



**Judges beyond Politics in  
Democracy and Dictatorship**  
*Lessons from Chile*

**LISA HILBINK**

CAMBRIDGE STUDIES IN LAW AND SOCIETY

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Lisa Hilbink opens her *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* by asking why judges trained during a period of robust Chilean democracy facilitated the human rights violations of the Pinochet regime by deferring completely to the government's authority over public security and order matters. In the first few pages, Hilbink dispenses with an obvious potential explanation – that judges were pressured by the military into abandoning a commitment to human rights. Hilbink demonstrates that Chilean judges allowed significant governmental restrictions on individual rights not related to the holding of property long before 1973 and continued to do so after the transition back to democracy. This critical piece of evidence transforms the book's central research question from a relatively narrow concern for judicial deference under authoritarianism to a more general concern for why Chilean judges have historically failed to constrain the Chilean state. The answer, we learn, turns on the institutional structure of the judiciary and how that structure perpetuated a narrow 19th century conception of judicially cognizable rights.

The book's content nicely reflects the decade of research the author devoted to the project. It provides an historically rich yet accessible account of the Chilean judiciary's role in politics across two centuries, derived from careful archival work and more than one hundred interviews with scholars, justice ministers and judges. *JUDGES BEYOND POLITICS* can be used effectively in both undergraduate and graduate courses on law and politics, Latin American politics or political institutions. I wish to summarize Hilbink's argument and highlight how she evaluates competing explanations. Despite a small conceptual concern I wish to raise, *JUDGES BEYOND POLITICS* delivers on its promise to identify how institutions, in concert with particular ideological proclivities, can powerfully influence legal constraints on political power.

Hilbink's explanation centers on rules that guide judicial appointment and promotion. The Supreme Court enjoys extraordinary control over judicial career trajectories. The Court conducts yearly performance evaluations for the entire lower judiciary and is responsible for retention and promotion. In fact, although the president appoints the Supreme Court, the Court itself provides the slate of nominees, which gives it nearly complete control over its succession. Two primary consequences resulted from this structure. First, by [\*436] rewarding judges that reflected the Supreme Court's own deferential view of the law and punishing those who pushed new interpretative theories, the Court created strong incentives for lower court judges to behave largely as it desired. Hilbink demonstrates persuasively that judges who fell out of step were simply purged through negative performance evaluations. Second, giving the Supreme Court control over its successors made it impossible to radically change the Court itself. In short, institutions of judicial administration ensured that the Supreme Court's preferences were relatively stable over time and that the judiciary as a whole reflected those preferences well.

On its own, however, the institutional element to the argument can only do so much work, because it stops short of predicting what type of individual rights protections we ought to expect. We only know that whatever these protections are, they should reflect what the Supreme Court wanted. For this reason, the second piece of Hilbink's argument is ideological. The author suggests that the dominant "institutional ideology" in the Chilean judiciary holds that judges should restrict themselves largely to the resolution of private law problems (violations of property rights and contractual obligations) and give great deference to government in the context of public law problems (protection of order, security and morality). In Chile, to do otherwise is to be an illegitimate, "political" judge. Hilbink provides considerable evidence in Chapter 2 that this conception of the judicial role reflected a 19th century notion of what violations afford judicial remedy, and when the Court was given administrative control over its inferiors in the 1920s, this ideology was frozen into the judiciary. Appointment and promotion rules locked-in an antiquated conception of rights, and it is this combination of institutions and ideology that explains the Chilean judiciary's failure to protect human rights.

*JUDGES BEYOND POLITICS* is most persuasive when Hilbink addresses alternative and quite plausible class and legal explanations for the behavior she observes. The class explanation suggests that the Chilean judiciary has historically reflected the interests of the landed elite, and for this reason, we should observe strong protections for property rights but little protection for civil and

political rights, especially for individuals mobilizing to change Chile's economic structure. Although Hilbink finds that judges of the 19th century were indeed drawn largely from the oligarchy, she shows that by the 1960s Chilean judges had been overwhelmingly raised by families in the lower-middle to middle classes. Thus, a straightforward class-based account cannot explain the judiciary's behavior.

The legal explanation Hilbink addresses suggests that Chilean judges are guided by a strongly positivist legal theory, which "renders [them] insensitive to the substantive content of the laws they apply, and unconcerned about the outcomes of their decisions" (p.166). By carefully identifying ways in which Chilean judges have given expansive interpretation to statutes, interpretations that go well beyond the clear language of the law, but only when coming to a result that favored the protection of property rights, Hilbink suggests that it cannot be positivism per se that explains the historical trends she observes. [\*437]

Despite the overall persuasiveness of the book, perhaps because it is so persuasive, I believe it is worth raising a question about a key concept in the analysis. Hilbink's attempt to distinguish between an "ideological" concept, as, for example, we find in Segal and Spaeth (2002) and the "institutional ideological" concept that she advances. The institutional ideology of the judiciary, as discussed on pages 37-38, is an ideology of "anti-politics." As I have discussed above, it envisions a judicial role in which courts give high deference to government over public order and security policies but closely scrutinize policy choices in the context of property rights or contractual obligations.

The concern here is that this anti-politics ideology seems indistinguishable from a concept of conservatism in which judges simply prefer a world characterized by 19th century policies concerning economic liberty and social control. In other words, it is possible that the "institutional ideology" of deference over public law concerns merely hides familiar ideological preferences, as Segal and Spaeth would suggest. Highlighting this ambiguity in the text itself, on page 39, Hilbink notes that the "central claim of this book is that institutional features of the Chilean judiciary promoted a conservative bias among judges" [my emphasis]. In order to keep the concepts of ideology and institutional ideology distinct, a more precise summary might be that the institutional ideology of anti-politics, in the context of Chilean institutions of judicial appointment and promotion, induced a conservative bias in judicial outcomes. Either way, it strikes me that this adds a bit more complexity to the argument than is needed or can be supported by the evidence. Without an independent measure of ideology (either in the conservative-liberal sense or whatever would make sense in Chile), which Hilbink does not have, it is not clear what we gain by invoking this new ideological concept. No doubt it matches the way that Chilean judges talk about the judicial role, but it does not take us conceptually much beyond the political ideology concept judicial scholars typically adopt.

Despite this minor concern, *JUDGES BEYOND POLITICS* represents an excellent contribution to the literature on comparative judicial politics. The argument is highly plausible, and Hilbink's efforts to rule out alternative explanations are extremely persuasive. This is clearly a must read for anyone in judicial politics who focuses on Latin America.

A longitudinal case study of Chile that assesses competing hypotheses regarding judicial behavior in both democratic and undemocratic contexts, this book explores the relevance of regime-related factors, judges' personal policy preferences, social class, and legal philosophy, but argues that institutional features grounded in the ideal of "apoliticism" best explain the persistent failure of Chilean judges to take stands in defense of rights and rule of law principles, before, during, and after the authoritarian interlude. Dr. Hilbink offers comparative examples to support broader theoretical claims about when judges will be willing and able to assert their independence against abuses of public power.

"...Hilbink, a political scientist, enriches the sparse literature in this area of scholarship with her meticulously researched work....Judges sheds light on a variety of critical questions at the intersection of democratic theory, law, and political science;....clarity and comprehensiveness of her

research is impressive..."

"...this book adds a new element to this frequently studied period of Chilean history. Hilbink makes a convincing case for the need to look at institutional dynamics in understanding judicial behavior and identities. It will be of interest to both political scientists and historians for its contributions to the study of the dynamics between law, high politics, and civil society."

This book examines different hypotheses about Chilean judicial behavior before, during, and after the authoritarian interlude. The book explores arguments based on judges' personal policy preferences, social class, and legal philosophy, but contends that institutional features, grounded in the ideal of "apoliticism," best explain judges' conservative and conformist conduct.

Lisa Hilbink's *Judges beyond Politics in Democracy and Dictatorship* provides a thought-provoking account of the judiciary in Chile and why this "independent" court failed to protect human rights during the Pinochet era. Her argument is that the hierarchical and bureaucratic nature of the judiciary allowed senior conservative judges to keep the rest of the judges in line with their "apolitical" ideology. Moreover, judges exhibited pro-conservative tendencies even before and after Pinochet, indicating a deeper structural problem than simply fear of the military.

Hilbink's work raises a larger question of what judicial independence actually means. In Chile, the courts were formally independent from the government - and by Hilbink's account seldom overtly pressured - yet within the judiciary judges were not independent. It's an interesting question - one rule of law advocates ought pay closer attention to.

One gap is that she barely discusses the Constitutional Tribunal. The Tribunal was composed of several members appointed by the Supreme Court, yet it actually ruled against the Pinochet regime in key cases. This seems like an interest test of her theory - i.e., placing judges in a different institutional context will yield different results. It merits further exploration. Otherwise, this is a very useful book for anyone in the field of judicial politics.

Before I begin with the book, I bought both the hard copy and the kindle edition. It's for a grad-school class I'm taking and having both formats was a matter of convenience. That said, the kindle edition needs some serious work in its format. Tables don't appear properly on the cloud reader or my keyboard kindle. The table of contents has format issues that are not user friendly with the keyboard kindle, but work fine with the cloud reader. The chapters and sections are not tabbed for quick navigation, and the citations that should link to bibliographies are linked to kindle locations based on the publication date: for example, the citation (Brett 1992, 249) is hyperlinked to kindle location 1992, not the bibliographical entry corresponding to the citation. I would expect a kindle edition that costs \$30 to be much better formatted than this is.

The book is well researched, organized more or less chronologically, and her arguments are clear with substantial evidence to back her claims. There are significant differences between the Chilean and US legal system. Hilbink criticizes the judges for blocking prosecution of human rights abuses, but it appears that under Chilean law, the judiciary's hands are tied to strictly interpret the law whether or not justice is served. Hilbink focuses on the courts' neglect for human rights more than on the legal constraints imposed on the judiciary. The judiciary, by the law, had to grant amnesty to administration officials and transfer military cases to the military tribunals, and they did so unilaterally. Don't get me wrong, there were many human rights abuses during the Pinochet regime and they should not be swept under a rug, but Hilbink's analysis of the judiciary is skewed left of center.

Lisa Hilbink received her Ph.D. from the University of California at San Diego in 1999. Her research and teaching centers on the judicial role in democracy and democratization, with a particular focus on Latin America and Latin Europe. She is a two-time Fulbright grantee to Chile and Spain, and before joining the faculty at Minnesota, was a Post-Doctoral Fellow in the Society of Fellows and lecturer in the Woodrow Wilson School at Princeton University.

Professor Hilbink is currently working on a second book, tentatively entitled "Judging for Democracy? Sources and Consequences of Judicial Activism in Iberia and Latin America." She is also co-editing a book (with Ofelia Ferrín) on the political and social effects of the exhumations of mass graves from the Spanish civil war.

"Politicizing Law to Liberalize Politics: Anti-Francoist Judges and Prosecutors in Spain's Democratic Transition." In Terence Halliday, Lucien Karpik, and Malcolm Feeley (eds.), *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change*. Oxford: Hart Publishing, 2007.

Lisa Hilbink's book *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (2008), starts with a very simple question, "Why in a country with such a long history of democratic practice and respect for legality, a country whose human rights movement was one of the strongest on the continent, did judges make no public and concerted effort to defend liberal and democratic principles and practices, not only under Augusto Pinochet but well into the 1990s" (p. 4). In her search for an answer, Hilbink combines literature on comparative politics of judicial behavior, a century of Chilean history, and an intensive series of contemporary interviews with Chilean justices. Looking at these elements together, she argues that autonomous judicial institutions, and the ideology of apoliticism they promoted, shaped and determined judicial behavior and outcomes more than any other factor. Hilbink therefore questions the value of an "apolitical" judiciary in advancing and protecting liberal humanitarian values in democracies.

Hilbink situates her work in the current literature on the comparative politics of the judiciary's role in promoting and sustaining democracies. She works through several hypotheses for judicial behavior in illiberal governments, examining several hypotheses as having marginal significance. Manipulation by authoritarian leaders was not prevalent in the Chilean case, and the court had often rejected human rights cases and established a general pattern of behavior before the authoritarian government took power. Further, class identity and personal policy preferences seemed to have little correlation to the behavior of the judges. While they may have impacted individuals, alone these factors could not explain the uniformity of the judges' behavior. Only institutionalized understandings of law and judicial roles seem adequate to explain the uniform and strongly conservative decision-making of the Chilean judiciary, which extended through both sides of the Pinochet era.

Looking at this institutional/ideological hypothesis in the Chilean context, Hilbink finds a Chilean legal tradition that was strongly positivist. Chilean officials, concerned with the need to protect rule of law, promoted the idea of "apolitical judges." Judicial reforms in the 1920s and 1930s minimized governmental interference in the judiciary, yet also reinforced a strict separation between "law" and "politics." Moreover, it made the judiciary a highly hierarchical bureaucracy, with the Supreme Court in control of career advancement and discipline of lower ranking judges, thus placing a premium on conformity to institutional standards of professionalism. Professionalism, in this context, was overwhelmingly associated with apoliticism, that is a strong legal positivist interpretation of the law, in which the judiciary's sole role was to apply the laws made by the legislative branch. The Supreme Court enforced this notion of apoliticism within its ranks, disciplining justices who acted beyond this prescribed role.

Hilbink is quick to point out, that Chilean judges did deviate from a simple positivist stance at times, so long as the legal ruling would maintain or restore a conservative status quo. The judges viewed this not as political, but rather within the appropriate responsibilities of the judiciary as maintaining stability in the face of "radical" agendas. Thus, Hilbink argues, there were two important and interrelated components that made it unlikely that the Chilean judiciary would challenge the junta to defend liberal and democratic principles--the structural elements of judicial bureaucracy and ideological principle of apoliticism that defined justices' role within that structure. This understanding, Hilbink explains, fostered a "strict separation of powers doctrine, according to which legal oversight of the private sphere constituted the core and exclusive 'judicial' function, while questioning of executive or legislative decisions on questions of public law was inappropriate or meddling in politics" (p. 72).



Examining closely judicial decisions from the 1960s through Pinochet's arrest in London in 1998, Hilbink tells a story of continuity in judicial decision-making rather than an exceptional lapse of judicial responsibility during the authoritarian government. Her argument for the primacy of institutional factors in explaining judicial decision-making in Chile is perhaps the strongest element of the book. Hilbink marshals both personal interviews and anecdotes from justices themselves in support of this argument. Her review of a long period of judicial rulings amply demonstrates the continuity of judicial behavior over a long period of time. As the author aptly notes, there were no sudden changes in judicial rulings when the junta took power or when Pinochet stepped down. Rather, there was a remarkable level of consistency throughout decades of court decisions, despite new appointments made by democratic and authoritarian governments. At the same time, Hilbink is careful not to dismiss other factors as contributing to the conservative bias of the courts. Personal preferences and political attitudes influenced individuals, and at times, the authoritarian government did try through indirect means to influence judicial outcomes.

Hilbink also brings a sophisticated touch to her analysis of institutions and ideology. Rather than simply treating an institutional structure as something that judges conformed to for professional advancement, she examines how these structures shaped individual judges' identities; over time, judges internalized and personalized their role, which defined who they were as individuals and what they should do. This discussion is an important contribution for understanding political and social behaviors, and this work makes a solid case for scholars to take up similar questions in studying institutional dynamics.

This work's most provocative conclusion is that, as the apolitical ideal led to an inherently conservative and anti-liberal bias within the judicial structures in the Chilean case, "the construction of a judiciary around the idea of apoliticism is thus not only illusory, but is also fundamentally at odds with advancing a liberal-democratic rule of law" (p. 247). Here, the author's terms could be defined more tightly to avoid confusion, especially as she herself notes that the "apolitical" postures of the justices often had a very political content. She argues that justices need to be removed from undue coercion and manipulation by formal political parties and entities, yet they also need to be engaged in the societies and context in which their legal decisions are made. The Chilean judiciary's institutional structures and autonomy, she argues, inhibited justices from developing a sense of professional responsibility for the welfare of their society. Yet it is unclear that abandonment of apoliticism, or politicization of the judicial branch, would resolve this, rather than the cultivation of different values within its autonomous institution.

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