

The Neglected Stepchild: Military Justice and Democratic Transition in Chile

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Introduction

IN THE COMPARATIVE LITERATURE ON DEMOCRACY, CHILE IS OFTEN IDENTIFIED AS A LATIN American success story (see, for example, Carothers, 2002: 7). A key component of this alleged success has been a particularly effective rule of law (Galleher, 1988: 185). Along with Costa Rica and Uruguay, Chile is usually categorized as a country in which generalizations about Latin America's dysfunctional judiciaries and lack of respect for the law do not apply (O'Donnell, 1999). Furthermore, since Chile's democratic transition, the governments of Aylwin (1990 to 1994), Frei (1994 to 2000), and Lagos (2000 to the present) have enacted significant judicial reforms that have been praised by observers as being unusually coherent and effective (Prillaman, 2000: 137–161).

This article will challenge the conventional wisdom about judicial reform in Chile. The characterization of this reform as a success can only be made by ignoring the issue of military justice, a justice system that affects many citizens. It is important to emphasize that the Chilean military justice system lacks certain elements of other court systems, such as the independence and autonomy of judges. In fact, its purpose is less the administration of justice than the protection of the armed forces' interests in hierarchy, discipline, and order. As long as military justice remains in

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its present form in Chile, it serves as a barrier to the creation of a democratic rule of law, thus damaging the prospects for democratic deepening.

In Chile, despite important advances in other areas of the legal system, an enlarged and insulated system of military courts still rewards the armed forces with special prerogatives that violate the principle of equality before the law. This court system is partly a legacy of the Pinochet regime (1973 to 1990), and partly a legacy of longer-term state-society interactions. Section I analyzes the importance of military justice to democracy. Section II describes the current organization, jurisdiction, composition, and procedures of Chilean military justice, pointing out how some of its features are incompatible with the principles of civilian supremacy over the military and citizens' equality before the law. Section III advances an argument that explains that outcome.

I. Military Justice and Democracy

Military courts constitute the oldest, and often most archaic, court system in many states. Unlike their contemporaneous counterpart, ecclesiastical courts, they have rarely been abolished. In most countries they survive in the contemporary era, although typically with more limited jurisdiction than in the past. Their origin lies in the attempts of rulers to impose discipline on members of their own armed forces.¹

In such systems, the disciplinary function takes precedence over the ideal that courts be impartial and independent, because the military hierarchy is at the same time a party to and judge of the case. Similarly, military courts are usually not well equipped or capable of judging crimes committed by their own personnel against other soldiers and civilians. When it comes to restraining the violence of its own armed force, military justice is tantamount to self-policing.

Unlike more modern court systems, which create a cadre of long-serving, often almost irremovable judges who are thereby supposed to be separate and independent from the rulers of other state institutions, there is no clear separation in military courts between the hierarchy of the military as an institution and the judges who serve, usually temporarily, in military courts. Typically, military court judges are active-duty officers and enlisted personnel, temporarily assigned to the court, who answer to commanding officers who themselves may have an interest in the outcome of the case being judged.

Military justice contains a pre-liberal vision of justice that antedates Montesquieu's separation of powers, because it embodies the principle that "who commands may judge," and mixes the administrative-disciplinary power of the commander-in-chief with penal power. In its very structure, therefore, military justice lacks an important element that can serve to protect the rights of the accused in civilian court systems.

Fascist regimes that arose in Europe between the world wars generally expanded the jurisdiction of military courts. This can be seen most clearly in Germany, where

the Weimar Constitution of 1919 curtailed the jurisdiction of military justice except in time of war and on board ships (article 106). With the rise of Nazism, military justice was reestablished and expanded. Military justice was again restricted after the end of the Third Reich in Germany, and in 1985 the German Parliament awarded compensation for surviving victims of military justice on the grounds that the verdicts constituted an "obvious injustice."²

In Italy, the fascist regime also considerably expanded the jurisdiction of military justice, although not to the extent that it was in Nazi Germany; in the postwar period, the Constitution of 1948 (article 103.3) restricted it again. A similar process of expansion and contraction of military justice can be seen in the history of Spanish fascism. The fascist dictatorship expanded the jurisdiction of military justice to include common crimes of military personnel and some crimes of civilians. After the demise of the Franco regime, the Constitution of 1978 limited military justice jurisdiction to the military sphere and states of siege.³ Today in Spain, common crimes of military personnel are tried in ordinary courts, and civilians can only be tried in military courts in the rare cases in which they have participated with military personnel in a military crime.⁴

If fascist regimes have often found military courts to be convenient tools of repression and bellicosity, social democratic regimes have sometimes found them to be entirely dispensable. The Swedish government, for example, abolished military justice in peacetime in 1949. Military crimes were added to the civilian penal code, but applied only to military personnel. Members of the Swedish military from then on were judged in civilian courts for both military and civilian crimes; military courts were preserved only for the rather unlikely contingency that Sweden goes to war.⁵

Unfortunately, this sensible approach has not been widely emulated. In Latin America, for example, the advent of military regimes in the 1960s and 1970s led to the widespread use of military courts to prosecute those deemed to be threatening to "national security." For example, the Chilean military regime used military courts to prosecute alleged subversives. Once they began to operate, military courts gradually acquired more power and a larger jurisdiction.

Therefore, one of the most relevant indicators of a democratic civil-military relationship is the existence of a clear institutional separation between civil and military jurisdiction (Rice, 1992). Stepan (1988) suggests that countries in which civilian politicians are able to reduce military jurisdiction and in which civilians are not subject to judgment in military courts are more democratic than their counterparts, where such reforms have not taken place.

For this reason, in democratic countries civilians in peacetime cannot be tried in military courts, which are exclusively for members of the armed forces accused of military crimes, i.e., crimes by military personnel that have to do with their function in the military (desertion, disobedience, the theft of military resources) rather than common crimes such as murder, rape, and the theft of nonmilitary property.⁶ This is

not the case in Chile. In general, the less democratic the country, the more expansive the jurisdiction of military justice. Like the proverbial canary in the coalmine, the vitality of civilian court jurisdiction *vis-à-vis* its military counterpart is an indicator of the larger political environment. It can be taken as a sign of the health of democracy—perhaps not an infallible sign, but one that is highly revealing.

Nevertheless, military justice is often used as an instrument of authoritarian social control over civilian populations. For example, according to a Chilean government commission,⁷ a factor in the abuses committed during the Pinochet era was the military penal code. Many of its articles facilitated the violation of the human rights of thousands of Chileans.

In addition, the concept of the rule of law includes the ideal of equality of all citizens before the law. This is not attained when military justice has an expansive definition of military crime and judges civilians. Under these circumstances, military justice serves to constrain those who oppose the dominant martial values of the moment, rather—as we have pointed out before—than administer justice. As Shapiro (2003: 3) writes, “democracy is better thought of as a means of managing power relations so as to minimize domination.” Whoever mentions domination has an obligation to reflect on military justice and the need to minimize the state’s power, reducing its abuses.

II. Features of Chilean Military Justice

Chilean military courts were an important instrument of the political repression carried out by the Pinochet regime (1973 to 1990). Although military courts had jurisdiction over civilians before military rule, trials of civilians in military justice were rare (O’Keefe, 1989: 44). The Pinochet regime expanded military court jurisdiction and prosecuted thousands of civilians, first in “war-time” tribunals⁸ and then, after 1978, in peacetime courts for crimes such as violations of the 1972 Arms Control Law, membership in various banned organizations, the propagation of “subversive” propaganda, and the like.

This use of military courts against the authoritarian regime’s political enemies has left important legacies for Chile’s contemporary democracy. These include an exceptionally wide jurisdiction for military justice, a court system in which military hierarchy trumps the independence of judges, procedures that favor the prosecution more than it does civilian justice, and the widespread prosecution of civilians. These issues will be discussed in turn.

Unlike most countries of the world, in Chile, military courts have jurisdiction over civilians who commit certain crimes. Article 3 of the Military Justice Code spell these out: crimes against the sovereignty of the state or the interior or exterior security of the state, and crimes covered in other codes and laws when they are committed by military personnel, or military personnel and civilians acting together.

This wording comes very close to including all crimes committed by military personnel in the category of military crimes. In such a conception, military courts

are special courts to attend to crimes of the members of a specific corporate body, rather than courts to judge a specific type of crime. In practice, military prosecutors (*fiscales*) have broad discretion in the definition of military crime and thus in deciding whether a crime will be prosecuted in military or civilian courts. A case of a civilian robbing a civilian, for example, could go to a military court if the alleged robbery took place on a military base. Similarly, rapes can be prosecuted in military court if the alleged perpetrator is a member of the military.⁹

Military justice jurisdiction is expansive for reasons beyond the broad and vague definitions of the crimes listed above. The 1980 Constitution makes no mention of the limits of the jurisdiction of military justice, maintaining the discretionary power of the military prosecutor (*fiscal*) referred to above (O'Keefe, 1989: 44). Furthermore, some crimes are specifically assigned to military courts, despite strong reasons for believing that civilian courts would be more appropriate and neutral venues. Military draftees who refuse to serve in the military, for example, can be tried in military courts.¹⁰ In this instance, the military is simultaneously prosecutor, judge, and interested party in a case against a draft evader.

Other definitions of crimes enable the military to use military justice as an offensive weapon against real or perceived enemies. Article 276 of the Military Justice Code, for example, makes it a crime for anyone, even a civilian, to say or write anything that will provoke "disorder" or "confusion" (*alboroto*) in the armed forces, or induce military troops to indifference (*disgusto*) or tepidness (*tibieza*) in their duties. Similarly, article 284 of the Military Justice Code makes it a crime for anyone, even a civilian, to offend or injure, by spoken or written words or any other means, the armed forces and its various units or one of its members. Both articles have been used to prosecute lawyers, journalists, and political figures in military courts for the "crime" of disparaging the armed forces, including the uniformed police or Carabineros.¹¹ In addition to granting the military the right to prosecute its critics in its own court system, these two articles are serious limitations on the freedom of expression in Chile.¹² Because of them, the Organization of American States' special rapporteur for freedom of speech declared that Chile has harsher constraints on free speech than any other Latin American country besides Cuba (Agüero, 2002: 27).¹³

However, the incompatibility between the current system of military justice and a democratic rule of law is most obvious in the organization of the courts themselves. At the first level of Chilean military justice, the trial takes place on a military facility and is not open to the public.¹⁴ The judge is the local commander, who is not required to have any legal training. Although the commander is advised by a lawyer (*auditor*), he can completely ignore the *auditor's* advice and make his own decisions accordingly (article 20 of the Military Justice Code).

The second level of military justice is an appeals court called the Corte Marcial, located in Santiago.¹⁵ This consists of five judges: three military (one from the Army, Carabineros, and Air Force) and two civilian judges. The civilian judges are

chosen annually by lottery from the civilian Court of Appeals in Santiago. Military judges serve for three years, but are active-duty officers during their time on the bench. Unlike the judges at the first level of military justice, they have legal training, but they have neither the independence nor the security of tenure of their civilian counterparts. It is unrealistic to expect military judges in these circumstances not to be influenced by the chain of command of which they are a part. Judgments at the second level are majority votes, and it is not uncommon for the vote to be three to two: the three military judges against the two civilians.

At the third level, the judgment is made by the Supreme Court with the added participation of the Auditor General of the Army (*Fiscal General de Ejercito*) in all cases coming on appeal from a lower military court.¹⁶ Chile therefore lacks the equivalent of Brazil's Superior Tribunal Militar or Military Supreme Court. In general, Chile's system is more insulated from the civilian judiciary than Brazil's system is, retaining a totally military character at the first level, and lacking the civilian career judges (*juizes auditores militares*) that exist in the Brazilian system. The latter are trained in the law, but they are outnumbered in the court by military officers who are not.¹⁷ Nevertheless, no equivalent of the career civilian judge exists at the first level of the Chilean military justice system. The significance of this insulation can be appreciated when one considers the procedures that exist within the system.

At the first stage of a military court investigation, the prosecutor or *fiscal* has 40 days to formulate a case by gathering evidence and witness testimony. But the judge (the *fiscal*'s commanding officer) can extend this time limit according to circumstances. If the prosecutor's investigation exceeds 60 days, the investigation can be made public "when that is not prejudicial to the success of the investigation" (article 130 of the Code of Military Justice). This wording gives enormous discretion to the judge and prosecutor in the military court system, and means that the investigation can be carried out in secrecy.¹⁸

Normally, the defense lawyer in a military court trial only receives the prosecutor's investigative report when it is presented to the court. She or he then has a mere six days to respond to the charges and present a defense. This tremendous inequality in the amount of time that can be devoted to the prosecution report, as opposed to the defense, seriously biases military court trials against defendants. In addition, the military prosecutor has the power to decree the imprisonment of persons believed to be the authors, accomplices, or concealers of crimes in the case (article 136 of the Code of Military Justice). This prosecutorial power can and has been used to intimidate witnesses. However, this power tends to be wielded down the military chain of command, but not up. The *fiscal* is usually a captain or major and is bound to some extent by hierarchy—he cannot prosecute a general, for example.¹⁹

Another problem for defense lawyers in military justice arises from the way in which the investigative part of the trial (the *sumario*) is conducted. The *sumario* is supposed to take 40 days, but the military court judge can prolong this period

indefinitely, thus hindering the defense lawyer's ability to acquire additional evidence. In cases involving the Carabineros, defense lawyers face another obstacle. The police themselves control the gathering of evidence in such cases. In the words of one specialist on the subject, this is a factor in "inhibiting the chances for a transparent process" (Fuentes, 2004: 200).

If military justice were only applied to military personnel, the implications of its jurisdiction and procedures would be less significant for Chilean democracy than they actually are. However, Chilean civilians are routinely prosecuted and convicted in military courts, and evidence suggests that they may even be a majority of those convicted. According to Prillaman's (2000: 140) study of judicial reform in four Latin American countries, "observers noted by the late 1980s, approximately 95% of all criminal cases in Chile were tried in military rather than civilian courts." In a study of Chilean military courts, Pereira Fernández (1993: 62–66) examined court records in and around Santiago in 1970, 1980, and 1995. In 1970, of those convicted (*inculpados*), 34% were civilian and 63% were military (for three percent of the defendants this information was missing). In 1980, only 33% of those convicted were military, while 57% were civilian (with information missing for 10% of the defendants). In 1995, five years after the democratic transition, the figures from 1980 had changed only slightly: 37% of those convicted were military, while 55% were civilian, and seven percent were of unknown background.²⁰

The pattern of crimes prosecuted between 1970, 1980, and 1995 also changed. In 1970, the Arms Control Law did not exist, and almost half of all charges (42%) were crimes internal to the military — infractions of military duty and honor. Under the military regime, military courts turned outwards toward regime opponents. In 1980, violations of the 1972 Arms Control Law accounted for 31% of all convictions. Yet, only seven percent of defendants were convicted for verbally or physically assaulting police officers (*maltrato a carabinero en servicio*). After the democratic transition, the military courts shifted again, from being an offensive instrument against civilians, to being a defensive weapon to protect military and police personnel from civilian interference and complaints, particularly allegations of human rights abuses. In 1995, violations of the Arms Control Law accounted for only one percent of all convictions. Assaults on police officers, however, increased to include 31% of all convicted defendants. Crimes against military property also increased in this period from three percent to nine percent (Pereira Fernández, 1993: 62–66).

A more recent analysis of Chilean military justice examined all cases in which citizens alleged police violence between 1990 and 1997. In over 90% of the almost 800 cases examined, the military court judge closed the case because he found no evidence of a crime or could not identify the author of the offense. In only 4.7% of the cases did the judge convict a member of the police, and the sentences in these cases tended to be the legal minimum. Yet in cases in which police officers and citizens alleged violence on the part of the other (almost 900 cases), military

judges usually sided with the police officers. In these trials, only 0.2% of police officers were sentenced, in contrast to 11.7% of civilians (Fuentes, 2004: 201). These figures show how the military courts defend the corporate interests of the military (both the armed forces and the Carabineros).

In summary, military justice constitutes an authoritarian enclave within the Chilean state despite the transition to democracy. Although the Pinochet regime was not governed by a democratic rule of law, much of its legality is still intact, and nowhere more than in military justice. When the Pinochet regime sought to close the hundreds of cases involving the disappeared, it was military justice that invoked the 1978 amnesty to accomplish that mission. Furthermore, those found guilty in military courts under the authoritarian regime still have that conviction on their records, even in nonviolent cases involving expressions of opinion and membership in organizations that would today be perfectly legal. These convictions can prejudice the chances of former defendants of getting employment with some private employers.²¹ More important, civilians involved in conflicts with the military and the police must face justice in a system managed and often manipulated by the military and the police themselves. Such a system violates the democratic principles of civilian supremacy over the military and equality before the law.

III. Toward an Explanation of the Endurance of Chile's Military Justice System

If accounting for the anomalies in Chilean military justice is relatively simple, explaining why the system has not been reformed is not. The opposition politicians involved in Chile's democratic transition were well aware of the nature of military justice and its threat to the project of constructing a more democratic and accountable legal system. Furthermore, Chile has made considerable progress in reforming various aspects of the civilian judiciary. Explaining the significant case of the non-reform of military justice requires going beyond actors' statements of intentions and beliefs. It requires the analyst to read between the lines to discern the trade-offs involved in the political negotiations that took place during and after the democratic transition, their institutional contexts, and the often-unstated premises of the ensuing bargains.

A multiparty coalition known as the Concertación,²² which has formed all three post-transition governments in Chile, has remained united on many issues and has targeted the judiciary as in particular need of reform. The Concertación saw the civilian judiciary, especially the Supreme Court, as having been complacent and remiss under the military regime (Boeninger, 1998: 445). Even the military failed to strongly defended it. Therefore, the executive, working gradually and in coordination with a wide array of nongovernmental organizations,²³ political parties, and government ministries, has prioritized and successfully accomplished what its advocates describe as the "reform of the century" in the judicial sphere.

Concertación governments under Presidents Aylwin (1990 to 1994), Frei (1994

to 2000), and Lagos (2000 to the present) created a judicial academy to train judges and set criteria for promotions, thereby weakening the power of the Supreme Court in the latter area. They also passed a new penal code in 2000, which began a process of separating the prosecutorial and adjudicating functions of judges, creating a new national public prosecutor's office, and substituting purely written procedures in trials for oral arguments. This new system is scheduled to operate nationwide by 2005. These changes were intended to reduce the inquisitorial nature of trials, as well as to make them speedier and more adversarial, thus strengthening the rights of defendants in the system (Prillaman, 2000: 143–144). The commitment of these governments to judicial reform was expressed in other, less spectacular but perhaps equally important ways. The governments built 10 new courthouses and created an arbitration program for commercial disputes. They also expanded access to the civilian courts by increasing the number of positions at free government legal clinics, staffed by law school students and graduates, from 200 in 1990 to 1,000 by 1998 (*Ibid.*: 150). In 2001, the Lagos government went a step further in increasing judicial access by creating a public defender's office (*Defensora Penal Pública*). Finally, in 1997 the Frei government made the process of appointing Supreme Court justices more accountable, by stipulating that such appointments, made by the president, had to be approved by the Senate (Agiüero, 2002: 25–26).

Chile's judicial reforms are considered successful by many observers and—unusual in Latin America—have resulted in a fairly high level of public approval for the judiciary.²⁴ They are also impressive when one considers that reforming the judicial branch is probably more difficult than reforming the legislature or executive. Legislatures are periodically renewed through elections, and although most of the executive branch is protected by civil service rules, high-level appointees usually come and go with the change of governments. The judiciary in most states is the most traditional branch, the one whose key personnel have the most job security, and therefore the greatest ability to resist change.

However impressive, Chile's "reform of the century" ignored one part of the judicial system—military justice. This is not because members of the Concertación government have been unaware of the defects of military courts. In the late 1970s, the Grupo de los 24 (Group of 24), a group of oppositional students, politicians, and lawyers that met to discuss the Pinochet regime's proposed constitution, offered a critique of military justice.²⁵ As Francisco Cumplido, Chile's first minister of justice after the end of the Pinochet regime, declared early in the Aylwin administration, "military courts should only deal with military crimes committed by members of the military in active service" (quoted in Bickford, 1998: 4).²⁶ Another influential participant in the democratic transition and member of the Aylwin government, Edgardo Boeninger, writes that the jurisdiction of military justice had been "disproportionately amplified by the military regime with the undoubted intention of protecting its men." He added that military justice was governed by incorrect and unjust legislation, was vague and arbitrary in its typification of crimes, excessive

and draconian in its sentences, and did not assure to defendants the guarantees to which they had a right (Boeninger, 1998: 402).

The perception by government officials in post-authoritarian Chile that all was not well with military justice was periodically reinforced by some of the work of Chile's widely respected community of legal scholars. Unlike Brazil, in Chile legal scholars have assiduously examined and debated military justice, and the consensus seems to be largely on the side of reform.²⁷ Democratic reformers in post-transition Chile have therefore had the knowledge and the opportunity to dramatically transform military justice. Why have they failed to do so?

The answer requires an examination of the various opportunities to enact reforms, including the first time, the negotiations over the "Cumplido reforms." Introduced in Congress in the second half of 1990 and passed in amended form in early 1991, the Cumplido reforms consisted of several bills, the most important for our purposes being Law 19,047, which modified the 1972 Arms Control Law, the 1958 Law of State Security, the Code of Military Justice, the Penal Code, and the Code of Penal Procedures. Negotiations over the Cumplido reforms involved representatives of the two parties of the Right, the UDI (Unión Democrática Independiente) and the RN (Renovación Nacional), as well as the Concertación itself, including Andres Aylwin, the president's brother and a member of the Cámara de los Diputados, the lower house of Congress.

These negotiations concerned the fate of some 300 political prisoners still in Chile's prisons at that time, as well as jurisdictional and procedural issues. They were thus both backward and forward-looking. The key venue for their resolution was the Senate, with its nine appointed Senators, due to its important veto powers for the parties of the Right.

One component of the proposed Cumplido legislation involved changes in the organization and jurisdiction of military courts. Specifically, civilians were originally excluded from military justice. In the lower house, the Constitution, Legislation, and Justice Committee (Comisión de Constitución, Legislación y Justicia) on May 6, 1990, reached a consensus to restrict military court jurisdiction exclusively to military crimes (Bickford, 1998: 10). Interestingly, even UDI congressman Chadwick agreed with this on May 19 (*Ibid.*: 13). However, once the legislation reached the Senate, this important reform was reversed. On May 20, it was announced that a new compromise had been reached: all crimes under the Military Justice Code, whether committed by the military or civilians, would remain under the jurisdiction of military courts, with the exception of a few crimes not related to military affairs. Cumplido himself hailed this compromise as representing a "middle point" (*Ibid.*: 14). However, the compromise was a major defeat for the Concertación's project of reducing military power in the judicial sphere.

Though the Concertación succeeded in removing from the purview of military justice certain crimes stipulated in the 1972 Arms Control Law, the 1958 Law of State Security, and the 1984 Anti-Terrorist Law so that civilians held for these

crimes would be tried in civilian courts (Bickford, 1998: 14; Eyzaguirre, 1991: 29), few people were then being prosecuted for such crimes (as the data from the Pereira Fernández study reveal). This was therefore primarily a forward-looking concession, designed to prevent the kind of politicized justice that had brought political prisoners before military courts in the first place. The far more common and urgent problem of civilians being charged with verbal and physical assault of policemen (Carabineros) in military courts was ignored. By refusing to narrow the jurisdiction of military courts, the Senate ensured that two standards of justice would exist in Chile, one military and the other civilian.

Failure to substantially reform military justice in Chile may reflect a problem of collective action that is common to many other democratic transitions. During the Chilean transition, at least two issues were on the table: changing procedural norms for the court system in the future, and getting political prisoners out of prison.²⁸ The first affects all citizens, but since it is prospective and abstract, it affects few people's immediate interests; therefore, the issue lacks intensity for most players. The second affects relatively few people, but it affects them in a serious way and generates highly emotional responses because it symbolizes the entire struggle between the authoritarian regime and its opponents. Therefore, the negotiations tended to boil down to the issue of political prisoners, even though the *Cumplido* laws concerned both issues. The *Concertación*, it appears, traded away the chance to reform long-term procedural aspects of military justice in return for the immediate satisfaction of releasing political prisoners.²⁹ They thus gave a concrete benefit to their bases of support. By preserving military justice as it was, the Right appeared to benefit its constituency. This apparently "win-win" outcome hides the fact that an authoritarian enclave was preserved in Chile's democracy.

The Right decided to concede on the issue of political prisoners, but to defend the judicial system that had convicted those prisoners—military justice. In this way, they defended the concrete interests of those still in the military and yielded on an issue that did not affect them directly. They attacked the *Concertación*'s professed interest in procedural reforms as hiding their "real" motives of seeking to free "terrorists." Meanwhile, they pointed to their agreement to release "terrorists" as evidence of their ability to engage in "reconciliation" and compromise. To a certain degree, this stance was effective with public opinion. For its part, the *Concertación* appears to have accepted the terms of the debate as defined by the Right. It gave up on real reform of military justice, since other reforms allowed them to claim that they were democratizing the judiciary, not just releasing political prisoners. By releasing the prisoners, *Concertación* politicians evidently felt far more heat from the relatives and supporters of the prisoners than they did on the more abstract issue of reform of military justice, and avoided being criticized for selling-out and abandoning those who were repressed by the military regime.³⁰

In Brazil, the post-transition trade-off over military justice appears to have been different. Although the eventual outcome was the same as in Chile—almost no reform

of the basic structure of and procedures within the system took place—there were no political prisoners for the opposition and military regime to barter over. Most political prisoners had been released in the amnesty of 1979, and the remaining few were let out in 1985. In return for the institutional status quo, the military appears to have consented to largely stop the prosecution of civilians in military courts. In addition, a 1996 law removed intentional homicides of the military police from the military court system.³¹ The Chilean *modus vivendi* in the judicial sphere thus has more serious implications for democratic rights than is the case in Brazil, because while most crimes of the police against civilians are still judged in military courts, civilians are routinely prosecuted in military courts in Chile, but not in Brazil.

The negotiations over the Cumplido laws in Chile, however, were not the only opportunity for reformers to alter military justice. In 1997, a group of Christian Democratic congressional representatives in the lower house brought the issue up again. Their model of reform was the alteration of military justice enacted in Spain in the 1978 Constitution and further reforms in 1985, which definitively eliminated civilians from the purview of military courts. Spain's post-transition constitution clearly distinguished between military crimes and ordinary crimes committed by the military, limiting the jurisdiction of military courts to the former (article 117, paragraphs V and VI). In Spain, unlike in Chile, ordinary crimes committed by military personnel were under the purview of civilian courts—an officer who had taken part in an attempted coup, for example, would be tried in a civilian court in Spain, but not in Chile. Similarly, members of the Guardia Civil, the Spanish equivalent of Chile's Carabineros, faced civilian courts when charged with the abuse of civilians, unlike their Chilean counterparts (Zaverucha, 1994: 48–49).

According to Weeks (2002: 6), Congress' invocation of the Spanish model of reform alarmed the high command of the Chilean armed forces, which had followed Spain's democratic transition closely and argued that it was a model for Chile to avoid. Believing the model went too far in curbing military power and autonomy, the Chilean military thus defiantly opposed the congressional bill and convinced the minister of defense to request the lower house not to consider it. This is what happened, and the legislation died in the House.

In Chile's 2000 presidential election, the gap between the Concertación and the Right narrowed, going from 33.6% in 1993 to only one-half a percent in 1999.³² However, increased political competition did not place military justice on the reform agenda, since politicians see only great political costs in bringing up military justice and few obvious benefits. The public is not clamoring for change. The issue arises when a Carabinero commits an act of violence against a citizen, but these are isolated incidents.³³ The prevailing view seems to be, "let the lion [the military] sleep."³⁴ There are fairly slim grounds for believing that democracies contain long-run evolutionary tendencies in the direction of the restriction of military justice to the purely military realm.³⁵

In the abstract, a democratic rule of law is supposed to be a rule of laws and

not people, but in the Chilean transition, the fate of a few people became far more important than the nature of the laws themselves. The Concertación prioritized the release of political prisoners and gave up the chance to make the legal system fairer for everybody. Perhaps such a response is forgivably human. It certainly reflected the passions and interests of Chile's democracy, rather than an Olympian detachment from the present and a concern for the future of abstract citizens.

Conclusion

The lawyer Hector Salazar calls military justice the "illegitimate daughter of Chilean justice."³⁶ It is perhaps more accurate to see military justice as a protected stepchild of the armed forces. An accident resulting from the combination of a statist legal tradition and an authoritarian regime, the military court system is seen by many of its supporters as more legitimate than its civilian counterpart. Strongly protected by the armed forces as the best guarantee of its future corporate autonomy, and partially insulated from the participation and review of the civilian judiciary, military justice remains an authoritarian enclave within the Chilean state.

Mired in tradition, with rules that neither guarantee the rights of defendants nor allow judges sufficient independence and security of tenure to dispense justice, the system falls short of the democratic aspiration of equality before the law. By routinely convicting civilians for crimes that are not military in nature, but which merely appear to violate the perceived honor and interests of military institutions, military justice maintains a lopsided democracy, one that disproportionately valorizes the coercive apparatus of the state at the expense of the rights of ordinary citizens.

The Chilean case shows us that certain democratizing reforms of state institutions may not occur, even in a democracy that is considered by many to be well consolidated by regional and global standards. In Chile, the armed forces and their supporters have largely shielded military courts from the reforms imposed upon the rest of the court system. Why?

Lack of knowledge is not a credible answer: prominent members of the post-transition Concertación government have a strong awareness of the deficiencies of military justice. At the beginning of the Aylwin government, many of these new government officials did attempt to reform military justice in the "Cumplido laws" presented to Congress in 1990. Only a shadow of these reforms became law, however, and subsequent efforts to revive the issue in Congress also failed.

The Chilean case suggests that bargaining during democratic transitions may suffer from a debilitating imbalance. Strong incentives exist for reformers and defenders of the status quo to forego long-term procedural changes in order to concentrate instead on more limited reforms that directly benefit a small number of politically important individuals. The rights and guarantees of all citizens in the future are thus sacrificed for incremental gains on the part of core members to serve their constituencies.

Therefore, the reason there is no reform of military justice lies in a combination

of military power and accommodations by civilian politicians to that power. The armed forces in Chile emerged from the regime transition in a position of strength, and it enjoys the support of a significant portion of the public, who credit it with saving the country from “Cubanization” and for introducing reforms that modernized the economy. Therefore, the armed forces has some leeway to safeguard its authoritarian enclaves. Yet, many civilian politicians do not believe it is in their interest to challenge these authoritarian enclaves, especially ones the military perceives to be important prerogatives, and that arouse little popular indignation. This seems to be the case with military justice.

NOTES

1. For this reason, the punishment of death for desertion in battle is one of the oldest and most traditional sentences in military justice.

2. Stölleis (1998: 151–152).

3. Jorge Mera Figueroa (1998a: 63), cited in Pereira and Zaverucha (2000: 11).

4. Later modifications of the Military Penal Code in 1985 and the Code of Military Penal Procedures in 1987 further restricted the jurisdiction of military justice. From Anthony Pereira’s interview with former military court prosecutor and current judge in Spain, Jesus Santos, New Orleans, Louisiana, June 5, 2000.

5. Sherman (1974: 1413).

6. Some democratic countries such as Denmark, Finland, Norway, Austria, and Germany do not have military justice in peacetime.

7. Gobierno de Chile (1991: 837).

8. The Chilean military declared a state of war in Chile after its 1973 coup. This automatically extends the jurisdiction of military justice. Such a step was not taken in Brazil after the 1964 coup there.

9. Authors’ interview with Lucilla Valenzuela, Santiago, June 19, 1998.

10. This change was made in 1978. Before then, draft dodgers were tried in civilian courts. From authors’ interview with Carlos Lopez Dawson, Santiago, June 30, 1998.

11. In 1993, the army charged an advisor to then-presidential candidate Frei, Genaro Arriagada, with a crime under this article for making public remarks about the impunity of military intelligence. The charges were later dropped, but the intimidating tactic may have had an effect on President Frei’s policies toward the military. The authors would like to thank Greg Weeks for bringing this incident to our attention.

12. Authors’ interview with Sebastian Brett, Santiago, June 6, 1998. The lawyer Hector Salazar was charged with sedition in a military court in 1994 for suggesting that members of the Carabineros should not obey their then-Commander in Chief, Rodolfo Stange, whose involvement in the cover-up of murders committed by his subordinates had been made public.

13. Agüero cites *The Economist* (April 12, 2001) as his source for this statement.

14. The Navy has four courts at the first level: in Valparaíso, Talcahuano, Punta Arenas, and the national fleet (Escuadra Nacional). The Army and Carabineros have seven, in Antofagasta, Santiago, Concepción, Valdivia, Punta Arenas, Iquique, and Coyhaique. The Air Force has only one court, in Santiago. From Musante Romero (1985, Volume II, 436).

15. The Navy has its own appeals court in Valparaíso. This court consists of two civilian judges from the Court of Appeals in Valparaíso, the Auditor General of the Navy, and an active-duty admiral (Oficial General en servicio activo). From article 48 of the Code of Military Justice.

16. The Supreme Court has 21 judges, and appeals cases are handled by a *sala* (room) of five

judges. In cases coming on appeal from military courts, a sixth, military judge, the Auditor General of the Army, is added. If there is a tie, the accused is favored. From authors' interview with lawyer Mario Verdugo, Santiago, July 7, 1998.

17. Overall, the situation in Brazilian military justice in terms of procedures, court composition, and the prosecution of civilians is slightly better than in Chile, from a democratic point of view. But the military justice code in Chile was reformed after the democratic transition, which has not happened in Brazil.

18. The 1991 Cumplido reforms, discussed below, inserted language into the Military Penal Code that gives the defendant the right to the investigative report after 120 days (Law 19,047 of February 14, 1991).

19. Authors' interview with Nelson Caucoto, Santiago, July 1, 1998.

20. This research was based on consultations of court records (*Libros de Estado de Causas de II Juzgado Militar*) from Santiago, an area that includes the Fiscalías Militares and Carabineros of the Metropolitan Region, and the fifth, sixth, and seventh regions. The percentages do not always add up to 100 due to rounding.

21. Private employers can ask the intelligence services for the *antecedencia* (record) of a prospective employee. From authors' interview with Hector Salazar, Santiago, July 6, 1998. It is unclear how common this practice is.

22. The Concertación or Concertación de Partidos por la Democracia (Coalition for Democracy Party) includes the Socialist Party, the Radical Party, the Party for Democracy, and the Christian Democratic Party. Created as an electoral alliance in the 1989 presidential election, it has held Chile's presidency since 1990.

23. These organizations have included *El Mercurio*, Chile's most important daily newspaper, the Fundación Paz Ciudadana (Citizens' Peace Foundation), and reform-minded legal scholars at the Diego Portales University law school and other law schools. From Agüero (2002: 25).

24. Prillaman (2000: 151) reports a 1997 survey that found 36% of those polled approved of the judiciary, a higher figure than in most Latin American countries and higher than the approval given to Chile's Congress, political parties, and unions in the same poll.

25. See, for example, Session Number 150 of the Grupo de los 24, December 22, 1980, Santiago, 9:45 a.m., from the archive of the *Vicaría de la Solidaridad*.

26. The quote comes originally from a March 24, 1990, article in Santiago's *El Mercurio* newspaper.

27. See, for example, Mera Figueroa (1998a and b).

28. The Right, including the newspaper *El Mercurio*, characterized the Cumplido reforms as measures to release or reduce the sentences of "terrorists"; supporters called them reforms to improve procedural norms in the new democracy.

29. Former minister Cumplido confirmed this notion of a trade-off in an interview with Jorge Zaverucha, Santiago, July 14, 1998.

30. Felipe Agüero disagrees with the analysis here, arguing that the Concertación never considered an attempt to reform military justice to be realistic; there was thus no trade-off, and an explanation of the lack of military justice reform must be located exclusively at a later point in Chile's post-transition political history. However, logically and empirically, it makes sense to us that the trade-off described here was contemplated and made.

31. This law has not been applied to the armed forces at the federal level, so military personnel in these forces who are accused of intentional homicides are still judged in military courts.

32. In the runoff in 2000, the gap was 3.6%. The data come from Agüero (2002: Table 1).

33. For example, on June 10, 1999, some 150 university students gathered outside the appellate court (Corte de Apelaciones) in Valparaíso, Chile. Holding up signs that declared "Yes to Truth, No to Military Justice" ("*Si a la Verdad, No a la Justicia Militar*"), the students used red paint to mark the walls of the court building with the imprint of their hands. They were protesting the death of a

fellow student, Daniel Menco, and that the investigation was being carried out within the military justice system because the principal suspect was a policeman (Carabiniro). Expressing their distrust with military justice, the students demanded that the government appoint an independent investigator to examine the crime. From "Protesta Universitaria en Valparaíso" in *El Mercurio* (Santiago, June 11, 1999: C1, C6).

34. From Anthony Pereira's interview with Jorge Correa, Santiago, June 19, 1998.

35. Even in a long-running democracy such as the United States, the reform of military justice appears to be difficult. See Koff and Ewinger (2001). A recent commission in the U.S. concluded that military justice "has stagnated, remaining insulated from judicial review and largely unchanged," and has recommended various changes to bring military justice more closely in line with civilian procedures.

36. "*Es una hija ilegítima de la justicia Chilena, la justicia militar.*" From authors' interview with Hector Salazar, Santiago, June 6, 1998.

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