

Book Review of *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*, by Lisa Hilbink. New York: Cambridge University Press, 2007.

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The literature on law and politics has benefited in recent years from a number of studies on courts outside the United States. Much of this work has focused on questions of judicial empowerment in both democratic and authoritarian contexts. Lisa Hilbink's excellent new study of Chile, by contrast, seeks to explain judicial complacency. Why is it that a court system that was formally independent, professional and highly institutionalized failed to act to constrain Pinochet's dictatorship? By examining the performance of Chilean courts before, during and after dictatorship, Hilbink locates the roots of judicial complacency in a longer institutional history of "apoliticism."

The book is well-written and logically organized, proceeding historically with an extended account of the Pinochet years at the heart of the volume. It is rooted in the institutional approach which has appropriately become the dominant method to study courts outside the United States. While others have written on Chile, Hilbink brings to bear new historical research and interview data that help to round out the picture with regard to Chile's courts under dictatorship, and she also offers a theoretically oriented narrative that will prove useful for understanding courts in other contexts.

Hilbink begins at the dawn of the Chilean state in the early 19<sup>th</sup> century, and focuses on the introduction of legal positivism under Andres Bello, the father of the Chilean Civil Code and founder of the University of Chile. Positivists emphasized fidelity to law. Chilean positivism differed from its European counterparts, however, in the emphasis on state-building over democratic concerns. Whereas the European account of legal positivism focused on avoiding judicial usurpation of majoritarian imperatives, the Chilean version focused on the need for faithful agents to building an effective government. This ideology complemented the views of those who favored a strong executive such as founding statesman Diego Portales. From the beginning, then, Chile's judiciary has been imbued with an ideology of avoiding "politics" and supporting the state. This constant ideological refrain has remained a lodestar for the courts, even as its institutional capacity has developed over time.

Using case analysis, Hilbink establishes clearly that the nominal apoliticism of the courts was not genuinely apolitical, but rather that there was a one-way bias. In the years before the dictatorship took over, for example, judges extended rights protection "very unevenly, actively defending conservative values and interests but reverting to positivist and even formalist reasoning in cases involving defendants of the ideological Left." (p.77) During the early years of the dictatorship, Pinochet's regime avoided interfering with the judiciary, retained the rules governing writs of amparo (habeas corpus) and created new constitutional remedies. The courts, however, did not apply the remedies, accepting only small numbers of cases and nearly always finding ways to avoid constraining the government. This pattern continued throughout the dictatorship.

Most surprisingly, the judges retained the same approach during the return to democracy, when they have not been especially eager to uphold constitutionalist principles but rather have repeatedly deferred to government. Even when the courts began to issue new rulings in authoritarian-era human rights cases in the aftermath of Pinochet's arrest in London, Hilbink argues that these cases were the exception that proved the rule, and that a close examination shows the approach to be consistent with the earlier eras in the avoidance of constitutional bases for the decisions.

Because Chile's courts had a one-way bias, following the constitution and law in some cases but not others, positivism alone cannot explain their pattern of judicial behavior. Why then did judges behave as they did? Hilbink considers other alternative explanations, including the personal policy preferences of the judges, class bias, and regime-related factors. She finds all of them wanting. Instead she argues that the institutional structure and ideology of the judiciary are the crucial explanatory factors. Chile's courts were hierarchically organized in a bureaucratic structure, like other civil law judiciaries, in which the Supreme Court played a policing role. But Hilbink equally emphasizes ideational factors, including the role-conception of judges and the contextually-defined notion of "apoliticism."

Hilbink's study is a welcome addition. Well-researched and convincingly argued, it demonstrates the power of an extended institutional analysis of a single country across time. It also demonstrates the merit of examining a case in which the proverbial dog did not bark: Chile's courts seemed to have the institutional resources and skill to play a more active role, but failed to do so. In elaborating why this was the case, Hilbink suggests that those engaged in comparative judicial studies should devote greater attention to the internal structures of institutional and ideological self-reproduction within the judiciary.