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Criminal Procedure Reform: A New Form of Criminal Justice for Chile

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CRIMINAL PROCEDURE REFORM: A NEW FORM OF CRIMINAL JUSTICE FOR CHILE

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I. INTRODUCTION

A large number of Latin American countries—not just Chile—have undergone a process of social change. In the case of Chile, the reform of its criminal legal procedures has been related to the need for the country to join the globalized world.

This initiative dovetailed with the interests of law scholars and academics, who considered Chile's criminal justice system to be completely obsolete.

Chile's criminal procedure was already obsolete by the time the initiative was passed into law with a recommendation that it be replaced as quickly as possible.[1]

This old criminal justice system remained in effect for nearly 100 years.

These ideas were expressed very succinctly in this message the Executive Branch presented to the Chilean Congress along with the proposed Code of Criminal Procedures for its approval in 1995: "While the system of administration of justice in Chile was fundamentally designed and established in the middle of the nineteenth century, and it has remained wholly unchanged since that time, Chilean society has

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1. *See generally* James M. Cooper, *Competing Legal Culture and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501 (2008) (discussing the tension between Chilean culture and the need for legal reform); Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform of the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOY. U. CHI. INT'L L. REV. 253–69 (2005) (tracking the history and characteristics of Chilean criminal reform); James P. Carey, *Reflection on Criminal Justice Reforms in Chile*, 2 LOY. U. CHI. INT'L L. REV. 271 (2005); *see also* Hugo Rojas, *Cambios Sociales y Cambios Juridicos en Chile: Construyendo Nuevos puentes Entre Sociologia y Derecho en la Promocion del Realismo Juridico Latinoamericano*, 13 BERKELEY LA RAZA L.J. 453 (2002); John Henry Merryman, *Law and Development Memoirs I: The Chile Law Program*, 48 AM. J. COMP. L. 481 (2000) (discussing the author's experience in the Chile Law Program).

been transformed both economically and politically."[2] This reform process was implemented through the promulgation of laws that established a program for gradual implementation following a specific schedule that began in December of 2000, and culminated in June of 2005, when the new criminal justice system took effect in the entire country.

In the Latin American context, the phenomena described are the direct and indirect origins of the reform processes of the justice systems, and they have found two main individual routes to that end. The first route was adopting clauses included in international agreements, primarily free trade agreements and the second route was driven from university classrooms and by academic publications.[3]

This Essay will briefly explore the new criminal procedures in Chile, their context, and their successes and remaining challenges. Part II of this Essay examines the impact of political decisions to go forward with the transition of the Chile's criminal justice sector from one that operates within the inquisitorial system to one that embraces the adversarial system. In Part IIA, the weaknesses in the inquisitorial system are explored. In Part IIB, this Essay explores the criminal procedure reform process in Chile and the changes that were implemented. In Part IIC and Part IID, respectively, the principles of the reform are explored and the roles of different participants are explained. In Part IIE, the paradigm shift that has occurred in Chile is explored briefly. In Part III, this Essay examines the unintended consequences of the criminal procedure reform, and in Part IV, this Essay concludes by exploring how wrongful convictions still take place in Chile. This Essay also concludes with the call to action: Chile, like all Latin America, needs to embrace new technologies to help the wrongfully accused and convicted be freed from unjust imprisonment.

II. THE REFORM OF THE CHILEAN CRIMINAL JUSTICE SYSTEM

The motives that drove the reforms had the virtue of providing good arguments for the entire political spectrum to be able to agree to support the criminal justice reforms; some in order to improve the country's economic integration into a globalized world, and others in order to improve the laws protecting constitutional and legal rights,

2. Message of His Excellency, the President of the Republic of Chile, Initiating a Bill to Establish a New Code of Criminal Procedures, No. 110-331, (June 9, 1995).

3. Alfredo Fuentes-Hernandez, *Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century*, 21 PENN. ST. INT'L L. REV. 39, 44–45 (2002) (discussing the issues that Latin American Law schools face in improving the institutions for which they will work).

strengthening respect for human beings and their rights.[4] In the message cited above, this idea is expressed as follows: "Through modernization of the administration of justice, we seek to strengthen consolidation of the democratic rule of law and of the model of economic development."[5]

A. Weaknesses in the Inquisitorial System

The system of criminal procedures in effect in Chile until the reform, the vestiges of which still persist for prosecution of any crimes that occurred prior to the time the reform took effect, which is in effect in the entire country as of June of 2005, is based, according to the assertions contained in the first chapter of the book by Professors Horvitz and López, authors of the most important work written in Chile regarding the criminal procedures reform, on that the Criminal Procedures Code of 1906 was instituted,

> substantially preserving the structure of the inquisitorial criminal procedures established during the XIII century, in Books III and VII of the Seven-Part Code, and which was introduced to Latin America (from Spain) during the Colonial period and which continued in effect after the emancipation process of the XIX century.[6]

The structural characteristics of the old inquisitorial process resulted in slow processes in the context of exceedingly bureaucratic proceedings. The existence of a written file was the equivalent to a trial. The junior staff made many important decisions—not the judge. The results among the public were lack of trust in a system that was not very transparent and that left areas outside of the control of judges, open for corruption. Another critical effect was that because of the very long duration of proceedings, at the mid-nineties almost 60% of those incarcerated were awaiting sentencing.[7]

The system did not provide objective conditions of impartiality because the judge performed the functions of deciding if there was cause to initiate a criminal investigation, directing the investigation by issuing direct orders to police, then evaluating the results of the investigation and deciding whether or not to bring charges. In the event a decision was made to file charges and after allowing an opportunity for a purely

4. *See generally*, STEVEN LOWENSTEIN, LAWYERS, LEGAL EDUCATION, AND DEVELOPMENT: AN EXAMINATION OF THE PROCESS OF REFORM IN CHILE (1992); ROLANDO MELLAFE ET AL., HISTORIA DE LA UNIVERSIDAD DE CHILE (1993).

5. *Id.*

6. MARÍA INÉS HORVITZ LENNON & JULIÁN LÓPEZ MASLE, DERECHO PROCESAL PENAL CHILENO, TOMO I, 18 (2004).

7. CRISTIÁN RIEGO & MAURICIO DUCE, PRISIÓN PREVENTIVA Y REFORMA PROCESAL PENAL EN AMÉRICA LATINA, EVALUACIÓN Y PERSPECTIVAS 156 (2009).

formal defense, an evidentiary period was initiated, which was practically non-existent as the results of the written investigation file were considered sufficient. Finally, it was the same judge that issued a ruling convicting or absolving the accused of the crime.

In the opinion of the authors of the work cited above, this confusion of functions,

> began to be unsustainable as constitutional texts and international human rights accords signed by Chile and in effect in national law enshrined, with binding force for legislators, the principles and guarantees of due process recognized as universal standards.[8]

This adds a new motive to the catalog of grounds for change in the criminal justice system.

There was no agency responsible for representing the interests of the community or protecting victims and witnesses. Nor were there attorneys trained to provide legal defense for the accused, should the accused be unable to pay for an attorney, as law students completing their legal internships performed function of public defender.

Having worked in the old criminal justice system for twelve years, this author can attest that it worked well for the judges and litigators, both for criminal prosecution and punishment of crime, and it also worked well for criminal defense, but there were tremendous structural challenges to overcome, which was achieved with great effort on the part of the judges and attorneys who worked in this area. Thus, it is always important to consider the impact of the participants in the process and the use they make of all available tools. A justice system may be theoretically perfect and fail to provide its benefits to society due to the failings of those charged with performing the primary functions the justice system entails.

B. New Criminal Procedures

A new oral procedures system has been adopted in which proceedings—both those of the litigants for presenting motions and arguments and those of the judges when issuing their rulings—are conducted orally. The significance of implementation of this system means important advantages, such as the public nature of proceedings, transparency in judicial proceedings, which ultimately leads to democratic legitimization of the criminal justice system. This change began with the promulgation of a law containing the Code of Criminal Procedures for Chile, which began to be implemented in December

8. MARÍA INÉS HORVITZ LENNON & JULIÁN LÓPEZ MASLE, DERECHO PROCESAL PENAL CHILENO, TOMO I, 18 (2004).

2000.

C. Principles of the Reformed Criminal Procedures

There are a number of achievements and features that have been institutionalized as part of the criminal procedure reform. The first is the creation of oral proceedings for criminal matters. The participants in preliminary hearings and the parties to trial must present their allegations and arguments orally. Witness and expert testimony must also be presented orally at trial. There is also a new feature of impartiality that has come with the separation of the functions of investigating, filing charges and judging, which were previously confused with the role of the criminal judge. As a result, there is a newly implemented set of adversarial proceedings. In this new trial process between parties the judge must treat them as equals, the Public Ministry represents the public, and the defense attorney represents the defendant.

There has been some concentration in the judicial system as all evidence is presented during an oral, public trial; judges rule immediately to convict or to absolve. Moreover, there is a higher premium on immediacy. The presence of the Judge is a requirement for the validity of all proceedings. Transparency is an important feature of the new criminal procedure system now implemented in Chile. The general public, members of the family of the accused and of the victim, as well as members of civil society, can attend trials.

There is a bent on efficiency: alternative mechanisms are incorporated into the ruling in order to conclude criminal proceedings through procedural mechanisms generally called alternative resolutions (*salidas alternativas*). These diversion and alternative sentencing options increase problem solving in the criminal law.

Alternatives to sentencing during an oral trial have been incorporated into the criminal justice system in order to make conflict resolution more efficient, without necessarily going all the way through to sentencing at trial. For this purpose, formerly non-existent mechanisms have been incorporated into the system, such as conditional suspension of proceedings (similar to probation), the abbreviated proceeding (similar to the plea bargain), and the reparative agreement. The latter requires that, in the case of a minor crime in which the primary damage is to property, the victim may waive criminal prosecution in exchange for payment of an amount of money, or the accused can made an action with authorization of the judge of guarantee.

There is a possibility of implementation of other alternative forms of conflict resolution in criminal matters that did not exist prior to the

advent of the reform process. Criminal Mediation, intended to facilitate meetings between victims and perpetrators in order to reach agreements to implement one of the alternative resolutions set forth in procedural law, particularly the reparative agreement and conditional suspension of the proceedings. Drug Treatment Court, a special court that hears cases in which the defendants have been arrested by police and charged with committing a crime as the result of a drug addiction. The classic example is a person who commits a property crime in order to obtain money to buy another dose of an addictive illegal drug.

D. Participants in the New Process

There were a number of new institutions created for the purpose of implementing the reform: Courts of Oral Proceedings in the criminal area, and Courts of Guarantee in the Judicial Branch, the Public Ministry as an autonomous agency of the government, and the Office of the Public Defender in Criminal Matters. They are all tied to the Executive Branch through the Ministry of Justice.

The Courts of Guarantee are presided over by single judges who hold preliminary hearings during the investigation stage, which includes authorization for prosecutors to conduct proceedings that affect the rights of citizens, such as search warrants and wire taps. The Courts of Oral Proceedings operate with a panel of three judges who hear oral proceedings and make rulings. The judges have the freedom to weigh the evidence presented by the parties during the hearing and the obligation to justify their decisions. This evidence may be from witnesses, experts, documents, and material evidence.

The Public Ministry is organized as a National Prosecutor and eighteen Regional Prosecutors, with close to 647 prosecutors, plus 375 lawyers[9] who act as prosecutors' assistants and who perform certain functions of the prosecutors. The Public Ministry Act defines the function as follows:

> The Public Ministry is a senior, autonomous agency, whose function is to exclusively direct the investigation of events that constitute crimes, both those that prove punishable conduct and those that tend to prove the innocence of the accused, and, as appropriate, to bring criminal action on behalf of the public in the manner set forth by law. It shall also be responsible for implementing measures designed to protect victims and witnesses.[10]

9. Comité Puesta en Marcha, "Dotación Ministerio Público, Informe Nov. 2004 para implementación 5ª Etapa.

10. Law No. 19.640, art. 1, (1999), *available at* http://www.leychile.cl/N?i=145437&f=2010-10-08&p=.

In order to meet this objective, the Public Ministry shall coordinate with police, who must follow the instructions directed to them by prosecutors, and the Public Ministry has at their disposal the cooperation of state agencies that have a role in investigating crime, such as the Legal Medical Service. The new justice system also preserves the victim's opportunity to take part in the criminal proceeding as the complainant. The victim of the crime may be represented by an attorney which allows the victim to exercise the rights conferred upon him by the procedural laws.

The Criminal Public Defender is an institutionalized public service that is functionally decentralized and geographically distributed. The Criminal Public Defender is an independent legal entity with its own budget, tied to the executive branch by way of oversight by the President of the Republic through the Ministry of Justice. The Criminal Public Defender is made up of a national defender, sixteen regional defenders, 145 institutional defenders and approximately 350 defenders who are hired for specific periods of time (generally three years) to provide service in criminal defense. Their work is subject to oversight and evaluation by the Criminal Public Defender.[11]

E. Paradigm Shift in the Process

A fundamental change that has had a major impact on the approach to the work of lawyers in Chile is the effect of implementation of the new criminal proceedings to center the discussion of the litigation.

Both in the investigation stage as well as during oral trial, on the facts of the case, in order to influence the court stance regarding absolution or conviction, with the discussion regarding application of the law and criminal doctrine being relegated to second place.

The structure of the process implies the need to establish firmly the contentions regarding the facts of the case presented by the parties through the evidence submitted at trial. While thorough knowledge of criminal law and criminal doctrine must be part of the case preparation, the discussion regarding application of the law takes place once the first objective is achieved, which is preparation of the case and presentation of evidence.

This phenomenon, which constitutes a dramatic change in the way criminal prosecution is conducted, requires that trial attorneys learn new forms of litigation in order to be well prepared for the challenges of oral trials. Thus, chief among the tasks of those responsible for implementing the change in the justice system is to facilitate and to encourage the

11. DEFENSORÍA PENAL PÚBLICA, DEFENSORÍA EN CIFRAS 2010 16 (2011).

adequate training of the participants, judges, prosecutors, and defenders in the skills of oral litigation.

III. UNINTENDED CONSEQUENCES OF THE REFORM PROCESS

There were those who supported the reform thinking, erroneously, that a renovated and more efficient criminal justice system would lead to a reduction in crime. That is not a result that can be expected from a system designed to prosecute those individuals responsible for committing crimes and, after following due process, to impose a criminal penalty when applicable. The criminal justice system begins its functions when the crime has already been committed, so that, while the criminal justice system certainly has a relative effect on the person punished, the criminal justice system does not have the effect of limiting all the elements that come into play in the commission of a new crime. Thus, the effect of the criminal justice system on crime rates is very limited.

Anti-reform movements have emerged in many countries that have managed to reform the reforms—reducing due process guarantees and increasing the authority of police and prosecutors. Many countries believe that these measures can make the criminal justice system into an effective tool for increasing public safety and reducing crime.

IV. THE PROBLEM OF WRONGFUL CONVICTIONS IN CHILE

Chile changed its inquisitorial criminal justice system in December 2000, which by this time, was completely obsolete. During the inquisitorial system the chances of wrongful convictions were very high. The change to an adversarial system improved principles and elements of criminal procedure that lowered the incidence of wrongful convictions, but challenges remain. Chile has a public defense office that provides a good criminal defense service to the people that require it—those with few resources or who can afford a private lawyer. The Chilean Government, which according to the constitutional rule that provide for a legal defense to each person that requires it, created and organized the Public Defender Office (Defensoría Penal Pública) by Law in 2000. This change created a new institution as part of the criminal procedure reform that attended the return to democracy and enhanced legal rights including the right to a defense, the right to be presumed innocent, and the right to hear and to rebut the evidence being used against a defendant.

Public criminal defense established standards and a code of ethics of criminal defense to maintain the best standards in the professional

practice of defenders, yet there is a risk that a criminal defender's poor performance can still lead to wrongful conviction. For the origin for wrongful convictions, we need look only at eyewitnesses' misidentification and then the false confessions, which this Essay will refer to below. This problem in Chile is related with the bad procedures of the police officers who do not have rules or protocols for eyewitness identification and bad practice for examination of suspects. The police continue to have problems in adjusting their performance protocols to prevent eyewitness misidentification and coercive and excessively long interrogations. There are also problems with the relationship between prosecutors and the police. When police do not act within the confines of the law, the prosecutors tell the judges that the police acted in conformity with the law, rather than telling police to improve their performance.

Recently the police and the Public Ministry developed protocols regarding eyewitness identification, but it does not appear that the police have developed protocols dealing with false confessions. In Chile there are, like most other countries in the world, false confessions. Chile has procedural law rules that guarantee that false confessions not occur, but despite these safeguards, false confessions do, unfortunately, occur. Yet they occur, primarily for two reasons: (1) personal circumstances of the accused such as the power of suggestion, their age (young or old), anxiety, conditions of mental handicap, difficulties in memory, and (2) external circumstances, like police conduct, excessive pressure (which you in the Anglo–Saxon world call "duress"), typified by long periods of confinement and examination by police officials. These are the conclusions of a 2005 University of Concepción, Chile study, *Estudio Autoincriminación Falsa en el Proceso Penal Oral*, prepared for our Public Defender Office.

For example, Chile has decided a criminal case in which there was a sentence of not guilty for a man accused of killing and robbery. The reason for that sentence was that there was a false confession. This occurred in the court in La Serena, City, in the oral trial course in 2008. Another issue is that related to hearsay, Chilean judges have accepted that rule most of the time, particularly when a police officer hears the history related by the accused without the public defender being present. Often, courts give too much credit to information provided by police and are unduly reliant on this information.

Chile does not have a special government agency for this particular purpose, but has a procedural tool called the "recurso de revisión"[12] to

12. Article 473 of Chilean Criminal Procedure Code (Act) established the requirements to present the "Recurso de revision." These requirements are: Legitimacy for review. The Supreme Court may, extraordinarily, reverse any final decision on which someone was convicted for a crime or

obtain a reversal of a conviction. This functions as a kind of appeal that permits the review of a conviction without a deadline. This special appeal is possible only in cases of certain circumstances established by law. The prerequisites are very difficult to accomplish. In that way, the most common situations in which the Supreme Court has found wrongful convictions are for misdemeanors because the real perpetrator gave the name of another person.

Defense lawyers have a difficult job fighting the police agencies—both the national preventive police (the Carabineros) and the Investigation Police (Policía de Investigaciones or PDI)—and the public prosecutors, because these law enforcement agencies have the assistance of almost all of the government's agencies. For example, the police have the assistance of experts in areas like medical, psychiatrist, psychologist and more.

An example is a case in which the Public Defender Office is currently defending 8 jail guards. We must pay $34,000 for an expert to recreate and testify about the dynamic of the fire in a jail that resulted in eighty-one dead inmates. We do not have a problem about access to defense counsel during trial. Chile has a very strong problem related to post-conviction defense. First, the public defender office must provide this kind of criminal defense services, but the public defenders do not have the budget for a team of lawyers and paralegals to fully exercise this duty, making the provision of a robust defense, at times, difficult, for all clients. The same problem of underfunding does not affect the public prosecutor's office.

Two years ago, we started a pilot program employing contract lawyers and paralegals for post-conviction defense in one region of the country with funding from an international financial aid agency. This year we hope to expand the program to four additional regions and we hope that the government provides funding for this important area of defense. This will create a space for an Innocence Project in Chile, something on which we are working to achieve.

misdemeanor, invalidating such decision in the following situations: a) When, under opposing judgments, two or more persons are serving time for the same crime that could not have been committed but only by one person; b) When a person is serving time as the perpetrator, accomplice or accessory to the murder of a person whose existence is established after conviction; c) When a person is serving time for a sentence based in a document or testimony of one or more persons, provided that the document or the testimony have been declared false by final judgment in a criminal case; d) When after conviction, any fact or unknown document is uncovered or becomes available during trial, with such a nature that it is enough to establish innocence of the convicted person, and e) When the judgment is pronounced as a consequence of corruption or bribery of the judge or one or more judges who took part of its pronouncement, whose existence has been declared by final judgment. CHILEAN CRIMINAL PROCEDURE CODE, art. 473 (2000).