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Authoritarian Legality and Constitutional Jurisdiction in Chile: Continuities and Ruptures in the Formation of Constitutionalism from the 1990's

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Abstract

The redemocratization of Latin American countries in the 1980's and 1990's was often accompanied by the promulgation of new constitutional texts, a fact that poses the risk of conflict with the legislation produced during the authoritarian periods. Not all countries in the region, however, face the issue of the permanence of authoritarian legality from the adoption of a new constitutional paradigm. Chile, in which the political transition did not lead to a rupture of the constitutional order, the confrontation of the theme of the validity of authoritarian norms did not have room before the restrictions of access to constitutional jurisdiction: only from the constitutional reforms of 2005 the Chilean Constitutional Court was raised to protagonist of the confrontation of this authoritarian legacy. The way in which the Court has faced the issue of the validity of such legislation is the main object of research, by investigating the legal solutions found to resolve the controversies regarding such rules, the indication 1) of the understanding of the role of the judges of the Constitutional Court in contributing to the overcoming of the prevailing normative production standards so far, as well as 2) of their willingness to manage the constitutional text with a view to consolidating the formal democracy regime established. This reflection involves an analysis of the decisions taken by the Court regarding the reception of standards and their institutional design forged in the political transition process. The hypothesis proposed was that, as occurred in post-war transitions with some Courts of European countries, the way in which the reception theory of such norms applies is connected with transitional experiences in terms of continuity or not of the authoritarian legacy. The results indicate that the application of the Reception Theory in Chile presents an outstanding result of that of the North countries.

Keywords

Reception Theory, Authoritarian Legality, Superior Courts, Transition, Historical Sociology

1. Introduction

The object of this work is the analysis of the decisions of the Chilean Constitutional Court regarding the confrontation of the topic of authoritarian legality validity after the formal restoration of democracy. Specifically, the research problem is how the Chilean Court has faced the issue of the authoritarian legality validity. In other word, how the Court treated the legality produced in dictatorial periods in their transitional processes and in the coming of formal democracy.

The main objective of the problematization is to investigate the legal solutions found to resolve the controversies regarding such rules, in a way that it is possible 1) to understand the role of the judges of the Constitutional Court in contributing to the overcoming of the prevailing normative production standards so far, as well as 2) their willingness to manage the constitutional text with a view in order to consolidating the formal democracy regime established. This reflection involves an analysis of the decisions taken by the Chilean Court regarding the reception of standards and their institutional design forged in the political transition process.

The hypothesis of the research is that, as occurred in post-war transitions with some Courts of European countries, the way in which the reception theory of such norms applies is connected with transitional experiences in terms of continuity or not of the authoritarian legacy. Such observation may contribute to unveiling ruptures and continuities in relation to the authoritarian legacy. In line with what happened with global Northern countries in the post-World War II reconstruction processes, the legal solutions found to resolve the controversies regarding these norms may indicate a decision pattern interconnected to the way each transition was conducted.

It is aimed with the research, to find new elements for the analysis of rupture or continuity with the pre-constitutional norms of the authoritarian periods, based on the decisions of the said Court, understanding the use of the right to approximate or remove such authoritarian experiences.

2. Research Contextualization

The starting point that gave rise to the problematization is the perception of the permanence of authoritarianism as an element that characterizes and crosses the institutional and social structure of Latin American countries. The authoritarianism of Latin American societies is understood here as a phenomenon of socio-political domination arising from hierarchical social structures that historically remained stable through the use of force or political-economic power, even

after post-colonial foundational processes, which adopted constitutional mechanisms for recognition of formal equality. This domination consists of the social and institutional permeability, which these groups structured in power find, to impose their interests despite the formal existence of Rules of Law.

Authoritarianism marked the political, economic and social development of Latin American countries throughout the process of formation of states in the region. Authors such as Roberto Gargarella (2014), Cláudio Véliz (1984), Waldo Ansaldi and Veronica Giordano (2012) refer that the expansion of the recognition of rights in these countries was carried out as a way of controlling the process of social transformation—that is, as a form of avoiding the revolutionary, capitalist and democratic path or the communist path—which allowed conservative forces to modernize the State without the order being subverted. Thus, the established order was hierarchical, centralized, conservative and authoritarian. In this way, it represented, rather than a break with the past, the continuity of the colonial order based on eclectic social and institutional matrices, but coherent with a socioeconomic structure that combined capitalist components (as is the case with the formation of a state bureaucracy) and non-capitalist (represented, for example, by the continuity of patrimonial practices). The path taken shaped a specific way of exercising power, still widely present in Latin America.

It also must be considered the fact that Latin American societies are, throughout its history and even today and even today, among the most unequal in the world. And, despite the consolidation of formal democracies after the authoritarian experiences of the 20th century, from the 1980s and 1990s onwards, a new wave of authoritarianism persists in threatening these regimes[1].

In the Latin American experience, inequality results, therefore, in the formation of highly concentrated elites, formed by small circles of individuals or groups. But unlike mentions Michael Gerlich (2021) in the sense that they need their decisions to be supported by the majority, in Latin America elites employ authoritarian instruments to assert their political, economic and social interests.

A good synthesis of this perception can be found in the introduction of a book by Claudio Véliz, published in the 1980's, in which the author states that the authoritarian regimes lived in the region in the second half of the twentieth century did not constitute themselves as moral aberrations, but as expressions of a political behavior proper to societies with secular disposition to do so (Véliz, 1984: p. 15)[2]. Although there is plenty of historical bibliography with strong indications about our original propensity for the establishment and maintenance of author-

[1]Representative of these threats include the rise of Jair Bolsonaro in Brazil, Javier Milei in Argentina, the attempted coup d'état in Bolivia, the chronic institutional instability in Peru and the current situation of chaos in the area of public security in Ecuador.

[2]"También estoy convencido de que la proliferación de regímenes autoritarios de unos años para acá no es una aberración moral o política sino una manifestación de un estilo de comportamiento político, una disposición secular de la sociedad latinoamericana que, bajo diferentes formas—de las que la militar puede muy bien resultar la más transitoria—perdurará en nuestra zona durante cierto tiempo" (Véliz, 1984: p. 15).

itarian relations, dissecting the social and institutional mechanisms that favor these processes is a challenge, above all, in the field of law, in which much of the theoretical starting points do not relate to the social and historical causes.

If authoritarianism is an indicative element of how we relate politically, it is important to analyze if there were spaces to confront authoritarian legacies in the transitional moments dedicated to political resettlement and the re-foundation of the conditions of exercise of democracy, at least from a formal point of view. It is important to ask, for example, whether the institutional matrices, maintained and constituted before the transitions, were subjected to mechanisms of rupture or transformation of their structures in order to foster conditions more favorable to the development of democratic social and institutional processes.

What is intended with the problematization, specifically, is to analyze the role of the Courts, as structural spaces of the states, in the process of coping or not the reception of the norms produced during the non-democratic regimes, when triggered for this purpose. This normative set represents and materializes political decisions on various issues that go from the organizational arrangements of the State to the way in which guarantees or restrictions on fundamental rights will be established. The normative production of a dictatorial regime does not fully determine its authoritarian legacy, but it can represent an important part of it, since its capillarity reaches all the powers of the State and socially reverses with practical consequences that tend to extend in time, with different levels of public understanding about its effects.

The known laws of self-amnesty, adopted as a solution of impunity in several of these dictatorial experiences, for example, gained notoriety and considerable space within the public debates established in some of these transitional processes, mainly due to the nature of their repercussions and the obviousness of what they represent in terms of authoritarian legacy. However, other types of laws, as nefarious as these in terms of authoritarian permanencies, ended up not being so central in transitional debates and continued to produce effects in time and symbolically and in practical terms, in the daily lives of these societies, the authoritarian legacy of dictatorial regimes.

The perception of the strategic importance of this set of normative production drew the attention of the Brazilian journalist Anthony Pereira, who used the expression "authoritarian legality" to reflect on the reasons that led the dictatorial regimes of Argentina, Chile and Brazil produce norms rather than simply making decisions and executing them as *de facto* governments. His main conclusion is that "[…] it is very common for authoritarian regimes to use the law and courts to strengthen their power in order to obscure a simplistic distinction between de *facto* regimes and constitutional (or *de jure*) regimes" (Pereira, 2010: p. 36).

Authoritarian legality would thus address not only the set of rules produced by the regime, but the involvement of judicial branches in the process of "normalization" and routinization of the use and application of these norms with a

view to their social rooting. As this commitment varied according to each authoritarian experience (Pereira, 2010), the analysis of the scope of the political transition in relation to each judiciary and the way in which they began to deal with authoritarian legality in redemocratization may indicate a series of decisive elements for the greater or lesser success of the processes of submittal of powers to constitutional rules.

The analysis of the possibility of continuity or not of norms produced in authoritarian regimes takes place in the framework of the so-called theory of reception of norms, which presents legal strategies linked to the plans of existence, validity and validity of the norms. Each of them with different legal and political consequences, although the political consequences do not usually appear in their lexicon.

The debate that is legally established in the reception theory of the norms deals with the impossibility and even the absence of the need to begin the construction of the infraconstitutional rules *ab initio* when a new constitutional text arrives. Given this context, it opens up the possibility that the rules compatible with the legal and constitutional order can continue to produce their effects. It turns out that very little is discussed about the consequences of these normative incorporation in conjunctures of political transitions from dictatorial regimes to democracies. The most common approaches, especially in Latin America, are linked to more general debates about transitional justice (Teitel, 2003; O'donnel & Schmitter, 2010; Kritz, 1997; De Greiff, 2006; Abrão & Torelly, 2011). In general, it is ignored the fact that the way in which judicial branches decide to deal with the norms prior to the arrival of a new Constitution is, above all, a political issue (Varela & Stratustegui, 1979: p. 72).

In European countries, several responses were given by the experiences of constitutional reconstruction of Western countries within the tradition of the post-World War II constitution theory. Germany, for example, has placed the matter on the jurisdiction of derogation from previous rules within the new Constitution, in Article 123, which has maintained all previous arrangements in force that would not contradict it, and in Article 126 thereof, which indicates the Constitutional Court as the competent body to resolve the differences on the validity of rules (Varela & Stratustegui, 1979: p. 72).

Other Constitutions, such as the Swedish of 1974, determined that the whole previous order would suffer a novation, and it would be considered fully accepted, so that the repeal of laws could only occur by the approval of new rules by the legislative power, that is, by later laws, placing the theme within the simplified frame of resolution of antinomies (Varela & Stratustegui, 1979: p. 63). In the case of the Swedish Constitution of 1974, which replaced the Constitution of 1809, without this having represented a break with the previous regime, it is clear the political decision to maintain the pre-constitutional legal system, when it provided that the repeal of rules would be exclusively a responsibility of the legislative branch. Although this is the original space of legislative production,

placing parliament as a protagonist in the process of repeal of previous norms demonstrates the absence of political urgency in facing possible adversities for the new regime brought by the maintenance of the previous order.

Whereas the post-war Italian and Spanish Constitutions did not regulate the subject expressly, establishing a public debate on the various possibilities of dealing with the subject.

It turns out that, in Latin America, the subject was not only dealt with directly by the new Constitutions, but also the public and academic debate did not cope with these issues.

As said, this particular way of dealing with the subject of pre-constitutional norms is the main object of this research, in the sense that it is considered that the possibility of linking the transitional conjunctures of each country and the treatment given to the norms produced by dictatorial regimes can contribute to unveiling ruptures and continuities of authoritarian regimes. The legal solutions found to resolve the controversies regarding these norms indicate, on the one hand, the understanding of the judiciary agents on the condition of the new constitutional order to leave behind the authoritarian standards of normative production. On the other hand, their willingness to manage the new constitutional text with a view to consolidating the established formal democracy regime.

This is because the reception of pre-constitutional norms may or may not presuppose constitutional supremacy indicating whether the issue will be dealt with by the Superior courts or by the entire judiciary. This reflection involves, therefore, a normative analysis on the institutional design of the judicial branches contemplated in each Constitution, but also their symbolic and conjunctural meanings and even the level of social mobilization to demand on the theme in those spaces. For example, in the German case, allowing the debate on the validity of pre-constitutional rules to begin in the lower court judges to be resolved by the Constitutional Court is considered by Varela and Stratostegui (1979) as a strategy for incorporating the rupture with the previous legal order by the entire judiciary, based on a transition that made the continuity of the previous regime unfeasible. Whereas in the Italian case, in which the transition did not reach the same level of social incorporation as the rupture, a similar decision, to allow judges to decide on pre-constitutional norms, was understood by the authors as a way of allowing the continuity of the fascist legal system.

In the Chilean case, the constitutional text did not contemplate ways to confront the issue, making the Supreme Court of Justice and, later, the Constitutional Court the proper spaces of the interpretative management of the theory adopt one or another solution. Given its institutional design, the solutions and the paths adopted by them can point to political consequences of coping with or not authoritarian experiences, far beyond the "neutralized" justifications presented in many of the approaches of the reception theory of norms that predominate in the legal-constitutional literature in our region.

3. Design of the Methodological Approach

The constitutional documents are commonly conceived by academic literature as political, legal and social pacts that refer to a project for the future, or even reflect how societies that agree with them would like their realities to be one day, in a clear reference to compliance with the ultimate goal of every legal standard: the expression of a "must be" (Hesse, 1991: It is therefore usual that the research problems of the area are linked to the dynamics of a time delimited by the durations of the Constitutions).

The issue presented here does not escape this habit. Regarding the proposition of analysis, it seeks to verify whether the solutions of the Courts to the treatment of pre-constitutional norms contribute or not to improve the conditions for the exercise of the normative force of constitutions, the response that is sought has a concern anchored in the present.

What goes through in a very little trite way the proposed problem is the assumption of authoritarianism as a historical permanence that can be decisive for the understanding of the solutions of the Courts not from a strictly legal point of view, but situating them sociological and historically. That is, the normative result contemplated by the Constitutional Charts, added to the analysis of solutions of the Courts on how to deal with temporal normative conflicts, acquires importance for the intended cut-off if these elements are considered before the conditions of production of these constitutional pacts, so that they can be seen as structuring processes of existing power dynamics and extrapolate an analysis of the institutional structure in the strict sense.

Before such a challenge, the strategy of methodological approach chosen was that of historical sociology, considering its vocation for the study of social transformations from the large state structures, located in long historical periods, that enhances the overcoming of dichotomies between past and present through analyzes that link the formation of state institutions to human actions in time. This articulation seeks to characterize a continuous process in formation that can unveil and identify persistence, regularities, blockages and potentialities (Ansaldi & Giordano, 2012: t. I, p. 42).

In the case of the problem object of the research herein, the state structure is cut-off by the Supreme Court of Justice and by the Constitutional Court, which will be considered in the contexts of transformation of the Chilean society in its political transition from Pinochet's dictatorial experience to the formal democracy regime. The consideration of how these Courts is structured before this conjuncture is linked to an analysis of what possibilities were at stake and were defended within the political disputes that constituted this process.

As Charles Tilly proposes, the challenge seems to be to exploit to the fullest the assumption that the whole structure or process is a series of possibilities of choice. Even because the hypothesis of the work is based on the perception that the "when" the structures of the Courts were forged in the transitional contexts,

directly affects the result of their formats or the "how" were constituted (Tilly, 1991: p. 29), directly influencing the way they decided on which solutions would be applied to conflicts between the pre-constitutional norms and the texts of the Constitutions, even under "neutralizing" legal discourses.

The historical sociology provides the conceptual adoption of the hybridization of disciplines that, considering the protagonism of the constitutional concepts of theory of reception of norms for this research, makes it possible to add to history and sociology the law itself, being possible to speak in a historical sociology of the legal. In this case, the legal phenomenon is also conceived as a social phenomenon, resulting from the correlation between existing social conditions (with all their conflicts and disputes) and the available legal order (Giordano, 2012: t. I, p. 16).

Finally, it is necessary to clarify that the fact that the problematization adopts the assumption that authoritarianism works, in Latin American societies, as an amalgam historically present in social and political-institutional relationships, does not compromise the study of the present case to evidence or prove this assumption. On the contrary, assuming historical sociology as a method implies accepting the possibility that even the presupposition of authoritarianism as historical permanence may end up being questioned. And, therefore, by not electing the proof of the assumption as a goal of this study, it is assumed that what one wants is to reflect on the Chilean case so that it is possible to understand the socio-institutional conditions of coping with the authoritarian legacy and, also, compare it in future studies to other cases in the region. The comparison makes it possible, in a study such as the one proposed here, first of all, to understand *how* and *why* things happened differently in each of the chosen cases, and secondly, to identify the repercussions in the legal field of understanding obtained in this comparison process.

Comparison is one of the main tools of historical sociology and, depending on the research objectives, can be used in various ways. Considering the assumption and the objectives described above, the comparison of the solutions adopted by the selected sections can be inserted in a strategy of analysis of causal regularities in history (Skocpol, 1984: p. 376), which is not anchored in the goal of proving the assumption, but in the possibility of its improvement or even its elimination. This is because it is a perspective in which historical cases are analyzed considering all available opportunities and assuming the validity of alternative hypotheses as a way to help recognize or not regularities (Baggio & Berni, 2023: p. 9).

According to Skocpol, one of the advantages of this strategy is that there is no effort to analyze historical facts from a perspective of general models: there is no commitment to one theory or another, but the effort to discover the concrete reasons that explain the relevant historical processes (Skocpol, 1984: p. 376). And, in these terms, the comparison tool that can most contribute to this analysis strategy is the individualizing comparison, in the manner described by

Charles Tilly, since it does not claim to prove evidence, but to start a social investigation that may or may not generate generalizing conclusions, without this being its main function (Tilly, 1991: p. 120).

As it will be seen below, the case of Chile has a great potential for contribution in terms of the singularities it presents and ranging from the personification of Augusto Pinochet as dictator, to the fact that it was the longest political transition of the second half of the twentieth century, with the adoption of a new Constitution as an initial transitional framework. Moreover, the supreme courts were the builders of maintaining *the status quo*, long before the establishment of the dictatorial regime. At the same time that the case is inserted in the regional context of Latin American political transitions, its peculiarities can both tame the assumption of the research, making it more complete and understandable, and can also question it in its own category *status* capable of sustaining the proposed problem.

4. The Chilean Authoritarian Regime and the Construction of Authoritarian Legality

We will now identify "how", in the case of Chile, the characteristics of the authoritarian regime and the process of transition to democracy are related to the "when" they occurred, especially in relation to the formation and performance of the supreme courts.

Chile lived its authoritarian period between 1973—from the assassination of President Salvador Allende and the rise of Augusto Pinochet to power—and 1990—year in which Patricio Aylwin assumed the presidency. Ansaldi and Giordano (2012: t. II, p. 412) classify the Pinochet's regime as an institutional dictatorship of the Armed Forces. This means that the establishment of the dictatorship resulted from a decision by the Armed Forces as an institution. In it, we observe the projection of its authoritarian-bureaucratic ideology for the State and society.

The Chilean authoritarian regime, similar to what occurred in Brazil and Argentina, was established under the pretext of "restoring democracy", seen by the coup leaders as corrupt and threatened by populism and Marxism. In Chile, the statement "restaurar la chilenidad, la justicia y la institucionalidad quebrantada representa ese movimiento" (Ansaldi & Giordano, 2012: t. II, p. 412). However, from a very early age the Armed Forces abandoned any restorer claim of democracy (Ansaldi & Giordano, 2012: t. II, p. 434).

In a statement given to Ercilla Magazine in 1975, the general clearly expressed his intention to remain in power for a long period:

> El régimen actual está llamado a durar posiblemente una generación. Esta lucha puede esperar un siglo si es necesario porque conviene dar nascimiento a un espíritu público nuevo que haga imposible el retorno al juego político anterior. El proceso iniciado el 11 de septiembre de 1973 es un cambio sin

retorno (Nogueira Alcalá, 2008: p. 326)[3].

Now, the goal of "giving birth to a new public spirit" necessarily involves the political decision to invest in the transformation and creation of institutions capable of preventing "the return of the previous political game." The production of the authoritarian legality, given these terms, becomes an essential action and can only be carried out by the progressive concentration of powers in the hands of Pinochet and his main collaborators (Ansaldi & Giordano, 2012: t. II, p. 413).

Another feature pointed out by Ansaldi and Giordano (2012: t. II, p. 426), which also contributes to explaining the high investment of the Chilean dictatorial regime in the production and institutionalization of its own rules, is that it was *an almost* totalitarian dictatorship. On the one hand, there was the use of classical instruments of coercion (such as the use of the Army, the police, the bureaucracy and even the judiciary), *ad hoc* coercive techniques, in addition to the control of education and *the mass media*. On the other hand, there was no appeal to the masses (a striking feature of totalitarian regimes).

Moreover, the claim to establish a total control was introduced from the existence of a consented opposition. Examples of this are the popular consultation held in 1978, the referendum for approval of the Constitution in 1980 and plebiscite on the extension of Pinochet's mandate in 1988. This level of concern of the regime also helps to explain the difficulty coping with established authoritarian legality, since it helps to confuse the population and the political forces that, in some way, contributed to the legitimization discourse of the regime.

The successful outcome of this strategy lies in the perception that it was one of the regimes that advanced the most in terms of state disarticulation. The so-called *Chicago Boys* (a group of young economists who formulated Pinochet's economic policy) were responsible for the radical implementation of the neoliberal economic model, orchestrated by authoritarian norms produced by the regime. As an example, it is cited the fact that the number of state-owned enterprises was reduced from 300 at the beginning of the period to approximately 20 at the end. The policy of demobilization and depoliticization of the workers' movement was also successful, with deep erosion of trade unionism, a circumstance that will be important for the understanding of the lack of social mobilization verified in the transition (Ansaldi & Giordano, 2012: t. II, p. 440).

Perhaps the biggest sign of note regarding the Chilean case and that belongs to this strategy of refounding a new reality on which the previous one does not find room to return is that the redemocratization of the country did not lead to a rupture of the constitutional order then in force. In fact, it was orchestrated from the construction, by the dictatorship itself, of a new constitutional text, in 1980, under the narrative that it would be a transitional constitution and that, as already said, he managed to make up his authoritarianism by promoting the pleb-

[3]"The current regime is expected to last possibly a generation. This struggle can wait a century if necessary because it is advisable to give birth to a new public spirit that makes it impossible to return to the previous political game. The process initiated on September 11, 1973, is an irreversible change."

iscite that can be used to disseminate the involvement of the population and the Concertación, a coalition of opposition parties to the regime, in a clear strategy of intimidation and pseudo-legitimation.

Although the beginning of its validity occurred seven years after the coup d'état, the replacement of the constitutional text was one of the main strategies of the regime for the foundation of its new time. In fact, on September 24th, 1973 (13 days after the coup) a commission was created to elaborate a draft Constitution (Nogueira Alcalá, 2008: pp. 327-328). The text, approved by a government board, was submitted to a referendum, held in a climate of absence of freedom of expression and the blank votes were counted in favor of the approval of the project. Despite these circumstances, the opposition ended up opting for the strategy of waiting for the 1988 plebiscite, provided for in the Constitution, to replace the regime—which in fact occurred (Nogueira Alcalá, 2008: pp. 330-331). This strategy has undoubtedly contributed to the rooting of the effects produced by the 1980 Constitution over its initial validity for eight years.

And, even after the 1988 plebiscite, in which the dictatorship was defeated, prevailed the understanding that, in the democratization process, there was no need for political or economic crises. The strategy was to avoid any kind of conflict that would obstruct an exit from the Armed Forces in "order", that is, controlled from above (Ansaldi & Giordano, 2012: t. II, p. 524). A "authoritarian and protected democracy" was then structured, designed by the ideologists of the dictatorship and with limited military tutelage and pluralism (Nogueira Alcalá, 2008: p. 327).

Thus, many authoritarian enclaves remained in the Chilean legal system, which makes it an incomplete transition (for example, Pinochet becomes the Senator for life). As far as the justice system is concerned, it remained excessively closed in itself and quite hierarchized, with the Judiciary being opposed to several attempts at democratizing reforms throughout the 1990.

Thus, the confrontation of the theme of the validity of authoritarian norms did not have room before the restrictions of access to constitutional jurisdiction. Its excessive self-centering led to the difficulty of permeability of the structure of this power in relation to political demands typical of democratic periods, for example, in addition to facilitating the co-optation of its high authorities.

The constitutional reform of 1989, as a result of the defeat of the regime in the 1988 plebiscite, represents the transition from a granted constitution to an agreed constitution (Nogueira Alcalá, 2008: pp. 332-334). In the next fifteen years, a significant amount of constitutional reforms are approved (three between 1990-1994, eight between 1994-2000 and four between 2000-2006), the most important being 2005 (Nogueira Alcalá, 2008: pp. 334-335).

This is regarded as the reform that finally removes the authoritarian enclaves from the Constitution (Nogueira Alcalá, 2008: pp. 336-337). Among several relevant changes, it is worth highlighting 1) the restoration of the clear subordination of the Armed Forces to the President, 2) the elimination of the guardianship

role of the government foreseen for the National Security Council, 3) the end of the designated senators, establishing the full eligibility of senators, 4) the profound modification of the composition of the Constitutional Court and the strengthening of its competences (on which we will deal next) and 5) the strengthening of parliamentary control over the Executive. Ricardo Lagos, then president, stated on the occasion: "Now we can affirm that the transition in Chile has been completed" (Ansaldi & Giordano, 2012: t. II, p. 554).

Chile recently underwent a constituent experience that had a high potential for completion of the transitional process. Convened as the result of a political crisis generated by popular mobilizations in 2019, which claimed a clear social agenda, it was again possible to perceive the strength that still underlies in Chilean society of the political project established by the institutional dictatorship of the Armed Forces. Indeed, the constitutional text proposed by the Constituent Assembly ended up being rejected by the population, in consultation with the population held on September 04th, 2022.

5. The Composition and Functioning of the Courts in the Chilean Transitional Process

It is in this context, of a political transition aimed at maintaining the institutional structures of the dictatorial regime, that the confrontation of the theme of the authoritarian norms' validity had little space, especially considering the restrictions of access to constitutional jurisdiction present in the Constitution. As mentioned, only from the constitutional reforms of 2005 is that the Chilean Constitutional Court was formally qualified to act in the confrontation of this authoritarian legacy.

For Engelmann & Bandeira (2017), it is necessary to understand the political protagonism of the Judiciary, in addition to its institutional design, from the socio-political and historical understanding of the trajectories of legitimation of the judicial elites and the political field. The authors were responsible for a study that carried out a structural analysis of the relations between judicial institutions and political groups seeking to discuss patterns that present themselves recurrently in Latin American countries.

When approaching Chile, the authors (Engelmann & Bandeira, 2017) characterized its judiciary as independent "conditioned to political neutrality". The first feature highlighted is that there is a recruitment system by co-optation, in which the Judiciary itself designates the body of magistrates, through internal procedures. Therefore, without the interference of other powers, which gives it greater autonomy in relation to political powers. This form of recruitment has as a consequence the closure of power in itself. Given that the rise in the career of magistrate depends on the relationships established between the basic magistrates and their superiors, the result is the excessive hierarchy of the institution.

During the military dictatorship, from a constitutional point of view, the re-

cruitment system remained unchanged. However, arbitrariness was undertaken in order to establish a body of magistrates sympathetic to the regime as occurred in all dictatorships of the continent. The difference between the Chilean case, however, is in the fact that most of these initiatives were taken by the Judiciary Branch itself (Engelmann & Bandeira, 2017).

Faced with the cooperation presented by the Court, Augusto Pinochet strengthened the faculties of self-management of the judiciary, guaranteed since the Constitution of 1925, and the power of the Supreme Court—this is the court of the highest hierarchy of the judicial system. These mechanisms (in particular Decrees-Laws number 169 and 170 of 1973) allowed the Supreme Court to remove judges from the various degrees contrary to its vision by simple majority. In the comparative research conducted, Chile is the country in which the Judiciary has greater autonomy in the selection process of judges, highlighting the corporatism and the unifying capacity of the judicial school (Engelmann & Bandeira, 2017).

And, as already mentioned, even after the re-democratization the Judiciary continued to oppose attempts to democratizing reforms, barring several bills that aimed to transform not only judicial institutions, but also other state institutions (Skaar, 2003). Therefore, the excessive self-centering led to the difficulty of permeability of the structure of this power in relation to political demands typical of democratic periods, for example, in addition to facilitating the co-optation of the high authorities in authoritarian periods.

Specifically with regard to the development of constitutional jurisdiction, it is possible to affirm that there was little support from ordinary courts (Nogueira Alcalá, 2008: p. 347). The Constitution of 1980 maintained repressive judicial control and interparties as the jurisdiction of the Supreme Court of Justice (art. 80), through *the recurso de inaplicabilidad por inconstitucionalidad*. The declaration did not produce binding force or persuasive effect in relation to the interior courts. These characteristics comply with a weak legal institute as an instrument to provide the Constitution with normative force and grant effective protection to fundamental rights (Nogueira Alcalá, 2008: pp. 347-348).

Humberto Nogueira Alcalá (2008: pp. 350-367) highlights the main features of the Constitutional Court following the changes promoted by the 2005 reform: 1) increasing the number of members (from 7 to 10, 3 of whom are appointed by the President, 2 appointed by the Senate and 2 proposed by the Chamber and approved by the Senate, and 3 elected by the Supreme Court), 2) establishment of 9-year term of office, renewed the Court partially every 3, 3) guarantee of irremovability, 4) seal of re-election and 5) extension of its competences (which can be grouped as follows: control of normative or organic constitutionality, control of constitutionality of conflicts of attributions or competences, control of constitutionality through the protection of fundamental rights and their guarantees, as well as other competences and residual competences).

The constitutional reform of 2005 concentrated constitutionality control in

the Constitutional Court, consisting of a relevant change in the model of constitutional jurisdiction. However, it still maintained in the ordinary courts the constitutional jurisdiction of freedom (actions of support and *protection*) and pronouncement in appeal of nullity for violation of fundamental right (Nogueira Alcalá, 2008: p. 350).

6. Constitutional Court of Chile and the (in)Application of the Theory of Reception of Standards

In order to verify the way of action of the Constitutional Court regarding the (in)application of the theory of reception of the norms, a study of jurisprudence of this Court was carried out between 2006 and 2020, based on keywords previously selected[4]. In total, 2339 decisions were found. However, as the object of the research would only be discussions about the norms produced during the Chilean military dictatorship (September 11th, 1973 to March 11th, 1990), a new filter was applied, resulting in the selection of 297 decisions that fit the exact study criteria.

In these decisions, it is noticed that most of the subjects under discussion are related to the performance in the economic domain. In this sense, of the 297 judgments analyzed, more than half (168) deal with Tax Law, other 43 on Civil Law, 13 on Labor Law, 7 cases on Mining, 5 on Civil Procedural Law, 2 on Financial Law and 1 on Business Law. Other matters of public law, hardly related to restrictions on rights typical of authoritarian regimes (Social Security, Urban, Sanitary and Municipal Law) were observed in 14 cases. Cases of Administrative Law, besides the issues related to mining, already numbered, were found in 13 decisions. Mixed or diverse classifications have been found 3 times.

Issues that could denote greater access to the Constitutional Court on issues related to democratic transition, which would escape the logic of merely economic mobilization, were found in only 27 cases: 9 of Constitutional Law, 6 of Criminal Procedural Law, 5 of Criminal Law, 2 of Military Criminal Law, 2 of Military Criminal Procedure Law and 1 of mixed classification ("Criminal Law/Military Criminal Law"). Less than 10% of decisions, therefore.

This, however, is not because the total number of lawsuits in the country that deals with these matters is negligible. As an example, it is verified that, according to the *Informe Anual de Estadísticas Judiciales*-2020[5], approximately 40% of the lawsuits filed in Chile were of a criminal nature. The causes of this matter that reached the Constitutional Court, considered the search terms used, represent

[4]The following search terms related to the subject were selected: "derogación del derecho anterior a la Constitución [que le resulta incompatible]", "[cláusula] derogatoria general", "abrogación", "examen de vigencia", "examen de validez", "examen de vigencia examen de validez", "normas preconstitucionales", "efectos ultra-activos de las ndormas derogadas [pre y post constitucionales]", "conflicto normativo entre Constitución y normas preconstitucionales [que la contradicen]", "inconstitucionalidad sobrevenida" e "inconstitucionalidad superveniente".

[5]Available at https://www.ine.gob.cl/docs/default-source/justicia/publicaciones-y-anuarios/difusi%C3%B3n/informe-anual-estad%C3%ADsticas-judiciales-2020.pdf?sfvrsn=4ab75334_2#:~:text=En%202020%2C%20a%20nivel%20nacional,2019%20(1.166.929), Accessed on June 26th. 2022.

just over 5% of the total decisions. This seems to reinforce the idea that, at least before this Court, the debate on the rules produced in the dictatorial period took place essentially in the economic field.

The virtual absence of legal demands for the Court focusing on combating the authoritarian legacy may indicate that the organizational strategies of Chilean society in the transitional process did not prioritize this agenda. The lack of prioritization can be explained by the fact that it is understandable that the social reintegration processes of political transitions focus more on demands for economic reparation for victims of the authoritarian State or their families, as well as on criminal demands for accountability of State agents' perpetrators of crimes against humanity, so that concerns about the normative structuring of the State end up being secondary to these issues.

Formally, there does not seem to be a systemic difficulty accessing the Constitutional Court. In fact, any person, whether natural or legal, may file an application for inapplicability in order to declare the unconstitutionality of a legal provision. This could indicate that the widely majority appreciation of economic matters would occur exclusively due to the lack of popular mobilization in the discussion of matters related to the restriction of rights by the Pinochet dictatorship, not having the social structure related to the results obtained. There are, however, four situations that provide indications to the contrary.

First, the Chilean Constitutional Court began to play a leading role in the control of constitutionality only after the constitutional reform of 2005 (Nogueira Alcalá, 2008: p. 350)[6]. Although it was recreated by the Constitution of 1980, it basically exercised a control of preventive constitutionality, before the bills and decrees in progress. The field of action was therefore restricted, having no means to face, between 1990 and 2005, the legacy of norms produced by the Pinochet's dictatorship, due to a simple question of logical incompatibility. This characteristic allowed a concentrated double control of constitutionality, with the Supreme Court exercising it repressively, that is, due to legislative acts already in force (Nogueira Alcalá, 2002).

We must also consider the historical timidity and conservatism of the Chilean Judiciary in dealing with fundamental rights (Couso & Hilbink, 2010: p. 171). Neither the ordinary bodies nor the Constitutional Court had the tendency to undertake the defense of constitutional guarantees, leaving the subject much more to the margins of political decisions than their appreciation. This situation, added to the corporatist character of this power, contributed to its isolation from society. Although it is possible to observe a more activist performance by the Constitutional Court in recent years (Couso & Hilbink, 2010: p. 199), this would hardly bring as a consequence greater social mobilization in dealing with transi-

[6]"Esta nueva atribución del Tribunal Constitucional lo coloca como intérprete definitivo de la Constitución, con la consecuencia de que los jueces quedan impedidos de aplicar la norma declarada inaplicable (al menos en un determinado sentido); y en apelación o casación los jueces deberán revocar o casar la sentencia que aplicó el precepto declarado inaplicable" (Silva Irarrázaval, 2012: p. 583).

tional issues, so many years after the process of democratic reopening.

Moreover, decisions in abstract constitutional control have ex *nunc* effects (current article 94 of the Constitution). Thus, considering that the performance of the Constitutional Court in repressive control began only after the constitutional reform of 2005, as well as the fact that its decisions would not operate retroactive effects, it must be understood why there would not have been a great social mobilization on restrictive rights standards produced by the Chilean military dictatorship.

Finally, it should be noted, as already mentioned, that, if on the one hand the constitutional reform of 2005 concentrated the constitutional control of constitutionality in the Constitutional Court, on the other hand it still maintained in the ordinary instances the constitutional jurisdiction of freedom (support and protection actions) and the pronouncement in appeal of nullity by violation of fundamental right (Nogueira Alcalá, 2008: p. 350) Thus, discussions on non-economic matters may have been limited to ordinary courts.

Regarding the hypothesis presented, it was verified that it had partial proof. This is because, contrary to what was thought, the Chilean Constitutional Court seems to apply uniformly the theory of the reception of norms. The position of the organ does not necessarily vary depending on the matter, but rather the moment when the decision with erga *omnes* effect is taken.

The paradigmatic case of this issue refers to a series of judgments on Art. 116 of the Tax Code. The article provided for the delegation to administrative staff of the assignment to know and resolve complaints and complaints related to the competences of the Tax and Customs Court[7]. Of the decisions of the Constitutional Court that meet the criteria of the survey, 134 (45.12%) deal with this case.

On March 26th, 2007, in List number 681-2006, the Court, by operation of law, understood that the rule would be, in fact, unconstitutional, attributing to its decision erga *omnes* effects, although it granted effectiveness only *ex nunc*, that is, non-retroactive. Only taxpayers who had entered with similar lawsuit prior to this declaration of unconstitutionality were benefited from decisions of retroactive effects. From that moment on, the Court ruled that it would no longer be up to it to make any decision on the matter, precisely because the article would have been declared unconstitutional in a ruling of *erga omnes* effect. In its view, the derogatory effectiveness of the decision would prevent new inapplicability requirements from being known, since there was no longer a rule to be declared as unenforceable. This despite the fact that the article still has effects against other taxpayers, in relation to the period before the decision on unconstitutionality.

This led to the creation of two distinct categories of the legally appointed ones in practice: (A) the one to which Article 116 of the Tax Code could not be ap-

[7]"Article 116. El Director podrá autorizar a los funcionarios del Servicio para conocer y falar reclamaciones y denuncias obrando 'por orden del Director Regional'."

plied even before March 26th, 2007[8]; and (b) the one to which the standard would follow with its regular application until the decision of rejection. Thus, what happens is that, despite the coherence of the court regarding the declaration of unconstitutionality of the norm, the discrimen occurs from the moment when the decisions are taken, creating unjustifiable differentiation among the courts in the same condition. Ultimately, it follows that the very normative force of the Constitution (Hesse, 1991) is weakened.

A last question of relevance to the study of the (no) confrontation of the authoritarian legacy by the Courts concerns the mechanisms of procrastination for the withdrawal, from the legal system, of the norms produced in that period. In the Chilean case, the indications are that this mechanism would be related to the very possibility of the Constitutional Court acting ex-officio in the withdrawal of the system's rule, if there is already a decision, in concrete control, for its unconstitutionality (as occurred with the aforementioned article 116 of the Tax Code).

It turns out that this expedient is not always adopted and, even in the cases where it is, may represent, due to the absence of retroactive effects, the extension of the authoritarian legacy to facts prior to the decision making. In the end, this is a political decision by the Court: the longer it takes to decide, the more the effects of the rules produced in the authoritarian period will be prolonged in time[9].

7. Final Considerations

The adopted methodological approach allows to explain the results obtained. It was found, first of all, that the excessive hierarchization of the Chilean Judiciary Branch, added to its self-centering and corporatism adopted by it, led it to isolate itself from society and its demands. Such aspects lead to the difficulty of permeability of its structure in relation to political demands typical of democratic periods and facilitate the co-optation of the high authorities in authoritarian periods.

Thus, the Chilean courts themselves, historically alien to any form of popular mobilization, have developed arbitrary ways of ensuring the creation of a personnel of magistrate's supporter of the dictatorship, thereby strengthening the narrative of legitimacy of the regime and ensuring the maintenance of institutional dynamics proper to the dictatorial regime. In the process of re-democratization it was no different, with this power opposing the attempts of democratizing reforms aimed at the transformation of both judicial institutions and other agencies and entities of the State.

What is seen, therefore, is that the judicial conservatism regarding the funda-

[8]The pronouncement of unconstitutionality by operation of law by the Constitutional Court, of effect *erect omnes*, presupposes the existence of previous decisions in concrete control (Article 93, 7th, of *the Constitución Política de la República*).

[9]This would be a type of legal practice that contributes enormously to the construction of an authoritarian culture in the field of law, comparable to other mechanisms of generating authoritarian culture in different areas, which help to establish patterns of permanence and reproduction of authoritarianism in a society under the aegis of an authoritarian regime. For example, regarding the existence of such mechanisms in the field of art, see Vasiliu (2019).

mental rights constituted a historical regularity, not a peculiar trait that emerged in the context of the process of democratic transition. Also, the Chilean judiciary's way of acting during the exception period helps to explain the way of behavior adopted by the Constitutional Court in the type of confrontation with the authoritarian legacy that was implemented by it. In other words, the conservative features of this branch help to understand, on the one hand, why it served as an element of stability for the Pinochet's dictatorship and, on the other hand, why the confrontation with the authoritarian legacy made by the Constitutional Court was mostly connected to the matters of the economic field. Finally, the characteristics pointed out also help to understand the absence of social mobilization in legal issues that escape the domain of economic power—a paradigmatic example of the relationship between the structuring of power and human action.

Another relevant conclusion that articulates the results obtained with the historical context and the methodology of historical sociology refers to the case of article 116 of the Chilean Tax Code. Although, due to the historical behavior adopted by the Judiciary, the confrontation of the authoritarian legacy, mostly, has been limited to causes linked to the domain of economic power, even in these situations the Constitutional Court can act inconsistently—not in the application of the theory of reception of norms, but in relation to the moment when the decision is made. This, as seen, creates a distinction among the legal appointed ones and, also, in the production of effects of the norms approved in the dictatorship. It is seen that the "when" of the lawsuit directly affects the "how" the solution was adopted.

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Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Abrão, P., & Torelly, M. D. (2011). *O programa de reparações como eixo estruturante da justiça de transição no Brasil*. ICTJ.

Ansaldi, W., & Giordano, V. (2012). *América Latina: La construcción del orden* (Tomos I e II). Ariel.

Baggio, R. C., & Berni, P. E. (2023). Briefs Adjustments to the Contribution of Historical Sociology to Latin American Constitutionalism. *Revista Direito e Práxis, 14,* 1052-1078. https://doi.org/10.1590/2179-8966/2022/62441

Couso, J., & Hilbink, L. (2010). Del quietismo al activismo incipiente: Las raíces institucionales e ideológicas de la defensa de los derechos en Chile. In G. Helmke, & J. R. Figueroa (Eds.), *Tribunales Constitucionales en América Latina* (pp. 169-218). Poder Judicial de la Federación.

De Greiff, P. (2006). *Justice and Reparation*. Oxford University. https://doi.org/10.1093/0199291926.003.0013

Engelmann, F., & Bandeira, J. (2017). Judiciário e política na América Latina: Elementos para uma análise histórico-política de Argentina, Brasil, Chile, Colômbia e Venezuela. In F. Engelmann (Ed.), *Sociologia política das instituições judiciais* (pp. 197-220). Editora da UFRGS/CEGOV.

Gargarella, R. (2014). *La sala de máuinas de la Constitución: Dos siglos de constitucionalismo en América Latina (1810-2010).* Katz.

Gerlich, M. (2021). How Elite Configurations Explain Shifts from Democracy to Authoritarian or Totalitarian Regimes: Turkey as a Case Study. *Open Journal of Political Science, 11,* 273-300. https://doi.org/10.4236/ojps.2021.112019

Giordano, V. (2012). *Ciudadanas incapaces. La construcción de los derechos civiles de las mujeres en Argentina, Brasil, Chile y Uruguay en el siglo XX*. Teseo.

Hesse, K. (1991). *A força normativa da Constituição*. SAFE.

Kritz, N. J. (1997). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. US Institute of Peace.

Nogueira Alcalá, H. (2002). Las competencias de los Tribunales Constitucionales de América del Sur. *Ius et Praxis, 8,* 71-92. https://doi.org/10.4067/S0718-00122002000200003

Nogueira Alcalá, H. (2008). La evolución político-constitucional de Chile 1976-2005. *Revista Estudios Constitucionales, 6,* 325-370. https://doi.org/10.4067/S0718-52002008000100011

O'donnel, G., & Schimitter, P. C. (2010). *Transiciones desde un gobierno autoritario*. Prometeo.

Pereira, A. W. (2010). *Ditadura e Repressão: Autoritarismo e o estado de direito no Brasil, no Chile e na Argentina*. Paz e Terra.

Silva Irarrázaval, L. A. (2012). Es el Tribunal Constitucional el supremo intérprete de la Constitución? *Revista de derecho (Valparaíso), 38,* 573-616. https://doi.org/10.4067/S0718-68512012000100014

Skaar, E. (2003). Un Análisis de las Reformas Judiciales de Argentina, Chile y Uruguay. *América Latina Hoy, 34,* 147-186. https://doi.org/10.14201/alh.7365

Skocpol, T. (1984). Emerging Agendas and Recurrent Strategies in Historical Sociology. In T. Skocpol (Ed.), *Vision and Method in Historical Sociology* (pp. 356-391). Cambridge University. https://doi.org/10.1017/CBO9780511621567.012

Teitel, R. G. (2003). Transitional Justice Genealogy. *Harvard Human Rights Journal, 16,* 69-94.

Tilly, C. (1991). *Grandes estructuras, procesos amplios, comparaciones enormes*. Alianza Editorial.

Varela, S., & Stratustegui, M. (1979). Constitución nueva y leyes viejas. *Revista del Departamento de Derecho Político, No. 4,* 59-77.

https://doi.org/10.5944/rdp.4.1979.7982

Vasiliu, E.-A. (2019). Lucian Pintilie and Censorship in a Post-Stalinist Authoritarian Context. *Psychology, 10,* 1159-1175. https://doi.org/10.4236/psych.2019.108075

Véliz, C. (1984). *La tradición centralista de América Latina*. Ariel.