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ESSAY

CHILE RECOVERS ITS DEMOCRATIC PAST: Democratization by Installment

Timothy R. Scully and Alejandro Ferreiro Y.†*

In a well known article describing the process by which countries become democratic, Dankwart A. Rustow argued that the most common experience involved a largely discontinuous, "step by step," transition;¹ democratization, as he phrased it, "on the installment plan."² This point has also been emphasized in the body of literature emerging from recent experiences of democratic transition in Latin America.³ Most recently, Guillermo O'Donnell has argued that the overall change from an authoritarian to a democratic regime may in fact consist of not one but two transitions: the first leads to the "installation of a democratic government," and the second to the "consolidation of democracy," or to "the effective functioning of a democratic regime."⁴

Authoritarian rulers are not generally known to relinquish their control over the state willingly. In the familiar words of Generalissimo Francisco Franco, the goal of a dictator under pressure to democratize is to leave key features of the authoritarian regime "tied down, and well secured" ("atado, y bien atado"). In the course of attempting to bring about a transition, it may well be necessary for democracy's proponents to enter into agreements that provide guarantees to authoritarian rulers and the forces who support them in order to bring about the installation of a democratic government (phase #1) but that are inimical to the effective functioning of a democratic regime (phase #2). In order to bring about the full "consolidation of democracy," therefore, it is often necessary to eliminate, sometimes one by one, non-democratically generated "tutelary powers" and "reserved domains" of authority and policy making powers.⁵

Chile's struggle to recover fully its democratic past is marked by similarly incremental efforts to reduce, and eventually eliminate, legacies of authoritari-

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1. Dankwart A. Rustow, *Transitions to Democracy: Toward a Dynamic Model*, Comp. Pol., Apr. 1970, at 337, 345.

2. *Id.* at 356.

3. O'Donnell and Schmitter (1986) *Transitions from Authoritarian Rule*. 4 Vols. Baltimore: Johns Hopkins University Press. See also Vol. 4, "Tentative Conclusions about Uncertain Democracies," pp. 37-47.

4. See O'Donnell, Chapter One in Mainwaring, O'Donnell, and Valenzuela, forthcoming, University of Notre Dame Press. See also Samuel Valenzuela, "Democratic Consolidation in Post-Transitional Settings: Notion, Process and Facilitating Conditions," *Kellogg Working Paper* No. 150 (1991). Valenzuela's analysis of the complex relationship between continuity and discontinuity between the first and the second transitions has been most useful for my own understanding of the process of transition in the Chilean case.

5. As Valenzuela notes, whereas tutelary powers claim of a right "to exercise broad oversight

anism after almost 17 years of military rule under General Augusto Pinochet. This article describes some of the most important legal and institutional mechanisms left behind by the Pinochet regime designed to block, or at least severely constrain, the consolidation of democratic rule in Chile. Specifically, we will focus on important institutional arrangements within the executive, legislative, and judicial branches of government adopted during the authoritarian period to serve as barriers to the full recovery of democracy in that country. We argue that, not unlike the process of transition in other countries, Chile's democratic consolidation will have to be accomplished in mostly unromantic, often bureaucratic, incremental steps; as Rustow suggested, democratization by "installments."

I. THE PROBLEM

On March 11, 1990, Chile celebrated the inauguration of its first democratically elected president in nearly two decades, Patricio Aylwin Azocar, thereby emerging from the longest and most brutal authoritarian experiences in history. Somewhat ironically, the legal framework for the democratic government was provided by the Constitution of 1980, a document devised by the country's former military rulers to insure the fundamental continuity of the authoritarian regime. Because of the failure of Pinochet's opponents to oust the dictator by extra-legal means such as massive social protests, the recent transition to democracy in Chile has taken place almost entirely within the ground rules established by democracy's opponents. Thus, the price Pinochet's opponents had to pay for a peaceful and constitutionally sanctioned transition to democracy has been high: multiple tutelary powers and reserved domains set out by both the 1980 Constitution and by legislation enacted by the military *junta* prior to the inauguration of Patricio Aylwin.

In many ways, the opposition to Pinochet had no choice but to accept the legal framework provided by the 1980 Constitution. After years of attempts at social and political mobilization aimed at destabilizing the dictatorship, the leadership of the major opposition parties from the center and the left determined that continued reliance on the immediate and full return to democratic rule would end in failure. By mid-1987, most of Pinochet's opponents had concluded that there seemed no real alternative but to accept *de facto* the constraints imposed by the military's constitution and attempt an incrementalist strategy of democratization from within the framework of the 1980 Constitution. Relying on the provision within the transitory articles of the 1980 Constitution that called for a national plebiscite in October 1988—an electoral instrument designed to legitimize the continued role of General Pinochet as head of state until 1997—the opposition mounted an extraordinarily successful electoral campaign to unseat the General. To their own amazement, and that of the military's, the opposition succeeded in using the legal framework dictated by the authoritarian regime to frustrate Pinochet's ambition to remain in office. The opposition's victory in the national plebiscite of October 1988 paved the way for constitutionally mandated presiden-

of the government and its policy decisions" in vaguely defined areas, reserved domains "remove specific areas of government authority and substantive policy-making from the purview of elected officials." See Samuel Valenzuela, "Democratic Consolidation in Post-Transitional Settings: Notion, Process and Facilitating Conditions," *Kellogg Working Paper* No. 150, pp. 8-15.

tial and congressional elections in December, 1989. However, during the fifteen months that separated these two events, the October 1988 plebiscite and the national elections of December 1989, the military junta was busy enacting legislation to leave key features of the authoritarian regime "tied down, and well secured."⁶

A central assumption of this article is that, in order to follow the path of Chile's democratic transition, it is crucial to understand the role played by key aspects of the legal legacy left by its authoritarian architects, especially as stated in the Constitution of 1980. Taken together, these provisions represented the necessary guarantees for crucial components of the authoritarian coalition, among them especially the right and the military, to tolerate a transition to a democratically elected government.

Our objective in this brief article is, therefore, fairly simple. We will set forth what we believe to be the central reserve domains established by the 1980 Constitution in the executive, legislative, and judicial branches of government in Chile. Whether or not Chile's current democratic government will succeed in exercising these tutelary powers and reserved domains, and thereby succeed in reestablishing the minimal conditions for majoritarian democracy remains uncertain. Until it does, however, the consolidation of democracy in that country will remain incomplete.

II. RESERVE DOMAINS WITHIN THE EXECUTIVE BRANCH

The 1980 Constitution provided for a decisive shift of powers and responsibilities from the legislative to the executive branch of government.⁷ In fact, the office of the presidency has not possessed the range of constitutional powers it currently enjoys since the late nineteenth century. Despite this shift, however, there remain multiple constraints on the executive office designed to limit the capacity of the president to govern. These include: 1) the relationship between the executive and the armed forces, 2) the relationship between the executive and local governments, and 3) the capacity of the executive to control the state bureaucracy and state enterprises. We will address briefly key features within each of these three problem areas.

A. The Armed Forces

Article 90 of the 1980 Constitution states that "The armed forces, composed only of the Army, the Navy, and the Air Force, exist in order to defend the nation, and are essential in order to *procure national security and to guarantee the institutional order of the Republic.*" This represents a fundamental change in the role assigned to the armed forces. Whereas the only reference made to the armed forces in the previous Constitution (of 1925) stated that "The armed forces are obedient and non-deliberative" (Article 22 of the 1925 Constitution),

6. All laws enacted by the military government were acts legislated by the governing military junta as authorized between March 11, 1981 and March 11, 1989 in transitory Article 8 of the 1980 Constitution. In fact, the military continued to enact legislation right up until the inauguration of President Aylwin on March 11, 1989.

7. For an account of the Pinochet regime's efforts to reinforce the power of the presidency, see Arriagada, 1984, especially pp. 176-185.

the Constitution of 1980 formally designates the military as guarantor of the institutional order enshrined in the Constitution.

Though there is no explanation as to how this new role is to be exercised, the 1980 Constitution creates the National Security Council whose purpose includes, in addition to insuring national security, examining all matters that may "gravely undermine the bases of the institutional system" (Articles 95 and 96). In carrying out their oversight responsibilities, the members of the National Security Council are empowered to demand all necessary information from any government official. Of the eight members who comprise the National Security Council, four are to be occupied by the heads of the Army, Navy, Air Force, and the National Police, and two others were named, indirectly, by General Pinochet before leaving the presidency.⁸ Pinochet's dominance of this body is enhanced by his creation of the Strategic Advisory Committee, an agency at Pinochet's personal disposition comprised of approximately 50 full-time staff persons whose public role is to assist the General to fulfill his duties as a member of the National Security Council. The agency is designed to keep watch on every aspect of national policy and serve as political advisor to General Pinochet.

The attempt in the 1980 Constitution to provide the armed forces with broad tutelary powers over the democratic government is also evidenced by the composition of several key state institutions. The National Security Council is charged with the responsibility for designating two of the seven members of the Constitutional Tribunal (Article 81). Four of the nine designated senators called for in the constitution must have previously occupied the head of one of the branches of the armed forces. In addition, each branch of the armed forces is guaranteed a spot in the multiple Regional Development Commissions provided for in the Constitution.

The 1980 Constitution is the work of the armed forces themselves, and they have sworn themselves to see that it is honored. As Major General Jorge Lucar, second in command of the Army after General Pinochet, has put it,

It is important to understand that a change of governments cannot constitute in any way a derailing of the many political, social, economic, and cultural advances the country has made. For those who seek to derail this process, the Army will always be there, decisively and with no reservations, to carry out the mission entrusted to it by the Constitution, and to guarantee that the trail already blazed with tranquility and confidence will carry us to a promising future.⁹

Though the Constitution stipulates that the heads of the armed forces are subordinate to the President, most critical element of that subordination, the power of appointment and removal, is absent a period of eight years after the transition to an elected government. The positions of each of the heads of the armed forces, and the entire command structure of the military, are constitutionally protected until 1997 (Transitory Article 8, in relation to Article 93). As

8. These articles were modified to some extent in a national plebiscite in mid-1989. The modifications appear in *La Epoca* of June 2, 1989, and the text incorporates these changes. See Valenzuela, 1991, p. 10.

9. *El Mercurio*, International Edition, Week of October 19-25, 1989, p.1.

a result, the same military leaders who occupied leadership within the governing *junta*, will continue to do so in democracy.

Before leaving the government, the junta enacted a set of legal provisions fixing the amount spent on the armed forces in 1989 (in real terms) as the minimal amount that can be allocated for the military in the future. Lest there be no misunderstandings, the law also states that funds to insure these levels of military spending must be provided automatically from the sales of copper by the state owned National Copper Corporation. Furthermore, elected government officials cannot determine the use of military budgets, the acquisition of armaments, and are barred from making changes in military doctrine or from changing in any way the curriculum in the respective Service Academies. Control over military intelligence is also left entirely in the hands of the military leadership.

The continuing presence of General Pinochet at the head of the Army, a unique feature of the Chilean transition, has been a major source of the difficulty of the Aylwin government during its first year with the Army. Though President Aylwin requested General Pinochet to resign "for the good of the country" shortly after winning the presidential election, the latter refused to do so precisely "for the good of the country."¹⁰ Whereas the other military branches, the Navy, the Air Force, and also the National Police, have adjusted their rhetoric and even much of their practice to the advent of a democratic government, the Army and its top leadership has been openly critical of the government. The army's hard-line stance has been especially visible in its continuing and vehement objections to the Aylwin government's attempts to investigate abuses committed during the period of military rule. For example, on December 19, 1990, while top leaders within the military, and even General Pinochet's son, were undergoing judicial and congressional review for financial misdoings during the Pinochet regime, the Army garrisoned its troops, precipitating widespread fears of armed intervention and rumors of a coup d'état.

In early March, 1991, President Aylwin made public the six volume report of the Rettig Commission, his blue ribbon commission investigating human rights abuses. The President publicly requested the armed forces to respond to the contents of the report, and specifically to charges that its members were involved in the deaths of more than 2,000 persons during the period of their rule.¹¹ On March 27, 1991, top officials of both the Army and the Navy publicly repudiated the findings of the Rettig report, and warned the National Security Council that "its conclusions could seriously jeopardize the national security." Days later, Pinochet's main civilian supporter and author of the 1980 Constitution, Jaime Guzman, was gunned down by unidentified assassins in the streets of Santiago. A slow but steady increase in political violence threatens to undermine the government's strategy to render Pinochet ineffective by publicizing the many abuses of power during the period of military rule.¹²

10. See *El Mercurio*, December 24, 1989, p. D1, for an account of the first meetings between Pinochet and President elect Aylwin. See also Valenzuela, 1991, p. 10.

11. The Commission confirmed the deaths due to "political violence" of 2,279 persons during the period of the Pinochet regime. 2,115 of these were attributed by the Commission to human rights violations on the part of the Pinochet government.

12. General Pinochet is 75 years old. The law holds that, upon completing 41 years of active

Whatever the immediate fate of Pinochet, it is clear that the transition to democracy in Chile is faced with the task of reasserting civilian authority over the multiple tutelary powers maintained by the military. To do this, the government must agree upon an acceptable set of institutional mechanisms with the leadership of the armed forces (and the political right) that safeguard the institutional autonomy of the armed forces while at the same time returning ultimate authority over the legitimate means of coercion to elected public officials.

B. Local Government

Of the more than 300 local and municipal governments in Chile, only 15 experienced a change in leadership due to the transition to a democratic political regime.¹³ All the remaining municipal governments, including all mayors and municipal councils, were elected according to a corporatist formula set forth in the 1980 Constitution wherein the supporters of the former authoritarian regime were practically guaranteed almost exclusive representation. As a result, the Independent Democratic Union (UDI), the rightist party most staunchly loyal to Pinochet, succeeded in placing its members as mayors in more than 200 municipalities throughout Chile.

The inability to control local governments has constituted a serious problem for the government. As a result of administrative changes enacted under the military government, municipal governments gained control of essential public services such as education, unemployment, and health benefits. Thus, with the loss of control over local government, vast resources that could potentially be used for political patronage are lost to the right and supporters of Pinochet.

The Aylwin government has sought an amendment to the constitution that allow for the direct election of all mayors and municipal councils. However, the right, which due to its nine designated senators maintains a majority in that legislative body, has repeatedly stated its unwillingness to permit the election of municipal governments. A bill was introduced on the floor of the senate on January 16, 1991, providing for the direct election of all mayors and municipal councils. Though the Chamber of Deputies, where the coalition forces of Patricio Aylwin's government enjoys a majority of 72 of the 120 Deputies, gave the measure the support of precisely three-fifths of the Chamber, in the Senate the bill received only 23 votes in favor,¹⁴ to 15 against and 3 abstentions. Since any change in the constitution with respect to municipal government requires the support of three-fifths in both chambers, the measure went down to defeat. Presumably, the leadership of the right is hoping to seize a more opportune political moment at some future date when the Aylwin government might not

service within the Army, a general must retire. At the request of the President of the Republic, a general may continue for 3 years beyond mandatory retirement. Since General Pinochet entered the army in 1933, he should have been retired in 1974. This year General Pinochet will complete 58 years of service. The Vice Commander in Chief, General Jorge Lucar is 16 years behind General Pinochet.

13. 15 mayors were named by President Aylwin to head the 15 largest and most important municipalities in Chile. The only exception was Iquique, which remained in the hands of Pinochet supporters due to the fact that it is the home of the strategic center of the army garrison commanded personally by General Pinochet.

14. These include the 22 Senators of the governing coalition, plus the vote of one senator designated by the Supreme Court, Ricardo Marin, who also supported the measure.

enjoy its current levels of popular support. Since any conceivable electoral outcome at the municipal level will almost certainly represent a loss of municipalities for the right, it can be expected that they will continue to oppose a change for some time to come.

C. State Bureaucracy and State Enterprise

1. State Bureaucracy

According to the "Law of General Bases of the State Administration" (Law No. 18,575 of the military junta),¹⁵ the Pinochet government froze into place the positions of all government functionaries—even those who previously had held only temporary positions—whose jobs did not require the "complete confidence of the President of the Republic." Of the 140,000 public functionaries in Chile, only 1,250 have been named directly by the government of Patricio Aylwin. To this must be added approximately 150 public officials named by the Aylwin government to staff key positions within the 15 municipalities under its jurisdiction. In sum, no more than 1,500 public functionaries of a total of 140,000 (or about one percent) have been appointed by officials within the Aylwin government.

Though such a measure can succeed in curbing temptations toward excessive patronage politics as was the case in the Argentine transition under Alfonsín, it also resulted in the creation of yet another reserved domain within the state apparatus, a domain that potentially unresponsive to the authority of the new government. For example, there are 118 state employees in the politically sensitive Ministry of Justice, the Ministry charged with, among other things, the problem of human rights abuses in Chile during the Pinochet years. Of these, President Aylwin can appoint five employees, among them the Secretary and Undersecretary of Justice. The rest, the 113 public functionaries of the Ministry of Justice, were all named by General Pinochet and members of his inner circle.

2. State Enterprise

Between 1984 and 1989, 32 state companies were sold to interests in the private sector. According to a report by President Aylwin's Minister of the Economy, Carlos Oninami, the State Development Corporation (CORFO) lost a total of over 2.2 billion dollars as a result of these sales.¹⁶ The report states that critical state enterprises, such as the national telephone company and the national electric company (ENDESA), were acquired by private interests through irregular means and numerous "sweetheart" deals.¹⁷ In addition, state companies were sold free of debt, which meant that the State Development Corporation will have to pay almost 2 billion dollars in additional debt repayments over the next 14 years. The departing Pinochet regime also created an autonomous Central Bank

15. Laws governing the state administration are considered "organic" constitutional laws (*leyes organicas*), and require a majority of four-sevenths in both houses of Congress in order to be modified.

16. Steve Anderson, *Chile Information Project*, from *LA NACION*, and *EL MERCURIO*, March 5, 1991.

17. *Id.*

that has control over monetary, credit, and exchange policies, as well as an autonomous oversight Council to keep an eye on radio and television licensing and programming. Pinochet named the boards of directors to serve lengthy terms.

Since the 1980 Constitution contains very strong mechanisms to safeguard the rights of private property, it is almost inconceivable that these assets will be recovered. The Supreme Court has adopted a very narrow interpretation of Article 19 of the 1980 Constitution which states that "[t]he Constitution protects the right to private property of all persons."¹⁸ Expropriation is only possible by law specifically "authorizing expropriation by virtue of public utility or national interest. . . . In all cases the owner will have a right to indemnification for any alienated property," the total sum being fixed by common agreement or adjudicated by a decision of the appropriate court.¹⁹ Given the interpretation by the Supreme Court, any future expropriation must be renumerated at market value and with full payment in cash.

There can be little doubt that, due to these and other reserved domains, the Aylwin government has labored under difficult conditions to govern. Yet, despite these conditions, the government has experienced significant legislative successes of its own in its first twelve months. Among the most important of these have been tax reform legislation involving an increase in value added to personal income tax that will add 580 million dollars (or an additional 14.2 percent of the total budget) to the national treasury annually.²⁰ In addition, the Aylwin government pushed through needed labor reforms that permit the creation of national unions and extend certain protections to workers.²¹

Still, any legislative success enjoyed by the Aylwin administration has necessarily required the support of important sectors of the right in order to be approved by the Senate. Thus, the same leaders of the political right who voted for Pinochet in the plebiscite in October 1988, and for his heir Hernan Buchi in the elections of December 1989, are those who today possess a veto over the legislative efforts of the Aylwin government. It is the continuity with the authoritarian regime that these tutelary powers and reserved domains represent, and especially those within the legislative branch itself, that provided the necessary condition for a transition to democratic government in Chile.

III. RESERVED DOMAINS WITHIN THE LEGISLATIVE BRANCH

The importance of the legacies left behind by the Pinochet regime would be greatly diminished if the ample electoral majorities won by the political coalition led by Patricio Aylwin, called the Concertation for Democracy, could have been duly translated into congressional seats. If such had been the case, reserved domains could have been eliminated relatively quickly by way of legislative reform. However, two key mechanisms, an uneven electoral formula and the existence of designated senators, have prevented the share of votes obtained by political forces from being fairly reflected in the composition of the membership of Congress.

18. CHILE CONST. art. 19 (1980).

19. *Id.*

20. Law No. 18,985.

21. Law No. 19,010 and 19,049.

A. The Electoral System

The electoral law established by the Pinochet regime provided that, for the elections of both deputies and senators, each congressional voting district (or region in the case of senators) would elect two candidates. Parties were allowed to form electoral alliances, or form joint lists," in order to maximize the vote obtained. In order for a single list to win both seats in a given voting unit, the combined total of their nearest competitors. This system theoretically permitted a list obtaining minority support (33.4 percent or more) to win one half of the seats.

Owing to the effects of this electoral formula, parties in opposition to Pinochet obtained 72 deputies (60 percent of the Lower Chamber) with 57 percent of the vote, while the right won 48 deputies (40 percent) with 43 percent of the vote. In the Senate, opposition parties won 22 seats (48 percent) with 56.3 percent of the vote, whereas the right gained 16 seats (34 percent) with 35.4 percent of the vote. Though the electoral formula was clearly designed to systematically favor partisans of General Pinochet, it should be pointed out that the electoral formula could have resulted in (and was probably intended to produce) far more grave distortions than actually resulted in the December 1989 elections.

B. Designated Senators

The cornerstone of the continued power held by elements of the authoritarian regime over the legislative process in democracy rests in the constitutional provision for the designation of 9 senators in addition to the 38 who were to be elected.²² According to Article 45 of the Constitution, four of these "institutional" senators must be chosen by the National Security Council from among the ranks of retired Commanders in Chief of the Army, Navy, Air Force, or National Police; two are chosen by the justices of the Supreme Court from among retired justices; a third must be chosen by the Supreme Court from among retired Attorney Generals of the Republic; one is to be chosen by the President of the Republic from among the ex-Rectors of an officially recognized university; and finally, the President selects one from among former cabinet ministers. Fifteen days after the Pinochet regime lost the December 1989 elections, the names of those designated to hold these positions were announced to the public. In every case, those chosen to occupy these positions were public supporters of General Pinochet, and most had served in some official capacity in his government.

During the first year of the Aylwin government, it became clear why Pinochet had so stubbornly refused to bow to public pressure to eliminate this feature of the regime during the months of negotiations after the plebiscite. In almost every instance, these eight senators have acted as a solid parliamentary bloc to join with parties on the right, the National Renovation (RN) and the Independent Democratic Union (UDI) to provide a majority (and thus a veto) in the Senate.

22. The 1980 Constitution originally provided for only 26 senators to be elected, in which case the nine designated would have represented 26 percent of the total. However, as a result of constitutional reforms approved by national plebiscite in July 1989, the number of elected senators rose to 38, which reduced the percentage of designated senators to 19 percent. Since General Pinochet chose to continue as head of the Army instead of exercising his option of becoming a senator for life, the total number of designated senators fell to 8, or 17 percent of the total.

The capacity of parties within the Concertation to respond effectively to the retention of tutelary powers and reserved domains of the prior regime would have been greatly increased without the presence of designated senators. Without the presence of designated senators, parties loyal to President Aylwin's political alliance would control 60 percent of the seats in the lower House, and 58 percent of the Senate, permitting the government to enact much of the legislation necessary to bring about the effective functioning of a democratic regime.²³

Though it is unquestionable that the presence of designated senators has given the right veto power over every legislative initiative coming out of the Aylwin government, the overall political consequences of this institutional arrangement have not been completely negative. The opposition to the Aylwin government could have adopted an openly and completely hostile posture toward the legislative initiatives of the democratic government. Instead, during the first year of the Aylwin government, the right has demonstrated a pragmatic attitude toward the proposals made by the government, supporting government initiatives that do not seem to threaten directly their interests. The occasionally cooperative posture of the right can be explained at least partly by the overwhelming popularity Patricio Aylwin's government has enjoyed during its first year. Opinion polls throughout the first twelve months showed popular support for the government running at over 70 percent. In such a climate, total opposition may haunt parties of the right at election time. It is quite possible, however, that a future drop in the popularity of the Aylwin government, an eventuality that seems all but inevitable, may provide the right with reason enough to enter into a more truculent form of opposition to governmental legislative initiatives.

IV. RESERVED DOMAINS WITHIN THE JUDICIARY

Before concluding, we focus on three problem areas within the judiciary: the Supreme Court, the Constitutional Tribunal, and the problem of human rights. Throughout the period of the military regime, the judiciary in Chile failed to provide protection from widespread abuses of civil and human rights. The same judiciary that systematically denied justice to Chilean citizens during the dictatorship is now charged with overseeing justice during Chile's recovery of democracy. If Chile is to consolidate democratic rule, it is imperative that the judiciary, like the executive and legislative branches, be freed of the legacies left by the authoritarian past.

A. The Supreme Court

It might be argued in defense of the behavior of the judiciary that its duty consists only in upholding the law of the land as mandated by the competent legislative authority (authority which, during the Pinochet regime, rested in the hands of the military junta). However, given an opportunity to interpret the meaning of the law, the Courts took practically no exception to the interpretation offered by the advocates of the Pinochet government. The reasons for the passive

23. Not all changes would have been possible under these circumstances. To change the Constitution requires 60 percent, or 66.6 percent of the vote of each of the Houses of Congress, depending on the Article being amended. Therefore, constitutional reform would have required the support of at least some members of the opposition.

attitude of most justices towards abuses during the period are surely many and complex. Among them, however, is the general ideological affinity of the justices with the overall social and political goals of the Pinochet regime. The Allende government had found itself in permanent conflict with the Supreme Court, and many justices of that institution probably welcomed the events that followed the 1973 coup. Recent opinion polls reveal that public confidence in the Court is severely eroded. One such poll taken by the Institute for a New Chile indicates that public confidence in the Supreme Court ranks at the bottom of a list of nine institutions, together with the Army and entrepreneurs.²⁴

The independence of the Supreme Court from the regime was compromised by the provisions of the 1980 Constitution. It provides for the membership of the Supreme Court to be chosen by the President from among three candidates selected by current members of the Court. Consequently, twelve of the Court's seventeen justices were chosen by General Pinochet. In addition, after losing the national plebiscite of October 1988, Pinochet offered 14 million pesos (44,400 U.S. dollars), together with the normal pensions, to any justice of the Court who would agree to retire, thereby opening a place for younger, more aggressive appointees.²⁵ Pinochet's was a limited offer; justices had only three months to take advantage of it, or take their chances with the incoming government. Six justices accepted Pinochet's offer of early retirement, allowing Pinochet to fill six vacancies on the Supreme Court during his final months in office.

Any improvement in the composition of the Supreme Court must wait until new vacancies are created by attrition which, given the recency of Pinochet's appointees, promises to be a very long time. The other alternative is to "pack the bench," increasing the total number of justices by way of a constitutional reform. However, the practicality of this latter alternative, is diminished by the same problem all reforms requiring legislative consent confront: it would require the cooperation of the right in Congress. Again, it is unlikely that the right will support any measure that jeopardizes the conservative and pro-authoritarian nature of the Court. Here we return to the central dynamic of the Chilean transition. On one hand, the right can support further democratization at the risk of losing key areas of reserve power and influence. On the other, the right can support the maintenance of such enclaves, and risk an erosion of popular support at the polls at some future date.

B. The Constitutional Tribunal²⁶

Like many countries in continental Europe, judicial review in Chile is a function of an independent body called the Constitutional Tribunal. This body is comprised of seven members, six of whom have been unswerving political allies

24. The other institutions included in the survey were the government, the Navy, the Air Force, the Police, the Congress, and the Catholic Bishops. See "Indicadores Politicos de Opinion Publica," Instituto Para el Nuevo Chile, January, 1991.

25. The exchange rate in July 1990 was 316 pesos per dollar. The monthly salary of a Supreme Court justice was 440,000 pesos, or 1,392 U.S. dollars. Pinochet's offer represented three years of salary, plus pensions.

26. Though this body is technically considered to be independent and not part of the judiciary, it seems appropriate to include this constitutional mechanism as though it were for the purposes of this exposition.

of General Pinochet. The Tribunal is ultimately responsible for insuring that the laws and decrees issued by both the legislature and the executive branches are consistent with the Constitution. Its decisions are final and cannot be appealed. Though the Tribunal has exercised its constitutionally sanctioned veto power prudently, it poses yet another extremely potent tutelary power at the heart of the government. Toward the end of the first year of the Aylwin government, for example, the Constitutional Tribunal found several articles of the regulatory legislation proposed by the government for the fishing industry to be unconstitutional. Consequently, the law was irrevocably declared null and void immediately. While the legal merits of this specific decision are debatable, the power represented by the Tribunal is not.

C. Human Rights

One of the most difficult problems confronting the Aylwin government is the legacy of human rights abuses left by the Pinochet regime. On April 19, 1978, after five years of authoritarian rule, the military regime enacted a law granting general amnesty for any violations of human and civil rights committed during this period, the period of most widespread abuse.²⁷ Challenges to the constitutionality of the law have been rejected by the Supreme Court, which has even refused to allow investigations of possible human rights abuses during that period to be carried out by its own members.

Though abuses that occurred after 1978 can be brought to trial, the courts have been almost entirely ineffective in prosecuting such cases. This is partly due to the fact that, by law, most cases of human rights abuses must be brought to trial within military, not civil courts. In some of the most sharply contested legislation dictated by the Pinochet regime (Laws No. 18,314 of 1983 and No. 18,342 of 1984), it was decided that all cases involving in any way a member of armed forces or police, as either victim or perpetrator of a crime, could only be tried by the military itself. Thereby, the fox is once again left keeping watch over the chickens, and justice in human rights abuses remains for all intents and purposes, paralyzed.

Cognizant of the need to respond in some way to the clamor for justice for the many victims of human rights abuses during the dictatorship, President Aylwin named a blue ribbon commission in May 1990 composed of recognized jurists representing a broad cross-section of political opinion in Chile. In a stirring address to the country in early March, 1991, Aylwin released the report of the Rettig Commission to the public. In its six volumes, the report details the disappearances of over 2,000 persons during the period of the dictatorship, and provides an officially sanctioned testimony of the truth about what really occurred in terms of human rights abuses in Chile from September 11, 1973 to March 11, 1990. Since the release of the Commission's report, the reaction from many sectors of Chilean society has been to publicly acknowledge the existence of abuses, and to call for national peace and reconciliation. However, those who formed the core support for the Pinochet regime, the armed forces and the

27. The law of amnesty, No. 2,191, explicitly exempted the Letelier case from the protection of the amnesty legislation.

Independent Democratic Union party, have refused to acknowledge any wrong doing. In fact, as mentioned earlier, the president of the Independent Democratic Union, Jaime Guzman, was assassinated several days after publicly denouncing the findings of the Commission.

The dilemma of human rights abuses from the authoritarian period and the minimal requirements of justice cannot be considered resolved by the publication of the findings of the Rettig Commission. However, continued improvement of fragile relations with the armed forces depends to a great extent upon how the Aylwin government handles the next step. It is probable that political imperatives will dampen the desire for full retribution. It remains to be seen whether the Aylwin government will be able to balance the requirements of justice with the conditions for continued political stability.

V. CONCLUSION

The full recovery of democracy in Chile is beset by institutional arrangements left behind by the military regime of General Augusto Pinochet. These legacies are carefully designed to protect former military rulers, and those who backed them. Though Pinochet was unexpectedly ousted from the presidency he coveted by the terms of the very Constitution written to guarantee his continuation until 1997, the legal formula provided by the 1980 Constitution provides multiple obstacles for the consolidation of democracy.

There are many good reasons to hope that Chile will continue to recover its democracy, step by step. The reconstitution of Chile's strong political parties as the principal arena for conflict mediation, and a new found disposition among a broad range of party leaders to encourage moderation and consensus, suggests that the authoritarian experience was not without its lessons for Chilean politicians. The distribution of the electorate after Pinochet gives further reasons for hope, especially on the right. Since their precipitous electoral decline in the early 1970s, the right has experienced considerable rebirth. The outcome of the general elections in December 1989 provided the conditions for the political leadership of the right to drop its sometimes ambiguous (at best) attitude toward democracy and play fully by the rules of competitive politics.

Even taking into account the distorting effects of the electoral regime adopted by the Pinochet government, the level of electoral support for parties of the right in the December 1989 elections was considerably higher than it had been in 1973. The combined list of both the National Renovation party and the Independent Democratic Union party in the congressional elections, together with other successful candidates on the right, reached slightly more than 40 percent. This figure was almost double that obtained by rightist parties in the 1973 election, when they obtained just over 20 percent (21.3 percent) of the total vote.

This renewed electoral strength of the right provides potentially auspicious conditions for the gradual reduction of tutelary powers and reserved domains, for it may mean that the political supporters of Pinochet no longer need to rely on extra-democratic means. If these new conditions are matched by deft political craftsmanship on the part of the Concertation government of Patricio Aylwin, then it is possible that Chile will succeed in recovering fully, albeit by "installments," the effective functioning of a democratic regime.

