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Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

Authoritarian constitutionalism, judicial capture, or the ambivalence of modern law: The case of the Chilean Constitutional Tribunal

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EDUARDO A. CHIA*

Abstract

This article explores the tension between *ratio* and *voluntas* in modern law. It primarily relies on a literature analysis to critically engage with two interrelated issues: (i) the notion of "authoritarian constitutionalism" and (ii) the ambivalences observed in the conceptual articulation and institutional structuring of the judiciary. The paper then presents the Chilean legal order as a case study, examining how certain practices and decisions of its Constitutional Tribunal during specific periods reflect the aforementioned interplay. Subsequently, it incorporates reviews of recent experiences of "democratic backsliding" in selected Central and Eastern European countries to provide a broader comparative perspective. Despite occurring in distinct economic and historical-political contexts, the cases discussed support the presence of an antagonistic duality in modern law that oscillates between liberation and repression. The study suggests that this tension is universally observable, albeit manifested contingently within different legal and constitutional orders.

Key words

Chilean Constitutional Tribunal; authoritarian constitutionalism; judiciary; *ratio* and *voluntas*; authoritarian neoliberalism

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* Eduardo A. Chia, Institute for Criminal Justice and Philosophy of Law, Goethe-Universität Frankfurt am Main. Email address: eduardo.chia@gmail.com

Resumen

Este artículo explora la tensión entre *ratio* y *voluntas* en el derecho moderno. Se sustenta principalmente en un análisis bibliográfico a fin de abordar críticamente dos cuestiones interrelacionadas: (i) la noción de "constitucionalismo autoritario" y (ii) las ambivalencias observadas en la articulación conceptual y la estructuración institucional de la judicatura. Luego, presenta el orden jurídico de Chile como un caso de estudio, examinando cómo algunas prácticas y decisiones de su Tribunal Constitucional, en períodos específicos, expresan la interacción mencionada. Posteriormente, incorpora revisiones de experiencias recientes de "retroceso democrático" en países seleccionados de Europa Central y del Este, para ofrecer una dimensión comparativa más amplia del fenómeno. Los casos expuestos, a pesar de acontecer en contextos económicos e histórico-políticos disimilares, respaldan la presencia de la dualidad antagónica del derecho moderno que oscila entre liberación y represión. El estudio sugiere que ésta aparece como universalmente observable, aunque se manifiesta de manera contingente en los órdenes jurídicos y constitucionales.

Palabras clave

Tribunal Constitucional chileno; constitucionalismo autoritario; judicatura; *ratio* y *voluntas*; neoliberalismo autoritario

Table of contents

1. Introduction

The coexistence of *voluntas* and *ratio* in modern law permeates its operations through antagonistic interaction. Throughout Western history, social forces have contrasted the law's volitional moment, rooted in state sovereignty, with its rational moment, expressing the law's potentiality to realise legal freedoms. This tension involves the interplay of conflicting dualities such as authority v. autonomy, coercion v. freedom, or regulation v. emancipation (Cf. Tuori 2010/2016, 2018; Neumann 1936/1986, 1937; Cotterrell 1995; Santos 2002/2020).

Traditional jurisprudential theories often prioritise one of these moments, leading legal scholars to oscillate between barely compatible positions. For instance, legal positivist theories underscore law as a product of sovereign decision-making, which may overshadow its rationality for instrumental ends. Conversely, natural law theories rooted in external normative principles anchor law fundamentally in a broad idea of justice, positing its moral basis as primary. The former approach risks stripping law of its rationality by privileging instrumentalism, whilst the latter overlooks the social determination of legality. Liberal political and legal theory has taken the utmost pains to justify and reconcile this antagonism (Cf. Neumann 1937, Habermas 1987). This paper contends that *ratio* and *voluntas* in modern law operate concurrently without favouring one over the other. The activation of one of them would depend on the dominance of some social and political forces at concrete historical junctures.

The study will explore this tension through a critical analysis combining conceptual arguments with empirical data, employing legal comparison where applicable. The concrete case analysis will be the Chilean Constitutional Tribunal's practices and decisions between 2010-2022. Subsequently, the investigation will briefly compare it with the experiences of recent politico-constitutional conjunctures related to democratic "regressions" or "backslides" in selected constitutional orders from Central and Eastern European Countries within the European Union (EU-CEE). Although the examined cases belong to diverse regions with parallel juridical and socio-economic expressions, they are not automatically homologous.

The article's central claim is that despite differing contexts, examined cases probe that the dualistic ambivalent nature of modern law —simultaneously leaning toward liberation and repression— is universally noticeable yet contingently realised.

1.1. Study structure

Section (2) provides the theoretical constituents that inform subsequent analyses. It reviews liberal constitutional theories that underestimate the law's ambivalence, challenging their prevailing assumptions. It addresses the conceptual foundations of the dialectics of modern law.

Section (3) examines the principle of judicial independence in liberal democracies, underscoring the judiciary's dual role: safeguarding freedoms and potentially facilitating anti-democratic practices and moves in non-full-scale authoritarian settings. This section briefly describes how constitutional courts, without direct capture or co-option, might ally with executive authorities under the force of law, destabilising the

balance of powers and sometimes causing hindrances to democratic progress. This part aims to unveil how judicial practices and rulings mirror the ambivalence of modern law.

Section (4) presents a concrete case study: Chile's Constitutional Tribunal (ChCT). It serves as a counterpoint to prove the Janus-faced nature of modern law: it illustrates how the practices and decisions of a constitutional court contributed to preserving, via emphasising the volitional moment of law, an authoritarian (neo)liberal model in a formally democratic setting. This case diverges from the judiciary operating under anti-democratic pressure by some authoritarian rulers resorting to legality (like some CEE-EU nations).

2. *Ratio* and *voluntas*, *Ius* and *Lex*

The conceptual duality of law between will *and* reason finds jurisprudential antecedents in Augustine's dictum, "*Lex vero aeterna est ratio divina vel voluntas Dei*" (400/1841, XXII. 27).[1] The sentence suggests that God embodies a harmonious amalgamation of reason and volition. Nonetheless, with the consolidation of post-metaphysical thought in Western modernity, this symbiosis is fractured, engendering the insoluble dilemma of deciding the predominance of either one or the other. If one transposes this dichotomy into modern jurisprudence, it receives secular articulation in the contractual theories developed by Hobbes and Rousseau. Even though both favoured *voluntas*, they approach the problem from contrasting perspectives.

Hobbes's Leviathan indicates that on one flank, law accords recognition to individual freedom as a domain existing prior to political and legal structures, aligning closely with *ratio*. Conversely, the law manifests as a command of the sovereign will, enabling and authorising the freedoms it subsequently juridifies. Hobbes understands law primarily as an expression of sovereign *voluntas*, a binding and obligatory force that harmonises with the notion of *lex*. Within this construct, *voluntas* are central, serving as the operative principle. Rather than framing this tension as an intractable paradox, Hobbes contends that its *stabilisation* necessitates an absolute sovereign —an agent equipped to safeguard individuals from their self-destructive inclinations, thereby transcending a life that is "nasty, brutish, and short." This focus on centralised authority proves crucial in preserving the essential constituents of the bourgeois societal organisation whilst continuously *balancing* the tension between *ius* and *lex*. Consequently, in Hobbes's schema, the sovereign's binding edicts assume a commanding role, relegating the *ratio* to a subordinate status (Hobbes 1651/1996, Ch. XIV, 3. See also Ch. XXVI, 43.)

Hobbes's insights shed light on the dialectic of modern law. Liberal legality aspires to function as an autonomous, binding order stabilising governmental actions and institutional forms and as a guarantor of freedoms. In this regard, the laws enable the realisation of personal autonomy through subjective rights that facilitate individual decision-making. However, this legality also sets the conditions for domination and subjugation; it allows rulers to invoke the law's coercive and exceptional mechanisms to control subjects lawfully. Conversely, legality also allows individuals to insist on

[1] This unity reaches its fullest cogency in the medieval scholastic philosophy of Thomas Aquinas. For him, the will is rational, as expressed in the assertion: "… *voluntas nominat rationalem appetitum* (…)". *Summa Theologiae*, 1-2 q6 a2 ad 1.C.

recognition as autonomous legal persons endowed with subjective rights that enable their agency.

Time after, Rousseau opened his *Social Contract* by posing this dilemma as the conflict between liberty and coercion. He wrote that a "man is born free, yet he is in fetters everywhere." Rousseau's famous dictum that the compulsion against the individual to follow the *volonté générale* settled in the democratically generated law means nothing but the coercion to be free. He exposed the paradox explicitly (Rousseau 1762/2007, Ch. VII, Liv. I. See also Ch. I, Liv.1). Although Rousseau was aware of the puzzle, he did not develop it further. One prevalent interpretation posits that Rousseau might have resorted to state absolutism, which is not wholly disparate from Hobbes's conception. In Rousseau's vision, *voluntas* appears to subordinate the law's *ratio*, despite his espousal of a society characterised by radical democratic principles and the potential for socio-economic parity.[2]

This discussion was a focal point in early 20th-century legal and political theory debates. Notably, prior to World War II, Franz Neumann engaged with what he conceived as "the problem of political philosophy and its dilemma", whose solution would be "the reconciliation of freedom and coercion." (Neumann 1952, 52). Translated into legal theory language, it refers to the dual significance of the rule of law —the interrelation of modern law's authoritative and rational moments: *law* and *right*, *Gewalt und Gesetz*: the dialectics of modern law (Fine 1984/2002, Habermas 1992, Spång 2018, 33-57, Cordero 2019, 3-18).

> In juridical terminology, this actual contradiction is expressed in the double meaning of the word 'law' [*Recht*]. For it means, on the one hand, objective law, i.e., the law set by the sovereign or at least attributable to the sovereign power; on the other hand, the legal subject's claim. In other words, the denial of individual autonomy and, concurrently, its affirmation. (Neumann 1937, 593; Cf. 1936/1986, 11-12)

Addressing this aporia involves confronting the problem of how state decisions through violence are embedded in legal norms that concurrently concretise freedoms. Modern legality serves two intertwined functions: it legalises violence to perpetuate a formally autonomous legal system whilst safeguarding individual autonomy via subjective rights. The assurance and actualisation of freedoms appear to be inextricably linked with applying force (*Déjà vu*, Rousseau). When law institutionalises violence, it concurrently sanctions the restrained deployment of force. The instantiation of any rational legal order in modern society seems insolubly bound to the calibrated dispensation of violence. Attempts to resolve this tension within liberal legal and political theories, particularly those advocating for a *Rechtsstaat* or constitutional state, have been so far unsatisfactory. According to Neumann, these views overlook that "both elements, norm and legal relation, objective law and subjective rights, are original data of the bourgeois legal system" (Neumann 1937, 593). He meant that the formation of the modern Western legal order coincided with the rise of bourgeois society, whose law reflects insurmountably contradictory social relations. For Neumann, traditional theories ignore that juridical structures in modern society are determined in the last instance by underlying material rapports, often conflicting with each other, that cannot be harmonised within the scope

[2] On this interpretation, the interrelation between authority and law and the relevance of paradoxes in Rousseau's work, I am persuaded by Shklar (1964, 922-925).

of the legal system. Thus, this overlooking manifests itself in the liberal belief that social and political power can be subsumed and neutralised into legal relations.

If one observes this interplay historically, modern legality also appears continuously bifurcated in different aspects. On one side, law may function as a repressive apparatus wielded by the extant ruling class. On the opposite spectrum, it serves as a practical normative discourse providing a terrain for contestation that may mitigate domination to a certain degree. Moreover, modern law is based on democratic consensus, fostering social cohesion by integrating individuals through democratic laws whilst simultaneously immobilising this consensus and undermining cohesiveness by over-emphasising individual subjectivity (Buckel 2007, 73, *passim*). Furthermore, although law is instrumental in strengthening capitalist accumulation through private property rights, thereby maintaining social hierarchies and subordination, it simultaneously assures room for realising individual freedoms. As Thompson underscored within the context of 19th-century England: "[f]or as long as it remained possible, the ruled —if they could find a purse and a lawyer— would actually fight for their rights by means of law" (Thompson 1975, 261). In sum, Susan Silbey has indicated, in a nutshell, the different ways in which the dialectic of modern law has been revealed to us:

> Although the historical record revealed the law's development as an ideological tool of repression, research also uncovered spaces of freedom. It began to seem as if the law was constituted by domination and resistance, consensus and conflict. (Silbey 2005, 341)

Theoretically outlined in this section, this twofold effectuation permeates modern law's various disciplinary applications. The ensuing part aims to illuminate how constitutions encapsulate this dual tension.

2.1. Constitutions and anti-democratic moves

Günter Frankenberg (2019, 2020) surveyed why some individuals adopt, resort to, and/or adhere to constitutional forms to implement authoritarian programmes, considering that they aim to rationalise political power.[3] He answers that constitutions perform alluring *functions* to authoritarian rulers and challenge the conventional demarcation that segregates authoritarianism from constitutionalism. Frankenberg takes on the age-old question rooted in Jewish mythology concerning the paradox of divine authority: Why would a sovereign deity voluntarily subject itself to constraints?[4] Translating this question into contemporary jurisprudential terms, he queries the *rationale* of appealing to a juridical document that allocates powers, institutes checks and balances, and safeguards freedoms, yet neglecting to engage with its normative aspirations thoughtfully. The author argues that this aporia is because liberal constitutionalism harbours latent authoritarian moments; these manifest themselves —mainly but not only— through the activation of the lawless state of exception and the prerogative power.[5] His argument is both riveting and unsettling: it posits that the liberal constitutional project was, from its inception, fraught with structural ambiguities. As Western history has unfolded, these fissures have served as conduits for various

[3] In another register, the question is: Why would a despot voluntarily impose limitations on his own power?
[4] See e.g., the Book of Genesis 9:11 (Covenant with Noah).
[5] It refers to John Locke's idea of prerogative power that authorises the monarch to act without law, sometimes even against it, as long as the state would be endangered.

authoritarian instances to infiltrate the bastion of the modern idea of freedom. Frankenberg asserts that this enduring ambivalence, characteristic of traditional liberal theory, remains unresolved to the present day. He stated that:

> ... from the very beginning, the liberal citadel has a deep crack in its masonry, creating inroads for a personal, arbitrary, executive style of governing that eludes the model's constraints. To use another metaphor: the prerogative becomes a Trojan horse that sneaks diverse authoritarian moments into the inner sanctum of liberality. (Frankenberg 2020, 83)

Indeed, in recent history, almost all authoritarian rulers have resorted to the Janus face of modern legality and constitutions to bestow themselves with authority. Adolf Hitler, through a set of polemical laws and notably through the enabling statute[6] and its subsequent validity renewals, amassed unchecked political and legal authority, paradoxically at the same time empowering him to strip law's rationality. Article 48 of the Weimar Constitution was also invoked, activating the extraordinary powers of the *Reichspräsident*. Time after, on the other side of the world, Augusto Pinochet in Chile, following the *coup d'état*, swiftly turned to the states of the exception set out in the 1925 constitution, granting his regime of terror a legal form. Paradoxically, even as the *Junta de Gobierno* (an oligarchic military dictatorship) breached the constitution, it simultaneously established its rule by employing legality and capriciously invocating constitutional provisions. Interestingly, Hitler and Pinochet ruled their regimes under the exceptionality of Martial Law (Huneeus 2007, 54, Barros 2009, 167, Bazyler 2016, 6, Lavis 2020, 97). Similar trajectories, where legal and constitutional structures institute and underpin authoritarianism, have recurred —respecting diverse subtleties and contexts— in countries such as Myanmar, Spain, Argentina, Italy, Syria and the Soviet Union.

Indeed, modern legality and constitutions are not analogous constructs; nonetheless, they have shared features. Whilst constitutions establish the political-juridical foundation of a legal order, legality translates these principles into specific articulations, addressing societies' varied dynamics. Moreover, both reflect concrete antagonist practices and conflicted material forces in the context of a modern society marked by the consolidation of capitalism. Furthermore, they embody Enlightenment philosophy, emphasising rationality, universality, and liberal law's rule. Despite their distinct functions within particular legal systems, laws and constitutions are structured under the modern legal form, capturing its characteristics, ends and inner contradictions.

Expanding on Frankenberg's work, this paper posits that the conundrum does not lie mainly at the functional level but is embedded in the core of liberal legality. Because of their internal contradictions, modern legal systems accommodate the undemocratic impulse for unlimited centralised authority and opposing claims for human emancipation. Legality thus becomes a space for contradictory imperatives to converge, underlining the ontological perplexities of modern law itself.

[6] Gesetz zur Behebung der Not von Volk und Reich (Ermächtigungsgesetz, 24.03.1933). See also Gesetz über das Staatsoberhaupt des Deutschen Reiches (01.08.1934).

2.2. Authoritarian constitutionalism?

The paradox of the self-limiting tyrant has been further discussed. In contemporary constitutional studies, Alexander Somek, writing about Austria in the 1930s and updating Hermann Heller's dictum on *authoritarian liberalism*, referred to this dilemma (Cf. Wilkinson 2021). He stated that "[a]uthoritarian constitutionalism accepts structures of governance that contain most of the features of constitutional democracy, with the noteworthy exception of (parliamentary) democracy itself." (Somek 2003, 362) Ergo, it might contain the rule of law, protection of freedoms and *vestiges*[7] of the separation of powers whilst excluding the election of popular assemblies and control by them. What is distinctive, Somek says, is the absence of a democratic regime to achieve social integration. This goal, he underscores, would be challenging to attain through the cooperation of competitive democratic institutions and civil society but only via authoritarian rule.

Afterwards, Mark Tushnet (2013, 36-48) engaged with the topic from a conceptual standpoint, considering the case of Singapore. The author cautions against framing the issue in dichotomous terms, arguing that Manichean debates fail to capture the complexity of the subject. He incorporated normative and pluralist dimensions into his analysis to refine the categorisation of hybrid regimes. However, Tushnet's work still grapples with a dualistic framework, contrasting what he regards as ideal, normatively right constitutionalism ("fully" constitutionalist regime) with its corrupted, authoritarian counterpart. This stance was later substantiated in an expanded version of his argument (Tushnet 2015, 398, 438). According to a classification table authored by Tushnet, the defining characteristics of authoritarian constitutionalism include an "intermediate" commitment to freedoms and a "low" tendency to use force and manipulate elections. Despite advancing a conceptual discourse, Tushnet's approach remains consonant with the mixed categorisations established in political science literature. He ultimately posits that authoritarian constitutionalism represents a complex intermingling of constitutional and authoritarian *practices*, marked by limited *normative* engagement —a characterisation one can describe as an intermediate category (Tushnet 2013, 44-47; 2015, 448-450).

A subsequent scholar (Niembro 2016) defines *authoritarian constitutionalism* as "a way in which ruling elites with authoritarian mentality exercise power *in not fully democratic states*" (340 ff. [emphasis added]). Niembro situates this concept in a spectrum between countries caught in an ambiguous terrain between optimum liberal democratic ideals and their contraventions. He notes that elites imbued with "authoritarian mentalities" instrumentalise constitutional framework and discourse to serve specific, often nefarious, objectives. Two concerns arise from this formulation. Firstly, evaluating varying degrees of democratic institutions based on abstract criteria whose parameters remain debatable yields only context-specific, non-generalisable insights. Therefore, conceptual conclusions are barely obtainable. Secondly, in settings without sufficient

[7] A concrete historical example of this description is found in the post-1973 Chilean authoritarian regime. Although the military *Junta* factually breached the 1925 constitution, it did not formally derogate it. The separation of powers remained distorted, and institutions like the judiciary and the General Comptroller still operated *relatively* independently (insofar as they did not defy the regime regarding human rights issues), drawing upon the remnants or "flaps" of the 1925 constitution. Cf. Barros (2002).

democratic structures, authoritarian constitutionalism emerges as a *distortion* of genuine constitutionalism. Niembro posits that a robust liberal constitutional theory is necessary to counter these authoritarian "mentalities", seemingly psychological or characterological traits inherent to specific individuals or societies. Interestingly, Niembro does not engage with Adorno *et al.* (1950, 1 ff., 222 ff.), who offer an empirically substantiated taxonomy of psychological traits of the "authoritarian personality" that might add complexity to the understanding of what Niembro terms "mentalities."

Other authors provide similar conceptualisations (Pozas-Loyo and Ríos-Figueroa 2022), anchoring their analysis in empirical constitutional systems. They gauge the extent of formal democratic elements within these regimes. As these scholars assert, authoritarian constitutionalism [is] "the presence of effective institutional constraints-on-power in countries with an authoritarian regime." Their work primarily focuses on Latin American cases, deploying a minimalistic and negative definition of authoritarianism as "a distinct phenomenon that occurs under a non-democratic regime." The assessment scale they employ spans from rudimentary to more advanced democratic systems, and the evaluative criteria hinge on institutional architecture —measuring levels of public control, accountability, transparency, the competitiveness of electoral processes and the presence or absence of alternative governance structures.

These abovementioned pieces have articulated "authoritarian constitutionalism" as a conceptual category that encapsulates the subtleties of *non-democratic* impulses embodied in 21st-century forms of constitutionalism. This move is because the days of the 20th century's blatant disregard for lawfulness or incur in overt lawlessness are so far not usual. Given the ambivalent nature of modern constitutions, anti-democratic tactics have become increasingly nuanced. Thus, constitutions are appropriated as formal apparatuses with sufficient authority to subvert rational democratic processes. It is particularly intriguing that whilst there has not yet been a fundamental resignification of the concept of constitution, there has been an enhanced inventiveness in exploiting its dual potential —both for oppression and liberation. Consequently, constitutions have become paradoxical entities: they facilitate the actualisation of freedoms even as they harbour the seeds of their own negation.

The revised scholarship evidences diverse gradations in approaches to authoritarian constitutionalism. Accordingly, political regimes can be situated along a continuum, from ideal constitutional arrangements to mixed or failed constitutional orders. The determining factor for this placement rests on the intensity of a regime's commitment to formal democratic principles as they manifest in each specific governance context. One of the shortcomings of these perspectives is that they tend to relegate the problem of constitutionalism to the realm of psychology, society, or whatever else that is external and omit to address the inner tension of modern law and the contradictoriness of constitutionalism. For this group of authors, liberal legality and its constitutional form appear as an uncontestable axiom afflicted by pathologies stemming from exogenous factors. The emphasis does not problematise their immanent aporias but overlooks them, either invisibilising or embracing them.

2.3. Constitutionalisms and their ambivalences

In academic dialogues, "constitutionalism" refers to an intellectual and normative programme rooted in liberal thought, engendering a complex historical-philosophical discourse on constitutions. This programme has given rise to multiple scholarly currents with myriad meanings.[8] The heterogeneity of constitutionalism is indicative not merely of its epistemic breadth but also serves as a focal point for political contestation. Alexander Somek underscores the juridical component in a restricted articulation and posits that constitutionalism embodies "the project to establish and constrain public power. Law is the means thereto" (Somek 2014, 1). The invocation of law here may be read within the parameters of nation-state liberal legality and its inherent coercive mechanisms. As supreme juridical rules, constitutions function as the axiomatic source of validity for legal forms and relations. Constitutional provisions set the procedures for enacting laws, ultimately enabling and constraining action. This architecture of referrals, however, is not uncontroversial.

This closure hierarchy of validity organising the interplay between constitutions and subordinate laws finds its genesis in the formative periods of liberal constitutionalism. This dualistic and ambivalent nexus between constitutional safeguards and operative legality was a point of acute critique for Marx. In his analysis, constitutions paradoxically enshrine liberties in grandiloquent terms, only to entrust their materialisation to legal frameworks that can negate them (Marx 1851/1977, 535 ff.). It is unambiguous that, beyond organic-procedural rules, constitutional provisions about freedoms often exhibit such interpretative latitude that they contain the seed of their own dissolution, either by legislative amendment or judicial interpretation. Marx wrote:

> The eternal contradictions of this constitution (...) show plainly enough that the middle-class can be democratic in words, but will not be so in deeds —they will recognise the truth of a principle, but never carry it into practice— and the real 'Constitution' of France is to be found (...) but in the organic laws enacted on its basis (...) The *principles* were there —the *details* were left to the future, and in those details, a shameless tyranny was re-enacted! (Marx 1851/1977, 546. Italics in the original published in English. Presumably translated by Friedrich Engels)

Following orthodox constitutional theory, constitutional texts serve as codified manifestations of concrete political junctures. Ideally, these constitutional moments are meant to emerge from an original exercise of democratic popular self-determination. However, historical trends largely contradict this aspiration, presenting the constitution as a legally formalised institutionalisation of ruling class power dynamics —structuring governance arrangements for the restrained exercise of authority whilst simultaneously enumerating a panoply of fundamental rights. This configuration encapsulates a core paradox — the abiding tension or incompatibility between democracy and constitutionalism.

In dealing with this dilemma, continental liberal jurisprudence introduced a specialised constitutional court (Kelsen 1931/2019) as a mediating authority. This technology enabled constitutional supremacy to be secured through judicial control of legislation

[8] On different updated conceptions of constitutionalism, see, e.g., issues N° 46 and N° 47 (2022) of the Journal *Revus*.

whilst concurrently giving constitutions binding force. Owing to the interpretive elasticity and indetermination of the constitution's language, these courts often serve as norm-stabilising agents within volatile political settings. The institutional architecture is thus *designed* such that its justices are either the byproduct of compromise amongst rival political entities or are appointed by a hegemonic political faction. Consequently, in polemical cases, the judgments of these tribunals tend to be radically contingent, oscillating following the prevailing political climate or displaying predictability where an implicit ideological alignment exists (Cf. Kennedy 1997, 74). Within this operational paradigm, the juridical realisation of fundamental freedoms is ultimately subject to the vicissitudes of institutional configurations and subsequent judicial interpretations.

2.4. An insolvable conundrum

This conflict, deeply rooted in socio-political relations, is critical for understanding the puzzling nature of modern law. At the heart of this complexity lies the dialectic of authority and autonomy in modern society, a theme to which the young Herbert Marcuse devoted attention. He illuminates the psychological (*Geistig*) paradox of freedom and submission, autonomy and heteronomy, within the modern subject — terms he perceives as "essential moments" in one's subjective disposition toward authority (Marcuse 1936, 136). Given this duality of the modern human, it is not unexpected that liberal legality is fraught with closely resembled tensions insofar as it reflects social relations. However, attempts to reconcile these antithetical moments within the legal frameworks have hitherto proven insufficient. Constitutions, as the cornerstones of legal systems, attempt the Sisyphean task of reconciling these opposing elements of human disposition. As mediation mechanisms, they have not succeeded in their attempts to integrate these antagonist dimensions.

It is this underlying ambivalence that allures authoritarian figures. These rulers exploit the constitution's loopholes within its open-ended clauses and exceptionality provisions to consolidate power whilst strategically adhering to legality. In every constitution forged in liberal juridicity, mechanisms that endorse freedoms are concomitantly accompanied by elements that enable their negation. This precarious balance in modern law echoes Marcuse's words, thus mirroring the contradictory imperatives of freedom and authority that haunt the modern individual.

This duality, oscillating between autonomy and submission, reflects subjective peculiarities and the constitutive fabric of modern social relations. This interplay informs collective behaviours, shaping the social matrix legal systems seek to regulate. Far from existing as an abstract normative structure, law serves as the positivisation of society's underlying tensions, values and contradictions. Accordingly, the dialectics of autonomy and authority are not merely individual quandaries but symptomatic of broader societal antagonisms that find their expression in legal and constitutional forms. Therefore, the ambivalence characterising the modern subject is not isolated but becomes magnified through the prism of social relations, which legal systems strive to govern with varying degrees of success.

It is for these reasons that Marcuse remarked that:

> Combining inner autonomy and external heteronomy, the brokenness of freedom into unfreedom is the decisive characteristic of the concept of liberty that has dominated

> bourgeois theory (...). It has taken the utmost pains to justify this contradictoriness. (Marcuse 1936, 137)

If one transfers this complexity to the field of law, one finds the same *cul-de-sac*. That is why Franz Neumann lucidly saw that all attempts to resolve this puzzle in legal studies have not succeeded because they have been pseudo-solutions. The question, then, is how to reach a synthesis of the legal system's normative rationale and coercive volitional moments. The challenge is obtaining the unity of these antithetical instances, demanding a juridical form transcending liberal aporias.

At the outset of this article, it was observed that traditional constitutional theory frequently characterises the *constitutional question* as a deviation from an idealised model, hybrid regimes, or failures in institutional technology. Such views often implicitly assume that the inherent tension between authority and freedom can be effectively resolved through technological remedies —i.e., allocating incentives and redesigning institutions via legal engineering. Consequently, the complexities and contradictions inherent in material practices are often overlooked or neglected. In adhering to their axiomatic definitions, liberal scholars unwittingly corroborate, to a certain extent, the sombre insights of Herbert Marcuse and Franz Neumann regarding the limitations of traditional theory.

3. The ambivalence of modern law in the judicature

In recent years, an expanding corpus of scholarship has revisited the relationship between anti-democratic tendencies and modern law. What has startled observers is that these authoritarian proclivities now eschew overt violence and flagrant unlawfulness. Furthermore, this is not a phenomenon confined to Latin America or certain Asian regions; it has permeated liberal democracies in the E.U. and North America, causing democratic deficits within the margins of modern law and constitutionalism. Authoritarian rulers subtly harness legal mechanisms to advance agendas scarcely aligned with the principles of genuine democracy. Exploiting the dialectic of force and liberation, norm and exception, legality and constitution become focal points for articulating socio-political anxieties. Anti-democratic factions have adopted a tactic once championed by progressive sectors: leveraging the malleability of law and the responsivity of judicial systems to forward their aims. The paramount difference lies in the objectives; contemporary authoritarian manoeuvres aim to curtail freedoms, stifle dissent and eliminate competitive pluralism. This phenomenon can be characterised as a "lawfare"[9] executed through calculated opportunism.

Kim Scheppele has popularised the term "autocratic legalism" to characterise how anti-democratic actors in countries such as Hungary, Russia, Venezuela, Turkey and Poland exploit modern law to advance their agendas. Scheppele states,

> Intolerant majoritarianism and plebiscitary acclimation of charismatic leaders are now masquerading as democracy, led by new autocrats who first came to power through

[9] I have adapted this terminology to encompass the increasing recourse to legality for achieving democratic socio-political change, maintaining the *status quo*, or justifying undemocratic 'erosions' of freedom. Both antagonistic tendencies employ similar strategies, rendering the issue radically contingent. Fragmented competing political forces deploy discourses on subjective rights and legality as *weapons*, whilst viewing the judiciary as a *battleground* for their particular struggles (see also Tacik 2019, 36-38).

> elections and then translated their victories into illiberal constitutionalism. When electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda, I call this phenomenon *autocratic legalism*. (Scheppele 2018, 549. Italics in the original).

Though Scheppele's terminology is sound, it frames authoritarian practices as deviations from an ideal liberal model. This account overlooks the tension within modern law, expressed by the juxtaposition of *voluntas* and *ratio*. Nevertheless, Scheppele's scrutiny surpasses many conventional narratives on authoritarian constitutionalism. It is not inaccurate to observe a "decline" or "backsliding" in democratic processes. Although a wholesale transition to overt despotism or full-scale authoritarianism remains absent, what manifests is a deceleration and occasional regression in the democratisation of freedoms, all within the confines of formal democratic structures. This phenomenon presents less as dismantling democratic regimes and more as a robust contestation of Western liberal principles by appealing to the Janus-faced legality. Importantly, these shifts are not solely juridical-constitutional but are influenced by a tapestry of economic and social changes affecting voter preferences. Multiple dynamics operate in concert, both domestically and globally, eschewing any monocausal explanation.

In the current context, heightened scrutiny has been directed towards the prevailing circumstances in EU-CEE countries. Existing studies (Sadurski 2019, 63-84, Cianetti *et al.* 2019, Čuroš and Moliterno 2021, 1159-1191, Bernhard 2021, 585-607) suggest that politicians with authoritarian inclinations have invoked legality and constitutions to imbue their reactionary actions with legitimacy and authority. These manoeuvres have been termed "democratic erosion" (Lührmann and Lindberg 2019, 1105) or "democratic backslide" (Castaldo and Memoli 2024, 138-156), representing a series of practices that lend constitutional and legal "façades" (Law and Versteeg 2013, 852-853) to anti-democratic initiatives. Contrary to historical patterns of overt force —*coups d'état*, military invasions or blatant violence— the contemporary strategy emphasises the primacy of the legal and constitutional framework as a vehicle for achieving populist ethno-nationalist or "illiberal" objectives. To this end, the system of checks and balances has been systematically undermined, chiefly at the expense of the judiciary. Concurrently, the liberal rule of law appears to *degenerate*, and a growing body of evidence suggests that the constitutions could be *manipulated* in favour of the one individual —and their entourage— who claims to embody the unity of the majority. Hence, anti-democratic trends are reinforced by acquiescent parliamentary factions, captured judiciary and meticulous procedural observance, transforming law into a mere *tool* for rulers' commands whilst diminishing its underlying rational core.

Drawing on a global perspective with an emphasis on China, John Keane has termed such phenomena as a form of organised lawlessness, describing regimes where "the rule of law has a phantom quality; it means rule through law" (Keane 2020, 183; On law and lawlessness, see 181-195). In these instances, an outright absence of law seems an overstatement; the law is expressed more as *voluntas* than *ratio*, as a rule *by* law instead of the rule *of* law (Keane 2020, Günther forthcoming 2025). Some scholars (Lührmann and Lindberg 2019, 1095-1113) concur that, except in a few cases, it is too early to declare the presence of entrenched despotic regimes in most countries under scrutiny. Indeed, these researchers indicate that the global declines in democratisation up to 2019 have been relatively moderate. Further, current data suggests that the global ratio of

democratic nations remains near its historical zenith when evaluated against formal criteria (Brunkert *et al*. 2018, 422-443). Despite these metrics and conceptual distinctions, there exists a general agreement: the allure of authoritarianism effectively leverages legality to advance undemocratic goals, thereby twisting the law's rationality.

3.1. Judicial independence under siege?

In this debate, the autonomy of judicial reasoning (*contra* Raz 1993, 1-15) and judicial independence have been spotlighted as central to the separation of powers in constitutional states. This principle safeguards formal equality and freedom before the sovereign whilst mitigating power concentration in one government branch. The aspiration of non-qualified judicial independence, however, is illusory. Influenced by social contexts and ideological currents, judges are hardly entirely neutral arbiters. Judicial independence operates as functional and relational, particularly in its institutional and financial aspects (Graver 2018a). This form of independence is presently "under attack" (Graver 2014, Čuroš and Moliterno 2021).[10]

The following pattern has emerged: anti-democratic rulers, wielding modern legality's double-edged sword through nuanced strategies, organise the judiciary in their favour once in power. Often, such shifts occur with parliamentary and popular backing, rendering judges mere functionaries of the ruling elite. These deeds undermine the judicature's structural integrity and eradicate the possibilities of the law's rational moment. For extremist populist agendas, co-opting judges is pivotal; they effectuate and determine statutory or constitutional words. Coalescing judges with authoritarian politicians fast-tracks the descent into arbitrary rule. Unlike constitutional court justices, who are more susceptible to political vagaries, the explicit politicisation of ordinary judges exacerbates the crisis. The debate surrounding these complexities remains fierce, and solutions, hinging on legal engineering and institutional technology, seem unpromising. As Franz Neumann observed, "[t]he attitude of the judges towards the law, and their position in the state, is the crux of the liberal legal system" (Neumann 1936/1986, 224).

This predicament poses a vexing dilemma, as judiciaries are simultaneously vulnerable and powerful. Their effective functioning necessitates operational, intellectual and structural independence, paradoxically making them susceptible to self-interest. Such existential constraints underpin judicial operations. Whether through explicit coercion or subtle influences, judiciaries have historically allied with oppressive regimes, either by capitulation or ideological alignment.[11] Conversely, under specific economic and political junctures, they have championed liberties. Their role in upholding or

[10] An up-to-date volume against the backdrop of Brexit is found in Giannoulopoulos and McDermott (2022). It presents perspectives on contemporary "threats" to judicial independence in comparative jurisdictions including Poland, Hungary, France, the USA, Myanmar and the UK.

[11] The literature on this subject is extensive. Neumann (1942/2009) concisely analyses Nazi jurists' interventions in the judiciary to conform it to Hitler's ideology. Hilbink (2007) comprehensively examines the Chilean judiciary's relationship with Pinochet's regime. Graver's works (2014, 2015/2019, 2018b) explore judiciary systems under various authoritarian contexts, including Brazil, apartheid South Africa, Nazi Germany and occupied Norway. For an in-depth look at the politicisation of the judiciary and the ideological leanings of Spain's Supreme Court judges during Franco's regime, see Bastida (1986).

undermining freedoms is crucial despite historical biases against the underprivileged.[12] Judicial decisions exemplify the dual nature of modern legality, manifesting under two related scenarios: (i) judiciaries co-opted by anti-democratic forces and (ii) judiciaries reflecting particular ideologies (racial, political, religious, economic) in non-authoritarian settings. Modern law's ambivalence is not escapable for judges.[13] Nonetheless, there is a dependency on those conspicuous judges willing to withstand authoritarian tendencies and uphold Western civilisation's universal values. To what extent are they willing to do so?[14]

A preliminary, albeit restricted, response to this challenge posits judges as the de facto moral arbiters of society, endowed with a priori legitimacy to safeguard normative principles. It presumes that, without external interference, justices would render *correct* interpretations. This perspective might also contend that judges may possess particular moral or psychological appropriateness for upholding the rule of law. A more expansive answer emphasises the necessity of articulating the judicature's institutional role within the modern state's rational organisational structure, considering the judiciary's professionalisation and adherence to organic, procedural, substitution and disciplinary rules that control impartiality and independence. Such a *design* grants judges, to some extent, insulation from external pressures, thereby legitimising and endowing the judiciary a measure of power, like no other institutional body, for defending the integrity of the law. Notwithstanding, these perspectives are fraught with theoretical and practical complexities.

Judicial decisions and behaviour, often enveloped in the institutional liturgy, reflect societal conditions and dominant ideologies at specific historical-political junctures. This interplay is especially pronounced when judges confront novel factual circumstances — arising from technological advancements or shifts in socio-political dynamics— where precedents and statutes do not offer unambiguous guidance. For instance, drawing upon Dahl's (1957/2006) portrayal of the U.S. Supreme Court as a "national policy-maker," it is noticeable that some courts may face complexities whilst dealing with legal indetermination, driving them to make explicit political decisions that extend beyond pure legal interpretation based on supposed autonomous judicial reasoning. Kennedy (1997) further enriches this understanding by critically analysing how judges, influenced by their ideological predispositions, strategically manoeuvre within legality to produce decisions that, while appearing to be dictated according to the law, subtly advance

[12] J.A.G. Griffith's seminal study (1977/1997) shows that UK judges, influenced by their social and class backgrounds, tend to decide cases on a *conservative* basis that upholds the *status quo.*

[13] The ambivalence of constitutions and their interpretations finds perhaps its most lucid expression in U.S. Supreme Court case law. Across a quintet of seminal decisions, this Court has navigated a convoluted course, oscillating between racial ideology and egalitarian rationality whilst simultaneously affirming liberal freedoms and then retracting them in the name of religious and political considerations in legal disguise. Notably, these shifts have transpired without an authoritarian regime. The Court's shifting stance can be traced from denying citizenship to African Americans in *Dred Scott v. Sandford* (1857) to the posterior validation of racial segregation in *Plessy v. Ferguson* (1896) and its subsequent proscription in *Brown v. Board of Education* (1954). Similarly, the Court has endorsed liberal tenets such as abortion rights in *Roe v. Wade* (1973), only to backtrack on this position in the recent *Dobbs v. Jackson Women's Health Organization* (2022) decision. This judicial volte-face evinces an almost schizophrenic disposition within an institutional model often extolled as exemplary.

[14] Graver's scholarship addresses this question. See Graver (2014) for comprehensive treatment; also Graver (2015/2019) for a more specific study-case.

specific ideological agendas. According to Kennedy, this *strategic behaviour* underscores the judiciary's role in shaping policy under the guise of legal interpretation.

Varied responses —enthusiasm or reluctance, servility or independence, expediency or dissidence— arise contingent upon environmental pressures, be they collusions or acts of heroism. Despite this spectrum, the judiciary's dual character —vulnerable yet powerful— may undermine the rule of liberal law even in non-authoritarian settings. Judicial fallibility exists alongside challenges posed by excess judicial (creative) discretion (Dworkin 1963/2016), "juristocracy" (Hirschl 2004), or contra-majoritarianism (Bickel 1962/1986, referring to the U.S. legal system). These scenarios produce an effect whereby the judiciaries may pose as adversaries of popular sovereignty. These paradoxical moves (Maus 2018) complicate the judiciary's role and present significant difficulties in applying and conceptualising the democratic principle (Wacks 2021, 59 ff. accounts of these problems with further references).

The above suggests that the decisive question for unpacking the nature of the conundrum of law's ambivalence is not necessarily at stake in the vicissitudes of the courts' behaviour or the configuration of the judicature structural architecture. Courts often reproduce the ambivalence and contradictoriness entrenched in the law. In the ensuing analysis, the article intends to proceed in the opposite direction to delve further into the puzzle. The focus shifts to cases in a post-authoritarian context where constitutional courts react against substantive democratic claims through liberal legality. Such is the recent experience of the Chilean Constitutional Tribunal.

4. The Chilean Constitutional Tribunal case

The current architecture of the Chilean Constitutional Tribunal (ChCT) was established in 2005; it emerged from amendments to the 1980 Constitution aimed at proscribing blatantly authoritarian elements.[15] It is an autonomous, centralised and specialised constitutional body distinct from the judicial branch and functionally independent of Congress and the President. It reviews legislation, both *ex-ante*[16] and *ex-post*.[17] Meanwhile, the Supreme Court retains constitutional jurisdiction over remedies for protecting freedoms, such as *Habeas Corpus* (*Recurso de Amparo*) and writ of protection (*Recurso de Protección*). This bifurcated design leaves room for jurisdictional conflicts[18] between the Supreme Court and the ChCT.

[15] Post 1988 referendum, which ended Pinochet's regime, 54 constitutional reforms were introduced in 1989 to facilitate the transition. The 2005 amendments, comprising 58 changes, derogated the "authoritarian enclaves." These reforms included curtailing the autonomy of the Armed Forces as political actors and abolishing *de jure* senate seats.

[16] It may annul draft laws prior to their enactment, as established in arts. 93.1 and 93.3. This control is compulsory in some instances. Alternatively, parliamentarian coalitions may petition the tribunal if they deem a majority-approved bill constitutionally flawed, infringing upon rights and freedoms or violating formal constitutional clauses. This power is one of the most problematic.

[17] It may declare a norm in force, invoked in any litigation pending before a lower court "non-applicable" (for constitutional reasons) only in that concrete case (art. 93.6). This action lacks *erga omnes* effects and represents one of the tribunal's most frequently pleaded powers.

[18] Conflicts predominantly emerge in the realm of fundamental rights interpretation. For instance, a controversial Supreme Court ruling (Decision N° 21.027-2019) claimed jurisdiction to review ChCT judgements. These disputes often encapsulate power struggles, either epistemic or political. Depending on

The constitutional mechanism for nominating justices appears formally democratic. This cooperative and representative process incorporates all government branches and contrasts little with other comparative foreign models. Justices' qualifications are diverse, combining politicians, lawyers and academics; just one professional career judge has been appointed. Congressional appointments (four) hinge on the majority based on compromises within party coalitions. Presidential appointments (three) reflect political affinities, often favouring party comrades or legal-political advisors. Supreme Court appointments (three) sometimes prioritise academic and professional merits whilst balancing political factors. Though the Supreme Court holds public candidate selection contests, internal votes remain secret. Overall, the process lacks thorough public scrutiny and robust democratic deliberation; it tends to hinder the effectuation of judges' independence, and the deficits in their technical capacities undermine their reflexivity as political criteria predominantly determine appointments. These characteristics highlight that the ChTC is an overtly political forum,[19] casting aspersions on its purported independence and the soundness of its legal reasoning.

4.1. Judicial activism for political stalemate

Upon closer examination, the ChCT has served as an instance for revanchism of those politically defeated to challenge parliamentary deliberation and decision. This anomaly leads to two intertwined issues. Firstly, the ChCT operated as a "negative legislator" (Kelsen 1931/2019; 1949/2006, 268-269) but also implicitly made law as a "positive legislator"[20] (cf. Brewer-Carias 2011, in comparative perspective). Secondly, whilst accomplishing this overreaching of faculties, alterations to draft laws distort and obstruct governmental public policies from being implemented. These deeds constitute an informal, improvised veto mechanism, termed the "third (legislative) chamber" effect (Bassa 2015, 271; Atria 2020, 143). This description suggests that the ChCT, when assessing legislation's constitutionality, does not often apply legal reasoning in its decisions. Instead, its judgments tend to *reflect* the political affinities of its members, determined by the political commitments of the appointing authorities, leaving little independence for the justices. Thus, the tribunal in polemical landmark cases becomes an extension of party politics, whether straightforwardly legislating or vetoing. These operations present significant challenges to an executive-focused government, especially within Chile's "exaggerated" presidential regime (Siavelis 2002), where the President possesses extensive legislative influence and the exclusive prerogative to initiate specific bills.

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their members' shifting compositions, both courts may adopt "progressive" or "conservative" stances in legal interpretation.

[19] Empirical evidence partially supports the tribunal's increasing partisanship. Tiede (2016, 377-403) demonstrates that the appointment process has boosted judicial dissent in cases of statute unconstitutionality. Judges with clear partisan ties are more prone to dissent. Supplemental data also merits consideration: the ChCT's president holds tie-breaking power, making their political orientation pivotal in landmark decisions. For example, in a split vote on a contentious issue —to authorise abortions in certain circumstances (Decision Nº 3729)— the ChCT president —a well-known militant— cast his decisive vote in favour of the legalisation of abortion in 2017.

[20] See e.g., decision Nº 3729, on the statute decriminalising some abortion hypotheses. In this ruling, the ChCT overtly *rewrote* the text of the bill previously passed in parliament, regarding the section regulating conscientious objection.

For example, as some authors have shown (Lovera and Vargas 2021, Lovera and Contreras 2023), the ChCT has outrightly challenged the legislator's interpretations of the constitution in certain instances. According to these scholars, this move implies that in those cases whereby the legislative power provides its constitutional interpretation of a statute that is subsequently appealed before the ChCT, the latter might reverse that interpretation —with little legal reasoning or elegance of argument— by authoritatively setting its own reading. Moreover, throughout a set of decisions, the ChCT has not merely served as the Chilean constitution's "guardian" but has positioned itself as the definitive constitution's embodiment (Atria 2011, 157). Furthermore, in other cases,[21] the ChCT has overreached, factually assuming the legislative function and encroaching or even usurpating upon its powers (Lovera and Contreras 2022, 3-4, with further references). As a result, through these practices and rulings, in the last time, the ChCT has aligned with the global tendency in comparative constitutional law towards the doctrine of controlling the substantive constitutionality of constitutional amendments.[22]

In some concrete historical moments, whilst groups of parliamentarians from any political coalition[23] may invoke the Tribunal's authority, right-wing parties have predominantly exercised it. Their extensive usage of *ex-ante* judicial review is attributable to several contingent factors. Firstly, when in government, right-wing parties often faced transient parliamentary minorities, resulting in fewer laws being enacted during periods such as 2010-2014 and 2018-2022. Secondly, the limited legislation that was passed garnered centre-left support and was not affected by divisive social, economic or ethical polemics. Thirdly, most constitutional justices were politically aligned with local right-wing ideologies, rendering a favourable outcome for centre-left petitions to the ChCT less probable. In that context, the ChCT's behaviour was troublesome when centre-left-oriented governments aimed to enact modest reformist agendas via liberal legality. In this case, right-wing parliamentarians, defeated in democratic debates, would appeal to annul what they consider "unconstitutional" draft laws. The ChCT often upheld these petitions, arguing conflicts with fundamental rights or constitutional procedures. Such outcomes may arise from the tribunal's shifting political majority,[24] potentially truncating substantial sections of a concrete government's reformist programme.[25]

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[21] See decision N° 9797, on the constitutional reform allowing the withdrawal of pension funds. It declared unconstitutional a constitutional amendment bill. See also decisions Nº 11.230; Nº 11.559; Nº 11.560; Nº 11.683.

[22] I must credit Domingo Lovera for bringing this point to my attention. (See also Gözler 2008, Roznai 2017).

[23] For example, Centre-left parliamentarians petitioned the ChCT to halt the already parliamentary-approved Trans-Pacific Partnership Agreement (TPP). In this case, however, the ChCT rejected the request (Decision N° 6662). The *modus operandi* remained consistent.

[24] As of this writing, a change in the composition of the ChCT has occurred that might favour liberal-progressive interests, considering the political relations involved in the recent appointments of some magistrates. The incumbent President of the Republic appointed two jurists aligned with his political agenda (2022), which may prove decisive in tipping the balance of political forces within the tribunal. In turn, the National Congress focused its recent appointments (2023) on political loyalty by selecting four lawyers aligned with similar party/coalition leanings. The latter pattern does not innovate and maintains internal political equilibriums.

[25] During 2014-2018, the ChCT intervened in legislative liberal-reformist projects, either at the behest of right-wing parliamentarians or through obligatory constitutional control. Bills affected by the ChCT's behaviour included those addressing profit and selection in education (decision N° 2781), civil union agreements

The convoluted institutional architecture rendered the constitutional system static despite social forces' democratic economic redistributive endeavours. The combined operation of ChCT's informal veto power, supra-majoritarian laws (four-sevenths, 57%),[26] a strong presidential regime, and rigid constitutional amendment quorums[27] exacerbated the stagnation. This gridlock is to be understood within a multi-party system that typically coalesces into two grand, opposed factions. The pluralistic yet fragmented political landscape coexists with an electoral model that incentivises faction alliances to avoid vote scattering. The situation is further complicated by a tribunal conducting an *ex-ante* review of legislation. At this juncture, fluctuation effects because of judicial ambivalence become critical. Influenced by their appointment procedures, justices often align with the agendas of defeated legislators (in the cases presented herein belonging to ring-wing parties). This practice redirects public policy in favour of those who lost the parliamentary vote (Bassa 2015, 265, Chia and Quezada 2017, 70-76), undermining legislative efficacy, leaving it futile, and potentially activating political crises. From a short-term perspective, such challenges highlight the need for institutional technology: counterbalances to mitigate the influence of transient political forces and judicial partisanship in polemical decisions within a concrete juridical culture. From a long-term perspective, these local conundrums reflect the judiciary's paradoxical position as the modern legal system's crux, reflecting liberal legality ambivalence.

The description presented does not advance further insights not encompassed in the debate on the "negative legislator" —in the Chilean case, also "positive legislator" — besides falling into the well-trodden debates on judicial activism v. self-restraint (cf. Viera 2021, 19-36). This discussion mirrors the migration of political democratic deliberation to non-representative bodies, a move often prompted by the radical vagueness of constitutional provisions and systemic failures to address crises. It suggests a deterioration of deliberative political processes into depoliticised, juridically framed technological manoeuvres —the reverse side of political contingencies. There is a mix of all these difficulties involved in the Chilean case. Whilst the literature on these topics is extensive, this analysis neither affirms nor refutes the existing explanations. Future courses in constitutional engineering must be democratically determined. The primary

(decision N° 2786), income tax reform (decision N° 2713), free higher education (decision N° 2935), union rights enhancement (decision N° 3016), and consumer rights protection (N° 4012). In these rulings, the ChCT functioned deliberately as a "third chamber", either redirecting public policy or engaging directly in lawmaking.

[26] "Constitutional Organic Laws" enacted and "entrenched" during Pinochet's dictatorship primarily manifest as a form of *constitutional laws* (Cf. Schmitt 1928/2017, 21-23, 177) preserving the legacy of Pinochet's legal programme. They govern pivotal sectors like education, political parties, central bank, states of exception, mining industry and the military. Initially essential to regime maintenance, such super-majoritarian laws lack reasonable justification in non-authoritarian settings.

It warrants mention that during the writing of this paper, the quorum requirements for passing these laws underwent an amendment. The Chilean legal system no longer encompasses supra-majority laws following the enactment of the Constitutional Reform Act of 2023 (N° 21.535). This Act established that constitutional organic laws and qualified quorum laws are to be enacted, amended, or derogated by the "absolute majority" (50% +1) of the sitting deputies and senators.

[27] Specific provisions concerning formal matters required a three-fifths (60%) majority of sitting deputies and senators. For substantial matters, a two-thirds (66.6%) majority was requisite. Nevertheless, the constitutional amendments quorum now stands uniformly at four-sevenths (57%), as provided for by the Constitutional Reform Act N° 21.481 of 2022.

aim was to underscore how Chile's constitutional jurisdiction, unencumbered by the restrictions of the populist or authoritarian regimes mentioned previously, has nevertheless hampered the promotion of social freedoms[28] and the development of economic democracy. The ChCT activism —at least under the examined period— intensified the overarching structural paralysis. In abstract terms, heightened judicial protagonism is often attributed as a response to systemic institutional deficiencies that impede its efficacy and responsiveness; paradoxically, the ChCT's decisions deepened the political stalemate.

The modern law's ambivalence, characterised by its contradictory duality, enables moments for democratic "regressions" or "backslides", weakening social rights and freedoms and expanding authoritarian practices through legality. These phenomena might manifest in contexts where the judiciary is 'captured' by contingent political interests and in non-authoritarian settings where the judiciary is not outright controlled but whose decisions are ascribed to specific ideological programmes. The situation in Chile presented a concrete case that necessitates further explanation.

4.2. Keeping the ambivalence: Authoritarian (neo)liberalism

The ChCT has predominantly preserved General Pinochet's constitutional model for the past twenty years. It has done so primarily by obstructing the advancement of reforms to enhance social welfare and foster more democratic participation in the control and distribution of the economy. This performance contributes to constitutional rigidity, hindering political actualisation and hampering the law's liberating moments for societal change through the legal form. Additionally, the constitutional entrenchment of pro-market subjective rights and stringent safeguards of private property pose significant barriers to policy reforms for improving the country's productive model. Concrete legal reforms in the economic matrix often necessitate constitutional authorisation, constraining the scope for enacting welfare-oriented policies. However, it is worth considering that constitutional rigidity alone does not automatically immobilise the entire socio-political and economic system (Lorenz 2005, 359-360).[29] The unique juxtaposition of Chile's inconsistent constitutional arrangements gives rise to perplexities.

Unlike populist, illiberal or ethnonationalist-oriented constitutional amendments observed in other countries, there is no need to reform the Chilean constitutional *text* to turn it into a vehicle for implementing authoritarian or substantively undemocratic practices and programmes. This is so because the constitution's origins reflect an original authoritarian moment encapsulated in the constitutional textuality that has served and benefited technobureaucratic elites, the military, the bourgeoisie and the oligarchy that

[28] Ponce de León and Soto (2021) edited an up-to-date compendium of essays that are critical of the tribunal's recent decisions. This anthology underscores and substantiates the tribunal's ambivalence in the period under discussion, oscillating between activism favouring liberal pro-market policies and moral traditionalism.

[29] According to this study, until 2022, Chile's constitution ranked as the ninth most rigid globally, sharing the top ten along with stable, consolidated democracies. The crucial distinction lies in the non-dictatorial origins of these other rigid constitutions (USA, Japan, Bolivia, Canada, Belgium, Australia, Netherlands, and Denmark) or their attainment of sufficient legitimacy within their historical and local contexts. Indeed, there exists no necessary linkage between constitutional rigidity and ethical-democratic cultures.

supported the regime. Due to its operators' practices, this model has remained largely unaltered in its structural principles. In effect, the ChCT's interpretations have preserved Augusto Pinochet's liberal pro-market and traditionalist conservative legacy embedded in the constitution.[30] In that respect, Ansaldi and Pardo-Vergara (2020, 21-27) have argued that "[t]he court's decisions (...) can largely be seen as an effort to defend Pinochet's political project." These authors also suggest that constitutional judges have taken judicial activism to the point of firmly establishing a political interpretation of the constitutional *text* aligned with the dictatorship programme. This move implies the triumph of a genetic interpretative methodology applied creatively — "extraconstitutionally"— by like-minded jurists, lawyers, policy-makers, intellectuals and public servants.

Though the constitution has undergone numerous minor procedural modifications, its core identity has remained, so far, unaffected. It reveals an ambivalent and peculiar blend of divergent ideologies, juxtaposing moral traditionalism and elements of political (Catholic) corporatism (Drake 1978) with market radicalism (cf. Alemparte 2022, 86, 96). On the one hand, it features components of subsidiarity for the social organisation (Couso *et al*. 2011, 39, Lovera 2022, 85) and bourgeois family values as a "source of moral virtues and, simultaneously, as an agent with economic responsibilities" (Sembler 2022, 177). On the other, these traits are contrasted with (neo)liberal tenets that bolster the commodification of social goods and ease non-competitive capitalism, further prioritising individual property rights as inviolable. Additionally, this is punctuated by a limited array of unenforceable social rights (Lovera 2022, 92), the realisation of which hinges on lawyers' inventiveness and the judicial interpretation of liberal rights. Notably, instances of popular participation are scarce, with limited parliamentary powers. Given these characteristics, arguably, the Chilean constitution exemplifies a specific juridical form of authoritarian (neo)liberalism that has remained actual with no substantive alterations so far (see Biebricher 2020, 15; Gallo 2022, 555-556; cf. Jessop 2019, 343-361, Bruff and Tansel 2020).

The rigidity of Chile's institutional architecture constrains new agents harbouring democratic and liberating aspirations. This inflexibility stems from a particular historical juncture: General Pinochet implemented an authoritarian constitution devoid of popular participation strategically fashioned to protect ruling class interests (e.g., military, businessmen, oligarchy, technobureaucrats). This enduring legal and ideological project has been further bolstered, to some extent, by constitutional magistrates whose jurisprudential decisions reveal a unique contextual idiosyncrasy. Notably, some of these justices have displayed an unswerving fidelity to Pinochet's constitutional heritage, making any extrajudicial interventions to advance modern forms of authoritarian-populist agendas redundant. These judges have served as "guardians" of a paradoxical form of (neo)liberal authoritarianism, which they actualise and perpetuate

[30] The persistence of the (neo)liberal and authoritarian constitutional model established by Pinochet and his supporters cannot be attributed to the actions and decisions of the ChCT alone. It is a complex phenomenon that involves the participation of state technobureaucracy, successive governments' inaction and political actors' conformity. Alemparte (2022, 104) highlighted this dynamic in Chile and named it "the endurance of neoliberal constitutionalism". This author articulates another categorisation or qualification of constitutionalism, without directly critiquing the constitutionalism itself.

through their interpretative practice. In this regard, General Pinochet's remarks (1977, 12) provide an enlightening lens in this context. Whilst setting the "fundamental outlines for a new constitution", he unambiguously acknowledged the enduring contradiction between authoritarianism and (neo)liberalism within the legal architecture of the "new order". He contended,

> [i]n this perspective, we clearly recognise that we must shape a new democracy that is authoritarian, protected, integrating, technical and of authentic social participation (...) a democracy is authoritarian insofar as it must provide a legal order that guarantees the rights of the people.

This dissonance persists to this day, epitomising the complexities in Chile's actual constitutional order. Indeed, constitutional texts are a matter of interpretation, though their structure can be established to narrow (and even enclose) interpretative possibilities. Notwithstanding, the decisive factor lies in the material relations that drive shifts in the consciousness of those interpreting the legal texts. It will depend on the contending social forces to bring the liberating moments of law and constitutions to the fore. General Pinochet's juridical-constitutional form will likely persist insofar as such a change in the practices of its operators does not occur.

4.3. The Chilean case and EU-CEE countries: Some brief comparisons[31]

At this juncture, a succinct comparison between Chile and selected EU-CEE nations may illuminate the Janus-faced character of modern law. The focus is on elucidating the malleability of legality and constitutions through empirical analysis. The aim is to underscore the universally recognisable ambivalence in liberal legality, which is contingently realised across diverse legal cultures, stages of economic development and historical-political backgrounds whereby contradictions manifest.

Despite the seemingly strained comparative scope, noteworthy congruencies exist, given shared histories of post-dependence, post-dictatorship rule, prevailing Catholicism and the recent adoption of (neo)liberal paradigms as processes of capitalist modernisation. The one and the others exhibit similar contradictions concerning the operational modalities that position modern law in service to barely substantive democratic objectives. Ruling elites in these polities have adroitly utilised liberal legal schemes and constitutional forms to sanction a degree of authoritarian outcomes across various timelines, magnitudes and contexts.

Nevertheless, particular distinctions merit attention. In critical junctures, the ChCT practices and decisions described in this paper tend to reaffirm undemocratic programmes through constitutional jurisdictional validation, thereby contributing to strengthening a form of contradictory (neo)liberal authoritarianism emanating from dictatorial heritage. Conversely, selected EU-CEE nations have manifested authoritarian

[31] Comparative legal studies between Latin American and CEE countries remain limited. Nevertheless, both regions share similarities in the context of the undemocratic imposition of (neo)liberal reforms and their peripheral or semi-peripheral status within the global order. These commonalities render certain comparative analyses not only feasible but also relevant. In this context, Madariaga's (2020) work is valuable, offering an empirical comparative investigation of political economy and economic sociology based on case studies in Argentina, Chile, Estonia and Poland to expose the tension between capitalist policies and democratic political decisions.

leanings through comprehensive legal and constitutional reconfigurations, impinging the law's rationality (Cf. Cianetti *et al.* 2019, Bernhard 2021, Mańko *et al.* 2024). In Chile, constitutional jurisdiction tends to obstruct the enactment of democratic policies and programmes without direct co-option. By contrast, in the EU-CEE countries, the judiciary's appointment restructuring through liberal legality (cf. Sadurski 2019, 63-84, Tacik 2019, 31-44, Ziółkowski 2020, 347-362) has sparked institutional and political perplexities, propelling these states towards the validation of authoritarian decisions and programmes resorting to the most repressive moments of law.

In the Chilean legal order, the inception of authoritarian (neo)liberalism was constitutive and prospective in intent, continuously actualised by the ChCT's decisions. On the contrary, the authoritarian practices in specific EU-CEE states have been retrospective, engendered by tactical disruptions in democratic processes aimed more at restricting freedoms and rights than extending their scope.[32] Notwithstanding these differences, in Chile and EU-CEE contexts, dominant elites have exploited the ambivalence of the constitution and liberal legality to consolidate their agendas through lawyering. These instances elucidate the instrumental role of lawyers' inventiveness in distorting constitutions and laws for ends antithetical to rational law. The thrust is to endow the dignity of law's formality to political purposes and practices far from genuine democracy. The priority is *voluntas* over *ratio*, *lex* over *ius*.

5. Concluding remarks

This article began with conceptualising the foundational tension in modern law. Legality's operation presents conflicting moments and movements, oscillating between *voluntas* and *ratio, Ius* and *Lex*. Whilst traditional theory postulates the rule of law as a harmonising principle that attempts to articulate and stabilise them, its full realisation is blocked by the persistent irreconcilability between sovereignty and autonomy. This tribulation is incessantly driven by political turbulence on a global and national scale; the fractures become compounded, and the inability to confront the challenges to the democratic spirit becomes lethargic.

The discussion then moved towards a concrete expression of the ambivalence of modern law: "authoritarian constitutionalism." This notion invariably encapsulates the tension between volitional decision and freedom effectuation within the constitutional form. Such an antinomy unfolds in the following dimensions: initially, it may appear as *legality in the unlawfulness* and later transit through lawfulness exceptionality to legalised violence —an interstitial situation. Nonetheless, laws and constitutions also offer avenues for gradual progress towards enhanced personal autonomy. Notwithstanding, authoritarian moments are not an anomaly but constitutive of the liberal legal model itself.

The crux of this complex is the judicature. During crises, the judiciary's position becomes the Achilles' heel of the modern legal system, significantly when its functional and intellectual independence is compromised. Justices often serve as a conduit for activating authoritarian practices through legal forms, either by capture, collusion or

[32] The European Commission's 2022 and 2023 *Rule of Law Report* provides an updated, country-by-country diagnosis. Compare with the information provided by the literature cited in section 3.

conviction. Notwithstanding this, in certain circumstances, courts have also been inclined to protect and expand the scope of freedoms and rights through legal and constitutional forms. The discussion examined this conundrum as an institutional manifestation of the ambivalence embedded in modern law and constitutions.

Finally, the study brought its lens closer to the Chilean Constitutional Tribunal case during concrete historical periods. In these contexts, constitutional rigidity hinders democratic progression, to some extent cementing the legacy of General Pinochet's constitution. It expresses a set of institutional and legal arrangements promoting a non-competitive capitalist paradigm, stifling popular participation and making the realisation of social rights and economic democracy cumbersome. Two temporal instances delineate this constitutional form: the beginning of Pinochet's dictatorship, predicated on liberal legality, and its subsequent perpetuation through —not exclusively but to a significant extent— constitutional tribunal interpretations that limit the deployment of democratic programmes. In this scenario, the ChCT acted as a proactive "guardian" of authoritarian (neo)liberalism implemented and effectuated through modern legality.

The Janus-faced character of modern law, expressing a constitutive ambivalence that oscillates between liberating and repressive moments, is not only a conceptual problem. Its contingent practical realisation can be universally recognisable across diverse economic and socio-political contexts. This assertion was supported by examining the position of the Chilean Constitutional Tribunal during specific junctures. Then, this case was juxtaposed with recent transitions towards democratic backsliding and authoritarianism through liberal legality and constitutions in EU-CEE countries. In these instances, judiciaries emerge as crucial agents in mitigating or exacerbating modern law tension between *ratio* and *voluntas*. Challenges to democratic agendas become urgent when the judicature is, in some way, co-opted or captured, allowing the more volitional instances of law to prevail.

This study has examined the interplay between authoritarian and emancipatory elements presented in modern legal and constitutional forms by scrutinising their tensions. Nevertheless, the paradoxical nature of these structures suggests that the communion between legal and personal autonomy has yet to be realised. Whilst the liberal rule of law is often touted as an ideal mediator, its ability to reconcile rational democratic aspirations with authoritarian tendencies remains problematic. This critical point might be because the rule of liberal law is not necessarily the rule of rational law.

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