

CHAPTER 16
THE CIVIL LAW TRADITION, THE PINOCHET CONSTITUTION AND JUDGE EUGENIO
VALENZUELA

Sergio Verdugo*

Abstract

The depersonalization of the courts that the civil law tradition encourages makes it less likely that judges in those types of jurisdictions will become *towering* judges or, at least, it will make their influential jurisprudence anonymous or less visible. By exploring the experience of Eugenio Valenzuela, a Chilean judge that served at the Constitutional Court in the 80s, this Chapter shows that, despite the limitations of the civil law tradition, sometimes it is nonetheless possible to identify a towering judge in a civil law country. The author studies how judge Valenzuela led a group of judges within the Chilean Constitutional Court and succeeded in challenging critical pieces of legislation enacted by the military Junta during the Pinochet dictatorship. By showing how the Valenzuela jurisprudence helped to advance the transition to democracy against the interests of the authoritarian regime, the author claims that founding moments in fragile institutional settings of civil law countries may provide an opportunity for a *political* towering judge to emerge.

Keywords

Towering Judge – Civil Law Tradition – Eugenio Valenzuela – Chilean Constitutional Court

Introduction

Civil law jurisdictions are not a fertile ground to produce or identify *towering* judges. The formalistic judicial style of the civil law tradition discourages the personalization of the courts,¹ and some countries even promote the anonymity of judicial decisions and prohibit

* Associate Professor of Law, Universidad del Desarrollo. Doctor of Juridical Science (JSD), New York University. Master of Law (LL.M.), U of California, Berkeley. Master of Public Law, P. Universidad Católica de Chile. LL.B., Universidad del Desarrollo. Email: sverdugor@udd.cl

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¹ I use a weak approach to the idea of legal formalism. I do not mean a comprehensive legal theory, but a judicial inclination to emphasize the role of legal texts in adjudicating cases, presenting the arguments in an apolitical way, seeking for the consistency of legal concepts, the coherent systematization of legal issues and the relevance of linguistic conventions, while avoiding writing morally charged or politically inclined arguments. Perhaps the most accurate way to describe this is by saying that the civil law tradition invites

the publication of judicial dissenting opinions. It is probably not accidental that this book does not explore the experience of any civil law judge from Western Europe.² Even though judicial doctrines in the civil law tradition may still help to shape relevant aspects of the legal system, and that there seems to be a growing trend allowing the publication of separate opinions,³ the identity of the judges that authored those doctrines many times remain anonymous or is forgotten over time. In these kinds of civil law systems, key legal actors can probably identify who the influential judges are, but it is perhaps hard for those individual judges to build a broader long-term reputation, as the court is frequently seeing as speaking with one voice. As a result, as Pasquale Pasquino has suggested, judges in countries like France, Italy and Germany, “have no public persona.”⁴

Despite the limitations described above, which oversimplify a diverse group of jurisdictions, this Chapter claims that civil law judges can *tower* over other judges and examines one set of conditions under which this happens. I argue that, although the civil law features may limit the possibility of identifying towering judges in courts like the French *Cour de Cassation*,⁵ and towering judges are expected to arise less often in civil law jurisdictions, centralized constitutional courts in civil law countries situated in politically fragile contexts⁶ may produce the conditions for a towering judge to appear, and help the legal community to recognize that judge as such.

I do not claim that having towering judges is necessarily a desirable thing in every context, as an excessive personalization of judicial institutions may carry some problems that I cannot examine here. My purpose is to explain *how* the legal features of the civil law tradition may not prevent the existence of constitutional towering judges in scenarios of institutional fragility, producing recognizable legacies that the community can associate with the identity of a specific judge, although perhaps not the high visibility of judges such as Aharon Barak and Earl Warren. I will claim that judges do not need to achieve the public stature of people like Barak or Warren to become *political* towering judges. As stated by

judges and legal actors to be “conceptualistic, not pragmatist.” See Víctor Ferreres Comella, ‘Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition’ (2011) 89 Texas L Rev 1967.

² As Rehan Abeyratne and Iddo Porat’s introduction to this book says, “10 out of 15 jurisdictions covered in this Volume are common law or common law affiliated systems.” See the Introduction, IV.A.

³ The Venice Commission identified 11 states of the Council of Europe that forbid or have no regulations on judicial dissenting opinions, and 36 states that regulate those kinds of judicial votes. Venice Commission, ‘Report on Separate Opinions of Constitutional Courts - CDL-AD(2018)030’ 4.

⁴ Pasquale Pasquino, ‘E Pluribus Unum - Disclosed and Undisclosed Vote in Constitutional/Supreme Courts’ in Jon Elster (ed), *Secrecy and Publicity in Votes and Debates* (CUP 2015) 204.

⁵ A useful example is Lasser’s book, which shows how the French *Cour de Cassation* and the French judicial system, unlike its American counterpart aims for a different type of legitimacy, one that is not based on participatory and deliberative values, but on an unified institutional approach that avoids judicial transparency. Mitchel de SO-1’E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP 2009).

⁶ I am borrowing Sam Issacharoff’s expression. See Samuel Issacharoff, *Fragile Democracies. Contested Power in the Era of Constitutional Courts* (CUP 2015).

the introduction to this Volume, a political towering judge needs to promote a particular agenda or change,⁷ having a substantial impact on his or her constitutional system and individually distinguishing from his or her colleagues.⁸

This Chapter elaborates an example to illustrate my claim: the experience of Eugenio Valenzuela, a judge that served in the Chilean Constitutional Court in the 1980s and that helped to advance the democratization agenda in the context of General Pinochet's dictatorship—a regime that had ruled the country since September of 1973. At that time, the formal independence of the Chilean Constitutional Court was weaker than the one of the Chilean Supreme Court, as constitutional judges of that time lasted for eight-renewable terms, and the dictatorship controlled the judicial appointments directly or indirectly. However, while the Supreme Court aligned with the dictatorship's plans by promoting an apolitical judicial ideology that provided a sense of legal legitimacy to the regime,⁹ the Constitutional Court challenged the autocrats by helping to create the conditions that were going to end in Pinochet's defeat. The Constitutional Court behaved differently than the Supreme Court possibly because of two factors: first, the presence of judge Valenzuela; second, the institutional arrangements that centralized the judicial review power of legislation in the Constitutional Court, which provided the opportunity for judge Valenzuela to act. These factors, along with the authoritarian context and the democratization agenda that many politicians were promoting, partly explains why the Constitutional Court, and not the Supreme Court, defied the Pinochet regime.¹⁰

This Chapter will also show that judge Valenzuela's legacy has two distinguishable dimensions. First, a *legal* aspect, consisting of a flexible and democratic way of interpreting the constitutional text enacted by the dictatorship that challenged the authoritarian originalism that prevailed at that time.¹¹ Second, a *political* dimension, consisting of the onset of a gradual and incremental way to advance democratization. The Chilean way for transitioning to democracy, unlike other countries that replaced their constitutional texts in post-authoritarian scenarios (e.g., Spain 1978, Brazil 1988), consisted of an evolving constitutional transformation that gradually eliminated authoritarian enclaves.¹² Valenzuela

⁷ Introduction, III.

⁸ Introduction, I.

⁹ See Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP 2007).

¹⁰ I offer a more complete explanation elsewhere: Sergio Verdugo, 'Making Sense of the Chilean 1980 Constitutional Court' [2020] On file with author. See another explanatory account, compatible with the one that I offer in this Chapter, in the book by Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (CUP 2002).

¹¹ The *legal* dimension that I conceptualize in this Chapter is a less demanding version of the "jurisprudential dimension" that the Introduction associated with some towering judges. As I will show, although the doctrinal legacy of judge Valenzuela was relatively relevant, it was not as meaningful as the jurisprudential dimension or "intellectual mark" described by the editors of this Volume. Introduction, III.

¹² Elsewhere I have summarized the democratization reforms that ended with the authoritarian enclaves. See Sergio Verdugo, 'The Role of the Chilean Constitutional Court in Times of Change' in Richard Albert, Carlos

played a role in that strategy by turning the Pinochet Constitution against the interests of Pinochet.

This Chapter proceeds as follows. Section 1 elaborates on the idea of a *towering* judge in the context of the civil law tradition and explains my claim. Section 2 briefly elaborates on the political context in which judge Valenzuela worked, and summarizes the Constitutional Court's main institutional features, aims, and procedures. Section 3 explains how the Constitutional Court helped to advance the democratization agenda against the interests of the incumbent regime. Section 4 elaborates on the personae of judge Valenzuela and describes how he *towered* over other judges and how the legal and political communities have recognized his political legacy. Section 5 concludes.

1. Some theoretical remarks on the possible dimensions of the *towering* judges and the limits of the civil law tradition

There are different ways in which a judge can *tower* over other judges. A judge can become towering because of the influence that his or her doctrinal views have and the intellectual mark they leave—the *jurisprudential* dimension¹³—including the way that his or her judicial opinions frame essential legal and political debates over time. This dimension usually also involves the judge acquiring public visibility, at least within the legal community. A judge like Aharon Barak, for example, framed long institutional discussions that are still important in Israel. A judge can also become towering because of his or her agenda, which impacts the constitutional system in meaningful ways. The judge can become an institution-builder—the *institutional* dimension¹⁴—sometimes protecting the court's independence, such as Chief Justice McLachlin in Canada¹⁵ and sometimes they can push for significant changes—the *political* dimension.¹⁶ These kinds of judges may appear in foundational moments and use those moments as opportunities to contribute to shaping the political or legal landscape of their countries. Chief Justice Arthur Chaskalson of the South African Constitutional Court is perhaps a textbook example of this. It is also possible that in these sorts of scenarios, judges can also champion liberal or democratic values in fragile institutional systems, such as judge László Sólyom did in the 1990s in Hungary.¹⁷ Even though some of these judges' doctrines may not last long in some cases due to

Bernal and Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019).

¹³ Introduction, III.

¹⁴ Introduction, III.

¹⁵ See in this Volume, Chapter 4

¹⁶ Introduction, III.

¹⁷ Kim Lane Scheppele, 'Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law After Communism* (Central Eur U Press 2005); Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 *U of Pennsylvania L Rev* 1757.

political backlashes,¹⁸ scholars will continue to pay attention and debate the legacies of these judges, they will continue to cite their judicial decisions, and history books or comparative constitutional projects like this Volume will continue to discuss their rulings and even their separate opinions.

Many times, towering judges are also associated with progressive doctrines that require the elaboration of innovative tools of interpretation. Over time, their decisions may become the “canon” for a democratic or human rights normative approach.¹⁹ Judges that are also talented lawyers are perhaps better positioned to gain a good reputation and to influence their peers.²⁰ Becoming the leader of a personalized court –or personalizing the court—can also help,²¹ as it is probably easier for a broader audience to associate the court’s outcomes with the personae of a specific judge in these cases. Even though these conditions may not be necessary—nor sufficient—for a judge to become towering, they can help us to identify who the towering judge is, if there is one.

As I said in the introduction to this Chapter, towering judges are probably more easily found in common law jurisdictions rather than in civil law systems because judicial institutions in common law countries tend to be more personalized. Textbooks in common law jurisdictions typically refer to the doctrines of particular judges, and those doctrines are subject to academic scrutiny evaluating the consistency of those judges’ approaches. Apex court judges usually are more influential than law professors in developing legal interpretations, and litigants discuss whether previous opinions authored by particular judges apply to their specific procedures, and expect those previous rulings to control the actual cases they litigate.

On the contrary, law textbooks in civil law countries typically avoid personalizing the doctrines of the court, and even though judges tend to cite previous judicial decisions, they usually do not associate them with the personal identity of a judge and prefer to quote ‘the court’ as an institutional actor that speaks with a single and unified voice. The judicial culture in many civil law countries still seeks to legitimize the judicial role by elaborating on the appearance of strict adherence to the written law—including the codes. If there is only one correct judicial answer to any legal issue, then the court should limit its function

¹⁸ See examples of political backlashes or failed judicial experiences in Stephen Gardbaum, ‘Are Strong Constitutional Courts Always a Good Thing for New Democracies?’ (2015) 53 *Columbia J of Transnational L* 285; Tom Gerald Daly, *The Alchemists. Questioning Our Faith in Courts as Democracy-Builders* (CUP 2017).

¹⁹ On the possibilities of judicial decisions becoming “canons,” and what a canon means, see the useful discussion included the article by Michaela Hailbronner, ‘Constructing the Global Constitutional Canon: Between Authority and Criticism’ (2019) 69 *U of Toronto L J* 248.

²⁰ In this Volume, see Mark Tushnet’s argument in Chapter 2

²¹ See, in this book, Richard Albert and Lawrence David’s article on Justice Beverley McLachlin, from the Canadian Supreme Court, in Chapter 4

to identify what that answer is, and apply it to the case with a unitary voice. The law should not have contradictions and, if judges are the loyal agents of the law, then they should not show conflicting views. Most civil law judges present their arguments using an apolitical narrative. Sometimes the role of leading legal scholars commenting on the written law can be quite influential in the elaboration of consistent legal concepts and in building or systematizing legal categories.²²

Some courts, like the French *Conseil Constitutionnel*, release brief anonymous decisions that avoid deeply elaborating moral arguments. Like the French *Council*, a group of civil law jurisdictions—mainly from Western and Northern Europe—prohibit the publication of dissenting or separate opinions, and some possess a judicial tradition that disincentives the existence of dissenters even in politically charged cases.²³ Even in jurisdictions such as Germany, where the publication of judicial dissenting opinions are allowed since 1971 and the Constitutional Court has been regarded as “transformative,”²⁴ it is not easy to identify an influential and visible judge that towered over others.²⁵ In these conditions, it is hard in a civil law jurisdiction to identify important and visible judges like the American “great judicial dissenters.”²⁶ If we also consider that constitutional judges in civil law countries usually serve short, fixed, and non-renewable terms, they will also have less time, influence and opportunities to become towering figures and to be recognized as such by their legal communities.

Even though these features may limit the possibilities for towering judges to be recognized as such in civil law jurisdictions that possess a legal culture of judicial secrecy and value the idea that courts should have a unified voice, civil law judges may still *tower* over their colleagues inside closed chambers, while releasing anonymous opinions that will influence the political or legal landscape of the country or frame debates in significant ways. Their peers, and possibly some key legal actors, will know who the towering judges are.

²² John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America* (third edition, Stanford U Press 2007).

²³ The literature is too extensive to cite. See, for example, Pasquino (n 5). Exceptions exist, of course, and we should probably remove the Brazilian Supremo Tribunal Federal from this list. Diego Werneck Arguelles and Leandro Molhano Ribeiro, “‘The Court, It Is I’? Individual Judicial Powers in the Brazilian Supreme Court and Their Implications for Constitutional Theory” (2018) 7 *Global Constitutionalism* 236.

²⁴ Michaela Hailbronner, ‘Transformative Constitutionalism: Not Only in the Global South’ (2017) 65 *The American J of Comparative L* 527.

²⁵ There is a comparative constitutional law literature on judicial dissent that engages with this and other related topics. See, for example, Lee Epstein, William M Landes and Richard A Posner, ‘Why (and When) Judges Dissent: A Theoretical and Empirical Analysis’ (2011) 3 *J of Legal Analysis* 101; Sergio Verdugo, ‘Aportes Del Modelo de Disidencias Judiciales al Sistema Político’ (2011) Año 18, N° 2 *Revista de Derecho (Coquimbo)* 217; Santiago Basabe-Serrano, ‘Determinants of Judicial Dissent in Contexts of Extreme Institutional Instability: The Case of Ecuador’s Constitutional Court’ (2014) 6 *J of Politics in Latin America* 83; Lydia B Tiede, ‘The Political Determinants of Judicial Dissent. Evidence from the Chilean Constitutional Tribunal’ [2016] *Eur Political Science Rev* 377; Katalin Kelemen, *Judicial Dissent in European Constitutional Courts. A Comparative and Legal Perspective* (Routledge 2018).

²⁶ Kelemen (n 26) 63–66.

However, it may be harder for a legal scholar or a historian to find proof of how that judge *towered* over others. In the end, the towering judge may retire, and his or her legacy will be remembered, but not his or her identity. Indeed, we can quickly identify influential judicial doctrines as belonging to a particular court, but we will probably know little—if anything—about the doctrine’s real judicial author. If a concept of what a towering judge is requires a long-lasting reputation outside the judicial sphere, then judges in civil law jurisdictions certainly have a disadvantage over common law judges.

Nevertheless, I argue that a particular type of court (i.e., the centralized constitutional court) working in a specific kind of context (i.e., a foundational moment), within the civil law tradition, can provide a fertile ground for a towering judge to appear. Judges integrating these kinds of courts are likely to have the opportunity, and many times the obligation, to be involved in politically salient and morally complex cases, and their identities can be associated with their decisions because of the high visibility that these cases possess. If the court or legal system allows the judges to sign their opinions and even publish their separate votes, it will be easier to identify the judge’s ideas, even if the number of rulings released is relatively small.

When politically charged cases are submitted to courts, it is hard for civil law judges to avoid giving answers to complicated constitutional questions. The centralization of the judicial review power might put more pressure on constitutional judges when they need to answer politically charged constitutional questions in cases that are critical for the development of the political system. This should not surprise us, as one of the aims of proposing the creation of centralized courts was to prevent regular judges from answering hard constitutional questions.²⁷ True, scholars like Tom Daly have nonetheless suggested that courts in democratization scenarios should select their battles prudently, and find the correct timing to advance normatively desirable political principles.²⁸ However, as Víctor Ferreres Comella claims, centralized constitutional courts usually cannot select the cases they decide and, although it is not impossible, it is hard for those courts to develop self-restraint doctrines to avoid solving critical political conflicts.²⁹ Indeed, justifying

²⁷ See John Ferejohn and Pasquale Pasquino, ‘Constitutional Adjudication: Lessons from Europe’ (2004) 82 *Texas L Rev* 1671; Víctor Ferreres Comella, ‘The Rise of Specialized Constitutional Courts’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011). Also, see Hans Kelsen’s reasons for preventing regular judges from engage in constitutional issues in the context of the Austrian Court: Hans Kelsen, ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’ (1942) 4 *The J of Politics* 183. But Kelsen was also skeptical of the power of centralized courts engaging with abstract principles or fundamental rights. Hans Kelsen, ‘La Garantía Jurisdiccional de La Constitución.’ (1928) 10 (2008) *Revista Iberoamericana de Derecho Procesal Constitucional* 3.

²⁸ Daly (n 19) 280–286.

²⁹ Víctor Ferreres Comella, ‘The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism’ (2004) 82 *Texas L Rev* 1705; Víctor Ferreres Comella, *Constitutional Courts & Democratic Values. A European Perspective* (Yale U Press 2009).

deferential theories such as the political question doctrine and elaborating a sort of Bickelian judicial “passive virtues” idea,³⁰ or pursuing strategies such as avoidance³¹ or deferral,³² might be a difficult task for a constitutional court to accomplish without abandoning the formalistic nature of judicial reasoning in these countries. As a result, when a single court that is separated from the regular judiciary centralizes the judicial review power over legislation, it is common for that court to attract the attention of critical political and social actors interested in the judicial outcomes. Moreover, if the court also has ex-ante judicial review powers—i.e., the authority to review legislative bills before their promulgation—those courts will be pushed to evaluate the work of sitting legislatures, many times getting involved in partisan politics³³ and sometimes becoming a sort of “third chamber.”³⁴

The existence of a fragile democratic system, a post-authoritarian context, or a vulnerable democratization agenda aimed to avoid authoritarian turns, provide foundational moments that judges can use to secure a legacy that will be remembered by legal scholars and politicians, even though other judges may prefer not to cite them in their judicial decisions. These contexts of fragile political systems may provide the ground for great judges to appear. In this book, David Landau’s account of judge Manuel J. Cepeda,³⁵ and Gábor Attila Tóth’s study on judge László Sólyom are useful examples to illustrate this,³⁶ as both judges served on centralized constitutional courts in a context of vulnerable or fragile democracies in civil law countries.

However, the conditions listed above may also push courts to become submissive institutions that align with the goals of incumbent regimes. After all, incumbent regimes have many ways to control the courts and discipline the judges.³⁷ In Chile, for example, the

³⁰ On the idea of the judicial passive virtues, see the seminal work by Alexander M Bickel, ‘Foreword: The Passive Virtues’ (1961) 75 *Harvard L Rev* 40.

³¹ Erin F Delaney, ‘Analyzing Avoidance: Judicial Strategy in Comparative Perspective’ (2016) 66 *Duke L J* 1.

³² Rosalind Dixon and Samuel Issacharoff, ‘Living to Fight Another Day: Judicial Deferral in Defense of Democracy’ (2016) 2016 *Wisconsin L Rev* 683.

³³ Alec Stone, ‘The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe’ (1990) 19 *Policy Studies J* 81, 84; Juliane Kokott and Martin Kaspar, ‘Ensuring Constitutional Efficacy’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 807.

³⁴ Pasquale Pasquino, ‘Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy’ (1998) 11 *Ratio Juris* 38, 48; Ferejohn and Pasquino (n 28) 1675; Tom Ginsburg and Zachary Elkins, ‘Ancillary Powers of Constitutional Courts’ (2009) 87 *Texas L Rev* 1431, 1437.

³⁵ See Chapter 12 of this book

³⁶ See this Volume, Chapter 14

³⁷ The literature identifies diverse strategies that those regimes can employ. See a useful example in the way the Polish Law and Justice party controlled the Constitutional Tribunal of that country in Wojciech Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’ [2018] *Hague J on the Rule of L* <<http://link.springer.com/10.1007/s40803-018-0078-1>> accessed 8 March 2019.

autocratic regime did not need to intervene in the regular judiciary, as the Supreme Court had spontaneously aligned with the dictatorship's goals by, for example, avoiding to investigate human rights violations.³⁸ Nevertheless, those conditions can also provide an opportunity for constitutional courts to challenge powerful political actors by releasing impactful and consequential judicial decisions. This is what happened in Colombia when the Constitutional Court prevented former President Álvaro Uribe from triggering “a significant erosion of democracy”³⁹ by stopping him from reforming the Colombian 1991 Constitution to be able to run for a third presidential term.⁴⁰

A critical question that needs further research is how those judges can secure that the incumbent regimes will obey their decisions. I do not aim to reply to that question here.⁴¹ Instead, in the remainder of this Chapter I explore the example of judge Valenzuela to show how a civil law judge integrating a constitutional court in an authoritarian context can champion democratic values and explain how that judge *towered* over the others.

2. The 1980 Constitution and the Chilean Constitutional Court

The first Chilean Constitutional Court, created in 1971 by the constitutional reform pushed by former President Eduardo Frei Montalva, had closed after the 1973 military coup.⁴² A military Junta ruled the country between 1973 and 1990, committed gross human rights abuses, and implemented a rightwing Chicago style economic program. The regime had promised to restore the rule of law and to establish a ‘democratic’ system safeguarded by the military, although it took 17 years for an elected civilian administration to return to power. Pinochet was the commander of the army, the head of the Executive branch and a member of the *Junta*, an institution that concentrated the legislative power. The Junta was also composed by the commanders of the navy and the airforce, and the “*general director*” of the police. Pinochet did not rule with absolute power, though, as the regime established

³⁸ Jorge Correa Sutil, ‘The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy’ in Irwin Stotzky (ed), *Transition in Latin America: The Role of the Judiciary* (Westview Press 1993) 90–101. Also, Hilbink (n 10); Lisa Hilbink, ‘Agents of Anti-Politics: Courts in Pinochet’s Chile’ in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law. The Politics of Courts in Authoritarian Regimes* (CUP 2008).

³⁹ David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis L Rev 189, 201–203. Also, Samuel Issacharoff, ‘Constitutional Courts and Consolidated Power’ (2014) 62 The American J of Comparative L 585, 600–604.

⁴⁰ On this decision, see also Carlos Bernal, ‘Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine’ (2013) 11 Intl J of Constitutional L 339.

⁴¹ I developed an answer to this question somewhere else. See Sergio Verdugo, ‘How Can Judges Challenge Incumbent Dictators and Get Away with It?’ [2020] On file with author.

⁴² About the experience of that Court, see Enrique Silva C., *El Tribunal Constitucional de Chile (1971-1973)*, vol 38 (second edition (2008), Cuadernos del Tribunal Constitucional 1977); Sergio Verdugo, ‘Birth and Decay of the Chilean Constitutional Tribunal (1970–1973). The Irony of a Wrong Electoral Prediction’ (2017) 15 Intl J of Constitutional L 469.

critical norms such as the decision-making procedure of the Junta, which required the unanimity of all its members to adopt key political decisions.⁴³ Also, Pinochet was somehow forced to keep the credibility of the initial promises of the regime, as both the opposition and the regime's civilian supporting coalition had expected the military to return to their barracks in the future.⁴⁴ However, no clear deadlines existed and, in Pinochet's words, the government "only had goals, not deadlines."⁴⁵

In 1980, the Pinochet regime enacted a Constitution that reshaped the political system and that aimed partly at legitimizing the regime's institutions while also making credible the regime's promises.⁴⁶ According to the 1980 Constitution, a referendum in 1988 was going to decide whether Pinochet's 'presidency' was going to be extended or not. Pinochet was initially skeptical of this referendum, but one of his key advisors convinced him that it was important to legitimize his 'presidency' with votes.⁴⁷ The constitutional plan was then designed for Pinochet to win the 1988 referendum.⁴⁸ Pinochet had easily approved the 1980 Constitution through a controlled referendum that did not meet minimum democratic guarantees,⁴⁹ and he expected to repeat that strategy for the 1988 plebiscite. The political rights of his opponents were severely limited, and no electoral court was going to supervise that new plebiscite.

Among many institutional changes the Pinochet Constitution implemented, the Constitution created the second Chilean Constitutional Court. The judges of that Constitutional Court only worked for the Court part-time without exclusivity, and the dictatorship controlled all the appointments directly or indirectly. The Junta, General Pinochet, the National Security Council and the Supreme Court, an institution that had proven its loyalty to the regime,⁵⁰ all had the power to appoint judges to the Constitutional Court. Constitutional judges were

⁴³ See generally Robert Barros, 'Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile' in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (CUP 2003); Robert Barros, 'Personalization and Institutional Constraints: Pinochet, the Military Junta, and the 1980 Constitution' (2001) 43 *Latin American Politics and Society* 5.

⁴⁴ An interesting example of the political attitudes of many rightwing civilian politicians, is the political agreement that they achieved with the opposition seeking to reform the Constitution –later rejected by Pinochet. See Matías Tagle D. (ed), *El Acuerdo Nacional. Significados y Perspectivas* (Corporación Justicia y Democracia 1995).

⁴⁵ Cited by Verónica Valdivia Ortiz de Zárate, "¡Estamos En Guerra, Señores!" *El Régimen Militar de Pinochet y El "Pueblo", 1973-1980* (2010) 43 *Historia* 136, 167. My translation.

⁴⁶ See Jeffrey M Puryear, *Thinking Politics. Intellectuals and Democracy in Chile, 1973-1988* (The John Hopkins U Press 1994) 129; Heraldo Muñoz, *The Dictator's Shadow. Life Under Augusto Pinochet* (Basic Books 2008) 127–128.

⁴⁷ Ascanio Cavallo, Manuel Salazar and Oscar Sepúlveda, *La Historia Oculta Del Regimen Militar. Historia de Una Época, 1973-1988* (Editorial Grijalbo 1997) 127–128.

⁴⁸ Genaro Arriagada, *Pinochet. The Politics of Power* (Nancy Morris, Vincent Ercolano and Kristen A Whitney trs, Unwin Hyman 1988) 46.

⁴⁹ Claudio Fuentes, *El Fraude* (Hueders 2013).

⁵⁰ Grupo de los 24, 'Las Críticas Del Grupo de Los 24' 7; Alejandro Silva Bascuñán, 'Las Fuerzas Armadas En La Constitución' (1985) 37/38 *Revista de Derecho Público* 137, 155.

supposed to serve eight-year terms and, at the end of their terms—and before the elections of the future Congress—institutions controlled by the regime would decide whether to renew their tenures. Given these conditions, any way to evaluate the formal independence of the 1980 Court will probably conclude that that Court was hardly independent. Take, for example, Brinks and Blass’ proposal on how to measure judicial empowerment.⁵¹ For their model, the Chilean Court had low ex-ante autonomy because of who the appointers were and, although it had some degree of ex-post autonomy, the Court’s authority was too narrow to be able to “reshape the political landscape.”⁵²

The lack of sufficient judicial independence should not surprise us. Courts can be useful for autocrats,⁵³ and the Chilean Constitutional Court of 1980 was no exception. Indeed, the Court was supposed to become a one-sided constitutional insurance for the regime.⁵⁴ That insurance consisted of a long-term mission to supervise the legislation enacted by future elected Congresses,⁵⁵ and in a short-term mission to rubber-stamp the legislation passed by the Junta and provide a sort legal legitimacy to the regime. For that purpose, the regime designed an ex-ante mandatory judicial review power, partly inspired in the French abstract organic law review model, and expected the Court to “remain in line” with the policies and interests of its leaders.⁵⁶

3. Championing Democracy in an Authoritarian Context

Initially, the Constitutional Court served the aims of the regime by rubber-stamping the legislation enacted by the Junta,⁵⁷ contributing to banning political organizations that threatened the dictatorship,⁵⁸ solving some legal disagreements that the advisors of the Junta had, and becoming a deferential or even obedient institution.⁵⁹ When the Court

⁵¹ Daniel M Brinks and Abby Blass, ‘Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice’ (2017) 15 Intl J of Constitutional L 296.

⁵² *ibid* 318.

⁵³ See, for example: Julio Ríos-Figueroa and Paloma Aguilar, ‘Justice Institutions in Autocracies: A Framework for Analysis’ [2017] *Democratization*; Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law. The Politics of Courts in Authoritarian Regimes* (CUP 2008).

⁵⁴ On the idea of a one-sided insurance, see Rosalind Dixon and Tom Ginsburg, ‘The Forms and Limits of Constitutions as Political Insurance’ (2018) 15 Intl J of Constitutional L 988.

⁵⁵ See, e.g., Amaya Alvez Marín, ‘Forcing Consensus: Challenges for Rights-Based Constitutionalism in Chile’ in Colin Harvey and Colin Schwartz (eds), *Rights in Divided Societies* (Hart Publishing 2012) 252; Felipe Meléndez Ávila, ‘La Influencia Del Control Preventivo En El Diseño Normativo Del Régimen Presidencial Chileno’ (2017) 21 Anuario Iberoamericano de Justicia Constitucional 81, 96.

⁵⁶ Carlos Huneeus, *The Pinochet Regime* (Lynne Rienner Publishers, Inc 2007) 399.

⁵⁷ Patricio Navia, ‘The History of Constitutional Adjudication in Chile and the State of Constitutional Adjudication in South America’ (1999) 2 Asian J of Latin American Studies 1, 27.

⁵⁸ See Eduardo Aldunate, ‘Chile’ in Markus Thiel (ed), *The ‘Militant Democracy’ Principle in Modern Democracies* (Routledge 2009).

⁵⁹ Teodoro Ribera, ‘El Tribunal Constitucional y Su Aporte al Desarrollo Del Derecho. Aspectos Relevantes de Sus Primeros 59 Fallos’ (1989) 34 Centro de Estudios Públicos 195; Patricio Zapata, ‘¿Alternativas Menos

thought that a judicial decision could make the Junta uncomfortable, it respectfully addressed the issue in a non-confrontational way and one time even used informal channels to communicating with the Junta to avoid any possible confrontation.⁶⁰ This first period of the 1980 Court is important, as it helps to understand better how the Court built its credibility with the Junta, probably gaining the confidence of the regime. Had the Junta not trusted the Court, it would probably have never submitted the bills that the Court later challenged.

Since 1985, the Constitutional Court, with the leadership of judge Valenzuela, adopted a more independent attitude and significantly contributed to framing the conditions that allowed the opposition to the Pinochet dictatorship to win the 1988 plebiscite and put an end to the military regime. The most crucial case came that year when the Court reviewed the regulation establishing the Electoral Court. The Constitution established that the Electoral Court was going to be implemented after, and not before, the 1988 referendum, and the bill enacted by the Junta tried to detail that rule. Nevertheless, the majority decision, written by Valenzuela, made a creative interpretation of the Constitution and established that political electoral principles demanded the implementation of the Electoral Court before the 1988 plebiscite was going to take place, and not after.⁶¹

In his decision, Valenzuela identified a tension between parts of the Constitution and established that the Electoral Court should be implemented before the 1988 plebiscite by using abstract constitutional principles that seemed to oppose the specific rule. This argumentative strategy was surprising, as originalism and literalism were the prevailing legal tools of interpretation at that time.⁶² Some civilian advisors and members of the dictatorship's supporting coalition shared Valenzuela's approach to the constitutional question,⁶³ and judge Valenzuela knew about this.⁶⁴ These facts are relevant because they show that Valenzuela's position was not an isolated doctrine, but an idea that could be defended from *within* the regime's supporting coalition. Also, Valenzuela's position was consistent with the regime's legitimization narrative consisting of the need to restore a civilian democracy, and by a Constitution that was drafted partly as a result of this narrative. Sure, Valenzuela was brave. But he was not alone.

Drásticas? Notas Sobre El Uso y Abuso de Prevenciones, Exhortaciones y Consejos Por El Tribunal Constitucional Chileno' (2001) 63 Revista de Derecho Público 601.

⁶⁰ Robert Barros, *La Junta Militar. Pinochet y La Constitución de 1980* (Milena Grass tr, Editorial Sudamericana 2005) 320–323.

⁶¹ TC (1985) rol 33

⁶² Patricio Zapata Larraín, *Justicia Constitucional* (Editorial Jurídica de Chile 2008) 203–209.

⁶³ Carlos Cruz-Coke, 'La Sentencia Del Tribunal Constitucional de 24 de Septiembre de 1985' (1985) 37/38 Revista de Derecho Público 143.

⁶⁴ In a paper published in 2003, Valenzuela stated that political actors from diverse tendencies and the "immense majority of constitutional scholars" were supportive of his position. See Eugenio Valenzuela Somarriva, *Contribución Del Tribunal Constitucional a La Institucionalización Democrática*, vol 30 (Tribunal Constitucional 2003) 23.

An interesting question is why the Pinochet regime did obey the Court's decision on the Electoral Court statute. Although I cannot fully respond to that question here, secondary evidence suggests that Pinochet believed that he was going to win the plebiscite in any event,⁶⁵ probably influenced by his advisors and by the polls the regime made at that time.⁶⁶ In another paper, I also argue that the expected costs of disobeying the decision were high.⁶⁷

Later, Valenzuela also drafted or voted in favor of rulings that helped to democratize the other aspects of the 1988 plebiscite regulations. In 1986, the Court reviewed the regulations of the electoral register and the Electoral Service agency. The Court decided to cut down the power of the Director of the Electoral Service for canceling citizens' electoral inscriptions, arguing that that power violated due process.⁶⁸ In 1987, the Court prevented the Junta from promulgating several questionable rules included in the new statute regulating the political parties.⁶⁹ That ruling strengthened the possibilities of the factions that opposed the dictatorship to organize their campaigns more effectively. For example, it declared the unconstitutionality of a norm aimed to expand the regime's power to ban political associations;⁷⁰ and it removed the prohibition of using the name, abbreviations or symbols of political parties that were already dissolved (a ban that, in practice, targeted the Communist and Socialist parties).⁷¹ The Court also prevented the Junta from establishing that only "natural persons" could provide funding to political parties (harming the creation of new parties);⁷² and determined that the Junta's power to regulate political parties should be interpreted narrowly, obliging the Junta to defer to the parties regarding critical organizational party rules.⁷³

Then, the Court had to review a new electoral regulation enacted by the Junta, and Valenzuela managed to convince sufficient judges to protect the political rights of citizens that were not affiliated to the existing political parties. The new regulation tried to limit independent citizens' political rights by imposing rules such as preventing them from becoming *apoderados* –i.e., individuals that check and review the voting procedure. The

⁶⁵ J Esteban Montes and Tomás Vial, 'The Constitution-Building Process in Chile: The Authoritarian Roots of a Stable Democracy' (Intl IDEA 2005) 12; Roberto Garretón, 'Chile: Perpetual Transition Under The Shadow Of Pinochet' in Ximena Barra (ed), *Neoliberalism's Fractured Showcase* (Brill 2011) 78; Patricia Arancibia Clavel, *Carlos F. Cáceres. La Transición a La Democracia 1988-1990* (Libertad y Desarrollo 2014) 58–59.

⁶⁶ Peter M Siavelis, *The President and Congress in Postauthoritarian Chile: Institutional Constraints to Democratic Consolidation* (Penn State U Press 2000) 13.

⁶⁷ Verdugo, 'How Can Judges Challenge Incumbent Dictators and Get Away with It?' (n 42).

⁶⁸ TC (1986) rol 38, at pp. 6-7.

⁶⁹ TC (1987) rol 43.

⁷⁰ TC (1987) rol 43, at pp. 14-15.

⁷¹ TC (1987) rol 43, at pp. 16-17.

⁷² TC (1987) rol 43, at pp. 17-18.

⁷³ TC (1987) rol 43, at pp. 18-22. See Ribera (n 60) 218.

Court declared that some of these rules violated equality.⁷⁴ Also, the Court forced the Junta to specify the date of the Presidential elections (Pinochet could lose the plebiscite, and the regime needed to organize Presidential elections in that scenario), and to specify the plebiscite's date.⁷⁵ The Junta had decided that the referendum was going to take place between 30 and 60 days after the regime had officially announced the regime's candidate. Valenzuela obliged the Junta to publicly establish the date with some time in advance, helping the 'No' campaign to be organized more effectively.⁷⁶ The Junta obeyed the Court's decision and amended the electoral regulation as a result.⁷⁷

With these decisions, the Valenzuela's jurisprudence succeeded to secure favorable electoral conditions for Pinochet's opponents, who used the opportunity to organize a sophisticated and well-planned 'No' campaign.⁷⁸ Pinochet was defeated in the end.

4. On judge Valenzuela, his appointment and his legacy

As I explained above, the depersonalization of the courts in the civil law tradition sometimes makes it hard for towering judges to be noticed. In other words, even if a towering judge rises, and other judges follow this judge, it may be hard to identify or demonstrate how that judge *towered* over his or her colleagues. However, I have also argued that a foundational moment like the one consisting in advancing democracy in the context of an authoritarian regime, along with the centralization of the judicial review power in a single constitutional court, may produce the opportunity for a towering judge to be noticed in a civil law jurisdiction.

Judge Valenzuela was not an outsider of the regime. The National Security Council appointed him along with judge Enrique Ortúzar—Ortúzar was a close advisor of Pinochet and had chaired the committee that wrote the first draft of the 1980 Constitution. Before the National Security Council discussed Valenzuela's nomination, Pinochet tried to convince the Council to appoint another lawyer: Avelino León Hurtado, a well-known commentator of the Civil Code, but the Junta opposed León Hurtado's nomination because of his advanced age.⁷⁹ Mónica Madariaga, Pinochet's Secretary of Justice—who advised Pinochet in judicial matters—recommended Pinochet to appoint Valenzuela. Valenzuela was at that time a lawyer of the *Consejo de Defensa del Estado*, an administrative agency that litigates in favor of state interests. Valenzuela had resigned to the *Consejo*, and Madariaga, who was

⁷⁴ TC (1988) rol 53.

⁷⁵ TC (1988) rol 53.

⁷⁶ See Cavallo, Salazar and Sepúlveda (n 48) 477–479.

⁷⁷ Ribera (n 60) 220. The Court reviewed the modification in TC (1988) rol 56

⁷⁸ See Eduardo Engel and Achilles Venetoulis, 'The Chilean Plebiscite: Projections Without Historical Data' (1992) 87 J of the American Statistical Association 933.

⁷⁹ Cavallo, Salazar and Sepúlveda (n 48) 392, 472.

impressed by him, tried to retain Valenzuela by offering him a position in the Court.⁸⁰ Valenzuela had no clear partisan background, but he was supposed to be a reliable lawyer with a promising legal career, and Madariaga seemed to trust him.

When the Junta submitted to the Constitutional Court the bill regulating the Electoral Court, the judges were divided on how to rule that case. It is helpful to note that, unlike its French counterpart, the Chilean Constitutional Court allows the publication of dissenting opinions, and the identity of who wrote the decisions many times appears at the bottom of the documents that include the rulings. That way, along with using secondary evidence, it is not hard to identify voting coalitions. We know that Valenzuela convinced some of his colleagues to support his views,⁸¹ and wrote most of the decisions that I explained in the section above.

Valenzuela's positions divided the Court into two groups. The first faction, led by judge Ortúzar, was loyal to the regime and used a formalistic approach to constitutional interpretation with literalistic and originalists techniques that aimed at implementing the Junta's will. The other faction, led by judge Valenzuela, elaborated creative legal techniques that avoided literal interpretations that could conduct to undemocratic outcomes and enforced a more liberal approach to the 1980 Constitution.⁸² By doing this, Valenzuela ignored the literal meaning of the constitutional rule and broke with a long Chilean judicial tradition that emphasizes a formalist reading of the legal texts.

In an interview commenting on his decision on the Electoral Court, Valenzuela said that "Rosende [one of the regime's more influential lawyers] wanted the plebiscite to be like 1980, and he thought he could manipulate us. But we argued that to be compatible with the Constitution, the plebiscite had to be transparent."⁸³ Valenzuela was also aware of how the decisions helped the dictatorship's opposition: "Few people knew it at the time, but we changed the course of Chilean politics. We made the process something people could believe in."⁸⁴

Valenzuela's positions were not only remarkable in the cases where he advocated for creating unfavorable electoral conditions for Pinochet, as he also showed hints of independence at least since January of 1985. That time, he wrote a dissenting opinion against the Court's decision legitimizing the ban of the Communist and the Socialist Parties

⁸⁰ *ibid* 472.

⁸¹ Huneus (n 57) 399–400; Hilbink (n 10) 140.

⁸² Druscilla L. Scribner, 'The Judicialization of (Separation of Powers) Politics: Lessons From Chile' (2010) 3 *J of Politics in Latin America* 71, 85.

⁸³ Cited by Pamela Constable and Arturo Valenzuela, *A Nation of Enemies. Chile Under Pinochet* (Norton 1991) 303. My translation.

⁸⁴ *ibid* 304.

along with other leftwing political organizations.⁸⁵ Another interesting case that was going to test the Court's commitment to democratic principles came in 1987. The dictatorship was prosecuting Clodomiro Almeyda—a former Allende's secretary of state and a founding member of the Socialist Party—who had returned to Chile after being exiled. The Pinochet regime's secretary of interior asked the Court to declare that Almeyda had violated the constitutional rule that prohibited the promotion of the Marxist ideology. Although Valenzuela could not convince his colleagues to favor Almeyda in this case,⁸⁶ he filed a dissenting opinion.⁸⁷

Three additional facts helped to make visible Valenzuela's work in advancing democracy. The first one was the only noticeable measure that the Pinochet regime took against the Constitutional Court: when judge Valenzuela's term ended, the National Security Council decided not to renew his term, and Valenzuela was forced to retire from the Court.⁸⁸ The National Security Council could not reappoint judge Ortúzar because he had reached the age limit (75), so it replaced both, Valenzuela and Ortúzar, with two rightwing appointees.⁸⁹

The second fact is that, later, civilian politicians acknowledged Valenzuela's actions and even rewarded him. In 1997, the Senate needed to appoint one judge to the Court, but rightwing senators were divided and could not achieve an agreement.⁹⁰ While some argued that appointing Valenzuela might politicize the Court, others claimed that Valenzuela could help the Court to become a more credible institution.⁹¹ Leftwing senators knew that a leftwing judicial nomination was not feasible, and decided to team up with the rightwing faction that was supporting Valenzuela, and voted in favor of Valenzuela's nomination. Thus, Valenzuela's appointment was due to a bipartisan agreement that succeeded in reaching 28 votes against the rightwing nominee, who got 17 votes.⁹² Later, Valenzuela was invited by the Senate to give his opinion on the reforms that President Lagos was promoting to put an end to the authoritarian enclaves of the 1980 Constitution.⁹³ Although it is hard to know the exact impact of Valenzuela's views on the outcome of the 2005 reform, it is easy to notice that, at least, the final institutional design of the Court coincided

⁸⁵ The regime had already dissolved those parties, but some regime supporters had asked the Court to enact a formal judgment on the matter, probably to legitimize the ban. TC (1985) rol 21.

⁸⁶ Cavallo, Salazar and Sepúlveda (n 48) 479.

⁸⁷ TC (1987) rol 46, at pp. 66-84.

⁸⁸ Sergio Díez, *Reflexiones Sobre La Constitución de 1980* (El Mercurio - Aguilar 2013) 391.

⁸⁹ See Mary Helen Spooner, *The General's Slow Retreat. Chile After Pinochet* (U of California Press 2011) 24.

⁹⁰ Manuel Antonio Núñez, 'Sobre La Designación de Los Magistrados Del Tribunal Constitucional Chileno' (1998) Número Especial Revista Chilena de Derecho 211.

⁹¹ Díez (n 89) 390.

⁹² Senate's 30th session, March 5th, 1997.

⁹³ Biblioteca del Congreso, 'Historia de La Ley N° 20.050' 29-43.

with most of Valenzuela's recommendations.⁹⁴ In 2005, the Senate reappointed Valenzuela with 35 votes (out of 39),⁹⁵ but Valenzuela retired a year after.

The third fact that helps to discuss how Valenzuela's reputation grew, is the way the legal community currently cites and discusses his judicial opinions. Although the Constitutional Court has only cited Valenzuela in a few rulings that use the non-literalist tool of interpretation that Valenzuela promoted in the 1980s⁹⁶ and that only a few advocates have mentioned judge Valenzuela's decisions to explain a constitutional approach to political equality,⁹⁷ judge Valenzuela's rulings have influenced many legal scholars. Those scholars typically cite the rulings as landmark examples of how to challenge a literal and originalist interpretation of the Constitution by advancing a "systematic" interpretation that treats political principles as relevant democratic ends.⁹⁸

Other scholars have claimed that Valenzuela's opinion on the Electoral Court bill was "courageous,"⁹⁹ "brilliant,"¹⁰⁰ and "beautiful."¹⁰¹ These kinds of approaches have been popularized among Chilean legal scholars, mainly due to Patricio Zapata's treatment of the Electoral Court case.¹⁰² Another relevant example of a contemporary work highlighting Valenzuela's jurisprudence is a paper written by former Chief Justice Marisol Peña, who celebrated Valenzuela's judicial opinions and his judicial style.¹⁰³ Former judge Peña never cited Valenzuela in her judicial opinions, but she did cite him in her academic writings. Other scholars writing from a historical or political science perspective have also given credit to Valenzuela. To name only one, an author claims that Valenzuela's decision on the Electoral Court was a "decisive step towards the transition."¹⁰⁴

5. Why is Eugenio Valenzuela a towering judge, and what can we learn from this?

⁹⁴ *ibid* 31, 90, 102, 243, 301, 302. Also, see Javier Couso Salas and Alberto Coddou MacManus, 'La Naturaleza Jurídica de La Acción de Inaplicabilidad En La Jurisprudencia Del Tribunal Constitucional: Un Desarío Pendiente' (2010) 8 Estudios Constitucionales 389, 394–395.

⁹⁵ Senate's 35th session, March 9th, 2005.

⁹⁶ See, e.g., TC (1992) rol 141.

⁹⁷ See, e.g., TC (1992) rol 160, TC (1996) rol 245, TC (1998) rol 282. Also, TC (2005) rol 460

⁹⁸ José Luis Cea Egaña, 'Influencia Del Tribunal Constitucional En El Proceso de Institucionalización Política' (1988) 15 Revista Chilena de Derecho 205, 205–211; Cruz-Coke (n 64) 143–148; Zapata Larraín (n 63) 201–209.

⁹⁹ Cea Egaña (n 99).

¹⁰⁰ Zapata Larraín (n 63) 203.

¹⁰¹ See Mario Verdugo's work, cited by *ibid* 207.

¹⁰² Patricio Zapata Larraín, *La Jurisprudencia Del Tribunal Constitucional. Parte General* (Biblioteca Americana - Universidad Andrés Bello 2002) 48–55; Zapata Larraín (n 63) 201–209.

¹⁰³ Marisol Peña, 'El Perfil de Un Juez Constitucional: El Ejemplo de Eugenio Valenzuela Somarriva' in José García and Rafael Pastor (eds), *Grandes Jueces Chilenos* (Ediciones Jurídicas de Santiago - Universidad Autónoma de Chile 2017).

¹⁰⁴ Óscar Godoy Arcaya, 'La Transición Chilena a La Democracia: Pactada' (1999) 74 Estudios Públicos 79, 92.

Judge Valenzuela *towered* over his colleagues of the Constitutional Court of 1980 because he succeeded in building the necessary judicial majority to confront the dictatorship in cases that were crucial for advancing the democratization agenda. In doing that, he defeated the faction led by Enrique Ortúzar, he did not follow the conventional formalistic approaches to legal interpretation, and he succeeded in building a reputation that transcended the closed chambers of the Court.

Valenzuela's legacy has two dimensions: A *legal* aspect, which consists of Valenzuela's way to approach and interpret the Constitution using an anti-formalism technique that diverged from the conventional ways to read the Constitution in the 1980s. Although some contemporary scholars highlight Valenzuela's approach, judges rarely cite Valenzuela's judicial opinions. Thus, it should be noted that Valenzuela's legal influence does not achieve the required intellectual mark to fit with the *jurisprudential* dimension conceptualized in the introduction of this book. If Valenzuela left a "mark," it was due to the *political* dimension of his work, which had a significant impact helping to put an end to the dictatorship and advance democracy.

Perhaps Valenzuela differs from other towering judges discussed in this book, at least because of two reasons. First, as already explained, although legal scholars have studied and discussed Valenzuela's opinions, other judges have rarely cited his decisions and, when they do cite his views, they do not identify Valenzuela as the author. This last fact is probably associated with the features of the Chilean civil law tradition, which encouraged the depersonalization of judicial rulings. After all, Chilean judges rarely give credit to a concrete judge for a judicial doctrine that they cite, and they prefer to quote the formal institutional author—the 'Court.' Second, unlike other judges discussed in other chapters of this book, Valenzuela did not participate in an elevated number of decisions. Indeed, the official statistics show that the 1980 Court released an average of 9.6 rulings each year from 1981 to 1989.¹⁰⁵ If a judge needs to participate in numerous cases to become a towering figure, and other judges need to cite those decisions while giving credit to their author, then Valenzuela can hardly be a towering judge.

On the contrary, if a judge does not need to participate in an elevated number of decisions to become towering, and there are other ways in which a judge can be recognized besides other judges citing his or her judicial opinions, then there is an argument that can be made to recognize Valenzuela as a towering judge, and the way the Valenzuela jurisprudence influenced the political history of the country compensates the small number of rulings in which Valenzuela was involved.

¹⁰⁵ Tribunal Constitucional, 'Cuenta Pública Del Presidente Del Tribunal Constitucional 2016' 179–180.

Judge Valenzuela's example shows one path for a civil law judge to become a towering figure. Valenzuela's experience shows that the depersonalization of judicial institutions associated with the civil law tradition, may not prevent a towering judge when there are foundational moments in fragile political scenarios.