynamics, organizational cultures, the spaces for social interactions, or the organizational systems that regulate decision-making, recruitment, discipline, continuing education, and performance appraisal. All of these features embody certain ideas, values, and beliefs about organizing, making a coherent whole, and forming a particular organizational model. Therefore, assuming that the judiciaries of Chile and England and Wales represent distinctive and paradigmatic judicial systems, the study seeks to identify some of the main variables of judicial organization that judicial training and performance appraisal arrangements embody in each case. Furthermore, the study aims to characterize both judicial models based upon the information extracted from the analysis of judicial training and performance appraisal, and understand changes to these models that are fostered by the same mechanisms. In other words, judicial training and performance appraisal are used as a lens to observe and characterize two representative models of judicial organization and the changes linked to the implementation of such mechanisms. This chapter asks to what extent it is possible to do that and to make general inferences about judicial organizational models based upon judicial training and performance appraisal systems only; and more specifically, what aspects of these mechanisms should be studied for such a purpose.

The thesis claims that it is possible to make sound inferences about judicial organizational models based upon the study of the systems of training and performance appraisal. The rationale of this methodological selection of factors can be expressed using a traditional Spanish aphorism: *Tell me who your friends are, and I will tell you who you are*, which, for the purpose of the thesis, can be modified as: *Tell me what judicial training and performance appraisal are like, and I will tell you what kind of organizational model the judiciary has.* The aphorism implies that judicial training and performance appraisal reflect the main attributes of the organization. In fact, both training and appraisal mechanisms introduce normative prescriptions explicitly aiming to shape the work and performance of judges around prevailing values, principles, and beliefs. Of

course, other mechanisms such as recruitment or disciplinary arrangements also reflect to varying extents the particularities of the organization in which they are used. However, their main purpose is not to actually shape the work of judges, as it clearly is in the case of training and appraisal. Indeed, in different ways, what judicial training aims to do is to equip judges with the tools they need to perform according to what is expected from them in a particular system, while performance appraisal purports to assess their work in order to ensure satisfaction of the accepted standards of judicial work. Therefore, both training and appraisal systems have a straightforward role as channels through which institutional influences and expectations are carried to judges. In consequence, the way in which such a process works, the role of judges in the whole process, and the influences exerted over them should clearly express not only the way in which the organization is structured, but also the principles that rule its functioning and the dominant practices within it.

According to the institutional logics perspective (Thornton & Ocasio 2008; Thornton et al. 2012), different institutional mechanisms influence individuals, while agents might also contradict, modify, or blend institutional frameworks. These processes of top-down and bottom up influence are structured by organizational systems such as training and performance appraisal in different ways, depending upon the specific arrangements adopted and the social interactions fostered by them. Therefore, study of these mechanisms can help to understand the normative framework that shapes top-down institutional influences carried to individuals through such vehicles. Moreover, analysis of the actual operation of training and performance appraisal arrangements affords insights into the general functioning of the organization, in terms of the interactions between judges and their reaction to the institutional influences exerted over them by such mechanisms. The identification and understanding of these processes of top-down influences and bottom-up reactions, linked to new approaches to judicial training and performance appraisal, help to explain their contribution upon wider processes of organizational change.

The chapter explains how judicial training and performance appraisal can operate as channels of top-down institutional influence and bottom-up reactions, following the *Institutional Logics* perspective (Thornton et. al. 2012). It also reviews the literature on judicial training and performance appraisal, and outlines the main features and criteria that can be used to classify these systems, the normative content that the different arrangements contain, and the specific mechanisms that in each case might work to influence judicial behaviour.

2. Judicial Training and Performance Appraisal from the *Institutional Logics*

Perspective

Arguably, the study of organizations needs to take into account organizational systems such as training and appraisal, as they: "connect and activate structural frameworks" (Greenwood & Hinings 1993, p.1054). Indeed, the significance of the structure of the rules and roles of a particular organization relies largely upon the specific ways in which such rules and roles are applied and exercised. As training and appraisal explicitly aim to shape such functioning, their methods and contents will normally reflect the values and beliefs that prevail in a particular judicial system, thus constituting a reliable lens through which the main aspects of the organization may be studied.

The research strategy of this thesis is based upon the assumption that judicial training and performance appraisal bring to bear top-down institutional and organizational influences upon individual judges in order to shape their work; and for that purpose, these systems provide individuals with key information and knowledge of the kind of organization in which they perform their duties. Therefore, study of training and appraisal arrangements, their functioning, and the opinions of judges about them offers the opportunity to capture some of that key information and develop an understanding of the main aspects of judicial organization. An obvious example of this would be a strict top-down approach to performance appraisal, fully controlled by the judicial elite, and designed to enforce control through rewards and punishments. The structure and functioning of such a system would provide information to individuals about the organization, that is, who commands it, what they have to do to receive rewards and avoid punishments, and their expected role within the organization as followers rather than makers of the rules. In turn, the study of such information, and that of individual reactions to the system, would help to understand the organizational structure, strongly hierarchical in this case, its internal vertical dynamics, the way in which organizational strategies are designed and developed, and eventually the internal divergences that may trigger organizational change (Greenwood & Hinings 1993; Thelen 1999; Mahoney & Thelen 2010).

The way in which top-down institutional logics shape individual identities, goals, and action schemas is by focusing the attention of agents. For this purpose: "organizations develop structures and processes that shape individuals' and groups' focus of attention, (whereas) institutional logics guide the allocation of attention by shaping what problems and issues get attended to and what solutions are likely to be considered in decision-making" (Thornton et al. 2012, p.90). Therefore, specific mechanisms determine the availability and accessibility of the relevant information that individuals can use in socially relevant interactions. In turn, the *activation* of the knowledge to be applied in

concrete situations depends also upon the salient circumstances of the case. Hence the social identities and individual goals that guide cognition and action are activated by top-down institutional influences and also by bottom-up environmental stimuli, both shaping the accessibility and availability of the relevant knowledge and information that individuals need to take decisions (Thornton et al. 2012, pp.83–93).

From the institutional logics perspective, individual behaviour is understood to be: "situated, embedded (and) boundedly intentional" (Thornton et al. 2012, p.80). Therefore, it is not fully determined by institutional logics or by circumstances, but rather, it is shaped by the interaction of both top-down and bottom-up influences. In fact, the situational fit between both aspects – institutional logics and contingencies – is likely to activate particular identities and individual goals, shaping action. However, contradictions in this relationship can generate ambiguities in which alternative logics or new combinations of logics, identities, and goals can be triggered, fostering institutional and organizational change (see Thornton et al. 2012, p.92; Greenwood & Hinings 1993, p.1057).

From the perspective of institutional logics approach, professional training and performance appraisal can be considered as: "structures and processes that shape individuals' and groups' focus of attention" (Thornton et al. 2012, p.90). A straightforward example of this is provided by Mumford et al. (2008) in a study of ethics training in scientific environments, in which trainees are encouraged to develop solutions to past cases of ethical significance, aiming to provide mental models and strategies that might be used to frame and make sense of new ethical issues. The aim of this approach is to focus the attention of trainees, making the strategies and mental models developed in training accessible to them when analogous cases emerge. Similarly, in the context of judiciaries, training has been used to reinforce ideals and principles such as independence and self-restraint; or to develop awareness of the social context and to widen the reference group of judges (see Guarnieri 2005). In such cases, training is designed explicitly to discuss values, practices, and even the structure of the judiciary and its position in a democracy, thus focusing the attention of judges upon those aspects and providing them with information to shape their identities and the implicit rules of appropriate behaviour (see March & Olsen 2004). Likewise, the capacity of performance appraisal mechanisms to focus the attention of individuals upon goals that match broader institutional logics is clear in systems that apply performance-related pay. In the case of judiciaries, Spain has developed such a system, focusing the attention of judges upon economic rewards (Bagues & Esteve-Volart 2010), revealing the increasing influence of market institutional logics. Arguably, training and appraisal constitute channels through which: "dominant logics focus the attention of actors on both particular features of the

organizations and their environment (e.g., market competition; hierarchical structure), as well as shape the availability of the repertoire of organizational solutions and initiatives" (Thornton et al. 2012, p.81).

From a different perspective, looking into the functioning of training and performance appraisal arrangements may also reveal the lack of fit between dominant normative logics and contingent organizational practices. In fact, the eventual disagreements and uncertainties of actors about the prescriptions that emerge from these systems are likely to reflect the normative ambiguities visible in situations of institutional and organizational change. Therefore, training and performance appraisal arrangements may be considered a useful lens to observe not only the structure and organizational systems of judiciaries, but also their processes of evolution. An example of the latter is the study conducted by Townley (1997) of the introduction of performance appraisal in UK universities when identities forged in prevailing institutional logics were invoked by organizational agents to resist the strong managerial focus of reforms and the introduction of new normative frameworks. Conversely, multiple studies analyse the use of judicial training as a tool for organizational reform (see Armytage 1995; Hammergren 1998), revealing the applicability of this mechanism in processes of evolution in which new normative paradigms challenge pre-existing logics in judiciaries.

In sum, judicial training and performance appraisal provide and make key information available to judges, focusing their attention upon certain portions of knowledge used in relevant social interactions. Accordingly, both training and appraisal arrangements express the normative prescriptions implicit in prevalent institutional logics and the corresponding organizational frameworks. The study of these top-down influence mechanisms is likely to reflect the main structural aspects of organizations and their functioning, while the reactions of judges to their application might reveal some of the internal discrepancies and ambiguities that could trigger processes of organizational change.

3. Judicial Training in the Context of Professional Education

Judicial training is a specific form of professional education, applied in processes of professionalization of judiciaries. Therefore, the principles and objectives of professional education need to be taken into account in the implementation and analysis of specific judicial training schemes. The importance of this idea needs to be underscored, considering that in certain contexts, such as Latin America, judicial training has been commonly used as a *silver bullet*, aiming to face complex challenges, without

prior reflection about the particularities of professional education and the principles of adults' learning. Indeed, in Latin American, judicial training programs usually mimic university studies, being based in prescriptive theoretical courses that do not attend any concrete problem or training need (Hammergren 1998). In such cases, an overly optimistic view of education probably undermines the reflection about the specific problems that can be attended through professional training, and also about the adequate means and methods to face such organizational challenges (Marensi 2002).

In his seminal work on judicial education, Armytage (1996) proposes a model of judicial training that is anchored in the principles of adult education and also in the special characteristics of judges as professionals. Following Cross (1981) he acknowledges that adult learning, in contrast with undergraduate education, is generally autonomous, self-directed, builds on personal experience and is oriented to problem solving. This perspective provides a *humanistic* approach to professional education, emphasizing the adult's responsibility as a self-directed learner, based on the natural tendency to learn if encouraging environments are provided. Accordingly, educators are expected to play the role of a facilitator, rather than directing the process of learning through the classic pedagogical model of didactic teaching. Besides, *developmental theory* offers to this perspective the idea of human development as an unfolding process by which individuals face new stages in their lives. The role of educators in such process is to help the individual advance to the next level of cognitive development. Furthermore, Armytage (1996) also highlights the importance of *cognitive psychology* principles, which emphasize the active and constructive process of learning by which learners acquire clear and organised bodies of knowledge in a cumulative process that rests on prior experience. Therefore, educators must take into account the knowledge of learners, according to which new information is interpreted, processed and eventually taken to practice. This model of education focuses on the learner and the process of actively making sense of new knowledge. In contrast, the behaviourist or competence-based model of education focuses on the concrete application of learned knowledge to produce functional outcomes. Such an approach promotes breaking learning tasks into segments to identify correct responses and encourage learners to act accordingly. This model can be applied to concrete skills learning, but in the case of judges as reflective professionals who face complex and changing scenarios everyday, such kind of approach seems insufficient and limited to very specific and practical objectives.

Armytage (1995) endorses Cross' blended approach to the process of adult learning, claiming that generally speaking, humanist theory is relevant to learning self-understanding; behaviourism seems useful in teaching practical skills, while developmental theory has much to offer to goals of teaching ego, intellectual or moral

development (p.173). This approach has been influential in the adoption of judicial training methodologies, which generally entail facilitated learning through various techniques that actively involve judges in the process of their own training, fostering their critical reflection (see European Comission 2014).

Besides principles of adult education, Armytage (1996) acknowledges that judicial training is delivered to professional adults; hence the particular character of professional knowledge in the judicial context needs to be considered by educators. Following Schon (1987), he claims that professional knowledge consists of two elements: first, a particular notion of professional competence defined as *artistry,* which is needed to face indeterminate zones of practice, characterized by uniqueness, uncertainty and value-conflict. In such scenarios, common to professionals, prior knowledge and experience are not enough by themselves to face new problems, which consequently demand special abilities: an *art* of problem framing, an *art* of implementation and an *art* of improvisation. The second element of professional knowledge from this perspective examines the learning processes by which successful professionals accomplish their *artistry.* Two models of professional learning can be distinguished: the first entails *knowing-in-action,* which is basically like learning to ride a bike, providing organised knowledge, values, preferences and norms; in a way that professionals can execute activities naturally and without having to *think about it.* The second model is far more complex and has been described as *reflection-in-action*, focusing on the process of making sense of uncertain, unique or conflicting situations of practice. From this perspective, the emphasis of the education process is placed on the process rather than the outcome, and on the problem setting, rather than merely on the problem solving.

Taking into account the previous insights from educational theory, Armytage (1996) studies the particular characteristics of judges as learners to promote the application of such body of knowledge to judicial training. In the first place, the author claims that judges are autonomous professionals whose learning is normally self-directed. In fact, aspects such as personal benefits, professional advancement and job security, play a limited role motivating judges to participate in training programs. Indeed, the peculiarities of the judicial profession i.e. tenure, the stability of wages and the lack of an identifiable patient or client relationship, make extrinsic motivations rather inapplicable in the case of judges. On the contrary, the reasons for judges to participate in training programs tend to be substantive instead of instrumental, as Catlin (1982) claims with basis on empirical studies. Some of these reasons are associated with the professional perspectives of judges e.g. acquiring leadership capabilities or developing a perspective to their role in the social context. Other motivations relate to the need for collegial interaction, while judges also rely on training to enhance their judicial competences,

which according to the principles of adult education, extend beyond functional skills to the notion of *artistry*, based on active self-analysis and critical reflection. Indeed, "the essence of judging is a highly complex intellectual, problem-solving process which resists procedural description or predictable outcomes" (Armytage 1995, p. 180). Hence the cognitive psychology explanation of learning seems particularly accurate in the case of judges and consequently, training should mostly foster critical reflection and reinterpretation of experience to be applied to specific problems.

In sum, Armytage (1996) proposes a model of continuing education for judges based on three precepts: first, it should be a voluntary, Judge-led process; second, it should develop judicial skills, disposition and attitudes, in addition to the acquisition of information, aiming to nurture the professional *artistry* of judges; and third, to be effective, the process should facilitate self-managed learning through continuous critical analysis of received assumptions, common sense knowledge and conventional behaviour; accommodating the distinctive styles of learning and practice.

Generally speaking, judicial training can be used for many different purposes some of them related to the process of judicial appointments i.e. introducing new judges to their duties (Fisher 2009) or screening candidates to judicial posts, in certain civil law contexts (Vargas 2011). Besides, training as continuous education may have many other purposes: updating judges in new areas of knowledge, guarantee greater uniformity and predictability of decisions, ensure to the public that judges have an adequate command of laws and procedures, facilitate processes of reform, introduce new values, attitudes and perspectives or build institutional solidarity and a sense of common purpose (Hammergren 1998, pp. 8-9). In sum, training might reinforce capacities of judges in three aspects: knowledge, skills and attitudes (European Commission 2014, p. 29, Armytage 2005, pp.27-28).

The broad scope of aspects that can be faced through judicial training explains its worldwide expansion as a relevant organizational tool. However, it has also been a source of difficulties in relation to the definition of the problems to attend in specific countries, where: "training is defined as the solution before the problem is fully understood" (Hammergren. p. 15). To be effective, training should respond to concrete problems, identified through reliable training needs assessments, which constitute the first step of a cycle process. Once needs have been identified, the next step is the design of contents, curricula and methodologies, in order to implement and deliver training programs to address such needs. Finally, the results should be assessed in order to determine the effects of training activities and with that information nurture the training needs analysis once again (European Commission 2014, p. 29). Failure or insufficiencies in any of these stages is likely to affect the outcome of judicial training and by extension, the

organizational problems it is supposed to address.

4. Classification of Approaches to Judicial Training: Their Normative Content and the Institutional Influences upon Judges

There is great diversity in approaches, methods, structures, and purposes of judicial training and education in judiciaries around the world. Such diversity makes it difficult to classify these systems in order to observe their similarities and differences. However, it is clear that training systems are shaped and have historically responded to the demands of the juristic frameworks in which they operate. At least two broad families of judicial training systems can be differentiated in historical perspective. First, the systems that operate within Continental or civil law frameworks, which, despite their varieties, provide education and training through an extensive, institutionally directed, prescriptive, and tightly structured approach, usually based upon a comprehensive curriculum, sometimes involving examinations and formal assessments. Secondly, the systems that operate within the common law framework share the opposite characteristics: As they deal with experienced lawyers generally appointed in the last stages of their careers, training tends to be lighter in content, building upon pre-existing legal competence. Hence judicial education is provided through short courses focusing upon specific aspects rather than a comprehensive curriculum. Arguably, the strengths of one approach are the weaknesses of the other. Therefore, the Continental approach has the advantage of a strong structure and institutional support, but it can be very expensive and rigid in the way training is designed and delivered. Conversely, the common law approach has the advantages of its pragmatic character, flexibility, and relatively cheap structure, while its disadvantages are determined by the lack of a comprehensive and systematic approach to judicial education (Armytage 2005, pp.25–26).

Whilst the classification discussed above can be useful as an initial approach to the study of judicial training systems, the on-going evolution of judiciaries clearly limits its explicative capacity. Indeed, in recent decades the differences between judicial *families* have been progressively blurring, consequently, it is no longer possible to rely upon the classic civil law-common law distinction to fully understand different approaches to judicial training. For the sake of the argument, it might suffice to acknowledge that systems within the Continental tradition have introduced forms of lateral recruitment of judges with prior experience, while common-law countries have also begun to develop longer-term judicial careers or career paths (Bell 2006, p.14), in a process that, at least in England and Wales, has been explicitly endorsed (see Advisory Panel on Judicial Diversity 2010; House of Lords, Select Committee on the Constitution

2012; Judicial Diversity Task Force 2013). Evidently, current changes in recruitment and promotion in judiciaries have made the rationale for the distinction between training schemes in common law and civil law jurisdictions rather inapplicable. Similarly other factors have also increased the demand and need for stronger programmes of judicial education and training in both contexts. The growth of case loads, the greater complexity of laws and legal issues, the demands to diversify the pool of judicial appointees and incorporate new groups into the judiciary, and the increasing pressure from public and governments on the work of judges are all factors that contribute to a certain confluence on training needs (Piana et al. 2007, p.6; Thomas 2006, p.12), and subsequently, upon ways of satisfying such needs in different organizational settings.

In sum, the differences between juristic frameworks are not as marked now as before and consequently do not provide sufficient elements to classify approaches to judicial education. Accordingly, it might be more accurate to distinguish training systems in relation to their normative content, i.e. the rationalities (see Townley 2002; 2008; Healy et al. 2010) they tend to emphasize. I will now explain some of the central aspects that can be used to differentiate judicial training models, based upon the categories outlined by Piana et al. (2007). I aim also to explain how models of training might embody different rationalities, which consequently focus the attention of judges upon social identities, individual goals, and schemas of action, depending upon such normative frameworks.

4.1 Juristic Framework and Background Factors

Even while the distinction between civil law and common law systems might not be as significant as in the past, it is not possible to ignore it. In fact, despite the increasingly changing context, the organizational dynamics in judiciaries are still influenced by the principles of either the hierarchical or coordinate frameworks that have characterized Continental and Anglo-American judiciaries. Indeed: "modern pressures […] interact with inherited structures in complex ways and produce hybrids that can hardly be analysed without regard to their historical antecedents" (Damaska 1986, p.18).

As a result of the influence of juristic frameworks, civil law systems can be expected to have strong, long, and specialized initial education programmes (Thomas 2006, pp.21–22) intended to form a specialized judicial class (Fisher 2010, p.181), and to forge a consistent professional identity among young inexperienced appointees. On the contrary, initial judicial education in common law contexts historically has barely existed (Amy 2002, p.134; Fisher 2010), although in recent years countries such as England and Wales have adopted short induction programmes (Ichino 2010, pp.8–9). Such

programmes initially aimed at tackling issues connected to specific aspects of judging, particularly sentencing (Working Party on Judicial Studies and Information 1978), and consequently had limited focus compared to civil law systems.

With regards to the normative content of initial training schemes in civil law and common law contexts, on the one hand, civil-law education approaches have historically emphasized the development of a system of values, in order to forge a strong sense of judicial identity and to focus the preferences of judges around a set of ultimate values i.e. a substantive rationality (Kalberg 1980; Townley 2002). On the other hand, the adoption of initial training in common law environments has had a rather pragmatic emphasis, fostering a practical rationality that tends to focus the attention of judges upon specific goals and action schemas as the most expedient ways to deal with day-to-day difficulties. It is important to bear in mind, however, that in reality all types of rationality, i.e. formal, substantive, theoretical, and practical, actually co-exist being distinguishable only for analytical purposes (see Townley 2002). Consequently, while organizational systems might emphasize specific rationalities, in fact other aspects coalesce. In the case of the English approach to initial training, for instance, whilst the pragmatic orientation prevails in formal initial training programmes, other aspects should also be considered to be part of the actual training framework, incorporating various rationalities. The extensive use of part-time appointments as a first step into an increasingly formalized judicial career, the role of supervising judges and particularly mentoring schemes (see Ichino 2010, p.9), all speak of a process of adaptation of judges to a system of rules, beyond the adoption of specific practical skills. Such a conclusion is clearly discernible from the definition of mentoring provided in the context of the English tribunals: "a process whereby an experienced member of an organization acts as a confidential adviser to one or more recently appointed members in order to help them understand the workings of the organization and their role within it" (Judicial Studies Board 2004, p.1; see also The Association of Her Majesty's District Judges 2013).

As regards continuing professional training, the influence of juristic frameworks is less evident than in the case of initial education programmes. The reason for this is that formalized continuing judicial training is a relatively new phenomenon in the world, both in civil law and common law contexts. Indeed, while systems within the former tradition have historically emphasized entry-level assessments and extended orientation training, those within the latter framework practically lacked any formal training structure or system. In fact, it is only in recent decades that continuing training in judiciaries has been massively adopted all over the world (Armytage 2003), consequently, the influence of historical inherited structures over this area of organizational life has not been particularly strong. On the contrary, the need for continuing judicial education and training has

increased in recent years, both in civil law and common law contexts, responding to similar challenges, thus making training approaches in countries with different judicial traditions increasingly comparable (Piana et al. 2007, pp.6–7). Moreover, the creation of international organizations devoted to the development of judicial training, e.g. the European Judicial Training Network (EJTN), and the International Organization for Judicial Training (IOJT), among others; have fostered greater commonalities in the approach to continuing judicial training. An example of this common view is a recent study of best practices in judicial training in Europe funded by the European Commission and developed by the EJTN, which relies upon a detailed assessment to promote specific practices in judicial training systems in Continental Europe and the UK (see European Comission 2014).

Besides traditional juristic frameworks, other background factors have an important influence over judicial training approaches. For example, judicial training needs can be particularly urgent in developing countries or in jurisdictions that have made a recent transition to democracy. Therefore, such systems can be differentiated to more stable contexts where judicial training is well established and there is no urgent need to conduct comprehensive training needs assessments or build extensive training capacities (Piana et al. 2007, p.6). More generally, background factors demand that the judiciary face new challenges in areas such as awareness of the social context, reinforcement of judicial independence, or judicial integrity. In such cases, judicial education programmes are expected to give rise to significant attitudinal changes by forging the collective identity of judges. For that purpose, training programmes might cover new fields in areas such as social science, political theory or ethics, aiming to provide the information needed to focus the attention of judges upon the role of the judiciary and its rules, building identification, commitment, and loyalty towards the organization (Guarnieri 2005). Evidently, where background factors severely affect the image, efficiency, or legitimacy of the judiciary, e.g. contexts with weak levels of social awareness, consistency, or individual autonomy, there might be a greater need for training to emphasize substantive and/or practical rationalities, reinforcing the identification of judges with ultimate democratic values, or with the system of rules of the organization respectively (see Townley 2002).

4.2 Training Structures

A range of historical and political factors determines the preferred structure for the design and delivery of training to judges. In fact, common law countries have generally relied upon a peer-group educational model, while in civil law countries a law

school educational model has prevailed (Amy 2002, p.134). These emphases have shaped the organizational training structure in each context, as civil law countries have developed much more formal systems than common law countries, mirroring university structures to a certain extent. Accordingly, at one end of the spectrum it is possible to find formal state judicial schools funded by governments, predominantly controlled by the judiciary, and involved in both the recruitment and training of judges. Such models prevail in civil law countries with a greater tradition of judicial education, such as France, Germany, and Spain. The opposite are less structured organizations, with no premises for training, controlled either by judicial associations, ministries of justice, or independent organizations within the judicial structure but funded by the government, as is the case in England and Wales (Piana et al. 2007, p.7).

The effect of training structures upon the model of education and its emphases is not straightforward. However, based on the extent of training efforts, the available resources in each case, and the relative importance attributed to judicial education, it can be reasonably inferred that in countries with more formal and developed structures the model of education is likely to be wide in scope, comprehensive, and complex in content. Conversely, countries with less structured training organizations are likely to have more limited training scope, probably aiming to address particular judicial issues thus emphasizing practical rationalities, e.g. focusing training on judicial skills rather than more substantive approaches that promote the preference for certain ultimate values (see Townley 2002). Accordingly, the formal judicial school model can be generally linked to the purpose of developing judicial identities, focusing the attention of judges by forging identification with complex systems of rules and values. On the other hand, less structured systems can be linked more easily with a goal-oriented purpose, which aims to influence not so much the identity of judges but, more specifically, their individual choices in concrete situations. The previous distinction is not based upon the opposition of identities and goals. As previously clarified, the distinction is more about the emphases involved, as the assumption of this thesis is that human behaviour relies upon a combination of both, social identities and individual goals (Thornton et al. 2012).

The specific emphases that training organizations place upon their educational models depend on several factors which are difficult to list. However, one aspect that needs to be taken into account is the structure of control and direction of judicial training. Generally, training is in the hands of the judiciary, achieved by having a majority of judges on the governing body. However, such bodies usually include representatives of the ministries of justice or political institutions as well, while in countries where training organizations have developed partnerships with universities e.g. Canada, the US, and Australia, it is usual that law professors also take part in the governing bodies (Piana et al.

2007, p.7). The way in which the views of judges, politicians, and academics are balanced is likely to have a certain impact upon the model of education, its openness, and the way in which it focuses the attention of judges. Where judges dominate the governing organization, it is likely that a pragmatic approach, focusing upon the best ways to deal with day-to-day tasks, could be emphasized, while it is also possible that corporatist influences may emerge. Besides, the influence of politicians who represent the funding bodies might put more effort into aspects such as efficiency and means-ends calculations, thus emphasizing a formal rationality, while the input from academics is likely to have a greater theoretical influence over the educational model, hence fostering that kind of rationality (see Townley 2002).

4.3 Scope of Training Curricula

The approach to training is, by and large, determined by the mission of judicial education, which is generally to improve the quality of judicial performance by developing the competences of judges. The notion of competence must not be limited to the acquisition of particular bodies of knowledge or skills, but rather, it involves a balance between at least three components: mastery of legal *knowledge;* development of professional *skills,* and acquisition of judicial *disposition* (Armytage 2005, pp.27–28). Accordingly, most training systems cover to varying extents the three areas, as shown by a comparative study of judicial training in different countries, which claims that the main curriculum areas include: substantive law; legal and judicial skills; social context; judicial ethics, and personal welfare (Thomas 2006, p.57). Clearly, substantive law subjects are included in every training system, covering most of the legal knowledge component mentioned above. Legal and judicial skills subjects relate to the professional skills component, while topics regarding social context awareness, judicial ethics and welfare, cover the more diffuse aspect of judicial disposition.

The way in which judicial training systems balance the various aspects of their curricula provides a point of comparison between training arrangements, also revealing different rationalities and emphases that can be linked in each case to broader organizational models. For example, a training system that places the greater effort upon teaching substantive law emphasizes the theoretical rationality implicit in abstract legal concepts as a way to understand how the world works and to inform action accordingly (Townley 2002). In turn, theoretical rationality in judicial contexts might focus upon the explicit corpus of knowledge laid down in legislation and case law, or include the tacit knowledge that informs legal interpretation practices (Healy et al. 2010, p.814). Such theoretical emphases can be expected in more dynamic contexts of legal evolution, where

judicial training efforts would reasonably aim to keep judges updated. Theoretical rationalities might be salient in judiciaries in which the role of the judge has been historically understood in terms of mere application of pre-existing law. In such cases, the role of training might be strongly oriented to teach judges the corpus of knowledge they need in order to perform their role, understood in rather mechanistic ways. Therefore, the system would focus the attention of judges upon the theoretical inputs needed to deliver judgements by simple deduction. The prevalence of theoretical rationalities is likely to coalesce with formal means-ends rationalities (see Townley 2002, p.165), in which the means-end calculation is made by reference to universally applied laws (see Healy et al. 2010, p.809), revealing a formalistic impersonality typical of bureaucratic organizational settings. Such emphases have been prevalent in judicial systems influenced by the 19th century French model, which strongly inspired Latin American judiciaries.

From a different perspective, systems that prioritize the enhancement of judicial skills are pragmatically oriented, thus emphasizing a practical rationality focused more upon the work of the judge than upon the theoretical background and the system of general rules. In such cases, training aims to guide actions in daily routines, providing patterns of action for the expedient means of dealing with immediate practical difficulties, such as conducting hearings successfully, delivering accurate and understandable judgements, or assessing the credibility of witnesses. Typically, such practical rationality has been dominant in organizational settings where the role of judges has a higher status as a legal source and there is more space for judicial creativity, i.e. common law systems. In such contexts, the recent introduction of training has naturally concentrated upon the day-to-day work of the judge, as it is particularly important that the space for discretion, creativity, interpretation, and application of the law is well exercised.

Finally, training initiatives that emphasize substantive rationalities, i.e. the preference for certain values (Townley 2002), are likely to reflect in straightforward ways the kind of organization in which such values are promoted, and the identities that the system aims to forge. For example, the extent to which diversity issues or judicial ethics are covered by the training scheme, and the specific contents and methods used to discuss such topics, will likely reflect the commitment of the organization to issues in those areas and, eventually, the internal disputes around such conflictive topics, the kinds of institutional rules emerging in those areas and, more importantly, the way in which such rules are discussed, adopted, enforced, and applied within the judiciary.

4.4 Methods for Delivering Judicial Training

Historically, judicial training referred to the transfer of knowledge and expertise

from trainer to participant. Hence the trainer defined the content of courses, while the trainee was seen, metaphorically, as a vessel to be filled up by means of traditional lectures (European Judicial Training Network 2014, p.27). Accordingly, training was a way to tackle deficiencies (see Armytage 1996, p.25) in knowledge and experience of judges appointed at a young age, formed according to prescriptions imposed from the top of the organization. Evidently, a prescriptive, theoretically focused, and vertical methodology for judicial training reveals a certain pattern of power distribution, being also consistent with a coercively bureaucratic understanding of the judicial role in which judges are expected to apply the law in a mechanistic fashion. On the contrary, such a prescriptive, top-down methodology used to address deficiencies could hardly be accepted in a culture in which judges are selected from experienced and highly skilled lawyers who are appointed by merit. In fact, such an understanding was fundamental to strong objections to the late introduction of formalized judicial training in common law countries at the end of the 1970s (see Armytage 1996, pp.31–33).

Currently, besides addressing deficiencies, judicial education is envisaged also as: "an opportunity for development, and a benefit, rather than as the remedy for a deficit" (Armytage 1996, p.26). Such an idea can be applied to any context, in relation to either young inexperienced judges or to the highly skilled and experienced, depending upon what is expected from the judges and the general understanding of the judicial role. If the judicial role is envisaged as a form of *artistry,* i.e. the ability to use knowledge to solve common situations in professional practice, which are characterized by uniqueness, uncertainty, and value conflict (Schon cited by Armytage 1995, p.174), a developmental approach to training can be a useful tool for the continuous development of judicial competences in any context. Moreover, when the judicial role is seen not as a mechanistic, value-free process, but rather as a complex evaluative exercise, successful training methodologies need to foster active participation, debate, and reflection. In such a case, besides the cognitive acquisition of information, training becomes a way of developing judicial skills, disposition, and attitudes; enhancing the capacities needed to take sound decisions, that is, self-critique and critical analysis of received assumptions, common sense knowledge, and conventional behaviour (Armytage 1995, p.180).

In sum, by focusing upon training methodologies, it is indeed possible to make inferences about the way in which the judicial role is understood, what is expected from the judges, the working dynamics that the system fosters, and the role of authority within the organization. Interestingly however, training systems are generally moving from traditional methods to participatory approaches, aiming to foster reflection, debate, and learning from experience, despite their historical backgrounds (European Judicial Training Network 2014; European Commission 2014; Thomas 2006). Accordingly,

differences in training methodologies tend to be subtle and their effects upon organizations harder to identify. Nevertheless, points of differentiation can be discerned by focusing upon the extent to which training systems reflect the precepts of judicial education highlighted by Armytage (1996), that is, the extent to which judicial education is: a voluntary, independent, judge-led process; which promotes the development of judicial skills, disposition, and attitudes in addition to the acquisition of information, and facilitates individualized learning, which is self-directed, reflective, and fosters the capacity for rigorous self-critique.

5. Performance Appraisal in the Context of Judiciaries

Performance appraisal has become a general heading for a variety of activities through which organizations seek to assess employees, develop their competence, enhance performance, motivate them and distribute rewards. It involves two main aspects: first, the *content* of appraisal, that is, *what* is appraised, which has been generally centred on achievement against goals and the assessment of competencies; and second, the *process* of appraisal, that is, *how* appraisal is conducted (Fletcher 2001, 2007). Accordingly, crucial to any appraisal system is the determination of the aspects to be assessed, either at the organizational or individual level, and also the identification of suitable performance indicators. Likewise, the methods for collecting and analysing data for the qualitative or quantitative assessment of performance also constitute a central aspect of formal appraisal systems.

Before discussing the content and the process of appraisal, it is relevant to decide about the aims of this mechanism i.e. making reward decisions, improving performance, motivating staff, identifying good and poor performers to make planning decisions, promote dialogue between different levels of the organization, or formally assessing unsatisfactory performance. The conceptions of those involved in the appraisal scheme – the organisation, the appraiser and the appraisee – about the aims of the system and its emphases do not always coincide and might be conflictual. Therefore, an effective appraisal scheme should take the different perspectives into account and set realistic goals that offer something valuable to all the parties. Literature suggests that appraisal for development and motivation reflects the most acceptable aim for all those involved, as it normally represents a high priority for any organisation and also an individual aspiration, while other purposes for appraisal schemes seem harder to achieve. Particularly, assessing individuals relative to their peers through appraisal is not likely to be achieved effectively (Fletcher 2007, pp. 5-11).

Scholars classify performance appraisal systems based on their different purposes. Fletcher (2007) distinguishes appraisal *for assessment and comparison*, and appraisal *to motivate and develop*. The former historically focused on the evaluation of personality attributes, and has become rather unpopular these days. However, there are still remnants of this approach, particularly linked to processes of selection or promotion within organizations. A more sensible and widely used form of appraisal for assessment and comparison focuses on evaluating job-related abilities, for example using rating scales to assess individuals' performance. The subjective component of these schemes might easily lead to serious distortions even if measures are adopted to minimize such effects. From a totally different perspective, appraisal used to motivate and develop generally focuses on results-oriented evaluations or the assessment of competencies, both aspects seeking to emphasize performance improvement through goal-setting and personal development (pp. 13-35).

Scholars have also used the distinction between *judgemental* and *developmental* performance appraisal to classify these systems. Townley (1997) explains that *judgemental* schemes are based on a centrally coordinated information system, which is used as a tool for resource allocation and is the basis of compensation, promotion and disciplinary decisions. The author claims that links to punishments and rewards might compromise the accuracy and veracity of the information retrieved by the scheme. On the contrary, *developmental* systems find organizational benefits accruing from individual commitment to, and trust in, the scheme. As a consequence, such systems aim to identify individual strengths and weaknesses, to develop skills and abilities and reduce mistrust, denying links between appraisal and rewards or punishments. In the context of these approaches, it is essential that appraisees play an active role in the process, for example, by exercising some freedom in the designation of the appraiser (Townley 1997, p. 267), co-developing performance standards, participating in the design of methodological tools, producing self-evaluations or actively engaging in the appraisal interview (Roberts, 2003). In fact, empirical studies have established a correlation between the effectiveness of the appraisal scheme and its participative features (e.g. Groen et. al. 2012). Indeed, greater success in terms of motivation and development can be expected when the individual is allowed to exercise autonomy, internalizing the expected behaviour and acting according to self-determination (Gagne & Deci 2005).

The analysis of performance appraisal schemes is particularly helpful to understand the organizations in which they are applied. Indeed: "appraisals may differ, reflecting…the culture of the organization in which they operate, their functions mirrored in the particular details of the scheme: the choice of the appraiser; links with promotion or discipline; appeal mechanisms; confidentiality of documents, etc." (Townley 1993, p.

226). In fact, managerial systems such as performance appraisal cannot be understood as merely technical, politically neutral and decontextualized activities. On the contrary, they reflect power relations in a particular context and as such, appraisal: "becomes a mechanism around which interests are negotiated, counter-claims articulated and political processes expressed" (Townley 1990, p. 43).

In relation to judiciaries, performance appraisal has been adopted in many contexts, both in the civil law and the common law world, responding to increasing claims for greater judicial accountability. Currently, traditional forms of accountability in judiciaries such as public scrutiny, media surveillance, the appellate review or academic commentary, important as they are, have become insufficient in the face of the increasing complexity of judicial organizations. As a result, judiciaries have adopted systems to assess judicial attributes through qualitative and quantitative methods; and also, court and administrative performance management through measurement of factors such as timeliness and benchmarking (Colbran 2003). Performance appraisal schemes aim to tackle all of these aspects through variable methods and structures, as the following sections explain.

6. Classification of the Different Approaches to Judicial Performance Appraisal: Their Normative Content and the Institutional Influences upon Individual Judges in Each Case

Besides judicial training, this research also focuses upon the way in which performance appraisal influence individual judges with institutional prescriptions, providing them with key information and knowledge about the kind of organization in which they perform their duties. Accordingly, the aim is not to describe and analyse performance appraisal systems in detail, but rather, to observe how evaluation mechanisms in judiciaries generally shape judicial behaviour, forge professional identities, or focus the attention of judges upon individual goals. Assuming that any form of judicial evaluation can be potentially influential for judges, the research focuses on the one hand upon traditional individual appraisal schemes; and on the other, upon collective evaluations and measurements of judicial performance. Therefore, the first distinction between appraisal approaches relevant for this work, borrowed from the European Network of Councils for the Judiciary (Sudre 2005), differentiates the individual evaluation of judicial work from the systems that aim to evaluate and gauge the work of courts more generally.

The research also relies upon the distinction between judgemental and developmental appraisal schemes (Townley 1997). Evidently, the variable combinations

of appraisal features, either individual/collective, or judgemental/developmental, emphasize different rationalities and focus judges' attention upon distinct elements, shaping identities and individual goals accordingly. In some cases, judicial systems have more than one evaluation scheme, which might have different purposes and configurations. In the case of Chile, for example, it is possible to observe an individual appraisal system and two schemes of collective evaluation of judicial work.

6.1. Individual and Judgemental Evaluation Systems

This category includes many traditional evaluation systems used in hierarchical judiciaries, based upon the top-down assessment of the work of individual judges by superiors. These schemes are based upon the evaluation of individual performance according to either general criteria or more specific performance indicators. In both cases, the appraisal scheme falls within the range of mechanisms focusing upon appraisal for assessment and comparison purposes (Fletcher 2007, pp.13–21). What makes these approaches peculiar is the aim to rate judges according to variable criteria, i.e. personal attributes, job-related abilities, or performance results, in order to compare and distribute rewards and punishments accordingly. The range of systems within this category and their organizational effects can be wide. On the one hand, schemes focusing upon general personal attributes, e.g. responsibility, tend to be highly unpopular owing to the lack of objectivity involved in such assessments (Fletcher 2007, p.13). Indeed, given the ambiguity of the evaluation criteria, these types of systems generate excessive space for discretion and unfair appraisals, eventually fostering an oppressive organizational atmosphere, particularly if the consequences of the appraisal process are significant.

Other schemes within the same category are based upon more measurable aspects such as specific job-related abilities, performance results, or a combination of such aspects. In all cases, the different approaches share a judgemental character, considering the use of rewards and punishments as extrinsic motivational sources through which the expected behaviour is regulated. The limited scope of these approaches based upon the introduction of external incentives to individuals and a straightforward means-ends formal rationality can provide a great deal of organizational information about the way in which the system focuses the attention of judges. In particular, how performance indicators are identified, the methods for collecting and analysing data, and especially the consequences attached to the results of evaluations might reveal authority structures, internal dynamics, and the broader institutional logics of the judicial system. For example, a strict top-down scheme controlled by the hierarchy and based upon rewards and punishments might reveal a coercively bureaucratic structure in which the appraisal

scheme is used to consolidate the identity of judges as passive rule followers, rather than creative and autonomous individuals. In turn, a judgemental and not so prescriptive approach might use economic rewards, i.e. performance-related pay schemes, in which individual goals are strongly emphasized without necessarily fostering the identification of the individual with organizational purposes. In such a case, the strength of external incentives might crowd out the values implicit in judicial professional identities (Sandel 2013), fostering individualistic dynamics and even distortions such as gaming behaviour among judges who might focus upon economic rewards at the expense of their duties. An example of such a phenomenon is visible in the Spanish system of *módulos de dedicación,* which reveals the influence of market-based logics and internal dynamics increasingly dominated by self-interest and individual goals (Bagues & Esteve-Volart 2010; Doménech Pascual 2008).

6.2. Collective and Judgemental Evaluation Systems

This category refers to systems of evaluation focusing not upon individual judges but rather, upon the performance of the courts or the judiciary as a whole. In this case, performance indicators focus upon collective targets, while collective rewards are distributed upon accomplishment of the expected results. Eventually, these systems might evaluate individual performance, but anyway the results are analysed as a whole and rewards distributed collectively, for example, among the members of a particular court. Given the collective nature of the system, the judgemental component is generally expressed through economic compensation. Hence the central tenet of judgemental schemes, i.e. the use of a centrally coordinated information system to assess performance and distribute compensations, rewards, and punishments (Townley 1997, p.267), is evident in these schemes.

Generally, collective and judgemental evaluation systems have been implemented in judiciaries as part of management schemes known as *Management by Objectives* (MBO), which have become increasingly relevant since the emergence of New Public Management approaches. Many countries, e.g. Austria, France, the Netherlands, Spain; have implemented these kinds of approaches to evaluate the judicial system in terms of outputs and to allocate resources according to measurable results. In these cases evaluations are mostly quantitative, based upon statistical methods, and generally focusing on managerial values, i.e. efficiency and efficacy (Contini & Mohr 2007a). Therefore, these schemes tend to focus the attention of judges upon such managerial values, shaping individual goals, particularly if the results of the assessments have a direct consequence in terms of rewards. Accordingly, the risk of gaming behaviour and

distortions mentioned in relation to some individual appraisal schemes is also present in the case of these collective systems.

A particular approach could also be mentioned as part of this category, although it does not attach any consequence to the results of evaluations. Such systems focus upon measuring performance in relation to specific indicators, but no explicit consequences follow the results, either at the individual or court level. Probably the best example of this approach is the *Courtools* scheme, developed by the National Center for State Courts in the US. The system was designed as a flexible mechanism that allows each court to determine the goals or standards to be met, assuming that courts will integrate performance measures to their strategic plans (National Center for State Courts 2005). Therefore, *Courtools* is not a proper appraisal mechanism, but rather, it is a measurement instrument aiming to deliver relevant information about the performance of courts to be used for management purposes. Arguably, the lack of pre-established standards and goals, and pre-determined consequences following measurements, could lead to the conclusion that this mechanism is a value-free instrument designed for mere quantification. However, measurement is never neutral as: "the process of deciding what and how to measure performance is capable of having very real effects on the behaviour of persons and thereby distort actual conduct" (Spigelman 2001, p.26). Indeed, some of the weaknesses of this particular scheme rest precisely upon the absence of definitions on key aspects. In fact, the definition of goals and standards is particularly problematic in an institution characterized by a very intricate structure of values, interests, and stakeholders. Consequently, it is crucial to consider who can establish such goals. The same can be said of the consequences of measurement, as the system does not say much about what to do with the results of the assessment (Contini & Carnevali 2010, p.5). Decisions on these matters are not generated in a political process in parliament or the judicial council, while no mechanisms of institutional dialogue have been linked to this instrument to develop adequate standards and to justify institutional action. Rather, *Courtools* puts measurement at the centre of the management process, based upon a limited set of quality indicators. Therefore, the process might over-emphasize quantitative measures, while pressures to target indicators could arise, as it is always possible for organizations to improve performance as measured, by reducing quality in incremental ways that are not necessarily detectable (Spigelman 2001, p.40). Indeed, there is now such a thing as a neutral measuring system. Once measurements are done and made available to relevant institutional actors and the public, the results might automatically influence judicial behaviour, e.g. through pressure for recognition by peers, the press, or the public; drawing the attention of individuals to performance measurements, shaping their goals and identities.

6.3. Individual and Developmental Evaluation Systems

This kind of approach basically involves two people: the appraiser and the appraisee, jointly assessing the latter's performance, in terms of achievement of targets or the mastery of specific competences. The strength of these types of systems is in the way they analyse the progress of the individual and direct attention to those areas where skills can be improved, deciding the appropriate measures needed to make further progress, e.g. training. However, when the scheme focuses upon concrete targets and results, there is a risk of over-emphasizing ends at the expense of means. Likewise, the potential advantages of developmental schemes can be nullified if rewards are linked to the results of the assessment (Fletcher 2007, pp.22–36). Indeed, these schemes are designed to identify individual strengths and weaknesses and to develop skills and abilities. Consequently, trust in the scheme is an essential aspect of its success (Townley 1997, p.267), while sources of behavioural distortion i.e. over-emphasis upon results, should be avoided.

Evidently, developmental schemes applied in judiciaries aim to focus the attention of judges upon self-development, in relation to certain targets and competencies relevant to the organization, reinforcing values and rules considered relevant. The way in which targets and competencies are determined, the relationship between appraiser and appraisee, the specific manner in which the appraisal is conducted, and the outcomes of the process determine the specific character of the system, the information provided to judges by the scheme, and the eventual emphasis upon certain types of rationality over others.

6.4 Collective and Developmental Evaluation Systems

Generally, collective and developmental approaches have been used as part of broader initiatives, mostly based upon Total Quality managerial trends. Probably the best example is constituted by the experience of the courts of Rovianemi in Finland. The objective of the system is to enhance the quality of the judiciary so that the proceedings meet the criteria of a fair trial, the decisions are well reasoned and justified, and the services of the court are affordable for users. The main method consists of systematic discussions among judges and other participants for the purpose of improving the quality of adjudication. In 2006 a set of quality benchmarks designed through a participative process was introduced as the basis for quality work in the following years and to monitor developments in quality (Working Group on Quality Management ENCJ 2008, pp.20–

21). This project fosters dynamics based upon the formation of quality groups, annual quality conferences, and the discussion of quality benchmarks, developing a new culture of communication among all the actors involved in the judicial process (Contini & Mohr 2007b, p.40).

The purpose of the benchmark system is to provide information about development needs and does not intend to be a monitoring mechanism for individual judges, or to be used for disciplinary purposes. Besides, it has been designed as a tool for training and education, offering a common frame of reference to be used in discussions of judicial quality. The scheme seeks to evaluate the following aspects at court and not at the individual level[19]: the process; the decision; treatment of the parties and the public; promptness of the proceedings; competence and professional skills of the judge, and organization and management of adjudication. Each of the six aspects contains a number of performance indicators or quality criteria amounting to a total of 40 indicators (Court of Appeal of Rovaniemi, Finland 2006, pp.31–47). In turn, there are five methods of evaluation, quantitative and qualitative, to be used depending upon the nature of the quality criterion. (Court of Appeal of Rovaniemi, Finland 2006, pp.58–79)

Finally, regarding the consequences of the evaluation process, there are no mechanisms of hard accountability following the results of the assessment. The system is oriented to institutional development and learning, hence the results are not linked to any kind of formal rewards or punishments. Rather, the system has developed mechanisms such as annual talks, the annual conference on quality, and participation of all judges in the working groups, which create group and peer pressure as favourable conditions for horizontal and soft accountability (Contini & Mohr 2007b, p.41). Furthermore, the wide spectrum of participants in the process and the effort to communicate to the public the results of the quality conferences through the free distribution of reports and their publication on the internet (Working Group on Quality Management ENCJ 2009, p.20) help to empower the broader judicial audience with knowledge about the expected behaviour of courts in specific aspects, generating another source of informal pressure for judges to meet the standards.

In terms of the values promoted by the system, there is a balance between legal-judicial values and managerial ones as long as the latter involve a direct impact upon the judicial process (Court of Appeal of Rovaniemi, Finland 2006, p.31). The orientation of the system is reinforced by the participation of representatives of the non-judicial sphere at different stages, either for the development of standards or for evaluation purposes, involving private and public attorneys, prosecutors, legal scholars, police officers,

[19] Individual-level evaluations are anonymous.

communications professionals, and court users. Consequently, different interests are taken into account (Contini & Mohr 2007b, p.42). Moreover, the active participation of all judges in the identification of quality criteria facilitates a space for them to discuss their role and the distinctive elements and rules that should guide judicial behaviour. Accordingly, the system focuses the attention of judges upon the values and rules expressed in the quality benchmarks through self and group reflection. Such a comprehensive process of evaluation addresses many aspects of judicial work, clearly reflecting the internal dynamics, openness, internal distribution of power, and generally the organizational character of the judiciary. It does not seem to emphasize a particular rationality, fostering a balance between the different aspects of judicial performance.

7. Conclusion

This chapter explains that it is possible to characterize judicial systems, identifying some of their main organizational variables, by studying their training and performance appraisal arrangements. It argues that judicial training and performance appraisal arrangements have a normative content that broadly reflects the underlying organizational beliefs and values of the judicial system in which they are applied. Following theoretical insights developed by the institutional logics perspective, we have seen that training and appraisal systems carry top-down influences from the institutional system and organizational rules to judges, providing relevant information to them about the organization in which they work, focusing their attention, and shaping social identities and individual goals. In turn, the reactions of judges to the use of certain training and appraisal approaches might also reveal the internal discrepancies and ambiguities that trigger processes of organizational change in judiciaries. In sum, the study of the functioning of training and appraisal schemes might capture some of the information that these systems provide to judges about the structure, internal dynamics, and organizational cultures of judiciaries. Hence judicial training and performance appraisal constitute a reliable lens, through which the main features of judiciaries may be studied, allowing the researcher to make sound inferences about the structure and functioning of the judiciary, including aspects such as the distribution of authority, the working dynamics, the organizational cultures, and in particular, the values and beliefs embodied in organizational arrangements.

In order to support the argument above, different approaches to judicial training and performance appraisal systems were discussed in the chapter, aiming to demonstrate the variable ways in which they focus the attention of judges, forging identities, and

shaping individual goals. The main aspects that differentiate training and appraisal schemes are outlined, highlighting the normative emphases that each approach entails and, subsequently, the information that in each case is provided to judges and the influences exerted upon them. The categories used to differentiate training and performance appraisal schemes guide the enquiry in the following chapters, as the study and characterization of judicial training and performance appraisal systems in Chile, and England and Wales focuses upon such categories.

Finally, some ideas about the potential of Judicial Training and Performance Appraisal as vehicles for organizational change should be highlighted. In the first place, it is clear that both mechanisms can be used for many different purposes, which largely depend on the context where they are applied. This chapter claims that it is possible to identify distinctive rationalities underlying the various structures, methods and contents of judicial training and performance appraisal systems. Such rationalities express a normative emphasis, which could be aligned with prevailing values and beliefs of organizations or differ and contradict them. Accordingly, training and appraisal systems might *carry* institutional influences to judges, aiming to reinforce dominant rationalities or rather promote organizational changes from the top.

As the chapter explains, to be effective, reforms should identify concrete problems to tackle and specify the aims of either training or appraisal schemes. In fact, a rather common misconception about judicial training is to take its benefits for granted, without reflection about the problems to attend. Likewise, the strong influence of the New Public Management might induce organizations to implement managerial mechanisms such as performance appraisal, understood in merely technical terms and without reflecting sufficiently about its aims and the complexities of its application. Once the aims of these mechanisms are settled, it is crucial to develop the right methods to fulfil such purposes. In the case of judicial training, literature suggests that principles of cognitive psychology and adult learning should be taken into account, while regarding performance appraisal, developmental systems seem better suited to deal with the complexities of judicial work.

Importantly, the use of judicial training or performance appraisal, either to promote changes or to maintain the status quo, will likely produce an effect on judges. Indeed, both systems might become spaces around which interests are negotiated, counter-claims articulated and political processes expressed, as Townley (1993) explains in relation to performance appraisal. The normative content implicit in these systems interacts with the ideas, values and beliefs that prevail in the judiciary, in different ways, depending on the aims of the systems, the methods used, the expectations of judges and their convictions. Such interaction might foster stability, promote gradual evolution and

adaptation, or prompt resistance, conflict and unexpected effects. Arguably, individuals play a significant role in this process, adopting, resisting, adapting or bending influences that emerge from the top of the institution.

In terms of the areas of change that can be linked to judicial training and performance appraisal, the scope of these mechanisms is broad. They might produce effects upon: the structure of the organization i.e. the roles and responsibilities of organizational actors, if organizational mechanisms alter in some way dominant patterns of power distribution; the organizational culture, if training and appraisal foster new forms of relationships between judges and their colleagues, superiors or external actors; and finally, the functioning of the organization, if these systems prompt new working dynamics within the judiciary. In any case, results depend to a great extent on levels of coherence between the problems to tackle, the aims of the systems, the methods used and the context of application. As the next chapters explain, differences in the levels of coherence between such aspects might explain the contrasting results of judicial training and performance appraisal in the countries under study.

IV. JUDICIAL TRAINING AND PERFORMANCE APPRAISAL IN THE JUDICIARIES OF CHILE AND ENGLAND AND WALES

1. Introduction

The purpose of this chapter is to describe and characterize the systems of judicial training and performance appraisal in Chile and England and Wales, comparing both approaches in order to contextualize the following steps of the research. Accordingly, the elements used in the previous chapter to differentiate judicial training approaches and performance appraisal systems generally, are used to characterize the particular arrangements of Chile and England and Wales. Therefore, the approaches to training used in each case are described according to: the influence of background factors, including juristic frameworks; the training structures adopted; the contents of training programs, and the methods used to train judges. In turn, performance appraisal systems are characterized according to the categories discussed in the previous chapter, that is, individual or collective appraisal, and judgemental or developmental approaches.

In terms of the sources used to describe training and appraisal systems, the chapter draws upon interview data and documentation. It relies upon extant literature, but mostly in policy documents generated by the different agencies and authorities in charge of training and appraisal systems in each country, e.g. the Judicial College, the Lord Chief Justice, the Senior President of the Tribunals, the Association of District Judges or specific tribunals, in the case of England and Wales. In the case of Chile, documents produced by the Academia Judicial, the Corporación Administrativa del Poder Judicial, and the Supreme Court were also consulted. Interviews were conducted with the directors of training for the tribunals and courts at the Judicial College, and the Director of the Judicial Academy of Chile. Likewise, a Circuit Appraisal Judge in England and relevant officials in the administrative corporation of the Chilean judiciary were interviewed in order to facilitate the understanding of appraisal systems in each case. In addition, judges interviewed in Chile and England and Wales provided their impressions of the schemes of training and performance appraisal in which they participate. Lastly, media articles about judicial training and performance appraisal in both contexts were also reviewed in order to reveal the way in which these systems are presented and explained to the public.

The aim of the chapter is not to offer detailed descriptions of judicial training and performance appraisal arrangements in each country but rather, to characterize and contextualize them. Indeed, following the institutional logics perspective, the thesis assumes that organizations are embedded in broader normative frameworks,

consequently, organizational tools such as judicial training and performance appraisal cannot be adequately understood in purely technical terms without considering the background in which they are embedded. Therefore, the focus of this chapter is not technical, but rather, training and appraisal are considered as social phenomena reflecting different interests and interpretations the significance of which emerges from the context (see Healy 1997). Hence in order to contextualize judicial training and performance appraisal systems, the research follows a similar strategy to the one developed by Townley (2002) and Healy et. al. (2010), based upon the interpretation of Weber's work developed by Kalberg (1980). Accordingly, the study outlines the values, beliefs, and normative ideals of the judiciaries of Chile and England and Wales, interpreting them in terms of multi-faceted rationalities formed by substantive, theoretical, practical, and formal aspects. In turn, the chapter explores the rationalities implicit in the judicial training and performance arrangements in each case in order to highlight the new values and ideals being introduced through these mechanisms to the judiciaries under study. In sum, the analysis focuses upon the rationalities that are brought into play in the attempt to flesh out what is involved in implementing rational technologies such as professional training or performance appraisal (Townley 2008, p.208) in the contexts under study.

2. The Focus Upon *Rationalities*

This thesis stands in contrast to the abundant managerial literature on professional education and particularly performance appraisal which describes these mechanisms using one-sided and typically managerial perspectives, offering a *rational* way to improve management and performance. The aim is to focus upon the significance of these mechanisms, which cannot be disassociated from their particular contexts, under the assumption that organizations are deeply embedded in institutional environments and value spheres (Thornton et al. 2012). Consequently, training and appraisal arrangements cannot be valued as intrinsically good or bad, but rather, their significance can only be discerned within their context in relation to the dominant logics, in particular societal spheres, with their differing belief systems and distinct types of social relations (Townley 1997, p.263).

The contextual analysis of organizational systems follows the strategy used by Townley (2002; 1997) and Healy et. al. (2010), who study and describe different value spheres, i.e. universities, museums, and the judiciary by focusing upon their multi-faceted substantive, theoretical, practical, and formal rationalities. These approaches rely upon Weber's distinction of four types of rationality, as interpreted by Kalberg (1980), using

these categories to examine the underlying rationalities that inform the work and purpose of organizations, and the competing rationalities introduced by mechanisms such as performance measures or business planning (Townley 2002, p.164). According to this point of view, four types of rationality co-exist in organizations: the practical (the calculation of the means to deal with day-to-day difficulties according to the accepted practices of a particular social order); the theoretical (the mastery of reality through the construction of general abstract concepts); the substantive (the preference for certain ultimate values), and the formal (the means-ends rational calculation according to universal rules) (Kalberg 1980; Townley 1999; Townley 2002). These different dimensions of rationality: "are not antithetical, thereby forcing an either/or analysis. Rather, all are operational within a given societal or value sphere" (Townley 2002, p.165). Consequently, organizations and organizational technologies incorporate all of these dimensions to varying extents, being differentiated according to such variability. Typically, organizations governed by market logics, for example, tend to emphasize formal economic rationalities, while substantive rationalities are much more important in the context of organizations such as the family. However, even in such value spheres, other rationalities are also brought into play, shaping the understanding of rational action in such contexts.

Failure to recognize the co-existence of different types of rationality in organizations, disregarding the need for a balance between these dimensions and over-emphasizing a particular rationality in the design of organizational systems, might result in *irrational* consequences (Townley 2008, pp.207–210). A good example is provided by the experience of performance-related pay in the Spanish judiciary, strongly emphasizing a formal economic rationality and disregarding the values of the judiciary (the substantive rationality) and its accepted practices (the practical rationality), thus fostering distortions and gaming behaviour among judges (Bagues & Esteve-Volart 2010; Doménech Pascual 2008). The introduction of such one-sided types of mechanism might also foster resistance to their implementation, as documented in studies of the implementation of performance appraisal in UK universities. The governmental initiative to introduce this mechanism in the 1990s was initially shaped by a strong managerial focus, incorporating elements of formal bureaucratic, technocratic, and economic rationalities. However, the initiative conflicted with the dominant values and practical rationalities of universities, prompting a strong opposition that re-shaped the model of appraisal adopted by many of these organizations (Townley 1997; 1999). Conversely, systems such as training or performance appraisal might be used to re-balance rationalities in organizations in which a certain dimension outweighs other rationalities, producing undesired outcomes. An example of this situation is provided by a study of the functioning of assessment centres

in the English judiciary for recruitment purposes. In this case, the newly implemented recruitment procedure was based upon the formal rationality of fairness and objectivity, coalescing with substantive values that normally shape liberal equality perspectives, i.e. diversity and equality of opportunity. The introduction of these kinds of assessment centres conflicted with pre-existing substantive rationalities that have systematically prevailed, excluding certain groups from the judiciary, thus constituting a significant innovation for the organization (Healy et al. 2010).

In sum, the focus upon multiple rationalities is useful for the purposes of this chapter, as it facilitates the contextual analysis of judicial training and performance appraisal in the judiciaries of Chile and England and Wales, highlighting the values, ideas, and beliefs that underpin such arrangements. Therefore, the chapter is not limited to the technical aspects of these mechanisms and does not assess their purposes, methods, virtues, and failures by mere reference to universalistic and dis-embedded rational criteria, e.g. technocratic or purely economic rationalities (see Townley 2008). On the contrary, the distinction between overlapping dimensions of rationality that coalesce and conflict within organizations provides the opportunity to analyse the complexity involved in the implementation of systems such as judicial training and performance appraisal.

3. Judicial Training and Performance Appraisal in the Chilean Judiciary

3.1 The Context: Rationalities of the Chilean Judiciary

Following Chilean independence in 1810, the creation of a new judicial organization in the nascent nation was inspired by the grand ideals of the Enlightenment and the unstable post-independence political context. The result was the adaptation of Continental European judicial models for the purpose of securing order and stability. Legal codification was developed, while political and intellectual leaders advocated a strong version of legal positivism. At the same time, the organizational model adopted was bureaucratic and attuned to the purpose of securing order. Therefore, judges were literally seen as *slaves of the law*, who should not have attributions to erode the power of the Executive using discretion or creative interpretations. In fact, informal controls over their behaviour exercised by the Executive operated for several decades, mutating by the end of the 19th century into more formal structures of bureaucratic control from the top of the organization. Hence the external independence of the judiciary was secured rather early in Chile, limiting the influence of the other state powers over the judiciary. In exchange, the internal independence of judges, in terms of their autonomy from their

superiors, was almost neglected. The organization became an autonomous bureaucracy, strictly controlled from the top, which at the same time remained attuned to the preservation of the status quo. Such an effect was based upon the power of prevailing ideologies, that is, legal positivism in its hardest version, which dominated the legal scenario; and the judicial ideology of *apoliticism*, which was paradoxically equated with political conservatism. Bureaucratic features in the form of top-down controls, the career structure, and the system of punishments and rewards operated to perpetuate such judicial ideologies, shaping the role of judges in ways that are still visible in the judiciary (Hilbink 2007).

Bureaucratic features have shaped the rationality of the Chilean judiciary. Therefore, a formal rationality has been particularly powerful, to the extent of making other rationalities less visible or rather, subsumed in the former. Kalberg (1980) describes formal rationality as a means-end calculation made by reference to universally applied laws or rules, which is essentially what characterizes a purely formal bureaucratic setting. Indeed, bureaucratic features provide the calculability of means and procedures through a system of abstract, predictable, and impersonal rules, enforced by a structure of hierarchical authority and strict supervision of lower units by higher units. In turn, the universal nature of bureaucratic rationality stems from its focus upon procedural attributes, i.e. impartiality, predictability, objectivity, rather than outcome (Townley 2008, pp.46–65). Accordingly, a purely formal bureaucratic rationality is indifferent to substantive ends and values, a remarkable feature in the case of the Chilean judiciary, considering its *apolitical* ideology (Hilbink 2007), which historically worked to reinforce the myth of judges as totally neutral adjudicators, completely abstracted from political or social contingencies, who merely apply pre-existing laws regardless of the results.

Besides formal-bureaucratic features, an extensive body of codified laws and regulations, enacted by Parliament and complemented in some cases by Supreme Court regulations, traditionally formed the corpus of knowledge of the judiciary, bringing together the abstract concepts that define the theoretical understanding of reality within the organization (see Kalberg 1980). This particular dimension of rationality informs the dominant formal rationality, providing judges with the abstract, general, predictable, and objective knowledge needed to act within the parameters of a formal bureaucracy.

Generally speaking, the universalistic nature of formal rationalities may work to undermine other dimensions of rationality, particularly those that provide "the structure of morality" (Townley 2002, p.177) of organizations, i.e. substantive and practical rationalities. In fact, the latter also involves means-end calculations, in this case to face day-to-day contingencies, by reference not to universal rules but to the practices and traditions of a particular value sphere. Accordingly, practical rationalities are constituted

by one's membership of, and integration into, a particular social institution, which defines substance, obligations, and duties. The exercise of practical reasoning entails the use of a practical intelligence to deal with concrete situations, based upon what is valued as appropriate in the context of the institution (Townley 1999; MacIntyre 2007). This type of rationality seems at odds with universalistic formal bureaucratic rationalities, consequently emphasis upon the latter as the dominant criteria that guides action in the judiciary might undermine the former. In fact, in the Chilean judiciary the influence of higher judges over lower colleagues and the corporatist turn of the organization in the early 1900s tended to bend judicial practices to the will of superior judges (Couso & Hilbink 2011; Hilbink 2007; Vargas & Duce 2000). Therefore, strong incentives to follow the will of superiors worked to blur the moral content of judicial practices, fostering formal, instrumental, action among judges, i.e. doing what superiors expect in order to be promoted (Vargas 2007).

The dominance of formal rationality that emerges when purely means-end rational action permeates organizations might also uproot substantive value-based rational dimensions by over-emphasizing rule-oriented behaviour in a pervasive way (see Arendt 2006). Moreover, organizational emphasis upon the formal dimensions of rationality as expressed in general and impersonal rules might work to obscure the system of values of the organization and decrease the visibility of power relations (Townley 2008, p.57). In fact, in the case of the Chilean judiciary, it is clear that the substantive core of the organization has not historically relied upon the values of bureaucracies that might counter-balance formal rationalities, i.e. fairness, objectivity etc. (see Du Gay 2005; Olsen 2006). Rather, as Hilbink (2007) claims, beneath the judicial historically bureaucratic structure of Chile a substantive conservative ideology has been at work. Accordingly, judges had to play their role as passive adjudicators deferring to conservative elites. In turn, the organization developed strong top-down control systems to ensure the obedience of judges, underscoring the central value that shaped judicial action, that is, consistency in attitudes and decision-making, even at the expense of individual independence.

The evolution of the Chilean judiciary in the last two decades led to remarkable changes in different areas of judicial work. Indeed, traditional formal bureaucratic rationality has weakened significantly as a result of environmental ideological changes and organizational reforms, fostering an incipient move towards a rights-based jurisprudence (Couso & Hilbink 2011). Furthermore, the strict mechanisms of top-down control have partially lost their power (Vargas 2007). Consequently, obedience to the will of superiors is not enforced as it was in the past. Also, theoretical rationality is still shaped by codified laws. However, new legal bodies, international human rights treaties

in particular, have produced a qualitative change in terms of the legal resources used by judges (Fernández González 2010; Couso & Hilbink 2011). Moreover, there has been chaotic diversification of the interpretative tools used to apply the increasingly complex corpus of legal knowledge (Vargas 2007, p.113), affecting the theoretical coherence of the system. Simultaneously, the substantive rationality of the organization is also undergoing change as the central role attached to the value of attitudinal consistency in the old bureaucratic framework no longer seems to hold. In terms of rationalities, this phenomenon might be the consequence of historical emphasis upon formal-instrumental rationalities emptied of ethical content and sustained only by punishments and rewards. Indeed, as the enforcement of organizational rules is no longer strong, the idea of consistency has been disregarded by many judges, who place it in opposition to judicial independence, thus acting as free riders in a context of weak control from the top (Vargas 2007, p.113). At the same time, there has been remarkable reinvigoration of judicial independence as a core judicial ideal, particularly in terms of autonomy from superior judges (Jurisdicción & Democracia 2012; Corte Suprema de Justicia, Chile 2011). However, the legitimacy of the judiciary depends upon a balance between several values, two of which - independence (internal and external) and consistency - in the Chilean case seem to be in conflict since the weakening of the structure that supported purely formal bureaucratic rationality.

In sum, the rationalities of the Chilean judiciary are evolving from a historical pattern in which the formal rationality of bureaucracies prevailed, ideologically sustained by a discourse of neutrality and apoliticism, and obscured substantive conservative values oriented to the preservation of order through the strong top-down enforcement of judicial consistency. At present, the dominant value of the organization seems to be judicial independence in all its meanings, seen in some cases as antagonistic towards judicial consistency. Furthermore, the practical rationalities of the organization have become increasingly fragmented as the hierarchy has failed to provide a framework of appropriate judicial behaviour. External influences, the role of alternative visions of the judicial role within the organization, the importance of new organizational arrangements, and the increasing relevance of new judicial associations can all be seen as eventual triggers not only of promising attitudinal change among Chilean judges, but also of a worrying tendency to fragmentation that currently shapes the practical understanding of their role.

3.2 The Judicial Training System of Chile

In this section, judicial training arrangements in Chile are examined using the categories outlined in the previous chapter. Accordingly, background factors, training

structures, the content of training programmes, and the methods used to deliver training, are all analysed with the aim of describing the main features of the system. The purpose is to understand the ideas, values, and beliefs brought into the organization by this mechanism in order to make sense of the significance of judicial training arrangements for the evolution of the normative framework of the Chilean judiciary.

3.2.1 Overview

The Judiciary of Chile historically lacked a formal training system for judges. There was no induction process and consequently, newly appointed judges would learn their job informally in the workplace, following routines and learning-by-doing. There was no continuing education scheme either, despite occasional initiatives of Judicial Associations and Universities to provide courses and seminars to update judges' legal knowledge (Gálvez 1989). In 1988 the Judges' Association created the Institute of Judicial Studies, aiming to promote research about the judiciary and provide alternatives for judges to reflect about their job and enhance their judicial capacities through seminars and courses. The Institute was born as a judicial initiative, without official funding and fully in charge of judges themselves. Consequently, it was an incipient but very limited attempt to provide formal continuing education for judges.

In 1994, the Judicial Academy was created as a result of negotiations oriented to democratize the judiciary after Pinochet's dictatorship, by reducing the power of the Supreme Court to shape the judges' perception of their role through appointments and hierarchical control (Vaughn 1992). Legal Statute 19.346 was issued to create this new body as an autonomous agency, governed by a Council, which includes representatives of the higher echelons of the judiciary, as well as representatives of the government, the legal profession and academia. The Council is in charge of: delineating judicial training policies, determine the academic activities to be offered each year and the number of places available, appoint the Academy's Director, and supervise the management of the organisation. Remarkably, the Director is not supposed to be a judge but an academic with at least 5 years of experience as Law professor. In fact, the Judicial Academy has had three Directors, all of them professors of Law with extensive experience in different Universities. The Director is in charge of management of the Academy, and also of the organization of courses and academic activities, as well as proposing new academic programs to the Council, generally directing or supervising academic, administrative and financial activities of the organization.

Statute 19.346 regulates the purposes and activities of the Academy, complemented by a decree that governs its duties en greater detail. According to article 2 of the latter instrument, the main objectives of the Academy are: first, to educate

prospective applicants to the judiciary; second, to enable the most experienced judges to be promoted to posts in Courts of Appeals; and third, to provide continuing training to all the members of the judiciary. To accomplish such goals, the Academy provides or supervises three educational programs as specified by the statute: first: the formation program, which aims to educate prospective applicants to judicial posts on the knowledge, skills and basic criteria for the role, and also on the principles that inform judicial work. Secondly, the enabling program, *programa de habilitación,* aims to provide the knowledge and basic skills needed to perform the role of Court of Appeals judge. In the third place, the continuing education program seeks to update judges on the knowledge needed to exercise their role, while also focusing on the objectives set for the formation program. In 2012 a total of 309 of these courses were offered to judges and administrative officials by the Academy, each designed to be delivered during one week on average (Academia Judicial 2012b). All judges must attend the *perfeccionamiento* courses at least once a year.

As the previous account explains, a legal statute and a decree define the purposes of training programs delivered by the Judicial Academy. Evidently, those are not instruments that could be easily changed or adapted to the circumstances, therefore, they should be sufficiently general to cover emerging needs and at the same time, precise enough to serve as guidance for those in charge of the process. However, the definition of aims and purposes is not precise but based upon expressions that are too general to be operative, such as: *educate on the knowledge* and *basic criteria for the role*, or the *principles that inform judicial work*; all of which entail intrinsically debatable concepts. Perhaps this is one of the reasons of the methodological weaknesses in the design and delivery of training programs that scholars have acknowledged in the last years (see Aldunate Lizana 2011, Couso 2011, Vargas 2011).

The Chilean Judicial Academy started to function in a period of great legal changes in the country, particularly, procedural reforms that entailed a massive expansion of the number of judges. Consequently, the first challenge was to implement a successful formation program for a high number of prospective applicants to the new courts that started to be implemented progressively since year 2000. At the same time, the Academy became the entrance door to the judiciary, since approval of the formation program was established as a legal requirement for applications to enter the judiciary. The initial challenges were faced successfully by the Academy, which managed to design an objective and transparent selection procedure for prospective judges, while at the same time implementing numerous formation programs, hundreds of continuing education courses for judges and also several special courses designed to prepare judges for the application of revolutionary new legal procedures. In a short period of time, reforms were

successfully implemented, while the academic profiles of new judges improved dramatically if compared with historical patterns in the organization (Couso & Hilbink 2011, p. 109, Vargas 2011). As a result, reforms aiming to modernize the judiciary by improving the calibre and capabilities of personnel and the effectiveness of judicial procedures began to take effect at the base of the organizational pyramid (Vargas 2007).

The Chilean Judicial Academy faced urgent challenges from the beginning, dealing with them through the implementation of objective and transparent procedures for selection of candidates to its training programs and an impeccable organization of a massive number of academic activities. Nonetheless, there was not a clear definition of purposes and concrete problems to tackle, while the methodological approach was not clearly defined either. Indeed, the Directors of the Judicial Academy have all been professors of Law, while most of the academic programs were historically designed and delivered by legal scholars. Not surprisingly, their perspectives shaped the methodologies and contents covered by courses, reproducing the approaches used by law schools to teach law, while the specific needs of training for judges and judges-to-be, were not properly attended (Vargas 2011, Couso 2011, Aldunate Lizana 2011). In 2012, the new and current Director of the Academy explicitly acknowledged this fact in the leading article of the Judicial Academy's report. Under the heading *Change of Course*, the Director expressed his dissatisfaction with the state of the three educational programs run by the Academy. With regards to the formation program, he claimed that it had overly focused upon legal contents and deficiencies of legal knowledge that young lawyers allegedly had, considering the explosive and uncontrolled expansion of law schools in the last 30 years. According to the new Director, the formation program should be stricter in selecting candidates with no evident deficiencies in legal knowledge, in order to focus on properly judicial topics, emphasizing aspects such as attitudes and skills. Moreover, applicants to judicial posts should be self-committed to constantly enhance their knowledge of the law by themselves. Similarly, regarding the continuing training program, *programa de perfeccionamiento*, the Director argued that while the provision of training at this level had been quantitatively impressive, scholars without experience in adult and professional continuing education had designed the objectives and methods of courses. Hence he announced the incorporation to the Academy's team of a non-lawyer expert in such areas, in order to emphasize aspects such as judicial skills, using adequate methods. For that purpose he also announced the implementation of a special program to train judges to become judicial trainers, with the support of the Canadian Judicial Institute, in order to radically change the orientation of the continuing education program. Finally, the Director acknowledged the deficiencies of the *Programa de habilitación* that aims to prepare prospective Courts of Appeals judges, claiming that it had not clear focus,

purposes or methods (Academia Judicial 2012c).

In the 2015 Judicial Academy's report, the Director of the organization refers to the curricular and methodological changes that began in 2012, claiming that the new approach has been fully implemented through the use of a new training needs assessment scheme, a stricter selection and evaluation procedure for the formation program, a stronger focus on judicial skills and attitudes, and a methodological change based in judge-led active courses, particularly in the continuing education program (Academia Judicial 2015). Evidently, the extent and effects of these changes are not yet clearly visible, as it will take a few years before the new approach can be properly assessed. This study in particular cannot offer a full evaluation of the new approach. However, as the empirical study was conducted when the new procedures were being implemented, the research provides insights to some of its features, despite the fact that the conclusions are mostly based upon the role played by the Judicial Academy's historical approach to judicial training.

3.2.2 The Influence of Background Factors

The Chilean judiciary belongs to the civil law tradition developed in Continental Europe, which influenced the construction of Latin American judiciaries at the beginning of the 19th century. However, in the Chilean case there was no formal training for judges before 1994, when the decision to implement the Judicial Academy was taken in a context still influenced by the recent dictatorship that damaged the democratic system in the country as never before. Indeed, during Pinochet's regime the courts remained passive and strictly deferential to the junta's power, despite the unprecedented, constant, and evident abuses of human rights committed by agents of the state. In fact, the main criticism of the judiciary, articulated by the commission in charge of investigating human rights violations following the dictatorship, claimed that courts and judges were generally passive and excessively formalistic in the application of the law (Comisión Nacional de Verdad y Reconciliación 1991), revealing the exacerbation of a formal bureaucratic rationality that dominated the judiciary historically. Such formal rationality, totally emptied of a moral background and compromise with substantive values other than obedience and consistency, in practice meant that judges not only avoided challenging the military, with a few remarkable exceptions. Moreover, they generally facilitated the illegal action of agents of the state and provided a mantle of legitimacy to the regime (Hilbink 2007, p.104).

As a result of criticism of the judiciary after the dictatorship, the government of President Aylwin proposed a major reform to the judicial structure that would limit the powers of the Supreme Court, creating an autonomous judicial council. Such an initiative

did not succeed, considering the strong veto put in place by the dictatorship to limit deliberation even after the restoration of democracy. However, as a result of the negotiations, the creation of the Judicial Academy was agreed, under the optimistic assumption that, by having better trained judges, changes in the judiciary would develop naturally (Aldunate Lizana 2011). For such a purpose, it was assumed that legal education in Chile was generally in crisis, owing to its excessive theoretical focus and rigidity (González 2003). Consequently, from the beginning the Academy focused upon supplementing the legal education of judicial candidates through an extensive formation programme (Vargas 2011b). In connection with that, being selected to be part of the programme was instituted as a legal requirement to enter the judiciary. Thus the Academy became a key factor in the judicial recruitment process.

In sum, the juristic framework and the historical background of the judiciary reflects the dominance of a strong formal rationality, exacerbated during the dictatorship, which motivated a reaction from the legal and political community following the end of the regime. In such a context, the implementation of judicial training emerged partly from the rejection of the unbalanced, purely formal understanding of the judiciary and the judicial role, fostering the implementation of training structures that aimed to produce gradual changes from inside the organization.

3.2.3 The Judicial Training Structure

Following the tradition of civil law countries, the Bordeaux model, based upon long-term in-residence centralized entry training (Hammergren 1998, p.2), inspired the implementation of the Judicial Academy in 1994. As limitations in terms of resources entailed that the permanent academic staff was very limited in number, external academics and judges deliver training programmes.

The Academy's role extends beyond judicial education, selecting the candidates to judicial posts who have to enrol in the formation programme as a legal requirement. Accordingly, it has a central role in the recruitment process, an area in which the Academy has achieved its greatest success, changing a system that in the past was fully controlled by the Supreme Court. Indeed, many scholars and judges have recognized the importance of the Judicial Academy as an entry point to the judiciary, relying upon a merit-based, objective, and fair selection process, which has dramatically enhanced the profiles of lower judges (see Vargas 2011; Couso 2011; Morales 2011; Couso & Hilbink 2011). In this way, the Judicial Academy has worked to reinforce the substantive values that the Chilean judicial bureaucracy lacked, in terms of fairness and equality of opportunity (Du Gay 2005; Olsen 2006) in the appointments process, thus making formal and substantive rationalities overlap and contributing to avoid the pervasive effect of

purely formal rationalities.

The design of the training structure was a matter of intense negotiations following the dictatorship. Accordingly, the organization created by legal statute number 19.346, enacted in 1994, reflects certain levels of compromise between the major political coalitions. As a consequence, according to Article 2 of the statute, the board of the Academy, in charge of judicial education and recruitment, is formed by a panel of nine members open to non-judicial representatives, i.e. representing the government, lawyers associations, and legal academics; and representatives of different judicial spheres, thus resembling a sort of judicial council (Vargas 2011b, p.241). Despite the importance of this new structure for an organization that had been historically characterized by its strong corporatism and insulation, it is important to recall that the rules of the board of the Academy do not allow a lower judge to represent their colleagues, but is open only to Appeal Court judges and Supreme Court judges. Accordingly, it has been criticized for not representing the views of the judiciary as a whole, reproducing old patterns of power distribution, as expressed by one of the judges in interview:

> The conservative paradigm has always been present in the Chilean judiciary. It is part of its DNA and I think that the people who conduct the Judicial Academy are reproducing it, because in fact it is the Supreme Court that is ruling the Academy in alliance with representatives of other levels who share the same visions. I say this because even the representative of our Judicial Association has to be a member of an Appeals Court. That is revealing of the way in which the conservative thinking is reinforced, because in those positions you normally find people who represent such conservative views (Judge CL07).

The criticism is sound, but not completely accurate. Indeed, despite the composition of the board, the Academy has allowed scholars from non-conservative universities to teach judges, consistently transmitting new legal ideologies and particularly neo-constitutionalist paradigms that broadly shape legal discourse in Chile (Couso & Hilbink 2011, p.107). This point has been highlighted by the current Director of the Judicial Academy, claiming that scholars with particularly critical views are invited to participate in courses, mentioning the examples of professors Correa and Atria (Aldunate Lizana 2011). Moreover, the Academy has also been a space for judges who represent minority views within the organization to teach other judges. Perhaps the clearest case is Judge Carlos Cerda, who has participated in many formation programmes at the Academy, being particularly influential for new judicial candidates. In fact, the media frequently underscores the role of Judge Cerda as a model followed by the new generation of judges (Sanhueza 2011; Carvajal 2013a). This perception of the influence

of Judge Cerda and other judges who are critical of the judiciary might be exaggerated. In fact, a couple of interviewed judges expressed doubts about the extent of his influence over new judges, even recognizing his historical importance. However, the existence of such influence is not false at all, as confirmed by other judges interviewed in this research. One of them was particularly clear about this point: "If I have to highlight something from my experience at the Academy, it is the view of the judicial role that I received from Judge Cerda" (Judge CL02).

The changes to its functioning and the new attitudinal paradigms visible in the judiciary have frequently been attributed by the press to a liberal, left-wing, legal-political ideology that new judges supposedly acquire at the Judicial Academy (see Carvajal 2013a; Díaz & Duarte 2012; Sanhueza 2011). Such an idea has proliferated particularly following judgements in controversial criminal cases that were not favourable to the Executive, especially during President Piñera's right-wing government[20], which tried to implement a strong law and order policy. As a result of this rather simplistic but generalized idea, those members of the Judicial Academy board holding conservative views became particularly active. In fact, one of the interviewed judges mentioned that some members of the board now participate directly in the interviews to select new candidates to the Academy's formation programme, in what seems to be a new practice. Likewise, another judge claimed that she had been vetoed as a lecturer in a particular course by one of the members of the board for being too protective of the individual guarantees, too *garantista.* Such situations reflect the ideological struggle that underlies the structure of the Academy, an aspect that should be taken into account when devising changes to a balanced training model in the future.

In sum, the structure of the Chilean Judicial Academy is coherent with the evolving formal rationalities of the judicial organization. The Academy is part of the judicial bureaucracy, consequently embodying the formal means-end rationalities that characterize bureaucracies. In fact, it was originally seen as a rational tool that would provide significant inputs to the judiciary by enhancing the weak legal knowledge of new candidates to judicial posts (Vargas 2011b). However, the Academy also brought new rationalities into play. In the first place, it reinforced the substantive aspects of bureaucratic organization (Du Gay 2005; Olsen 2006), by enhancing the fairness and objectivity of the judicial recruitment process. Likewise, even if the board of the Academy is not fully representative of the judiciary, it has also allowed acceptable levels of fairness and objectivity in the selection of trainers, either from academia and from the judiciary itself. Accordingly, as diverse scholars and judges have been in charge of

20 President Piñera governed from 2010 to 2014

delivering training, new thoughts and perspectives have percolated into an organization that has been historically corporatist and conservative. Therefore the Judicial Academy has been a vehicle for the introduction of new substantive and practical rationalities, not fully controlled from the top as in the past, but borne by a diverse group of judicial and non-judicial trainers.

3.2.4 The Judicial Training Curricula

The Judicial Academy delivers training at different levels. First, it provides an entry-level extensive course for candidates to judicial posts. This programme is based upon the assumption that traditional legal education does not provide sufficient elements for the exercise of the judicial role (Academia Judicial 2012a), consequently it has tended to supplement the education received at the law school (Vargas 2011b, p.235), emphasizing legal knowledge. Such emphasis is currently in the process of change at the Academy, assuming that deficits in legal education should be detected during the recruitment process, while the formation programme should rather focus upon specifically judicial aspects (Aldunate Lizana 2011, p.225; Carvajal 2013b). Secondly, the Academy delivers a continuing training programme, offered through residential three to four-day courses on different topics, which all judges need to attend once a year (Academia Judicial 2012b). In this area, the legal-theoretical emphasis has also been prevalent, as described by the current Director of the Judicial Academy:

> I think that the idea of training focused on the enhancement of judicial capacities was somehow forgotten right after the Academy started to function because it was put very quickly under pressure of the processes of procedural reform. Therefore, it became a judge-production machine and as a consequence, training was routinized […] I think that the training model relied on the academic input provided by universities and no efforts were made to discover the specifically judicial aspects that should be covered by a judicial training programme (JA Director CL).

Nevertheless, at least in theory, from the beginning the Academy aimed to focus upon the different levels of judicial training as outlined by Armytage (2005), that is, legal knowledge, professional skills, and judicial disposition. However, training efforts tended to over-emphasize the first aspect, perhaps as a result of poor work within the Academy regarding the design and evaluation of courses (Vargas 2011b, p.237), and the extensive role of non-judicial academics in the process of training (see Duce, in Morales 2011, pp.176–177). In fact, several judges mentioned in interview the excessive focus upon theoretical aspects as a weakness of their training experience.

Currently, courses in the formation programme range from very theoretical areas,

e.g. courses on the concept of law; to judicial contents, e.g. judicial independence and impartiality, legal argumentation, evidence assessment, international legal sources; and practical areas of judicial work such as the writing of judgements (Academia Judicial 2014b). Likewise, in the context of the continuing training programme, it is also possible to observe a similar range of contents (Academia Judicial 2014a). In fact, such a balance in contents is not new, consequently, the theoretical focus has had more to do with the methodologies used, the design of the courses, their evaluation, and the people delivering them, rather than the devised general contents.

The emphases are currently changing from the strong focus upon legal theoretical knowledge to more specifically judicial aspects (Aldunate Lizana 2011; Academia Judicial 2012c) in an attempt to achieve a balance. Judges have debated the issue with input from academics (see Morales 2011; Couso 2011; Vargas 2011). In such discussions, Professor Couso (2011) in particular proposed that, in the Chilean context, given the new attitudinal paradigms and the weakening of consistency in decision-making (Vargas 2007), the Academy should attempt to train judges in different approaches to legal interpretation; judicial values, particularly impartiality, independence, and fidelity to the law enacted by Parliament, and critical thinking. In turn, the current Director of the Judicial Academy, who is implementing reforms in the orientation of the programmes delivered by the Academy, did not fully share Professor Couso's approach, as he made explicit when interviewed:

> Critical thinking, interpretation […] these are very sophisticated topics. They might be included in a three year programme, but we have been focusing first on what the judge needs to know: how to write a judgement, how to evaluate evidence, which is not a theoretical problem of judicial reasoning but a matter of praxis (JA Director CL).

Central to the Academy's Director purpose is to address aspects of the day-to-day work of judges. Such emphasis, if focused only upon the efficient and calculated pursuit of goals according to a technique, entails the risk of fostering a purely formal technocratic rationality characterized by a lack of reflection about which goals should be chosen (see Townley 2008). Taking the examples provided by the Director, the assessment of evidence necessarily demands the exercise of critical thinking to distinguish solid from weak evidence. Likewise, producing a good written judgement is not just a matter of putting words together in a certain order. It needs to reflect certain legal values implicit in legal interpretation approaches.

In sum, the training curriculum has been historically planned as a relative balance between different dimensions, in which the emphasis upon legal knowledge has been particularly strong. Whilst specifically judicial aspects have been part of the programmes,

methodological difficulties have fostered overweening focus upon the legal-theoretical dimensions of the topics covered by courses, thus emphasizing theoretical rationality. Generally speaking, such theoretical emphasis is functional to formal bureaucratic rationalities, as the corpus of legal knowledge provides the inputs for the formal means-end calculation in a bureaucratic context. Consequently, a dis-embedded understanding of the judicial role is fostered, as the generality of abstract law shapes the judges' understanding of their work, while the context of application becomes less important. In Chile the strong theoretical rationality of the Academy's courses has been an obstacle for the balanced evolution of the judiciary's dominant rationalities, as the practical and substantive aspects of judging have not been addressed systematically. Arguably, even if external academics have introduced new legal paradigms, values, and practices to the institution, the process has not been systematic; consequently, it has not fostered a coherent evolution of the practical and substantive rational dimensions of the organization. As an example, there has been revalorization of internal judicial independence and autonomy at certain levels of the judiciary, but at the expense of judicial consistency (Vargas 2007; Couso 2011, p.209), producing an antagonistic relationship between values that should rather be complementary. Lately, changes to the curriculum and methods fostered by the Director of the Academy address with greater strength aspects of the day-to-day work of judges. Such an approach could shape significantly the practical and substantive rationalities of the judiciary. However, to produce such an effect, the new curriculum should not focus only upon the technical means to achieve certain goals, e.g. write an understandable judgement; but should also foster the reflection of judges about the ends pursued, e.g. promote an independent interpretation of the law which is faithful to broader legal-political principles. Otherwise, the outcome of the new initiatives could just reflect the reinforcement of purely formal rationalities, this time in a technocratic fashion.

3.2.5 Methods for Delivering Judicial Training in Chile

The methods used by the Chilean Judicial Academy have focused upon the delivery of legal-theoretical contents, mainly through lectures by legal scholars external to the judiciary. One of the explicit aims has been to overcome deficiencies in legal education provided by law schools (see Academia Judicial 2012b). Paradoxically however, until recently the Academy had not managed to develop a strong methodological orientation based upon the particularities of the judicial role. Rather, it replicated the poor methodologies used in traditional legal education. Interestingly, when the creation of the Judicial Academy was being planned, the team in charge had a very different idea. They gravely mistrusted traditional legal education; consequently, they

designed pilot projects using methods based mainly upon collective reflection and peer discussion. However, when the Academy was established in 1995, none of this was brought to fruition. Academics assumed their training role as a routine, while the courses were organized as independent units, without an understanding of the needs and particularities of the judiciary (Vargas 2011b, pp.236–238). The work of the Academy was generally well organized, while the courses were fairly distributed to different academic teams, but perhaps lacked a common orientation. The design of courses was simplistic, while the methods were entrusted to the academic teams themselves. Thus there was no connection between the courses in terms of strategy, methods, and objectives, while great variability in the quality of the training activities was evident. One of the judges interviewed was very keen to reflect such variability: "Some courses were extraordinary, but other courses frankly would make you cry" (Judge CL07). Similarly, most of the judges interviewed highlighted the lack of a systematic approach.

Rather than developing a strong methodology to deliver courses coherently, the Academy focused upon the organization of programmes and courses under great pressure, trying to distribute fairly the teaching among a diverse universe of judicial and non-judicial trainers. Generally speaking, a formal bureaucratic rationality can be discerned from the aim to distribute resources impersonally, producing an impeccably well organized range of courses, which nevertheless became quickly routinized as they were not linked to a solid academic strategy, a defined methodology, clear goals and common quality standards (Vargas 2011b, p.237). In such a context, the theoretical focus of traditional legal education prevailed. Consequently, judicial training courses generally replicated the same vertical, abstract, and prescriptive methodology that had been used for about 150 years in Chilean law schools.

The process of reform initiated in the last few years by the new Director of the Academy, particularly regards the methodologies for judicial training delivery, based upon the principles of adult education (see Armytage 1996). For such a purpose, a group of judges and academics have been trained by the Academy, with support from the National Judicial Institute of Canada, to act as facilitators in courses under the new scheme, based in a participatory methodology (see Academia Judicial 2012c). The Director of the Academy expanded upon the purposes and principles of the new system:

> I am not convinced by the idea that judges are trained just by listening to law professors. The academic input can be relevant up to a certain extent, but we are tying to make a step change because indeed judges are more open to learn from other judges and, also, they are more open to learn when the contents are directly connected to what they do at work […] the aim is to transform the Academy, not abandon the transference of knowledge from academia to the

judiciary, but emphasize the transference of knowledge produced at the workplace (JA Director CL).

Under the new scheme, judges lead the training programmes, develop the courses, and act as facilitators, aiming to engage small groups of participants in debates about cases. Such an interactive approach was described positively by some of the interviewed judges who had taken part in this type of course: "Everyone is at the end happy because everything happens very fast, it is interactive and participative" (Judge CL05). Another continued: "a certain problem is discussed, but no right answers are given. Rather, there is a range of possible solutions to consider" (Judge CL01).

The new scheme has been in operation since 2013 only in a limited number of courses, but it is in the process of expanding. It is mostly judge-led and participative, based upon collective discussions and reflection, adopting the precepts of judicial education described by Armytage (1996). The implicit rationalities of the new system are not yet totally clear and will probably become more visible once the scheme is settled. Indeed, there is a clear aim to emphasize the practical aspects of judicial work. However, the risk is in focusing upon the technical rather than the properly practical. The former entails a purely formal rationality implicit in the means-end calculation based in general technical knowledge, disregarding the context; while the latter encompasses the system of values of a practice or an organization (see Townley 2008). If the judicial role is envisaged as a complex evaluative exercise, then the correct use of a technique is not sufficient to provide acceptable results. Rather, the technique should provide the right means to achieve the ends considered appropriate within the context.

The Judicial Academy is making efforts to promote discussion and reflection among judges, suggesting that it wishes to emphasize the dominant role of organizational values and beliefs in resolving legal problems. However, it is also the case that the Director of the Academy has repeatedly emphasized the interest in focusing upon the technical aspects of judicial work, seemingly in opposition not only to the theoretical, but also to the evaluative, spheres (see Aldunate Lizana 2011; Morales 2011). In fact, asked about this point, he underscored the aim of emphasizing the technique:

> Regarding legal reasoning, what academics interpret in terms of a legal argumentation problem, judges see as a problem about the writing of the judgement […] what judges are interested in is how to explain an argument in their judgements. One could say improperly that this reflects the difference between the theory and the technique (JA Director CL).

It may be the case that the Director of the Academy over-emphasizes the focus upon the technical aspects in order to downplay the influence of theoretical teaching at the Academy. Therefore, it is important to observe the evolution of the new methodology

in order to see whether it will definitively foster learning through debate among peers, self-reflection, and exercise of critical capacities, thus encompassing the different dimensions of judicial rationalities; or if it will be limited to a purely pragmatic exercise, focusing upon the technical aspects of judging and disregarding the theoretical and evaluative elements that the role also entails.

3.2.6 Taking Stock

Judicial training has had an impact upon the Chilean judiciary that can be expressed in terms of the rationalities at play. The organization was traditionally governed by a strict formal bureaucratic rationality and a hidden conservative substantive rationality. Strong positivistic views provided the inputs underpinning the formalistic thinking, while the practical rationalities were obscured and controlled from the top of the organization through the exercise of hierarchical power. The system collapsed following the dictatorship and the creation of the Judicial Academy was intended to foster judicial renovation. The Academy strengthened the substantive rationalities of bureaucratic organization, providing fairness and objectivity in recruitment processes and in the distribution of teaching responsibilities among judicial and non-judicial trainers. However, it did not develop a strong methodological approach to judicial education, tending to replicate traditional systems of legal education that emphasized theoretical rationalities. Nevertheless, external trainers and some judges were able to introduce new ideas and values to the organization, contributing to change its substantive and practical rational dimensions. Although the lack of a systematic approach produced a relatively chaotic fragmentation of perspectives in which certain values have been reinvigorated, i.e. judicial autonomy, other equally important values have been disregarded, i.e. judicial consistency. In sum, the Academy has failed so far to foster coherent substantive and practical rationalities that might help to develop a common understanding of appropriate behaviour within the Chilean judiciary. The recent implementation of a new training methodology seems a promising way of incorporating the formal, theoretical, substantive, and particularly the practical dimensions of rationality through judge-led activities based upon collective discussion among judges. In order to achieve a balance, the challenge might be to avoid excessive focus upon the technical aspects of the judicial practice. Otherwise, the Academy could end up promoting a new version of purely formal rationality, this time under a technocratic heading.

3.3 Judicial Performance Appraisal in Chile

This sub-section provides an overview of judicial performance appraisal in Chile,

reviewing the systems used to evaluate the work of judges according to the categories outlined in the previous chapter. Therefore, the systems currently at work will be classified using the individual/collective and judgemental/developmental distinctions, aiming also to uncover their implicit rationalities, and their impact upon the rationalities of the organization as a whole.

3.3.1 Overview

The Chilean judiciary has had a performance appraisal system since 1927, when it was included in the Code for the Organization of the Courts, *Código Orgánico de Tribunales*. The statute regulates the scheme in detail in articles 273 to 278 bis, while the Supreme Court complemented these regulations in 2007 through *autocordado* 181. The system is based on the pyramidal hierarchical structure of the judiciary, as superiors have the duty to appraise their immediate subordinates yearly. Accordingly, Supreme Court judges appraise Court of Appeals judges, while the latter appraise the performance of lower judges. All of the members of superior courts participate in the appraisal scheme, as each one of them has to evaluate the performance of every subordinate judge within their jurisdiction. For that purpose, each year they evaluate eight very general aspects specified by article 277 bis of the Code: responsibility, capacity, knowledge, initiative, efficiency, self-improvement, human relationships and attention to the public. For each aspect, the appraiser rates performance with a grade from 1 to 7 based upon the general observation of the appraiser and the appraisee's record of disciplinary measures. The mean is calculated from the total grades obtained by the appraisee to represent the final result of the appraisal process. According to the statute, a grade from 6,5 to 7 means outstanding performance, allowing eventual promotions; 6 to 6,49 means very good performance, while 5 to 5,99 represent a merely satisfactory performance. A grade between 4 and 4,99 entails not good performance. The last three possible outcomes are neutral regarding the career of the appraisee, as there is no immediate consequence attached to them. However, it is very unlikely that anybody that has not received an outstanding performance grade could be promoted to a new post. Finally, any grade between 3 and 3,99 means bad performance, and the appraisee who receives these grades in two consecutive years must be dismissed from the judiciary. Similarly, being rated below 3 entails the immediate dismissal of the appraisee. The *autoacordado* regulations of the Supreme Court complemented the scheme establishing further rules, the most important being the one that sets the starting point for performance evaluation in the grade 6,5. According to this regulation, the average performance should be rated 6,5. If the appraiser wishes to rate performance above or below 6,5, it has to be explicitly justified.

The appraisal system is intrinsically complex, demanding great organizational efforts involving most of the judges in it each year. The result of the regulations introduced by the Supreme Court has been that almost every judge is rated with a 6,5 or higher grade, meaning outstanding performance. Evidently, such an outcome does not seem realistic and reflects the aim of the Supreme Court's to standardize the results of the scheme, which had been historically criticized for being unpredictable and unfair (see Zapata 2008). Arguably, the complexity of the appraisal process, which demands all superior judges to individually evaluate performance of every subordinate within their jurisdictions, often without knowing them or their work, and without having any special time, methodological tools or specialized support; produces results that are clearly unreliable.

In 1997 a new appraisal scheme for Courts' performance was introduced by statute 19.531, according to which, all judges received a substantial economic bonus upon the achievement of quantitative goals by their courts, only if at the same time they had at least a 6,5 grade in the individual performance appraisal scheme. The entangling of both systems probably undermined further the possibility of producing accurate results in the individual evaluation, as appraisers who had little elements to evaluate performance, now had the power to affect the wages of judges through this mechanism. Therefore, appraisers naturally tended to rate performance of most judges as outstanding in order to allow judges to receive a significant bonus, while at the same time, in specific cases they retained the power to affect significantly the career and working conditions of certain judges by rating them with a non-outstanding grade, based on the general and imprecise criteria for evaluation set by the law. Statute 20.224 modified the collective appraisal scheme in 2007, but superior judges generally continued applying similar criteria to evaluate performance. Consequently, the Supreme Court introduced the new standardization rule, formalizing the dominant approach to performance appraisal, based on generally high grades to everyone, and exceptionally, lower grades to a few, without clear criteria to make such distinctions.

3.3.2 The Individual and Judgemental Appraisal System

The statutory performance appraisal system instituted in 1927, gave the Supreme Court the power to review the performance and classify in lists of descending merit all judges for their efficiency, zeal, and morality every three years (Hilbink 2007, p.56). The judgemental character of the system was evident. It aimed to rate, classify, and compare judges according to very general criteria in order to distribute rewards and punishments (Fletcher 2007). The career of the appraised judge was at stake when appraisal was carried out, as it would serve as a basis for promotion or dismissal, forging a strong

culture oriented to pleasing, or at least not displeasing, superiors (Hilbink 2007, p.36). Hierarchical controls according to vague criteria shaped the system, fostering a means-end calculation according to pre-determined general standards, i.e. deferential and conservative interpretations of the law reflecting the will of superiors. The discretionary character of the evaluation process made the system foreign to values that bureaucracies ideally reflect, such as fairness and objectivity (Du Gay 2005; Olsen 2006).

The appraisal system instituted in 1927 shaped the dominant rationalities of the Chilean judiciary, emphasizing the formal bureaucratic dimensions and disregarding or obscuring other aspects, particularly the substantive and practical aspects of the organization. New measures have modified the system since then, aiming to maintain hierarchical control but based upon fairer standards. In 1971 the frequency of evaluations changed from every three years to annually, while a classification system was introduced as a way of standardizing the results of individual appraisals and the consequences that should follow, i.e. to be promoted, a judge had to be included in *List one*. *List two* signalled dissatisfaction. *List three* meant a warning, and *List four* entailed immediate dismissal (Hilbink 2007, p.35). A number of reforms have attempted to enhance the fairness of evaluations within the same framework. The last reform implemented in 2007 by statute 20.224 and by the Supreme Court through *autoacordado* 181-2007, introduced the eight factors of evaluation explained in the previous sub-section, and determined that higher judges in charge of appraisal should justify their decisions, writing down the arguments used to reach a result. Despite the intention of introducing objectivity and transparency, the results are far from good, as is made clear by all of the judges interviewed in this research. The experience of one of them reflects the way in which the purely formal rationality has prevailed over the substantive values that the reforms aimed to introduce:

> In my case, four or five of my superiors evaluated me, giving me a high grade using the same phrase to justify it: 'according to the information provided by the evaluation commission, the quality of performance is above the expected' […] and another superior judge evaluated me with a low degree, justifying it by saying: 'according to the information provided by the evaluation commission, the quality of performance is below the expected', so it's totally arbitrary, based on sympathy or ideological coincidences (Judge CL07).

The quote reflects the formalistic spirit that dominates the system of appraisal, despite the attempts to reinforce values such as fairness and objectivity. Such a view is common among judges. In fact, even members of the Supreme Court have recognized the failures of the system. Judge Dolmestch, for instance, in an international judicial meeting said that, despite the initiatives to reinforce objectivity, such as the standardization of

criteria, the appraisal mechanism has not yet reached an acceptable balance. However, he also claimed that, currently, it is not possible to stop using the system because it serves purposes of control and motivation that are considered important (Dolmestch 2009). Even accepting the trade-off proposed by Judge Dolmestch, and given the lack of objectivity of the system, it might be that even purposes of control and motivation are not being fulfilled by the appraisal mechanism. In fact, specialist scholars have highlighted the lack of efficient systems for internal control (Vargas 2007; Cordero 2011), while in the context of this research judges generally disregarded the importance of appraisal for control or motivation. Interestingly, however, many judges described the system as a controlling mechanism that infringes judicial independence and their autonomy to apply the law. Nevertheless, asked specifically about the influence of the appraisal mechanism over their day-to-day work, all of them said that it had no importance at all, mentioning all sorts of personal motivations to exercise their role adequately, from civic spirit to religious commitment. These results show that the system of performance appraisal is used discursively as a symbol of the traditional hierarchical domination that is rejected by lower judges. However, performance appraisal does not seem to be currently working to control judges and even if they still feel pressure from the top, they do not recognize it explicitly, revealing that the dominant standard of appropriate behaviour is in the process of changing from commitment to obedience and consistency to behavioural independence and autonomy.

3.3.3 The Collective and Judgemental System

By definition, a judgemental appraisal scheme involves the use of a centrally coordinated information system to assess performance and distribute compensation, rewards, and punishments (Townley 1997, p.267). The Chilean system has had this sort of mechanism at the collective level since the 1990s. Discussion of the enhancement of the judiciary after the dictatorship involved various ideas, one of them was the introduction of economic incentives to motivate judges and enhance their performance in measurable terms. In 1997 Statute 19.531 created the system by which two types of economic rewards were implemented. First a collective mechanism based upon the accomplishment of targets determined annually by the Supreme Court, focusing basically upon timeliness. According to this system, judges in the 40% of the courts with the higher score in the measurements received an economic bonus. At the same time, judges who had the highest scores in the individual appraisal system were rewarded with a bonus, enlarging its significance. This system was subject to criticism, mostly because it reinforced the hierarchical powers of the Supreme Court, now able to indirectly control judges' levels of income. Accordingly, it was modified in 2007 by Statute 20.224, which

implemented a new model of collective performance appraisal also associated with economic rewards. This new system is based upon the accomplishment of targets by courts, in areas agreed by a commission formed by members of the judiciary and the Executive. The areas covered have so far been human resources, mostly involving training targets; timeliness, and the relationship with the public i.e. diffusion of information, response to complaints etc. (Arenas & Berner 2010, p.58). According to the system, all judges and staff of the judiciary of a specific court receive a bonus if the targets are accomplished up to 70%, while the bonus is doubled if the accomplishment reaches 90%.

The character of the new collective appraisal system is judgemental as long as it is based upon the use of centralized information to distribute rewards. However, the judgemental element is clearly weak in comparison to the original mechanism devised in 1997. Indeed, the determination of the areas to be assessed is made by negotiation in a commission formed by members of the judiciary, including one Supreme Court judge and two representatives of judicial associations from any level of the judiciary, and members of the Executive, including representatives of the justice and finances ministers. Each year, this commission reviews and approves the targets proposed by the judiciary and determines the criteria for the evaluation of accomplishment. Initially, external consultants in management were commissioned to determine the targets, but in 2014 a new judicial commission is in charge of this process, while new regional councils have been entrusted with the duty of overseeing the process of evaluation locally. The regional administrator of the judiciary, two Court of Appeals judges, one lower judge, and two representatives of the staff take part in these councils. A judge who has participated in the new system illustrated the significance of the recent changes regarding the adequacy of performance targets:

> I have been a member of the regional council for two years. When I started working on it I remember that we had to apply targets that were really painful, because the people in charge of devising them worked for companies that were used to doing this in the private sector and did not have knowledge of the particularities of our work. From 2013 a new judicial commission has been in charge, so the targets will be more adequate this year (Judge CL06).

The increasing involvement of judges from different levels of the organization has indeed weakened the judgemental element implicit in the system. However, it has not completely changed it. Still the purpose is to distribute rewards according to pre-existing standards, thus introducing extrinsic motivations to judges. Once the targets are determined, judges have a straightforward motivation to accomplish them, which is obviously the purpose of the system but also the source of eventual behavioural

distortions (Sandel 2013; Mannion & Braithwaite 2012; Bagues & Esteve-Volart 2010; Doménech Pascual 2008). In fact, under the original system created in 1997 the press investigated some cases of such distortions, as one of the judges recalled:

> What they value is timeliness, not the quality of our work. That is why so many things have happened, like the case of the "express judge", do you remember? Why did that happen? Because of the bonus! Do you remember that she had supposedly written more than 200 judgements in just one day? That was because of the bonus! (Judge CL05).

The press has also focused upon a different and worrying case concerning children living in State shelters, whose general well being has to be overseen by family judges. It has been claimed that judges have failed to look after the children, facilitating all kinds of abuse within the shelters. Allegedly, judges are too focused upon finishing cases to get their bonuses, while reviewing and re-opening cases to assess the condition in which children are treated would affect the accomplishment of targets (Guzmán 2013).

In terms of the rationalities implicit in the system, it is clear that formal means-end economic rationality is being introduced in the judiciary by this evaluation mechanism. However, the pervasiveness of the formal rationality implicit in the original model implemented in 1997 has been addressed and moderated by the new mechanism in different ways. First, training and relationship with the community are matters for evaluation, tending to reflect certain non-economic aspects and values that are relevant to the organization. Second, the incorporation of members of the judiciary from different levels to the commissions and councils in charge of determining targets and evaluating accomplishment, has reinforced practical rationalities. Indeed, different views of judicial work coming from all levels of the organization are now part of the discussion about appropriate targets for the judiciary. Third, the involvement of representatives of the Executive in the commission that oversees the process serves to form a forum, preventing organizational corporatism and insulation, enhancing the quality of the discussion. Indeed, the composition of the Commission brings together the formal rationality of rewards in exchange for performance, which is in the government's interest, with the practical rationality of evaluating according to appropriate standards for the judiciary.

The downside of the new system is that it could undermine substantive rationalities that judiciaries should embody regarding universal aspects such as justice, fairness, and other values that courts should aim to protect in a liberal democracy. Indeed, the straightforward character of the economic rewards offered to judges might be a source of distortion, which could result in crowding out such values. An alternative that may bring together rationalities under these types of management-by-objective schemes would be using the results of the evaluations as an input to later discuss rewards in a

representative forum. In that way, eventual distortions could be detected and rewards ruled out in such cases, while the influence of economic rewards would not be as straightforward as it is currently. An example of such an approach is the management-by-objectives system at work in the judiciary of Finland (Contini & Mohr 2007a)

3.3.4 A Neutral Measuring System?

In 2012 a new system for the collective evaluation of judicial work was introduced in the Chilean judiciary. It is called the *Indicator of the Quality of Justice*. The purpose is to have an annual indicator of quality, based upon multiple qualitative and quantitative indicators of the quality of judicial work. For that purpose, experts determined eight dimensions of quality, i.e. access to justice, efficiency, transparency, perception of the community etc. In turn, for each dimension, several aspects were outlined and multiple indicators of quality identified (the total number of indicators is approximately 700). Performance indicators are measured according to statistical evaluation of the internal processes of the judiciary, while surveys with judges, judicial staff, and users (lawyers and non-lawyers) provide information about the perception of quality in different areas of judicial performance. The results are then converted into numbers and after a rather complex calculation the mean is determined as the annual indication of judicial quality (Departamento de Desarrollo Institucional 2012).

The system of quality indicators is a complex measurement tool, based upon a great number of indicators, complex calculations, and statistical analyses, and hundreds of surveys. There is no consequence in terms of rewards or punishments attached to this mechanism and the results cannot be associated with particular judges or courts, but only regions. Hence the eventual introduction of extrinsic motivations that could foster behavioural distortion should not be a concern. However, the weakness of the system might be its complexity, particularly if compared to the rather modest product it delivers. Indeed, application of the system involves great efforts in terms of specialized work and financial resources. In exchange, it provides the indicators of quality for each region, in each of the quality dimensions, which considered altogether provide the national indicator of judicial quality. These results will supposedly be compared each year in order to evaluate the evolution of quality, but no measures are associated with it. Arguably, a complex and costly mechanism such as this should deliver more significant results. In particular, the development of institutional dialogue about the instrument, the results, and the measures to enhance quality might be a way forward, taking the example of the courts of Rovaniemi (see Court of Appeal of Rovaniemi, Finland 2006). In fact, no involvement of judges in any discussion about the instruments, indicators or results has been promoted.. One of the judges interviewed revealed dissatisfaction with the

implementation of new managerial instruments such as the quality indicator: "What bothers me is that all these things are done in the dark" (Judge CL06). Other judges shared similar views when asked about the topic.

In terms of the rationalities of the system, clearly the methodology and the use of a specific terminology resemble economic logics. The President of the Supreme Court explained the new scheme on television using an analogy with the IPC, which is the country's economic indicator of inflation (see Muñoz 2012), suggesting the prevalence of a formal means-end economic rationality. However, the rationalities of performance measures depend greatly upon the way in which the results of measurements are used. They can be used to achieve reasoned justification of action; or alternatively, as a way of introducing managerialism into the public sphere, bringing free-market principles and disciplines to public sector organizations. The former approach uses measures as an input in the process of deliberation where courses of action are decided, while the latter uses measures as a technical mechanism for prioritizing problems and allocating resources, thus overriding dialogue and deliberation. Ideally, reasoned justification should interact with, and be complemented by, purposive-rational action. However, the resolution of this interaction is an empirical question (Townley et al. 2003, pp.1046–1047) that too often results in the dominance of formal-instrumental rationalities.

The specific use of performance measures in the new system implemented by the Chilean judiciary is not yet clear. So far, only one measurement has been done, and the results were published without any attempt to take further action in relation to such results. However, it is not clear what will happen when comparisons between different periods are available and pressures to enhance performance eventually arise as a consequence. If the data is used to foster a process of institutional dialogue about how to improve defective areas, maintain good results, or enhance the quality of the measurement process, then it is likely that the judicial representatives involved in the deliberation will bring substantive and practical rationalities to discussion of the best courses of action. Conversely, judicial authorities could adopt straightforward management decisions based upon the data, equating organizational ends with measurement results and precluding debates that might incorporate different dimensions of judicial rationality. Unfortunately, the hierarchical nature of the Chilean judiciary makes the latter possibility more likely. However, it is still time to reflect upon the potential of the mechanism and eventually obtain a much richer outcome from it.

3.3.5 Taking Stock

Historically, the Chilean judiciary has used performance appraisal instruments to reinforce its hierarchical character. The individual appraisal scheme was devised as a

mechanism for control from the top of the organization, revealing one of the aspects that characterize bureaucracies whereby: “each lower unit is under the control and supervision of a higher one” (Townley 2008, p.50). The initial system of appraisal provided superior judges with a tool to secure order and obedience from lower judges. Accordingly, the prevailing substantive and practical rationalities were strongly controlled from the top of the organization, fostering the rather uncritical adoption of *apoliticism* and conservatism (Hilbink 2007). The individual performance appraisal system of the Chilean judiciary embodied the formal aspects of bureaucratic organization as an impersonal rational-legal order, strictly enforced by superior judges who shaped the values of the organization. In such a scenario, the appraisal mechanism worked to secure obedience but at the same time discouraged judges from exercising their role according to other values that are also relevant for judiciaries, even under a bureaucratic configuration, i.e. autonomy in applying the law to individual cases without pressure (see Olsen 2006, p.3).

Only in 2007 the Supreme Court introduced changes to the appraisal system in order to enhance fairness, objectivity, and transparency in evaluations. However, the purpose of reinforcing such substantive values has not been accomplished, as evaluators tend to override the purposes of the new regulations, despite the formal fulfilment of its requirements. Accordingly, the individual appraisal mechanism has not worked to introduce new rational dimensions to the judiciary, rather being an instrument of the traditionally formal-bureaucratic judicial system. The reaction of judges to such a system in recent years has been an important element of change. In fact, all of the judges in this research claimed that the appraisal system does not play any role regarding their motivation, criticizing the mechanism and revealing strong disagreement with the purposes of the system. This finding is consonant with the fact that, in judicial debates, the performance appraisal scheme has been targeted as one of the central features of the organization to be changed (see Cordero 2011; Duce 2011). The appraisal system is seen as a symbol of the historical lack of internal independence in the judiciary, hence inviting adverse reactions from judges. Therefore, it is not surprising that performance appraisal has lost the potential it traditionally had to reinforce judicial consistency, helping to forge the view of judicial independence as an antagonist, contributing at the same time to the current fragmentation of practical rationalities.

The implementation of a collective evaluation mechanism in the 1990s, which included economic rewards in exchange for the accomplishment of performance targets, brought new dimensions of rationality into the judiciary. Accordingly, a formal economic rationality was introduced, focusing the attention of judges upon the rewards. The system was strongly judgemental at the beginning and disregarded completely rational dimensions other than the formal. However, the system has been reformed in recent

years, allowing the increasing but still limited participation of judges in certain aspects of the process, as recognition of the need to incorporate practical rationalities as well. Nevertheless, the prevalence of the means-end rationality of rewards is still a concern. Indeed, distortions in judicial behaviour have been attributed to this mechanism, allegedly because judges pursue rewards disregarding their duties. Arguably, the collective system of evaluation has been a factor in the weakening of substantive value-based rationalities, fostering at the same time managerial practical rationalities and contributing to the current fragmentation of the judicial sense of appropriateness. Increasing institutional dialogue and participation in all stages of the process of evaluation, reinforcing the direction of changes introduced since 2007, might be a reasonable way of bringing together the different dimensions of rationality and developing a more significant evaluation system. The same can be said of the quality measurement mechanism recently implemented, which rather than just producing a bunch of numerical results, might play a relevant role of providing inputs for further dialogue, analysis, and rationally justified action towards the enhancement of quality in the judiciary.

In sum, the Chilean judiciary has used performance appraisal for a long time. Initially, the scheme aimed at individual control and surveillance of the work of judges from the top of the organization, representing a strongly judgemental character and a straightforward formal rationality. In recent years new mechanisms have been adopted to evaluate judicial performance at a collective level, also in judgemental terms i.e. as means to distribute rewards and punishments. New types of formal means-ends managerial rationalities have been incorporated by the new systems, but clearly, aspects such as the practical and substantive aspects of judicial work are not yet expressed by these mechanisms. The judgemental components and the strongly formal rationalities of these schemes have diminished in the last years through the introduction of measures to enhance objectivity and transparency, and in the case of the collective scheme, through the incorporation of judges from all levels to the discussion about targets. Such efforts should be broadened, in order to achieve a greater rational balance, enhancing the developmental components of appraisal.

4. Judicial Training and Performance Appraisal in the Judiciary of England and Wales

4.1 The Context: Rationalities of the Judiciary of England and Wales

Before the 18th century the English judiciary was formed by a variety of courts

and judges, who had secured autonomy from political interference since the Act of Settlement of 1701. The authority of judges was not sustained by the strength of a branch of State, but rather, by the tradition of expertise of the bench and the bar, and the subsequent high status of judges in British society. During the 18th century, legislation began to outweigh judge-made law, configuring the principle of parliamentary supremacy, while judges developed a strong sense of self-restraint and deference to political power under the assumption that their role was to uphold the law and not to create it. In the last decades of the 20th century the scope of attributions of judges began to expand, when the law-creating role of judges was again acknowledged. Public critiques of judicial passivity and conservatism also influenced the process, while the political situation from the 1980s pushed judges to take a much more active role than in the past. For centuries the functioning of the judiciary was based upon the traditions and informal arrangements of a small *club* of judges who knew each other personally and had a general reputation for impartiality, integrity and effectiveness, facilitating coherence within the judiciary, despite the lack of organizational unity and the absence of structural independence. Various pressures on the judiciary determined that, since 2000, such traditional configuration of the judiciary would change (Malleson 1999; Stevens 2002; Bell 2006; Popkin 2007).

Evidently, the formal rationalities of the judiciary of England and Wales were traditionally weak. Not only was the structure of the judiciary relatively informal, but also the functioning of the organization was ruled by traditions, practices, convictions and principles, rather than impersonal, general, and abstract rules. The lack of a formal career was probably the clearest example of this, ruling out the potential for instrumental calculation as to the likelihood of promotion by judges when exercising their role. Furthermore, the judiciary generally did not rely upon purposive rational mechanisms to achieve its ends. For instance, recruitment was the responsibility of the Lord Chancellor and based upon secret *soundings* (consultation) with the existing judiciary and a conventional interview (Healy et al. 2010, p.811). Likewise, judicial training did not formally exist in the British judiciary until 1979 when the Justice Studies Board timidly began its work. Judicial skills were envisaged as somehow innate, intangible, and *un-teachable*, while new appointees were inducted into their new role through informal and unstructured peer advice. In fact, even after the implementation of formal training, it took many years for judges to trust the new approach, which was initially seen as a potential threat to judicial independence. Nevertheless, the recognition of judicial control over training as an essential principle of judicial education has been a crucial element in the gradual change of such views (Malleson 1999, pp.156–159). In the same fashion, the traditionally unstructured English judiciary never had formal means of achieving quality

and consistency, such as supervision structures or performance appraisal. Indeed, the common origin of judges and their shared culture shaped outside the organization enabled them to maintain a club-like ethos. Therefore, the *judicial family* managed to integrate strong individuals in a group that was generally coherent in the ways in which the judicial role was exercised (Bell 2006, p.323,346).

The judiciary of England and Wales has traditionally relied upon strong substantive and practical rationalities, rather than the formal rationalities embodied in complex bureaucratic structures and purposive rational organizational mechanisms. Whilst judicial independence constitutes a core value that governs the functioning of the judiciary in England and Wales, it has never relied upon formal legal or constitutional arrangements. Rather, it has been sustained by shared convictions about the importance of this value and its rhetorical power (Stevens 2002, pp.96–97). Judicial independence has also been reinforced by the practical conditions of judicial service, enabling a system with limited collective independence to achieve high levels of individual independence and impartiality (Malleson 1999, p.66). Therefore, practical dimensions of rationality underpin and coalesce with the central substantive values of the system. Practical conditions such as the high status of judges and their lengthy experience, the lack of a career system, the relatively small size of the judiciary, and the social and cultural homogeneity of judges not only sustained the value of judicial autonomy and impartiality. Such conditions also enabled the achievement of other values such as commitment to quality and consistency, all based upon the practical conditions for peer interaction and a well established ethos of *doing the decent thing* (see Malleson 1999, p.199; Bell 2006, p.323).

The importance of substantive values was also evident in the development of theoretical rationalities. The traditional British legal culture was strongly shaped by legal positivism, particularly influenced by Austin and Dicey. Since the 19th century, the doctrines of binding precedent and the literal statutory interpretation of precedents affirmed judicial passivity and deference to legislature. However, these doctrines were sufficiently malleable that judges retained considerable interpretive power (Popkin 2007, pp.21–25). Such flexibility might be used to reinforce certain values or eventually to avoid the results of plain literal interpretations of the law that might conflict with the sense of justice and fairness that judges should aim to protect. In other words, the theoretical rationality of legal positivism was tempered by substantive rationalities, as a way of enabling judges to reach acceptable results in their judgements and avoid the excesses of literalism.

The prevalence of substantive and practical rationalities in the judiciary of England and Wales was crucial for the development of the organization. However, just as

the unbalanced prevalence of formal rationalities might end up producing substantively irrational consequences (Townley 2008, p.52), the unbalanced dominance of value-based rationalities without a formal structure of fair procedures and general rules might well generate similar results. For example, in England and Wales the weakness of formal rationalities and the lack of formal mechanisms for the achievement of organizational purposes, facilitated the reproduction of the historical lack of diversity within the judiciary. Indeed, the recruitment system based upon secret consultations without any criteria to ensure fairness placed the emphasis upon *who you know* rather than on *what you know* in the process of judicial appointments (Healy et al. 2010, p.811). As a result, the judiciary has historically represented a narrow social elite, identified as white, male, and upper middle class, drawn from those educated at public schools and Oxbridge (Bell 2006, p.314). Hence judges began to face strong criticism in the 1970s for representing the conservative views of the upper classes (Griffith 1997), appearing out of touch with the challenges of the country (Stevens 2002, p.25).

In addition to the lack of diversity, other pressures such as the massive growth of the organization, the demands of the public for judicial accountability and the increasing complexity of the law (see Malleson 1999) prompted the adoption of a more structured organizational model. Accordingly, a stronger formal rationality based upon general procedures and abstract rules has developed in the judiciary of England and Wales, particularly in the last 20 years. Therefore, the rationalities of the judicial system are evolving from reliance upon values, traditions, and practices, to a more balanced configuration in which the different dimensions of rationality interact. The result of this interaction is not completely clear yet, depending greatly upon the functioning of the new organizational arrangements that are still being implemented. In fact, the recruitment procedures have been criticized for their timid and slow results regarding the enhancement of diversity (Malleson 2009; Rackley 2007; Feenan 2008). In turn, the historical relevance of judicial independence as the central value of the organization has strongly shaped the new arrangements adopted. Consequently, regarding systems such as recruitment mechanisms, judicial training, and performance appraisal, judges have adopted a central role in their functioning. There have been critiques regarding the allegedly excessive power that has been given to judges (The Politics of Judicial Independence in Britain's Changing Constitution Project 2012), eventually fostering corporatist tendencies in the sense of closeness and insulation from social and political realms. If such objections are accurate, despite many successes in the implementation of new organizational mechanisms, there might be an unresolved conflict between substantive and practical rationalities on the one hand and formal rationalities on the other, the former expressed in the commitment to judicial independence and quality, the

latter manifested in the need for openness of new organizational arrangements. Arguably, the future of the organizational structure of the judiciary depends greatly upon the way in which this relationship is worked out. In fact, the enhancement of judicial values such as judicial independence itself depend upon the achievement of a balance between rational dimensions, based among other factors upon relative openness of the judiciary through the increasing engagement of judges with the community and representatives of other spheres of society (Gee et al. 2015).

4.2 The Judicial Training System of England and Wales

This section relies upon the same framework used to describe and analyse the judiciary of Chile. Besides the introductory overview, judicial training arrangements of England and Wales are explored using the categories outlined in Chapter 3, that is, background factors, training structures, the contents of training programmes, and the methodologies used to deliver training. The purpose is to capture the ideas, values, and beliefs that underpin these arrangements, understood in terms of multi-faceted rationalities, in order to explain the significance of this mechanism in the broader normative framework of the English and Welsh judiciary.

4.2.1 Overview

Historically, the judiciary of England and Wales did not have a judicial training system until recent decades. The first attempts to introduce formal training in the 1960s focused upon specific tasks that demanded particular technical knowledge, specifically sentencing. A formal review of such arrangements was carried out in the 1970s, resulting in the *Bridge Report* (Working Party on Judicial Studies and Information 1978), which proposed a new approach to judicial training that would later be crystallized in the Judicial Studies Board. The adoption of more structured training was strongly objected to at the beginning, for mainly two reasons. Firstly, because exercising the judicial role supposedly entails some *un-teachable* and intangible skills that can only be acquired by practice, and secondly, because of the concern that judicial training could be a back door route for the Executive to control the judiciary, thus undermining independence (Malleson 1999, pp.158–159). Both objections were based upon the practical and substantive rationalities that have historically prevailed in the judiciary of England and Wales, which came into conflict with the formal rationality of a structured training system. The answer to these objections, the practical and the principled, was to create a training system controlled by the judiciary (Ibid. 1999, p.159).

The Judicial Studies Board progressively expanded its activities until the merge between courts and tribunals lead to a significant organizational change. The need to provide a coherent training approach for a recently unified judiciary prompted the creation of the Judicial College, also reflecting the increasing importance and acceptance of judicial training in the judiciary of England and Wales. The new College reinforced the academic character and formal structure of the training system, aiming not only to provide training to the whole of the judiciary, but also to create stronger links with academics through the organization of properly academic activities (Hallett 2012).

As the continuer of the Judicial Studies Board, the Judicial College is in charge of the three main activities of the former: initial training for new judicial office-holders and those who take on new responsibilities, continuing professional education for existing judges and thirdly, supporting the administration of justice and legislation changes through the identification of training needs and delivery of training programs to address such needs (Judicial Studies Board 2011). More recently, the Judicial College has expanded its duties to new areas: first, the academic program, reflecting the aim to promote a closer relationship with academics in relation to topics that are not strictly linked to day-to-day judicial work. This program involves lectures delivered by judges and academics e.g. *being a judge in the modern world, judges and the media, should judges make law?,* and *diversity* (Judicial College 2015, 2015b). Secondly, aiming to maintain the status of international referent in judicial training, the Judicial College has expanded its work to the international level by offering places to international judges at seminars delivered by the College, providing training overseas, actively participating in international judicial training networks and encouraging judges to participate in international training programs offered in Europe (Judicial College 2015b)

With regards to initial training, the system of England and Wales is different to the usual approach in continental countries and certainly in Chile. The Judicial College does not provide any educational program prior judicial appointment. Given the experience of newly appointed judges, the induction process is rather short and has a clear practical focus. The induction program run by the Judicial College includes a period of *sitting in court* of five to ten days with an experienced judge, and a five-day residential induction course. Besides, a supervising judge and a mentor support new judges in the process of adaptation to their role. In the case of Tribunals, there are also induction programs for new judges prior to their first sitting. However, the length of training in this case varies among jurisdictions (Ichino 2010). Generally speaking, induction training provides the bricks needed to act as a judge, focusing on very basic aspects, such as how judges have to conduct themselves when they come into court, how to address a jury, how to sentence; all aspects that new judges may have seen while acting as lawyers,

which nevertheless can be very different from the perspective of the judge. The scheme aims to provide these very basic skills and particularly to give the confidence to new judges to act as such (Hallett 2012).

The College provides its continuing training program through a wide array of courses delivered nationally or regionally. In the period 2014-2015, a total of 446 courses were offered in the courts, coroners' courts and tribunals, attended by a total of 18.643 judges. Courses vary in length from one to four day residential training, and in size, from 20 to 100 participants (Judicial College 2015). In the courts, training alternatives are offered to judges through a prospectus that describes the main aspects of each activity. Judges are invited to participate and plan their own training by choosing the course that better suits their needs, being mandatory to do so. Courses are offered in various areas of practice, while certain programs cover cross-jurisdictional topics e.g. *the business of judging* (Judicial College 2015b). In the tribunals, the College coordinates training activities generally, but the areas of training, and training tracks largely depend on the arrangements of their specific jurisdictions.

The Board of the Judicial College oversees the planning and delivery of courses, relying upon various committees for the development of contents, methods and practical aspects of training activities. There are specialized committees for the Courts, for the Tribunals, for the Welsh judiciary, for diversity and development, and for international affairs. Courses are in charge of judges who act as course directors, while mostly judges deliver training as well, with occasional and limited participation of external academics (Judicial College 2015).

The aims and purposes of training are clearly delineated in the Strategy of the Judicial College, which is reviewed every three years. Since 2011, the strategy has specified an overriding objective for the College activities: to provide training of the highest professional standard for judicial office holders which satisfies the business requirements of judicial leaders, promotes the professional development of judicial office holders, strengthens the capacity of judges to discharge their functions effectively, including, where appropriate, their leadership and management functions, and enhances public confidence in the justice system. To achieve such objective, the College's specific functions are: the design and delivery of training programs of high professional standard, the design of cross-jurisdictional training programmes, the expansion of e-learning programmes and the development of research capacities. The strategy of the College also specifies the aspects that training must cover: substantive law, evidence and procedure; the acquisition and improvement of judicial skills; and the social context within which judging occurs (Judicial College 2011, 2015c). The specification of objectives, functions and areas of training is clarifying, guiding the efficient and coherent development of

training activities and methodologies by the Judicial College (European Commission 2014).

In sum, the Judicial College has managed in a relatively short period of time to develop a strong approach to judicial training, becoming a leading organization recognized internationally. Activities are built upon a clear definition of its principles, purposes and strategy, while its success reflects the consolidation of judicial training and its acceptance among judicial office holders of England and Wales, despite their initial resistance.

4.2.2 The Influence of Background Factors

As part a common law system, judges in England and Wales have historically formed a small group of widely respected experts recruited from a small bar and a smaller cohort of QC's characterized for being highly educated and skilled legal experts. As a consequence of such profiles, the judicial system did not have a formal system of training or any induction to the exercise of the role. In fact, initial resistance to the implementation of judicial training was only overcome by trusting the whole process of training to judges themselves. Currently, point 19 of the Strategy of the Judicial College for the period 2011-2014, determines that: "judicial training should be designed and delivered by practising judicial office holders or by trainers with appropriate professional skills under judicial direction". Hence whilst there is space for academics to participate in certain courses at the College, such an opportunity is very limited. The strong reliance upon judges as trainers shapes the practical focus of the training delivered..

Other background factors that need to be underlined concern the criticism that the judiciary began to face for its lack of diversity and political conservatism (see Griffith 1997), and the increasing demand for judicial accountability since the 1980s (see Malleson 1999, p.43). At the same time, the law has become more complex, particularly since the enactment of the Human Rights Act in 1998 and the increasing importance of EU law in the domestic realm. Judicial training has been one way to tackle all these issues. In fact, the main purposes of training are directly related to these background demands, as the Director of Training for tribunals at the Judicial College explains:

> The main purpose of training is firstly to ensure that judges are up-to-date in the areas of law and practice in which they are operating; secondly, to reassure the public that they are up-to-date; thirdly, to update the judges' awareness of the social context in which they are operating […] and judgecraft skills (JCT Director EW).

In light of the historical character of judicial organization in England and Wales, the purposes of training are different to other systems basically because judges have been

traditionally appointed after a lengthy career at the bar. The Director of Training for the Courts at the Judicial College was very explicit about the influence of the judges' profile upon the type of training they receive:

> Because you are dealing with judges who have been legal practitioners…we in our system say: you find out what the law is in this new area. We will not teach you. We will teach how to apply it and the skills we think you require in Court to apply it, but I won't teach you the law (JCC Director EW).

The previous quote demonstrates that the legal experience of judges and their assumed legal knowledge shapes the purposes of the Judicial College and the approach to training. However, the structure of the judiciary of England and Wales is changing in many ways. The number of judges has increased massively, while the tribunals have been incorporated to the judiciary. There has also been an increase in entry-level fee-paid posts, and a broadening of the eligibility criteria that has allowed those eligible to apply earlier in their careers (Hallett 2010). These changes reflect a trend towards the development of a career system for judges (Advisory Panel on Judicial Diversity 2010; House of Lords, Select Committee on the Constitution 2012), which might modify the historical pattern of recruitment. The change could bring to the judiciary younger and less experienced lawyers, who will spend most of their professional life in the judiciary climbing the career ladder. In that case, one of the standpoints of the training orientation, that is, the assumed previous experience and extensive legal knowledge of judges, would no longer hold.

In sum, the juristic framework and historical circumstances of the judiciary determined until very recently the absence of any formal judicial training in England and Wales, based upon the strong dominance of practical and substantive rationalities. The implementation of training brought formal rationalities into play, which initially conflicted with prevalent substantive and practical dimensions. However, securing strict judicial control over training resolved the conflict, allowing the expansion of training in order to face the growing demands the judiciary faces. Such demands are permanently changing as a result of social evolution and as a consequence of structural changes in the judiciary. Hence the judicial training system should be managed with an eye to current and emerging demands, particularly those that might arise as a result of changes to the historical patterns of judicial recruitment.

4.2.3 The Judicial Training Structure

Formal judicial training was adopted in England and Wales by establishing the Justice Studies Board in 1979, which, besides opaquely talking about *studies* rather than *training*, provided a relatively informal, amateur, and low-key approach to training (Gee

et al. 2015). Increasing awareness of the importance of judicial training in a context that demanded greater accountability, fostered general acceptance of the role of the Judicial Studies Board. Moreover, after the Constitutional reform of 2005, the training structure would be further formalized, particularly as a result of the merger between the courts judiciary and the tribunals. The Judicial College, successor to the Justice Studies Board, was created with this purpose of delivering training to the whole of the judiciary in a more structured *professional manner* than its predecessor (Gee et al. 2015). The Executive Board oversees the work of the College, which in turn is governed by a board formed by representatives of the different levels of the judiciary. This board sets the strategy of the College, agrees business plans, and oversees the delivery of training. Several committees also work in different areas, i.e. the Tribunal Committee, the Courts' Committee, the Diversity and Development Committee etc. (Courts and Tribunals Judiciary 2014b), all of them formed by representatives of different levels of the judiciary according to the specific area of work of each committee (Judicial College 2013).

The structured character of the new judicial training arrangements reflects the adoption of formal means-end rationalities, expressed in the belief that training delivered systematically through a rational methodology will enhance the capacities of judges and their general performance. Such formal rationality coalesces with the practical rationalities of the judiciary and its main substantive values. Indeed, balanced representation of the different levels of the judiciary arguably allows judges to express their views and focus training activities upon the needs agreed objectively within these representative governance structures. A good example of this kind of dynamic is provided by Gee et. al. (2015), recalling that in 2011 the Judicial Executive Board, agreed that training in leadership and management was a priority. The Judicial College established a forum, bringing together judges at all levels to identify the training needs for leadership and management skills. Clearly, the training priority established by the higher levels of the judiciary reflects the formal rationality of a bureaucracy in which organizational ends are determined at the top. However, such rationality overlaps with substantive values of fairness and objectivity, implicit in the balanced representation of judges in the decision-making bodies of the College that elaborated the training initiative, discussing the best means to enhance leadership and management skills. Moreover, the decision to involve even more representatives of the judiciary in the discussion reflects with clarity the overlapping practical rationalities, presumably expressed by the views of those who would receive training in this particular area.

The practical rationalities of the way the Judicial College conducts its business are important, particularly the views of judges in the evaluation and design of programmes. In fact, both directors of training for the courts and tribunals described in

interview the mechanisms used to capture the opinions of judges and to adapt courses to such views and training needs. In both cases they mentioned surveys after each programme, processed through simple but reliable systems. Likewise, both interviewees mentioned clear standards to analyse the results and to respond to issues arising from the interviews. More complex training needs assessments have been carried out in both courts and tribunals, involving various mechanisms such as focus group interviews and surveys. For example, the courts and the mental health tribunals have successfully conducted broad studies to capture the views of judges about the training programmes as a whole. The results in the case of the courts are still being analysed, but the Director of Training mentioned powerful conclusions that might lead to changes in the orientation of some courses. Similar initiatives have been introduced in the courts to evaluate the effects of training by conducting ex-post interviews with judges three or four months after the training experience in order to assess its real impact. Finally, it is important to note that tribunals have relative autonomy to organize their training within the structure of the College. Therefore, even more strategies to incorporate the views of judges to the design and evaluation of courses can be found in the different tribunals. For example, the employment tribunals have just created a system of training liaison judges, one for each region, in order to identify local training needs. In all the previous cases, a practical rationality can be discerned from the aim to respond to the needs, views, and opinions of judges as recipients of the courses.

Plans for development of the Judicial College, contained in the strategy for 2015-2017, reveal the interest in reinforcing the training structure. In interview, both directors of training at the College mentioned the idea of implementing a proper faculty, with expanded capacities beyond the organization of courses. The ambition to have an increasingly formalized training structure was revealed in detail by the Director of Training for the courts in interview: “we should become a formal judicial university”. He envisaged that such a body would be capable of expanding the curriculum to new areas, including topics that are not strictly judicial, developing cross-curricular training, having a greater number of judges devoted full-time to work in the College, researching areas of interest for the judiciary, and expanding e-learning capacities. Evidently, formal rationalities underlie the aim to develop a proper university-type organization and a structured system devoted to judicial education. However, strong practical rationalities also inform this idea. The aim that the judiciary should have its own research, its own mechanisms for the development of training, and more judges in charge reveals the goal of developing judicial knowledge within the boundaries of the judiciary through an organization that is properly judicial rather than academic, consequently embodying the values, beliefs, traditions, and practices of the organization.

Finally, it is clear that the training structure, with its particular configuration, in which judges mainly share the responsibilities of developing training, reflects the values of the judiciary of England and Wales. The relevance of judicial independence has determined in this context that judicial training must be in the hands of judges. Thus judges from different levels of the judiciary form the governing bodies of the Judicial College almost exclusively, while plans to expand the influence of the College are also based upon the principle that such expansion should be led and executed by judges. Accordingly, the greater visibility of formal rationalities implicit in the adoption of formal training structures is bounded by the influence of substantive rationalities, which in turn coalesce with the practical rationalities embodied in the specific arrangements for delivering training.

The strong influence of value-based rationalities and, specifically, the principle of judicial independence over the training structure, serve as bedrock for the organization. However, such influence can also be problematic, by not allowing external influences to enter the judiciary. Generally speaking, it makes sense that the judiciary should avoid external influences in order to protect independence. However, when such protection results in the lack of contact with other realms, then a version of corporatism based upon proximity and insulation might arise. The problem with such a form of corporatism is that values, ideas, and beliefs may be taken for granted within the corporation and rarely questioned or reviewed in the light of external changes or new social demands. The danger of insularity in the judiciary in England and Wales is evidenced by the fact that judicial independence was once used to reject any form of training, mainly because a broad, unqualified definition of the principle allowed it to be misused in that way (Malleson 1999, p.71). Likewise, the lack of permanent and critical review of the values and convictions of the organization can be further facilitated by the absence of contact with external representatives, for example, from the academic and political realms. Therefore, the composition of the governing bodies of the Judicial College and the involvement of external academics in the design and delivery of training could be re-studied without changing the governing principle of judicial control over the training of judges.

4.2.4 The Judicial Training Curricula

The training curriculum in England and Wales stems from the strategy of the Judicial College, contained in a formal document agreed by its governing bodies. According to the strategy applied since 2011, judicial training involves three elements: substantive law; the acquisition and improvement of judicial skills, and the social context within which judging occurs (Judicial College 2011, 2015c). In turn, the curriculum is

differentiated, depending upon the specific area of the judiciary. There is a curriculum for the courts, designed annually and published in a prospectus delivered to judges, whereas the tribunals have a differentiated curriculum for each jurisdiction. At all levels, the curriculum includes courses and seminars on different areas of judicial practice, with different emphases. In the case of the courts, there is a clear focus upon the development of judicial skills as the main purpose of training. There are economic reasons for this preference, as explained by the Director of Training for the courts:

> Because of the limited training time available, we don't spend a lot of time on delivering hard information…we spend it on training judges on the application of the law and the improvement of their judicial skills (JCC Director EW).

The same interviewee acknowledged the fact that the College teaches very little law because it is part of the duties of judges to know and study the law by themselves. With regard to training in social contexts, it is not delivered in the form of stand alone programmes, but rather it is embedded in courses with legal-judicial contents. Given this methodology, the Director acknowledged as a weakness of the system that it is sometimes easy to overlook the social context contents that should also be a matter of training.

The tribunals have separate curricular arrangements, worked out within each jurisdiction, under the leadership and coordination of the Judicial College. As one of the judges explained, the Director of Training plays a key role in establishing consistency in approach, chairing a group of training leaders who share ideas about coherent ways of delivering training, despite the great differences in size and jurisdiction of tribunals. Perhaps consistency within the tribunals stems from the common aim of covering the three aspects outlined in the strategy of the College, with different emphases depending upon the jurisdiction. For example, a judge from a Residential Property Tribunal explained that, considering the area of judging of the tribunal, training focuses upon legal knowledge, but it is set in a social context and goes hand-in-hand with training skills to apply such knowledge. The employment tribunals have a different approach, based upon a very structured training system and compulsory courses that need to be attended in sequence. In this case, there is a formal induction course, courses on career development, mostly focusing upon skills, and a number of more specific courses, one of them about social awareness, which is treated separately. Conversely, immigration tribunals do not have stand alone training in social context, mainly because this jurisdiction is: "all about social context" (Judge EW15).

As regards the rationalities of the system, the importance attributed to training in judicial skills reflects the dominance of practical rationalities in the system of judicial education. Indeed, the aim of developing a structured approach to training has focused strongly upon the accepted beliefs, practices, and traditions of the organization. In fact,

the curriculum is generally oriented to reinforce such aspects, expressed in terms of the skills that judicial office-holders in England and Wales should master. In turn, the system of training has incorporated formal rationalities through the structured transference of institutional knowledge to judges. Hence rather than relying upon informal peer-contact as a way of developing skills and reinforcing consistency, the Judicial College provides a systematic way of distributing knowledge on the accepted standards of work within the courts and tribunals. Finally, substantive rationalities are also present in the curricula, reflected in the interest in fostering awareness of the social context of judging, and also in the aim of the College to become a Judicial University, stated on its strategy for the 2015-2017 period (Judicial College 2015c) in order to broaden the curriculum to areas that are not necessarily related to day-to day work e.g. ethics, comparative legal systems, social media, medicine and law, science and law, and social context in aspects such as the understanding of Islam (Judicial College 2014). Clearly, this are ways of tackling the historical lack of diversity of the judiciary, and the subsequent weak contact with reality that judges have been accused of in the past. This does not mean that a certain catalogue of values is being imposed upon judges, but rather, aspects of social reality are put within the reach of judges so that awareness of their role in such contexts can be expanded. In this way training can be used as a purposive-rational tool to thicken the ethical dimensions of the judiciary, reinforcing the substantive rationalities in areas where the judiciary of England and Wales has historically shown its greatest weaknesses.

4.2.5 Methods of Delivering Judicial Training in England and Wales

The training methodology aims to enhance judicial performance and for that purpose the Director of Training for the courts explains that they intend to make training as close as possible to real life, attempting to confront judges with situations they will face in court. While there is a theoretical element in each course, about three-quarters of any training programme involves practical exercises. The College has a number of judges who have been trained to act as facilitators in small groups. Within each group, all judges are encouraged to participate in the exercises, mostly based upon cases, actively discussing and eventually performing a role, e.g. passing sentence before a group of six or seven peer judges who will then discuss and criticize the performance under the careful guidance of the facilitator.

The general methodology explained above is used to deliver training in all the areas of interest of the Judicial College. Not only skills are matter of collective discussion in the way explained, but also legal contents, social context, and other aspects which could be relevant to a specific programme. The Director of Training for the tribunals explained in interview that videos are used to train judges in judicial ethics containing

conflictive situations, which judges might face in real life. Discussions in small groups are then promoted under the guidance of a trained judicial facilitator. Likewise, training in social context in the tribunals relies upon judicial facilitators to guide discussions in small groups, aiming to challenge common misconceptions that judges may have. The relative flexibility that tribunals enjoy when designing their training has strengthened the range of methodologies available, which have been adapted to the specific needs of the various jurisdictions. Hence there is a wide range of methods used to enhance judges' awareness of the social context. Probably the best example of these innovative and flexible methodologies involves bringing external speakers to talk about their context. In some cases these are specialists in the area or representatives of specialist bodies e.g. Stonewall, the Ethnic Minority Law Centre (see Cooper 2014). Moreover, several judges reported that talks delivered by users of the tribunals were particularly moving and provocative for them, e.g. patients detained in mental health tribunals or people from ethnic or sexual minorities who spoke to employment judges of their experiences of discrimination.

Besides collective discussions, role-play, and small-group work, other methods are also used in training programmes. In fact, lectures by experts are occasionally delivered to judges in the context of their training, while documents, notes, and flow charts are widely used to inform judges about legal and practical topics, i.e. the internal processes of courts and tribunals. Several judges mentioned the importance of these documents as practical reminders, particularly after induction courses, when they are just starting their careers.

The collective discussion-based approach to training is generally valued as adequate by judges in the context of England and Wales. The Director of Training for the tribunals explained that, while this rather pragmatic approach is different to other judicial education systems, it has proven to be appropriate for the English judges. Such adequacy stems from the underlying judicial values that the training approach embodies. Indeed, besides the strong commitment to judicial independence, judicial consistency is also enhanced through the general methodologies used to train judges. One of the judges explicitly acknowledged this fact, saying that training actually reinforces consistency because judges do not just receive a lecture. They have to discuss, eventually changing their minds and reaching agreements, thus fostering shared understandings of the judicial role.

Given the importance of guided discussions, the effectiveness of the methods depends a great deal upon the ability of facilitators to create an atmosphere in which trainees feel comfortable and open to participate and engage in activities. When such an objective is accomplished, the dynamics of group discussion facilitate the exchange of

information and views of judges, helping them to learn from each other as an interviewed judge underlined. This is very much a peer-to-peer training system in which the key role is played by facilitators, who are trained in specific techniques to foster dialogue by the Judicial College. The effective transference of knowledge, in this case from the group to each participating member was expressed with great clarity by one of the judges:

> If you have to defend a position in a group like that, with five peers […] if you defend it successfully, you will remember that. If you get knocked off it, you remember too (Judge EW14).

Finally, regarding the rationalities implicit in the methods of judicial training, it is possible to observe a balance between different rational dimensions in which the practical and substantive components dominate. Indeed, formal rationalities are expressed in the systematic and structured, yet flexible, approach to training. The implicit assumption is that, through the application of these formalized methods, judicial performance will be enhanced. However, the formal rationalities clearly coalesce with practical dimensions that shape the specific way in which training is delivered, fostering peer interaction and the transference of practical knowledge between judges about how to resolve day-to-day conflicts. This practical orientation cannot be seen as a purely pragmatic or technocratic exercise. On the contrary, it is embedded in a substantive discussion about the ultimate values that the judiciary should protect and respect, i.e. independence expressed in the judge-led character of training; consistency, reflected mainly in group-based discussions methodology; and diversity, which is matter of innovative training methods that afford judges an understanding of the social context in which judging takes place. Importantly, the achievement of a balance relies upon the clarity of the triple-pronged definition of judicial training, which has been commended by the European Commission as *best training practice* to be applied by other judicial organizations (European Commission 2014). The definition provides a template to ensure that the College's vision and policies are entrenched in training practices. Without such clarity, training efforts could too easily focus unduly upon purely legal and technical aspects (Cooper 2014, p.15).

4.2.6 Taking Stock

The implementation of judicial training, in particular, the creation of the Judicial College in England and Wales, represent the introduction of formal rationalities in a judiciary in which substantive and practical rationalities have been traditionally dominant. Therefore, it entails a step change in the history of this organization, by which some of the main challenges aim to be addressed. Judicial training is a purposive-rational system that supposedly enhances judicial capacities. Consequently, it represents a formal and standardized response to issues such as the lack of diversity of the judiciary, the

distance of judges from issues that affect the life of the people, and the challenge to judicial consistency that may follow the massive expansion of the judiciary, in a context of increasing complexity of the law. However, the introduction of this rational system has not affected the relative prevalence of value-based rationalities in the judiciary of England and Wales. Indeed, the ultimate values of the judiciary have shaped the organization of the Judicial College and the delivery of training. Hence governance of the College has been entrusted entirely to judges from different levels of the organization, with minimum influence from external bodies, while mainly judges deliver training, reflecting the aim to protect judicial independence from any external influence. Likewise, judicial practical rationalities shape the training curricula and the methods used to deliver training, focusing mostly upon the enhancement of judicial skills to face day-to-day difficulties through interactive learning from peers, while new substantive rationalities are expressed in the focus on social context and the aim to broaden the College's curriculum to new areas beyond day-to-day practicalities.

In conclusion, the introduction of formal rationalities through judicial training arrangements has balanced the historical dominance of practical and substantive rationalities within the judiciary of England and Wales. Contemporary challenges are being faced through a systematic and structured approach and without undermining the practical understanding of the judicial role or the central values of the judiciary. However, the relevance of values such as judicial independence has determined the lack of external influences at the level of the Judicial College's governing bodies. Such insulation may produce, and reproduce, an uncritical understanding of judicial values, which, paradoxically, could end up undermining them. Considering that collegiate bodies govern the Judicial College, the presence of representatives from academia and the political realm on the board, without altering the judicial prevalence, would not harm judicial independence. Moreover, it would allow external views to be considered in the discussion of the role of training, the understanding of judicial values, and the appropriateness of judicial practices in an increasingly complex context.

4.3 Judicial Performance Appraisal in England and Wales

This section describes and analyses the mechanisms for the appraisal of judges in England and Wales according to the categories used previously to study the judiciary of Chile. The different mechanisms applied in this case are, therefore, classified depending upon their individual or collective configuration, and their judgemental or developmental character.

4.3.1 Overview

Formal performance appraisal has been introduced in the last 15 years at the level of tribunals, through different arrangements depending upon the jurisdiction, and in the courts for Deputy District Judges only. Currently, there is a pilot project of performance appraisal running at the level of circuit judges, which will serve to decide upon expansion of the mechanism to the rest of the judiciary. The project, backed by the Lord Chief Justice, has been launched to test recorders but could, if successful, be a prototype to appraise more senior judges (Gibb 2013). The judicial office did not grant access to information or to interview participant judges for the purposes of this research. The reason was that academic involvement could interfere in the pilot project. This lack of transparency in itself may be evidence of the excessive insulation of the judiciary, based upon an unqualified understanding of judicial independence.

The expansion of performance appraisal in the judiciary of England and Wales is a developing phenomenon backed by the main authorities of the judiciary (Gibb 2013; Ring 2012) and Parliament (House of Lords, Select Committee on the Constitution 2012). The Select Committee on the Constitution of the House of Lords (2012) carried out formal consultation with witnesses from different levels of the judiciary, taking into account the existing experience of tribunals and district courts. Its final recommendation was that formal appraisal should be introduced to the whole of the judiciary as a mechanism that has clear benefits for those appraised (pp.56–58). Two conclusions may follow. First, that the expansion of appraisal will probably consider the cumulative experience within the judiciary, taking into account that appraisal has been used consistently in the tribunals and district courts. Secondly, the systems implemented so far have had a clear individual and developmental orientation, as reflected by the *benefit for appraisees* highlighted by the committee.

Despite the variety of appraisal systems used in different tribunals and district courts, the schemes have a relatively similar methodology. For the tribunals, the Judicial Studies Board developed guides for appraisal in 2003 and 2009, containing the main principles that shape appraisal schemes. These documents regulate the scheme in detail, conceptualizing appraisal as a constructive, evidence-based assessment, aiming to ensure that individuals have acquired the competences necessary for the role by measuring their performance against the tribunal's standards. The system also aims to identify training and development needs, create opportunities for individuals to raise issues related to their experience at work, and provide support in the development of skills required for good performance. The appraisal scheme for tribunals is comprehensive, as all judges and members of the tribunals are appraised. The process is carried out by specially trained

judges and takes place on a regular basis. Newly appointed members must be appraised after the first 12 months of sitting, while subsequent appraisals should take place within three years of the initial appraisal and at least every three years thereafter (Judicial Studies Board 2003, 2009).

Appraisal in the tribunals involves several steps: First, a self-assessment prior to an appraisal visit must be carried out using a special self-assessment form; second, observation by the appraiser, aiming to assess the full range of competences based upon evidence such as: recent decisions or statements of reasons, information about training attended by the member, previous appraisals and personal development plans, adjournment rates, the prompt and timely return of written decisions or the number of sittings undertaken annually; and third, an outcome, according to the standards: *Satisfactory* or *Developmental needs identified.* The outcome is reached in a discussion between appraiser and appraisee followed by an agreed self-development plan identifying scope for improvement and a mandatory remedial strategy to support the judge's further development. The plan may include: additional training, guidance from the mentor, sitting with an experienced member or further appraisal visits. The scheme encourages the adoption of development plans even if performance has been evaluated as satisfactory, assuming that self-development and the enhancement of competences are always possible and desirable (Judicial Studies Board 2009).

The appraisal criteria has been determined in terms of judicial competences, in a cumulative process that started with the regulations of 2003 and 2009, in both cases following consultation with Chamber Presidents, Presidents of the Tribunals and those responsible for training and appraisal. More recently, in 2014, a new framework brought together all the work done in the judiciary to identify essential skills and abilities of judicial office holders. The new framework classifies judicial skills in six categories: a) assimilating and clarifying information, b) working with others, c) exercising judgement, d) possessing and building knowledge, e) managing work effectively, and f) communicating effectively. For each area, the framework provides a definition and explains the different elements that reflect such abilities. For example, regarding the area of effective communication, it is defined as the demonstration by the judge of good oral and written communications skills and authority. The different elements of this category are: a) establishes authority and inspires respect and confidence, b) remains calm and authoritative even when challenged, c) explains relevant legal procedural information in language that is succinct, clear and readily understood by all, d) asks clear, concise, relevant and understandable questions, and e) is willing to listen with patience and courtesy (Courts and Tribunals Judiciary 2014c).

The Association of Her Majesty's District Judges began to run its own appraisal

scheme in 2000 in order to assess the performance of deputies. Generally speaking, the scheme is similar to the one applied by tribunals. Nonetheless, besides individual development of skills, it also aims to provide information to judges with management responsibilities and the Judicial Appointments Commission, with information about performance of individual judges. The functioning of the scheme is organized in circuits, overseen by a Circuit Appraisal Judge and administrated by appraisal coordinators and appraiser judges. As with the tribunals, the scheme also involves three steps. First, observation by the appraiser for a day while the Deputy District Judge deals with a list and box-work. The second step involves self-appraisal by the appraisee completing a form for that purpose; and thirdly, the process ends with post-appraisal feedback and a discussion between the appraiser and the Deputy District Judge, in which problems are discussed, as well as strengths, areas for improvement and ways to improve. An appraisal report form must be filled up by the appraiser, including any comments that the appraise may wish to make. The assessment used to take place against the Core Qualities and Abilities drawn up by the Judicial Appointments Commission. Currently, the new judicial skills and abilities framework described above is applicable to the whole of the judiciary, including courts and tribunals (Association of Her Majesty's District Judges 2013).

4.3.2. Individual and developmental approaches

The systems used in the judiciary of England and Wales to formally appraise the judges' performance is focused on the individual, tending to the enhancement of their judicial competences. In the case of tribunals and district courts, such purpose is made explicit in the regulatory instruments, while great importance is placed upon the last stage of the process, in which the appraiser provides feedback to appraisees, mostly pointing to areas of improvement. The developmental approach is also fostered by a clear definition of judicial skills and abilities, and the specific elements and behaviours that are considered accepted and positive. In this way, a clear path for improvement is made clear to judges, allowing them to self-reflect about their performance, also providing external feedback from a specialized appraiser.

Besides details and practicalities, the approaches to performance appraisal in the case of district courts and tribunals can be differentiated with a basis in two elements. First, the scope of the scheme; and second, the use of the information obtained in the appraisal process. Regarding these aspects, district courts appraise performance of deputy judges only, assessing their aptitude for a potential appointment as salaried judges. Accordingly, the results of the appraisal are provided to the appointments commission if a deputy district judge applies for a permanent position (Association of Her Majesty's

District Judges 2013). Conversely, within the tribunals there are different approaches. Some tribunals appraise only fee-paid judges, e.g. the Employment Tribunals, whereas in other cases, fee-paid and salaried judges are subject to performance appraisal, e.g. the Residential Property Tribunals. Regarding the use of information, only the appraiser, the appraisee, and the presiding judge have access to the results of the appraisal process (Judicial Studies Board 2009). If the judge applies to a salaried position, the President may use appraisal records to provide references, but no other use is made of the information. The Committee on the Constitution of the House of Lords has endorsed the latter mechanism as best practice, assuming that the straightforward use of appraisal for appointments affects the reliability of the appraisal process (House of Lords, Select Committee on the Constitution 2012, p.58).

As previously explained, the developmental character of the schemes is set out in the regulatory documents mentioned above. However, where the results of appraisal are linked to the prospect of future appointments, the developmental character weakens, while the judgemental element becomes stronger. In any case, the developmental nature of the system is clearly prevalent. In fact, only one of the interviewees mentioned the experience of being appraised by someone who was too prescriptive, illustrating the situation with the expression: *if you don't do it my way, you're not doing it properly*. For this judge, the experience was irritating, particularly given the prospect of applying to a new position in the district courts. However, the same judge acknowledged that, generally speaking, appraisal serves to improve skills and develop capacities. He explained how another appraisal experience helped him to take a concrete attitudinal change: He had become much more careful not to *cut corners*, taking more time and being more explicit about what he means when addressing people at court. Likewise, another judge mentioned that she was able to change the way she used to deal with a particular procedure, realizing that she was wrong, thus adopting a new case management strategy. Furthermore, many judges lamented the relative isolation of their job and the lack of feedback about their performance. They particularly valued performance appraisal as an opportunity to receive the opinions and advice of a more experienced judge, especially in the early stages of their careers. Other interviewees provided similar views, describing the appraisal scheme as reassuring or as a learning opportunity in which either support, coaching, or training can be offered. Learning from appraisal is not limited to appraisees. A couple of judges who had experience as appraisers underscored the self-reflection and learning that appraising others has for them. Finally, some judges valued the experience of performance appraisal because it can provide an opportunity for career development for fee-paid judges who receive an objective opinion about their potential in the judiciary.

Despite these generally positive views of appraisal, most of the interviewees

mentioned that the process of being appraised made them very anxious. Some of them described the process as stressful. However, in all cases, the source of anxiety had to do with the fact of being observed and not necessarily from the feeling of being judged or hierarchical pressure. In fact, they mentioned that at the end of the day they normally felt relieved and more confident. One of the interviewees was very clear, explaining that the process was a catharsis because, despite her anxiety, she was able to say: "yes, that discussion was useful, it was a useful process and I can now go on and continue as I am or perhaps adjust a little" (Judge EW11). Moreover, a judge who had an appraisal that did not go very well said that the appraisal day was awful, but the feedback discussion was good in the sense of pointing with clarity to areas for improvement, rather than being some sort of reprimand. Arguably, the key to this sort of outcome relies upon the dynamics of the feedback stage, which is generally conducted positively by appraisers. Most of the judges mentioned that the feedback meeting was basically a relaxed and free conversation in which they could eventually disagree with the appraiser. Moreover, some of them revealed the importance of this stage by saying that they would welcome more extended feedback. Aside from the positive attitude of appraisers, the open character of discussions and the beneficial outcomes stem from the fact that the hierarchical element implicit in the process is not strong as in other judiciaries. In this regard, one of the judges said that, even if there is hierarchy, appraisers are seen as more experienced colleagues rather than hierarchical superiors, thus facilitating openness to share ideas and opinions.

In terms of the rationalities implicit in the appraisal scheme, clearly there is a formal dimension underpinning the aim to enhance performance through a systematic process of assessment. However, the practical dimension is clearly the dominant element of the process. Indeed, performance appraisal is seen very much as an opportunity to learn, to develop capacities, to receive feedback, to correct mistakes or feel reassured, based upon the experience of other judges. Hence the role of appraisers is mostly to transfer knowledge, accepted practices, and traditions of the organization; in other words, the rules of appropriateness (March & Olsen 2004) that regulate behaviour in the judiciary. Moreover, commitment to consistency and diversity are also reinforced, strengthening substantive rationalities without affecting the centrality of judicial independence. Indeed, the process is structured but nevertheless based upon open dialogue, which is generally not obscured by the sense of control or hierarchical pressure.

The weaknesses of the system have three main sources: First, the direct link to appointment that prevails in district courts and some tribunals, which can produce distortions to the process of appraisals (House of Lords, Select Committee on the Constitution 2012). Such a situation was pointed out by at least one interviewee who once

felt forced to adopt practices he felt wrong as he had a possible appointment in mind. Clearly, the situation illustrates how formal-instrumental rationalities can be forged by the system if it introduces straightforward means-ends incentives; Second, the limited availability of resources to expand the potentialities of the system. It is not the frequency of appraisals that is at stake. In fact, not-so-frequent appraisals can be more beneficial, particularly if complemented by other developmental instruments, i.e. training possibilities and mentoring. However, the lack of resources affects the possibility of conducting a more comprehensive assessment. Indeed, relying upon a one-day observation makes the process a bit artificial as some judges mentioned in interview, affecting its reliability and limiting the possibility of expanding feedback; and third, the limited developmental effects that can be linked to appraisal. In this area, more could be done to reinforce the link between appraisals and mentoring, to explore coaching alternatives, as one interviewee proposed, and to foster collective dialogue about best practice observed in appraisals, thus reinforcing the practical and substantive rationalities of the judiciary.

4.3.3 A collective (and judgemental?) appraisal system

Collective appraisal is becoming more important in the context of England and Wales since the 2005 Act and the Lord Chief Justice's increasing responsibility for the running of the courts. Accordingly, some governing attributions have been delegated to judges with leadership responsibilities, i.e. presiding and resident judges, particularly regarding the supervision of the courts' functioning (Goldring in House of Lords 2011, p.23). The former Lord Chief Justice publicly explained the role of presiding and resident judges as scrutinizing performance statistics for their court centres and working with colleagues to understand differences and find ways of improving performance (Lord Judge 2012, p.7). Lord Justice Goldring strengthened the approach during his period as Senior Presiding Judge, when monthly reports began to be produced covering the performance of each crown court based upon data about working processes. The statistics are reviewed comparatively and then resident judges are asked to discuss the data with court managers and judges. Therefore, there is a flow up of data and then a flow down to individual courts (Gee et al. 2015). This type of comparative evaluation is not yet completely settled as a practice in the judiciary. In fact, it has been generally limited to criminal courts, while in civil justice it has been acknowledged that measurement of workload and performance cannot be based upon mass volume alone, owing to the complexity of cases and specialisms of the law (Lord Judge 2012, p.12). Nevertheless, senior judges intend to expand the possibilities of evaluation to both civil and family justice (Gee et al. 2015).

The limited sample of this research, and the still emerging and relatively abridged character of collective appraisal in England and Wales, did not allow for the collection of sufficient empirical data from lower judges to assess their views. However, it is clear that the system of evaluation represents a relevant step and a fundamental change in the working culture of the judiciary, which aims to reinforce values such as transparency, accountability, and consistency of court services. These changes entail a form of quality management that basically understands quality in a quantitative way, related to the measure of resources and time needed for numerous court activities (Shetreet & Turenne 2013, p.81). The judgemental or developmental nature of the mechanism will be clearer when the system becomes further formalized and extended to the whole of the judiciary. In any case, the character of this sort of appraisal mechanism depends upon the ways in which the data is used to address difficulties in courts, in other words, the *flow down* from the senior judiciary to courts and individual judges. Indeed, if the statistical data fosters dialogue, negotiations, and constructive debate about ways to enhance efficiency, taking into account the multiple determinants of court performance, practical rationalities would become relevant in the process of rational justification of organizational action. Conversely, if the data is used to apply straightforward incentives, i.e. punishments or rewards of any sort, then formal means-end rationalities would prevail, eventually promoting instrumental behaviour among judges. Indeed, the influence of these types of collective systems over individuals can be straightforward, particularly when monitoring reveals under-performance in specific courts or units as "you don't need to dig very far to get to an individual who may not have been performing" (Goldring in House of Lords 2011, p.23).

4.3.4 Taking Stock

The implementation of individual and collective performance appraisal in the judiciary of England and Wales represents the decisive introduction of formal rationalities into the judicial system. Indeed, these mechanisms embody the belief that standardized evaluations of individual and collective work can lead to the adoption of appropriate measures to enhance performance. However, regarding the individual appraisal mechanism, such formal rationalities are balanced against the traditional substantive values of independence and consistency and also by new values that the judiciary aims to protect, i.e. diversity. Moreover, the practical rationality reflected in the importance of judicial traditions and practices in dealing with day-to-day difficulties are prominent. This dimension of rationality is expressed mainly in the way in which appraisal is conducted and in the appraiser transferring an experienced perspective, rather than imposing the view of either superiors or external agents. Conversely, owing to its

quantitative focus upon statistics concerning the use of resources and timeliness, the collective mechanism reveals the much stronger influence of means-ends economic rationalities, which tend to equate organizational ends with quantitative results. The system has not been fully developed and indeed it has the potential to blur practical and substantive dimensions of rationality if straightforward rewards and punishments are associated with it. However, it is still possible to use the results of statistical evaluation for the management debate, rather than taking them as the sole element that defines quality. In such a case, the justification of organizational action within the judiciary could take into account a broader array of circumstances that influence judicial performance, fostering a more balanced relationship between different rational dimensions.

5. Conclusion

This chapter provides a comparative account of judicial training and performance appraisal arrangements in the contexts of Chile and England and Wales. The perspective has not been purely technical or entirely descriptive. Rather, assuming that organizations are embedded in broader normative frameworks, analysis focused upon the significance that judicial training and performance appraisal have within their normative contexts. The dominant values, beliefs, and normative ideals of the judiciaries of Chile and England and Wales were interpreted in terms of multi-faceted and overlapping rationalities, borrowing from studies based upon Weber's works on the topic (Kalberg 1980; Townley 2002; Healy et al. 2010). In turn, the rationalities implicit in the training and performance appraisal arrangements in both countries were explored and analysed in their context in order to understand the significance of these mechanisms for the normative frameworks, i.e. the dominant values, ideas and beliefs, of both judiciaries.

The chapter reveals that judicial training and performance appraisal systems have fostered contrasting changes to the rationalities of the judiciaries of Chile and England and Wales. Indeed, in the case of Chile, where formal-bureaucratic rationalities traditionally prevailed, the use of judicial training and performance appraisal in recent years facilitated the reinforcement of new value-based rationalities. Conversely, in England and Wales, where substantive and practical rationalities have been historically dominant, the implementation of judicial training and performance appraisal brought new formal rationalities into play, balancing the traditional normative configuration of the judiciary.

In the case of Chile, judicial training enhanced the substantive aspects of the bureaucratic organization by introducing fairness and objectivity to the recruitment

process and to the designation of judicial trainers. The poor training methodologies have focused upon theoretical rationalities and have been functional to the traditional organization of the judiciary. However, individual judges and academics participating in training programmes were able to promote new values, particularly a renewed understanding of judicial independence and a strong focus upon the protection of individual rights. This phenomenon was not part of a systematic approach to substantive change and, consequently, while relevant values were re-discovered, other values, i.e. commitment to judicial consistency, have been in practice neglected. In connection with this, there has been a clear fragmentation of practical rationalities, as the organizational systems have not been able to reinforce a common view of the judicial role. However, the recent implementation of a new training methodology, based upon the active participation of judges, debates, and discussion has the potential to reverse the situation and reinforce practical rationalities, as judges are required to exchange ideas, reach agreements, and learn from each other. For such a purpose, the system should avoid over-focusing upon the purely technical aspects of judicial work, fostering a balance beyond mere technocratic rationalities.

In turn, the performance appraisal system traditionally used in the Chilean judiciary has worked to strengthen its dominant formal-bureaucratic rationality. Recent changes have been cosmetic; consequently, the individual appraisal system can still be characterized as strongly judgemental. However, judges imbued with a renewed sense of independence have reacted against this appraisal scheme through rejection and indifference, making it rather irrelevant. The appraisal scheme has become in some way the battlefield where new substantive rationalities are showing greater significance in relation to formal means-ends dimensions. Formal-economic rationalities have been also introduced to the judiciary through collective appraisal and measurement systems. As a result, instrumental rationalities have been to a certain extent promoted, fostering instrumental thinking among judges, as revealed by certain episodes of behavioural distortion. However, the increasing involvement of judges from different levels of the judiciary in the determination and evaluation of the mechanism's targets has brought new practical rationalities into play, tempering the dominance of formal dimensions that prevailed in the past and opening new perspectives to the system.

As I claimed in the previous chapter, the potential of judicial training and performance appraisal to affect organizational change largely depends upon the levels of coherence between the problems that these systems aim to tackle, their specific objectives, the methods used and the context in which they are applied. In Chile, the judicial context in the last couple of decades shows an evolution from a strongly hierarchical system, governed by formal bureaucratic rationalities, conservative values

and a preference for organizational consistency over the internal independence of judges; to an increasingly complex organization, in which new values of objectivity and fairness allowed new judges to enter the organization and express a strong preference for judicial independence over organizational consistency. Generally speaking, there has been a fragmentation of the practical understanding of the judicial role and a diversification of theoretical rationalities, stemming from the greater complexity of legal sources and the influence of academics upon judges. All of this is happening within an organization that is still formally hierarchical and governed from the top by the Supreme Court, which has consequently seen its powers to control judges weakened. Arguably, the implementation of judicial training played a role in the process, contributing to trigger the changes experienced by the judiciary. However, the training system has failed to offer an alternative to address new challenges, mainly because the identification of specific problems to tackle has not been faced systematically through proper training needs assessments. Consequently, the objectives of training activities have been too general and overly optimistic, under the assumption that any training will naturally deliver benefits, while the methods used have not been adapted to the needs of adults learning and judicial learners. Clearly, the training system had its greater success in relation to the selection of prospective candidates to the judiciary, and also in allowing judges and academics from different backgrounds and ideas to influence the new generations of judges, thus contributing to a significant process of organizational change. Nonetheless, the historical approach to training used by the Judicial Academy cannot be used to face the challenges that emerged simultaneously with a prospect of success. Positively, in the last couple of years, the actual Director of the Academy acknowledged this fact and began to gradually develop a promising approach to training needs identification and training methods, which might help making the training scheme's influence more significant in years to come.

In the case of performance appraisal, there have not been significant changes to the individual appraisal system in place since the 1920's, despite recent efforts to make it more objective and transparent. The system is still a judgemental mechanism for hierarchical control, which is no longer efficient for such a purpose in the face of new organizational challenges. Similarly, the implementation of collective measurement and appraisal aimed to modernize the management of the judiciary, introducing economic rewards to motivate better performance from judges, opening space for the possibility of behavioural distortions. Nonetheless, an incipient process of change in the regulations of this scheme allowing judges from all levels to discuss about adequate targets, and consequently, about the problems to address and the objectives of the mechanism, seems a promising strategy to expand the influence of collective performance appraisal in

relation to actual organizational difficulties. Remarkably, despite the very limited influence that performance appraisal might currently have in changing the Chilean judiciary, it has a symbolic relevance for judges who see this mechanisms as an expression of top down authority and lack of judicial independence. Appraisal has become the arena for organizational debate, and consequently, it is relevant in the actual process as a space where claims are articulated and discussed by organizational actors.

In the case of England and Wales, the introduction of judicial training and performance appraisal entails the reinforcement of formal rationalities in a context in which substantive and practical dimensions were traditionally dominant. The use of these mechanisms emerged as a response to institutional challenges expressed in critiques to the judiciary's lack of diversity, the increasing complexity of the law, and the massive expansion of the judiciary. The implementation of these mechanisms has been carefully designed; consequently, practical rationalities and traditional values still prevail in the judiciary, balanced by the formal rationality of new organizational mechanisms. However, the balance between these rational dimensions presents areas of concern: First, the excessive insulation of the judiciary; and secondly, the potential excesses of formal economic rationalities implicit in the incipient collective appraisal system.

The training system in the judiciary of England and Wales aims to address current challenges and is well suited to contribute positively to organizational changes, particularly in relation to the ways of keeping consistency in an organization that has expanded massively and was historically very homogeneous, Such a small and coherent organization depended upon informal arrangements that are no longer suitable to face new challenges. Therefore, the introduction of formal mechanisms such as professional training and performance appraisal represent a change in the way the judiciary organizes itself to keep working standards high. The training scheme has developed a structure, the Judicial College, which offers coherent training to the whole of the judiciary. The problems it aims to address and the objectives of the system are discussed and made explicit in a strategy document reviewed every three years, providing a stable yet flexible framework for training activities. Subsequently, the training methods used by the College correspond to such a framework, being generally based upon collective discussion and reflection by judges, facilitated by specially trained judicial office-holders. The approach is clearly compatible with accepted principles for adult education and judicial learners. Moreover, it is well suited to address the specific challenges of the judiciary of England and Wales, in relation to the need to reinforce common standards and consistency in a much larger organization. Indeed, the scheme offers judges from the courts and tribunals the opportunity to share training activities and discuss about their practices and perspectives to the judicial role. In this way, positive dynamics can be expected regarding

the enhancement of consistency and the reinforcement of shared views among judges in a much larger and complex organization.

The incipient use of individual performance appraisal in the judiciary of England and Wales has also the potential to contribute positively to face current organizational challenges, particularly if the developmental components of the schemes in place are maintained and reinforced, and the potentially judgemental elements i.e. the use of records for appointment purposes, are ruled out. The appraisal schemes are based upon standards clearly set by the organization after a process of collective debate regarding judicial skills and abilities expected across the judiciary. Appraisers have been specially trained to reinforce such standards through observation and discussion with appraisees, in a process that should naturally work to reinforce common practices across the organization. Nonetheless, individual appraisal still has a limited application, as it is not used across the judiciary. Particularly, salaried judges from the courts do not have any sort of formal appraisal and consequently, the possibilities of this mechanism to contribute to the process of organizational change is still very limited, specially if compared with the broader effort to train judges at all levels. In the case of collective approaches to appraisal, it has not been formally instituted as such, but the much clearer lines of management and control will naturally foster evaluations. The results and effects upon organizational change of this emerging approach will be visible in the future. However, its potentially judgemental elements should be kept to a minimum in order to protect relevant values for the judiciary, such as internal judicial independence.

In conclusion, it is clear that the systems of training and appraisal in both contexts, Chile and England and Wales, have introduced new values, ideas, and beliefs into the respective judiciaries, expressed in new rationalities that work to counter-balance traditionally dominant rational dimensions in both organizations. Consequently, these mechanisms have the potential to introduce new normative elements to judicial organizations, contributing to change the values, ideas, and beliefs that shape the structure of judiciaries and their functioning. They can do it either by reinforcing formal dimensions as in England and Wales, or by allowing substantive and practical rationalities to expand, as in the case of Chile. Moreover, they can promote a balance between the different rational dimensions or these mechanisms can over-emphasize certain types of rationalities, resulting in *irrational* or unbalanced outcomes. In any case, these changes to the normative framework of judiciaries should have an impact upon the structure and functioning of the organization. The extent of these changes largely depends upon the coherence or fit between the problems that need to be addressed in a particular context, on the one hand, and the specific objectives and methods of training and appraisal, on the other.

V. THE EFFECTS OF JUDICIAL TRAINING AND PERFORMANCE APPRAISAL UPON THE STRUCTURE AND FUNCTIONING OF JUDICIARIES: A JUDICIAL TYPOLOGY

1. Introduction

The previous chapter relied upon the ideal types of rationality identified by interpreters of Weber (Kalberg 1980; Townley 2002; Healy et al. 2010) in order to uncover the ideas, beliefs, and values implicit in the judicial training and performance appraisal arrangements of Chile and England and Wales so as to explain the impact of such systems on the normative frameworks of both judiciaries. This chapter goes one step further by focusing upon the best way of explaining structural and functional changes expressed by the introduction of these systems.

The normative framework of organizations is constituted by the values, ideas, and beliefs that underpin organizational structures and systems (Greenwood & Hinings 1993). As we have seen, the implementation of mechanisms such as judicial training and performance appraisal might introduce changes at the normative level. Arguably, such changes should also have an effect at the structural and functional levels of the organization. In other words, as the organizational systems and structures embody a certain set of values and ideals, changes at the normative level should also be reflected in the structure and functioning of the organization. This chapter develops a way of exploring and understanding these effects, aiming to go beyond the description of visible and tangible reforms that may have purely local significance. Hence the purpose is to offer a broad analytical perspective based upon the role of judicial training and performance appraisal arrangements in the two cases under study, taken as representative empirical referents.

The thesis is based upon the use of typologies which: "are especially useful for reducing complexity, reducing the number of types needed, aiding comparisons, and defining multidimensional concepts" (Bailey 1994, p.23). Accordingly, the chapter studies the functioning of judicial training and performance appraisal arrangements in Chile and England and Wales in order to identify the central dimensions of judicial organization expressed by them, using such dimensions to form an empirical typology of judicial organization. The exercise on the one hand delivers useful information about the nature, characteristics, functioning, and effects of training and appraisal systems in the two judiciaries. On the other hand, such knowledge helps to make broader inferences about the variables that differentiate these judicial systems more generally. In other

words, the mechanisms, methods, and functioning of judicial training and performance appraisal are used as a lens to observe two representative models of judicial organization and determine the key aspects that make them different. The results are explained in the form of a typology of judicial organization that can help us to understand the changes expressed by judicial training and performance appraisal arrangements in two contrasting contexts.

The analysis carried out in this chapter is inductive, focusing upon empirical data related to the use of judicial training and performance appraisal in the countries under study. The purpose is to identify underlying concepts of organizational relevance in relation to aspects such us training methodologies, quality of training, social relationships developed as a result of training activities, formal and informal contents of training activities, influence of appraisal systems over day-to-day work, effects of the results of appraisal processes, and so on. The next step in the inductive process is to connect such concepts by developing categories that involve: "the grouping of putatively dissimilar but still allied concepts under a more abstract heading" (LaRossa 2005, p.843). Therefore, the concepts are grouped according to dimensions of organizational relevance, e.g. different forms of exercising authority, either vertically or horizontally. In turn, such organizational dimensions are used as variables of the new typology, which can serve as an analytical tool for the study of hypotheses regarding judicial organizational phenomena.

While the Weberian rationality typology served in the previous chapter to understand the changes to the normative framework of the judiciaries of Chile and England and Wales expressed by training and appraisal arrangements, the typology developed in this chapter is based upon the structural and functional effects of such changes. This analytical tool may be used to study reforms to the structure and functioning of judiciaries prompted by judicial training and performance appraisal arrangements in the two countries, and in any other places where similar circumstances may be found. Moreover, the abstract and general character of the typology make it useful for other purposes, as an heuristic device which can guide further studies of the increasingly complex organization of judicial systems.

2. Categories of Judicial Organization Extracted from the Study of Judicial Training and Performance Appraisal.

The process of inductive analysis of the empirical data, i.e. interviews and documents, lead to the development of four distinct categories or dimensions according to which it is possible to distinguish models of judiciaries. In the following pages, these

categories are presented, aiming to explain the way in which the distinct organizational features revealed by the data were grouped into the four areas discussed. These organizational features were not grouped according to their similarity, but rather, they were grouped together because they belong to the same *dimension*. Each dimension or category represents a continuum, while the organizational features of judiciaries constitute patterns that represent a range of variation within this continuum.

2.1 Power Distribution

This is perhaps the most obvious dimension of judicial organization. The focus upon authority and power has been central in the development of traditional judicial typologies, such as Damaska's (1986). Indeed, the distinction between hierarchical and coordinate models largely relies upon the way in which authority is distributed and legitimized in judicial organizations, the former according to the formal structures of the rational legal paradigm, the latter based on traditional authority, precedent, and usage (Weber 1964). The data shows that judicial training and performance appraisal arrangements reflect different levels of dominance of the rational legal order, i.e. impersonal, general, and abstract rules and procedures. Evidently, in the case of England and Wales, traditional features temper the prevalence of bureaucratic structures, producing a different organizational outcome if compared to traditionally bureaucratic organizations. Nevertheless, it is clear that bureaucratic forms have progressively become dominant in judicial organizations, even in common law scenarios (Fiss 1983). Taking this fact into account, the analysis goes beyond the broad bureaucratic/non-bureaucratic classification, distinguishing forms of legitimate authority not only in relation to the basis of order and authority (Weber 1964), but also considering the role and reactions of the various organizational actors regarding the legitimacy of such rules (Gouldner 1964).

2.1.1 The Vertical Authority Pattern in the Chilean Judiciary

Based upon data, the power distribution category is a continuum with two ends - the vertical authority paradigm and the horizontal authority form. In the case of the Chilean judiciary, judicial training and performance appraisal arrangements reflect the dominance of a vertical model of authority. Indeed, the organization in different echelons of authority and the top-down supervision structure of hierarchical models are clearly expressed in such arrangements. As regards judicial training, according to Article 2 of Statute number 19.436, only judges from the higher echelons can join the Board of the Judicial Academy, i.e. Courts of Appeals and Supreme Court judges. Whilst judicial associations elect one member of the board as a representative of judges, the legal

requirement is that this particular member also needs to be a senior judge from the superior courts. In other words, the majority of lower judges choose from among higher judges one who represents their views of judicial training in the Board. Importantly, the Board plays a role in the process of training and recruitment, devising training strategies and agreeing general rules for the day-to-day work of the Judicial Academy. Hence decision-making about the functioning of judicial training is governed by a structure that embodies the hierarchical principles of the judiciary, excluding lower judges who receive most of the training.

The top-down organization of training was reflected also in the opinion of some judges interviewed in the research, who expressed their concern about growing involvement of the Board in the activities of the Academy beyond general planning, thus reinforcing the influence of the judicial hierarchy. One mentioned that the Board begun to participate more actively in the process of recruiting candidates to the formation programme, while another judge who applied to participate as a tutor in the Academy's courses, said that she had been prevented for ideological reasons from participating by members of the Board. In turn, the Director of the Judicial Academy acknowledged that the determination of training needs relies mostly upon the opinions of higher judges, claiming that one of the greatest obstacles to enhancing the impact of training is the hierarchical culture of the judiciary. He illustrated this idea by saying that in some cases performance targets determined by the judicial hierarchy are incompatible with the purposes of training, suggesting that training efforts need to adapt to a setting that is mainly shaped by senior judges, where the opinions of lower judges are generally disregarded.

The vertical nature of power distribution within the Chilean judiciary is clearer in performance appraisal arrangements. Indeed, the statutory individual appraisal system depends wholly upon the views of senior judges, who tend to exercise this role quite arbitrarily (Vargas 2007; Hilbink 2007; Bordalí 2007; Couso & Hilbink 2011), a view confirmed by all of the judges interviewed, claiming that, appraisers do not use performance standards or targets systematically, despite innovations introduced by the Supreme Court quite recently. Moreover, judges expressed their dissatisfaction with the appraisal mechanism, mostly claiming that it affects individual independence by allowing interference from superiors in the process of decision-making. One of them states: "the system serves purposes of ideological control of the judge rather than appraising performance" (Judge CL07). However, as we have seen, despite the emphatic rejection of performance appraisal by judges, based upon its strictly hierarchical and controlling nature, at the same time all of the judges denied any specific pressure over themselves from the system of appraisal. This apparent contradiction reflects that judges generally do

not see the system as legitimate. In fact, one of them claimed explicitly: "as the appraisal system is not really legitimate, I simply don't care about it" (Judge CL09). Accordingly, while judges do not feel appropriate to be controlled by the mechanism, by denying its influence in their particular cases, they are making a statement against the appraisal system on legitimacy grounds but not necessarily in relation to its actual impact.

As regards collective evaluation and measurement systems, the situation is similar as judges generally reject these mechanisms that they feel are alien to their interests and to the nature of their role. Some expressed their disagreement with inappropriate influences, i.e. managerial and economic incentives introduced by the collective evaluation system from the top of the organization, while most of the judges mentioned their discomfort concerning the lack of participation of lower judges, despite welcoming the recent incorporation of lower judges into the regional commissions in charge of overseeing local evaluation processes. Likewise, many judges expressed their distrust of the new measurement mechanism *Indice de Calidad de la Justicia*, basically because representatives of lower judges did not participate in it and because they do not have sufficient information about this system emanated from the top of the judiciary.

One way to understand developments in the organization of the Chilean judiciary would be to deny the prevalence of a vertical pattern of power distribution based upon changes in recent years. From such a point of view, it could be claimed that, as judges apparently do no longer feel bound by control mechanisms such as performance appraisal, authority is being distributed more horizontally. Such a conclusion would be wrong according to this study, as the pattern of power distribution has not really mutated to a new paradigm. The Chilean judiciary is still an organization based upon formal rules and procedures enforced in a chain of subordination. What the changes demonstrate is that the historical *punishment-centred* character of the organization, based upon command and hierarchy, might be weakening, while features of a *mock bureaucracy* (Gouldner 1964), in which rules and procedures become de-legitimized not only for subordinates but also for superiors, becomes salient. In fact, such an idea has been expressed by scholars (Vargas 2007) and partially recognized by Supreme Court members (see Dolmestch 2009). Therefore, it is more accurate to claim that the enforcement of rules using appraisal and supervision mechanisms has become weaker, without altering the dominant organizational principle of vertical distribution of power. Thinking prospectively – and optimistically - this could be a transitional stage towards a third possibility within the same pattern of power distribution, that is, the *representative bureaucracy* highlighted by Gouldner (1964). According to this pattern, superiors and subordinates uphold the rules because they fit their common values. For such a development to occur in Chile, the participation of lower judges in organizational systems

should be reinforced, in the same way as in the regional commissions that oversee performance evaluation. In fact, a judge who has participated in such commissions expressed in interview a relatively positive view of the system and its outcomes as a result of the work of these commissions, changing her originally negative perspective towards it.

2.1.2 The Horizontal Authority Pattern in the Judiciary of England and Wales

On the opposite extreme of the continuum of power distribution, the horizontal pattern entails that authority is shared among judges who are not linked in a strict hierarchical chain of supervision. According to this study, judicial training and performance appraisal arrangements suggest that the judiciary of England and Wales belongs to this category. This was clearer in the past, when the judiciary was much smaller and had a very informal structure. In recent years the organization has moved along the dimension of power distribution, nevertheless retaining its horizontal structure of authority. In other words, it is true that hierarchical forms have been adopted in the judiciary. However, the system can still be characterized as predominantly horizontal regarding the way in which authority is distributed and exercised.

As regards judicial training arrangements, the Lord Chief Justice and the Senior President of the Tribunals oversee the work of the Judicial College with the advice of the Judicial Executive Board. The Board of the College, which is a representative body that includes circuit judges and members of the tribunals, governs the College's activities. Several committees formed by judges from all levels of the organization are responsible for the various training programmes in different areas (Courts & Tribunals Judiciary 2014b). Accordingly, the governance structure allows views from different levels of the organization to be included in the administration of judicial training. Within the structure of the Judicial College there are also different organizational arrangements for the courts and tribunals. The Director of Training for tribunals described the College as the People's Republic of China and Hong Kong - *one country, two systems* - to reflect the organizational divide according to which courts have a single centralized training structure, while the tribunals have different structures for each jurisdiction based upon their historical developments, coordinated by the College. In this way, the training organization allows greater contact with judges, because the different jurisdictions have developed their own systems to capture their opinions, as different interviewees revealed. These take the form of training liaison judges in employment tribunals, informal focus group meetings, and extensive studies carried out to evaluate training programmes by mental health tribunals and the courts. Even more significantly than these formal participatory arrangements, some judges reported that they perceive a positive culture of

dialogue in their jurisdictions, enabling them to freely reach the people with training responsibilities and to propose improvements.

Importantly, training delivery also reflects a horizontal distribution of authority. Tutors and facilitators are selected from the judicial ranks by open competition, while the methods used to deliver training are intrinsically horizontal, based on open discussion, role-play, and collective reflection. Moreover, informal hierarchies between judges are removed through the use of cross-jurisdictional training programmes, which put judges from the courts and tribunals in the same room, the former seen historically as having greater seniority. Such a sense of different hierarchies is blurred in those activities in which judges engage in dialogue and receive feedback about their performance from peers with very different backgrounds and judicial status. In fact, many judges reported that these activities served in different ways to share experiences horizontally through reciprocal cross-fertilization.

As regards performance appraisal, the arrangements reflect a predominantly horizontal organizational pattern too. As some judges explained, there is an element of hierarchy in the process, which nevertheless is very weak compared to traditionally bureaucratic judiciaries because appraisals are not carried out by senior judges but by more experienced colleagues who hold salaried positions. In fact, the whole system relies upon building confidence between appraisers and appraisees, as reflected in the opinion of one judge: "I had a good trusting relationship with my appraiser. I trusted his judgement to be appropriately critical" (Judge EW12). The judgemental and hierarchical elements of appraisal, therefore, are kept to a minimum in order to facilitate the process of appraisal, which depends largely upon the quality of feedback provided in an open discussion at the end of the observation session. This idea was confirmed by most of the judges interviewed in district courts and tribunals.

In sum, the introduction of formal mechanisms such as judicial training and performance appraisal in the judiciary of England and Wales has strengthened the bureaucratic structures of the organization. However, the pattern of power distribution has not changed from horizontal to vertical, as is common in strict bureaucratic settings. Rather, the mechanisms allow participation and involvement of judges from different levels in the processes of training and performance appraisal, either through representatives who intervene in the design or evaluation of these mechanisms, using channels of communication to feed the decision-making levels responsible for running these systems, or engaging openly and actively in their own training and performance appraisal. As a consequence, a feeling of joint enterprise and shared acceptance of the rules tends to predominate in the organization, resembling the *representative bureaucracy* pattern outlined by Gouldner (1964).

2.2 Organizational Culture

Scholars have developed the idea of culture, at both the societal and organizational levels in similar terms: those who share it and transmit it also define it; it includes cognitive representations of values, norms, beliefs, and assumptions; it is conditioned or learned, and it shapes behaviour. Accordingly, central categories that define culture at the level of society, such as individualism and collectivism, can also be used to characterize the culture of organizations (Robert & Wasti 2002, p.546). Generally speaking, the core element of individualism is the assumption that individuals are independent of one another, centralizing the personal – individual goals, uniqueness, and personal control - over the social. Conversely, the core element of collectivism is the assumption that groups bind and mutually obligate individuals, centralizing goals and values in social units in which the personal is a component of the social (Oyserman et al. 2002). In turn, the classification of a society or an organization as individualistic or collectivistic is based upon the degree to which individualistic or collectivistic values, norms, beliefs, and assumptions apply in a majority of contexts and to a majority of members of that society or organization.

Organizational cultures develop in response to stimuli that are experienced in common by organizational members (Robert & Wasti 2002), e.g. shared social experiences related to social class, occupations, gender, or ethnicity (Healy et al. 2004) or human resources practices such as judicial training or performance appraisal that carry an underlying set of values and assumptions, providing the basis for common perceptions of the organizational culture at the individual level (Robert & Wasti 2002, p.549). Accordingly, the distinction between individualistic and collectivistic judicial cultures in this research is based upon the extent to which judicial training and performance appraisal promote values, beliefs, assumptions, and practices in one way or another; and also upon the reactions, views, and perceptions of judges about these systems, which might reflect either rejection or agreement with the values promoted in this way. In this particular dimension it is possible to observe significant changes in both judiciaries under study, which can be linked to training and appraisal as relevant factors of such processes.

2.2.1 The Adoption of a Collectivistic Cultural Pattern in the Judiciary of England and Wales

At one extreme of the organizational culture continuum, the individualistic pattern emphasizes the culture of autonomous decision-making that prevailed historically in the judiciary of England and Wales, where the day-to-day work of judges was rather

solitary and relatively isolated. Individualism was seen as the bedrock on which judicial independence ultimately rests, enabling judges to play a creative role in shaping the law. Such a culture was based to a large extent upon the fact that the judiciary was a rather small and homogeneous club-like group, which could accommodate high degrees of individuality in approach while still retaining its coherence (Malleson 1997).

Following the expansion of the judiciary in size and attributions, the culture of individualism has changed in the judiciary of England and Wales. One aspect that reflects such change is the introduction of judicial training and performance appraisal, shaping the views of judges concerning the organizational environment in which they work. One of the judges expressed the current openness to a more collectivistic setting:

> We have been in the past guilty of a slight isolationism […] we have to work smarter and that certainly means working more together (Judge EW14).

The creation of the Judicial College reflects the aim of reinforcing a collective outlook in the judiciary, which can be seen as one of the central outcomes of the constitutional reform of 2005 (Carnwath 2013). The College brought together the training efforts of the courts and the tribunals, becoming a key feature of the judicial unification process. Such a process is not only an administrative move. The Judicial College has devised cross-jurisdictional training programmes, which judges from both the courts and tribunals attend, aiming to foster cross-fertilization and the enhancement of consistency. The innovative experience puts judges from very different backgrounds in the same room to discuss various judicial topics, facilitating the exchange of ideas and knowledge. For that purpose, much effort has been put into designing these courses and seminars, particularly trying to identify judicial skills that are common to all jurisdictions, in order to address such common areas of interest, as was explained by the Director of Training for the courts when interviewed. The College also runs other cross-jurisdictional activities, including a series of seminars on topics of common interest offered across the country: "cementing a greater sense of being part of a judicial community" (JCT Director EW).

The reactions of judges to cross-jurisdictional experiences have been positive, according to this research. One judge who has participated as a facilitator in these experiences explained that, comparatively, tribunal judges have been more familiar with the dynamics of courses because they are more used to collaborative work, to getting formal and informal feedback when they sit in panels or when their performance is appraised, and to working in variable judicial scenarios that are the norm in large tribunal centres where people are mostly unrepresented. In turn, court judges share a more developed sense of judicial ethics, regarding how to behave, and possible conflicts they may face in that area. Therefore, there seem to be clear aspects in which judges from both

sides might contribute to each other, complementing their traditional judicial skills and abilities. In fact, judges with experience in these courses confirmed positive outcomes in various areas. One mentioned their reassurance after comparing their own abilities with judges from other backgrounds. Another judge highlighted the importance of the transference of skills for dealing with litigants in person that tribunal judges have developed, to their colleagues in the courts. A third judge underlined the importance of sharing experiences of adaptation to new judicial scenarios in different contexts, which seems to be a particular strength of this type of course. A similar approach has been adopted for more specific purposes, for example through blended learning applied in the Social Security and Child Support Tribunals, where judges and specialist non-judge members train together using cases from their areas of work to promote realistic and detailed discussion, both legal and subject-specific. Training provided in this way has not only proved to be effective, it also fosters dialogue among tribunal members with different specialisms, fostering the sharing of knowledge and the development of common perspectives among them (European Commission 2014, p. 48).

Apart from cross-jurisdictional and blended training, the directors of training at the Judicial College explained the general methodology used to deliver training, which is based upon collective discussion and reflection using tools such as case studies, mock trial, role-play, and debates in small groups, aiming to enhance consistency in the judges' approach to their work. The Director of Training for the courts expressed the core idea of the methodological approach very clearly:

> You might hear six judges passing sentence in six completely different ways in the same case (in a role-play activity) and then you would have a discussion at the end, tying threads together about what is the best way of constructing and delivering a sentence (JCC Director EW).

Evidently, the methodology underlines the importance of sharing knowledge, views, experiences, and practices between judges, promoting consistency in approach. In fact, most of the judges confirmed the participatory character of training methods; enabling judges to learn from each other based upon collective discussions in which they extract useful elements. Moreover, an interviewee explained other collective mechanisms for sharing knowledge in the context of employment tribunals, in which legal updates are provided on a cascading basis. Accordingly, a few judges from each region are invited to residential courses where they receive information about new legislation that they have to share after the course with colleagues in the regions.

Another aspect of judicial training shapes the cultural pattern stemming from the possibilities of networking and socialization that training activities provide. Indeed, many judges highlighted the fact that residential courses are very useful to meet other people

and to share relevant experiences, providing a network support system, avoiding isolation, or simply giving an opportunity to meet people and discuss the training event informally in a bar or before dinner.

As regards performance appraisal, it is also possible to observe the influence of a collectivistic cultural pattern in the judicial organization. Indeed, the individual appraisal mechanism is a structured system that aims to enhance judicial performance in a consistent way based upon consistent methods. It has been regulated in detail for its application in district courts and tribunals, based upon standards of the appropriate judicial behaviour. Although the process of appraisal can be rather stressful, most of the interviewed judges valued the learning, guidance, and support they receive from more experienced colleagues. Hence the existing experience of performance appraisal and the possibility of its expansion within the judiciary clearly demonstrate the aim of standardizing the attributes that any judicial office-holder should possess. In fact, standards have been carefully developed (Courts and Tribunals Judiciary 2014c), and appraisers trained to apply a methodology that helps to transfer knowledge and accepted practices across a wide and diverse organization. Hence, as an organizational tool, appraisal not only delivers performance evaluations, promoting individual development. It also provides judges with support, guidance, and feedback from more experienced and centrally trained judges which could hardly be delivered in other ways, given the relative isolation that characterizes judicial work.

2.2.2 The Adoption of an Individualistic Cultural Pattern in the Chilean Judiciary

A collectivistic cultural pattern historically characterized the Chilean judiciary. Indeed, the stratification in a chain of subordination put judges under pressure to unify, while a spirit of team playing was fostered by the dynamics of hierarchical promotion, enabling advancement to judges who played by the superior's rules only. Accordingly, a coherent judicial ideology of *apoliticism* was imposed from the top and ultimately shared by most of the judges, shaping their role in an extremely passive and conservative way (Hilbink 2007).

In recent years, the collectivistic paradigm has changed as the organization progressively and spontaneously adopted a rather individualistic model. Relevant factors in this process have been training and performance appraisal arrangements, which fostered an extensive understanding of judicial independence among judges, a factor they mostly see as an antagonist to judicial consistency. This effect has been possible partly as a result of what training and appraisal have not done, i.e. the challenges not addressed by these mechanisms, rather than resulting from the intended influence of both training and appraisal. In other words, the individualistic pattern has developed as a result of the de-

legitimation of organizational rules that used to maintain consistency through control from the top. This process was facilitated by the welcomed opening of the organization to new judges and to new influences, in part through the introduction of the training scheme. However, training and appraisal systems have not managed to address the challenges that emerged simultaneously in a judiciary formed by a great number of new judges, who tend to be critical to the organization's preference for status quo.

As regards judicial training, the Director of the Judicial Academy acknowledged that, historically, there was no systematic methodology behind the formal structure of courses. Courses have been mostly theoretical, delivered in the same way as traditional legal education, without unity in approach and disregarding the properly judicial aspects of judicial training. In fact, courses have been mostly delivered by external academics using their own methodologies, which in practice meant that they over-emphasized theory and the traditionally vertical approach used in law schools. In turn, the Board of the Academy imposed the criteria for selection of trainers, based upon constant rotation, as the Director of the Academy explained, which can be reasonably fair, but at the same time allows too many perspectives involved in the process of training, many of them external to the judiciary. Accordingly, most of the judges interviewed expressed very low conformity with the training system, which they generally believe provides minimum academic support. Hence the impact upon the cultural pattern cannot be more than modest in terms of collective engagement and mutual development of judges. In fact, most of them criticized the system for being too theoretically focused, providing knowledge that is not generally applicable, using overly passive methods. In addition, all of the judges but one who did not address the issue, were very emphatic, claiming that training courses provide very little if any opportunity to discuss and reflect collectively upon topics of interest for the judiciary and the way to exercise the judicial role in the actual context. In fact, two of the judges mentioned that the most relevant opportunity for such purposes are the informal spaces, i.e. lunch and coffee breaks provided spontaneously by training activities, when they can talk in a more relaxed way about their experiences in different courts and jurisdictions. In such a context, the poor results in terms of reinforcing consistency and unity constitute in the obvious outcome of the weak and vertical methodologies, the disparate background and lack of specialized training among trainers, and the absence of opportunities to reflect collectively, exchange visions, practices, and to reach agreements.

It is important to consider that judicial training, besides doing very little to reinforce consistency and unity, at the same time constitutes a good opportunity to introduce external influences and internal minority views about the judicial role into the judiciary. In fact, some of the judges acknowledged that training provided an opportunity

to field views of the judicial role and legal ideologies of some historical leaders who have represented minorities within the organization, e.g. Judge Cerda. Similarly, many interviewees value the opportunity to meet well-known academics in courses provided by the Academy and to know of their work, making them more interested in the academic analysis of the judiciary in the broader political and ideological context. These elements have enabled new views to penetrate the judiciary, reinforcing values such as judicial independence. However, the lack of a systematic approach to discuss judicial issues upon a consistent methodological framework has produced a clear fragmentation of judicial values. Accordingly, judicial training has not helped to balance the renewed importance of judicial independence with values such as judicial consistency. In fact, one of the judges expressed this unbalanced situation, claiming that after being overturned by the Appeals Court in a particular case, lower judges should continue deciding future cases using the same overruled criteria in spite of the legal opinion of the Court of Appeals. In his opinion, this is the way to preserve judicial independence. This opinion reflects the overstatement of one very relevant value, that is, individual independence lacking a view of other values that should also be considered by judges.

As regards performance appraisal, it is clear that, at the individual level, it has lost the power it traditionally had to enforce rules and maintain consistency within the judiciary. In fact, all of the judges interviewed criticized the mechanism for its arbitrariness and for affecting judicial independence. At the same time, all of the interviewees claimed that they do not feel that performance appraisal binds them, and consequently, they generally disregard the appraisal outcome. These results show how little judges are incentivized by performance appraisal to perform according to common standards.

In sum, judicial training has helped to diversify views of the judicial role within the judiciary, particularly enhancing the importance of judicial independence. At the same time, training arrangements have done very little to reinforce consistency and unity in the organization by fostering coherent views of the judiciary, the importance of consistency, equality before the law, legitimacy of judicial decisions, or the context in which judging happens. Similarly, judicial performance appraisal is rejected by most of the judges as an arbitrary mechanism, which is consequently disregarded. Hence the proliferation of new perspectives and the lack of organizational mechanisms that foster unity and consistency lead to a process of fragmentation that has changed the traditionally collectivistic cultural model of the judiciary. The problem is that contemporary challenges and the complexity of the law demand coherence in the way the judiciary works. New participatory and reflective methodologies that are starting to be applied by the Judicial Academy and new mechanisms for collective evaluation of quality, if

adequately implemented, could help to reach positive outcomes, fostering more balanced perspectives upon the way judges see their work.

2.3 Degree of Formalization

Formalization is the centrepiece of bureaucracy. It refers to the existence of explicit rules, procedures, regulations, and task assignments, indicating the procedures for acting, deciding, and communicating. These directives exist prior to the entry of individuals into positions within the organization, while each position entails pre-defined duties in such a way that: "the role makes the person" (Jaffee 2001, p.91). The degree of formalization is variable, indicating the extent of formalized rules governing work behaviour and the extent to which they are enforced (Adler & Borys 1996, p.77). Evidently, the use of judicial training and standardized mechanisms of performance appraisal entails in itself a degree of formalization. However, differentiation may be discerned regarding the level of formalization versus discretion allowed in a particular system, and in relation to the actual enforcement of formalized rules.

2.3.1 The Adoption of a High Formalization Pattern in the Judiciary of England and Wales

Low formalization historically characterized the judicial system of England and Wales, based upon the power of traditions, precedents, and usage (Weber 1964). In such a system there was no need for structured mechanisms for recruitment, training, performance appraisal, or discipline; areas that mainly relied upon the leadership of the Lord Chancellor, with the informal advice of the senior judiciary and the pronounced power of shared convictions about: "doing the decent thing" (Bell 2006, p.323).

The introduction of various organizational mechanisms over the last two decades has changed the formalization pattern quite dramatically, as the judiciary has become: "less accidental and more considered" (Judge EW13). Probably the clearest example of formalization has been the implementation of a very structured system of judicial recruitment under the responsibility of the Judicial Appointments Commission. Recruitment procedures have been regulated in detail, based upon extensive descriptions of judicial roles and responsibilities and the use of assessment centres for the purposes of identifying suitable candidates to judicial posts (Healy et al. 2010). Similarly, the introduction of judicial training has contributed to formalize the organization. Besides training structures, the provision of training has also been regulated in detail, beginning with the Strategy of the Judicial College (Judicial College 2011), which sets out the governing principles of judicial training. The European Commission highlighted this

regulation as *best practice* in judicial training (European Commission 2014c), providing a coherent template for the design and delivery of training. In fact, at the Judicial College itself the explicit regulation of the College strategy is considered to be a central element in the success and consistency of training provision, as the Director of Training for tribunals explained.

Besides the strategy, the Judicial College has also regulated the provision of courses, their contents, and methodologies, all of which are summarized in a prospectus that judges from the courts receive every year to plan their own training. Regarding tribunals, each jurisdiction has its own regulations, coordinated centrally by the Judicial College according to agreed standards. In terms of the discretion allowed to judges, attendance at training activities is mandatory in the courts. However, according to the Court's Director of Training, the dominant principle in this area is that judges should know their training needs; consequently they have discretion to choose courses and seminars from the list provided. Conversely, in the tribunals there is less discretion and generally attendance is mandatory while judges are not free to choose courses, with the exception of mental health tribunals, where the system is analogous to the one applied at the courts. In the rest of the tribunals, training committees devise adequate training programmes for judges, depending upon detected training needs. In some cases, e.g. employment tribunals, judges have a compulsory training career mapped out for them, involving a sequence of courses and activities which progressively enable them to take new responsibilities, e.g. sit in complex discrimination cases.

As regards the enforcement of rules about training, the system in England and Wales also has specific regulations in the case of the courts for rare cases of reluctance to attend training activities. The procedure involves several steps and could eventually be a matter of a formal complaint at the Judicial Complaints Office. Tribunals adopt similar procedures in order to make sure that judges attend the training devised for them. More importantly, there are formal mechanisms and techniques developed to promote not only attendance but also active participation in training courses. In fact, a course director runs courses under the supervision of the Training Director. Also, judicial facilitators participate in the training activities with the explicit purpose of fostering participation according to a specific methodology. The Director of Training for the courts explained that facilitators are appointed in a formal process and then trained by specialists in adult education, particularly regarding skills to foster debate and active participation in small groups. In other words, the system does not rely solely upon general principles. Rather, it is based upon specific methods and regulations applicable to the recruitment, training, performance, and supervision of trainers. As a result of the approach, which is generally the same for the tribunals, involvement of judges in training activities is enforced in the

subtle way explained by one of the interviewees:

> Staying in silence doesn't happen…because in the small groups everybody ends up speaking, so…it's likely that it (training) has an impact on everybody (Judge EW16)

There are other aspects of judicial training arrangements that show increasing formalization in the judiciary of England and Wales. Generally speaking, judicial training fosters the standardization of processes and outcomes of judicial work. Hence many judges reported that dummy files, notes, and flow charts provided during induction courses can be very helpful to structure judicial work. Similarly, the response of judges to particular challenges is standardized through judicial training, for example by focusing during a course upon the applicable sentencing guidelines, thus complementing the role of such instruments. In a more subtle way, reflective and discussion-based methods also tend to standardize the reaction of judges in particular situations. A clear example is the training provided in judicial ethics, which basically asks judges to discuss difficult situations they may face, in an attempt to find an appropriate way to respond, as the training Director of the Tribunals explained. The approach provides templates for judges to make sense of ethical issues they may encounter (Mumford et al. 2008), thus reinforcing the formal guidelines that regulate judicial conduct in a more abstract and general way (Judiciary of England and Wales 2013).

Finally, it is worth mentioning that the training is provided in relation to the judicial qualities and abilities that every judge should have. In fact, the predecessor of the Judicial College, the Judicial Studies Board, developed a formal framework of judicial abilities and qualities intended to identify the knowledge, skills, behaviours, and attitudes that the judiciary are expected to demonstrate in performing their role. For that purpose, it provides core judicial abilities and associated qualities that were widely discussed within the judiciary, also providing examples of the way in which such abilities can be demonstrated. The framework complements the selection criteria of the Judicial Appointments Commission and assists the design of judicial education programmes (Judicial Studies Board 2008). A new version of the framework for judicial skills and abilities applicable both to training and appraisal activities across the judiciary has been recently published, making the formalization pattern more clear than ever (Courts and Tribunals judiciary 2014c). In sum, formalization is reflected in training arrangements through the explicit definition of the core judicial abilities that training aims to develop, the strategy to do it, the methods, courses, and rules applicable to training, and the standardization of expected outcomes.

As regards performance appraisal, it has also contributed to change the formalization pattern of the judiciary of England and Wales. The standards for

performance appraisal are set out in the framework of abilities and skills mentioned above. The system has been regulated step-by step in terms of the frequency of appraisals, the applicable methods, and the post appraisal stage. Regarding the methods in particular, self-appraisal, observation, and post-appraisal discussion are also regulated in detail, while the possible outcomes of appraisal are also clearly stated, e.g. participation in specific training programmes (Judicial Studies Board 2003; Judicial Studies Board 2009; Association of Her Majesty's District Judges 2013).

Besides formal regulations, appraisal clearly fosters the standardization of judicial performance, promoting certain practices that are considered compatible with the core skills and abilities agreed by the judiciary. The enforcement of standardization rules expressed by performance appraisal is mostly informal, based upon the peer pressure that judges naturally feel during the observation process and the appraisal discussion with a more experienced colleague. In fact, most of the judges revealed that appraisal was a source of anxiety for this reason, despite the positive effects they also acknowledged. Furthermore, formal enforcement mechanisms are also used, particularly in district courts where the Appointments Commission has access to the results of appraisal if a Deputy Judge applies for a permanent position. Similarly, in tribunals the results of appraisals are used as a basis for recommendations in application processes. In sum, besides the explicit character of judicial training and performance appraisal regulations, consistent mechanisms are also applied to enforce compliance and to foster standardization of practices across the judiciary.

2.3.2 The High Formalization Pattern in the Chilean Judiciary

The Chilean judiciary has historically been highly formalized and the judicial training and performance appraisal arrangements reflect this. As regards performance appraisal arrangements, the regulations are included in the Code of the Organization of the Courts, which regulated individual appraisal in 1927 for the first time, although various modifications have been introduced since then. These regulations, contained in articles 273 to 278 bis of the Code are incredibly detailed, setting out the annual frequency of evaluations, the role of superior judges as appraisers, the stages of the process, the general evaluation standards, the method of expressing the outcome of appraisal, and the consequences attached to the system. The Supreme Court has complemented these regulations through an *autoacordado*, number 181-2007, which introduced further rules, particularly regarding the aspects that demonstrate good performance throughout the year, such as the number of written judgements, the absence of disciplinary complaints etc.

Despite the extensive regulations of the appraisal system, it is clear that its impact

is poor. In fact, most of the judges interviewed criticized the system for the arbitrariness of performance standards that are simply too vague and discretionary. One of the interviewees reflected the spirit of the criticism:

> I am evaluated for my responsibility, but what does that mean? What is responsibility? Which criteria are used to evaluate my responsibility? What are the minimum standards to be considered a responsible judge? (Judge CL01).

The consequences of the system, particularly the negative ones, are very drastic, eventually leading to dismissal. Accordingly, performance appraisal has been historically used for disciplinary control, rather than as a development tool. However, it is clear that the appraisal system has lost the strength it had in the past, as reflected by the complete rejection of the system by all the judges interviewed in this research. Moreover, even for superior judges, the system does not play a relevant role these days. In fact, almost all of the judges receive outstanding results in the annual evaluations, reflecting that the system has turned into a ritualistic mechanism that works only to detect extreme cases of poor performance. In sum, detailed regulation of the system and the great administrative efforts that these regulations demand are indeed meaningless, considering the weak results in terms of consistency and standardization.

As regards judicial training, Statute 19.346 regulates in detail its structural aspects. Importantly, this statute created the Judicial Academy, regulating its structural aspects, i.e. the governance arrangements, the composition and general responsibilities of the board etc. A more specific regulation, the *Reglamento de la Academia Judicial,* incorporates further rules, mostly regarding the specification of the roles and responsibilities of members of the Academy. It also establishes the different areas in which courses and training must be delivered, without regulating the methodologies, the academic strategies, or the specific objectives of training. As a result of the purely structural character of the regulations, judicial training has been rather inconsistent and methodologically weak. Most of the judges in interview, except one, voiced the same dissatisfaction with the training provided: It is too theoretically focused, does not allow for participation, and discourages collective reflection. Hence the achievements of the training system have more to do with the positive effects upon judicial recruitment, i.e. "it certifies a minimum quality of judges" (Judge CL05) and the impact of specific trainers, rather than with the training system as a whole.

In sum, judicial training and performance appraisal in Chile reflect a level of high formalization, which is mostly structural, while methodologies are not matter of regulations or broad agreements as is the framework for training of the Judicial College in England and Wales. The weak effects of formal regulation upon the enforcement of

institutional rules, standardization, and consistency show that, despite being highly formalized, the Chilean judicial system is at risk of embodying the pattern of a *mock bureaucracy* (Gouldner 1964) characterized by formal rules that nobody complies with, thus nullifying the potentially positive effects of formalization.

2.4 The Type of Formalization

The empirical analysis of data revealed that high and low formalization are relevant categories that may be used to differentiate judiciaries, particularly considering that the judiciary of England and Wales has changed its historical pattern of low formalization. As a result, it is clear that both judiciaries under study currently embody the high formalization model, but with very different results. On the one hand, increased formalization in England and Wales shows very clear positive outcomes, e.g. the explicit strategy of the Judicial College serves as a template and a guide to devise training courses and activities, receiving international recognition as best practice. At the same time, it is evident that the high formalization pattern of the Chilean judiciary shows very poor results, with highly regulated mechanisms that demand great efforts of the organization, delivering very limited outcomes, i.e. no enhancement of consistency, no standardization of good practices, weak enforcement of organizational rules.

Based upon the results summarized above, it is clear that a new category should be used to differentiate between systems with similar degrees of formalization but with very different results, in an attempt to identify the variables that determine different organizational outcomes along this dimension. Comparing the training and appraisal regulations in Chile with England and Wales, such variables became evident. In particular, the participatory versus coercive character of regulations emerged as a central aspect to assess the variable results of formal regulations. Looking for support in the literature, the work of Gouldner (1964) clearly highlights the dual nature of organizational formalization. On the one hand, as an administration based upon discipline, on the other, as an administration based upon the conviction that formal rules embody the best way to realize organizational goals. Furthermore, the research findings are considered compatible with the distinction between enabling and coercive formalization developed by Adler and Borys (1996), which encompasses some of the main elements that according to this research represent different approaches to formalization.

2.4.1 The Enabling Formalization Pattern in the Judiciary of England and Wales

The enabling pattern essentially involves the participation of organizational

actors, i.e. judges, from all levels of the organization in the development and application of organizational rules. Following Adler and Borys (1996), flexibility and transparency also form this pattern. The three aspects were identified in the data as part of the judicial training and performance appraisal arrangements in England and Wales. In the case of judicial training, the participatory element is present in many forms. First, in the determination of training needs, which generally involves various mechanisms for consultation with judges, e.g. training liaison judges in employment tribunals; Second, in the methods applied to deliver training, which tend to encourage the active participation of all judges through discussion in small groups and collective reflection; Third, in the evaluation of courses, and the training system as a whole; Fourth, in the identification of the core qualities and abilities used to devise training activities and to guide performance appraisal, which were a matter of collective debate involving many judges from different levels (see Judicial Studies Board 2008); Finally, in the structure of the Judicial College and training committees within the College and for the tribunals, all of which involve representatives from different levels of the organization. On the other hand, performance appraisal also embodies participatory principles, mainly expressed in the methods used to appraise judges, allowing them to receive direct feedback in an open conversation, as the interviewees generally attested. In fact, the appraised judge plays an active role in the assessment by being able to respond to feedback, discuss and eventually disagree with the appraiser, in order to reach an agreement about the appropriate outcome of the process.

As regards flexibility, it is mainly visible in the character of the discussions promoted in training courses, as there is no one correct answer to the problems discussed. Rather, as the Director of Training for the courts highlighted, the system encourages judges to find answers together, sharing knowledge, experiences, and practices in order to identify various possible solutions. In turn, performance appraisal arrangements also allow certain levels of flexibility, again expressed in the appraisal discussion and the possible outcomes of the process, which includes the adoption of various formal and informal measures such as the provision of coaching, training alternatives, and even emotional support. In fact, several judges revealed that such outcomes constitute a positive aspect of their particular performance appraisal experiences. Especially revealing of the flexibility of performance appraisal was the experience of one judge who recalled his first appraisal experience, which was not completely satisfactory. After the process he realized that his substantive knowledge of a certain area of law was rather weak. Following the advice of the appraiser, he began specialized post-graduate studies, taking specific recommendations from the appraiser about the programme and the university where he would pursue such studies. In this case, the outcome of the process clearly involved measures beyond those considered beforehand by the organization, as the

appraiser was able to propose and actually design a specific training activity that was suitable for a particular appraisee. Such an outcome clearly reveals the flexibility of the system, based upon the kind of relationship between participants in the appraisal process that this particular arrangement promotes.

In relation to transparency, such an attribute is clearly expressed in regulations that contain the principles of the training system. First, in the strategy of the Judicial College, which explains the core of the training approach in such a way that the various courses can be designed and evaluated by anyone against the principles set out in the strategy document (see Judicial College 2011). Secondly, in the core qualities and abilities of judges, explained in detail and containing examples of the expected attitudes and behaviour of judges (see Judicial Studies Board 2008). In these ways, judges are provided with explicit information about what is expected of them, thus minimizing ambiguities and decisions adopted based upon obscure or unknown standards. Also, the results of appraisal are openly discussed with judges, as all of the interviewees explained in detail, reflecting a process that, for them, generally makes clear their strengths and areas needing improvement. In sum, the system reflects with clarity what the organization internally expects from judges and the mechanisms developed to support their performance.

From a different perspective, regarding external transparency, an aspect also highlighted by Adler and Borys (1996), the system offers judges a view of the social context in which judging takes place through a catalogue of training methodologies to directly or indirectly enhance awareness of the social context. Examples of these varied methods were provided by both directors of training at the Judicial College and also by judges themselves. Particularly interesting is the experience of Mental Health Tribunals where former patients whose cases had been resolved by these tribunals talk to judges about their particular experiences. Also original and useful in the context of employment tribunals is the use of provocative talks by lawyers who belong to ethnic minorities, explaining their experience interacting with judges. More subtle techniques were also explained, e.g. embedding social context discussions in training in general subjects, for example, deliberately introducing discriminatory remarks against minorities in the design of role-play activities in order to detect if judges pick them up and debate the problem. In spite of the extensive array of approaches and techniques to train judges in social context awareness, it is worth noting that judicial training and performance appraisal do not seem to contribute to judges' awareness of more articulated demands that might emerge in specific realms such as the academic or the political world. In particular, there is very limited participation of external academics in the process of training generally, while judicial control over training and performance appraisal systems almost prevents any

external intervention. Perhaps this is an area in which more could be done to enhance external transparency, in the sense of the judges' awareness of demands and expectations of their work, sourced outside the judiciary. Indeed, allowing participation, within clear limits, of representatives of both the academic and the political world in the process of training and performance appraisal design would not affect the principle of judicial control over these areas. Consequently, it should not be seen as a potential threat to judicial independence.

2.4.2 The Coercive Formalization Pattern of the Chilean Judiciary

In the case of the Chilean judiciary, a coercive formalization pattern has traditionally prevailed. Indeed, the participation of lower judges in the design and process of training has been low, while performance appraisal mechanisms have mostly excluded appraisees from the process of evaluation. As regards judicial training, the identification of training needs has relied mainly upon the opinion of senior judges, despite recent initiatives by the Judicial Academy to explore training needs through visits to the courts and meetings with the judges, which, according to the Director of the Academy, are in the process of implementation. Another element that reflects the lack of participation of judges in judicial training initiatives regards the structure of the Judicial Academy, since judges in the lower echelons do not have a representative in the Board of the Academy, thus making it distant to their interests and needs, opinion expressed by a couple of judges when asked about this aspect. Likewise, the dominant methodology used for judicial training is based upon the vertical delivery of knowledge from academics to judges who would basically listen, as many interviewees complained. Hence the dynamic of training does not foster participation, in spite of exceptions based more in the initiative of individual trainers than in a consistent approach. Nevertheless, the new training methodologies that the Academy is currently implementing could form the basis of a remarkable change, as greater involvement and participation of judges is encouraged through guided discussions and peer learning facilitated by specially trained judges, who also devise the contents, methods, and emphases of training activities. The effects of the new approach are not yet visible, as only a few courses have been delivered under the new methodology. The potential change of paradigm to a more enabling pattern depends upon the capacity of new judicial trainers to develop robust skills as facilitators, able to foster open and engaging discussions among participants in the courses. It also depends upon the capacity of the judiciary to support the long-term expansion of the approach and not reverse the process in response to organizational contingencies such as the renewal of current judicial leaders or the Director of the Judicial Academy.

Regarding the individual performance appraisal system, it is clear that it does not

allow any participation of the appraisees in the process. In fact, their role is limited to awaiting the end of the year and receiving the letter advising of the outcome of appraisal. All of the judges felt that the information received from appraisal is completely useless, as there is no indication that might be used to reinforce or modify attitudes. Accordingly, they see the system as an arbitrary top-down control mechanism that is completely alien to their interests.

As regards flexibility, the continuing training system in Chile allows judges to choose the courses they prefer. However, the methodologies used to deliver training do not allow much flexibility regarding the process of training or the outcomes of judicial education. In fact, many judges mentioned that they see little effort from trainers to adapt the topics of courses to their day-to-day work. Hence academics tend to conduct courses and activities according to a certain plan that does not allow variations. One of the judges expressed this lack of flexibility with particular clarity:

> In the courses interesting discussions emerge sometimes, which trainers could use to focus on the level of application. However, they don't do it…they don't encourage discussions in that way. It seems that they have the course planned and they don't adapt or re-orient activities according to the interest of judges (Judge CL08).

In turn, the initial formation programme is based upon similar methodologies, delivering contents through a rather rigid curriculum. In fact, the judges who had participated in such an experience mentioned that the programme focuses upon the levelling of legal knowledge and the structured induction to work in the judiciary, while the influence of innovative trainers who introduce greater flexibility to the curriculum by challenging traditional views of the judicial role was rather exceptional.

As regards the performance appraisal systems, the individual mechanism clearly lacks any flexibility. It is in fact very rigid, while the innovations introduced to enhance objectivity have made it even more rigid according to judges. In fact, the new requirements of the system regarding the justification of appraisal outcomes have led senior judges to use formulaic evaluations, which do not give any clue to judges as to how to enhance performance. However, in the context of collective appraisal, there is a difference regarding the flexibility of the system. The creation of regional committees has not only allowed participation of judges from different levels of the organization, but it has also allowed some flexibility in the design and use of performance targets which are devised and analysed by the judges who participate in the committees, taking into account the context and adequacy of targets. In fact, one of the judges highlighted the fact that targets are now determined with the participation of judges, making adaptation to the particularities of judicial work much more evident than in the past, when external

consultants were in charge of the system.

As regards transparency, at the internal level the Judicial Academy has reinforced the quality of information provided to judges about their training alternatives. Traditionally, a prospectus of courses has been distributed to judges annually in order to facilitate their choice. However, the information is relatively broad and in the past did not identify the academic teams in charge of each course. In recent years this information has been incorporated into the prospectus, reflecting a simple measure that nevertheless was valued by most interviewees as being very important for their training decisions. However, in broader areas the Academy does not provide general information about its academic strategy, while there is no definition of the core abilities and qualities of judges that shape the scope of training efforts. In fact, the Director of the Academy has explicitly rejected the idea of sticking to a specific *model of judge* or judicial profile. The reason for this, according to the interviewee, is that pluralism could be affected if the Academy seeks to form a specific *type* of judge. However, despite the well-intentioned definition, it is not clear how focusing upon certain core abilities that any judge should master could affect pluralism. On the contrary, pluralism could still flourish if certain undisputed judicial capacities and core topics of judicial interest are confronted with a greater sense of unity and coherence.

As regards external transparency and visibility of the training system, the Academy has traditionally been influenced by academia in the delivery of courses and from the political realm through the representation of political coalitions in the Board of the Academy. However, these links to the external world are limited to the elitist worlds represented by academics and politicians. In fact, little is done in judicial training to make judges more aware of the social context of judging, an area that formal training activities have started to address quite recently.

Finally, one of the worst failures of performance appraisal systems in Chile is the lack of transparency. All of the judges complained of the poor information they have regarding all the stages of appraisal, particularly the reasons that justify appraisal outcomes. One of them claimed “you never receive that information, so there is no space for improvement” (Judge CL08), revealing how far the system is from achieving minimum standards of transparency. On the contrary, regarding the collective appraisal system, the recent incorporation of judges to committees for the definition and evaluation of performance targets constitutes an incipient and positive effort to enhance not only participation and the adequacy of such targets but also the knowledge that judges receive about the mechanisms used to evaluate their work.

3. A Typology of Judicial Organization

Analysis of the empirical data aimed to identify the main organizational dimensions that can be used to differentiate judiciaries, based upon the structure and functioning of judicial training and performance appraisal arrangements. The results synthesized in this chapter show that four salient dimensions underpin training and performance appraisal systems in the two contrasting cases under study: Power distribution, the organizational culture, the level of formalization, and the type of formalization. In turn, variations within these dimensions are expressed in terms of opposing patterns, resulting from the identification of distinctive organizational features in the contrasting judiciaries of Chile and England and Wales. Accordingly, the power distribution dimension involves two distinctive and opposing patterns - the vertical and the horizontal authority pattern. In turn, the organizational culture dimension includes the individualistic and collectivistic patterns. Also, the level of formalization dimension involves high and low formalization patterns, while the type of formalization dimension includes the coercive and enabling patterns. In sum, four variables of judicial organization and eight distinctive patterns combined enable different organizational configurations in judiciaries.

The combination of the organizational patterns identified by the research constitutes a: "purposive planned selection, abstraction, combination and accentuation of a set of criteria with empirical referents that serve as a basis for comparison of empirical cases" (Mckinney cited by Bailey 1994, p.22). Indeed, these possible combinations reflect distinctive types of judicial organization extracted from the observation of the two cases under study, which in turn can be used to analyse and compare judicial phenomena, e.g. organizational changes, by focusing upon the central aspects of judiciaries.

For the purpose of clarity, it is convenient to develop the full typology through the combination in a tabular form of the different organizational patterns. The first step is to identify the combinations that represent the polar types (see Bailey 1994) of the typology, i.e. the two extreme opposite types reflecting fully antagonistic combinations of patterns. Based upon the historical analysis of the judiciaries of Chile and England and Wales, it is very clear that in the past both organizations represented opposing patterns. In the case of Chile, the judiciary was organized under a vertical distribution of authority that fostered a collectivistic organizational culture based upon high levels of coercive formalization. Borrowing from Damaska (1986), this organizational type may be called *hierarchical,* despite the fact that it is based upon different dimensions from those identified in Damaska's construct. Conversely, in England and Wales the historical pattern was exactly the opposite, that is, horizontal distribution of authority,

individualistic culture, low formalization, which nevertheless enabled judges to perform their role autonomously and at the same time consistently. This organizational type may be called *coordinate*, again based upon Damaska's terminology.

In order to reflect the possible combinations in a table, the patterns that constitute the polar types have to be grouped and identified in numerical terms. Therefore, all the patterns that constitute the *hierarchical* type can be identified with the number '1'. In turn, the patterns that conform to the *coordinate* type can be identified with number '2'. The combination of these patterns allows for sixteen different possibilities, which can be reflected in a tabular form, taking the example provided by Bailey (1994, p.25). For that purpose, considering that a matrix expressed in paper is limited to two dimensions, the only way that a four-dimensional table can be constructed is by stacking two dimensions in the horizontal dimension and two in the vertical dimension.

JUDICIAL ORGANIZATIONAL TYPOLOGY		Variable 3: Level of Formalization			
		High (1)		Low (2)	
		Variable 4: Type of Formalization			
		Coercive (1)		Enabling (2)	
Variable 1: Power Distribution		1 (1,1,1,1)	2 (1,1,1,2)	3 (1,1,2,1)	4 (1,1,2,2)
Vertical (1)	Horizontal (2)	5 (1,2,1,1)	6 (1,2,1,2)	7 (1,2,2,1)	8 (1,2,2,2)
Variable 2: Organizational Culture		9 (2,1,1,1)	10 (2,1,1,2)	11 (2,1,2,1)	12 (2,1,2,2)
Collectivistic(1)	Individualistic (2)	13 (2,2,1,1)	14 (2,2,1,2)	15 (2,2,2,1)	16 (2,2,2,2)

Table 5: Judicial Organizational Typology

The table above reflects all possible combinations of the eight patterns that represent the organizational dimensions identified throughout the research. The polar types, i.e. the *hierarchical* and *coordinate* types, are represented in cells 1 and 16 respectively, expressing organizational models of historical relevance. The purpose of the typology is not to rely upon these two extreme ideal types to extract the historical antecedents of each system, as is the purpose of Damaska's construct (Damaska 1986, p.18). Rather, the typology enables a more detailed classification of judicial organization based upon actual empirical referents. Accordingly, it may be used to characterize the current organizational settings of the judiciaries of Chile and England and Wales,

comparing them with their historical antecedents. In both cases the research has identified a process of evolution regarding some of the dimensions of the typology. In the case of Chile, the analysis through the lens of arrangements and functioning of judicial training and performance appraisal shows that the vertical authority pattern is still dominant, while the high and coercive formalization patterns continue to prevail, despite some incipient and still timid attempts to modify the model in such aspects. At the same time, the functioning of training and performance appraisal shows a change in the cultural dimension, moving from the historically dominant collectivism to a newly acquired individualism. This change can be linked to the reaction of judges to the mechanisms that traditionally sustained organizational consistency, including the individual mechanism for performance appraisal, and also to the introduction of new organizational values, i.e. a renewed understanding of judicial autonomy and independence fostered by judicial training among other circumstances. In consequence, following the empirical results of this study, cell number five in table number 1 represents the actual type of organization of the Chilean judiciary: vertical authority distribution, individualistic culture, high and coercive formalization.

In turn, in England and Wales looking into judicial training and performance appraisal arrangements reveals that the organization is also moving away from the historical *coordinate* model. In fact, while the authority pattern remains predominantly horizontal, the traditionally individualistic culture has clearly mutated to a more collectivistic pattern. Also, the peculiarly low formalization that characterized the judicial organization of England and Wales has definitively changed with the adoption of a high formalization pattern, expressed in multiple bureaucratic features, formal rules, and procedures that nowadays regulate the work of the judiciary. However, the type of formalization has remained mostly aligned with the enabling pattern, as a result of the adoption of formal but reasonably flexible and transparent structures and procedures, which generally allow the participation of judges in organizational processes. In consequence, the current organizational model of the judiciary of England and Wales fits the model represented by cell number 10 of table number 1 above: horizontal authority distribution, collectivistic culture, high and enabling formalization.

4. Conclusion

This chapter synthesizes the results of the empirical research carried out by this study. The concepts of organizational relevance regarding the structure and functioning of judicial training and performance appraisal arrangements have been grouped together,

forming organizational dimensions. These dimensions constitute abstract categories formed by "putatively dissimilar but still allied concepts" (LaRossa 2005, p.843), which consequently serve to differentiate models of judicial organization. The analysis of empirical concepts through *open coding* (Strauss & Corbin 1998) lead to the identification of four dimensions or categories, that is, power distribution, organizational culture, level of formalization, and type of formalization. In turn, each of these dimensions contains two opposing paradigms or patterns that reflect the distinctive organizational features that characterize and differentiate the empirical referents used for the study.

Identification of the four organizational dimensions and the subsequent patterns that form each category was followed by the development of an organizational typology based upon the combination of the different organizational patterns. The results revealed the potential existence of sixteen different combinations, each reflecting a distinctive type or model of judicial organization. In the two extremes of the typology, the polar types reflect the historical configurations of the judiciaries of Chile and England and Wales, which can be used as reference points to assess actual deviations. In fact, the results of the empirical research show that there is indeed a deviation from the historical patterns in the case of both referential judiciaries. These deviations have been expressed in the proposed typology, making clear the dimensions in which changes are salient. Accordingly, the Chilean judiciary has changed in its cultural pattern from a strongly collectivistic model to an individualistic alternative, owing to the de-legitimization of mechanisms that historically sustained organizational consistency, i.e. individual performance appraisal and disciplinary arrangements and the renewed and unqualified understanding of judicial autonomy influenced by judicial training experiences among other factors. England and Wales have also altered the historically dominant cultural pattern from an individualistic to a collectivistic setting where judges have several opportunities to share experiences, be influenced by other judges, participate in organizational development, and generally act collectively for the achievement of common purposes. Likewise, the judiciary has adopted a highly formalized organizational configuration based upon multiple systems and structures, which nevertheless have been developed to maintain an enabling and participatory character.

In the previous chapter, the use of a Weberian typology of rationalities provided a first approach to answer the question that guides the research. The conclusion was that judicial training and performance appraisal might contribute to shape the dominant values, ideals, and beliefs of organizations, interpreted in terms of multi-faceted rationalities. Accordingly, the normative framework of organizations may be either reinforced or weakened by the introduction of these mechanisms, as they carry their own

normative content. This chapter takes this argument a step further. Apart from contributing to the normative alteration of judicial organizations, judicial training and performance appraisal arrangements may also promote structural and functional reforms in judiciaries. Such changes can be explained by reference to the four main organizational dimensions identified by the research, offering a total of sixteen possible judicial types or models. Whilst it is plausible to assume that structural and functional changes correlate with changes at the level of the normative framework of the organization, the next chapter explores the issue in greater detail, aiming to tie threads and draw sound conclusions.

VI. THE ROLE OF JUDICIAL TRAINING AND PERFORMANCE APPRAISAL IN THE ORGANIZATIONAL REFORM OF JUDICIARIES: THE CONTRIBUTION OF THIS STUDY

1. Introduction

This chapter builds upon the findings of the research to spell out the contribution of the study in various ways: First, by proposing specific mechanisms to enhance the analytical capacities of the typology worked out in the previous chapter. Second, by explaining the links between normative changes connected to judicial training and performance appraisal on the one hand, and structural and functional reforms of judiciaries on the other. And third, by using the typology and the empirical data on training and appraisal schemes to propose and test hypotheses related to judicial organizational phenomena, particularly regarding processes of organizational reform in judiciaries. The chapter provides new insights, seeking to answer the main research question of this thesis: What is the role of judicial training and performance appraisal in the organizational reform of judiciaries?

Previous chapters have drawn upon empirical data to show how organizational systems, such as judicial training and performance appraisal, can promote changes to the normative frameworks of judiciaries, introducing new rationalities that may conflict, complement, reinforce, or modify the dominant combination of rationalities within the organization. Subsequently, these mechanisms can also foster structural and functional changes as explained in Chapter 5 by reference to the salient dimensions of judicial organization identified throughout the empirical research. Accordingly, organizational reforms linked to judicial training and performance appraisal are explained by this thesis as changes in the following variables: power distribution; organizational culture; level of formalization, and type of formalization. These dimensions contain opposing organizational patterns that, combined in different ways, represent variable models of judiciaries. By helping to identify the organizational aspects of judiciaries that might change as a result of particular judicial training and performance appraisal approaches, the proposed typology has already proved to be a useful analytical tool.

This chapter goes one step further, illustrating ways in which the final stage of grounded theory can lead to more robust results concerning the effects of the organizational changes prompted by judicial training and performance appraisal mechanisms. Accordingly, the chapter explores the axial and selective coding steps of

theory-building (Strauss & Corbin 1994; Strauss & Corbin 1998; LaRossa 2005), using the typology proposed in the previous chapter to assess normatively the impact of the organizational changes that have been identified, making the contribution of the approach visible. As a result, besides explaining changes to judicial organization by reference to multi-faceted rationalities and also in relation to the four organizational dimensions identified by the research, in this last chapter, the *type of formalization* emerges as a central variable of judicial organization, which both judicial training and performance appraisal arrangements reflect with particular clarity.

2. The Analytical Power of Typologies

As has been claimed throughout the thesis, typologies constitute powerful analytical tools, which can be particularly helpful in explaining multi-dimensional phenomena. The focus on central variables entails a purposive selection of a set of criteria, based upon empirical referents, which can be used as a yardstick to compare with real cases and also to assess deviations from the types or models identified by the typology. Typologies can be: "especially useful for reducing complexity, reducing the number of types needed, aiding comparisons and defining multi-dimensional concepts" (Bailey 1994, p.23). Nevertheless, these instruments have also been criticized for being overly simplistic and for not having an empirical basis, reflecting mere intuitions of the researcher. This study has dealt with the criticism, developing an empirically based typology, as other researchers have done in the past, using different methodologies (e.g. Doty & Glick 1994; Kluge 2000). In this case, grounded theory methods were used to identify the dimensions of the typology, the implicit organizational patterns, and the possible combinations of variables that might produce different organizational models as a result. Evidently, the proposed exercise has limitations and could be complemented by further research efforts in order to enhance the analytical capacities of the typology, particularly if the aim is to use the analytical instrument for the study of organizational phenomena beyond the specific aspects addressed by this thesis. Among the measures that may be adopted to expand the potential of the typology, at least two should be considered:

2.1 A Stronger Empirical Base for the Typology through the Study of Other Organizational Mechanisms, Structures, or Judicial Systems

The research in this case has focused upon the cases of Chile and England and

Wales. The organizational models identified and expressed in the proposed typology have been developed by induction, based upon the information extracted from two organizational systems only, that is, judicial training and performance appraisal. As claimed in Chapter 3, both mechanisms constitute a reliable lens to study and interpret judicial organizational models. However, it is also true that the typology of judicial organization would be strengthened if other features of judicial organization were considered. In such a case, the typology could be used to address broader organizational phenomena more accurately, while the results regarding the effects of judicial training and performance appraisal could be reviewed, ratified, or modified in the light of a more robust empirical basis.

2.2 Typological Reduction

One of the problems of typologies as analytical devices is that the combination of possible patterns might deliver dozens of alternatives, making the typology difficult to manage and frustrating its simplifying purposes. Several strategies for reducing the potential alternatives may be followed; particularly considering that many combinations proposed by the typology might not have real empirical significance (Bailey 1994). In the case of the typology proposed by this thesis, it is clear that in contemporary judiciaries at least half of the possible combinations of judicial organizational patterns do not actually have an empirical counterpart. In particular, within the *level of formalization* dimension, the increasing formalization of the judiciary of England and Wales, probably the least formalized judicial organization in the modern world, demonstrates that actual organizational models are no longer based upon the low formalization pattern despite its historical significance, particularly in the Anglo-American world. Taking this fact into account to *reduce* the typology proposed in the previous chapter, it is possible to exclude half of the possible combinations proposed by this particular analytical instrument, leaving a manageable set of eight reasonably possible combinations of judicial organization, as shown in the following table:

JUDICIAL ORGANIZATIONAL TYPOLOGY		Variable 3: Level of Formalization			
		High (1)		Low (2)	
		Variable 4: Type of Formalization			
		Coercive (1)		Enabling (2)	
Variable 1: Power Distribution		1 (1,1,1,1)	2 (1,1,1,2)	~~3~~ ~~(1,1,2,1)~~	~~4~~ ~~(1,1,2,2)~~
Vertical (1)	Horizontal (2)	5 (1,2,1,1)	6 (1,2,1,2)	~~7~~ ~~(1,2,2,1)~~	~~8~~ ~~(1,2,2,2)~~
Variable 2: Organizational Culture		9 (2,1,1,1)	10 (2,1,1,2)	~~11~~ ~~(2,1,2,1)~~	~~12~~ ~~(2,1,2,2)~~
Collectivistic(1)	Individualistic (2)	13 (2,2,1,1)	14 (2,2,1,2)	~~15~~ ~~(2,2,2,1)~~	~~16~~ ~~(2,2,2,2)~~

Table 6: Typology reduction: models with no actual empirical referents (in grey)

As the table above shows, all the combinations of organizational patterns that included the possibility of *low formalization* were excluded from the typology, leaving eight more plausible alternatives for contemporary judiciaries. Accordingly, the reduction facilitates further analyses based upon the analytical construct, delivering a more manageable set of possible organizational models. Therefore, the reduction exercise helps to pin down the argument of this thesis in particular. Judicial training and performance appraisal mechanisms contribute to shape the normative framework of judiciaries; consequently, structural and functional reforms may follow the normative changes fostered by these mechanisms, eventually promoting the adoption of a new organizational model, which depending upon variables of change, will conform to one of the eight alternative types identified by the typology.

3. The Influence of Normative Changes upon the Organizational Model of the Judiciary

In Chapter 4 the study focused upon the normative content of judicial training and performance appraisal arrangements, explaining it in terms of overlapping rationalities. It was also claimed that such mechanisms embody a particular combination of rationalities, which in turn contributes to shape the normative framework of the judiciary, i.e. the dominant ideas, beliefs, and values of the organization. In Chapter 5 the effects of these mechanisms upon the structure and functioning of the judicial system

were explored, extracting four central variables of judicial organization from the study of training and performance appraisal arrangements. So far it has been assumed that changes at the normative level introduced by such mechanisms, i.e. changes in the dominant combination of rationalities, should be reflected in structural and functional changes of the judiciary in relation to the dimensions or variables previously identified, i.e. distribution of power, organizational culture, level and type of formalization. This section focuses more specifically upon the relationship between normative changes introduced by training and performance appraisal and the outcome at the structural and functional level of the organization.

A key argument of this thesis, following interpreters of Weber (i.e. Kalberg 1980; Townley 2002), is that organizations and organizational systems have a normative content that can be explained in terms of multi-faceted and overlapping rationalities, that is, substantive, theoretical, practical and formal. It has also been claimed that the failure to recognize the co-existence of different types of rationality in organizations, disregarding the need for a balance between these dimensions, and over-emphasizing a particular rationality in the design of organizational systems, might end up producing *irrational* consequences (Townley 2008, pp.207–210). For example, formal economic rationalities in many areas tend to be introduced in a pervasive way, obscuring value-based rational dimensions and producing formally *rational* but substantively *irrational* outcomes (Sandel 2013; Mannion & Braithwaite 2012; Doménech Pascual 2008; Chwastiak 2001). Accordingly, it is clear that the implementation of mechanisms such as judicial training and performance appraisal carries a normative content that influences the dominant values of the organization. The question now is how to connect specific normative influences, i.e. a certain combination of rationalities implicit in the training and appraisal approaches,, with a particular effect upon the structure and functioning of the judiciary, i.e. a certain combination of organizational patterns.

Many combinations are possible and this study does not provide sufficient variables to assess all of the possibilities, some of which may have purely local significance. However, some relevant conclusions may be obtained from the data collected by this study.

3.1. The Effects of Normative Change Introduced by Judicial Training and Performance Appraisal in the Cases of Chile and England and Wales

The two cases under scrutiny constitute empirical referents that can be used to make sense more generally of the connection between normative changes linked to judicial training and performance appraisal on the one hand, and specific organizational

outcomes on the other. In the case of Chile, judicial training has enhanced the substantive aspects of the bureaucratic organization by introducing fairness to the recruitment process and to the designation of judicial trainers. In turn, traditionally, the training methodologies overly focused upon positivistic theoretical rationalities that were functional for the top-down organization of the system. However, individual judges and academics have used training programmes to promote new values, particularly a renewed understanding of judicial independence and a strong focus upon individual rights. This has not been part of a systematic approach, consequently, while relevant values have been re-discovered, other values, i.e. commitment to judicial consistency, have been neglected. There has also been a fragmentation of practical rationalities, as the organizational systems have not been able to reinforce a common view of the judicial role owing to the same methodological weaknesses. In turn, the performance appraisal system traditionally used in the Chilean judiciary has worked to strengthen its dominant formal-bureaucratic rationality, while changes to it have been superficial. Accordingly, judges influenced by new values and a renewed sense of independence have reacted against the appraisal scheme with indifference, making it irrelevant. Hence the appraisal scheme has become in some way the battlefield where new substantive rationalities are being discussed in opposition to formal means-ends dimensions. Meanwhile, formal-economic rationalities have also been introduced to the judiciary through collective appraisal and measurement systems. As a result, instrumental rationalities have been to a certain extent promoted, fostering instrumental thinking among judges, as revealed by certain episodes of behavioural distortions.

In the Chilean case, despite some recent and still incipient changes in training methodologies and collective performance appraisal, the implementation of judicial training in the 1990s and the superficially reformed individual appraisal scheme, reflect conflicting rationalities. In the first place, these systems have reinforced the substantive content of the formal-bureaucratic organization, i.e. enhancing levels of procedural fairness within the strongly coercive top-down command structure that characterizes the judiciary. Other substantive values, e.g. individual judicial autonomy, anchored in a variety of theoretical backgrounds, have been re-valorised, percolating into the judiciary spontaneously and accidentally through the channels provided by organizational mechanisms such as judicial training. Accordingly, values such as consistency in judicial attitudes and legal interpretation have been generally disregarded. As a result, a multiplicity of radically contrasting views of the judicial role have emerged, fostering the clash between multiple practical rationalities, visible in the conflicting ways in which judges understand their role these days, from a strongly passive, deferential, and non-creative approach based upon the pre-eminence of literal legal interpretation and strict

adherence to the will of superior courts; to judges who act pro-actively as free riders, according to their particular understanding of the law. The outcome entails the introduction and progressive intensification of an individualistic pattern, which in the absence of efficient means to bring cohesion to the system has changed the traditionally dominant collectivistic model.

The Chilean example shows that judicial training and performance appraisal provide spaces and opportunities for relevant social interactions, allowing normative influences to flow and new rationalities to expand. In addition, this case indicates that the methodological weaknesses of organizational systems, including training and appraisal schemes, might produce unexpected outcomes, in this case the adoption of an individualistic pattern in a context of vertical authority distribution and high levels of coercive formalization. In sum, the case shows that in highly hierarchical and coercive organizational systems, the introduction of new substantive and practical rationalities that reinforce the role of individuals might weaken the structure of the organization significantly. If the invigoration of value-based rationalities is not framed by adequate and coherent methods and practices, the result could be the one we see in Chile these days, that is, a conflicting setting in which judges struggle to impose their particular views, while the hierarchy battles to strengthen its capacity to control the organization.

In the case of England and Wales, the introduction of judicial training and performance appraisal entails the reinforcement of formal rationalities in a context dominated by substantive and practical rationalities. Historically, the organization of the judiciary has been informal, relying upon values such as a strong commitment to judicial independence or a developed sense of judicial quality; and practical understandings and traditions that maintained adequate levels of organizational coherence and consistency. The down side of the value-based core of English and Welsh judicial organization is that, underlying the structural informality, values of elitism and exclusion have also been part of shared understandings within the judiciary (Healy et al. 2010). Therefore, purposive-rational mechanisms were implemented as a response to critiques of the judiciary for its lack of diversity, aiming also to face more recent challenges such as the increasing complexity of the law and the massive expansion of the judiciary. The implementation of these mechanisms has been carefully designed to introduce changes without affecting the values that have historically shaped the judiciary. As a consequence, practical rationalities and traditional values still prevail in the organization, balanced by the formal rationality of new organizational mechanisms, which coalesces with enhanced procedural fairness and objectivity in the different structures and processes of the organization.

Despite the relatively balanced configuration of rationalities that conform the normative framework of the judiciary in England and Wales, some areas of concern

remain, e.g. the unqualified understanding of the value of judicial independence, which has fostered excessive insulation of the judiciary from external influence, particularly regarding judicial training arrangements, and the potential excesses of formal economic rationalities implicit in the collective appraisal system that is currently being developed. However, generally the English and Welsh case shows how multiple overlapping rationalities coalesce smoothly. Indeed, judicial work is still governed by strong values and beliefs, and a coherent sense of the appropriate role of judges (Gearty 2007), embodying a practical rationality that is reinforced by newly implemented organizational mechanisms infused by formal rationalities. In fact, as this study shows, the use of formally rational systems such as judicial training and performance appraisal has afforded new spaces for social interaction, collective reflection, and sharing experience, fostering the active participation of judges in the identification of appropriate practices in the judiciary. The outcome involves the adoption of a new collectivistic cultural pattern, aiming to confront a challenging context and the increasing diversity of the judiciary without losing the essence of the organization. The new structures and systems have brought increasing levels of formalization, which nevertheless allow for the participation of judges in organizational affairs in a context of flexible regulations and internal transparency. The new combination of: horizontal distribution of authority among multiple leaders; support from participatory structures which enable the involvement of judges in organizational development, and under more structured regulations but within acceptable ranges of flexibility; does not seem to affect the convictions of judges and the ethos of the judiciary. In fact, in this case the adequacy of the methods used to implement the new organizational systems seems to be delivering a balanced outcome in terms of the rationalities at play and regarding the structure and functioning of the judiciary.

3.2. The Normative Balance of Judiciaries

The cases of the judiciaries in Chile and England and Wales reveal that the introduction of new rationalities into systems that represent well-established organizational paradigms may have very different outcomes. Indeed, the experience of England and Wales shows that new rationalities have been introduced adequately, resulting in positive combinations of structural and functional organizational patterns, while in Chile, despite the enhancement of fairness in organizational processes, judicial training and the individual performance appraisal scheme have accidentally triggered conflicts along dimensions of judicial organization, i.e. conflicts between newly empowered individualistic judges and the coercive structure of the judiciary. Arguably, these different outcomes depend, on the one hand upon whether organizational

arrangements embody a balanced combination of the multiple normative dimensions or not; and on the other, upon the fit between the objectives of organizational systems and the methods used, with the context in which they are implemented and the problems that need to be attended.

Generally speaking, normative unbalance in organizations derives from the pervasive character of certain rational dimensions, obscuring or even marginalizing other aspects of rationality (Townley et al. 2003, p.177). The historical organization of the judiciaries of Chile and England and Wales reflects such a phenomenon. In fact, in the case of the former, the strength of the formal bureaucratic rationality implicit in the hierarchical organizational model almost nullified value-based dimensions. In a similar way, in England and Wales strong substantive and practical rationalities obscured formal rationalities and values such as procedural fairness and objectivity that characterize formal organizational structures. In accordance with these unbalanced and contrasting normative configurations, the organizational models of the two judiciaries also represented extreme opposites. On the one hand, a hierarchical, collectivistic, highly and coercively formalized model, which emphasized top-down control. On the other hand, a horizontally coordinated, individualistic, and barely formalized system, emphasizing the independence and autonomy of a small judicial elite prevailed. While these patterns dominated for long periods, in the context of contemporary democracies both models seem clearly out of touch. Indeed, the passivity enforced from the top, severely limiting judicial autonomy in Chile (Hilbink 2007); and the dominant substantive rationalities of exclusion in England and Wales (Healy et al. 2010), do not seem to be acceptable in the actual context. In both cases, new organizational arrangements, including judicial training and performance appraisal, were introduced to re-balance the normative core of these organizations up to a certain extent, contributing to change the dominant organizational model in each case.

As a consequence of the intrinsically unbalanced rationalities underpinning the historical organizational models of the judiciaries in Chile and England and Wales, both types of organization should be considered non-applicable in the current circumstances. Considering this fact, in the table that expresses the typology worked out throughout the thesis cells number 1 and 16 must be excluded from the set of available alternatives of judicial organization revealed by the study of judicial training and performance appraisal arrangements. Table 3 below reflects this situation, in addition to the combinations ruled out in the previous section of this chapter.

JUDICIAL ORGANIZATIONAL TYPOLOGY		Variable 3: Level of Formalization			
		High (1)		Low (2)	
		Variable 4: Type of Formalization			
		Coercive (1)		Enabling (2)	
Variable 1: Power Distribution		1 (1,1,1,1)	2 (1,1,1,2)	~~3~~ ~~(1,1,2,1)~~	~~4~~ ~~(1,1,2,2)~~
Vertical (1)	Horizontal (2)	5 (1,2,1,1)	6 (1,2,1,2)	~~7~~ ~~(1,2,2,1)~~	~~8~~ ~~(1,2,2,2)~~
Variable 2: Organizational Culture		9 (2,1,1,1)	10 (2,1,1,2)	~~11~~ ~~(2,1,2,1)~~	~~12~~ ~~(2,1,2,2)~~
Collectivistic(1)	Individualistic (2)	13 (2,2,1,1)	14 (2,2,1,2)	~~15~~ ~~(2,2,2,1)~~	~~16~~ ~~(2,2,2,2)~~

Table 7: combinations that reflect intrinsically unbalanced rationalities (dark grey)

Besides the historical models of the judiciaries of Chile and England and Wales, other cases of normative imbalance might foster *irrational* organizational systems. Probably the clearest case emerges from the uprooting of value-based rationalities when purely means-ends normative dimensions are fostered and expressed in organizational arrangements. Such a case is evident when market logics and formal-economic rationalities are used to promote efficiency and timeliness in judicial work, as suggested by the experience of performance-related pay in the Spanish judiciary, and on a smaller scale by the collective performance appraisal system of Chile. In both cases, substantive behavioural distortions of judges have been identified as a result of the pervasive influence of economic incentives, fostering individualistic cultural patterns and a rather coercive style of formalization based upon straightforward rewards and punishments. The next section analyses some hypotheses to understand this and other cases of either conflictive or stable organizational models, which as we can claim, respond to the relative balance between multiple underlying rationalities, expressed in the objectives and methods used to address organizational challenges in a particular context.

4. Some normative conclusions. Combinations of Judicial Organizational Patterns

Using axial and selective coding (Strauss & Corbin 1998), it is possible to expand the analytical possibilities of the typology proposed by this study to the normative level. Accordingly, a set of illustrative hypotheses related to the effects of different approaches

to judicial training and performance appraisal upon organizational models are developed based upon some of the combinations proposed by the typology, which are subsequently assessed based upon the empirical data collected throughout the research. The description, testing, and analysis of the different hypotheses leads us to the final stage of grounded theory, called *selective coding*, in which a core organizational variable is identified among the four dimensions outlined by the typology, based upon its: "ability to pull the other categories together to form an explanatory whole" (Strauss & Corbin 1998, p.146). Whilst different combinations of patterns determine the adoption of particular models of judicial organization, out of seven possible types outlined by the proposed typology (after the typological reductions made in previous sections), the research has not yet provided explicit indications of the best combinations of variables for a given judiciary. This chapter builds upon the previous identification of relevant variables of judicial organization to explore some combinations of the patterns that constitute such variables through the development and testing of hypotheses. The aim is to provide a normative view of organizational models of judiciaries, based upon the data emerging from the two cases under study.

4.1 Hypotheses Concerning the Combinations of Organizational Patterns Identified by the Study

4.1.1 *In a context of vertical power distribution, organizational arrangements fostering an individualistic pattern of organizational culture make internal tensions arise in the judiciary*

Intuitively, it is plausible to expect that, in contexts controlled from the top of the organization through structures of hierarchical authority, governing organizational actors will be in conflict with the rest of the organization, if they are empowered by organizational mechanisms to act according to their particular interests.

Based upon the empirical data, the hypothesis is supported by the case of the Chilean judiciary, where judicial training enabled external influences to penetrate the organization, promoting a renewed valorisation of the individual independence and autonomy of judges, without simultaneously promoting consistency in judicial attitudes. Likewise, the de-legitimization of individual performance appraisal and the structures of top-down control generally enabled increasing degrees of autonomy in the way judges exercise their attributions, without concern for institutional consistency or the opinions of superiors (Vargas 2007). The combination of these variables seems largely conflictive, as there is a clear clash between prescriptions emerging from the top of the organization through different systems, including training and performance appraisal, and the reactions

of empowered lower judges, who consequently have found different channels to manifest disagreement and perform according to their particular understanding of the judicial role. In fact, in interview, all of the judges denied any influence of organizational top-down control mechanisms over their work, while a couple actually recognized that standards of legal interpretation and judicial behaviour set by superior courts are not binding at all and consequently they do not even consider them. Accordingly, the organization has experienced clear fragmentation of views and standards of appropriate behaviour, having an impact upon judicial behaviour and organizational consistency. In such a context, systems such as judicial training and performance appraisal have become a space where the struggle for power takes place, rather than mechanisms for organizational development and coordination. However, recent and incipient initiatives regarding both judicial training and performance appraisal, introducing new methodologies in the case of the former, and new participatory structures in the case of the latter, seem a promising way to address current organizational issues detected by this study.

4.1.2. *In a context of horizontal power distribution, the introduction of collectivistic features fostered by organizational systems such as judicial training and performance appraisal might give rise to internal tensions in the judiciary*.

Intuition again suggests that a horizontal pattern of power distribution, in which authority is distributed among many organizational actors and levels, is incompatible with collectivism in the sense of shared goals and organizational values, which generally demand complex coordination efforts and the subsequent centralization of authority. Accordingly, tensions should be expected if organizational systems promote collectivistic values in a scenario dominated by many equal power-holders. Particularly, individual independence could be threatened by the introduction of collectivistic organizational features.

The hypothesis does not hold according to the empirical data. The case of the English and Welsh judiciary demonstrates that organizational reforms, including those tending to expand, unify, and professionalize judicial training, seem to promote a collectivistic approach to the organization of judicial work (Carnwath 2013). However, the thoughtful design of such organizational arrangements has not raised issues regarding individual independence, while the collectivistic character implicit in new organizational arrangements such as judicial training and performance appraisal is now interpreted as a positive feature of the system. In fact, several judges revealed their satisfaction with mechanisms that make them work with peers, receiving feedback, sharing experiences, and generally being more aware of the way in which other judges work. Moreover, plans to expand judicial training were explained in interviews by the training directors of the

Judicial College, revealing that there is satisfaction with the outcomes of the system. In particular, the reinforcement of cross-jurisdictional training demonstrates that this mechanism is being used satisfactorily as an instrument for the promotion of collective values. The judges generally expressed such impressions. Moreover, the Director of Training for the tribunals mentioned the explicit aim of developing a true *sense of community*, revealing how much the judiciary is evolving from its traditionally individualistic outlook, in a process that has not altered significantly the dominant pattern of horizontal power distribution and has not raised issues about the individual independence of judges.

4.1.3. *In a context of horizontal distribution of power, high levels of formalization implicit in organizational systems such as judicial training and performance appraisal produce internal tensions in the judiciary*. *On the contrary, high formalization should not raise issues in contexts of vertical distribution of authority*.

Intuition suggests that high formalization might conflict with horizontal structures of authority that distribute power among organizational members. In such a case, some power-holders might dispute the formal regulations they do not share, weakening patterns of commitment to organizational rules. Conversely, stronger levels of commitment should be expected in organizations with vertical structures of power and high formalization, which presumably is useful for purposes of top-down control.

According to this study, the hypothesis does not hold as the evidence collected delivers exactly the opposite results. Indeed, in the case of England and Wales, increasing levels of formalization have not conflicted with the predominantly horizontal structure of authority. In fact, judges assert a positive view of regulations and procedures that structure their work, particularly with regard to training and performance appraisal. It was particularly clarifying to observe that judges generally reported that the process of performance appraisal was a source of anxiety, but they still valued the process positively, based upon the positive outcomes they perceive, in terms of the enhancement of their skills, knowledge, confidence etc. Also, critiques were generally circumscribed to very specific aspects and characterized by a constructive tone. For example, some interviewees mentioned that they would like to have more extended feedback from appraisers, while others mentioned certain topics that they would like to see emphasized in the delivery of training activities.

Conversely, in the case of the Chilean judiciary, the strong formalization of the judicial system is manifested in strict and detailed regulations, particularly regarding performance appraisal. Such a level of formalization is in theory compatible with vertical authority patterns. However, the combination has invited critiques, resistance, and

opposition to the system. In this case, regulations have been used very clearly as an instrument of vertical top-down authority, considering that superior judges have historically used control attributions quite extensively. Judges still complain about the way in which superior judges appraise their performance quite arbitrarily, as they revealed in interviews. Hence the combination of top-down authority and high formalization has led lower judges to interpret the latter as a mere instrument of power, ignoring the potential benefits of organizational regulations. As a consequence, there is a clear process of de-legitimization of the power of superior courts and organizational systems manifested in the interviews and also in the attitudes of newly empowered lower judges, who have adopted an actively critical position against regulations and the role of superior courts, thus weakening levels of commitment to organizational rules.

4.1.4. *Collectivistic organizational features and systems are weak in contexts of low formalization. Conversely, such a context has more compatibility with individualistic features.*

Intuitively, formalization entails various mechanisms that facilitate coordination within organizations, e.g. description of roles and procedures, flow charts, written instructions, and channels of command and communication (Jaffee 2001, p.91). Also, collectivistic organizational settings demand coordination structures to facilitate communication and the development of common values. Therefore, in modern organizations it is difficult to conceive the adoption of collectivistic values without a formal structure for such a purpose.

The evidence collected, considering that in England and Wales there has been a parallel evolution in both dimensions, indirectly supports the hypothesis. Indeed, as the judiciary has expanded in size and attributions, new ways of achieving consistency were needed. Accordingly, the organization adopted formalized mechanisms based upon detailed objective regulations in many areas, including training and performance appraisal. Simultaneously, increasing collectivism began to develop as judges engaged in the dynamics of formalized procedures and organizational mechanisms. Particularly illustrative was the experience of judges who have participated in cross-jurisdictional training programmes, both from the courts and the tribunals. These courses have been carefully designed at the Judicial College, a formal structure with clear regulations regarding internal authority, methods, objectives, and rules. In the context of such cross-jurisdictional courses, judges revealed specific experiences in which the adoption of common values was prompted by this experience. In particular, they mentioned how judges from tribunals were able to provide their colleagues from the courts with relevant knowledge and vice-versa, developing common approaches to similar issues and

fostering a *sense of community*. The plausible conclusion is that developments in both dimensions go hand-by-hand, while low formalization and individualism also connect in a natural way, as suggested by the history of the judiciary in England and Wales.

4.2. Positive Organizational Outcomes: The Enabling Formalization Pattern

Analysis of the previous hypotheses, which do not cover all the possible cases and combinations, give rise to interesting conclusions. First of all, it is clear that certain organizational models outlined by the typology might generate organizational tensions and conflicts. The case of the model accidentally adopted by the Chilean judiciary seems particularly clear in this sense. Indeed, the combination of vertical authority distribution and individualistic culture might induce empowered individual judges to resist prescriptions emerging from the top, as is the case currently in Chile, according to the evidence previously analysed. However, the data collected throughout the research also suggests that such a combination is not intrinsically negative or conflictive. In fact, the conflictive outcome is particularly inevitable if, in addition to vertical authority and individualistic culture, the high formalization pattern takes a coercive form as well. In such a case, the vertical distribution of authority has a correlated pattern regarding the types of rules and systems implemented by the organization and the subsequent enforcement mechanisms, exacerbating the contradiction with an individualistic culture of autonomous and empowered judges.

Conversely, if the vertical and individualistic organization adopts an enabling formalization pattern, a more positive outcome can be expected. Indeed, the Chilean case, despite being generally dominated by coercive formalization, in specific and still limited areas has adopted enabling and developmental rules. That is the case with the regional councils that oversee the collective performance appraisal scheme, which the judges valued positively as an organizational structure designed by hierarchical superiors, which nevertheless gives them control over the system, based upon collective dialogue about the appropriate use of the scheme. Similarly, the recent and progressive implementation of new participatory training methods based upon collective dialogue was also valued as a positive outcome allowed by judicial leaders, giving judges the opportunity to participate more actively in their own professional development, an aspect that all of the interviewees participating in the new scheme recognized with enthusiasm. In sum, considering these still limited experiences in the Chilean judiciary, it is possible to infer that tensions between vertical power distribution and individualistic culture may be tempered by the adoption of an enabling formalization pattern.

In connection with the previous ideas, it is likely that other organizational models

based upon coercive high formalization might produce tensions within the judiciary. Indeed, if this pattern coalesces with horizontal authority distribution, presumably the coercive nature of organizational rules would not be welcomed by all of the power-holders, thus leading to organizational conflicts. If in addition an individualistic culture were also salient, the possibility of tensions would be higher. Indeed, an example of such a pattern would be a judiciary dominated by formal-economic rationalities based upon punishment and economic rewards to accomplish measurable targets. The pervasiveness of such rationality would likely produce behavioural distortions, as the Chilean case marginally suggests, considering the problematic use of collective performance appraisal in the past, this situation being clearer in the case of the Spanish judiciary and the distortions, i.e. gaming behaviour, produced by its performance-related pay scheme (Doménech Pascual 2008).

In sum, looking at the table in which the organizational typology developed in this study is expressed; sixteen potential models of judicial organization were identified. Eight of these models were ruled out, basically for not having actual empirical referents, owing to the low formalization pattern implicit in them, a characteristic feature of the judiciary of England and Wales in the past. Among the remaining eight models, the hierarchical type characterized by vertical authority, collectivism, and high coercive formalization that characterized the Chilean judiciary until recent years was also excluded owing to its intrinsic contradiction with democratic values. Looking at the rest of the models, three of them potentially lead to organizational tensions, given the eventual incompatibilities between particular organizational patterns. One of these models represents the actual organization of the Chilean judiciary, providing an empirical basis for the negative assessment of the organization of the Chilean judiciary, based upon the evident contradiction between the new and accidentally adopted individualistic culture on the one hand, and the still prevalent vertical authority pattern and coercive formalization on the other. Finally, four very different organizational models remain not only possible, but also potentially positive types of judicial organization. The common element in the four cases is the enabling formalization pattern, which enhances participation, flexibility in the applicable rules, and transparency inside the organization and from the outside as well. Such a pattern has been clearly identified in judicial training approaches based upon collective dialogue and also in developmental performance appraisal schemes, particularly in the English and Welsh judiciary. In such a context, the enabling form of judicial organization has demonstrated its power, facilitating a smooth transition from a rather extreme model to one that reflects a much more balanced normative content, without threatening the most precious aspects of this particular organization, that is, its shared values and strong convictions about judicial independence, judicial quality, and

integrity.

JUDICIAL ORGANIZATIONAL TYPOLOGY		Variable 3: Level of Formalization			
		High (1)		Low (2)	
		Variable 4: Type of Formalization			
		Coercive (1)		Enabling (2)	
Variable 1: Power Distribution		1 (1,1,1,1)	2 (1,1,1,2)	~~3~~ ~~(1,1,2,1)~~	~~4~~ ~~(1,1,2,2)~~
Vertical (1)	Horizontal (2)	5 (1,2,1,1)	6 (1,2,1,2)	~~7~~ ~~(1,2,2,1)~~	~~8~~ ~~(1,2,2,2)~~
Variable 2: Organizational Culture		9 (2,1,1,1)	10 (2,1,1,2)	~~11~~ ~~(2,1,2,1)~~	~~12~~ ~~(2,1,2,2)~~
Collectivistic(1)	Individualistic (2)	13 (2,2,1,1)	14 (2,2,1,2)	~~15~~ ~~(2,2,2,1)~~	~~16~~ ~~(2,2,2,2)~~

Table 8: Models without actual empirical referents (grey), models that conflict with contemporary democratic values (darker grey), models that may actually exist but are potentially conflictual (darkest grey), and potentially positive organizational models (uncoloured)

5. Conclusion

The thesis claims that judicial training and performance appraisal might promote significant changes in judicial organizations. Indeed, these mechanisms can modify the normative framework of judiciaries through the introduction of new rationalities into the system. Subsequently, structural and functional changes to judicial organizations can also be fostered by these mechanisms. To understand such changes, the thesis proposed the use of an organizational typology, based upon the empirical study of judicial training and performance appraisal arrangements in two contrasting organizational settings, used as empirical referents, aiming to capture a wide range of variation and to reflect such differences in a new judicial typology. Such an analytical tool considers four central dimensions or variables of judicial organization: power distribution, either vertical or horizontal; organizational culture, either individualistic or collectivistic; level of formalization, either high or low, and type of formalization, either coercive or enabling. The thesis claims that different approaches to both judicial training and performance

appraisal aim to influence behaviour of judges and have distinctive normative contents which the study explains in terms of overlapping rationalities, i.e. substantive, practical, formal, and theoretical. The normative influences stemming from training or appraisal interact and eventually differ with the dominant values, ideas or beliefs of the judicial system, thus fostering change. If such contrast is studied in detail, it is possible to understand the orientation of changes purportedly or accidentally promoted by training or appraisal systems in a specific country. In turn, such changes can be explained in relation to the four dimensions or variables previously outlined and discerned from the observation of the judicial training and performance appraisal schemes in Chile and England and Wales. The possible combinations of organizational patterns expressed by training and appraisal schemes reflect that several models of judiciaries could emerge as a result of organizational evolution. However, the empirical information suggests that it is possible to reduce the number of plausible alternatives to around eight potential models of judiciaries, among which only four could be valued as positive or potentially successful, according to the evidence delivered by the study.

This research asks what is the role of judicial training and performance appraisal in the organizational reform of judiciaries. The contribution of the thesis, discerned from the many steps followed to address such question, can be summarized as follows:

a) The thesis highlights the utility of typologies for the study of complex organizational phenomena, helping to simplify the analysis, facilitating the statement of hypotheses and comparative analysis. Regarding judicial typologies, the study demonstrates that traditional typologies developed by scholars focus on the structural aspects of judiciaries i.e. distribution of authority, and consequently, are not useful for the analysis of complex contemporary reforms that are not necessarily structural.

b) Judicial training and performance appraisal might contribute to organizational changes in different ways, depending upon the fit between: a) the context in which they are applied and the specific problems to address; and b) the objectives and methods of the systems used in such context. Accordingly, to be successful, the use of these mechanisms should respond to the concrete problems and needs of a specific judiciary. In turn, the needs should be determined systematically and addressed using adequate methods for training and/or appraisal, pursuing clear objectives in each case.

c) If training and performance appraisal address concrete needs, have clear objectives and adequate methods, they might contribute to the normative balance of the organization, fostering positive dynamics within it. That is the case of England and Wales, where judicial training and appraisal needs have

been determined systematically and methods generally correspond to such needs. Principles of adult education have been applied, while appraisal tends to be mostly developmental, approach that specialized literature generally recommends.

d) The lack of adequacy of the systems in relation to the needs of the context might produce unintended and eventually negative effects, as the Chilean case demonstrates. Indeed, the lack of reflection about the specific needs to attend through training and appraisal, and the objectives of these systems in Chile resulted in the positive reinforcement of certain values i.e. judicial independence, but at expense of organizational coherence, aspect that should not be disregarded, compromising consistency in the attitudes and shared understandings of judges. Moreover, the intrinsically judgemental character of the appraisal schemes has become a symbolic battlefield in the conflict between newly empowered autonomous judges and the faulty systems that seek to preserve organizational consistency in the Chilean judiciary.

e) The changes fostered in each judicial context reflect the relative balance between the different dimensions of rationality: formal, theoretical, practical and substantive. In England and Wales, formal rationalities of fairness and objectivity implicit in new arrangements, including training and appraisal schemes, tend to counterbalance the historical dominance of value based rationalities, implicit in the mostly informal organization, which managed to preserve central values for the judiciary such as judicial independence and consistency; but nonetheless allowed values of elitism and exclusion to dominate the judicial organization, in a way that is not acceptable in a democracy. In Chile, the new arrangements have tended to counterbalance the historical dominance of formal bureaucratic rationalities, emptied of ethical content, through the introduction of values of organizational fairness and objectivity, accidentally allowing the reinforcement of substantive values such as judicial independence as well. However, lack of sufficient reflection about the problems to attend and the objectives of the schemes; and the use of inadequate methods, have not served to maintain or reinforce consistency, also excluding attention to the practical rationalities imbued in the actual uses of Chilean judges.

f) The changes fostered as previously explained might have an effect at the level of the structure of the organization, if training and appraisal contribute somehow to change significantly the pattern of authority distribution in a specific judiciary. In Chile and England and Wales, changes promoted at that

level are not significant enough to modify the historical patterns of power distribution in these judiciaries, vertical in the case of Chile and horizontal in England and Wales.

g) Training and appraisal schemes might foster reforms to the culture of the organization. In Chile, the historically dominant collectivism has evolved to an accidentally adopted individualism, process in which both training and performance appraisal have contributed indirectly as the study shows. Conversely, in England and Wales, its traditional individualism has evolved to a new pattern of collectivism, promoted by judicial authorities by using new systems, including training and performance appraisal.

h) Training and appraisal systems might promote changes regarding the formalization of the judiciary. This is clear in England and Wales, where the historically informal organization has changed remarkably to a new formalized structure. Both training and appraisal constitute landmarks of this evolution. Importantly, the type of formalization adopted has been mostly *enabling*, as training and appraisal arrangements reflect. Indeed, in both cases, the schemes involve participative procedures, sufficiently flexible rules, and transparency regarding internal rules and the external context. In Chile, training and appraisal do not express changes to the historical pattern of high formalization, dominant worldwide these days, as the experience of England and Wales reflects. Similarly, these organizational mechanisms do not embody a change from the traditionally coercive pattern to an enabling alternative. In this case, the schemes are not participative, despite incipient initiatives in that direction; rules are not flexible, and their application is generally not transparent to judges.

i) In sum, in Chile, the historical organizational model has been strictly hierarchical, based upon vertical distribution of authority, collectivistic culture, and the high and coercive formalization of its functioning. The implementation of judicial training and the use of performance appraisal in recent years, and particularly the methodological weaknesses in the use of such systems has contributed to the adoption of a new organizational model in the Chilean judiciary, based upon vertical distribution of authority, accidental adoption of an individualistic culture, and high formalization of functioning, still in a mostly coercive setting. As regards the judiciary of England and Wales, the historical coordinate model, based upon horizontal distribution of authority, individualistic culture and low levels of formalization traditionally enabled judges to exercise their role with

autonomy. In this case, the coherent implementation of judicial training and performance appraisal has also contributed to the change in the model of organization. Therefore, the new English judiciary can be characterized by its persistent horizontal power distribution, a newly acquired collectivistic culture, a functioning characterized now by high levels of formalization, expressed mostly in enabling terms; that is, relying upon participatory, flexible and transparent mechanisms.

j) The empirical results suggest that the common element in all the potentially successful models of judicial organization is the enabling formalization pattern, based upon active participation of organizational members, flexibility in the application and enforcement of rules, and transparency to internal organizational processes and to external demands upon the judiciary. Accordingly, different and contrasting structures of judicial organization, either vertical or horizontal, might produce good results, as long as enabling features dominate organizational rules, systems, and procedures, while the same can be said of organizational cultures, either individualistic or collectivistic. On the one hand, the participatory character of organizational systems reinforces the practical rationalities that shape the work of judges. On the other hand, enabling features might temper the excesses of organizational models that overly focus upon particular dimensions such as authority or individualism.

k) Evidently, the evolution revealed in Chile and England and Wales is an on going process to which the previous conclusions might contribute. In the case of England and Wales, the potential impact of training and performance appraisal, and their success facing the challenge of promoting consistency in a much larger and collectivistic organization, largely depend on the extent of the organizational efforts put in the implementation of these mechanisms. Arguably, there are sufficient reasons to support the expansion of judicial training, according to the projects that the Judicial College has proposed. Nonetheless, allowing some participation of representatives of areas external to the judiciary might be a way to contribute to the process, avoiding the risk of corporatism. Likewise, performance appraisal could be applied to larger sections of the judiciary and produce good results, as long as enabling and developmental features are expanded, and judgemental features ruled out. Particularly, the link between appraisal and promotions should be avoided, as behavioural distortions could emerge in such a case.

l) In Chile, the study suggests the need to reinforce incipient but well oriented

enabling initiatives in the areas of training and performance appraisal, changing the old methods to address concrete organizational needs, in order to avoid the risk of becoming a mock bureaucracy. Accordingly, the new approach to training adopted recently by the Judicial Academy should be maintained and expanded to all areas of training, increasing also the participation of judges from all levels of the judiciary in the structure of the Academy and the design of training activities. In the case of performance appraisal, a developmental approach should be embraced, following the still timid example provided by the regional councils that review targets for the collective evaluation scheme.

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APPENDIX A: METHODOLOGY

1. Research Strategy and Methodological Approach

This project aims to understand the role of judicial training and performance appraisal in judicial organizations. The focus is broad, considering the variety of judicial systems and organizational arrangements, and also the diversity of approaches to both judicial training and performance appraisal that can be found around the world. Therefore, two strategies are followed to make the project manageable: First, rather than trying to encompass as many judicial systems as possible, and use extensive data samples that could be out of the possibilities of the project, the analysis is approached using typologies, which "are especially useful for reducing complexity, reducing the number of types needed, aiding comparisons, and defining multidimensional concepts" (Bailey 1994, p.23); and second, the analysis focuses on two cases of judicial organization, which represent broader traditions of judicial systems. Accordingly, the judiciary of Chile was selected for being a good example of the hierarchical model, while the judiciary of England and Wales was chosen for being the inspiring case for the definition of the coordinate model, according to Damaska (1986).

Inevitably, studying the organization from the perspective of only two organizational systems entails a methodological purposive selection of factors. This means that the findings can only be seen as providing a partial - but still meaningful – picture of the increasingly complex organization of judiciaries. Indeed, the research does not aim, and could not deliver, a comprehensive understanding of the multiple elements of judicial organization. Rather, it aims to develop an analysis from the perspective of two relatively new and important organizational systems, without denying that a full understanding of judiciaries should take into account other systems and mechanisms, such as recruitment arrangements, career advancement systems or disciplinary procedures, all of which could be the subject of further research.

This project aims to contribute to the development of new typologies of judicial organization, incorporating into the analysis the influence of systems and mechanisms that influence structural frameworks, shaping the functioning of organizations. In particular, the research focuses on the functioning of judicial training and performance appraisal as independent variables, to understand the dependent variables, constituted by the organizational dimensions that differentiate types of judiciaries as a result of the use of these systems. Accordingly, the work is inductive, focusing on empirical data related to the use of judicial training and performance appraisal in the two judiciaries under study, in order to identify underlying concepts of organizational relevance, in relation to

aspects such us training methodologies, quality of training, social relationships developed as a result of training activities, formal and informal contents of training activities, influence of appraisal systems over day-to-day work, effects of the results of appraisal processes etc. The next step in the inductive process is to connect such concepts by developing categories that involve "the grouping of putatively dissimilar but still allied concepts under a more abstract heading" (LaRossa 2005, p.843). The results entail the grouping of concepts along dimensions of organizational relevance e.g. different forms of authority, either vertical or horizontal. Furthermore, the connections between resulting categories or variables (see LaRossa 2005), are studied to elaborate hypotheses regarding the organizational impact of judicial training and performance appraisal and to develop theoretical perspective to the role of these mechanisms over the organization of judiciaries.

The process described previously corresponds to the stages of a grounded theory approach (see Corbin & Strauss 1990; Strauss & Corbin 1994; Strauss & Corbin 1998; Martin & Turner 1986; LaRossa 2005; Suddaby 2006), which begins with the collection and analysis of empirical data to develop increasingly abstract concepts and finally elaborate a theoretical perspective by induction. The analysis of empirical data focuses on the spaces for relevant social interactions linked to judicial training and performance appraisal in which mechanisms that carry top-down institutional influences to individuals operate i.e. identity formation and identification, or the focusing of attention of organizational actors (see Thornton & Ocasio 2008; Thornton et al. 2012), and also on the reaction of individual judges to such influences.

The research highlights the utility of typologies for comparative studies. However, I am aware of critiques that portray ideal types as "sloppy categorical classification systems" (Doty & Glick 1994, p.231). I am also aware of the debate between conceptual typologists and empirical taxonomists (see Bailey 1994; Meyer et al. 1993). Nevertheless, the latter dichotomy seems largely artificial, as useful typologies, even if originated in concepts developed by theorists, synthesize configurations from multiple attributes, while their types are grounded upon empirical experience to variable extents. Likewise, taxonomies, even if based upon empirical methods and formal data, still require theoretical grounding. Therefore, the two approaches can be seen as complementary. It is equally important to theorize about types, and to search for their existence in taxonomic classes (Meyer et al. 1993, p.1183). Indeed, while typologies help to enhance the vision of the researcher, facilitating the statement of hypotheses, the ordering of situations and the conception of testing procedures; taxonomies, prompted by the prior development of typologies, can be used to test and correct them (Winch 1947). Besides, the combination of empirical data and conceptual typologies can also be made

inductively, following a grounded theory strategy which consists of forming empirical clusters and subsequently formulating conceptual labels, categories, to form a typology (Bailey 1994, p.32). The latter approach is used in this research project by focusing on the organizational categories implicit in judicial training and performance appraisal arrangements.

The theoretical validity and utility of typologies does not imply that critiques of their configuration are ungrounded. On the contrary, criticisms focusing upon the improper development of typologies are worth considering. In response to such criticisms, Doty and Glick (1994) claim that typologies can be seen as complex theories that meet the criteria to be considered as such only if they are empirically falsifiable using quantitative methods. In the context of this work, I do not go that far. Rather, I claim that the theoretical value of organizational typologies is enhanced by using empirical methods, either quantitative or qualitative, to test in the former case, or to elaborate in the latter, the categories that group organizational attributes into a central concept. Accordingly, quantitative and qualitative approaches can be equally used to combine conceptual and empirical levels of research, from different perspectives in each case. Indeed, a quantitative account would follow a 'classical strategy', focusing upon the empirical testing of pre-existing conceptual categories, while a qualitative approach focuses first upon the empirical data to extract concepts and typological categories (Bailey 1994, pp.30–32).

The categories, dimensions, or variables constitute the structural elements of typologies. Indeed, organizational types are formed by a combination of organizational dimensions, categories, or variables, which can be determined *before* the data collection in standardized quantitative studies, or *during* the process of analysis in qualitative projects, by means of the collected data and theoretical knowledge (Kluge 2000, p.4). But what exactly needs to be elaborated in the latter case? In other words, what is meant when we speak of categories, variables, or dimensions of a typology? From the point of view of grounded theory approaches, the concept seems crucial but its definition has been rather vague. Generally, categories involve the grouping of elements that share certain similarities. However, the process of elaboration of categories that is relevant to the development of a theoretical perspective grounded in data is different. It entails the grouping of putatively dissimilar but still allied concepts under a more abstract heading (LaRossa 2005, p.843). For example, a researcher studying children at play might elaborate categories grouping toy grabbing and toy hiding under the heading "various strategies to avoid sharing a toy" (Strauss and Corbin as cited by LaRossa 2005, p.843). In other words, the process not only entails grouping elements into a known category. Rather, it consists in the elaboration or discovery of the category itself, based on the fact

that the different elements to be grouped do not share any obvious characteristics or properties, which instead have to be found and interpreted from data.

2. Data Sources, Sampling and the Collection of Information

In the judiciaries of Chile and England and Wales, judicial training mechanisms and performance appraisal systems have been recently implemented or modified, offering the opportunity to study not only the use of these mechanisms, but also the effects over the historical configuration of the two organizations. These two cases are only examples within a wide range of judicial systems and a possibly wider spectrum of training and appraisal methodologies. Nevertheless, the focus on these two judiciaries that represent opposite paradigms offers the opportunity to explore the commonalities and differences in openly contrasting settings. Indeed, the contrast shows a range of variation in the configuration of judiciaries, allowing the researcher to explore paradigmatic organizational systems and identify the central aspects that differentiate them. In fact, the research does not aim to fully describe the judiciaries and organizational mechanisms under study. Rather, it aims to identify some of the defining variables of judicial organization by inductively inferring the categories of elements that shape and differentiate both models of judiciaries. In turn, the resulting variables are used to form ideal types of judicial organization, which can be used to understand changes fostered by new organizational mechanisms in comparative perspective. In contrast to typologies that differentiate judiciaries according to structural dimensions, this research emphasizes the differences in the functioning of judicial organizations implicit in judicial training and performance appraisal systems, which purportedly aim to shape the work of judges and the functioning of the judiciary in variable ways, reflecting the central aspects of the organization.

2.1 Data Sources

The data sources used in both systems are similar and varied, aiming to capture relevant information from two different perspectives:

2.1.1 Firstly, the aim is to have a clear understanding of the values, methodologies and goals of judicial training and performance appraisal systems in Chile and England and Wales. For that purpose, the following sources of data have been used:

2.1.1.1 Relevant literature provides the initial information about the type of

systems implemented in both cases. This includes books, academic articles and conference proceedings in connection to the implementation and use of judicial training and different mechanisms for performance appraisal in Chile and England and Wales.

2.1.1.2 Media information is used to reflect the increasing visibility of these mechanisms to the public, the opinions of judicial authorities regarding training and appraisal, and the expectations placed on judicial training and performance appraisal regarding the work of the judiciary. Likewise, conference proceedings, the transcription of talks and interviews to the press, reflecting the opinions of members of the judiciary were also used to capture the nature of the systems, as well as their strengths and weaknesses.

2.1.1.3 Documentary information produced internally by both judiciaries and by other public organizations is analysed, seeking to determine the approach to training and performance appraisal in each case.

2.1.1.4 Written sources are complemented using interviews with members of each judiciary who have been in charge of the implementation, design or application of these systems. The interviews are few in number as the sampling procedure aims to capture the opinions of people who exercise leadership in the area, being able to deliver an official view to either, judicial training or performance appraisal.

2.1.2 In addition to the empirical study of training and performance appraisal systems in terms of their design, implementation and methodologies, the second part of the empirical enquiry seeks to obtain an internal perspective on the use, methods and practices of judicial training and performance appraisal in Chile and England and Wales. For such a purpose, interviews with judges who have taken part in training or performance appraisal activities were done. In this case, the aim is to have an internal counterpoint to the information about judicial training and performance appraisal provided by official sources and by those in charge of developing and implementing such mechanisms. Whilst the interviews address some aspects of learning and attitudinal changes linked to either training or appraisal activities, the research does not aim to assess such areas, or the results of specific training and appraisal programs. Rather, the main purpose is to focus on the views, feelings and opinions of judges in relation to these new systems, in order to understand the meaning attributed to both training and performance appraisal by those who participate in them. The approach differs from usual practices in the assessment of professional training evaluation, which generally rely on relatively simple and quantitatively oriented tools, such as satisfaction surveys. In this case, the aim is to study in-depth, not one activity in particular, but the reaction of judges to the system of training and appraisal as a whole. Moreover, the purpose is to “go

beyond description to find meaning, even if that meaning is related to an individual's experience […] or the perceptions of a small number of people"(Webley 2010, p.932).

2.2 Sampling

As a general approach to sampling, the study relies upon the idea that "qualitative research tends to focus on a smaller number of 'observations' or 'data sources' (if compared to quantitative methods), whether people or events or documents, which are considered to be data rich and thus worthy of study, and to examine them in-depth" (Webley 2010, p.932). Various data samples are used in this study, depending on the specific source and also on the area of research:

2.2.1 Written sources, including documents and media, are very limited. Consequently, there has been no need to obtain a sample of these sources. Instead, all the written information that could be reached has been incorporated into the study, both in Chile and England and Wales. That includes legislation, policy documents and informative documents, among other sources.

2.2.2 The study of the values, methods and goals of the training and appraisal systems, aims to capture the official point of view upon these mechanisms, relying mostly on official written sources. However, the written information available is not enough to fully understand the kind of system implemented in each case. Therefore, the study is complemented with the views of interviewees who have expert knowledge and extensive experience of the subject. For such a purpose there is no need of a large interview sample but instead, what is needed is to talk to the 'right person'. Accordingly, two or three members of each judiciary who play a key role in the design, implementation or actual use of these mechanisms have been interviewed in the context of the research.

2.2.3 The interviews with judges who have participated in training courses and performance appraisal schemes do not aim to obtain a view about these mechanisms that could adequately represent the whole of the judiciary. Accordingly, the research is guided by common principles of qualitative studies, which mostly "do not seek to reach findings that are generalizable to an entire population. Instead, focused, in-depth studies are designed to go beyond description to find meaning, even if that meaning is related to an individual's experiences" (Webley 2010, p.932). Therefore, rather than looking for enough voices to represent the judiciary, the purpose is to obtain the views of some judges, to know their experiences and thoughts about training and appraisal, providing the research with an internal point of view to these mechanisms, enriching the analysis of the methods, values and goals of the system. This idea can be illustrated by an example: a formal course-based system of training designed to enhance theoretical knowledge may

be seen by judges as an opportunity to meet colleagues and learn practical aspects about their work, eventually modifying the scope of the system and the expected outcome. Only individual judges who have participated in training and appraisal mechanisms can provide such views.

Assuming the limitations in terms of time and costs that the project involves, the experience of ten judges in each country under study has been valued as sufficient to build a solid internal point of view, which may help to characterize judicial training and performance appraisal systems. In order to find the adequate interviewees, differentiation criteria for their selection has been introduced in each case. The aim is to capture perspectives emerging from areas of the judiciary that clearly express organizational changes in Chile and England and Wales. Accordingly, after studying the evolution of both judiciaries in the last years, it is very clear that certain structural changes have had an impact on the judges' self perception of their role. Indeed, the incorporation of judges professionally formed by the Judicial Academy in Chile, to fill the posts required by procedural reforms, brought a whole generation of new judges with a very different idea of judging, if compared to the historically prevalent views in the judiciary. Likewise, the merger between courts and tribunals in England and Wales, reflects a relevant change to the judicial structure, making the *judicial family* grow massively by putting judges with very different formation, professional experiences and backgrounds under the umbrella of a single organization. Consequently, the study aims to capture a range of variation in the perspectives of judges with different and identifiable backgrounds, determined by recent reforms to the judicial organizations in both cases. In this way the findings can be to an extent representative, "but not in the sense of allowing for the estimation of the distribution (of the views on training and appraisal among judges) as a whole" (Webley 2010, p.933).

Based on the differentiation criteria used to select interviewees, half of the judges interviewed in Chile have been formed by the Judicial Academy, while the other half corresponds to judges appointed before the implementation of the Academy. In the case of England and Wales, half of the interviewees are judges from the courts, specifically district courts, as performance appraisal has been implemented only at that level within the Courts so far (despite the pilot project running at the level of Circuit Courts). Members of the tribunals compose the other half of the interviewed judges. Of course, other differentiation criteria could have been applied to capture a wider range of variation e.g. age of judges, gender, echelons or jurisdictions. However, the selection has been made with basis on the study of the evolution of the judiciaries, aiming to make the research manageable, while also reflecting the most salient factors to differentiate judges resulting from contemporary reforms.

2.3 The Collection of Data

The collection of data has been determined by the nature of the data sources. In the case of documents, there was no need to select a sample, as the written sources available are very limited in both countries. Data was accessed via the official web sites of the judiciaries and the agencies in charge of either judicial training and performance appraisal in each country. These sites generally provide information to the public, which tends to be explicative but at the same time relatively simple, as it is not directed to an expert audience. Occasionally, web sites give access to policy documents and legislation that were also considered, while very occasional references in the press to either judicial training or performance appraisal in Chile and England and Wales were incorporated to the study as well. In addition, contacts with judicial authorities in both countries facilitated the request of more specific and detailed documents about the implementation and use of judicial training and performance appraisal. Particularly, the Chilean Administrative Corporation of the Judiciary provided detailed studies, surveys and documents related to the new system for judicial quality assessment in Chile, the *Indice de Calidad de la Justicia*.

The documents were mostly stored as PDF files, and in some cases, snapshots of web sites, online newspapers and magazines were also collected and stored for further analysis. The files were organized in folders, one for each country, and within them, new folders were created to group files according to topics: judicial training or performance appraisal. Within them, other folders grouped files related to: general aspects, opinions of external observers e.g. academics or journalists; opinions of judges, legislation and reports.

In the case of expert interviewees they were selected with the aim to reflect in the best way possible the official approach to judicial training and performance appraisal in each country. Therefore, regarding this category of interviewees, efforts were made to select judges or administrative staff working at a high level in the areas of training and appraisal, either in the courts, tribunals or the Judicial College in England and Wales, or the Judicial Academy and the Administrative Corporation of the Judiciary in Chile. The process of selection itself was based, on the one hand, on the knowledge and experience of the researcher and on the other hand on the availability of the targeted interviewees. As a result, in Chile the Director of the Judicial Academy was interviewed as well as one of the officials working in the implementation of a new system for the assessment of judicial quality. In the case of England and Wales, the Directors of studies of the Judicial College were interviewed, as well as a Circuit Appraisal judge, in charge of coordinating

performance appraisal activities in District Courts, and a tribunal judge in charge of performance appraisal in a particular region.

The interviews with the experts on judicial training and performance appraisal were semi-structured and based in a set of ten to twelve questions, and variable sets of follow up questions. The areas covered by the interviews where basically three: First, the characteristics of the systems of training and appraisal, in terms of purpose, values, methods and goals; secondly, the impact of the systems upon the work of judges; and thirdly, the areas for improvement and changes. Interviews generally took around one hour and were audio recorded using an Apple Ipod device and the Recordium application. The Mp4 audio files where transferred to a special folder in the researcher's computer, protected by a password. It was not considered necessary to encrypt the audio files, as the interviews did not address any aspects that could compromise the integrity of the interviewees. In the case of Chilean interviewees the interviews were made using Skype calls to telephone numbers while in the case of England and Wales, they were conducted in person. Finally, the interviews were transcribed using Microsoft Word and stored for further analysis in the same folders as the audio files, under the headings 'Interviews UK' and 'Interviews Chile'.

With regards to the interviews with judges in both countries, these were also semi-structured, based in a set of ten questions and a number of follow up questions, covering basically three areas: experiences with either training and appraisal programs, impact of these systems over the work of the interviewees and over the organization as a whole, and ideas for changes and improvements. Regarding technical aspects, organization, transcription and storage of the corresponding files, the procedures were the same as those adopted in the case of the experts on training and appraisal systems. Likewise, in the case of Chilean judges, they were interviewed using Skype calls to their phone numbers, while interviews in England were conducted in person.

3. The Analysis of Data

The analysis of data follows the stages of grounded theory building, aiming to develop a theoretical perspective based on the data emerging from the analysis of documents and interviews. Following Strauss and Corbin (1990), "coding is the basic analytic process engaged by the researcher" (p.423). It involves basically three stages: open coding, axial coding and selective coding (see Corbin & Strauss 1990; Strauss & Corbin 1994; Strauss & Corbin 1998; LaRossa 2005). The process of 'open coding', starts by reading documents and interview transcripts, analysing line by line to identify indicators referred to events, actions or interactions that could be significant for the

research purposes. These indicators are expressed in words, phrases or sentences in the materials being analysed, all of which are extracted from the text for analysis. In turn, the selected indicators have to be compared with previous indicators coded in the same way, to identify similarities and variations. The result of these "constant comparisons" (Corbin & Strauss 1990, p.421) is the emergence of concepts or labels associated to groups of indicators, in a process that continues throughout the research until all the indicators have been identified and linked to concepts (LaRossa 2005, p.841). At the same time, an important part of the research involves writing theoretical memos to "keep track of all the categories, properties, conceptual relationships, hypothesis, generative questions that evolve from the analytical process" (Corbin & Strauss 1990, p.422). Therefore, memo writing is not just about writing ideas. It is related to the formulation of a theory, trying to establish connections between indicators and concepts.

Besides developing concepts, the next stage of open coding involves the formulation of categories to connect and classify them. Accordingly, categories are used to group two kinds of concepts: those similar but not identical e.g. different objects that fly; and others that are dissimilar, but still allied. In both cases, concepts are grouped under a more abstract heading. The grouping of dissimilar but allied concepts is the most relevant for grounded theory, leading to the next stages of research (LaRossa 2005, pp.842–843). Indeed, in this case concepts are linked together not because of their similarities, but because they belong to the same dimension. In other words, they reflect different aspects within a certain dimension elaborated by the researcher, as the example given by Strauss and Corbin (1998) demonstrates: the actions of grabbing and hiding toys by children at play refer to different concepts, which nonetheless, in the context of the children's interactions can be grouped as different aspects of the more abstract dimension labelled as 'strategies to avoid toy sharing' (p.115). With regards to the resulting categories, they constitute variables, intending to capture not only conceptual similitude, but also dimensionality, in the sense previously explained (LaRossa 2005, p.843). The results of the open coding process are summarized in chapter 5 of the thesis, in which the identified categories were outlined and linked to supporting evidence, quotes and analytical comments.

The process of open coding can be carried out in different ways, including the use of software to facilitate the management of great amounts of data, emerging from a multitude of sources. In this case, software analysis was not considered necessary, due to the small sample and manageable number of data sources. As a consequence, the analysis was based upon the use of a simple table in a Microsoft Word file, allowing the presentation of the information in different and flexible ways. The table was designed with six columns and an undetermined number of rows. The columns were organized in

the following way:

a) First Column: Contains the indicators. As the documents and interview transcripts are read, words and phrases that could have organizational significance are copied, one in each row of this column. The whole quote is included, so that it can be reviewed at any time, facilitating also their use when writing the analytical chapter of the thesis.

b) Second Column: Indicates the data source by giving a number to each one of them, either document or interview transcript.

c) Third Column: Indicates the differentiation criteria for each data source. For example, in the analysis of the Chilean judiciary, 1 stands for judges formed by the Judicial Academy and 2 for judges that joined the judiciary before the Academy and consequently do not have the experience of the judicial formation program (but they have experience with continuous professional training programs delivered by the Academy). In turn, number 3 stands for judges from the Tribunals and 4 for judges from the Courts in England and Wales.

d) Fourth Column: Indicates the broad area covered by the questions that originate the answers in which the indicator emerged. For example, regarding interviews with judges, the areas covered by the questions are six: experiences with judicial training, impact of judicial training, ideas about training, experiences with performance appraisal, impact of performance appraisal, and ideas about performance appraisal. Therefore, a number from one to six has been assigned to each one of these areas and reflected in the fourth column as a way to orient the researcher in relation to the topic being discussed when the indicator emerged.

e) Fifth column: Contains the codes for concepts developed from the indicators. As indicators emerge, they are immediately linked to a concept. At the end many indicators are linked to a few concepts, which consequently group different indicators under an abstract heading. Each concept is assigned a number and this number is written in the fifth column. If a specific indicator cannot be connected to any of the indicators previously found, then a new concept needs to be elaborated, allowing further indicators to be linked to this concept, delineating it more clearly. In the same way, if an indicator can be linked to another concept at the same time, it can be done by including a new row in the table and writing the concept's code in the fifth column. Likewise, during the course of the analysis, indicators linked to a particular concept might also be linked to a different one or support the elaboration of a new concept to reflect more accurately its content. Some of the concepts elaborated in the process are: motivation of judges, participative training, influence form peers, influence from superior judges, influence from academics, determination of training needs, evaluation of training experience etc.

f) Sixth column: Contains the theoretical memos. That is, the comments and ideas regarding the connections between indicators, between indicators and concepts and any thoughts that could be useful for the further development of a theoretical perspective to the topic being researched, in connection to the corresponding indicator that prompts the idea.

The virtue of using a Microsoft Word table is that by using the 'sort' tool in the menu 'table', the information can be sorted in different and flexible ways. For example, if the concept codes are used as the first criteria to display the data, and the codes for the differentiation criteria between data sources are used in the second place, then the rows of the table are shown in order, starting by the rows in which concept number '1' has been used (if the descending order has been selected). In turn, all the rows (and indicators) that contain the concept number '1', are also sorted using the same technique to show in the first place the rows that include judges number '1', code used to group judges formed by the Judicial Academy of Chile. Of course this is just an example, as the data can be sorted in various ways to facilitate analysis and comparison, using the same technique and simple tools. The flexibility in the display of information was a key element for the analytical process, considering that the whole table has more than 120 pages in total and consequently, handling the information would have been particularly difficult without the tools mentioned above. A sample of the table has been incorporated to the study as appendix B.

Once a list of concepts has been elaborated as a result of the first analysis of the data, the next step is to establish links between concepts and develop categories or variables. This is a reflexive stage in which the data that has been already organized is reviewed to find linkages between concepts in terms of similarities, but especially in terms of dimensionality. Therefore, the aim is to elaborate the key organizational variables that are influenced in different ways by judicial training and performance appraisal systems. Once a number of variables have been developed, it is possible to move to the next stage of research.

The open coding is a process in which variables and types are elaborated. In turn, the axial coding stage plays a more theoretical role. At this stage, the purpose is to think about linkages between the variables or categories previously elaborated. Hence, the process of research is somehow reverted at this point, as the inductive strategy gives way to the development of hypotheses about the connections between variables, in terms of causes, contexts, contingencies, consequences, co-variances and conditions. In turn, the data is reviewed, either to find support for the hypothesis or to discard it. In sum, if during the stage of open coding, the role of the researcher is to develop variables, at the stage of axial coding, the relationship between or among variables is examined (LaRossa

2005, pp.846–850).

Finally, the research ends at the stage of 'selective coding', which is "the process of integrating and refining the theory" (Strauss & Corbin 1998, p.143). For that purpose, the first step is to select the central category, representing the main theme of the research. This variable has analytical power, based on its ability to pull the other categories together to form an explanatory whole. If no category can play this role, then a new term or conceptual idea needs to be developed, under which, the rest of the categories can be subsumed (Strauss & Corbin 1998, p.146). The core category represents the central phenomenon of the study and can be identified by asking questions such as: What is the main analytical idea presented by this research? (Corbin & Strauss 1990, p.424). In sum, selective coding is the decision made by the researcher about what is the main story underlying the analysis. Hence, it is basically an explication of the story line of the whole research, based in a core variable that encompasses all the other categories identified during the process. The processes of axial and selective coding are represented in chapter 6, the conclusive part of the thesis.

4. The Comparative Element

The research takes the judiciaries of Chile and England and Wales as representative examples of broader traditions of judicial organization, that is, the hierarchical/bureaucratic and the coordinate/professional systems respectively. In both cases, judicial training and performance appraisal systems have recently been implemented or modified, offering the opportunity to study not only the use of these mechanisms but also the effects upon the historical configuration of the two organizations. Evidently, these two cases are only examples within a wide range of judicial systems and a possibly wider spectrum of training and appraisal methodologies. However, the focus upon two cases that represent opposite paradigms offers the illuminating opportunity to explore the commonalities and differences in openly contrasting settings. Indeed, the contrast shows a range of variation in the configuration of judiciaries, allowing the researcher to explore paradigmatic organizational systems and to identify the central aspects that differentiate them. The research does not aim to fully describe the judiciaries and organizational mechanisms under study. Rather, it seeks to identify some of the defining organizational variables of these two representative cases in order to form a typology that can be used for broader analytical purposes.

The thesis is based upon comparison of two representative cases of judiciaries, which embody contrasting traditions of judicial organization. These judiciaries were portrayed as *polar cases*, that is, extreme cases in a continuum of judicial organization

that proceeds from a hierarchical/bureaucratic model to the opposing coordinate/professional system. As such, both systems work as a yardstick to assess variations and to identify various organizational models between the two representative cases in the continuum. The use of a typology is a comparative method in its own right, as it is developed upon dimensions of judicial organization that are visible in the two contexts of the comparison. Such dimensions can be discerned in both contexts under study, not because of similarity of organizational features, but because they form part of the same continuum, eventually in opposite extremes. Accordingly, the typology determines specific areas for comparison, simplifying the analysis.

The process of extracting information from data used the same procedures in both contexts. In Chile and England and Wales, presumably all the official information contained in documents published online by authorities in charge of training and appraisal was collected. Besides, the direct contact with authorities in both countries facilitated access to some documents that were not available to the public. Particularly, in England and Wales, contact with directors of training at the Judicial College, with a judicial appraiser from tribunals and with a circuit appraisal judge from the district courts, made access to such information possible. Similarly, contact with the Director of the Judicial Academy and with officials from the *Corporación Administrativa del Poder Judicial* produced similar results. The similarity in approach was clearer in the case of interviews. In both contexts, semi-structured interviews were used, based upon a questionnaire divided by areas of interest: Characteristics of training and appraisal systems; impact or effects of training and appraisal; and areas for development or improvement regarding training and appraisal schemes. Both in Chile and England and Wales, questions to interviewees were directed to cover all of these areas, starting with equivalent general questions in each case, and broadening the areas of enquiry depending on the context, its particularities, and the information provided by the interviewee.

Finally, the analysis of the information also followed a comparative approach. It was oriented to identify areas in common in the two contexts, in order to make sense of the information. The study did not just extract loose information to list it and put it in contrast with another list of data. On the contrary, the process was directed to discern relevant areas of comparison, in which the variable information obtained from two judicial systems, could be understood and interpreted. Accordingly, organizational dimensions were elaborated, explaining the difference between systems through comparative tables.

APPENDIX B: SAMPLE OF TABLES CONTAINING EMPIRICAL DATA

SAMPLE TABLE: INTERVIEWS WITH ENGLISH JUDGES

On the criminal side, David Ormerod, who was a law professor and is now a Law commissioner, he did a lot of judicial training for people like me. So that's the academic input. Senior judges often come in to do key note themes.	13	3	1	11	Esto en el marco de training fundamentalmente por jueces. Esta sería la excepción. 4 porque sería antidoto contra corporativismo al ofrecer a jueces una apertura y visibilidad hacia fuera junto a otras (clases en social context, especialmente con outsiders jugaría este rol).
There is a certain curve when you certainly realice what it is that you need to know. Your performance goes down a bit because you become uncertain and then as you put things into practice your confidence is rebuilt. I found each course that I've been on…the first thing I think as I walk out is: god, I was really unsafe as a judge because I didn't realice this. I then become less confident and more careful, until I've got the feeling that actually yes… that course… I can now apply the bits that I learnt and that begins to feed into particularly the way I write things.	13	3	2	14	Cursos promueven reflexión interna y auto-análisis crítico que lleva a cambio de prácticas, no de manera coerciva, sino por convicción
My senior judge watched me on the last 2 days (of hearings in a complex case) and said: look, you're very, very good on controlling the court and allow people access and all the ring master functions, but I don't think you know enough about the law. Why don't you come to Queen Mary College, where he was a visiting professor and I will arrange for you to audit a particular course that includes the freedom of information act because I think that's a training need that you've got. So I audited the course and I loved it. I really did learn something and decided to do my LLM the following year, using that course, 2 others and a dissertation. So, the appraisal took me to auditing something. I then developed that….The only reason I got into academic studies was to actually listen to what I was being told on an appraisal and went off and did it.	13	3	5	14	Ejemplo claro de efectos developmental.
There are certain areas, where there is more of a skill element, where we use role play. That might be in one or two ways: the training team might role play something and then get the course either in plenary session or small groups to discuss what they've seen and answer certain questions about it, or you might design a role play to be done in small groups, moderated by the facilitator	14	3	1	1	Desarrollo de habilidades también de manera colectiva

We do not regard training of judicial skills as a separate matter. It's integral to everything we do. So for the employment judiciary, a key judicial skill is case management, the ability to wrestle complicated discrimination claims into some sort of shape so that they can be heared in a coherent manner, with proper preparation. The ability, during that hearing to manage case management difficulties as they crop up and to maintain a structure to the hearing. Those skills, for example are tested and interrogated and trained on in the context of everything that we do.	14	3	1	1	Skills en contexto. El foco está ahí, pero en el marco de enseñanza de aspectos sustantivos. Hay visibilidad, no puras habilidades técnicas.
We created a system of training liaison judges, one per region. So there is somebody on the ground in the region, whose job is precisely, among other things, to identify what he or she might perceive as training needs, expressed by their colleagues, who they see everyday at work. I hope that will be an important conduit.	14	3	1	2	El sistema establece estructura para recoger impresiones de jueces (analizar en conjunto con evaluaciones de cursos)
(the performance appraisal system) was introduced after I was appointed salaried, so I never went through it. What I had was an annual report written on me by my regional employment judge, based on I don't know what. In fact, for most of the time that I was a fee paid judge it was kept secret from me what was said…I had no idea how I was regarded by my judicial manager, and I think that can't be the case anymore because those judges now have the direct opportunity to say: what do you think? Am I doing an ok job? If not, where am I not doing an ok job? How can I improve?	14	3	4	8	Falta de transparencia histórica que el nuevo sistema formalizado cambia
I want the answers to come from them (the trainee judges). It's my responsibility to create an atmosphere in which the feel comfortable to discuss with each other and feel comfortable about being open with each others and giving their opinions without fear of being ridiculized. Once I've done that, all I'm doing is making sure that we keep to some kind of time, that we cover the material that we need. If at the end of dicussion the group has missed a point I can fill that in. Really I'm not there to teach them. I'm there to make sure that they theach themselves, they teach each other.	14	3	1	12	Enseñanza no es top down. Es developmental.
We use training in legal knowledge as a vehicle for all other training	14	3	1	15	Es un vehículo. Da el contexto y permite visibilizar las habilidades requeridas.

SAMPLE TABLE: INTERVIEWS WITH CHILEAN JUDGES

Esta cosa economicista termina distorsionando y hace que se trabaje para la estadística o se trabaje para mejorar aspectos del bono	4	2	3	9	Visión crítica sobre bonos que se apoya en experiencia. Se termina trabajando para ellos y se generan distorsiones.
yo valoro que los instructores han sido gente que conoce muy bien el medio, entonces pueden hacer el nexo entre esta cosa teórica y como eso se puede ir implementando o como puede impactar, haciendo una proyección de cómo llevar el tema a la práctica	4	2	1	1	Experiencia muestra instructores con conocimiento, que permiten llevar cosas teóricas a la práctica. Eso se valora como positivo, el tema de aplicación práctica de teorías, a partir de la habilidad o conocimiento del profesor. No es que el conocimiento práctico emerja de una discusión, debate, análisis crítico. Es el profesor el que lo entrge, por lo que depende de su habilidad
si bien uno esperaría una beneficio mayor, con poco esfuerzo de parte de la academia, pero de todas maneras significan un adicional, que es el momento en que uno detiene la cosa rutinaria y piensa mas en grande el derecho y lo logra situar a uno en una óptica distinta	4	2	2	5	El impacto podría ser mayor, sin embargo se valora esto como un momento reflexivo. Ojo, si bien los cursos son pasivos, teóricos, se da un momento para la reflexión, para pensar el derecho y por tanto formar una postura crítica
creo que esos cursos debieran tener alguna forma de calificación, que sumado a alguna línea de ellos pudiera importar, que se yo, el equivalente a un diplomado o incluso a un magister, como lo hacen los médicos	4	2	3	6	Ojo, relacionar con entrevista del director de la academia. Pide calificación y con ello mas exigencia
A lo mejor no ha sido muy determinante, pero su es una contribución efectiva y no solamente en el aspecto estricto del ejercicio de la judicatura, sino además en abrir un poco la ventana por decirlo así, refrescar, tener la posibilidad de gente que venga a plantear generalmente una posición innovadora, actualizada y no ir quedándonos en seguir haciendo plantillas de lo mismo	4	2	1	11	Influencia de AJ se ve desde la perspectiva de la apertura de nuevas posibilidades que refrescan. Permiten que los jueces vean lo que hacen académicos. Ojo, esto con desinstitucionalización y teorización
Yo creo que eso es un gran mérito en el perfil que normalmente tienen los instructores. Es gente que viene no a repetir lo que se está haciendo o a mejorar cosas mínimas, sino que realmente a plantear una alternativa de una visión refrescada, mas moderna, mas actualizada del derecho	4	2	1	11	Nueva visión del derecho que entra desde fuera a través de la AJ. Se trata de una actualización relevante.

en general me he encontrado con muy buenos exponentes, gente que maneja muy bien el tema y gente que tiene además un conocimiento, cuando no pertenece al Poder Judicial, conocen la realidad judicial muy bien. Son instructores o profesores	4	2	1	16	Los reparos a la AJ no dicen relación con docentes, sino mas bien con enfoque, organización y diseño. Sin embargo se valora aporte de

que además están muy motivados en plantear muy bien su mensaje					académicos
como método de medición me parece que puede ser bueno tenerlo, el tema está en como construimos el instrumento y complementamos la información para que ese instrumento sea un buen reflejo de lo que se está midiendo. Entonces, si el instrumento es bueno y va a ser llenado bien, sin martingalas…	4	2	6	17	El problema no estaría en medir ni controlar, sino en el mecanismo y en "como construimos el instrumento". Pareciera que el instrumento se ve como empresa colectiva, ya que en caso contrario se inventa la trampa y comienzan las distorsiones. Ojo, da ejemplo de mediciones que se hacían en estados bimestrales y como se abultaban las cifras.
Finalmente, durante estos 3 días en que se han analizado casos y se ha confrontado también con estos académicos que nos dan el conocimiento mas puro, se llega a nuevas soluciones que pueden diferir o ratificar lo que los jueces pensaban al inicio cuando usaban las clickeras. Entonces se revisan las soluciones de cada grupo, se vuelve a dar una opinión sobre cada caso y se termina el curso de esa manera. Entonces todos quedan satisfechos porque todo pasa muy rápido, es todo muy interactivo	5	1	1	3	Nuevos cursos son esencialmente interactivos, con mucho debate y agilidad. Existe conformidad con formato en que se construyen visiones de forma colectiva sobre los problemas judiciales que se enfrentan. En este ámbito se confrontan aspectos prácticos y teóricos. No hay énfasis solo en aspectos sustantivos, sino solo se entrega la base. Se debate en grupos y en plenario. Claramente esto va hacia la construcción de artistry y visión colectiva del rol judicial y además enabling,? Por lo menos en cuanto se discuten caminos y posibilidades como abánico, en lugar de imponerse una visión.
Siento que se debe orientar mucho más los cursos a la práctica judicial y eso es algo que se está haciendo ahora con el nuevo programa en que me ha tocado participar, asesorado por el Instituto Judicial de Canadá. En este programa la metodología es sumamente activa y participativa	5	1	3	6	Enseñanza práctica es vista como el paradigma y se ve q el nuevo sistema se orienta a eso, mediante metodología participativa se busca llegar a la práctica.. Esto da un carácter colectivo a la formación, ya que depende de nivel de diálogo y no solo del profesor
Creo que lo principal es que ha aportado algo así como un sello de calidad. Es decir, que certifica una calidad mínima de los jueces y en eso hay una diferencia respecto de antes	5	1	2	5	Rol es acotado a certificar un mínimo de calidad. No aporta en gran medida pero asegura un mínimo

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mas que tutores que puedan guiar de alguna manera discusiones o debates en estos ámbitos veo a personas como don Carlos como líderes ideológicos, que pueden ser seguidos por algunos jueces pero ello no es propiamente parte de las actividades académicas	5	1	2	12	Señala que se da influencia de ciertos líderes a través de la academia, lo que se califica como “no académico”. Refleja que hay un espacio en la academia, aunque no necesariamente bien visto? Es un espacio para la ideología pero la ideología se trata como algo externo a lo técnico y la educación parece ligarse únicamente a lo técnico
Mi experiencia en el curso en que pude participar fue excelente. Pudimos revisar después las evaluaciones del curso y fueron sobresalientes, lo que es poco usual, lo que revela que el curso y la nueva metodología fue bastante bien recibido	5	1	1	16	Satisfacción con nuevo sistema
lo que los jueces buscan son habilidades específicas respecto de ciertos aspectos prácticos que manejan como jueces, mas allá del conocimiento teórico que pueden adquirir en postgrados, diplomados o incluso personalmente, tomando un libro y leyéndolo	5	1	3	1	Enfoque que jueces buscan es práctico, no teórico sustantivo, como ha sido el énfasis.