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Legal aid through legal training: Chile, a case study

Pablo Fuenzalida Cifuentes

A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of PhD in the Faculty of Social Sciences and Law, School of Law,
October 2021

WORD COUNT: 79,170

Para Amparo, Esperanza y Rafael

In memoriam Angela Mutinelli Gonzalez (1926-2018) and Omar Cifuentes Álvarez (1927-2021), loving grandparents

Abstract

This dissertation concerns the historical development of legal aid in Chile, particularly its characteristic and long-standing legal aid through legal training scheme. In a nutshell, this scheme combines public funded legal services to those who cannot afford lawyers with a preadmission to practise requirement for law graduates, who must provide unpaid legal assistance and representation for six-months.

Delivery of legal aid there has been on the policy agenda for successive political regimes. Despite that, the compulsory apprentice system for law graduates, which has been at the core of legal aid provision, has stood the test of time. It was introduced in the late 1920s and 1930s as a statutory feature of the Chilean Bar Association. Since 1981, it has been managed by Legal Assistance Corporations (LACs). The LACs are institutions created by the military dictatorship led by General Pinochet (1973–1990). Subsequent democratic governments have not reformed this scheme, although they have partially, and in some cases totally, excluded apprentices from delivering criminal, employment and family legal aid.

Thus, an examination of legal aid delivery provides a good route to understanding why an issue keeps coming up in the policy agenda without any actual overall change occurring. However, in recent times, specialist reform has become a feasible option. While being limited to specialist provision of legal services, these changes are relevant accessories to systemic procedural reforms to criminal, family and labour justice.

To understand change and continuity, I have explored different branches of the law relating to the governance of lawyers and its links to legal services delivery. The research adopts a socio-legal approach using archival and interview data. Case study data reveal the different tensions between the legal profession and the political context, and how the interplay between these actors has evolved. The creation of LACs is reflective of the ideological tensions between corporatist and neoliberal approaches to the legal profession and legal aid provision, offering a third way solution. The different procedural reforms to the judiciary, on the other hand, have highlighted a tension between generalist and specialist legal services, which has led to consequential change to legal aid delivery in those specialist areas, limiting the participation of law graduates.

My contribution to existing literature explores the different functions performed by legal aid schemes, particularly when law reform continuously fails. I analyse this phenomenon by reflecting on the dynamics between change and continuity. I explore the shifts from an established form of legal aid provision, based on the shared meaning ascribed to this scheme by stakeholders as a valued stage in the pathway to becoming a lawyer, towards its economic advantages for state finances, the highly adaptable governing institutions of this particular scheme, and its current by default generalist provision. While its common basis has declined for those agents furthering legal aid reform, specific structures have actually constrained reform to legal aid through legal training which explains its persistence over time.

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Although researching and writing a thesis usually involves an individual author who gets the honour of receiving the degree of Doctor, in truth it is more of a collective enterprise. Robert A. Kagan, Enrique Barros and Therese O'Toole were more than just my referees, as they read my initial dissertation proposal and provided valuable advice on how to improve it. In the case of Lucas Sierra, during this whole path he was also a tutor, mentor and most important friend, supporting me during the whole PhD journey.

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Author’s declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Pablo Fuenzalida Cifuentes
DATE: 30 October 2021

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Introduction

A prospective lawyer must fulfil several requirements before officially being admitted to practice. Applicants to join must have a tertiary degree, usually at undergraduate level, and produce evidence of ‘good character’ (Woolley 2007:28). In addition, in Chile an applicant must also have completed an unpaid six-month apprenticeship to be awarded the professional degree of lawyer by the Supreme Court. During this training period, law graduates provide legal assistance and representation before courts for low-income people – what this thesis denominates *legal aid through legal training*.

Legal aid through legal training was introduced in the late 1920s and early 1930s as a central feature of the Chilean Bar Association (CBA). The military dictatorship led by General Pinochet (1973-1990) removed the administration of legal aid through legal training from the CBA to newly created *Corporaciones de Asistencia Judicial* (Legal Assistance Corporations or LACs) in 1981. Beyond these managerial changes, however, the dictatorship continued with the original legal aid through legal training scheme, still in place.

This statutory pathway to becoming a lawyer might not seem unusual. Chile’s legal system follows the civil law tradition (Zweigert and Kotz 1998:114; Merryman and Pérez-Perdomo 2007:1) and it is common in such jurisdictions to combine academic and professional skills development, overseen by separate institutions (Hazard and Dondi 2004:124). The provision of such legal assistance to the needy has existed in other jurisdictions too. For instance, in Belgium and the Netherlands, ‘law shops’ or legal clinics created by activist students and progressive lawyers in the 1960s and 1970s provided legal advice by nonremunerated trainees. The Belgian (Gibens 2006:10-11) and Dutch (Goriely 1992:805-806) governments regulated these

schemes as first-line advice and assistance bureaux, employing and remunerating law graduates. However, the difference is that these regulatory changes did not make such work a prerequisite for admission to practise.

In the US, where there is an enduring dispute on whether lawyers providing legal services *pro bono* or for free to people of limited needs should be mandatory or voluntary (Cummings 2004), the state of New York introduced in 2013 a pro bono requirement for aspiring lawyers (Chan 2013). Every applicant to become admitted to the New York State Bar has to complete at least fifty hours of qualifying pro bono service. Nonetheless, this requirement is not legal aid through legal training because: completion can be spread across applicants' law school career (including legal clinics), rather than only after graduation; pro bono services are not limited to low income and disadvantaged people, but include activities with a public interest quality (i.e. civil rights) or may relate to the general improvement of the legal profession; fifty hours equates to just over six working days, as opposed to the Chilean requirement of six months; and pre-admission pro bono services do not replace publicly sanctioned and funded legal aid schemes (*Id:*601-603).

Students have complained about working conditions encountered during their training, as indeed they have done across the world with respect to internships. Common criticisms about internships characterise them as exploitative of the interns who work without recompense, inadequacies regarding employment protection laws, and the offering of only limited meaningful experience or skills development (Svacina 2012; regarding law firm interns, Fink 2013:436). In the US, unpaid internships have been criticised for creating or exacerbating a class divide between better-off and less fortunate students because of the lack of pay (Yamada 2002:218). An interesting question identified by Yamada (*Idem*:223) refers to the shift of burdens from the

training employers to the interns. Because of their unpaid nature, there are few incentives to improve existing training programmes.

In the case of legal aid through legal training, it is common to find undergraduate theses on legal aid in which the authors complain about the same issues regarding inadequate working conditions, particularly as they have to assume all their costs regarding transportation, meals and even office supplies (Castillo 1999; Gavilan 2002; Zagal 2004). Similarly, a former law dean acknowledged the poor didactic element of the apprenticeship period, which was limited to the application of previous knowledge learned at law school instead of learning (and therefore teaching) new skills (Correa 2009).

Nonetheless, a significant departure of legal aid through legal training from usual critiques of internships refers to the problem mentioned above concerning the shift of burdens. Sometimes referred to as a poor variant of a learning-by-doing scheme, in legal aid through legal training the costs of students' inexperience are shifted to legal aid beneficiaries (Rosenberg 2009:204). In other words, rather than contributing to close the gap in terms of access to justice this legal aid scheme exacerbates a class divide: between people who can afford superior skilled legal representation and poorer people who seem to deserve inexperienced legal aid.

What makes the Chilean scheme of legal aid through legal training atypical, then, is the fact that this final stage of vocational training constitutes an official, long-standing, and usually decried, legal aid scheme for those who cannot afford a lawyer.

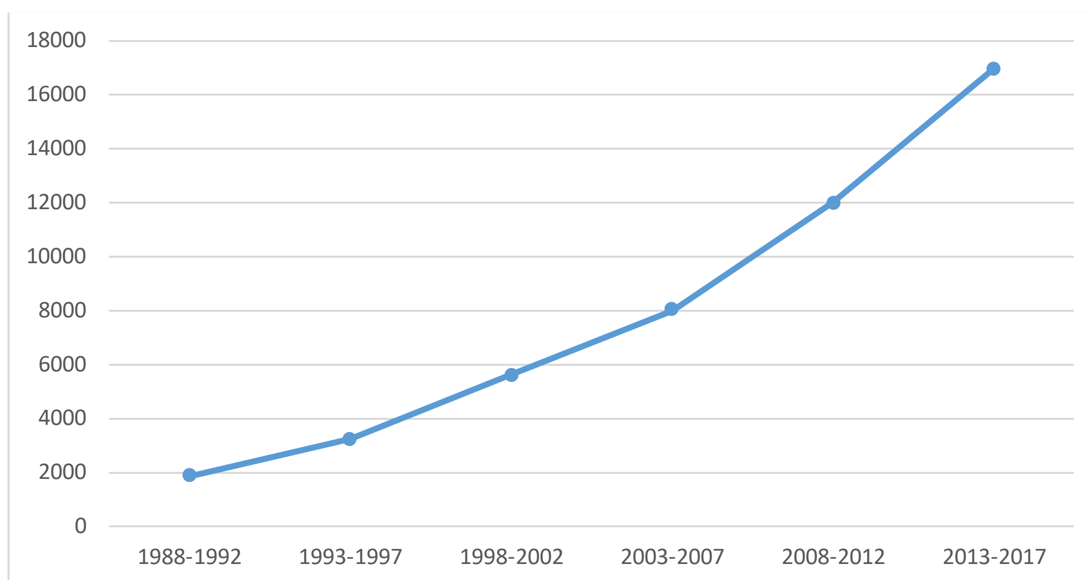
Legal aid in Chile and its critics

Legal aid has stirred debate sporadically throughout its history, but only since the reinstitution of democracy in 1990 has it been possible to perceive a common theme – criticism of the role of law graduates.

The legislative decision of introducing legal aid through legal training as a key feature of the CBA is illustrative of a corporatist framework, furthering a system of interest representation where 'bodies with a stake in the economy [...] took decisions about social and economic policy, rather than the government or parliament' (Passmore 2014:141; also Passmore 2002:141). The CBA became the sole and official provider of legal aid, supervisor the entry of law graduates, and regulator of the legal profession. The literature on legal aid provision used to highlight the need for more and novel forms of legal services delivery, such as legal clinics (Bates and Leiter 1974) or social insurance (Caceres 1975), without necessarily stripping the CBA from legal aid or its training duties.

The military dictatorship led by General Pinochet (1973–1990) reshaped several laws governing the legal profession and legal aid, including the enactment of a new constitutional order. Neoliberalism, an ideology which, on one view, subordinates the social, political and cultural spheres to a self-regulating economic market, casting governments as investors and facilitators of trade (Freeden 2015:110), provided an ideological roadmap for the regime. Under the Constitution of 1980, professional associations such as the CBA were stripped of all their powers over practitioners. Disciplinary control over professional misconduct became a remit of the judiciary. The dictatorship 'opened' the system of graduate education to private entrepreneurs, entitling individuals to found universities, thereby causing a massive growth in the professions. In the case of the legal profession, the existing six law schools until 1981 (Coloma and Agüero 2012:44) became 49 law schools in 2014 (De la Maza et al 2016:21). This change in the supply side of legal education led to a substantial increase in the production of lawyers as the following chart shows:

FIGURE 1 NEW ENTRANTS TO THE LEGAL PROFESSION (1988-2017)



Source: Own elaboration using data from Sierra and Fuenzalida (2014), updated with judicial annual reports (*www.pjud.cl/memorias-anuales*)

The 1980 Constitution was the first to guarantee the right to legal counsel as a constitutional right in and of itself. Nonetheless, beyond the removal of legal aid's administration from the CBA to four Legal Assistance Corporations (which are autonomous from each other and do not constitute a department of government), the dictatorship kept legal aid through legal training.

From 1990 onwards, however, assessments focused on issues which negatively affected LACs' performance: management issues; budgetary limitations; inconsistent coverage of different areas of law and different clients; and, lack of professionalisation as inexperienced law graduates assume the role of legal aid lawyers (Valenzuela 1991; Castillo 2006; García and Leturia 2006; Centro de Derechos Humanos 2008; Cofré 2014). On the issue of legal aid through legal training, the literature (Balmaceda 2000) underscored the high turnover of law graduates, the excessive delegation of responsibilities to them without adequate training and supervision, the lack of incentives, their sluggishness managing cases,

and the absence of mechanisms for controlling standards of services. A government evaluation of LACs' legal aid provision by the Ministry of Finance recommended professionalising legal aid delivery:

> The participation of applicants for the lawyer degree, a relevant human resource of the system, should be reduced by allowing their participation as assistants or 'students in practice', with proper selection of those most qualified. […] A public system must be an institutional framework based on quality and service, not on the goodwill and dedication of its staff. The National System of Gratuitous Legal Assistance should cease to be 'a poor service for poor people' and become professional […] The six-month training period that each aspiring lawyer carries out is also problematic, as cases are abandoned after the said period has elapsed. (Dirección de Presupuestos 2003:69)

With the return of democracy in 1990, reform of the judiciary became a central issue, and as a result of this, reform of legal aid. Whereas there appeared to be some level of consensus that the legal aid system required change, there was no consensus as to what the required changes might be. Subsequent democratic governments have vacillated between unsuccessful generalist reform attempts, and specialist jurisdictional changes. Examining the data on legal aid shows various attempts to reform legal aid have not led to changes in the provision of legal aid through legal training in Chile, thereby giving rise to a puzzle about the lack of reform. Conversely, specific changes to legal aid through legal training occurred in the context of a wave of procedural reforms, in the criminal, family and labour jurisdictions.

These attempted reforms and incremental changes to legal aid can be understood as response to the variety of critical assessments from different stakeholders, as discussed above. In view of those concerns, it might have been expected that any of the democratic governments' general policy proposals would have dispensed with the provision of legal aid through legal training. The procedural reforms indeed partially modified this legal aid scheme. Criminal defendants (and some victims of crime from 2011), as well as low-income labour claimants are now

provided with specialist lawyers. Provision in family law combines lawyers and interns with the aim of increasing the leading role of professionals, whereas general legal aid beneficiaries mainly receive the services of law students.

The reasons why reform in this sector has either remained off the agenda; or failed when actually addressed through generalist proposals; or succeeded in specialist areas without completely replacing legal aid through legal training, may shed light on why some political issues become the focus of attention through legal mobilisation and why others do not. The reasons for these divergent outcomes are not obvious, but are nevertheless worth exploring. The research outline that follows is designed to achieve this objective.

Researching legal aid through legal training

A range of questions have been raised with respect to access to justice, legal aid and the legal profession which are relevant for this research, as its central point is to comprehend why a particular legal aid scheme has stood the test of time.

The literature has identified different ways of understanding the notion of access to justice (Maru 2010, Webley 2020:220): of enhancing state-sanctioned dispute resolution processes (Genn 2010 and 2011); of measuring the incidence of justiciable problems and people's responses (Felstiner et al 1981, Genn 1999, Genn and Paterson 2001, Pleasence et al 2003); and of legal aid provision (Rhode 2004, Flynn and Hodgson 2017). Comparative and collective research efforts on legal aid in particular (Cappelletti et al. 1975, Cappelletti and Garth 1978, Goriely and Paterson 1996, Regan et al. 1999, Palmer et al. 2016, Flynn and Hodgson 2017) have addressed different types of research questions: Why should the state provide legal services?; why do states develop legal aid?; and what has gone wrong with legal aid and what choices exist to overcome this crisis? (Goriely and Paterson 1996a). Socio-legal

studies on the legal profession have studied its regulation, usually asking in whose interest regulation is being made: the professions, the public or the state (Haller 2012:218-20), and have also studied legal service providers, usually asking 'who' are the profession, how do they organise, operate and apply the law (Moorhead 2012:785, Webley 2020:215).

When compared to academic work undertaken in the USA and the UK, traditionally lawyers and the legal profession in Chile have not been popular research topics. A comparable fate as an underdeveloped subject has befallen the sociology of law in both law and social science departments, alike to that diagnosed for the British curriculum during the early 1990s (Travers 1993:442). Much Latin American scholarship and law teaching has been quasi-monopolised by legal academics, who are not particularly concerned with what the law *is* as a social practice (Huneeus 2015; Vecchioli 2011). This omission regarding research on the legal profession can also be explained through the composition of the Chilean legal academic community. Until recently, it has consisted mainly of practising lawyers and lacked full-time scholars (Muñoz 2014; for a comparative Latin American view, Merryman and Pérez-Perdomo 2007:108–9).

Literature on legal aid in Chile illustrates this diagnosis. Mostly written by lawyers from a normative or social policy standpoint, it criticises the tasks carried out by LAC, but does not always support those statements with original data (and sometimes is without data at all). One of the few comprehensive surveys on the perception of legal services by those on low incomes was carried out almost thirty years ago (Correa and Barros 1993). These rare empirical accounts puzzled me, as legal aid through legal training was not only of concern to its 'clients', but also affected every law graduate (and consequently every law school) in Chile.

Law and society scholarship or socio-legal studies in Chile enjoyed a short lifespan from the late 1960s until the mid-1970s when the military intervened in universities (Sierra 2002). Recently, there has been a revitalisation of empirical legal studies and social studies on the law (Riquelme 2018), to which a socio-legal study of the development of legal aid through legal training could offer a contribution.

From a less parochial perspective, this dissertation takes into account two research agendas from the literature: the need to overcome the dearth of attention paid to outputs outside the Anglo-American world (Harrington and Manji 2017:704), and the shift of research focus from the legal elites of advanced economies and global law firms, on the one hand, to legal aid providers in emerging economies, on the other (Liu 2013:681). This case study of legal aid through legal training contributes to the previous programmes in the sense that by looking at different jurisdictions with singular political contexts helps understand the actual extent to which legal aid is dependent, for instance, on state support, legal mobilisation, competition or legal education models. Moreover, although access to justice and legal aid in the country have been considered in broader comparative surveys on these themes (Cappelletti et al 1975; Cappelletti and Garth 1978), the published reports offered very brief descriptions of Chile and are clearly outdated (Johnson 1975:649, Brañes 1978). Newer national reports have confined their analysis to criminal legal aid provision and the Criminal Public Defender service introduced in 2001, omitting legal aid through legal training completely (Defensoría Penal Pública 2015, 2017 and 2019).

This research on the history of Chilean legal aid through legal training aims to advance knowledge through locating the developments chronicled in this case study within change and continuity in the broader literature produced by the English-speaking world. The change and continuity duality responds to the particularities of

the chosen case study. This duality has become ubiquitous in scholarly work on contemporary Latin American politics, as the traces and effects of its political history have remained prominent despite the remarkable advances of democratisation in the region (Hogenboom 2005:449).

This dissertation is not a comparative study of different legal aid schemes. The focus of this thesis with respect to the relevant literature uses the insights from past research, to identify commonalities and discordances with the findings of this case study.

Research questions

The following research question arises from the above discussion and will be considered in depth in this thesis:

Despite political ruptures and developments in the legal profession, why has the core provision of legal services – seeking to fulfil a constitutional right through a compulsory training stage for law graduates – stood the test of time since 1981?

This main research question has three interrelated sub-questions:

- Why did the military dictatorship choose to keep legal aid through legal training, despite radically reshaping higher education and professional associations?
- What does the hiving-off of legal aid from legal training in 2001 tell us about legal aid through legal training?
- What tensions have risen as a result of historical changes, and changing specialisation, in certain areas of legal aid?

Summary of the chapters

This thesis has six substantive chapters. To understand the resilience of legal aid through legal training, it is necessary to appreciate how legal aid has been developed according to the broader literature examining experience outside Chile. Chapter 1 situates this thesis within previous research on access to justice and the sociology of professions, with special attention given to the legal profession, by mapping the literature on the development of modern legal aid. This review is organised according to the function that legal aid performs (or is expected to perform). A first strand of the literature analyses the development of legal aid as a means for fulfilling higher values expressed through constitutional and international rules. From this perspective, policies on legal aid and access to justice are solutions aimed at overcoming barriers to equal access to the law. A second strand discusses legal aid as a mechanism for enhancing professional control over the legal services market. This strand problematises previous assumptions over lawyers' values, advocating policy proposals to reduce professional power over legal aid delivery. A third and final strand of the literature examines legal aid as one option within a vast menu of alternatives of delivery of legal services. This last strand originates in an unfavourable backdrop for legal services, marked by complaints against too many lawyers (and too much law) and a claim of few perceivable benefits for the public, and retrenchment of public funding for legal services. These complexities have diversified the policy repertoires in the search of more efficient or less expensive legal aid, as well as potential substitutes.

A range of themes emerge from this literature. At the macro level, themes include the influence of legal traditions in the development of legal aid schemes in common and civil jurisdictions, and the role of the state and the legal profession with respect to welfare provision. At the micro level, themes relate to key stakeholders and

their politics on legal aid. This material provides a common terminology for studying legal aid models (charitable, judicare, public salaried, mixed) and their features, which permit better knowledge of the particularities of legal aid through legal training.

Chapter 2 begins by explaining why a qualitative methodology is the most appropriate one for this research project. Next, it lays out which methods were used for data collection, their pros and cons, and how fieldwork reflexively affected my original research strategies. The chapter also discusses the methods used for data analysis. Finally, it reflects upon the ethical issues involved.

Chapter 3 narrates the origins of legal aid through legal training. The chapter begins with an account of legal aid during the nineteenth century, thus covering the last years of Chile as a Spanish colony and the beginnings of the new independent republic. Legal aid through legal training's inception is a product of the first half of the twentieth century, characterised by a shift towards increasing state intervention in the provision of social services, the establishment of the CBA as the legal profession's official body, and the influence of corporatist ideologies. After legislation was passed in 1934 establishing legal aid through legal training as the sole remit of the CBA, the chapter discusses how the CBA used this privileged position to extend its influence in state and judicial affairs, until the first reform attempts to transform legal aid provision into a state duty. These challenges occurred between 1964 and 1973, the year in which the dictatorship put an end to a long democratic era. In those critical years for the CBA, governments leaned to the left, endeavouring to implement policies that would have reduced the legal profession's control over legal aid through legal training by boosting state intervention over legal aid provision. The military coup of 1973, which overthrew the government and was supported by the

CBA, the Supreme Court and part of the legal academy, put a halt to those reform attempts. This chapter assists the reader in understanding the founding elements the particular combination of lawyers and the state in the supply of legal services and training in lawyering skills.

The purpose of Chapter 4 is to understand why the dictatorship led by General Pinochet (1973–1981) retained legal services delivery through mandatory training for prospective lawyers. In 1981, the military dictatorship enacted the first reform to this scheme by creating LACs. While the introduction of LACs put an end to the CBA's legal aid provision and control over the final stage of future lawyers' training, these new institutions were only created after stripping the CBA of its statutory powers. Ideological haggling had existed between corporatist and neoliberal advocates from the commencement of the dictatorship. The creation of LACs reflected these ideological contradictions within the military regime. In regulating the professions, the dictatorship veered towards neoliberalism, although it is possible to identify elements of continuity in the field of legal aid that could be read through a corporatist lens favourable to lawyers' interests, such as the integration of LACs' boards. The majority of LACs' board members are appointed as representatives of extra-governmental interests, on behalf of the legal profession and law schools. This transition from the profession to the state did not continue in the form of market-oriented reform to legal aid as happened in other areas. This chapter argues that the legal reform creating LACs did not represent a policy directed to improve access to legal services; but, rather, it was an incidental result of policies aimed to reduce professional power. Keeping legal aid through legal training may have operated as a pragmatic compromise, reducing the strained relationship between the dictatorship and the legal profession following the reduction of the CBA's power.

After the reinstitution of democracy in 1990, there have been several efforts to reform state-funded legal services. These are covered in Chapters 5 and 6.

Chapter 5 focuses on the question of what the hiving-off of professionalised and specialised legal aid services tells us about legal aid through legal training. During the first decade of democratic rule, generalist attempts at changing legal aid co-existed with substantive reforms to the judiciary. With the enactment of criminal procedure reforms in 2000, the first successful statutory reform to the LAC model ensued, with the creation of a new institution in 2001, the Criminal Public Defender. Criminal legal aid provision involved a mixed model of public and franchised private defenders, with complete exclusion of students in the representation of criminal defendants. The argument in Chapter 5 is that fulfilling access to justice drove generalist legal change, acting as an enabler for reform, but the existence of unpaid mandatory training constrained those legal transformations by altering the shared understanding of what constituted becoming a lawyer. Only when access to justice took the lead in a context of systemic change to the judicial branch, as occurred with the reform to criminal justice, did the persistence of an unmodified pedagogic goal of training become unsustainable. Change became possible by hiving off a specialist area away from the Corporations while trading off legal training as a voluntary task for the new public service in charge of criminal legal aid.

Finally, Chapter 6 addresses the question of what tensions have arisen as a result of historical changes, and changing specialisation in certain areas of legal aid. Before the hiving-off of criminal legal aid, access to justice and legal training were treated as compatible goals. The criminal legal aid reforms called into question compulsory training in favour of improving access to legal representation, challenging the previous implied agreement. Access to justice took on an antagonistic dimension

in relation to training, illustrated by the fact that announcements about legally eliminating or limiting legal training duties in relation to legal aid emerged as reactions to several forms of discontent from stakeholders. Subsequent governments have vacillated between combining all the existing alternatives, including legal aid through legal training, or replacing it with a new public service organised in a similar way to the Criminal Public Defender service. Again, none of these legislative initiatives has become actual law as economic, educational and procedural factors dampened the development of alternatives to legal aid through legal training. Simultaneously with these legislative processes, as incidental responses to procedural reforms creating new family and labour courts, governments implemented more specific policies excluding or limiting law graduates' participation in favour of professionalised and specialised legal services. These reforms made the participation of students acting as proto-lawyers antithetical to the novel forms of justice being pursued. Therefore, specialist legal services were effectively introduced, because they were a necessary complement to systemic procedural reforms.

Finally, the Conclusion summarises the findings of this case study of legal aid delivery in Chile. The persistence of legal aid through legal training can be explained through considering its highly flexible nature in changing settings. In eras of strain, it provides a common and unified identity, in this case for the legal profession, which forms part of the acculturation of the group to avoid or resist changes. In times when public expenditure is restricted as a result of economic crisis or budget cuts, the scheme provides a low-cost alternative. In periods of service diversification, keeping legal aid through legal training provides a default alternative for existing constituencies, whereas its governing structures are open enough for allowing innovation in novel areas.

Reform to legal aid through legal training becomes possible when it is not an issue in and of itself, but rather a necessary condition for the development of larger political goals. For example, legal structures contributing to create professional monopolies need to be limited or suppressed; substantive changes to specialist branches of justice demand particular skills and dedication from legal providers, of which law graduates in training lack. Change in this regard becomes incremental by taking legal aid through legal training from the CBA's management or hiving-off of specialist areas in concomitance with reforms to specialist lower courts.

Thus, a realistic expectation over reform to legal aid through legal training to increase procedural justice in Chile may require to acknowledge the specific grievances or basic needs which, not only cannot be solved or satisfied by this particular legal aid scheme, but would rather aggravate with its permanence.

Chapter 1 The development of modern legal aid

This chapter situates the thesis within previous research on the development of legal aid development and the sociology of professions, with particular attention to the legal profession. Existing research on access to justice and the professions provides the background to contextualise the analysis and historical developments on the changes and continuities of legal aid in Chile.

The purpose of this chapter is to provide a thematic framework that will guide the historical account. A range of themes can be developed alongside reference to common terminology in the context of reciprocal relationships between conceptions over rights, lawyers' role in fulfilling access to justice, and different models of legal aid delivery. The insights from this literature on other jurisdictions will be used in the following chapters to identify common and divergent patterns regarding the development of legal aid schemes to understand the Chilean case study.

The chapter is structured in three main sections. The first section clarifies the concepts of access to justice, legal aid and legal profession which are used throughout this dissertation. The second section reviews the literature on the development of modern legal aid, distinguishing three different stages: (i) legal aid as a function of higher values, (ii) legal aid as an enhancing mechanism for professional control, and (iii) legal aid as one of a range of legal services. The final section concludes, summarising the reviewed literature and providing an outline of the subsequent chapters of this thesis.

Some conceptual clarifications

This section explains the main concepts utilised in this research as concepts enable researchers to look at things from certain perspectives, from where they can continue to more theoretical approaches (Swedberg 2016:60-61).

With respect to legal aid, while during Ancient Rome and medieval times it is possible to find legal services for the poor, the grounds for doing so differed from its modern conception. Roman law's *clientela* system reflected the power relations of its society as the weak attached themselves to powerful *patronus* in return for legal services, whereas in the medieval world legal aid was considered a form of charity (Cappelletti and Gordley 1972:349–52).

Modern legal aid conceives vulnerable litigants as being entitled to a right to legal aid (*Idem*), elevating the concept of access to justice 'with symbolism, reverence and, at least, a certain degree of inalienability' (Zemans 1986:36). Thus, a modern definition connects legal aid to access to justice: 'access to affordable publicly funded legal assistance' (Paterson 2012:62). I adopt this definition of legal aid because it refers to its modern conception, linking the delivery of legal services to the poor with the rise of constitutionalism and centralisation of power in the modern state (Cappelletti and Gordley 1972).

The literature identifies three main publicly funded legal aid models in developed Western societies: the judicare, salaried and mixed models (Cappelletti and Garth 1978; Paterson 1996a; Currie 2000:). The *judicare model* combines the state's duty to finance access to justice with provision by private lawyers to all eligible people (*Idem*:199-202; *Idem*:239; *Idem*:287). Its main features are independence from government of the body responsible for administering and awarding legal aid, being demand-led as expenditure is open-ended although subject to permanent monitoring, its broad scope, the assessment of claimants through multiple eligibility criteria, being

contributory for beneficiaries on a means test basis and its wide choice of lawyers (Paterson 1996a:239-241). The *salaried model* conceives legal aid provision as a public service, provided by a cadre of lawyers paid by the government, with varying ranges of services depending on whether they become competitors with private practitioners (Cappelletti and Garth 1978:202-5; Paterson 1996a:253; Currie 2000:287). Finally, *mixed models* integrate features from judicare and salaried provision to eschew some of their limitations (i.e., neglecting the poor as a class or economic and staff shortages) in an ad hoc fashion (*Idem*:205-7; *Idem*; *Idem*). For instance, in the 1970s and 1980s, Sweden created a network of public law offices with salaried lawyers to operate where private law offices did not exist, which competed for non-legally aided clients, thus, containing legal services costs (Regan 2003:56).

Consequently, private provision of legal services for those who cannot afford them, such as pro bono schemes or legal clinics, although reviewed throughout this research, are not covered by this definition in relation to legal aid. Pro bono and legal clinics are expressions of the subsistence of the charitable model of legal services in modern times, grounded as professional or educational obligations, characterised by their limited funding and coverage, part-time provision through young and unexperienced volunteers, and exemptions from court fees and expenses (Paterson 1996a:237).

Finally, with respect to the notion of legal profession, I will refer to this concept in a descriptive fashion. ‘Lawyer’ denotes people who are allowed to practice law in a particular jurisdiction because of their occupational titles or qualifications, rather than in terms of their function (for these distinctive uses of the term, see Abel 2012:131).

The development of modern legal aid

Legal aid as a function of higher values

The conception of legal aid as a matter of right emerged with liberal constitutionalism, sharing the view of rights as duties of restraint which prevent the state from interfering with the individual freedom of access to lawyers (Fredman 2006). Consequently, as a way of restricting state encroachment on individual freedom, the only affirmative role the state was expected to play related to criminal legal aid (Zemans 1986). In practical terms, the lack of public funding for legal expenses and fees for those unable to pay signified that the only people that could exert the right to legal representation beyond criminal defence were those who could afford a lawyer. Additionally, lawyers kept control over the scope and quality of to-be-provided legal services for moral reasons regarding the propriety or purity of the issue. For instance, during the nineteenth century lawyers did not undertake bankruptcy, evictions and divorce cases (*Idem*:33).

This gap between modern legal aid's normative foundations - the poor were brought under the law's protection so that every meritorious case could receive representation as a matter of entitlement (Cappelletti and Gordley 1972) - and its actual implementation, showed that an inappropriate system of legal delivery existed. As Partington (1975) anticipated, while the provision of legal aid and services has been linked to the moral, political and legal philosophies prevailing in any given society from the outset, this truth 'certainly does not guarantee the optimal development of these services' (*Id*:720).

This would begin to change during the twentieth century, with demands for a major role for state action in the fulfilment of rights. Intervention from the state oscillated between active and reactive models of government, differentiated on whether they espoused 'a comprehensive theory of the good life' to be used as a basis

for 'a conceptually all-encompassing program of material and moral betterments of its citizens' (Damaska 1986:80) or limited to provide 'a supporting framework within which its citizens pursue their chosen goals' (*Id*:73).

After World War II this new active role for states as guarantors of welfare and human rights was addressed by sociologist T.H. Marshall (1950), as a feature of a new conception of citizenship furthering people's participation in society. To achieve this purpose, citizens became entitled to collective goods fulfilled by the state in the form of social rights such as the rights to education, health, housing or welfare. In this sense, citizenship established the institutional conditions for equality in the form of the rights to enjoy a modicum of civilised life (Turner 2009:66).

Legal aid reforms were part of this profound transformation in the role of governments from often minimal intervention to actively promoting citizens' well-being (Regan 1999:185). Marshall (1950:10-11) had envisioned a relevant role for state-funded legal aid as a means for securing the equal exercise of civil rights ('the right to justice'), where affirmative state action was aimed at effectively guaranteeing the right to legal assistance. Within this conception, access to justice could be understood as an implicit right of access to social resources to pursue justice (Sommerlad 2004:350; Galanter 2010:115-116).

These advances on access to justice and legal aid developed simultaneously with research on professions, which became a central focus of the literature on work and occupations in the years immediately after WWII (Abbott 1993:188). A first trend focused on identifying traits that would differentiate a profession from other occupations, such as expert knowledge, technical autonomy, a normative orientation towards the service of others and different forms of rewards (Gorman and Sandefur 2011:278). A more integrated variant came from functionalist theories, grounded in

Emile Durkheim's (1972:184–7) views about professions as a solution to anomie. Here, professionalism was defined as a value system of human agency, where the public would benefit from a non-exploitative delivery of professional service in exchange for rewards received by the professions (Saks 2016:175).

These theories were deferential to professional groups as they assumed, rather than empirically assessing, the distinctive traits and values these occupations self-profess (Saks 2016). In the case of law, this deferential tendency took for granted that lawyers stand for justice, occupying an elevated social status as guardians of democratic values and checkers of abuses of power (Parsons 1954:375, 384; Cummings 2011:15). In policy terms, these deferential views on professions favoured the institution of 'peak organisations' or 'democratic corporatism': collective representatives of an entire sector of an industry or community, acting as intermediaries between the state and the individual (Schmitter 1974). Inspired by the work of Durkheim (1957) and John Maynard Keynes (2010), this strand of corporatism advocated a system in which such organisations had a disciplinary capacity to regulate the desires of individuals, as the latter cannot contain themselves, through rule on modes of interaction, exchange and mutual expectation (Kaufman-Osborn 1986:647). Considering the nonpartisan and nonideological character of these organisations, such as professional associations, societal consensus would become possible, permitting the state to defer to these organisations' technocratic and professional expertise (Hearn 1985:156).

The creation of the judicare model in the UK is expressive of these changing philosophies of welfare (Goriely 1994 and 1996). The desire for improving civil legal aid during the inter-war years - provided during the first half of the twentieth century on a voluntary basis (charitable model) – was driven by an increasing working-class

demand for divorce and discourses appealing for equal justice (Goriely 2006). Victory of the Allied powers over the Axis during WWII translated into national politics as times of hope, social solidarity and trust on public services (Goriely 1994:546-548). Social disruption brought by armed conflict led divorce rates to rise inexorably, including those belonging to the Armed Forces, which led the government to setting up a civil legal aid scheme to deal with this social malaise, extending legal services beyond those classed as poor (*Id*; Goriely 1996:223-227). In this model, the Law Society, the 'peak' organisation representative and regulatory of English and Welsh solicitors, administered the scheme, directly reimbursing the participating lawyers, whereas funding came from government subsidies. Among the main factors that would explain the success of this judicare model, Berney and Pierce (1975:39-40) mention the discipline and cohesiveness of the legal profession.

The 'waves of access to justice'

This positive vision of lawyering permeated the Access to Justice movement led by Mauro Cappelletti, a comparativist Italian scholar who developed 'positions based on the Continental European tradition and his own juxtaposition of the rule of law against fascism' (Peysner 2014:12). This movement was a deliberate attempt at repudiating formalist approaches to legal education - as they oversimplified law to its normative aspect, neglecting its real-world components - and critical of liberalism and the rule of law - for offering futile promises to those unable to accede to and benefit from individual liberties (Cappelletti 1993:282-283). The Access to Justice movement advocated supplementing traditional liberties or first-generation rights with new 'social' rights in order to make poverty relevant for the law (*Idem*:295).

The Access to Justice movement went worldwide with the Florence Access to Justice Project, a global survey of the relevant statutes, case law and literature

produced in and about each country on the topic. This survey led to the introduction of the idea of *waves of access to justice* (Cappelletti and Garth 1978). Focusing on the more foundational large-scale features affecting access to justice, such as adversarialism and constitutionalism, rather than on its micro aspects – i.e., the motivations or duties of lawyers and judges (Cassese 2016:446; Economides 2016:253), Cappelletti and Garth identified three different and subsequent waves. The *first wave* consists of providing legal aid to the poor. The *second wave* concerns representing group and diffuse interests. The *third wave* involves expanding access to justice beyond dispute resolution and litigation.

The notion of waves of access to justice does not limit itself to the form of descriptive ideal types (MacDonald 2010). Each wave corresponded with a different obstacle to overcome. The *first wave* – providing legal aid to the poor - reflects economic obstacles to obtaining legal information and adequate representation (Cappelletti 1993). Examples of this rationale were the international treaties on human rights regarding legal representation, the US Supreme Court's decision in the landmark case of *Gideon v. Wainwright* (1963) and the role assigned to legal aid as part of the so-called 'War on Poverty', as declared by US President Lyndon Johnson in 1964.[1] The European Convention on Human Rights (ECHR), adopted in 1950, guarantees the right to a fair trial, which entitles individuals charged with a criminal offence to the minimum right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require' (Article 6 para. 3(c) ECHR). In

[1] The slogan was coined by President Johnson at a special address to the Congress. Its main highlights are available at https://sourcebooks.fordham.edu/mod/1964johnson-warpoverty.asp [29.6.2020]

similar terms, the American Convention on Human Rights (ACHR) secures the right to a fair trial and to be assisted by counsel (Article 8.2(e) ACHR).

In *Gideon,* a unanimous Supreme Court ruled that states had the constitutional duty to provide counsel to criminal defendants who cannot afford a lawyer, finding that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him' (372 U.S. at 342). Finally, one key element of the 'War on Poverty' occurred in 1964, with the creation of the Office of Economic Opportunity, which established a Legal Services Programme to enable local communities to offer free legal assistance by sourcing funds and setting objectives to be pursued by those communities (Bamberger 1966). The role envisioned for lawyers representing the poor was not limited to their client's case, demanding they become active agents 'for the inarticulate' by challenging 'the systems that generate the cycle of poverty', and 'arouse the persons of power and affluence' (*Id*:852).

Legal aid was perceived as a less suitable solution to the issues of diffuse interests. The *second wave of access to justice* – representing group and diffuse interests - responds to organisational obstacles caused by the economic shift with respect to production, distribution and consumption, moving from individual relationships to mass phenomena (Cappelletti 1993). While the introduction of social rights reflected these changes, individuals by themselves were not capable of vindicating these new rights of a collective nature. The basic problem of fragmented or collective interests, such as air pollution or consumer protection, 'is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action' (Cappelletti and Garth 1978:194). Because legal aid's

individualised nature does not lend itself to collective actions where many victims sue the same defender for the same alleged wrong (Paterson 1991:128), the creation of public enforcement agencies such as *Ombuds* became a preferred scheme for representing these interests, which considered broader categories of the public beyond those who cannot afford a lawyer. Moreover, procedural reforms opened the path to private enforcement of diffuse interests by broadening standing rules to allow organisations to act as champions of those interests. Similarly, rules on notice, the right to be heard and res judicata were modified to reach and benefit those individuals who have not been able to intervene before courts (Cappelletti and Garth 1978:210).

The *third wave of access to justice* – expanding access to justice beyond dispute resolution and litigation - responds to procedural obstacles related to the fact that traditional litigation might not be the most effective mechanism for vindicating rights, consequently moving outside the courts and litigation procedures (*Idem*:284–7). As Menkel-Meadow (2015:6) explains, those agents pushing for a third wave of access to justice (scholars, practitioners, consumers) perceived litigation in the formal judicial system - the locus of legal aid – as an unresponsive dispute mechanism to the complexities and particularities of disputes. To transcend the polarised results that the justice system produces, with winners and losers, flexible and party-controlled processes were believed to reduce harm and improve long term relationships between parties. These dispute mechanisms took the form of mediation and negotiation where parties were encouraged to represent themselves. Finally, the formal judicial system was also blamed for its inefficiency as it provided costlier and delayed solutions – something that could be avoided with mandatory arbitration clauses (*Idem*:7). Therefore, a complementary relationship exists between legal aid provision and these alternative dispute resolution mechanisms. Whenever the latter fail to put an end to

the dispute, it could lead to initiating or continuing with litigation. An example of this relationship occurs with the increasing use of mediation as a mandatory step before being able to action before courts (Economides 2016:251).

The literature on the waves of access to justice anticipates possible themes and research sites for discussing the development legal aid in Chile. Legal aid schemes, as part of other forms of access to justice, become a means for overcoming economic, political and social obstacles limiting equal access to the law. From a methodological perspective, a tri-dimensional research project emerges (Cappelletti 1992:26): a first dimension concerns societal premisses (problems, needs or demands) in search for legal intervention; a second dimension focuses on actual legal responses or solutions; and a third dimension centres on the results or impact of such response. This function of legal aid reflects a normative dimension of access to justice and legal representation, usually enshrined in constitutions and international human rights treaties, providing a framework to assess policy developments on legal aid. Regarding legal aid through legal training in Chile, research on its development and continuing features must consider whether constitutional and human rights performed a relevant part.

A different function played by legal aid, partially stemmed from critiques to the notion of waves of access to justice, is discussed in the following section.

Legal aid as an enhancing mechanism for professional control

Criticism of the 'waves of access to justice'

The promising features of the Access to Justice movement have been critiqued for offering an evolutionary and over-optimistic explanation. These critical evaluations on legal aid's development reverberated during the 1970s and 1980s with criticism

about previous understandings of professions as altruistic service-oriented occupations.

Richard Abel (1985:519–20) noted that by using the metaphor of 'waves of access', legal aid would appear to exist as if it was an apolitical matter, irrespective of human agency. Cappelletti, it has been argued, in the spirit of his time 'believed that legal systems could be comparatively assessed as being more or less efficient, and more or less just, according to allegedly universal standards of efficiency and morality. […] Yet what are these unimpeachable standards and values?" (Infantino 2016:495-496). Legal aid's development has led to different outcomes within countries because of idiosyncratic factors e.g., a poorly developed and/or Catholic country with low marital breakdown rates could eventually have a less developed legal aid scheme than an industrialised and/or Protestant country with more liberal divorce legislation (Blankenburg 1992; Cousins 1994). The combination of historical, legal and social factors - industrialisation and the development of advanced capitalism, marital breakdown and divorce, religion, and political conflict and violence - although not necessary determinative (*Idem*), limits the claim over universal standards in the development of legal aid.

The charge of over-optimism stated that access to justice achieved less than promised, whether for making the legal system inefficient by overloading the courts' caseload with previously unrepresented parties or for encapsulating substantive justice demands in terms of fair procedure and formal justice (see Zemans 1986:30-35 for a review of these arguments). Thus, as Abel put it, 'legal aid is a social reform that begins with the solution – lawyers – and then looks for problems that it might solve rather than beginning with the problem – poverty, oppression, discrimination, or alienation – and exploring solutions' (Abel 1985:598).

The hopefulness of the 1960s and 1970s expressed through ever-rising expenditure on legal aid provision was later replaced by pragmatism expressed through tight eligibility rules, budget cuts, and restrictions on lawyer's services (Paterson 2012:76). This turn to pragmatism may be seconded by Ronald Dworkin's explanation of procedural rights as ancillary rights (1985) – as rights 'to a certain weight attached to the risk of injustice and moral harm' (*Id*:97). In other words, as the allocation of resources to legal procedure should be commensurate to the right's relevance, legal aid provision could be ranked according to the level of the right to be protected (Goriely and Paterson 1996a:5). An illustration of this pragmatic approach can be found in the different level of protection received by civil legal aid.

The European Court of Human Rights (ECtHR) has not extended the right to legal aid beyond criminal legal aid to other areas of the law. In *Airey v Ireland* [1979–80] 2 EHRR 305, [26], the court ruled that to imply that a state must provide free legal aid for every dispute relating to a civil right would become a 'far-reaching' obligation, which 'sit[s] ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (article 6–3-c) deals only with criminal proceedings'. However, the Court ruled that the ECHR 'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for diverse types of litigation, or due to the complexity of the procedure or of the case'. The European Commission of Human Rights seconded the restrictive effects of *Airey* finding that legal aid may be denied in defamation cases (*Munro v. UK* [1987] 10 EHRR 503), affiliation proceedings (*Webb v. UK* [1983] 6 EHRR 120) and before industrial courts (*S. v. UK* [1983] 6 EHRR 136). Subsequent case law has discarded a

general rule ordering states to create a legal aid system for non-criminal matters, opting instead for a case-by-case analysis on whether legal aid should have been provided considering the complexity of the issue, the weight given to the rights at stake, and the risk of unfairness between represented and unrepresented parties (see ECtHR, *Steel & Morris v United Kingdom* [2005] EMLR 314, paras 67–75). At the national level, though EU member states have accepted the importance of access to the courts and the right to legal aid, many of these same countries have been reluctant to improve their procedural laws and fund comprehensive legal aid schemes (Cousins 1992).

Questioning professionalism

The previous sceptical perspectives on access to justice resonated during the 1970s and 1980s with criticism about previous understandings of professions as altruistic service-oriented occupations. New theories led the assault against 'professionalism' as understood by the deferential literature, instead viewing it as an ideology (Bruce 1999:90; Sciulli 2005:917; Bynum 2008:121-122). According to Johnson (1972:284), professionalism had been elevated to a cultural universal, assuming that these agents shared a common set of values or a unified professional culture, transmitted unmodified from metropolitan western education to colonial and postcolonial, industrialised and underdeveloped countries.

Some of this critical literature follows Weber's (1991:241) work on professional status and economic and social closures, exemplified by processes of monopolisation of markets and communities. Weber's work appealed to neo-Marxist theorists such as Larson (1977) who pioneered the notion of a 'professional project' for explaining professions' systematic attempts to translate a limited array of cultural and technical resources into a secure and institutionalised system of economic and

social rewards - in brief, insulation from market forces (Abel 1989:291). Following this line of research, this critical school inquired about why and how professions became powerful occupational groups able to close markets and co-opt the state to negotiate regulatory bargains (Evetts 2003:399–402). In the case of law, these "market control" theories focused on the conditions required by the legal profession to control the 'production *of* and *by* producers' (Abel 1981:653, italics in original) – controlling the supply of legal experts (*how* and *who* could enter to extract monopoly rents and enhance their collective status) and their practice (i.e., banning advertising and solicitation of legal services, establishing minimum or fixed fees) (Abel 2012:132-141). Cahn and Cahn (1966) had already anticipated this position, when they blamed the legal profession's refusal to delegate any of their functions to non-lawyers, by blocking attempts to relax the existent licensing regimes (*Idem*: 935-936).

A similar offensive against professions was occurring at the time with the emergence of neoliberalism in the field of economics. While neoliberalism is an extremely contested concept (Ghersi 2004, Peck 2013), it can be explained attending to its different theoretical uses (Larner 2000). As an ideology, neoliberalism furthers the values of individualism, freedom of choice, market security, laissez-faire and minimal government (*Id*:7). Consonant with those underlying values, neoliberal policy frameworks favour unfettered operations of markets, deregulation of the economy, liberalisation of trade and industry, and privatisation of state-owned enterprises (Steger and Roy 2010:14).

Professions' expert authority was viewed by neoliberals as a constraint on consumer choice (Freidson 2001:116). Thus, it was attacked on multiple grounds: through pressures on professions' legitimation practices; accusations of cartel formation; incremental profit orientation with the subsequent reduction of service

orientation; and the erosion of experts' normative superiority in making binding decisions for clients and the public in general (Pfadenhauer 2006:570–71). The Nobel prize laureate Milton Friedman offered these arguments in his influential book, *Capitalism and Freedom*, praised for its 'devastating' analysis on the effects of the ability of the American Medical Association to restrict entry to the medical profession (*Economist* 1963). Friedman, who had considerable influence in Chilean economics (as explained in Chapter 4), compared occupational licensure in medicine with the return of medieval guilds (1982:116). This technology of government was used as a tool to obtain monopoly positions from special producer groups, preventing new entrants to the profession, depriving the public of services offered under competitive circumstances and reducing the average level of competence (*Idem*:124–30).

In this context of substantial lines of criticism against both waves of access to justice and the taken-for-granted professions' commitment to public welfare (Abbott 2016:266-268), a different explanation of legal aid's development spawned.

The role of legal aid inducing demand creation for legal services

If professions engage in professional projects to shelter themselves from market forces, legal aid may have worked as a handful mechanism for enhancing market control. Focused on its micro features, i.e., key stakeholders and their different attitudes towards legal aid, Abel's (1985) extensive comparative work emphasised the politics relating to legal aid's development. Using secondary literature, archival and quantitative data (budget comparisons, percentages of legal aid coverage, and supply by private lawyers) he identified the following relevant agents: the legal profession (including judges), legal aid lawyers, clients, the state, capital, labour and philanthropy, proceeding to compare their attitudes. For instance, judges were usually more supportive of legal aid schemes than legislators. Law students' initiatives with

law professors to create legal clinics reflected their mutual commitment to the ideology of liberal legalism and the lack of any direct economic stake (*Idem*:500).

A significant conclusion from this study – subsequently developed as a general theory on lawyers (Abel and Lewis 1995, Abel 2003) – hypothesised that the legal profession mobilised to create demand for legal services as a strategy for controlling the legal aid market. This demand creation orientation has been evidenced in judicare models of legal aid, which were designed during a period of collective welfare provision characterised by a paternalistic approach, as the profession with the support of the state defined the needs of their clients (Goriely and Paterson 1996a:17). The design of judicare models is illustrative of a quasi-market: a service which is publicly financed, where the state purchases services from a variety of providers (legal professionals), all of which operate in competition for clients with one another (Le Grand 1991:1257). This is the sort of scenario propitious for the emergence of what economics literature identifies as the principal-agent problem, which occurs when funding is provided by a third party – such as the government – acting as a principal of an agent whom the principal does not supervise (Bevan 1996:101-103). Theoretically speaking, the beneficiaries (clients) should supervise the agent, yet they do not have the competence to make the agent accountable because of their lack of expert knowledge. Therefore, there is considerable leeway for professionals, in this case legal aid lawyers, to use this opaque relationship to induce demand for services which the customer cannot evaluate – in other words, a supplier-induced demand where 'suppliers decide what they will supply' (Bevan 1996:100). This uncertainty for the beneficiaries regarding the correct quantity or performance of the service is one of the reasons why legal services have been termed as 'credence goods', which

are 'provided by an expert who also determines the buyer's needs' (Hadfield 2000:968).

Bevan found that this phenomenon occurred in the late 1980s in the UK, when spending on legal aid increased substantially, 'far greater than what the payer (the Government) could afford (hence this resulted in the Government reducing [e]legibility and changing fee rates)' (1996:101). English and Welsh legal aid was the fastest growing programme since 1979, doubling its real costs every seven years (Bevan et al 1996:282). Canadian judicare schemes also experienced dramatic increases in public spending; with private lawyers taking up three quarters of the expenditure while dealing with under two third of the cases, over-billing or artificially extending the life of cases (Wall 1996:552-555).

Legal aid rising costs did not limit to judicare schemes. Evidence from salaried schemes in Australia and Quebec showed that the propensity to litigate and the cost per case were affected despite their fixed budgets (Goriely and Paterson 1996a:20). Among factors prompting demand for legal services in those jurisdictions were population changes, greater legal aid entitlements, social trends with respect to marital breakdown and the rise of legal costs faster than inflation (*Id*).

To reduce the profession's control over legal aid, these critical trends led to different innovations regarding legal services provision to the poor.

Bottom-up or top-down solutions to reduce lawyers' control over legal aid

The previous literature, whereas sociologically or economically oriented, shared a common diagnostic against the control exerted by the legal profession over the legal services market, and departed regarding possible solutions to this issue.

During the late 1960s and early 1970s poverty lawyers in the UK anticipated changing legal aid provision by increasing advisory centres and creating a national

legal service to tackle geographical distribution problems with areas with few or no lawyers (Goriely 1996:230). Though these reforms never happened, innovative provision developed outside the official legal aid scheme (*Id*:231). Progressive lawyers and law students at the time partnered through community-based initiatives, such as legal clinics or law shops, broadening legal aid constituencies during the late 1960s and 1970s (for a historical comparative survey see Romano 2016). Some of these initiatives would be later sanctioned by governments as legal advice and assistance bureaux (for the Dutch experience, Goriely 1992:805-806).

The spread of legal clinics in Africa and Latin America was part of the 'Law and Development' movement, an initiative aimed at studying and reforming the law as an instrument promoting economic and social development in third world countries, with the collaboration of US legal scholars (Merryman 1977). This initiative was sponsored by the Ford Foundation, a US-based philanthropic institution established in 1936 to fund small social entrepreneurships, which shifted towards a more ambitious and global agenda targeted at eradicating 'the causes of suffering' and helping 'man achieve his entire well-being – to satisfy his mental, emotional, and spiritual needs as well' (*The New Yorker* 2016). Some of these initiatives pursued a strategic style of legal services supply, oriented not just to immediate relief but also to longer run grievances affecting classes of actual or potential beneficiaries (Galanter 1983:10-11). This strategic style resorted to proactive search of relevant constituency groups, aggregating diffuse claims using judicial and out of courts arenas (lobbying, legal education and negotiation). These agents furthered the de-professionalisation of judicial processes to reduce lawyers' monopoly over representation in favour of community-based institutions (Menkel-Meadow 2015:6). Chile was one of the chosen countries for this initiative (the 'Chile Project' discussed in Chapter 3). This agenda

would receive support by legal academics and law schools, where policies regarding access to justice and legal aid would become part of a heated political environment.

Neoliberal reforms to legal aid focused on developing market-oriented policies and enhancing efficiency and rationality (Osborne 2006). The welfare state's bureaucratic administration was dismissed in favour of case-by-case decision-making typical of non-bureaucratic forms of governance, reminiscent of private management technologies, known as New Public Management (NPM) (Hood 1991). These forms of governance were characterised by hands-on professional management, disaggregating and decentralising units, using competition and contracting out for service provision, and distancing policymaking from implementation (Christensen 2006; Lane 2000). The nautical metaphor of 'steering, not rowing' is representative of these techniques, where the government sets the course, monitors the direction, and corrects deviations from the course it sets to private or quasi-autonomous institutions (Barlow and Röber 1996:73; Crawford 2006:454; Osborne 1993:352). Through these technologies, citizens become both able and obliged to exercise autonomous decision-making, encouraging individuals to perceive themselves as responsible for their own well-being (Larner 2000:13).

Literature on professions has explained the emergence of NPM as a transition from the successful manipulation of markets by occupational groups ('professionalisation from within') towards the domination of forces external to the occupations, such as market-consumerism and state-managerialism ('professionalisation from above') (Evetts 2003:398–409). For consumerism, the commodification of professional services transformed expert–client relationships into consumer relations (Hanlon 1998:50, Evetts 2011:416), advancing accessibility, client autonomy and quality improvement (Garth 1983). For state-managerialism,

professionalism needs to be redefined, seeking active subordination of professional interests to the imperatives of the market (clients, third parties, the public) and the state (Olgiati 2006:544, Timmermans 2008:182–3). Reform agendas in this line would be commercially aware, budget-focused, entrepreneurial and managerial (Fournier 1999:288).

NPM incited a multifaceted state involvement on the legal profession, with a strong emphasis on consumer protection and competition policies regarding legal services in general (Paterson 1996:146). Innovations in legal aid provision were undertaken using instruments which both increased state control over practitioners' autonomy and minimised the state to the role of a purchaser or facilitator of services rather than as a producer (Sommerlad 1995:168–70, Goriely and Paterson 1996a:23). State patronage of professional regulatory autonomy was lost in the judicare model as responsibility over legal aid management was transferred from professional bodies to quasi-independent authorities (*Id;* Kritzer 1999:748; Paterson and Sherr 1999:256). These new bodies prompted competition among contracted providers and focused on retrieving trust over expert provision from consumers by monitoring the use of lawyers' monopoly rights through franchising procedures and/or quality audits (Sommerlad 1995:168–70, Goriely and Paterson 1996a:23). In the UK, franchising was a scheme developed during the 1990s by the Legal Aid Board – the body supervising legal aid delivery (currently the Legal Aid Agency) – to incentivise specialisation in poverty law (Goriely 1996:240). This incentive followed a contractual logic 'whereby legal aid firms would be given financial rewards in exchange for contracting to meet certain specified quality standards' (Paterson and Sherr 1999:243).

In mixed legal aid models, salaried lawyers became limited to specific tasks such as initial advice, to favour private providers (Fleming and Regan 2006, Johnsen 2006). For example, in the Netherlands, they were restricted to the initial advice to clients, having to refer for further action to private practitioners, whereas in the US, areas usually related to cause lawyering such as school desegregation o lobbying were banned from legal aid provision (Paterson 1996a:253). Nonetheless, even if limited to the initial stages, by increasing the number of cases dealt by staff lawyers supplier-induced demand by the private sector has been reduced (Wall 1996:555, on Canada).

The literature on market control theories and demand creation anticipates possible themes for discussing the development of legal aid in Chile. Legal aid schemes, as credence goods provided in an imperfect market, might become an enhancement mechanism for control over the legal services market. This function of legal aid, illustrative of broader enquiries on how lawyers adapt to ordinary market behaviour (Moorhead 2012:800), underscore the micro aspects involved in legal aid's development - agents and their attitudes. Because of their critical assessments on lawyers' behaviour and the social costs involved for the public, generally these debates are intertwined with policy proposals on how lawyers and legal services should be regulated to boost access to the law. The previous themes are directly related with this dissertation where the focus is on legal reform and durability of a particular legal aid scheme in Chile. Furthermore, most of the reviewed literature on market control was published at the time when Chilean legal aid and its legal profession became policy issues.

Legal aid as one of a range of legal services

Criticism of market control theories and alternative explanations

Whilst the Access to Justice movement was criticised for legal aid's unfilled promises and other charges, market control theories were assessed too, including the policies these theories inspired. Professional agency can be arbitrary and self-interested - as accused by market control theories -, as well as sincerely advancing clients and general welfare instead of mere professional interests (Scott 2008:221). The interests of lawyers are too vague, complex and contradictory to serve just as a shared 'set of essential attributes' or as 'a singular tool used to quash the public interest' (Sarat 2002:1494). With respect to legal aid 'capture', frequently, the contention goes, the legal profession has resisted rather than promoted legal aid reforms; but, after this initial opposition, the profession has co-opted legal aid schemes without threatening their own vested interests (Paterson and Nelken 1984). Moreover, these struggles may be motivated to preserve the profession's autonomy and self-regulation against state intervention (for the US, Grossberg 1997; for Belgium, Gibens 2006).

An alternative explanation, then, for the previous developments have been explained through the hypothetical existence of a contractual trade-off between professionals and other agents or institutions (Paterson 1996 and 2012). Professions exchange resources and commitments with other actors, such as the nation-state, to establish and maintain positions of hegemony and power (Suddaby and Viale 2011:426), negotiating legitimacy over the cognitive and moral foundations of professional enterprises (Halliday 1983:337). In relation to legal aid, when schemes were originally instituted in the years after World War II, the public would be benefitted by lawyers by supplying them with competence, access, service ethic and public protection (Paterson 1996:141 and 2012:16). In exchange, lawyers were awarded benefits in authority, privileges, restricted competition and status (*Idem*), the

combination of which amounts to the definition of profession (Abbott 1988:8; or 'formal profession' according to Kritzer 1999:717).

New developments, related to market-driven policies from the late 1970s and 1980s, with respect to the legal profession, consumers and the state, demanded a renegotiation of the contract. Several social and economic forces reshaped the legal profession: the massive growth in the number of lawyers driven by the explosive growth of academic legal education, an increasing internal and external competition favoured by the deregulation of protective rules of professional oligopolies, and a demand for public accountability on behalf of consumers' rights (Abel 1989, Paterson 1996). These forces led to a more heterogeneous and less autonomous legal profession, eroding control over its members: to the legal academy, with respect to control of the production of producers; and to potential competitors, consumers and politicians, regarding control over the production by producers (Kritzer 1999:734). These transformations have been labelled by Kritzer as a shift to 'post-professionalism', where expert occupations became less exclusive, segmented through specialization, and affected by information resources stemmed by technology (*Idem*:717).

From the side of the public, legal aid provision had to adapt to 'the age of the assertive citizen' (Goriely and Paterson 1996a:16), entitled to new individual rights in fields such as education, health and social security, reconstructing legal aid recipients as 'active choice makers' (Sommerlad 2008:188-189). Consumerism and state-managerialism demanded renegotiation of the contract to enhance consumer choice, stipulating more educational requirements after degree conferment, and reducing previous benefits through legalised self-regulation and eliminating barriers of entry (Paterson 1996:141 and 2012:16). These new obligations over previous licensing

regimes have been explained as state mechanisms for securing the confidence or trust of expert services' users (Dingwall and Fenn 1987). A layperson's trust in expert systems appears as an 'article of faith' because it is a faceless commitment, not sustained in previous personal relations with the expert, but rather in technical knowledge of which the layperson is ignorant (Giddens 1990:29 & 88 and 1991:18). For laypeople to have confidence in professionals, a belief in the legitimacy of the expert system where they perform needs to exist; a belief reinforced by institutional features such as credentials and accountability mechanisms (Webb and Nicolson 1999:150). Therefore, from a contractarianist perspective, where professional groups are perceived to abuse their privileged position, 'these privileges should be withdrawn' (Dingwall and Fenn 1987:62).

The threat of losing state-sponsored privileges for the legal profession came from a rhetoric, drawn out from the increasingly high numbers of lawyers and lawsuits, which targeted provision of legal services for bringing too much law, yet too little justice to society (Rhode 2000). Concerns over adversarialism - the inclination for favouring legal contestation driven by litigant activism to implement policies and dispute resolution (Kagan 2001) - became common in the US. A so-called 'compensation culture' was denounced during the 1990s in the UK, suggesting the existence of a nation of victims voicing their grievances through litigation (for an empirical assessment of this narrative, Williams 2005; Morris 2007; Hand 2010). Policy advocacy for consensual and mediated solutions family law was complemented with 'adversarial mythologies', labelling lawyers and courts as poisonous and to be avoided at all costs (for an empirical contestation of the Australian experience, Hunter 2003).

Considering these developments, to continue with the ‘social contract’ metaphor, the actual bargaining conditions became rather hostile for legal aid provision, as explained in the next section.

The retreat of legal aid and the search for alternatives to accessing justice

Beginning in the 1980s, and deepened in the 1990s, governments began to avoid large public policy programmes, steadily reducing expenditure on public programmes. In economic terms, legal aid schemes are government subsidies to overcome market failures in the provision of legal services for citizens who cannot afford the cost of those services (Killian and Regan 2004:233). Thus, in accordance to the previous trend of constraining fiscal policies, several countries experienced a decline regarding legal aid through tight eligibility rules, budget cuts, and restrictions on lawyer’s services (Paterson 1996; Regan et al. 1999). For instance, by diminishing eligibility for legal aid, the UK government created a universe of people who funded legal aid provision through their taxes but could not afford legal services (‘taxation without legal representation’; Bevan et al 1996:283). As funding of legal aid became scarce, the decline of remuneration and profitability led private practitioners and firms to opt-out from legal aid contracts, reducing the supplier base (for the UK, Moorhead 2004). The ideal of equality was rather demoted by concerns over efficiency (Moorhead and Pleasence 2003:3), retreating from universality towards targeting or rationing proper access to justice to those most in need (Moorhead 1998; Moorhead and Pleasence 2003). Whilst the access-to-justice movement had been criticised for legal aid’s unfilled promises, the introduction of NPM technologies led to disputes on whether legal aid had been privatised in favour of market mechanisms alien to problems of social exclusion (Sommerlad 1995, 2004).

In addition, focalised provision of legal aid as a consequence of economic restrictions, the notion of access to justice was broadened to encompass 'access to law', in the form of a human right to be told, given the opportunity to know and understand the law, to use and comply with it, and to gain from law's benefit and protection (Rice 2010:10). This revamped notion of access to justice, although evocative of progressive lawyering focused on people's unmet legal needs – which must involve a legally trained professional for their just resolution –, represented a shift towards 'unresolved justice problems', thus, opening to a wider range of lawfully options rather than solely legal assistance (Sandefur 2019:49-50). From this perspective it is possible to understand why, building on Cappelletti and Garth's notion on waves of access to justice (1978), some authors have identified new and subsequent waves and obstacles to overcome. MacDonald (2010:508-9) identified a fourth wave of access which consists of elaborating preventative law schemes to deal with conflicts before they become crystallised as legal problems; and a fifth wave in the expansion of access to positions of authority to make and administer the law. Economides (2016:252-5) has suggested as new obstacles the adequacy of a standard conception of legal ethics' adversarialism commonly taught to prospective lawyers, and the geographical isolation of nonmetropolitan communities.

These two different approaches, underscoring efficient and rationed delivery of legal services vis-à-vis the expansion of the previous understandings on access to justice, spawned different policy options on legal aid provision.

The decline in legal aid eligibility led to the exploration of alternate sources of funding for legal services, without dismissing some of their potential menaces for clients, such as those encountered in conditional fee arrangements (also known as 'no win, no fee'). These legal fees arrangements – where lawyers do not get paid if they

lose, but if they win receive their normal fee plus a percentage of that same fee ('success fee') (Moorhead 2011:347-348) – became a popular, yet controversial, option, as these monetary agreements are tensioned by conflicting interests between the financial gains from the professional over their clients' best interests. The *Code of Conduct for European Lawyers* outlaws lawyers from entering a *pactum de quota litis* with their clients, 'by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter' (article 3.3.2.). These agreements are only permitted if they accord with official fee scales or are under control of the competent authority over the lawyer (article 3.3.3.).

To reduce these ethical risks and broaden access to legal services, policy choices endeavoured to combine market and state mechanisms. For instance, the introduction of contingency legal aid funds, which involve the establishment of a public fund to provide financial support for litigants taking civil cases (Capper 2003). From this fund some or all costs of unsuccessful litigants would be paid; conversely, the fund would be replenished by contributions from successful ones (*Id*:67). This proposition could lessen the ethical issues affecting conditional fee agreements, as they guarantee lawyers some payment for every case (Morris 2005:41 regarding Northern Ireland's rejection of this policy). Evidence from Australia, Canada and Hong Kong show that contingent legal aid funds work well but on a relatively small scale, limiting their economic viability (Jackson 2010:134-141)

A different policy proposal on funding mechanisms for legal services, driven by the observed experience from some continental European countries, contemplated the creation of legal expenses insurance (LEI). In Germany, this funding mechanism appealed to consumers because of the limited availability of legal aid, focused on a

small portion of its population (Killian 2003). For those entitled to legal aid, LEI's pull came from making monetary contributions to the scheme and for becoming liable for their opponents' costs in case of losing (*Id:*43). German LEI also flourished thanks to legal prohibitions over contingency fees, pro bono services and advice programmes provided by nonlawyers (*Id:*48). A different LEI experience occurred in Sweden. Since the 1960s, LEI was integrated into household insurance policies to fill the gaps in legal aid regarding costs of legal services (Regan 2003:52). Therefore, in a context of global discouragement from using courts for dispute resolution, the government's 1997 decisions to make major funding cuts to legal aid (i.e., by closing public law offices) and to target and narrow its coverage, were somewhat eased by the fact that Swedes still enjoyed some protection from legal expenses (*Id:*53-54). Still, it has been argued that LEI on its own is unable to achieve equal justice for all, because of its limited protection, the fact that those need it most – low-income people – are the least likely to purchase it and the lack of legal assistance in non-litigious legal issues (Killian and Regan 2004). In other words, LEI provides advantages when it is complemented by legal aid schemes, rather than substituting the latter, as evidenced by research on the Netherlands (van Velthoven and Haarhuis 2011).

As regards to the renewed interest in redefining prior understandings on access to justice, echoing progressive lawyering proposals and developments from the late 1960s and early 1970s, policies began to shift from a 'top-down' institutional angle to a 'bottom-up' perspective, focused less on formal processes and more on individuals' abilities to resolve problems (Pleasence and Balmer 2019:141). Alternatives such as self-representation and disaggregating services into legal information, assistance and dispute resolution, became attractive for curbing legal adversarialism and also reduce costs (Moorhead and Pleasence 2003:6-9; Sommerlad 2008:181).

Self-help legal services, where the consumer takes 'personal responsibility for completing all or part of the relevant legal transaction' (Giddings and Robertson 2003:103) became an attractive policy option. For instance, the provision of legal information to laypeople through self-help kits on consumer, family law and small civil claims issues (*Id*:103-104, regarding Australia), has been encouraged with the introduction of less formal, state-sponsored and mandated alternative dispute resolution processes (*Id:*113).

Whether as a desired outcome or unintended consequence, some jurisdictions have undergone through an intensified practise of guided litigation in person. The state of California, which pioneered this approach in 1971 though with a meagre 1% of unrepresented litigants state-wide on divorce proceedings, grew dramatically to 46% in 1992 and 77% in 2000 of divorce filings only in San Diego (Hough 2004:306). Two policies played a crucial role in this upsurge. In 1997, family law facilitators were statutorily introduced to guide litigants in person regarding disputes over child and spousal support, divorce, custody and visitation (*Id*:307-308); in 1998, the creation of family law information centres provided low-income self-represented litigants with information and pretrial assistance, broadening during the new century to other self-help areas of the law (*Id*:309-315). In the UK, where a long-standing right to receive lay assistance by litigants in person exists (*McKenzie v McKenzie* (1970) 3 WLR 472), this right to a 'McKenzie Friend' has evolved from its altruistic and charitable beginnings to a regular form of legal support in areas noneligible for legal aid (Smith et al 2017). After the *Legal Aid, Sentencing and Punishment of Offenders Act* (LASPO) came into effect in 2013, which removed from legal aid the majority of civil and family matters, an increase in the number of litigants in person went in hand with the growing emergence of 'non-legal professionals who offer

advice and moral support to litigants either free or on a fee-paying basis.' (Owen 2014:367). The possibility of fee-charging 'McKenzie Friends' has stirred ongoing debates over their regulation – i.e. prohibiting or authorising fee recovery and/or rights of audience (Barry 2019; Owen 2014; Smith et al 2017) - and the quality of the services they provide in contrast with that of family lawyers (Smith and Hitchins 2019).

The above scenarios suggest that legal aid has become one of many alternatives to accessing the law (Paterson 1996:254-257). The previous events underscore the political vulnerability of state-funded legal services (Albiston and Sandefur 2013:116), suggesting that legal aid has withered in recent times (Paterson 2012:59). These novel forms of legal services have been praised when they complement existing access to justice schemes; and questioned when they become a replacement of legal aid justified on benefits to the broad community (Regan 1999:181). However, 'defunding' efforts and contractions over eligibility have been almost absent with respect to criminal legal aid, where its constitutional and international grounds have permitted avoiding those restraints (*Idem*:188). Countries that became new entrants to the European Union (EU) in 2009, introduced criminal legal aid to fulfil this international mandate (Paterson 2012:67). A possible explanation refers to the role played by different (or a la carte) ideologies of state funding for legal services, leading to different outcomes (Moorhead and Pleasance 2003:10). Criminal justice has been the deontological realm of equality and rights, whereas civil (noncriminal) justice has faced an instrumentalist imprint centred on relative need and measured through impact and efficiency.

The literature reviewed in this final section anticipates as possible themes for discussing the development of legal aid in Chile whether social and economic forces

reshaping the legal profession (i.e. massive supply of legal education, critical discourses over adversarialism) had consequences over legal aid delivery. The notion of a contractual relationship between the profession with the state and the public, permit exploring changing and continuing trade-offs between these stakeholders. With respect to policy developments, new forms to access to legal services promoting citizens' self-reliance rather than dependence from the state and professionals (Regan 1999a:181) may have emerged, particularly as the cases discussed by the surveyed literature occurred during a period of intensive judicial reforms in Chile.

Conclusion

To paraphrase Goriely and Paterson (1996:25) any discussion of legal aid, whether past, present or future, should start with an examination of its purposes. As the review of the literature shows, sometimes legal aid purposes have been explicitly stated, as occurred during the heyday of the Access to Justice movement, where legal aid was expected to ensure that all citizens were able to participate in society, with lawyers playing a crucial role as champions of their rights. On other occasions, its manifest purposes permitted hiding latent motives, as occurred with lawyers' capture of legal aid schemes. In more recent times, it seems that a combination of scepticism towards providers and some level of retrieval of the original ideals of achieving full citizenship have led to the development of a menu of alternatives regarding access to justice, against or limiting advances on legal aid.

The remaining chapters will address the development of the legal aid through legal training scheme in Chile. This historical account focuses on the changes and continuities of this scheme and the possible purposes or functions it has performed. Chapter 2 explores the methodology used for this research. In order to understand meaning behind laws and policies it uses a qualitative approach, gathering and

analysing data from key stakeholders and primary archival sources such as draft Bills, legislation and parliamentary debates. Chapter 3 explains the origins of the legal aid through legal training scheme as part of the institutionalisation process of the Chilean Bar Association, the official national association of lawyers. The subsequent chapters focus on the three sub-inquiries underlying this research. Chapter 4 discusses why did the military dictatorship choose to keep legal aid through legal training, despite radically reshaping higher education and professional associations, with the creation of the Legal Assistance Corporations in 1981. Chapter 5 examines the statutory creation of the Criminal Public Defender service in 2001, responsible for professional and specialised criminal legal aid provision, to understand what does this hiving-off of legal aid from legal training tell us about legal aid through legal training. Particularly focusing on the period after 2001, Chapter 6 reviews what tensions have risen as a result of historical changes, and changing specialisation, in selected areas of legal aid - family and employment, in addition to criminal defence. The thesis discusses several failed reform attempts during the past thirty years of democratic rule.

Finally, this thesis concludes by summarising its findings, discussing its original contribution to existing knowledge on legal aid developments, its potential limitations and further research agendas spawning from this dissertation.

Chapter 2: Methodology

This chapter discusses the methodology and methods adopted for answering the dissertation's research questions. The general research topic is change and continuity regarding the history of Chilean legal aid through legal training scheme, asking why the provision of legal aid through a compulsory training stage for law graduates has stood the test of time since 1981. This main research enquiry has three interrelated sub-questions. First, why did the military dictatorship led by General Pinochet (1973–1990) choose to keep legal aid through legal training, despite radically reshaping the legal framework governing professions. Secondly, what does the hiving off of legal aid from legal training in specialised schemes since 2001 tell us about legal aid through legal training. Finally, what tensions have risen as a result of historical changes, and changing specialisation, in selected areas of legal aid.

The chapter begins by explaining why a qualitative methodology was the most appropriate choice for this research project. Then, it explains which methods were used for data collection, their pros and cons, and how fieldwork was conducted reflexively. This section also reflects upon the ethical issues arising during data collection. Finally, the chapter discusses the methods used for data analysis.

Methodology

This study has sought to deepen understanding of why a *particular* scheme of legal aid has apparently remained unchanged in its basic features, in a context of relevant legal, educational, social and economic changes affecting the legal profession. Thus, researching this topic begs for an historical approach, which presumes that there is a continuous process of making and unmaking of individuals and institutions involved with legal aid through legal training's development, where those elements become

patterns and regularities defined by reference to particular successive events. These moments shape the next iteration of events (Abbott 2016:ix-x).

The research methodology adopted for this project was qualitative because of the nature of the research questions which required actors' own interpretations of their behaviour and the external world concerning (legal) events (Della Porta and Keating 2008:26). Qualitative research intertwines theory-building with conducting research in progress, so it is often 'used to assess the credibility or applicability of theory' (Ragin et al. 2004:10). The combination of exploration and assessment reflects a logic of discovery underlying qualitative methodology, aimed at improving a topic's conceptualisation, testing its plausibility, and eventually producing hypotheses (Schmitter 2008:271). As Bryman (1984:84) suggests, qualitative research emphasises an inherently exploratory approach to social reality, and, as a result of this, 'the qualitative researcher embarks on a voyage of discovery rather than one of verification'. It is difficult to understand individuals' own motivations from merely observing their daily behaviour or using numerical data. Instead, participants' motivations at particular historical moments must be explored, by asking research participants to reflect on those moments. Contextualisation of legal topics can be gained by studying the reasons and competing pressures influencing the passage or withdrawal of laws expressed in archives, i.e. parliamentary papers and working documents (Ibbetson 2005:877).

Regarding qualitative analysis, the study of the motivations and preferences of agents focuses on searching for patterns of events, rather than establishing relationships of causality, and how they relate to prior theoretical beliefs about social phenomena (Ritter 2014:112). This is particularly relevant when confronting vast

amounts of data with the aim of identifying 'decisive bits of evidence not simply to summarize the whole body of data' (Ragin et al. 2004:13).

The literature analysed in Chapter 1 puts forward several findings which informed this study, establishing a dialogue between this case study and the broader literature produced in the Anglo-American and European world. This literature has certain inbuilt hypotheses which I used to construct my research questions. Consequently, I have drawn on previous studies to look for developments and factors that may or may not matter in the development of legal aid in Chile, but I left these unresolved until I analysed my own data. From my own data, I then assessed the connections between the development of legal aid through legal training, its continuities and changes, and the dominant political ideologies at different periods. By mapping data with literature, I looked for patterns which relate to – and do not relate to - the existing literature.

There is a relation between the level of reflexivity of the researcher and how qualitative methodology approaches the question of "truth". Reflexivity signifies the 'process of uncovering the agents' orientations, and the predispositions shaping their habits and practices' (Madsen and Dezalay 2002:190). The primary goal of qualitative research, on the other hand, is to 'make the facts understandable', often placing less emphasis on deriving inferences or predictions in favour of finding 'how' things happen or happened (Ragin et al. 2004:10). Thus, the process of finding truth from qualitative research findings

> involves operating on at least two levels in research work and paying much attention to how one thinks about thinking [...]. Empirical research in a reflective mode starts from a sceptical approach to what appears at a superficial glance as unproblematic replicas of the way reality functions, while at the same time maintaining the belief that the study of suitable (well thought-out) excerpts from this reality can provide an important basis for a generation of knowledge that opens up rather than closes, and *furnishes opportunities for understanding rather than establishes "truths"*.' (Alvesson and Skoldberg 2005:5, emphasis added).

I recognise that data collection and analysis is a subjective process which demands reflecting on my own subjectivity including biases and interests while undertaking the research. I have been a lawyer and a researcher in the field so it is important for me to reflect on the influence of my experiences on my research, which could affect my interpretation of the data, as I explain below (Dezalay and Madsen 2012:436). However, my positionality also enables me to reflect creatively, 'marrying some aspects of the insider's legal knowledge with the sociologist's ability to discern the wider themes underlying the individual dramas of the law – or, in Wright Mills' terms, to discern the public issue within the private trouble' (Baldwin and Davies 2005:890).[2] Therefore, I have been mindful of both the benefits and challenges of having been close to my research field.

Research methods

The research methods used for this dissertation draw on archival material and primary data coming from in-depth interviews. Focus groups and participant observation, on the other hand, were excluded as research methods for the reasons provided in this section.

As one of the aims of qualitative methods is to improve understanding, usually through immersion in a specific social setting (Baldwin and Davies 2005:892), I designed my research to collect multiple data types from different institutions. This research strategy permits using multiple kinds of data to cross-link and verify patterns

[2] For Wright Mills (1959:14–5), *troubles* 'occur within the character of the individual and within the range of his immediate relations with other [...] A trouble is a private matter: values cherished by an individual are felt by him to be threatened'. *Issues*, on the other hand, 'have to do with matters that transcend these local environments of the individual and the range of his inner life [...] often involves a crisis in institutional arrangements, and often too it involves what Marxists call "contradictions" or "antagonisms"'.

within data (Small 2011:69). For example, when research participants identified a specific moment as a key development regarding legal aid policy, public documents might have confirmed or problematised that assertion; when archival sources suggested a particular key moment, interviews might have suggested the converse. Consequently, in analysing the data (as to which, see below), these sources were used reflexively to provide a check on the claims.

Most sources of data relevant for this dissertation – documents and categories of individuals - can be found in the statutes governing the Corporations: the *Ley 17,995* of 1981 (Metropolitana), *Decreto con Fuerza de Ley 944* of 1981 (Valparaiso), *Decreto con Fuerza de Ley 994* (Biobio), and *Ley 18,632* of 1987 (Tarapacá and Antofagasta). According to the Corporations' design, their boards consider representing different interests: law schools (two deans from the oldest law schools), private practitioners (two lawyers appointed by the MoJ), the government (the MoJ's Regional Secretary) and the State Legal Defence Council (a service in charge of representing different governmental bodies in litigation, represented by its regional head). Tarapacá and Antofagasta LAC's board have two representatives of local councils, instead of law schools' representatives. Each board must appoint a lawyer as general director, who heads the respective LAC. With respect to the relationship between the government and the LACs, the MoJ oversees the Corporations, but the latter are not units within the administration of the said state department (for a detailed explanation about LAC's design see chapter 4).

Because this project focuses on legal change and continuity, data collection was undertaken around the enactment and implementation of the law governing legal aid through legal training. On enactment, besides the traditional legislative setting of Congress, the Ministry of Justice (MoJ) was identified as a key resource because it is

usually responsible for drafting Bills on these subjects. Further, because it oversees the running of the Legal Assistance Corporations (LACs), the MoJ could also provide data regarding implementation, as LACs, and specifically their boards, are the relevant setting and actors, respectively.

My original research plan posited a flexible data collection process, beginning with more general information (documents), moving to more detailed sources (interviews) and data that was less public and needed to be accessed more formally (LAC's internal documents). Each method related to a different research stage. One explanation for this design lies in the fact that, although all the documents considered are public, those concerned with law enactment were easier to gather compared to those affecting implementation.

In practice, data collection and analysis were more intertwined: archival materials enabled me to identify new research participants, and interviews snowballed into other interviewees and additional documents. In the same vein, interview transcription and coding made me aware of unanticipated archival sources.

Despite that crossover, the following sections deal with each type of data separately to enable a clear account to be provided of the different types of data. I also explain some of the limits affecting the collected data set.

Excluded qualitative methods

Focus groups and participant observation methods were discarded as suitable methods for this project because of this research's focus on in-depth information and historical data.

One of the advantages of in-depth interviews over focus groups is that interviewees usually speak more freely about political issues and state their opinions

more readily than in focus groups where they can be judged by the rest of participants. Additionally, as they combine so many opinions, focus groups lack the depth of information that can be obtained from individual interviews (Cronin 2008:232). Although focus groups would have allowed the exploration of contrasting views of research participants, these forums are difficult sites because research participants usually know each other and continue interacting in their professional capacities. It was anticipated that this being a sensitive topic, it would have led to more guarded attitudes in a focus group than in individual interviews. There were also practical issues militating against the use of focus groups – lack of funding, time and location, and difficulties coordinating participants' agendas.

Although everyday experience at the Corporations might have shed light on the actual implementation of legal aid, participant observation did not cover the historical developments necessary for answering the research questions. These focus on the historical aspects of the legal aid system, whereas participant observation as a method is suitable for understanding contemporaneous developments (Travers 2001:2–4). Additionally, the decisions involving legal change are usually undertaken behind the scenes rather than at the forefront of the institution and do not occur during everyday interactions serving the public.

Archival material

Documents provide evidence of policy directions, legislative intent, understanding of perceived shortcomings or best practice in the legal system, and agendas for change (Webley 2012:939). The collection of documents for this project allowed for the identification of the main actors and policy agendas concerned with legal aid. Because these documents often demonstrate political orientation, they could also offer some

explanation for the questions about why the dictatorship chose not to further a legal aid scheme created from scratch; why, in contrast, areas such as criminal legal aid became professionalised; and what tensions have risen from these developments in particular legal aid schemes.

Archival research

During my first month of fieldwork I focused on documentary research, accessing different archives and libraries such as the Chilean Bar Association (CBA) library, the Library of Congress and the National Library. I continued accessing these research sites during the remaining months in between interviews. Most of these research sites contain documents related to the enactment of laws, including statutes, regulations and case law, as well as legislative bills in which legal aid had arisen in parliamentary debate (e.g., the Criminal Public Defender service, employment and family law courts). Some of these documents have been digitalised, and are available online or by request. Other sources, related to law's implementation, were only available on paper, such as campaign manifestos and newspaper coverage.

I then began collecting less accessible public documents which I had identified from the previous documents consulted and which had been referenced by my participants. The existence of pre-legislative work on drafts of mooted reforms (draft Bills) elaborated by the MoJ was discovered through media and interview data. With respect to other less accessible documents, I requested all the MoJ studies that had been carried out relating to policymaking on legal aid and access to justice. In addition, I raised requests for the records of board meetings, annual reports and studies of each one of the four LACs. I obtained these documents through access to

public information requests – similar to the UK's freedom of information requests – governed by the Chilean transparency legislation (*Ley 20.285* of 2008).

Limitations regarding collected archival data set

There are several limitations to using collected archival data sets. First, there are epistemological reasons because 'law constructs its images and perceptions of society and social relationships in its own limited and formal language [...] [excluding] extra-legal factors, ideas, experiences and arguments which might be of paramount importance to a sociological inquiry' (Banakar and Travers 2005:135). Secondly, there is an author–audience issue. Documents are written by people who had a purpose in writing them and they are written for a specific audience. For example, it is likely that legal documents have been edited to remove discrepancies or sensitive issues. This is known in the literature as the analysis of traces: documents constructed by persons other than the researcher for a non-research purpose (Webley 2012:927). So, it is likely that there are 'hidden' transcripts which can only be uncovered through other types of data such as interviews.[3]

With respect to access limitations, I encountered different levels of resistance and on different grounds from LACs to my freedom of information requests. Three of the Corporations (Tarapacá and Antofagasta, Santiago, and Concepción) provided me with access to board-meeting records. Valparaiso's LAC was successful in its opposition to access before the Council for Transparency. However, it was also the only Corporation that permitted me to access its annual reports, as the other three had

[3] 'Hidden' transcripts refers to those discourses that take place 'offstage', 'beyond direct observation by powerholders [...] that confirm, contradict, or inflect what appears in the public transcript' (Scott (1990:4–5). 'Public' transcripts refers to 'the *self*-portrait of dominant elites [...] designed to be impressive, to affirm and naturalize the power of dominant elites, and to conceal or euphemize the dirty linen of their rule' (*Idem*:18, emphasis in original).

not kept copies of them or they had been destroyed through natural causes (see Appendix 2 for detailed account on the documentation).

Besides these shortcomings which generally affect archival research, this research had to overcome a different sort of limitation related to geopolitical assumptions arising from my positionality as a Chilean citizen. The original research plan only included the collection of Metropolitana LAC's internal archives and records of its board's meetings (located in the capital, Santiago). The reasons for choosing this Corporation combined practicality and politics. Researching these documents required the investment of considerable time and so, as all previous documentation was located in Santiago, I dismissed the alternative of researching the other Corporations. Moreover, Santiago is the biggest city in the country – according to the last census in 2017 more than seven million inhabitants from an approximate total of 17.5 million (INE 2017) – and most law schools are located there.

On the issue of politics, the country possesses a unitary system of government, where most of its governing power resides in a centralised government. In practice, Chilean politics are centralist, which means that most decisions are taken in Santiago. Hence, it might be assumed that the MoJ has a more interactive relationship with the local general director of Santiago's Corporation than with other regional directors. In turn, Santiago's general director has usually played a more prominent role in legal aid policies – for example, some directors have been appointed with the task of designing new legal aid institutions.

Propinquity is also relevant. With its headquarters just a couple of blocks from the MoJ, the Metropolitana LAC is more visible at the national level regarding legal aid policies in comparison with the remaining three regional LACs. The same is true of the two law schools – from the oldest and most prestigious universities –

represented on its board, the *Universidad de Chile* (1842) and the *Pontificia Universidad Católica de Chile* (1888). Their representatives' opinions usually have more impact than those of other universities and the same could be assumed with respect to Metropolitana board policies. Nevertheless, my original research design did consider some regional voices via interviews in Valparaíso.

The LAC located in the capital city of Chile is also more sensitive to the political upheavals faced by each government. This political agitation can be perceived by examining the level of rotation of general managers. In Santiago, every new government has appointed a new general director of the LAC and several of them have not completed the presidential period (between 1990–1994 and from 2006 until present, four years' duration; between 1994 and 2006, each presidential period was of six years' duration). This contrasts with the other LACs where in some cases the general directors have been in post during two or more governments, even when they did not necessarily endorse the same political ideology as the elected government. General directors appointed during the centre-left *Concertación de partidos por la democracia* government (2006–2010) were not replaced by the centre-right *Coalición por el Cambio* (2010–2014). Conversely, some directors appointed during the past centre-right government were still acting general directors during the outgoing centre-left *Nueva Mayoría* government (2014–2018), when I undertook the interviews.

Fieldwork experience confirmed the hypothesis about the Metropolitana LAC being more politically involved with the government in the design of legal aid policies. But it also altered my original decision of limiting my research site mainly to this Corporation. It was and still is true that the Metropolitana Corporation has a closer relationship with the government, but that relationship does not necessarily reflect what happens in the rest of the country. I also discovered that each LAC

usually developed their roles on their own, autonomously both from each other and the MoJ, distinguishing themselves from what transpired with Metropolitana's LAC. Two brief examples illustrate these differences. When I requested the list of members who had served as LAC board members, the reply I received from Metropolitana's LAC was that they did not have records for 1998 and 2002 because the board did not hold any meetings during those years. On the contrary, the boards from its regional counterparts held their meetings uninterruptedly. With respect to how they exercised their autonomy from government and each other, though from a statutory perspective LACs seemed entrenched to provide legal representation on traditional areas of the law (civil, criminal, family and employment disputes), in practice some Corporations undertook initiatives broadening the scope of legal services, creating mediation centres and providing legal representation in consumer protection disputes (for an analysis of these points, see chapters 5 and 6).

Interviews

Sampling research participants

As mentioned before, law-making and implementation of the legal aid through legal training scheme has involved several key stakeholders throughout the history of the scheme. I followed a purposive sample strategy because, based on my prior experience of the topic being studied, I assumed that certain categories of individuals would have a unique, different or important perspective on the phenomenon in question and their presence in the sample should be ensured (Robinson 2014:32). Between July and August of 2015, I compiled a sample of research participants through freedom of information requests and snowballing. I requested the lists of people from each LAC who had participated as general directors and/or board

members, from their creation until 2015. I used snowballing with people whom I knew from my previous trajectories, who referred me to potential participants involved with LAC and the MoJ.

In my original research design I had considered a limited sample for carrying out interviews with the following key stakeholders in the cities of Santiago and Valparaíso: (i) LAC's general directors (11, Santiago; 1 or 2, Valparaíso), (ii) law deans (2 or 3, Santiago; 1 or 2, Valparaiso), and (iii) MoJ staff (2 or 3). Nevertheless, in order to include data for the entire period, I broadened the sample of research participants by including interviewees appointed by the military dictatorship to the MoJ or to the board of one of the Corporations as a representative of private practitioners. I also included lawyers who had spent most of their careers working at the Corporations. In order to diversify beyond Santiago and Valparaiso, I arranged new interviews with research participants located in Concepción, Chile's third biggest city, where the Corporation with the largest geographical area is also located.

Between August and October of 2015 I approached thirty-one possible interviewees with a request to participate. I could not access two former MoJ policymakers and three LAC general directors for several reasons. Regarding former MoJ staff, one declined to participate for health reasons and the other failed to reply. With respect to former general directors, two failed to reply, whereas a third declined to be interviewed but provided me with some internal documents and press releases regarding his period in office.

I discovered that I could gather interview data for most of the research period from that sample as I encountered a case of revolving doors. When I initially surveyed possible research participants, I assumed that I would interview them regarding their involvement in one specific official capacity. I had anticipated that some interviewees

had been involved in more than one capacity regarding legal aid through legal training. However, what I had not anticipated was that several of them, at various stages and from different positions of power, had a personal trajectory closely related to the Corporations and their reform attempts. For example, research participants could have begun their career as legal aid lawyers moving up to general directors and/or civil servants or advisors for the MoJ, and more recently as deans of a law school. Some of them even had knowledge about the CBA's scheme in force before 1981. In other words, there was a kind of revolving door in operation in the field of legal aid provision. Thus, in many of my interviews, I could gather data covering most of the researched period from different perspectives.

Excluded research participants

I originally decided to exclude law graduates and legal aid claimants. Following the literature, I assumed that these groups had not played a role in designing or mobilising for new laws or policies on legal aid. Richard Abel concluded that 'the combination of general political orientation, commitment to the ideology of liberal legalism, and lack of any direct economic stake makes law students a natural constituency for legal aid. At the same time, they are *marginal, powerless, and transient*.' (Abel 1985:500, emphasis added).

The cohort of student trainees changes rapidly – every law graduate has to undertake their mandatory training for six months – and thus I had excluded students from in-depth interviews. However, this situation changed when, before returning to the UK, I found information that law graduates had recently organised themselves to mobilise for legal change in their working conditions. The students were asserting that an improvement in their work conditions would contribute to legal aid's

improvement. In order to investigate student involvement, I arranged an interview with one representative of the largest student coordination group through Skype and found that some of the word-of-mouth issues which I had heard during my training had not necessarily disappeared, even though there had been improvements. A more interesting finding referred to their cause for mobilisation - the improvement of training conditions rather than the elimination of mandatory training from legal aid delivery. This participant explained their motives from a consequentialist perspective, in the sense that by improving one element of legal aid through legal training, then legal aid would necessarily improve; and also from a *realpolitik* perspective, as the general directors had told them that no government would spend the amount of money needed to create a professionalised legal aid scheme. There is scope here for additional follow-up research from a bottom-up standpoint but, given that the student group is nascent and this project is historical in outlook, that would be a different project.

Finally, I did not interview legal aid users or 'clients' as they were basically 'one-shot' players: 'claimants who have only occasional recourse to the courts' in comparison to repeat players 'who are engaged in many similar litigations over time' (Galanter 1974:97). Some interviewees informed me that these individuals usually maintain a constant relationship with the LACs, addressing several legal issues over time. This finding nuanced my preconceived view, but, to the best of my knowledge, there was no indication that such users had mobilised beyond individual complaints in the course of everyday customer service relationships. Accordingly, for the purpose of this thesis' research question, there was not enough evidence to justify further interviews with this group of stakeholders.

Interview schedule and questionnaire

Between September and December 2015, I conducted twenty-five one-on-one, recorded interviews, and one interview using Skype. These were with seven general directors; two lawyers with extensive work experience at the Corporations; thirteen board members, who were mostly law deans; and three MoJ staff (for anonymity purposes, I do not provide more detail about their roles). These individuals were self-selecting because of the public role they have held or still hold with respect to legal aid through legal training. The Skype interview was with one representative of the law graduates' coordination group.

Board members were interviewed with the purpose of confirming, complementing or contrasting their interpretations with those provided by general directors and MoJ staff. The justification for preferring law deans who had been involved with LAC boards is that, compared to the other board members, these participants enjoyed considerable autonomy with respect to the government. Additionally, law deans probably had vested interests regarding the modification of the scheme which may differ from the other participants.

The interviews were conducted using a semi-structured questionnaire with a focused set of issues to be addressed, although the questions themselves were more open-ended (Denscombe 2010:175). The questionnaire was developed using the data previously gathered through archival research to reduce any issues around participant memory and selective recall (Webley 2012:937). In my original research design the questions themselves aimed to be more open-ended to allow interviewees to develop ideas and points of interest reflecting on their own personal trajectories. As historical methodological literature suggests (Bosi and Reiter 2014:135), I generally asked the same questions to participants, where I talked broadly about topics without providing

too much detail to the research participants (see Appendix 3 for the interview schedule). However, some discussion prompts depended on the identity of the participant because of their different historical activity and/or backgrounds. Some had particular knowledge about specific periods. The variation in discussion prompts, therefore, was directed at those specific points.

Questions were asked about their backgrounds and periods in office on different capacities – beginning with the past to situate the themes chronologically. I asked about the challenges surrounding the legal aid through legal training scheme throughout the periods they were involved with the scheme, and policies discussed that may have had an effect on the scheme. With respect to the main research question, I asked all participants about their knowledge and/or participation in failed and successful reforms to legal aid. This was aimed at eliciting understandings of underlying professional cultures and ideologies, and gathering an assessment of the legal aid through legal training scheme. For example, I asked them about their participation in reform attempts, what were the different positions at stake, who and what strategies they used (e.g. LAC lawyers unionised and went on strike), what expectations they had, and what was the outcome.

As LACs have two statutory mandates, to provide legal services to those who cannot afford them and to provide training to prospective lawyers, I asked how law students affected the operation of the scheme, the consequences of the increasing number of law students per year over LAC's operation, and what attitude the previous stakeholders showed towards these issues. I also asked about relationships with other stakeholders – law schools, the judiciary, the CBA, each LAC, the MoJ.

Finally, I asked about their perception of whether the training provided at the Corporations had added value for future lawyers; and, whether the scheme should be

changed and how. I introduced this theme using the government reform announcement in 2015 as background, as the reform of the legal aid through legal training scheme and of LACs had been an active issue at that time. This allowed research participants to reflect on their own experiences as apprentices looking back and forward to what had transpired in between. When participants answered these final questions they usually returned to some of their earlier responses to provide deeper insights in a more holistic manner.

The scheduled length for each interview was one hour. The average interview length was 50 minutes, where the shortest interview lasted 36 minutes. The shortest interview was informative regarding this participant's favourable attitude towards keeping the scheme for training purposes, limiting students' participation before reformed courts and snowballing to further participants.

Elite interviewees

All research participants are 'elite' because of their status (universities, government) as well as their educational background (higher education degrees). This raises a question about my positionality as a researcher, especially in a project that seeks in-depth knowledge (Ragin et al. 2004:14). I am part of the same elite because of my training and past work experiences. My position within this elite was heightened by the fact that I have also been personally acquainted with some research participants.

Research participants involved in this research were not vulnerable individuals who required special explanations to understand the risks posed by interviews. On the contrary, they were well aware of the issues and most of them have had experience as interviewers in light of their legal practice. Additionally, most of LAC general directors did not work at the Corporations or in the public sector anymore, having

considerable autonomy from the government. Likewise, deans of law schools are well known and respected in the legal community. Legal aid lawyers and MoJ staff share similar characteristics with the other research participants, although they could have faced more economic and disciplinary risks than the other study participants. Finally, the representative of the training law graduates benefited from one of the critical features affecting the scheme: the high rotation of law graduates. Thus, this research subject already had finished her/his training making any form of individual retaliation impossible.

Only one interviewee was not trained in law. This participant had extensive experience in policymaking in the justice sector and worked in teams comprised mainly of lawyers. This research participant also had academic experience in teaching at different law schools. Therefore, besides the added value coming from this subject's diverse educational background, the interview interaction itself did not differ substantively from the remaining interviews.

Risks involved in elite interviews

There are challenges particularly pertinent to elite interviewees: access problems; anonymity and confidentiality; power dynamics; and pushing their own research agendas through a strategic reconstruction of events (Goldstein 2002, Smith 2006, Harvey 2011). The risks anticipated by previous research on elite participants helped me to prepare for the interviews, even if most of them did not occur.

I did not face significant access problems, such as difficulties in contacting people or a general lack of interest. My previous work experience, particularly from my work for the CBA, helped me overcome issues of access. As some participants already knew me in an academic or professional capacity, I contacted them directly

by email. I only resorted to snowballing to contact those research participants that were suggested to me by friends, relatives or other participants, most of whom were working or used to work as MoJ staff.

With respect to anonymity and confidentiality, I submitted a consent letter to each participant requesting an interview where I explained my research aims, why I needed their participation, and how I was going to manage the data I expected to collect from them. Emphasis was given to confidentiality regarding their identities and anonymity with respect to the transcription of each interview. I also informed them that I was personally transcribing every interview without using external services or assistance. Finally, I informed them that they had the right to withdraw their participation until three months before I submitted my dissertation. Before undertaking the interview, I repeated the terms of the consent letter and asked them if they had any questions about it or any other related issue regarding their participation.

In relation to potential risks arising from power relations, it could be possible that these participants used the interviews in a self-serving way. They might expect to present their own research findings, exaggerating achievements and softening flaws, strategically reconstructing their personal histories as response biases designed to show the interviewee in a good light (Rathbun 2008, Moorhead and Hinchly 2015:395). Or they could try to manipulate research results or obtain research data (Smith 2006:644). One possible solution to diminish the risk of being used in these ways has already been mentioned: using these interviews in combination with documents to gather convergent, complementary and dissonant data. On very few occasions I was asked about other possible research participants, but usually it was just to recommend people who had more direct experience in the field. Even so, my answer was to refuse those inquiries on grounds of confidentiality and anonymity

obligations owed to all research participants. This situation of being asked about individuals from the sample of research participants reinforced my decision to undertake interviews rather than focus groups as interviews gave me more control over the data and problematic access by third parties. This did not mean that previous knowledge was not used in an interview in hypothetical form to elicit information, but I only conducted myself in this way when there was no chance of risking confidentiality and anonymity, cynical use of data, or deliberate attempts to create schisms or animosities.

As a final point, there is the question about potential bias that may have affected my data collection because of my personal acquaintance with some research participants. Some literature has identified the problems affecting previous or current social relations between researcher and research participants. Friendships make it difficult to frame embarrassing questions or cause the interviewer to assess acquaintances in a different way (Mungham and Thomas 1981:90). Antagonistic or deceitful experiences may increase scepticism towards research participants. I originally overstated some of these risks as they simply did not occur. There was just one situation during the interviews in which I became concerned (I quoted a strong criticism about one LAC's board to a research participant whom I knew was a member of the governing body in question at the time). However, the response was unexpected, as this interviewee shared the criticism and made similar related contentions about the board's functioning.

Issues relating to lawyers as research participants

In this section I discuss issues commonly faced when interviewing legal professionals. Some common disadvantages of interviewing lawyers are legal ethics

(lawyer–client privilege), the organisational setting, taboo topics, and the lack of legal training of the interviewer (Smigel 1958:160–2). It should be noted that the majority of these issues were not encountered during the interviews.

The issue on legal ethics was not applicable to general directors or law deans because their relationship with LACs is not professional but political (in a wide sense, not in partisan terms). It could have arisen with respect to MoJ staff, who might have become reluctant to participate on grounds of confidential government information. In practice, this problem did not materialise.

With respect to the issue of organisational setting, the literature states that research participants may be reluctant to talk about or blow the whistle on their own organisations, which poses a problem for reliability as it creates a fractured vision of data (Mungham and Thomas 1981:84–6). In my original research plan, in the case of general directors, I expected that this issue would affect current directors more than former ones. Conversely, as law deans are not remunerated for their participation as board members and enjoy prestige within the legal community, I expected that they would feel freer than the other research participants.

Finally, legal aid lawyers and MoJ staff may have needed reassurance that what they would say would not be disclosed to 'upper management'. This risk was very low as this group of informants would have obtained clearance within their organisation before talking to me. Nonetheless, if I were to perceive actual fear of potential retaliation, I would have offered to interview the subject in a less visible place or via the internet. This last option would have shifted power dynamics as it gives research participants more control over time and space, at the cost of losing their context, and there may have been problems caused by the digital divide with

older interviewees (Chen and Hinton 1999). However, as I did not face any of these difficulties I did not have to select an alternative.

One possible explanation for the absence of organisational issues could relate to the nature of the questions I forwarded, as most of them were about more general issues quite far removed from critical problems. When I addressed a public controversy, I did it to contextualise an issue that occurred fifteen years ago, trying to make a clear link with a potential legal reform. Additionally, most interviewees were not involved with the institutions I was trying to collect data from. Only once did a research subject smile and keep a complicit silence regarding a question mentioning a public controversy, but this interviewee still answered the rest of the question.

At the research design stage, it was difficult to identify taboo topics. This would only be possible after holding a few initial interviews. The examples identified by the literature were not applicable as they related to the economic features of law firms. I only experienced three situations analogous to taboos. One was related to the fact that in 2008 the family law courts' procedure was amended authorising the Corporations to represent both claimant and defendant. I referred to a common complaint against this legislative solution (which had been designed to avoid unrepresented parties), concerning the protection of clients' confidential information. I wanted to know how they handled this ethical duty within the same organisation. This question received a guarded response, dismissing the existence of an issue by underscoring the professionalism of LACs' lawyers.

The other moment related to the reform announcement considered during the previous centre-right government (2010–2014), after twenty years of centre-left governments under the *Concertación* – a coalition of Christian-democrats, liberals, social democrats and socialists that electorally defeated General Pinochet in 1988 and

1989. In 2009, the last *Concertación* government had produced a similar draft Bill, and the outgoing government, led by the centre-left coalition *Nueva Mayoría* (2014–2018), announced a new reform. The ideological turn to the right that the country experienced during this interval was not without resistance, including that coming from the Corporations' workers.

I expected to gather comparative knowledge on these different proposals undertaken between 2009–2015, including the attitudes of the different stakeholders towards the government's proposals. Unfortunately, an interviewee who had actively participated in the centre-right administration took a defensive stance from the outset of the interview. This interviewee felt that questions comparing proposals were equivalent to critical judgements, becoming confrontational and sometimes hostile to my queries. It was by far the most uncomfortable interview I conducted during my fieldwork. Despite that, I have included it in my interview sample because there was a contribution concerning the political and legal developments that forced the government to design a replacement for the legal aid through legal training scheme, including a ruling by the Constitutional Court; input on the design of the proposed scheme, which eliminated mandatory apprenticeship, and its governance; and which actors resisted this reform and on what basis.

The last taboo-like situation related to the use of language referring to the period *circa* 1973–1990. Until recently, in Chile it was possible to identify a person's political preference by concentrating on the terminology they used to refer to this authoritarian episode. If people said 'dictatorship' they were commonly associated with the left, whereas if they talked about 'military government' they were considered right-wing. Sometimes 'military regime' was used as an in-between or sort of neutral term. Thus, with older participants I tried to keep a neutral tone by talking about the

‘government at the time’ or similar expressions. Sometimes the research participants themselves opted to use similar neutral terms such as ‘military period’. When I perceived that they were constraining their answers regarding this period because I knew that they had been part of the political opposition, I referred to this government as a dictatorship as a strategy to build rapport with the aim of obtaining uninhibited answers.

Finally, as a trained lawyer I did not encounter the issue of lack of legal knowledge. Yet, there were other issues related to the fact of sharing a common educational background. In my initial evaluation, I considered that having a law degree could be an advantage as research participants would probably feel comfortable engaging with a peer of their own, allowing them to proceed directly. Yet, by the same token, this could cause a problem coming from the dominance of their professional way of thinking over everyday interactions (Wasserstrom 1975:15), eliciting more sophisticated and legalistic answers than if the interviewer were from a non-law background. Thus, research participants could set aside moral, political or policy opinions in order to present a favourable self-image as lawyers. Nonetheless, because of their training, most of the time their answers directly addressed the issues, as lawyers usually think in terms of courtroom procedures designed to eliminate the irrelevant (Smigel 1958:160).

The only time I received legalistic answers as a defence mechanism was in the context of the two interviews I identified under taboo subjects. These participants quoted by memory specific articles from statutes or asked me if I knew a court ruling, respectively, in a condescending or patronising manner and what may be considered a passive–aggressive tone.

My experience on the issue of sharing a common educational background with research participants was different to what I had foreseen. I encountered two different experiences, which I would refer to as 'conjecture' and 'empathetic', respectively. The 'conjecture experience' was a consequence of my consent letter. This document stated that I was a doctoral student without detailing that I was a Chilean lawyer or that the subject of my PhD was law. Thus, in some interviews, the research participants began answering my questions with considerable detail until they interrupted themselves to ask me if I was a lawyer too. After I replied affirmatively, they would say, 'so you know about this' and moved on to a different subject. The fact that I was a lawyer meant that I could have missed some valuable data because those interviewees believed that I already knew what they were going to say.

The 'empathetic experience' related to their normative judgements on the existence and conditions of the legal aid through legal training scheme, where they would answer some questions as if I was taking their side because of our common professional background. I tried to 'cover up' my own position as I felt that any hint of endorsement or disapproval of their views on the matter could have 'contaminated' the data by emotionally engaging with participants i.e. upsetting them for the remaining part of the interview (Edwards and Holland 2013:85).

Data analysis

Thematic analysis was the approach that best fitted this project, defined as 'a method for identifying, analysing and reporting patterns (themes) within data' (Braun and Clarke 2006:79). In this method, themes arise from the existence of patterned responses. A thematic analysis benchmark should be an accurate reflection of the content of the entire data set (Idem:82–3).

Qualitative analysis of documents traditionally focuses on authenticity, credibility, representativeness, and meaning (Macdonald 2008). Authenticity is not an issue here as all documents are officially recognised. The same could be said about credibility, other than the epistemological and hidden transcript points discussed above. The issue of representativeness has already been explained in relation to the expansion of data collection to take into account the four Corporations rather than solely relying on Santiago's LAC.

Thus, document analysis was focused in terms of their contents as mediums of thought and action (Prior 2004). For thematically analysing the archival data I read the documents in chronological order, searching for repeated concepts and broader themes. From this review I noted down keywords and themes, and located them in different historical moments, from which I developed a preliminary periodisation. I used this knowledge for framing my interview questions to encompass the lifespan of the legal through legal training scheme, underscoring where major shifts seemed to happen and possible transitions. Interviews added insights to my data, filling gaps and developed new issues, which led me to reread documents for crosschecking old and new themes. Data analysis was an iterative process as new themes emerged by from different data sources.

For thematically analysing the interview data I transcribed a few interviews before entering them into the QSR NVivo data management program. I developed a first group of codes from these first transcriptions, collected documents and some secondary literature, which I reflected on while continuing with transcriptions (Thomas 2006; Fereday and Muir-Cochrane 2006). As new codes emerged, the coding frame was changed, and transcripts were reread according to the new structure. I developed more general and interpretative codes by using the more

descriptive ones as child codes and moving towards the elaboration of broader categories to be used as possible answers to the research questions.

Because this is a case study through a long time span, which coexisted with research participants' life stories, special attention has been paid to the identification of continuities and key moments with the objective of establishing a periodisation for successful and failed legal and institutional change episodes. In the search for convergent and divergent patterns, all lawyers have been institutionalised through mandatory training in the chosen locus, shaping their world views by this experience, whether treasuring or rejecting it. I tried to identify if participants saw connections or differentiations between legal aid provision and its reform debates with broader professional issues such as legal education.

Regarding presentation of data, extracting quotes from documents and interviews has been used in the following chapters as evidence of what has been observed. This is considered good practice when writing up research findings (Thomas 2006:245) as it allows the reader to see some raw data, permitting her to travel to the research settings and reach the conclusions that the researcher provides (Webley 2012:946). Those extracts from my data consist of my own translations of documents and interviews from Spanish to English. Chilean idioms and colloquial expressions are rather imprecise and in very limited situations literal translations would not necessarily keep the original flavour. Thus, I intervened in a limited manner to ensure that quotes were not just literal translations containing colloquialisms which did not translate well into English while nevertheless retaining participants' meanings, striving to be faithful to the participants' comments.

Conclusion

In this chapter I have discussed the methodology used to answer my research questions. This included an explanation of the methods used and their limitations as well as how I plan to overcome the limitations. I have explained how my research plan had to be modified to account for geographical, stakeholder and temporal limitations from the original research design. Some unintended upsides solved or ameliorated those shortcomings, such as the revolving door affecting several research participants. Ethical considerations regarding elite interviewees and lawyers were addressed, most of which were exaggerated in theory and rather absent in practice. These adjustments were also present during data analysis as part of the reflexive approach that a qualitative research project such as this one demands from the researcher.

The following chapters of this dissertation will set out the analysis of the data in accordance with the frameworks set out in Chapter 1, with the aim of answering the research questions. Overall, this thesis will address the historical development of a particular legal aid scheme in Chile and its governing institutions, and attempt to answer why this scheme has stood the test of time during approximately four decades. Through this process its original contribution is to research an uncharted topic in existing literature on cases studies on legal aid development in different countries, and advancing knowledge on the existing typologies of legal aid models with what appears to be a novel legal aid model.

Chapter 3: The origins of legal aid through legal training (1810-1973)

This chapter analyses the evolution of Chilean legal aid from 1810, with the independence from the Spanish monarchy, until 1973, when a military coup deposed the democratically elected government. The main theme of this chapter refers to the origins and development of the legal aid through legal training scheme, particularly through its transition process from being a central feature of the *Colegio de Abogados de Chile* (Chilean Bar Association; CBA) to the first reform attempts aimed at transforming it into a duty of the state rather than of the legal profession.

It is possible to distinguish different phases in the development of legal aid. During the nineteenth century legal training was separated from legal aid provision, at the time delivered through a charitable model consisting of case-by-case judicial designation of lawyers to represent poor people, inherited from the Spanish colonial period. Legal aid through legal training as a state funded legal aid scheme began with the institutionalisation of the CBA as a legal entity governed by public law in 1925. Accordingly, legal aid delivery by the CBA was initially introduced timidly in the late 1920s, and only subsequently became a statutory feature of the CBA during the first half of the 1930s. During the subsequent era between 1934 and 1964, the CBA's agenda shifted towards statutory bargains aimed at developing common attributes of professionalism and increasing its influence in state affairs. Finally, the period which began in 1964 was a time of struggle for the CBA as it had to resist government proposals, increasing state intervention and reducing the Bar's participation in legal aid provision.

This chapter advances knowledge by providing a historical account of legal aid models in Chile, from which some of the patterns and regulation that would shape its subsequent trajectory and reform efforts emerge. The development of the legal aid

through legal training scheme was product of a combination of specific factors: the shift to an active administrative state, the implementation of state-sponsored corporatist policies, and the institutionalisation of the CBA as the official and mandatory national lawyer association. As some of the previous factors underwent through substantive transformations, the legal aid through legal training scheme became contested and the object of reform plans. Likewise, the account of legal aid through legal training origins provides the background for appreciating its continuing features as, through its consolidation, this scheme provided a belief system to legal professionals as part of their acculturation on what it means to become a lawyer (analysed in chapters 4 to 6).

This chapter is structured in four sections, following a similar number of possible different stages regarding legal aid provision in Chile before 1981. The first section focuses on a period of transition between colonial rule towards republican institutions (1810-1925). The second section analyses the formative years of legal aid though legal training, characterised by the CBA's mobilisation before government to legislatively strengthen the Bar's role as provider of legal services (1925–1934). The third section reflects on the CBA's agenda from its privileged position as the official legal aid provider, towards increasing its influence on professional and public affairs (1934–1964). Finally, the chapter ends by explaining the period beginning after 1964 until 1973, which responded to a phase of scepticism towards the law and existing legal institutions in general, and the CBA's role in legal aid provision in particular.

Charitable legal aid (1810–1925)

The first legal aid scheme during state formation of the Chilean republic was the product of a process of bargain, which began shortly after the country's independence

in 1810 from the Spanish monarchy, between tradition – the culture, structures and systems bequeathed from the colonial period – and innovation – the features of the new republic.[4]

Legal aid during the colonial period consisted of an ad-hoc system, where lawyers were judicially appointed to represent poor people. His fees – no woman was allowed to be a lawyer under Spanish laws – were to be paid by the judicial system, which usually did not happen or were insufficient (González 2012). With respect to the legal profession, law was a higher university degree, mainly focused on Canon and Roman Law. After the conferment of the law degree, graduates had to do an apprenticeship at the Royal Academy of Laws and Forensic Practice. During this stage they would study Spanish and Procedural Law (De la Maza 2001:42–4). Law was the only significant profession besides theology, and the only profession considered as worthy by the aristocracy. Lawyers were part of the elite because of their education, playing a relevant role in the construction of the new independent republic (Serrano 1993). Their privileged educational background allowed them to understand and spread Enlightenment ideas within the elite commanding the Revolution of Independence (De la Maza 2001:45–7).

From 1818 until 1833, the country experienced a period of experimentation through trial and error manifested in the enactment of several written constitutions, supported by different political and military factions, which came to an end with the Constitution of 1833 (Jocelyn-Holt 1992). The core elements of the legal and political system can be traced back to that period: a democratic republic organised as a unitary state - as opposed to a federal state - and its system of government has been

[4] In a strict sense, the Declaration of Independence was proclaimed on 12 February 1818, but the first rebellion against the Spanish monarchy occurred on 18 September 1810 with the establishment of the first *Junta de Gobierno*. The Declaration of Independence is available at http://www.bcn.cl/bibliodigital/dhisto/acta.

presidential, where the head of state is elected directly by citizens. The President shares legislative powers with a bicameral Congress, composed of the Chamber of Deputies and the Senate. The judiciary is organised as a state bureaucracy, with the Supreme Court at its pinnacle, below which stand the Courts of Appeals and the first instance tribunals (Hilbink 2007:251).

National law was still intertwined with that of the colonising countries (Pérez-Perdomo 2006:76) until Congress enacted new legislation during the second half of the nineteenth century to end previous laws deriving from the monarchy (Figueroa 1982). Several institutions, particularly in the case of the judicial branch and its procedures, in existence for most of the century, were gradually reformed with republican legislation. The law curriculum was changed with the purpose of producing statesmen imbued with the Independence ideals (Pérez-Perdomo 2006:76, Bascuñán 2007). Roman Law was eliminated from the law curricula in favour of the study of national laws, as well as of political economy. The apprenticeship stage was reorganised in 1832 through the new Forensic Practice Academy. This institution faced the same fate as its predecessor, the Royal Academy of Laws and Forensic Practice, being suppressed in 1851 (De la Maza 2001:27–9).

With respect to legal aid, the scheme was inherited from colonial laws, known as the *abogado de turno* (lawyer on duty), where lawyers were judicially appointed to represent poor people. This scheme was recognised by the new republic's laws in 1875 with the Organisation of the Courts Act (*Ley de Organización y Atribuciones de los Tribunales de Justicia*), mandating first instance tribunals and Courts of Appeals with 'the protection of poor and helpless people who are in position of filing any legal claim before them [NB: the courts]' (Article 42; Article 72). Consequently, these courts were in charge of certifying those claimants as poor and exempted litigants,

known as *privilegio de pobreza* (poor litigant's privilege), and to designate lawyers for representing claimants in civil and criminal cases free of charge.

This regulation of legal aid departs from those characterised as modern legal aid schemes (Chapter 1), enshrined under the notion of a constitutional right entitling citizens to access legal representation (Cappelletti and Gordley 1972). The legal aid model of 1875, in the form of a charitable duty imposed on lawyers, can be understood as a product of the Iberian legacy; instead of Lockean institutions such as individuals' natural rights that characterised the British colonies, the Spanish and Portuguese colonial periods bequeathed a hierarchical conception of the law imbued by Thomistic philosophy, alien to the notion of subjective rights (Wiarda 2009:86).

The Organisation of the Courts Act of 1875, in addition to legislating the 'duty of lawyers to defend the causes entrusted to them by the poor free of charge' (article 407), established several requirements for the conferment of the lawyer degree (article 402). Non-educational requirements included being twenty years old of age and not having been convicted or currently being prosecuted for a crime that merits corporal punishment. Educational requirements were having the undergraduate degree of bachelor from the Faculty of Law and Political Science of the University of Chile – the first university of the country and the only law school at the time. After verifying the previous requirements, the Supreme Court would issue the lawyer degree, for which each law graduate had to take an oath to loyally perform his duties before the president of the court (article 403).

Thus, from 1875 until the present the basic elements of this charitable legal aid scheme – as a court-ordered duty owed by lawyers rather than as a right to which poor litigants were entitled – and for becoming a lawyer – where admission to practice becomes a remit of the Supreme Court – were established. These

characteristics would play a relevant part in subsequent events regarding legal aid provision.

Legal aid through legal training (1925–1973)

State interventionism and corporatism

The creation and implementation of the legal aid through legal training scheme were part of a profound transformation in the role of the state, similar to what has been identified by the literature (Regan 1999:185), developing from minimal intervention to actively promoting citizens' well-being. This shift in state intervention in legal aid provision undertook a *corporatist* form, in the sense of a system of interest representation where 'bodies with a stake in the economy [...] took decisions about social and economic policy, rather than the government or parliament' (Passmore 2014:141; also Passmore 2002:141).

Whereas during the twentieth century corporatism was initially associated with fascism – thus, it was discredited as a legitimate political system (Wiarda 2003:141)–, corporatism encompasses diverse variants, depending on the extent to which organised groups are integrated into policy-making arenas of the state (Molina and Rhodes 2002:307–8). At first, corporatism referred to a form of organising social life, through a structure of interest representation imposed top-down by the state (Schmitter 1974). Subsequent milder versions conceived corporatism as a system of policymaking (societal neocorporatism) or as a system in which 'peak organisations', collective representatives of an entire sector of an industry or community, acted as intermediaries between the state and the individual (democratic corporatism) (*Idem*; Hearn 1985; Kaufman-Osborn 1986).

Latin American tradition has arguably presented a different variety of corporatism, reflecting a complex blend of institutions and practice: Iberian heritage –

economically, politically and spiritually centralised, authoritarian, and top-down governed (Wiarda 2003:133); nineteenth-century French, Spanish and English liberalism; authoritarian liberalism and Prussian military traditions; and corporative institutions closer to fascism (Loveman 2004:112). The notion of rights was corporate or group-based rather than deriving from individuals' natural rights, seeking to guarantee their autonomy and self-government as collective bodies (*Idem*:132). Corporatism persisted in postcolonial Latin America (Hogenboom 2005:450) because it fitted well into the region's top-down and clientelist political traditions – the proffering of material goods, whether in the form of threats or inducements, in return for electoral support (Stokes 2011:649). Thus, for political scientist Brian Loveman (2004:119) corporatism has been an 'invisible component of Chilean politics'

Democratic rule was briefly interrupted by the civil war of 1891, when the Navy sided with Congress against President Balmaceda, who was supported by the Army. Congressionalist forces won the war, which ended with a stronger parliament in relation to the executive until 1924 (Collier and Sater 2004:154–7). At that time, a parliamentary crisis led to a series of military actions (1924–1925), a reaction to what used to be called the 'social question' – the political conflicts between the ruling classes and the working-class movements regarding immense social inequalities between them (Faist 2009).

During this turbulent interval, a new constitution came into force in 1925. Milestones of the Constitution of 1925 were the separation of the Roman Catholic Church and the state, the expansion of constitutional rights, including the petition of habeas corpus, and the installation of a reinforced presidential regime. The Austrian jurist Hans Kelsen (2002 [1926]) described the 1925 Constitution as 'a product of those antiparliamentarian movements, which are spreading everywhere, also in

Europe […] a series of its provisions closely lead to the frontiers of what today it is usually denominated a dictatorship' (*Idem*:643-644). Populist leaders – known as *caudillos* or strongmen – such as President Arturo Alessandri (1920–1924, 1925, 1932–1938) and Colonel Carlos Ibáñez (1927–1931) flirted with variants of corporatist and statist models of government (Loveman 2004:112). The policies undertaken during the operation of this constitution created new agencies and annexed private associations in line with a new conception that the state should become the main protector of all strata of society (Góngora 1998:221).

Colonel Ibanez's dictatorship (1927–1931) was an example of this top-down, state-driven, ideological turn. An admirer of Primo de Rivera and Mussolini, he circumvented the legislature by governing through *Decretos-Leyes* (Decree-Statutes), anomalous rules concentrating administrative (decree) and legislative (statute) rulemaking powers in the executive branch (Bascuñán 1988:65; Bascuñán and Sierra 2006:§3 Number 46). Ibanez's dictatorship sought to expand interest-group and functional representation in policymaking (Loveman 2004:117).

The possibility of using corporatist mechanisms to organise and control the emerging social classes (Wiarda 2003:140) can be illustrated with the creation of the first state-sanctioned national organisation of lawyers, the Chilean Bar Association (CBA), and, subsequently, the legal aid through legal training scheme.

Legal training through legal aid: formative years (1925–1934)

In 1915, lawyers organised to create the successful *Instituto de Abogados* (Institute of Lawyers) (Estévez 1950). Although located in the capital, Santiago, its influence extended throughout the country (Sierra and Fuenzalida 2014:422–3). Among the composition of the Institute's board were: two future Presidents, the chief justice of the Supreme Court, the mayor of Santiago, three senators and four representatives of

the Chamber of Deputies in office, twelve professors of law, and seven future cabinet ministers (Villalonga 2021:231). The *Instituto* focused mainly on court processes and the improvement of the adjudication process. It scrutinised judges' and judicial employees' behaviour, as well as the conduct of trial lawyers and paralegals. Some of its disciplinary measures became binding professional rules. It also addressed quality in legal education by awarding a prize to the best dissertations, granting fellowships and creating the first Bar library (Pardo 1969:1). It had 200 members and functioned continuously until 1923. In sum, it developed the kind of structure and professional emphasis that typified the future organised Chilean Bar Association – i.e., the Institute of Lawyers' articles of association became the text of the foundational law that created the CBA (Serrano 1983:58).

The *Colegio de Abogados de Chile* (the CBA) was given legal personality in 1925 to be governed by public law by the *Decreto-Ley 406* of the same year, subsequently replaced by the Act 4,409 of 1928. To the extent that one can judge from the sources available, the parliamentary debate suggests that the move from a private organisation towards the conferment of legal personality as an association governed by public law was a joint effort by lawyers, academics and judges (Serrano 1983). The CBA was officially sponsored by the state as the only lawyer association: membership was compulsory in order to practise, and it had disciplinary jurisdiction over every lawyer. It kept close ties with government, achieving unparalleled influence in law reform and blurring the distinction between public and private spheres (Sierra and Fuenzalida 2014:423–38).

The first statutes governing the CBA were almost silent regarding the provision of legal services to the poor or about requiring a mandatory internship to become admitted to practise. The *Decreto Ley 406* of 1925 introduced a panel

composed of the CBA's chairman and the chief justices of the Supreme Court and Santiago's Court of Appeals, respectively, before which law graduates had to sit a final exam (Article 13). The *Ley 4,409* of 1928, which substituted the previous legislation, kept the same panel. It also authorised the CBA to open legal centres to assist poor people in solving their legal issues (Article 13 j).

In December 1929, a new regulation on higher education ordered the CBA to create an internal unit designed to train law graduates for one year as an admission to practise requirement (article 42, *Reglamento Enseñanza Universitaria 4,807*). One month later, this training stage was regulated in detail (*Reglamento de Práctica Forense*). The purpose of this apprenticeship was to prepare law students for every activity that a lawyer could undertake as a legal professional. Graduates had to litigate for six months; they had to work as court reporters for six days; as a judge's secretary for a month; and for fifteen days in other legal occupations (i.e., notary).[5] In addition, they had to engage in normal academic activities such as regular supervision meetings and presenting a legal argument before their peers. The incumbent five law schools of the day agreed with the introduction of this mandatory apprenticeship (C.D. 5th extra., 30.10.1934:254; C.D. 15th extra., 20.11.1934:777). Their consensus may be explained considering that this training in different professional roles reflected a form of professionalisation aimed at differentiating legal services delivered by trained lawyers from those services informally offered by untrained actors at the time (Pérez-Perdomo 2006, González 2017).

These regulations were not implemented until 1932, when the CBA was able to establish its first legal aid centre in Santiago (see *ACGCA* 31.2.1932, 14.4.1932,

[5] The civil law notary differs from the common law notary public, as the former drafts and authenticates substantial legal instruments, and keeps public records with copies of the previous documents (Merryman and Pérez-Perdomo 2007:107)

11.8.1932 and 20.10.1932; González 2017) – which became known as *Servicio de Asistencia Judicial* (Judicial Assistance Service; *SAJ*).[6] In 1933, the School of Social Work of the University of Chile requested that the CBA allow its students to work as interns (*ACGCA* 8.12.1933). There was a growing demand from potential claimants catalysed through local authorities for new centres outside the capital city of Santiago, as well as the referral of claimants coming from public services (*ACGCA* 17.11.1933, 16.3.1934, 2.8.1934).

The enactment of the *Ley 5,520 de 1934*

From the outset, the CBA was on the defensive against similar ventures such as the University of Chile opening a legal centre for the poor to be used by its students as part of a course on practical skills for law students (*ACGCA* 13.4.1934). The CBA communicated its disagreement to the university arguing that this course would hinder the CBA's scheme, that students would lack perseverance, and that it would be less efficient in comparison to the CBA's centre, located closer to the courts (*ACGCA* 11.5.1934). Similarly, it objected to the suggestion that one regional Bar association might merge its centre with the local law school's legal services centre (*ACGCA* 1.6.1934). Because of these objections Valparaiso's Bar association created its own legal centre, setting a path that was subsequently followed by other regional Bar associations such as Concepción and Valdivia (*ACGCA* 2.9.1937).

Still, the implementation of *SAJ* encountered two difficulties regarding the lack of funding and the different remits between the CBA and the judiciary with

[6] A caveat to the literal translation to the term 'judicial'. This notion may confuse the reader, by implying that the legal aid service belonged to the judicial branch. The reason underlying the name of the service is different; it is to underscore that legal aid basically consisted of legal representation before courts.

respect to claimants' means test management. With respect to the shortage of economic resources, the law governing the CBA's funding provided that the Ministry of Justice (MoJ) allocated money by approving the CBA's annual budget proposal. But there was no provision regarding the allocation of resources for legal aid. Because of this gap, instead of securing an annual fixed amount the CBA had to ask for funds every year from the MoJ and the University of Chile (*ACGCA* 1.9.1933, 16.3.1934). The MoJ aided the CBA with the acquisition of a building for opening a centre (*ACGCA* 7.7.1934)

On the issue around the means test certification procedure for exempting litigants from courts' costs, while the CBA provided legal aid to poor claimants, the judiciary was in charge of certifying those claimants as poor and exempted litigants – the *privilegio de pobreza* (poor litigant's privilege) explained above. The CBA complained that the judiciary were too slow to issue certificates, and asked Congress to expedite the process (C.D., 5th extra., 30.10.1934:253.)

Based on a Bill drafted by the CBA, Congress began discussing the first prospective legislation on the scheme (*ACGCA* 27.9.1934). It was common to encounter members of the CBA's board who were also members of congress in office, cross-pollinating professional interests to the political arena, as 'interest-group corporatist representation in government agencies became a part of Chilean politics, taken for granted rather than resisted' (Loveman 2004:120). There was a lack of rules on conflicts of interests, particularly on 'revolving door' issues (i.e. the movement between legislators or members of the administration and private legal practice). The CBA's first chairman, Carlos Estevez, was a member of the Chamber of Deputies when the Bill was discussed, representing the Conservative party. Estevez convinced his legislative peers to pass the Bill (C.D., 15th extra., 20.11.1934:777–8).

Arturo Alessandri Rodriguez, a board member and later chairman of the CBA, who was the main promoter behind *SAJ*, was the author of the draft Bill that became Act 5,520 (González 2017). He was son of President Arturo Alessandri Palma, who governed between 1920–1924, briefly during 1925, and again between 1932 and 1938, and law dean of the *Universidad de Chile*. In 1934 he authored a reform to the law curriculum aimed at a professional law graduate prospectus, educating lawyers to litigate before courts – also known as the '*Alessandri curriculum*' (Bascuñan 2007). This curriculum furthered a doctrinal approach to legal education with a strong emphasis on black letter law, taught through master classes and memorisation of legal provisions, following a rigid syllabus absent of specialisation courses and research-oriented courses (Arriagada 2014:555).

When the government submitted the Bill, it made explicit its agreement with the CBA about the justification for having law graduates participate in legal aid provision by transcribing their communications about the necessity of legislating on the matter:

> This apprenticeship […] forces students to pay back to society, although in a small part, the benefits that they have received from it when they were supplied with education and provided with a profession that will allow them to make their living. (C.D., 5th extra., 30.10.1934:254)

This argument for reimbursing society for tuition-free higher education epitomised the professional ideal of a service-oriented occupation and would play a relevant role, first, as justification for maintaining and, subsequently, questioning the scheme. While the Bill was passed by the Chamber of Deputies, a member of the Radical party – a left-wing social democrat party – and criminal law practitioner, Manuel Cabezón, made a critical assessment of this legal aid scheme on its lack of professionalism:

> Nowadays [poor people] are not served in a manner befitting their needs [...] they cannot feel satisfied when [...] they see that justice is not done in the same way for those at the top and for those at the bottom. I finish declaring my desire that these benefits for poor people are provided in full through a Lawyer Brigade located in every city of the country to serve workers, and in general, to people in need [...] we will have the opportunity to submit a more complete Bill establishing an efficient service for serving underprivileged people. (C.D. 15th extra., 20.11.1934:779)

Two elements of this criticism became part of the trajectory of the scheme: the lack of professionalisation and the imminent likelihood of future reform. Estevez replied to Cabezon's intervention by agreeing with him that legal representation of poor people had been practically non-existent, but he reminded him of the old aphorism that '"the best is enemy of the good". This is the first step that we are making in this direction. Therefore, let us endorse it by accepting these arrangements.' (C.D., 15th extra., 20.11.1934:780). After the Chamber's approval, the Senate passed the new legislation without debate (S., 32nd extra., 5.12.1934).

Congress enacted the Act 5,520 of 1934. With its new powers, the CBA became the only official and publicly funded legal aid provider. This statute made the CBA the sole authority for certifying the low-income status of legal aid claimants (Article 12 ñ), consequently becoming the only state-sponsored legal services provider. It also strengthened the regulation of the legal aid apprenticeship system, keeping its management under the CBA's control. Since this Act, every law graduate had a legal duty to work at the CBA's legal centres representing low-income people before sitting a final exam. Finally, the legal aid through legal training scheme was integrated with the *abogado de turno* scheme. Now, lawyers appointed by the judiciary to work without compensation had to report their performance to the CBA, which could penalise them with fines or temporally suspend them from practising law

if their work were assessed inadequate or compromised (*ACGCA* 27.9.1934). it has been the legal duty of

The introduction of legal aid through legal training provided a dual reward for the profession and political ecologies, a concept referring to particular social structures composed by actors, locations, and a relation associating the one with the other (Abbott 2005:248). These dual rewards or hinges refer to a strategy that worked well in both ecologies (*Id*:255), as legal aid through legal training became the government and the legal profession's answer to the so-called 'social question' with respect to provision of legal services to the poor (González 2017). Legal aid through legal training allowed the legal profession to appear to be fulfilling clients' expectation on competence (through mandatory training) (Paterson 1996 and 2012); and the state to offer improvement in access to justice, as legal aid was a step forward from the *abogado de turno* scheme – the charitable, judicially imposed duty rota. The regulatory techniques employed in relation to the CBA in this period became a model for the regulation of other professional associations. These subsequent statutes were based closely on the CBA's statute, sometimes including free provision of professional services to the poor. There was a point of distinction, however. Practically all such schemes did not have mandatory apprenticeship schemes.[7]

Now, legal aid through legal training differed from other jurisdictions regarding particular factors explaining why states developed legal aid, as analysed in Chapter 1. The Constitution of 1925 expanded constitutional rights, but no provision was introduced guaranteeing the right to legal representation or defence. Similarly, this new constitution provided for the separation of the Roman Catholic Church and

[7] Chilean Medical Association Act (1948) article 17 b); Chilean Dental Association Act (1948) article 17 b); Chilean Nursing Association Act (1953) article 6 e); Chilean Veterinary Association Act (1955) article 14 ñ); Chilean Civil Constructors Association Act (1955) article 7 Number 8.

the state, yet this key change did not translate in legal reforms on marital breakdown, permitting divorce. Data indicates that relevant connections existed between this legal aid scheme and previous forms of legal training, in hand with professional interests underlying the collective efforts of lawyers for creating an official association:

> [During the nineteenth century] this apprenticeship originated having a purely academic purpose, in the sense of being useful for training law graduates [...]. This changed during the 1920s and 1930s, when an institution separated from the universities was finally created [the CBA]. And, simultaneously, it began to have a concern for legal assistance for the poor, the needy. At one moment both things became unified. For me, since then until present this has been the justification and the basis for all this matter. On one hand, that law graduates have a period of training, that is normally more related to litigation [...] On the other hand, on the rebound, as a reflex, to help low-income people who cannot afford private lawyers [...] Because, to my best knowledge, there is no third reason. (Interview 1)

As regards traditional typologies of legal aid models discussed in Chapter 1, legal aid through legal training, as provided by *SAJ*, can be described as a sui generis mixed model for legal services delivery. This model combines features associated to charitable legal aid (gratuitousness, limited funding and coverage, inexperienced providers on a part-time basis, and exempted court dues or expenses) with others usually found in judicare models (public funding, the CBA's independence from the state, a general scope circumscribed to litigation, means test eligibility by social work graduates).

Legal aid's 'Golden Age' (1934–1964)

Now that it had become the sole official legal aid provider and the means for controlling the production of lawyers, the politics of the CBA were redirected towards new subjects for increasing its jurisdiction: the claim for legitimate control of a problem requiring expert service made before the state, public and workplace audiences (Abbott 1988). The central fact about professional jurisdiction is its

exclusive character, pre-empting as it does another profession's jurisdiction (Abbott 1986:190–3). A variety of forces create potentialities for gains and losses of jurisdiction, to which professions proact and react seizing openings and reinforcing or casting off their earlier jurisdictions (Abbott 2005:246-247).

With the purpose of increasing its influence the CBA began mobilising for new rules reflecting common attributes of professionalism closer to what was explained in Chapter 1 as a deferential conception of lawyers, imbued with an altruistic orientation toward the service of others and technical knowledge which satisfied certain social needs (De la Maza 2005:35–7). Accordingly, the legal profession demanded autonomy from the state to control its own activities and some level of monopoly over the provision of its services, together with other forms of rewards (*Idem).* This thrust for more autonomous collective action also included reinforcing legal aid.

Concrete examples of this shift in the CBA's agenda included the implementation of the final national exam in 1935 as the final requirement to become admitted to practise. Law graduates were required to take this examination after finishing their apprenticeship. It consisted of arguing a moot case before the chairman of the CBA and the Chief Justices of the Supreme Court and Court of Appeals of Santiago (Sierra and Fuenzalida 2014:426). As a manifestation of a normative orientation of service, the CBA used its rulemaking and adjudicative powers over practitioners. Thus, after a period issuing scattered recommendations and rules and ad-hoc adjudication of disciplinary misconduct, in 1948 it enacted its first Code of Professional Ethics, which became mandatory for every lawyer because of the compulsory membership requirement (Serrano 1949). The Code of Ethics of 1948 limited both intra- and extra- professional competition, banning advertising and

solicitation of legal services, as well as fee sharing with unqualified persons and partnerships with other professions, respectively. With respect to disciplinary jurisdiction, the CBA was the sole authority that could adjudicate upon and sentence lawyers for ethical misconduct. With respect to expanding its technical authority to other spheres of influence, the CBA became the first adviser on legislative work when it opened the *Instituto de Estudios Legislativos* (Institute for Legislative Studies), and it also became a statutory overseer of judicial behaviour (Sierra and Fuenzalida 2014). The privileged status of the CBA was recognised to the extent that the Act 16,518 of 1966 exempted the CBA from specific taxes.

Legal aid through legal training statutory consolidation

A similar tendency towards expanding its spheres of influence can be found regarding the CBA's legal aid through legal training scheme. The main policy developed by the CBA was to increase geographical coverage by opening new centres in different cities, as there was a consistent growing demand for legal aid communicated by local councils and other public services to the CBA (*ACGCA* 13.6.1935, 22.8.1935, 3.12.1936, 1.4.1943, 17.6.1943, 21.10.1943, 1.6.1944, 22.6.1944 and 19.6.1946). The main obstacle for boosting geographic coverage was financial. Until 1939, fundraising issues were solved by requesting money from different entities. The CBA requested funding from the local councils belonging to the different communes where users of its legal services lived (*ACGCA* 23.9.1937). The CBA even agreed to a form of retainer with the Worker's Insurance office in exchange for legal assistance to socially insured workers (*ACGCA* 16.12.1937).

Piecemeal statutes began allocating funds to the CBA that had originated from criminal fines (Acts 5,493 of 1934 and 5,750 of 1935). In 1939, Congress enacted Act

6,417 establishing a fixed amount to be allocated to the CBA every year in the national budget, with the specific purpose of funding legal aid centres nationwide. Subsequently, the Act 15,632 of 1964 allocated funding for buying new premises to establish legal aid offices and exempted the CBA from any taxes related to purchases made for that purpose.

The existence of the scheme was invoked by the CBA for advancing new legislation protective of its reserved activities. For instance, it was used as a justification for criminalising unauthorised practice of the law during the legislative debates which led to new penal provisions (Act 6,985 of 1940). The CBA used the training side of the scheme as a legislative trade-off tool when it accepted the elimination of the final exam to become admitted as a lawyer in exchange for an increase in the length of the training period from four to six months (Act 7,855 of 1944; see also Mohor 2007; Sierra and Fuenzalida 2014:426).

The 'Golden Age' of legal aid through legal training was possible because its legislation settled the CBA as the sole actor implementing and mobilising for legal change because of its monopoly over legal aid delivery. Similar to the setup of England and Wales' post World War II legal aid scheme (Moorhead et al 2003:772), this corporatist model of legal aid provision reflected the interests of the legal profession: administered by its professional body, the CBA, and focused on the mainstays of the law curriculum (criminal, private and procedural law). As was mentioned before, during the passage of the *Ley 5,520 de 1934* some congressmen opposed the idea of building a legal aid system based on training students, instead of introducing a restricted version of a public salaried scheme, managed by the MoJ through lists of available practitioners who were remunerated afterwards by the said ministry. Nonetheless, while the enactment of the said statute was not the product of

unanimous consensus and there was an implied compromise to pass Act 5,520 with the caveat that it constituted a first and transitory step, legal aid through legal training became hard and fast in the sense that this legislation made the CBA the exclusive body on legal aid delivery – the judiciary's participation certifying poor claimants was eliminated.

This section has evidenced how during the subsequent decades after the passage of Act 5,520 the CBA used its privileged position to expand its jurisdiction in relation to securing funding for legal service provision, with the acquiescence of the state, as well as to new areas of influence. But this trend would radically change from the second half of the 1960s, with the emergence of new political forces challenging the role played by the CBA regarding legal aid provision, as the next and last section analyses.

Legal aid during troubled times (1964–1981)

This 'Golden Age' regarding legal aid provision began to erode during the second half of the 1960s. From a macro perspective, this new setting relates to what has been commonly known as the *era of global planning*, as coined by historian Mario Góngora (1998:126). This notion refers to the 'spirit of those times' to propose utopias and shape the future accordingly, starting from scratch 'without taking into account the idiosyncrasies of peoples nor their national or universal traditions; the very notion of tradition seems abolished by utopia'. This last explanation is reminiscent of a common slogan at the time: to advance without concessions (*avanzar sin transar*) (Jocelyn-Holt 1998).

Complementing Góngora's vision, Puryear (1994:27) describes these forms of global planning as comprehensive, non-negotiable, transformative and top-down

solutions to social problems, without political alliances. As a normative ideal, policies should be planned 'at the top' and implemented by agents; an 'essentially prescriptive' vision about what ought to happen which would be co-ordinated and controlled through authority and hierarchy (Barrett 2004:254–5). The reality of the planning process differed from this description, responding to political opportunism from authorities, where 'policy tended to follow and serve to justify action rather than the other way round' (*Idem*:251).

A noteworthy development related to the use of the term 'crisis' to refer to the law's inability to keep up to date with the whirling social changes experienced by Chilean society (Sierra 2002). From the perspective of the Chilean legal profession, during this period lawyers' expert authority claims (jurisdiction in Abbott's terminology, 1988) regarding state affairs were challenged by other professions, namely sociologists and economists with their expertise in planning and statistics (De la Maza 2001). The initiation of these 'turf wars' between professions has been situated in the 1950s (*Idem*); yet recent literature has dated the 1930s as the beginning of lawyers' displacement from statecraft, with the emergence of the administrative state and bureaucratic institutions effecting a gradual differentiation between law and governmental practice (Villalonga 2021).

This attracted the attention of the Ford Foundation during the second half of the 1960s (for the global influence of the Ford Foundation on access to justice at the time, see Chapter 1). This foundation was interested in modernising legal education and research in Latin America (Dezalay and Garth 2002). According to the memoir of one of its actors, Chile was a good place for developing this agenda:

> The Chile Law Program [...] was an action program [...] to build a corps of legal professionals and a tradition of legal scholarship that would help provide the legal infrastructure thought by Chileans to be necessary for the nation to achieve its social and economic ambitions. (Merryman 2000:481)

According to another contributor of the Chile Program (Lowenstein 1978:153–9), these new times demanded a new type of lawyer committed to the development of the country, who had to be trained in ‘policymaking’; ‘synthetisation, coordination and implementation’; ‘structuration of institutions’; and ‘crisis management’ skills.

This fruitful collaboration led to the reform of the law curriculum by introducing courses on social methods in a mimetic attitude towards the social sciences (Peña 1994). This change in the law curriculum coincided with the creation of the first legal clinics in the country from 1970 onwards, beginning with the Catholic University’s Law School and later replicated by the University of Chile and Catholic University of Valparaiso (Harasic 1988:184). Finally, with the support of the Ford Foundation, a new organisation was created, the *Instituto de Docencia e Investigación Jurídica*¸ where academics researched in accordance with the law and society canons. The *Instituto* would play a role in the development of legal aid in the coming years.

This era of global planning comprised three governments: the centre-left Christian Democrats’ *Revolution in Liberty* government led by president Eduardo Frei Montalva (1964–1970); the government of the *Unidad Popular* (Popular Unity), whose motto was *‘the Chilean path to socialism’*, headed by president Salvador Allende (1970–1973); and the military dictatorship commanded by General Pinochet (1973–1990) and its neoliberal policies. Each one sought to reform legal aid by reducing the CBA’s role – but only the dictatorship, after seven years in power, was succesful in passing new legislation (see Chapter 4).

Legal aid reform during Eduardo Frei's administration (1964–1970)

Christian Democratic ideology emphasised a communitarian society, neither capitalist or socialist, based on solidarity and participation, which merged corporatist practices in the form of government-sponsored organisations linked with state agencies and efforts to mobilise the poor (Wiarda 2003:140, Correa 2008). On the justice sector, the presidential manifesto did not seek to address the provision of legal services for the poor. It had broader goals such as 'modernising the codes [i.e., Civil, Criminal, Employment, etc.] and the judicial systems' and creating 'peace courts' that were similar to neighbourhood courts (González 1988:358).

Nonetheless, the situation at *SAJs* was rather critical. From the late 1950s, and particularly during the 1960s, several heads of legal aid centres complained to the CBA. They argued that there were substantial differences between Santiago's *SAJ* and the remaining regional centres. Regional *SAJs* were underfunded, and their rendition of legal services lacked common quality standards (González 2017a). This affected coverage as some regional *SAJs* did not have the resources to provide expected services.

During 1965 the CBA took action, pointing out to the government that the public funds allocated were lower than the budget set out by the CBA – the governmental allocation only covered the wages of its workers (*Colegio de Abogados* 1965). After a formal request from the government, which was evaluating the possibility of providing legal representation directly rather than through the CBA's centres, the CBA began compiling records on the functioning of each *SAJ* (*Colegio de Abogados* 1965a). The CBA announced that it would use these data to elaborate a national plan to solve legal aid's problems and to stop the government taking the provision of legal aid services from its hands or limiting its participation in legal aid. In the meantime, the CBA rationalised the mechanism of judicial appointments of the

abogado de turno system by commanding each *SAJ* to produce lists of lawyers on call for each month (*Colegio de Abogados* 1965b). Because of the inferior operation of some centres, the CBA tried to avoid creating demand for legal services, i.e., it advised each *SAJ* against using radio adverts to inform people about their services (*Colegio de Abogados* 1965c).

Legal aid as an obligation of the state: the constitutional amendment Bill of 1964

In November 1964, the government submitted an ambitious Constitutional Amendment Bill to Congress, which had the goals of broadening voting rights, introducing workers' rights, effecting economic integration within the Latin American people, and providing the state with the necessary means to solve social problems (such as introducing new expropriation provisions).

This Bill recognised legal aid as a state duty. As part of the constitutional right to equality before the law this amendment added the next section to article 10 N. 1 of the Constitution of 1925:

> The state must provide legal assistance to [those] who, in order to enforce the rights that the law entitles them, cannot afford it by themselves. (New Article 10 N. 1). (C.D., 30.11.1964:3976, bulletins 10396 and 10396-A)

This constitutional amendment was barely discussed because congressional debate focused on the introduction of plebiscites and reform to property rights – with its consequences for a prospective reform towards agricultural property. Among the few comments relevant to the introduction of legal aid as a state duty was the intervention of Christian Democrat representative and lawyer Patricio Hurtado. After a lengthy doctrinal exposition on the history of constitutional law – including references to the *Magna Carta*, Aristotle, Karl Marx, Hans Kelsen and Léon Duguit –, he concluded the following:

> Current tendencies in modern constitutionalism […] are not political, as occurred in the days of absolutism, nor juridical, as happened in Greek and Roman times. […] *Contemporary constitutionalism is social*[.] (C.D., 37th, ord. 18.8.65:4242, emphasis in the original)

The reference to 'social constitutionalism' is reminiscent to the underlying tenets of the access to justice movement (explained in Chapter 1), as this constitutional trend referred to the increasing introduction of economic and social rights language in constitutions, the use of these new constitutional rights by social actors and their potential judicialisation (Brinks et al. 2015). This was a common trend in which several Latin American countries such as Argentina, Brazil, Costa Rica, Guatemala, Mexico and Uruguay, 'expressed, through the use of the legal language, the main social changes that had taken place in the region during the first half of the twentieth century, namely the incorporation of the working class as a decisive political and economic actor' (Gargarella 2014:12–3).

For the opposition from the right, this constitutional amendment was uncontroversial, as it just limited to 'constitutionalise' existing rights introduced by previous legislation, 'following the criteria coming from modern constitutions' (Gustavo Lorca, representative of the Liberal Party and trained lawyer, C.D., 38th, ord., 18.8.65:4341). A more sarcastic approach came from a representative of the Radical party. After blaming the other parties for not legislating to introduce divorce, on the constitutionalisation of legal aid provision she ironically concluded: 'What a novelty these subjects are for a constitutional amendment!' (Inés Enríquez, trained lawyer, C.D., 45th, ord., 1.9.65:5224)

The Bill was approved by the Chamber of Deputies in 1965 (C.D., 48th, ord. 7.9.1965). The Senate continued with its debate, but it narrowed it down to agrarian property reform and the proposals to amend the right to property. Thus, the

Constitution was amended in 1967 (Act 16,615) but only to regulate new forms of expropriation of landed property used for agricultural purposes (Thome 1971).

After this failed attempt to reform the Constitution, with high probabilities of challenging the existing structure of legal aid provision through major state intervention, *SAJ* workers went on strike in different cities in 1967, and in 1968 they created the first union of *SAJ* workers. Still, the government did not make reform of legal aid a priority (González 2017a), although it became a political issue for the next presidential election in 1970. The Christian Democrat presidential candidate, Radomiro Tomic, in his presidential manifesto suggested creating a National Legal Aid Service for low-income people who would have the right to choose a lawyer from a list elaborated by this new public service, whose fees would be paid afterwards by the same service (see González 1988:375). The incoming socialist government would propose a similar state managed legal aid scheme, as the next section explains.

Legal aid reform during Salvador Allende's administration (1970–1973)

With the election of Salvador Allende, supported by a coalition of left-wing parties, within them the Communist and Socialist Parties, known as the *Unidad Popular* (Popular Unity), the dominant narrative of the ruling elite became leftist revolutionary. The legal profession began to be viewed as an obstacle to the radical social changes that were being pursued by the administration. The government's main counsellor was Eduardo Novoa, a respected jurist, who had argued for several years that law was an obstacle to social change. To achieve social change, he advocated exceeding law's own limitations (Novoa 1975). In the same spirit, he also denounced the judicial branch as a 'classist justice' system (Novoa 1970). The government blamed the judicial branch for those limitations and attempted to substitute it for a

system of ‘popular justice’ (Peña 1993:380–90). The justifications for, and reactions against, the creation of neighbourhood courts exemplify the turmoil:

> The left claimed that most poor people had no access to the judicial system […] because the professional judiciary was part of a legal order which systematically discriminated against the poor. ‘Legal’ manipulations enabled rich land owners to absorb reservation lands from Indians in southern Chile, but theft of property by poor people, when apprehended, was sharply penalized […] The UP [*Unidad Popular*] sought to change this legal order and saw creation of the neighborhood courts as one step in breaking bourgeois domination of judicial institutions […] the right opposition (centered in the National Party) saw in the proposal partial fulfillment of its prophecy that once in power the left would attempt to destroy the Constitutional order. (Spence 1978:143–4)

The CBA became part of the opposition to the government of the *Unidad Popular*, opposing several governmental actions which disrupted legal practice such as the deliberate lack of enforcement by the police and other civil servants of judicial rulings against the government. The judiciary adopted a similar attitude towards the government.

In January 1972, the CBA publicly condemned abuses and tortures suffered by two right-wing lawyers perpetrated by the police and gendarmerie, requesting the Minister of Justice to open an investigation (*Colegio de Abogados* 1972a). It also communicated one of these cases to the UN Human Rights Commission (*Colegio de Abogados* 1972b). In April that year, the Minister of Justice was invited to discuss several issues worrying the CBA’s board. It was recorded as a friendly meeting (*Colegio de Abogados* 1972c), but this was a temporary truce. In June, the CBA held an assembly with each regional Bar association to discuss the issues then affecting the profession, particularly the role played by civil servants, police and other officers acting against enforcing judicial rulings. These Bar associations agreed to act as a unified front in relation to legal affairs (*Colegio de Abogados* 1972d). In the same vein, the CBA protested to the government against several irregularities in the

relationship between the judiciary and the executive branches, where the government appeared to be acting in contempt of the courts' rulings (*Colegio de Abogados* 1972e).

These antagonism between the CBA and the government came to a heightened point in October 1972, when a grass-roots mass mobilisation led to a national strike against the government (Collier and Sater 2004:349). The CBA participated in the strike, justifying its actions as a warning to prevent 'the breakdown of the rule of law that the country is suffering' (*Colegio de Abogados* 1972f). Left-wing media criticised the Bar's chair for participating in the strike (see Fontaine and González 1997:568). President Allende confronted the CBA's agreement to participate in the strike by asking the Supreme Court for a ruling condemning its illegality. The Supreme Court rejected the petition, arguing that the CBA's independence in relation to the exercise of its powers barred the Court from issuing a critical legal judgment (Daniel 1980:188).

These winds of change and times of hostility also affected legal aid reform, as indicated in the next section.

The creation of a National Juridical Service

As occurred in other jurisdictions in the early 1970s (Fleming and Regan 2006), the election of a socialist government became synonymous with policies aimed at major state intervention over legal aid provision, through the establishment of new public bodies to administer a comprehensive scheme. Advocates considered these new public services an arcadia of social justice and its opponents as protectors of private interests, whereas detractors unwelcomed state intervention as a threat to professional independence and apolitical legal aid provision (*Id*:78-84).

When the MoJ presented its reform programme, legal aid was addressed in the following terms:

> State legal assistance. Any attempt to provide access to and participation in justice entails a complementary organisation of an efficient and active public service that deals with enquiries on those issues, guides on the actions to be taken and represents the working-class before courts. With that purpose a National Juridical Service will be created, dependent on the Ministry of Justice, which will open centres in popular areas with the appropriate management staff and the participation of law, sociology and social work students. (See Farías 2000:641)

In 1972, the government commissioned the *Instituto de Docencia e Investigación Jurídica* to draft a Bill creating this National Juridical Service. These political debates occurred at a time when legal aid constituencies had broadened, with the creation of legal clinics by the incumbent law schools, with active participation of law students. The literature has found that when this broadening occurred, these interest groups played a significant role defending the importance of public salaried lawyers against the interests of private practitioners (Fleming and Regan 2006:91). In the case of Chile, law students, through their student representative bodies, advanced this position in favour of a state-run legal aid scheme. The idea was discussed during a national conference in the same year. One participant at the conference, who at the time was a student representative, recalled his constituency's position:

> We argued that the state should assume the task of providing free legal services to low-income people in order to verge towards equality before the law. [...] Low-income people did not have the same access to justice [as] those who have resources. This caused an inequality that the law or the state should solve. We pressed for the creation of a public body in charge of these institutions. [...] with lawyers in charge although law graduates in training would also intervene. (Interview 6)

The quote from interview 6 reflects the different dynamics underlying legal aid through legal training, because what was questioned was the exclusive role of the legal profession (the CBA) as provider, but not the professional pathway to become a

lawyer by following this mandatory apprenticeship stage. A common accusation against the CBA's management was to blame it for assigning funding from the national budget for the specific purpose of providing legal assistance to different and unrelated affairs (Mosquera 1977). A former member of a regional Bar recalled how the CBA confronted the government's announcement by trying to accommodate the existent legal aid scheme to the demands for more state intervention:

> "Why did the state not have its own independent thing instead of a professional association?" But the Chilean Bar Association had the characteristic of being a public association and, therefore, closely related to the state. It did not have the nature of a trade association as occurs today; so, for the immense majority [of lawyers] it was part of their being to have to defend those who have less resources. (Interview 17)

As explained before, the professional ethos underlying compulsory training became an obstacle against state provision of legal services. This struggle occurred in a febrile, hostile atmosphere between the CBA and the government, in the middle of the national strike against the government explained above. The government submitted a Bill to Congress creating a National Juridical Service (C.D., 9th, ord., 18.10.1972:429–35). This Bill was joined with another which reformed the CBA's electoral rules system (C.D., 10th, ord., 24.10.1972:488–93). Both were submitted in October 1972.

The written explanation of the reasons for the Bill introducing a National Juridical Service stated that the CBA's legal aid provision was 'paternalistic', 'insufficient' and 'deficient' and that it was designed to assist destitute people only, which amounted to lacking universality (C.D., 9th, ord., 18.10.1972:429–35). About its components, legal services were said to be limited to legal representation before courts, and not satisfying properly the existing demand for legal services.

For the government, this shift from the CBA to state provision of legal services was justified by the constitutional right to participate actively in almost every sphere of life (civic, cultural, economic, political and social). The constitutional text read:

> The state must remove those obstacles that, as a matter of fact, limit freedom and equality of people and groups, and guarantee and promote access to [...] services necessary to fulfil those objectives, through the systems and mechanisms established by the law. (Article 10 N. 17 Constitution of 1925, amended in October 1970).

To replace the *SAJ*, the Bill created a National Juridical Service headed by a general director appointed by the President, with regional and local branches. This proposal extended representation to better-off claimants, who would have to pay a contribution, and provided comprehensive legal aid, not limited only to litigation.

The board of the National Juridical Service undertook a corporatist form, composed of several interest groups. The CBA would have a reduced role as a member of the board, which was also composed of MoJ representatives, of the service's workers, the Social Workers Association, the Unitary Central of Workers, the law students' union, the National Farmers Council, the law schools, and the Ministry of Family. Without adding new rules, the Bill kept legal aid through training as it was at the time.

In seeking to resist these changes, the CBA, joined by the regional Bars' boards, presented themselves to the legislative authorities as successful managers and resisted becoming dissociated from the new service:

> Notwithstanding its high social relevance, this section's [*SAJ*] forty years trajectory has demonstrated the efficient way [in which] legal aid is delivered at low cost for the national budget. The creation of the new service will increase its costs approximately ten times more than its current value. On the other hand, it would bring all the deficiencies commonly associated with

> nationalisation, the intervention with political purposes and the bureaucratisation of the service. (*Colegio de Abogados* 1972g)

The CBA embraced a rhetoric of neutrality where law is separated from politics (Prabhat 2016:108–10) to advocate in favour of keeping the status quo. The argument against new state-run services as potential politicised bodies was a common discourse from those in the opposition to the Popular Unity government. A research participant who was doing his training at the time recalled this hostility in connection with this failed legal aid reform:

> For the Chilean Bar Association this [the provision of legal aid] was perceived as a typical function, that the [government] wanted to expropriate. It does not surprise that the creation of a new service subordinated to the state – which was already atrophied and the subject of total political suspicion and distrust – was defeated. By and large, professional associations were deeply active against the direction taken by the government [...] A lack of confidence towards politically manipulated public services was something experienced with gigantic intensity. The state was not perceived as a benefactor and provider of every imaginable benefit, but rather as a threat. If you were not registered in the correct political party or did not have the correct friends inside the government, you did not get anything (Interview 25)

In May 1973, the government tried to promote its Bill for the last time, but it withdrew its attempts to continue as soon as it realised that the CBA 'had been able to mobilize the support of the majority of Congress – Christian Democrats and right wing – against the project' (González 2014:16). This put an end to the possibility of reforming legal aid in an increasingly hostile political setting.

The final year of the Allende administration was characterised by a tense political environment. In March and May 1973, the Supreme Court accused the government of stepping outside the rule of law (Hilbink 2007:86), as did the Chamber of Deputies five months later (*Diario La Prensa* 1973). In an increasingly radicalised political environment, with the imminent possibility of armed confrontation between

rival forces, the CBA made a public statement on 31 August 1973. The statement asserted that, considering his repeated unconstitutional and illegal actions, the President was incapable of ruling and exhorted Congress to declare him unfit to continue in office (see Fontaine and González 1997:810–1).

On 11 September 1973, a violent coup led by the armed forces deposed President Allende, who committed suicide inside the government palace. The new regime intervened in almost every sphere, dissolving Congress, deposing authorities, interfering in universities, and suspending political parties and union elections (Collier and Sater 2004:359). The only exceptions to this ubiquitous intervention were the Comptroller General and the judiciary.

The CBA backed the new administration, communicating to foreign bar associations that it 'patriotically supported the new government' (Colegio 1973). According to Karpik (2007:475), the previous legal actors' orientation of taking sides with the military regime could be explained as the triumph of class logic over a professional logic. The great fears that communist actions in Latin America were spreading against small and middle bourgeoisies' symbolic and material interests, which turned to be viewed as roots of a civil war, might have displaced legal professionalism as a value system. An alternative explanation would consider the distinction between apolitical and political models elaborated by Halliday and Karpik (1997 and 1997a). In all likelihood, during most of its history the CBA has been rather apolitical, mainly because the profession was not periodically required to fight for itself or for liberal ideals as such, so eventually becoming a stranger to the art of political mobilisation in their role as lawyers. For the period between the 1920s and the 1950s the CBA self-identified as an apolitical organisation, reluctant to engage in political activities (Gonzalez 2021). This apoliticism included remaining publicly

neutral with respect to victims of political persecution, such as Communist lawyers during the early years of the Cold War (1947-1952), only intervening discreetly through private channels on grounds of professional solidarity (*Idem*:78-85). Only between 1970–1973 did the legal profession face direct assaults on liberal institutions, and its reaction was informed by extra-professional politics, such as the CBA's participation in the national strike of October 1972, rather than by intra-professional ideologies of legalism advocating fidelity to law's procedural side (Halliday and Karpik 1997a:354–5).

With respect to legal aid reform proposals, the CBA faced the risk of its existence becoming precarious in the sense of it ceasing 'to be legitimate in the eyes of its key audiences' (Moorhead 2014:452–3). These attempts to reform legal aid reflected a conception critical of the role of the CBA as a privileged provider, closer to market control theorists, exemplified by the creation of bottom-up providers such as legal clinics. Nonetheless, the CBA's status as a training provider went unquestioned, an element that will also come into play during the dictatorship years explored in the next chapter.

Conclusion

This chapter analysed the evolution of legal aid from being a remit of the legal profession – shown by its emphasis on its role as an admission to practise requirement – to becoming challenged as an inappropriate system to provide legal aid to the poor – demonstrated by different attempts to make it a state duty.

Between 1925 until 1973 it seems that a statutorily written agreement took place between the legal profession, represented by the CBA, and the state on instituting a traditional model of professionalism (Paterson 1996:141): where clients

expected to have access to competent legal services delivered on a service ethic basis and a public protected against abuses through professional self-regulation, whereas lawyers foresaw gaining a higher status, reasonable rewards, potentially restricting internal competition by using self-regulation and controlling new entrants through their mandatory training stage.

The development of the organised legal profession in the form of the CBA went hand in hand with the development of legal aid, showing a close relationship between the state and the legal profession. Legal aid played a key role during the formation of the CBA, strengthening the latter institution through bargains with the state. After 1934 it helped legitimating the profession's power and influence on state affairs. While the CBA increased its power and budget, the state appeared to fulfil the goal of access to justice for the poor, as well as guaranteeing minimal professional qualifications.

This history shows a constitutional dimension of the scheme's evolution, effecting different outcomes on legal aid provision. When in 1925 a new Constitution came into force, it did not recognise the right to legal representation nor did the legislation regulating the legal aid scheme. But during the 'global planning' governments (1964-1973), attempts to reduce the role of the CBA on legal aid provision were supported by failed or actual constitutional amendments, connecting state intervention with higher values.

A particular factor for explaining legal aid's development refers to legal education, not necessarily covered in the literature reviewed in Chapter 1 explaining why legal aid has been developed. Legal aid through legal training was originally introduced as part of new laws on higher education, with special emphasis on access to the legal profession, creating vocational training stages reminiscent to previous

sporadic attempts to provide legal skills during the nineteenth century. The legal consolidation of the CBA's monopoly over legal aid delivery in 1934, as the sole body issuing legal aid certificates on a means test basis and providing legal services for the poor via the legal aid through legal training scheme, was matched by a reform to the legal curriculum of the same year, furthering generalist and professionally-oriented legal education. During the late 1960s and 1970s turbulent period, a new law curriculum was adopted to face 'law's crisis', mimicking social sciences and introducing legal clinics. Regarding the legal aid through legal training scheme, although this final stage was characterised by controversies on the CBA's role as legal provider, questioning did not cover compulsory training in the form of legal aid provision.

The paradox of this process is that, despite political ruptures and developments in the legal profession, the provision of legal services for the poor remained constant. The reasons why reform in this sector remained off the agenda or failed may shed light on why some political issues become the focus of attention through legal mobilisation and why some do not. The reasons for failed reform attempts are not apparent and are worth exploring. Nonetheless, this pattern would become a permanent element throughout the remaining history of legal aid through legal training. The chapter that follows is designed to achieve this objective with respect to the question of why the military dictatorship kept this scheme as part of its reforms on legal aid and the legal profession.

Chapter 4: Continuity within change: the creation of the *Corporaciones de Asistencia Judicial*

The previous chapter discussed the origins and subsequent developments of the legal aid through legal training scheme. The ending sections of the preceding chapter referred to the first political and legal challenges to legal aid delivery (between 1964 and 1973), questioning the role of the Chilean Bar Association (CBA) as legal aid provider, alternatively fostering a state-run scheme. Those attempts came to an abrupt end when a military coup deposed the government and initiated a seventeen year-long authoritarian regime.

This chapter addresses the question about why the dictatorship led by General Pinochet (1973–1981) retained the legal aid through legal training scheme. In 1981, the military dictatorship enacted the first material legislative reform to legal aid through legal training by creating the *Corporaciones de Asistencia Judicial* (Legal Assistance Corporations, LACs). The creation of LACs epitomised a shift from what was described as a sui generis legal aid model, which combined judicare – management by the legal profession – and charitable – mainly delivered for free by law graduates in training – features, towards a system closer to a decentralised service. LACs were designed as quasi-autonomous non-governmental organisations ('quangos'): bodies appointed wholly or partly by the government, without constituting a department of government, to perform some public function involving the distribution of public moneys (Greve et al. 1999; *Oxford Dictionary of Law* 2015)

To answer the opening question of this chapter a temporal division is needed for addressing the creation of LACs (1973-1981) separately from policy debates on legal aid throughout the implementation of these institutions (1981-1990).

Before 1981 this chapter argues that the legal reform creating LACs did not conform to a policy directed to improve access to legal services; but, rather, it was an incidental result of policies aimed at reducing professional power. Rather than LACs becoming the output of the new constitutional order established in 1980, which introduced legal representation as a constitutional right, their creation belonged to the process of reshaping the profession's governing laws, prompted by the constitutional prohibition against mandatory affiliation to any professional association as a requirement to practise. While the introduction of LACs put an end to the CBA's legal aid provision and control over the final stage of future lawyers' training, these new institutions were only created after stripping the CBA (as well as every other professional association) of its statutory powers and prerogatives.

The policy debates which led to the reduction of professional power and the incidental creation of the LACs reflected the ideological struggles within the military regime between corporatism and neoliberalism. Corporatism (as discussed in Chapter 3) is a system of interest representation where intermediate groups, rather than state branches, such as professional associations made and/or implement policies; while neoliberalism (as discussed in Chapter 1) is an ideology which, on one view, subordinates the social, political and cultural spheres to a self-regulating economic market, casting governments as investors and facilitators of trade (Freeden 2015:110). In regulating the professions, the dictatorship veered towards neoliberalism, which ended with the displacement of the legal profession's influence over legal aid provision. On the other hand, LACs became a trade-off between tradition and innovation. Tradition was maintained by deepening corporatist representation in state sponsored schemes of services delivery, and innovation fostered through market-driven mechanisms for provision of legal services. Besides this ideological haggling,

it is also possible to identify elements of continuity in the field of legal aid related to corporatist representation of professional interests, as we shall see with respect to the LACs' board composition.

After the creation of LACs in 1981, reform to legal aid provision did not disappear completely from the government's agenda – it was announced in the statutes governing LACs. Nonetheless, an economic crisis emerged in 1982-1983 which brought several legal reforms to a standstill, including transformations to legal aid. LACs became a halfway-house alternative to state or market provision of legal services. Regarding legal aid through legal training, this scheme provided the regime with a low cost solution to the increasing demand for legal services as the marketisation of higher education would gradually supply the Corporations with an increasing corps of unpaid law graduates per year.

Keeping legal aid through legal training may have operated as a pragmatic compromise as well, reducing the strained relationship between the dictatorship and the legal profession following the reduction of the latter's professional power. The persistence of the role of law graduates in training as a substantive part of legal aid delivery upheld the legal profession's ethos supporting the CBA's scheme, becoming a form of concession from the government after intensively reforming different laws altering the former's legal prerogatives. The consequences of this decision would be perceived after the reinstitution of democratic rule, when this legal professional ethos played a constraining role over repertoires of change to the legal aid through legal training scheme (see Chapter 5). Nonetheless, the creation of LACs did not limit to mere 'under new management' reform, as during their first decade in operation the seeds to forthcoming criticism over their training responsibilities were planted.

This chapter is outlined in four sections. The first section explains the authoritarian facet of the new political context, enmeshed with repressive measures undertaken by the dictatorship after seizing power. Some of these actions targeted lawyers and the CBA, producing different responses from the latter. The second section focuses on the radical changes pursued by the dictatorship as expressed during the process which led to the Constitution of 1980. This section analyses the debate regarding the rights to legal representation and the dichotomy between compulsory and voluntary membership of professional associations, embedded in that ideological struggle between corporatism and neoliberalism. The third section reflects on the legal outcomes of the new constitutional order. The constitutional prohibition against compulsory membership as a requirement to practise became incompatible with the existing legislation on professional associations. New laws reduced these organisations to voluntary and nonexclusive trade associations. The introduction of freedom of education, encompassing the right to found new universities, reshaped legal education's supply and demand, and consequently, the legal profession with the increasing entry of new lawyers per year. Finally, the fulfilment of the right to legal representation kept open the question about the adequacy of the legal aid through legal training scheme. This schism underlies the creation of LAC in 1981. The fourth and final section considers why the legal aid through legal training scheme and its governing institutions – the LACs - withstood unchanged during the last decade of the military regime's administration.

The dictatorship's reactive dimension

Manuel Garretón, a scholar of sociology, while writing on the military regimes in Latin America (1983; 1989) introduced two dimensions of political action which

helps analysing the Chilean authoritarian regime (1983:125). These two are reactive and foundational which are useful because they permit classifying different policies on legal aid and the legal profession in light of these two dimensions. The *reactive dimension* expressed itself through repression and the dismemberment of the socio-political system. The *foundational dimension* related to the attempt to materialise a historical project - the creation of a capitalist order through a market-oriented economy.

Drawing from Garreton's framing I now look at the dictatorship's reactive characteristics before moving on to the foundational aspects.

After the coup on 11 September 1973, the dictatorship imposed military jurisdiction on civilians, declaring a state of siege as if it was a state of internal war (Loveman 2004:126). Lawyers who defended leftist prisoners and victims of persecution were harassed, terrorised, exiled and/or tortured (Constable and Valenzuela 1991:119–22). Access to their clients was impeded to the extent that lawyers had to trace them by using their own and third-party documents that proved their imprisonment. Military prosecutors only allowed one day per month for interviewing defendants and non-attendance by prosecutors was a common practice to delay cases and extend the imprisonment of criminal defendants (*Comisión Nacional sobre Prisión Política y Tortura* 2004:177–8).

The Supreme Court explicitly supported the Military Junta and exhibited an unwillingness to react to thousands of habeas corpus petitions: '[o]f the more than 6,000 habeas corpus writs filed by relatives during the dictatorship, fewer than ten were accepted despite evidence of extra-judicial executions, forced disappearance, and torture. The standard-form denials offered by security forces were simply accepted at face value by the courts' (Sugarman 2009:274). The Supreme Court's

loyalty to the dictatorship was also manifested by taking measures against judges and court officials accused of being Marxists, publicly supporting the regime by defending its record on human rights and criticising international organisations reporting abuses (Huneeus 2007:55).

In relation to law schools, the Supreme Court was openly critical about the change of orientation in legal studies during the late 1960s and its socio-legal curriculum (Bascuñan 1988). Thus, with the intervention into universities by the dictatorship, in 1976 there was a regression to the old 1930s law curriculum characterised by a positivist, doctrinal approach to legal studies following a rigid syllabus (Arriagada 2014:555; Franz et al. 2014). Legal academics who supported the military coup collaborated in the removal of left-wing colleagues from their academic posts (Ruiz-Tagle 2013). Other academics played a role in legitimating the military coup and the Military Junta's constituent power, drawing on arguments based on natural law jurisprudence (Cristi 2000a).

Similarly, from the outset the dictatorship showed a combative attitude towards *all* professional associations, because of a latent concern that they might mobilise against the regime as some of them had done against the deposed Popular Unity government. Elections of members of professional associations were banned after the coup. The next step against professionals' political activities came in March 1974 when the regime restricted professional associations' autonomy by authorising the Ministry of Interior to replace board members and even to request their resignation forcibly (Decree-Statute 349 of 1974).

The CBA offered a 'dual response' to these repressive measures, a notion coined by Halliday (1982:920) to describe the different forms of collective action performed by the Chicago Bar Association with respect to controversial public

policies (i.e. limitations to rights in the McCarthyism era): a public face offering patriotic support or acceptance of the policy's purpose; a private face mobilising against some of the legal issues caused by those policies. This dualism from the CBA towards the dictatorship's controversial repressive policies developed as follows: public support for the military coup and private contestation with some of the legal issues surrounding military repression. Regarding public support, as explained in the previous chapter, the CBA had backed the new administration, communicating to foreign bar associations its support for the military government (Colegio 1973). Another example of this backing now connected to legal aid provision was the case of a law graduate who made political remarks against the regime in an oral argument before a military court. The CBA reprimanded the graduate for this intervention, allocating a new criminal defender as requested by the military prosecutor (Fuenzalida 2018).

Acts of private resistance, on the other hand, were strictly legalistic. Led by its chairman, the Christian Democrat constitutionalist Alejandro Silva, the CBA opposed both individual and corporate forms of repression. In 1973, such opposition included the CBA's demand from the dictatorship that their members be free to communicate with defendants, and the right to access the content of indictments (Barros 2014). With respect to legal aid, it became common practice to encourage using delaying tactics to allow law graduates to prepare their defences of criminal defendants, such as withdrawing from the case, forcing military courts to postpone hearings. If the military courts complained about this, the CBA replied with a literal interpretation of procedural laws governing military jurisdiction to justify its decision (*Colegio de Abogados* 1974).

Perhaps in return, the dictatorship agreed to soften some of the more general restrictions applied to professional associations with respect to the CBA, justifying that approach by reference to the relevant role the CBA played in the administration of justice (Decree-Statute 474 of 1974). However, it did not authorise the CBA to hold internal elections. Instead, it extended the terms of the then current board members and allowed the board to appoint members when a vacancy arose (Decree-Statute 971 of 1975).

This policy was subsequently activated with the vote of no confidence by a majority of board members against its chairman, blaming him for 'protecting a number of Marxist delinquents and turning it [the CBA] into a sort of medieval church where there was impunity for just showing up and being welcomed' (council member Carlos Cruz-Coke, *Qué Pasa* 1977:34). The new chairman of the CBA, Julio Salas (1974–1975) had a less combative attitude towards the regime, for example denying the existence of human rights violations (Cavallo et al. 2008:3619).

The dictatorship's foundational dimension

In parallel to this reactive dimension expressed through repressive measures, the foundational dimension of the dictatorship's political action related to the creation of a capitalist order through a market-oriented economy. This foundational dimension was present from the outset of the regime too. The first public statement by the Military Junta acknowledged the 'serious social and moral crisis going through the country' as well as the 'incompetence of the government to control chaos' (*El Mercurio* 1973). Thus, the Armed Forces and the Police Services 'will initiate the historic and responsible mission of fighting for the liberation of the Fatherland and avoiding that our country continues under the Marxist yoke; and the restoration of

order and institutions' (*Id*). The political momentum underlying the military coup was expressed through the topical phrases 'national restoration' and 'national reconstruction'.

This foundational dimension was closely related to a strongly neoliberal group of economists from the technocratic financial services sector. Nonetheless, neoliberalism was not the only alternative for the regime. Other ideological possibilities for this period were corporatism and nationalism. For the purposes of this dissertation, nationalism did not play a relevant role in the discussion about the laws on legal aid or governing professions as neither were validated nor repudiated as affirmations or negations of national identity, respectively.

The following sections analyse corporatism and neoliberalism and their possible impact on the development of the new law on the legal profession and legal services' provision for the poor.

Corporatism

The previous chapter evaluated the different varieties of corporatism and how they permeated Chilean politics from the late 1920s onwards. While representatives of the legal profession were not considered in executive and legislative capacities on the ground of being members of a professional guild, members of the CBA board were not banned to run for congressional seats nor forced to withdraw from their guild responsibilities to stay in office. The previous chapter demonstrated that the regulation of legal aid followed a corporatist model, where the legal profession through its representative organisation – the CBA – designed and implemented policies on legal services' delivery.

After the coup of 1973, for the first time in Chilean politics advocates of corporatism expected a full-scale corporatist society promoted by the dictatorship to

materialise. According to Cristi and Ruiz (1990:45–6), these corporatist advocates were conservative intellectuals, hostile to liberalism and socialism, furthering social corporatism as effected by spontaneous associations representative of the '*fuerzas vivas*' (loosely translated as the 'silent majority'; Payne 2011:11).

In March 1974, the dictatorship published a manifesto known as the Declaration of Principles, positively embracing a nationalistic rhetoric with elements closer to corporatism. This document began by announcing that 'Chile initiates its *national reconstruction* in moments when a deep crisis upsets the world' (*Gobierno de Chile* 1974: Section I, emphasis added). Unsurprisingly, the Declaration rejected Marxism, but it also condemned consumerism and economic materialism.

Essentially, it proclaimed a separation between political and social power. This strand of corporatism divided power between two forms of political and social sovereignty, targeted at safeguarding national unity and avoiding social atomisation through a strong state (political), while guaranteeing total and comprehensive depoliticisation of intermediate associations, particularly professional associations, and union guilds (social) (Cristi and Ruiz 1990:47–8). Political power referred to the power related to governing a country; social power concerned 'the power of society's intermediate bodies to develop with legitimate autonomy towards their own specific ends, at the same time transforming themselves into vehicles limiting as well as enriching the exercise of political power' (*Gobierno de Chile* 1974:Section III.6a).

To achieve these goals, social power was said to be depoliticised and devolved to social organisations mediating between the individual and the state: 'Of particular importance within these organisations are trade associations, whether they are labour, business, professional or student related' (*Idem*). The Declaration proposed redefining the role played by trade associations hitherto, by not limiting themselves to a

demanding role before political power, but also to become technical co-operators of society: 'Thus, our democracy will be organic, social and participative'(*Idem*).

Continuing with the existing model of legal aid provision and training of future lawyers, as managed by the specific occupational organisation, had the potential to coalesce corporatist principles of non-political, technocratic, and disciplinarian government with discourses on professionalism focused on service orientation towards the public.

Neoliberalism

Chapter 1 reviewed critical literature of professions, especially on lawyers, which, in a nutshell, focused on the conditions permitting professions to exercise control over the market of expert services and induce demand from consumers. Legal aid provision was a usual research setting for assessing the previous claims and elaborate policy proposals to tackle those issues. These critical accounts and reform propositions were elaborated by sociologists and progressive legal academics from a Neo-Marxist perspective, as well as by economists usually associated with neoliberalism.

In the Chilean instance, because of the repressive measures undertaken by the military dictatorship examined above, where left-wing ideologies were censored from the public and academic sphere and their supporters persecuted, neo-Marxist assessments on these topics became a rather impossible task. On the contrary, neoliberalism was in the spotlight from the military regime's early days. Chile has been considered to have been the first neoliberal state formation experiment: 'a state apparatus whose fundamental mission was to facilitate conditions for profitable capital accumulation on the part of both domestic and foreign capital' (Harvey 2005:7).

Peck and Tickell (2002:383) distinguish two historical stages of processes of neoliberalisation: *roll-back* (1970–1990) and *roll-out* (1990 onwards) neoliberalism. *Roll-back* neoliberalism characterised by a pattern of deregulation and dismantlement, concerned with the destruction or deconstruction of anticompetitive institutions 'rather than with the purposeful *construction* of alternative regulatory structures' (*Idem*:386, emphasis in the original). *Roll-out* neoliberalism, on the other hand, is characterised by a pattern of active state building and regulatory reform (*Idem:*388).

Roll-back neoliberalism has explanatory value for the period discussed in this chapter. The backdrop to these changes was external conditions to the neoliberal project itself, such as the macroeconomic crisis of the 1970s blamed on more statist Keynesian interventionism on financial regulation, unions, labour markets and corporatist planning (*Idem*:390). Politicians from the right side of the political spectrum took the spotlight, legitimating their leading position through causes such as freeing-up markets, restoring managerial rights, and focusing on individual rather than social entitlements (*Idem*:388).

Neoliberalism's first expression in Chile was a market-oriented programme elaborated before the coup and known locally as *El Ladrillo* (The Brick) because of its size (Huneeus 2000:465, Steger and Roy 2010:100; Caldwell and Montes 2015:271). Not published until 1992 (CEP 1992), it was originally drafted in 1969 by economists who had studied at the University of Chicago under the supervision of Milton Friedman or closely followed his theories (locally referred to as the *Chicago Boys*). Friedman's influence on governmental policymakers at the time has been recounted in a book paying tribute to the Nobel Prize economist, authored by former ministers of the dictatorship (Lüders and Rosende 2015). In a chapter analysing the impact of *Capitalism and Freedom*, a former minister argued that Friedman's link

between political freedom and economic freedom 'has been clearly demonstrated in the Chilean experience', where limiting and dispersing governmental power within different estates constitutive of social life 'have become the foundation of a regime which aspires that the value of freedom enlightens all human actions' (Cáceres 2015:283–4).

The Brick was prepared as a possible manifesto for the right-wing presidential candidate for the 1970 election, former President Jorge Alessandri (1958–1964). As one of its authors recalled, Alessandri's candidacy team agreed with the programme, but considered that its policies should be implemented gradually rather than in one single push (de Castro 1992). In 1973, before the coup, *El Ladrillo* was updated, inviting new contributors who later worked for the regime.

The Brick became the main economic plan for the dictatorship, reflecting its foundational character as a critical assessment of the existing economic policies and proposals to overcome them. This document identified the cause for the crises affecting the country as 'the mistaken economic policies' introduced since the Great Depression of 1929 (CEP 1992:19). In broad terms, its proposals were aimed at opening up the economy to foreign exchange and investment, eliminating monopolies, putting an end to tariffs through deregulation, reforming taxation, creating a new pension system, normalising the agriculture sector after the agrarian reform that was carried out during the late 1960s and early 1970s, and protecting property rights. The policies that this group of technocrats drew up to surpass these crises demanded, according to their authors, to be implemented as a whole rather than in parts (CEP 1992:22).

The delivery of legal services through a monopolistic system controlled by legal professionals was antithetical to the patterns of deregulation and dismantlement characteristic of roll-back neoliberalisation.

Merging and rupture of corporatism and neoliberalism

Cristi and Ruiz (1990:48) have argued that during the early years of the regime there was a conservative synthesis between corporatists and neoliberals (and nationalists too). Corporatists, known as *gremialistas* (guilders), welcomed the neoliberal denunciation of state-ism and its praise for the market as a basis for a libertarian society. Conversely, neoliberals embraced corporatism's defence of social power and the autonomy it assigned to intermediate associations, which neoliberals would extend to the whole range of market transactions.

Nonetheless, after 1975, the regime swung to neoliberalism as its preferred ideology (*Idem*:52). Most cabinet positions had been filled with members of the armed forces and were subsequently replaced with civilians, including the so-called *Chicago Boys*. The appeal of neoliberal ideas received a boost when, in March 1975, Friedman himself visited the country, delivering several interviews and lectures, all of which were extensively covered by the press (Montes 2016). During his visit, joined by other economists, Friedman met with Pinochet to discuss economic policies. After his visit, he wrote a letter to Pinochet with several recommendations aimed at supporting Chile's economic recovery; Pinochet replied that several of his recommendations had been anticipated by his staff and were at the stage of implementation (Friedman and Friedman 1998).

The adoption of *Chicago Boys* policies – which included reversing nationalisations, privatisation of public assets, social security, and exploitation of natural resources, freeing the labour market from legal restraints, and terminating

import-substitution policies consisting of fostering national industries by subsidies or tariff substituted with export-led growth – was possible because the commander in chief of the air force, General Gustavo Leigh, was side-lined from the Military Junta by Pinochet himself (Harvey 2005:8). Leigh had been one of the main perpetrators of the coup, who had stated the need to 'eradicate Marxist cancer' from the country. He had been a critic of neoliberal policies, favouring corporatist and nationalist approaches instead (Valdivia 2001), and had contested Pinochet's power within the Military Junta both publicly and privately (Valdivia 2003). In 1978, Leigh was removed from the Military Junta (*El País* 1978).

This debate between advocates for corporatism and neoliberalism was also part of the elaboration of a new constitution. The next subsections will focus on the constitutional debates on access to justice and professional associations as examples of these ideological struggles.

The elaboration of a new constitution

Less than two weeks after the Military Junta had seized power, the foundational thrust was articulated through the elaboration of a new Constitution (Barros 2002:88). For Pinochet, the new Constitution was the second stage of the course set by the regime, in his famous *post hoc* speech known as *Discurso de Chacarillas*, delivered in 1977 (Cavallo et al. 2008:20674).[8] The first stage was of *recovery* (1973–1981), where power was held by the armed forces. The second was of *transition* (1981–1985), where civil–military authorities would direct the country progressively towards democracy. The final stage would be of *constitutional regularity* (from 1985), where

[8] The discourse is available at https://es.wikisource.org/wiki/Discurso_de_Chacarillas [18.10.2020]

two-thirds of the legislative authorities would be democratically elected and the remaining third would be appointed by the government.

The disaggregation of ideologies within the regime (Moustafa and Ginsburg 2008) was heightened by the fragmented process for drafting a new Constitution, consisting of three subsequent work stages: the creation of a new Constitution by a commission of legal scholars, the revision of this work by a corporatist body, and the legislative work by the Military Junta.

The debate before the *Comisión Ortúzar*

The first stage began immediately after the coup with the creation of a commission of constitutional law scholars, officially denominated as *Comisión de Estudios de la Nueva Constitución* (CENC). It was also locally known as *Comisión Ortúzar* because it was presided over by Enrique Ortúzar, a former minister during the last right-wing democratically elected government (1958–1964). Among its members was the prominent constitutionalist and then chair of the CBA, Alejandro Silva, affiliated to the Christian Democracy party. Another influential member was Jaime Guzman, one of Pinochet's closest advisors – he wrote several of Pinochet's speeches including the *Discurso de Chacarillas* of 1977 – and an ideologue of the regime who shifted from Spanish corporatism towards neoliberalism.[9]

The Commission's work went further than limiting itself to drafting the basis for a new constitution because the Military Junta, after assuming power, decided to enact these proposals in the form of Decree-Statutes, gradually replacing the constitution of 1925. On the subject of constitutional rights, the new rules elaborated by the Commission became the Decree-Statute 1,552 of 1976, known as *Acta*

[9] On Guzman's role during the dictatorship and legacy in Chilean politics, see Cavallo et al. 2008, Huneeus 2007, Cristi 2000, 2015 and 2016, Herrera 2014 and 2015.

Constitucional Número 3 (Constitutional Act Number 3) (Cavallo et al. 2008: Chapter 16).

The right to legal representation

The Commission began discussing a possible new right to legal representation in an environment personified with an ambitious legal agenda announced by the MoJ, where 'every stage of National Restoration goes through the path of the Law' (*El Mercurio* 1973a). This agenda included updating every statute book or code and the creation of neighbourhood courts.

The regime began working on reforms to legal aid from the outset, announcing the creation of a National Juridical Service, which was welcomed by some newspapers as an initiative that would 'democratise justice' (*El Mercurio* 1973b). The government organised a task force in 1973 with this purpose in mind, inviting the CBA to participate in this reform (*Colegio de Abogados* 1973a).

The draft Bill proposed by the government considered creating a new national service separated from the CBA. The CBA's role was reduced to that of the overseer of the new service, stripping it of its legal aid provision and training duties, with the sole exception of regulating the *abogado de turno* (*Ministerio de Justicia* 1974: article 29). This new service would be headed by a lawyer appointed as general director by the CBA from a proposal coming from the new directive body of the service, the National Council. This directive body would be composed of five members appointed by the CBA, one professor of law appointed by the law schools and a representative of the judicial branch appointed by the Supreme Court (*Idem*: articles 5 & 8). The design for the National Council would be mimicked at the regional level, creating Regional Councils with similar composition of members (*Idem*: article 13). Regarding

mandatory training of prospective lawyers, the only change pondered was increasing the period to one year (*Idem*: article 26).

The CBA expressed its discontent to the MoJ for losing legal aid delivery and for introducing new actors from law schools and the judicial branch, and rather advocated for the allocation of more funds to improve what already existed (*Colegio de Abogados* 1974a). The CBA resorted to a professionalism rhetoric justifying the dependence of legal aid delivery as part of its organisation 'which constitutes the most complete guarantee that it will continue being a depoliticised organisation' (*Idem*). The Supreme Court declared to the government that this Bill was inappropriate, though records do not state its reasons behind this position (*Ministerio de Justicia* 1976:16). In light of this opinion, the government decided not to continue with the Bill and instead allocated more resources to the CBA's centres (*Idem*).

At the constitution-making level, the Commission deliberated on whether introducing the right to legal representation as part of the guarantee of due process of law. The Universal Declaration of Human Rights, proclaimed by the United Nation in 1948, sets forth the right 'in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him' (article 10), without mentioning the right to legal representation or defence. The International Covenant on Civil and Political Rights (ICCPR), ratified by Chile in 1972, considers legal assistance as part of a series of minimum guarantees in the determination of any criminal charge against individuals, assigned to them only 'where the interests of justice so require' and if they lack 'sufficient means to pay for it' (article 14 3.d). The American Convention on Human Rights (ACHR), adopted in 1969, guarantees the right to a fair trial, which entitles every person accused of a criminal offense to 'the inalienable right to be

assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law' (Article 8 2.e). Nonetheless, at least regarding this matter, neither of these international instruments were discussed by the Commission's debate – regarding the ACHR, the postponement of its ratification, which occurred just before Pinochet left office in 1990, probably was part of the reasons.

The author of this proposal was the former chair of the CBA Alejandro Silva, whose draft reflected what Alexy (2002:120–7) classifies as defensive (right to negative acts) and performative (right to positive acts) rights. From a defensive rights perspective, this proposal stated the following:

> Every person has the right to request for assistance from a lawyer and no authority or individual may impede or disturb the lawyer's due intervention when sought. (CENC 100, 6/1/75 (3), read by the chair Ortúzar)

Silva argued that the new Constitution would be 'so respectful of the legal profession that it would elevate to constitutional status lawyers' right and, consequently, duty to perform whenever required [by their clients]' (CENC 100, 6/1/75 (3), intervention Silva). From a positive rights perspective, it indicated the following:

> The state must provide legal assistance to those who, in order to enforce the rights entitled to them by the law, cannot afford it. (CENC 100, 6/1/75 (3), intervention Ortúzar)

Silva's proposal mandated the state to provide legal assistance, which was reminiscent of the Christian Democracy's 1965 failed constitutional reform to introduce a state duty to deliver legal services (*Idem*; see also Chapter 3). His proposal did not circumscribe legal assistance to criminal defence, departing from the international provisions cited above.

While the right to shelter lawyers from undue intervention was welcomed by the commissioners with minor amendments, the state duty regarding legal

representation was subjected to criticism as it could make the nationalisation of legal aid provision possible, as transpired during the previous deposed government. Thus:

> [Silva] should bear in mind the efforts he had to deploy to convince some statists of legal assistance, about the inconvenience of depriving the Chilean Bar Association of being in charge of this important collective task, and hand it to a public service that, evidently, will be politicised at some future date. (CENC 100, 6/1/75 (3), intervention Evans)

Eugenio Evans, a constitutional law scholar and Christian Democrat, suggested that a rule on this topic should allow flexibility for the CBA to keep running its scheme and, simultaneously, the state might also deliver specialised legal assistance (*Idem*). Evans justified a restricted mandate – only the law should define the means for providing legal services – considering that future reform to the CBA's scheme was highly possible. In that situation:

> he prefers that the legislator, according to an express constitutional mandate, is the only one who can intervene in an extremely delicate field, and that it will not be allowed altering the current system or deprive the General Council of the Chilean Bar Association of this responsibility through administrative action or any other mechanism (CENC 103, 16.1.75 (3), intervention Evans).

The Commission considered separate proposals to establish which state branch had the power to determine the means to provide legal services, whether it was the exclusive remit of the legislature (Evans) or shared with the executive (Silva) (CENC 100, 6/1/75 (3), intervention Ortúzar; 103, 16.1.75 (3), interventions from Ortúzar and Silva). The Commission agreed with the restricted position furthered by Evans, passing it with minor modifications (CENC 103, 16.1.75 (3), intervention Ortúzar).

The corporatist-neoliberalist disagreement regarding the consequences of the right to legal representation for legal aid provision was rather subtle, particularly as the approved text kept open the possibility of continuing with the CBA' scheme as well as permitting future innovations. This was not the case on prospective

constitutional law governing professions, particularly on the subject of compulsory membership in order to practise a profession.

Freedom to work and compulsory membership to professional associations

When the Commission began analysing constitutional provisions related to professions and professional associations, early signs favoured continuance with tradition, even if this path appeared to be at odds with neoliberal principles. The Antitrust Commission, an administrative agency with wide rulemaking and adjudicatory powers, had ruled that the CBA's power to impose fixed fees or tariffs on legal services did not constitute a monopolistic agreement between private actors. Instead, it was a public power exercised by a parastatal professional organisation (*Comisión Resolutiva Antimonopolios* 1974).

The commissioners debated the professional associations' role in the new constitutional order, in relation to the constitutional rights to freedom of education, association and work. On freedom of education, the Commission deliberated on whether to create a new body, the Council for Higher Education – composed of representatives of universities, the state and professional associations in accordance to corporatism –, with the power to oversee the investment of public funds in higher education and the quality of the educational degrees being offered (CENC 151, 9/9/75 (5)). The Commission rejected creating this council.

Similarly, when the Commission discussed the right to freedom of association and its negative dimension as a right not to associate, it considered introducing an exception to allow mandatory affiliation to professional associations (CENC 127, 5.6.75 (4), intervention Silva). Nevertheless, as the Commission understood that mandatory affiliation referred to a practice qualification rather than to an exception to voluntarily decide to become a member of a certain professional association, it opted

for relegating this issue to a future time when it would be addressing the regulation of freedom to work (CENC 127, 5.6.75 (4), approving Ovalle's proposal).

The position closer to keeping the existing corporatist design was defended by Silva. He argued there existed a historical tradition of securing the national interest by imposing additional requirements to practise a profession, which was absent regarding other less qualified occupations (CENC 208, 6.5.1976 (6)). Silva distinguished professional associations' social role on delivering general welfare from that of unions, aimed at increasing workers' welfare. He warned against the introduction of a common constitutional regulation for both forms of organisations:

> professional associations have social significance, a social occupation considered relevant by the collective body, and those who are called to act in this relevant social occupation must pursue general welfare as to which is called this activity as a first goal, and not to prioritise personal profit, which must be pursued as a secondary goal. (CENC 206, 29.4.1976 (6))

Guzman offered the opposing argument against conferring a special status to professional associations, closer to concerns coming from neoliberal advocates. He coined the label of '*guild tyranny*', referring to the strengthening of professional associations through the introduction of additional practice requirements:

> they have damaged the field of universities with excessive practice requirements on the basis of demanding to become members of a particular guild, a particular professional association. (CENC 206, 29.4.1976 (6))

The position furthered by Guzman was criticised by other commissioners for not taking a stance on voluntary or compulsory membership (CENC 208, 6.5.1976 (6) intervention Evans) and partially praised by those sceptical towards compulsory membership (CENC 208, 6.5.1976 (6), intervention Ortúzar).

The debate came to an end in a further session, where the Commission discussed a proposal by Silva permitting compulsory membership to professional associations, following article 82 of the Venezuelan Constitution of 1961: 'The law

shall determine which professions require a university degree and what conditions must be met to practise them. Membership of a professional association is compulsory in order to practise those professions the law requires a university degree.' (CENC 211, 13.5.76 (6)). The Commission agreed to include a similar rule as it would limit the 'inadequate, inconvenient and inappropriate proliferation' of occupational associations, because this exception to voluntary membership was circumscribed solely to university professions (*Idem*, intervention Ovalle).

The Venezuelan Constitution was the only comparative example considered by the Commission, probably as it was the only constitution in Latin America at the time which explicitly authorised compulsory affiliation by law. The ACHR (article 16) and ICCPR (article 22) differentiate between authorised restrictions to freedom of association (on grounds such as safeguarding national security, public health or the rights and freedoms of others) and deprivation of the exercise of this right, which is only permitted regarding members of the armed forces and the police.

The review by the State Council

The second stage of the constitution-making process consisted of the review of the Commission's work by the State Council, composed of former Presidents and representatives of trade associations and '*fuerzas vivas*' (Cavallo et al. 2008:3145), including professional associations. The chair of the Commission, Enrique Ortúzar, participated in representation of the legal academy.

The review of the Commission's work with respect to legal representation and compulsory membership as a limit to freedom to work, was rather swift. The records do not show any relevant debate on either topic (CdE 58, 12/12/78; CdE 63, 16/1/79), only registering a unanimous approval. It is possible to hypothesise that the new constitutional provisions related to legal aid delivery were uncontested issues for the

State Council. The Commission's proposal struck a balance by innovating with respect to introducing legal representation as a constitutional right without suppressing the CBA's participation and allowing some leeway to the legislative branch to define new legal aid mechanisms. With respect to mandatory affiliation as an exception to freedom to work, it satisfied those corporatist trends within the State Council. Incumbent stakeholders such as lawyers, the CBA and law schools (and even the Commission), were represented at the State Council, favouring existing institutions and practices on the matter.

The Military Junta's final draft

The final draft of the new Constitution had to be approved by the Military Junta. Regarding this last stage, there is no public register of this work or about the identities of the key actors that aided the members of the Junta during the drafting process (Huneeus 2000a:228–45). Nonetheless, to elucidate possible debates on the constitutional provisions associated to legal aid through legal training, policies developed in related fields may be used as proxies.

The right to legal representation

With respect to the right to legal representation, there were signals of a process of weakening the CBA's monopoly over legal aid. The legal academy criticised the CBA for using the money allocated by the government for legal aid to fund other needs (Mosquera 1977). It was argued that legal aid should transition to a mixed model of delivery (Cáceres 1975), a trend common at the time in other jurisdictions (see Chapter 1). Claimants should have a right to choose their lawyers freely from a list of practitioners by speciality made out by the CBA, which would also have a cadre of

public-salaried lawyers ‘to make use of students in practice’ (Cáceres 1975:218). This new model should be funded through mandatory social insurance (*Idem*).

Legislation also undermined the CBA’s control over legal aid provision. From 1934 until 1978, the CBA was the sole authority with the power to conduct means tests for eligibility (see Chapter 3). The dictatorship passed a new statute, the Decree-Statute 2,399 (1978), which enlarged the provision of legal services to the poor by recognising the power to conduct their own means test for eligibility to legal clinics, which belonged to law schools, and the Women’s National Service.

Closer to the enactment of the new Constitution, an announcement on legal aid reform side-lined the CBA. In 1979 General Pinochet announced “seven modernizations” to satisfy social needs, where he pointed out that “the need for a deep, systematic and global tackling of legal and justiciable problems of law and justice” led the government to work on a policy proposal creating “a National Legal Assistance System that allows people, who lack the necessary means, to exercise an effective defence of their rights and an expeditious and effective access to the administration of justice”. (*Gobierno de Chile* 1979:9).

The major innovation of this policy proposal regarded legal services provision through ‘cooperative entities’, whether public or private (*Colegio de Abogados* 1980: articles 3 and 17). These ‘cooperative entities’ would be certified (franchised) and coordinated by the National Consultative Committee, composed by nine members: four representatives of the CBA, one from the judiciary, two coming from the law schools, one from the Council of Universities, plus the National Director of the service (*Colegio de Abogados* 1979a). The government also considered as a possible alternative substituting this new public service with provision offered or coordinated by the MoJ (*Colegio de Abogados* 1980). A new body managing legal aid would have

permitted broadening legal services from the state, as the government would have had more control over expenditure, reducing the moral hazard affecting legal aid through legal training under the CBA's management. This policy proposal reflected a turn towards market-oriented reforms where a pool of providers – including the CBA – would compete for public funds. Thus, the CBA would be treated *as a competitor* in the market for legal services for the poor.

The CBA resisted these reform attempts by self-presenting to the authorities as the only institution that could guarantee nonpartisan provision of legal services (*Colegio de Abogados* 1979a). Opening a market for private legal providers, the CBA argued, might potentially include profit-seeking providers and, more importantly, lawyers and NGO's who were members of the opposition to the regime and represented political dissidents and armed revolutionaries persecuted by the dictatorship (Meili 2008; McEvoy 2019). The CBA made the following remarks against this draft Bill:

> The Ministry will be obliged to grant this recognition [to cooperative entities controlled by the opposition], since its refusal would be exploited at all levels before international organisations. (*Colegio de Abogados* 1979a)
>
> By including private legal persons, the Ministry is obliged to grant recognition to those who only pursue political purposes or profit, even if those practicing within those institutions are not lawyers [...] The Ministry would become exposed for having to grant recognition and consequently subsidise organisations whose true ends are to make politics against the Government through legally assisting terrorists whom they categorise as ideologists. (*Colegio de Abogados* 1980)

These politically motivated arguments contrast with the previously legalistic rhetoric of neutrality, of law's autonomy from politics displayed before the military courts, using procedural technicalities to ameliorate the limitations over lawyers and law graduates' representation of dissidents. Besides expressing its loyalty to the regime, the previous positions questioning profit-motivated providers were aimed at achieving

shelter from the legal services market. For the CBA, the fundamental problem with legal aid reduced to the lack of funding, which it represented constantly to the government by requesting an increase in the annual state subsidy (*Colegio de Abogados* 1979, 1980a).

The dictatorship did not proceed with this policy proposition as the agenda shifted towards the enactment of the new Constitution. On the right to legal representation the Military Junta's constitutional text provided the following:

> No authority or individual may impede, restrict, or disturb the due intervention of a lawyer when required. The law will indicate the means for providing legal advice and defence to those who cannot afford those services. (Article 19 Number 3)

This provision did not alter what had been previously approved by the Commission and passed by law in 1976. Thus, the Constitution of 1980 became the first Chilean Constitution to guarantee the right to legal counsel as a constitutional right in and of itself, without specifying exactly how it would be delivered.

Freedom to work and compulsory membership to professional associations

The Military Junta considered two options for the regulation of professional associations: to follow tradition by constitutionalising mandatory membership as a requisite to practise, or to guarantee unfettered freedom to work as part of the new free market orthodoxy. Laws closer to the enactment of the Constitution began restricting the CBA's control over practitioners, following a logic closer to the second option. The dictatorship suppressed tariffs, thus allowing professionals to negotiate their fees freely. It also ended the requirement of producing evidence of registration with the respective professional association for applying for public office (Decree-Statute 2,516 of 1979). The legal academy voiced its criticism against this reform

because it deprived the CBA of the power to discipline professional misconduct when negotiating legal fees with clients (Daniel 1980).

The Constitution of 1980 guaranteed the right to freedom to work, suppressing the possibility of legislatively ordering compulsory affiliation as a practice requirement:

> The Constitution guarantees to all persons: Freedom to work and its protection. (…) No law or public authority provision may require membership to any organisation or entity as a condition for carrying out a particular activity or work, nor disaffiliation to keep them. The law shall determine which professions require a university degree or title and the conditions to be met to practice them (Article 19 Number 16).

The ideological debate on this issue was won by those fostering neoliberal positions. Accordingly, the new Constitution outlawed compulsory membership to any organisation as a practice requirement, which included affiliation to professional associations.

The dictatorship held a plebiscite in 1980 to approve the new Constitution, criticised for its lack of transparency, being held without an electoral register, allowing only one rally to the opposition and the tight control over the press (Huneeus 2000:228–45). Unsurprisingly, the new Constitution was approved, coming into force in 1981. It set the basic framework for subsequent legislative change.

The Constitution retained several corporatist elements to constrain future democratically-elected legislators (Cristi 2000), making its presence felt through institutional senators, not elected by universal suffrage but appointed by the armed forces, police, judiciary, universities, and Comptroller General. The armed forces were sanctioned as permanent guarantors of the institutional order, intervening as part of a new National Security Council which could act without the acquiescence of the civil authorities (Loveman 2004:129). Nonetheless, the regime sought to implement a new institutional order that cohered with neoliberal tenets: fortifying private property

rights and economic liberties, limiting the state's role to a subsidiary one, and increasing technocratic authority by creating several autonomous and nonelected institutions (Bauer 1998:114–5).

The next section focuses on the legal outcomes produced by the 1980 Constitution regarding the legal profession and legal aid delivery.

The implementation of the Constitution of 1980

The literature on the changing relationships during the late 1970s and 1980s between the legal profession and the state, and the legal profession with the public, highlighted several social and economic forces which reshaped the legal profession (Abel 1989, Paterson 1996). Within forces identified are a demand for public accountability on behalf of consumers' rights; the increasing internal and competition for, and commercialisation and commodification of legal services favoured by the deregulation of protective rules of professional oligopolies; and the massive growth in the number of lawyers driven by the explosive growth of academic legal education.

In Chile, similar changing relationships emerged, connected to the policies implementing the Constitution of 1980, which had a large impact on the law governing professions and legal aid. Laws implementing the new treatment received by professional associations were rather hostile, effectively reducing professional power, as demonstrated by the CBA's dissimilar attitudes towards reforms to professional associations and legal aid. The CBA questioned changes to professional associations through a varied repertoire of professional politics, while becoming noticeably silent on being removed from legal services provision for the poor. Individuals became entitled to establish new universities and other educational institutions as secured by the right to freedom of education. The exercise of this

constitutional right would lead to massifying supply of legal education, in a context of higher demand for legal services from corporate and international clients. Finally, legal aid provision turned into an open question to be decided by statutory rules; thus, legislation was subsequently adapted to comply with this new constitutional order with the creation of LACs.

Deregulation and reregulation of professional associations

During the 1980s the restructuration of disciplinary procedures was a common response to the crescendo of external criticism, particularly for bars or law societies' lack of responsiveness to consumers' grievances. New structures created independent and physically separate complaints bureaus from representative bodies, and disaggregated fact-finding tasks from judging functions (Abel 1989:318 with respect to the English and Welsh Law Society's divisions). In the Chilean experience, the military government shared the criticism of unresponsiveness from the CBA, but went a step further with respect to the solution adopted.

The constitutional prohibition against compulsory membership on grounds of freedom to work created an antinomy with the existing legislation ordering mandatory affiliation to professional associations as a practice requirement. The government next enacted the Decree-Statute 3,621 of 1981 privatising professional associations. This law began with an explanation of motives, asserting that compulsory affiliation had favoured professional control over the market for expert services; labelling its disciplinary jurisdiction as 'an inconsistency' because the same entity promoting its members' interests was also adjudicating claims against those same members.

The Decree-Statue 3,621 left to the individual practitioner whether to affiliate with an association. This rule forced professional associations to choose between disbanding as organisations sanctioned by the state or continuing as private law

organisations assimilated to trade associations. The Decree-Statute 3,621 also 'privatised' the initiative to create new occupational organisations, in the sense that individuals (as opposed to the state) had the power to create such trade associations. The fragmentation of the collective structure of these occupational associations became possible. Finally, with respect to professional ethics, the wide regulatory and adjudicatory powers of professional associations were overridden, transferring jurisdiction over professional misconduct to courts.

The Minister of Employment, Miguel Kast, justified the changes towards professional associations in the name of freedom of choice, and the elimination of economic cartels and governmental control. This new legislation, he argued, was inspired by three basic goals:

> [T]o guarantee Chileans that they live in a free society; to guarantee them progress and to achieve real social justice, offering equal opportunities to those who face extreme poverty. Within this framework, the new law gives professions the same rights that most Chileans have, such as forming a trade association without bureaucratic hindrances. (*El Mercurio* 1981:A-14)

Professional associations opposed these changes because they considered them rashly enacted (*El Mercurio* 1981a). The chair of the Chilean Medical Association accused the government of following 'a book from Milton Freedman, which says that professional associations should not exist because they can become powerful pressure groups' (*El Mercurio* 1981b). The chair of the CBA claimed that the Decree-Statute was 'the monster we expected. This is going to be a disaster. There is no ethical nor logical reason to dissolve professional associations' (*Idem*). The CBA held a national referendum to consult the opinion of its members about becoming a trade association. Although the majority voted against it, the CBA as well as the other professional associations opted to continue as trade associations (*El Mercurio* 1981b).

As illustrated below (Figure 2), the legal reduction of the CBA to a nonexclusive and voluntary lawyers' trade association, combined with a massified provision of legal education, would diminish considerably its power and representativeness over the legal profession.

The CBA's mobilisation against the *Decreto Ley 3,621*

It is possible to identify three different strategies the CBA used to confront this new legal setting: compliance, opposition, and negotiation. As regards compliance, the CBA began adapting to this new legal landscape by adopting a rather formalistic attitude towards the new rules banning its disciplinary jurisdiction. The CBA communicated with potential claimants about its lack of jurisdiction with respect to new misconduct cases, while also requesting permission from the MoJ to conclude those cases initiated before the *Decreto Ley 3.621* came into force (approximately 159 cases) (*ADNCA* 7.6.1982).

Opposition occurred later when the CBA blamed the *Decreto Ley 3,621* exclusively for the crisis it was facing, a discourse that would also play a part when negotiating with the dictatorship. For example, it made a public statement denouncing the fact that ethical misconduct claims had become virtually non-existent since the *Decreto Ley 3,621* was enacted (*ADNCA* 10.1.1983).

Regarding negotiation, the CBA also engaged in constant bargaining with the military government in an attempt to reverse the suppression of some of the CBA's powers and prerogatives. The MoJ drafted a first Bill which introduced a new general code of ethics regulating every existing profession based on the CBA's 1948 Code of Professional Ethics. The Bill also conferred jurisdiction on the courts, announcing the future creation of dedicated and specialised courts (*ADNCA* 3.1.1982, 15.11.1982, 12.12.1983, 19.12.1983, 12.3.1984 and 9.4.1984). The CBA, after setting forth its

disagreement with the creation of new courts with exclusive jurisdiction on professional misconduct, suggested the government to enable claimants to choose their preferred forum between the CBA and the courts. In addition, it resisted the fact that the new code of professional ethics followed the CBA's code of ethics only partially, rather than in its entirety.

The dictatorship worked on a new Bill, that would establish a new regime for professional associations, reinstituting their disciplinary jurisdiction but limited to judging only their members (*ADNCA* 23.8.1984, 12.12.1984 and 19.12.1984). Simultaneously with these developments, the Federation of Professional Associations, an organisation representing every professional association except for the CBA, proposed returning to the legal framework prior to 1981. The CBA, in accordance with its compliant attitude towards the new Constitution, decided against endorsing this proposal, arguing that it unconstitutionally restrained freedom of association (Sierra and Fuenzalida 2014:447).

This bargaining process was interrupted during the second half of the 1980s with the election of new members to the CBA's general board who were also members of the opposition against the dictatorship. As a result, the CBA's previous agenda, driven mostly by professional interests, shifted to human rights issues (Couso 2007).

Marketisation of legal education and multiplication of lawyers

The sharp increase in the numbers of lawyers has become a common feature in several countries which experienced during the past 40-50 years a shift in control from the profession to the educational establishment regarding entry to the legal profession (Kritzer 2012). According to Galanter (2011), who has documented this phenomenon, this global take-off in lawyer numbers 'is fed by, and in turn drives, a

great increase in the number and enrollment of legal educational institutions, ranging from university law faculties to freestanding proprietary law schools' (*Idem*:72). The Chilean experience, where growth in the number of lawyers between 1982 to 2000 represented 74% (*Idem*:78), is illustrative of the previous finding.

The new free market orthodoxy manifested itself through the reshaping of the legislation governing entry to professional degrees. The Constitution stated the normative grounds for legislative reform: 'The Constitution guarantees to all persons: The right to education […] Freedom of education includes the right to open, organise and maintain educational establishments.' (Article 19 Numbers 10 and 11). The Decree with Force of Law 1 of 1981 'opened' the system of graduate education to private entrepreneurs. This rule entitled individuals to found universities. New universities and law schools were created, causing a massive growth in the professions. Tertiary education in Chile moved from an elite to a mass system in a relatively short period (OECD/World Bank 2009). In the case of the legal profession, the incumbent six law schools until 1981 became gradually defied by new entrants, amounting to a total of 49 law schools in 2014 (De la Maza et al 2016:21).

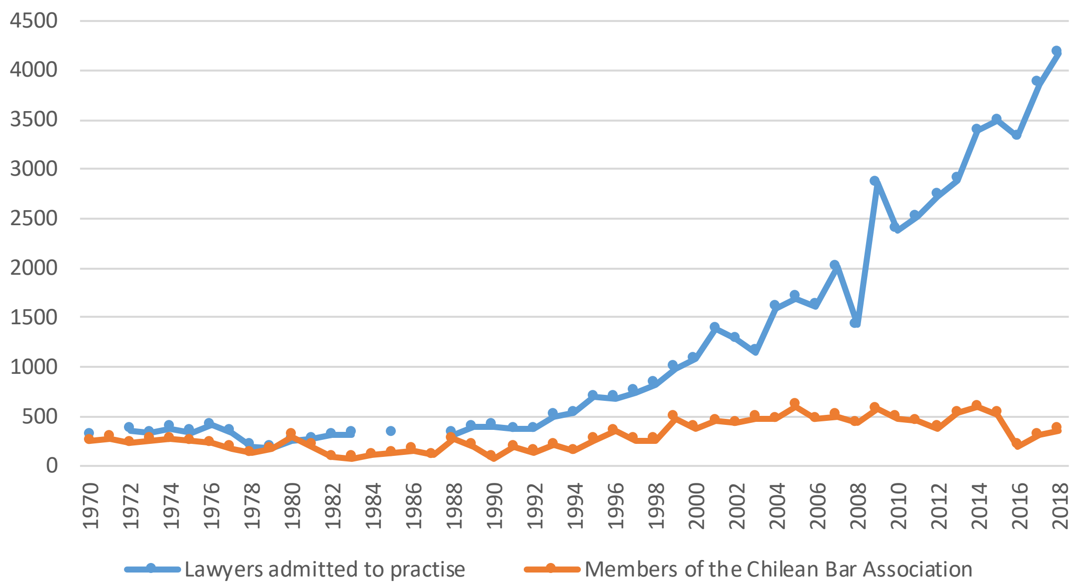
This tendency to increase enrolments has been explained comparatively by Kritzer (2012:210), attending to the incentives encountered by universities: revenue and prestige. In an educational system with a strong pre-existing prestige ranking, the argument goes, law schools lower down in the hierarchy will be minimally selective in their admissions to increase revenue, whereas those institutions already prestigious may still attract large numbers of well qualified applicants and have high enrolments. Regarding Chile, the pre-1981 six law schools became the benchmark for the new ones regarding prestige; conversely, former incumbent law schools were forced to compete with new entrants for potential students, which led to an increase in the total

number of placements. This trend, which began to be perceived from the second half of the 1980s, has not shown any signs of stoppage or significant decrease (Sierra 2019).

On the demand side, key attractions for choosing to study law include the potential financial rewards and the availability of financing (Kritzer 2012:216-217). From an economic perspective, a thirty-year longitudinal investigation evidenced that the return on investment for studying law in Chile is always positive (Urzúa (2012). The attraction of foreign capital generated by the new market economy imposed by the military regime created new demand for lawyers to act as brokers of multinational interests, translating those interests in accordance with national laws (Dezalay and Garth 2011). With respect to financing for coursing a law degree, De la Maza et al (2018) have shown that new sources of funding for tuition fees through student loans paradoxically made possible to achieve an old left-wing ideal of 'university for all', permitting previously postponed socioeconomic groups to access higher education.

The preceding changes in higher education, and particularly legal education, led to a substantial increase in the production of lawyers (Figure 2).

FIGURE 2 ADMISSIONS TO PRACTICE AND MEMBERSHIPS TO THE CHILEAN BAR ASSOCIATION 1970-2018



Source: Anríquez et al 2019:25

The increasing supply of and demand for legal education played a relevant factor in the development of 'Big Law' in Chile – the transition from a model of professional practice characterised by individual or small family firms which supplied legal services to unsophisticated economic actors, towards the emergence of law firms supplying a more sophisticated and complex demand for legal services from corporate clients (De la Maza et al 2016 and 2018). The Chilean legal profession went along with similar developments in other jurisdictions (Webley 2020:220), beginning an incipient process of internal segmentation characterised by a division between practitioners who provide services to the public from those who provide them to commercial entities.

Legal aid reform. The creation of the *Corporaciones de Asistencia Judicial*

The new constitutional rules guaranteed legal aid as a constitutional right, mandating the legislative branches to define the means for fulfilling this state duty. The 1980

Constitution did not prohibit recognising other state-funded or official legal aid providers, public or private, leaving open the possibility of further reforms. Legal change in this matter followed a common trend with other jurisdictions, of loosening the stranglehold that the legal profession had on legal aid schemes, by removing the administration from professional bodies to newly created government agencies (i.e., the creation in 1989 of the Legal Aid Board in the UK; Moorhead et al 2003:773). Nonetheless, as happened before with professional associations, reform in Chile went once again a step further, by completely removing the CBA's participation from every responsibility regarding legal aid delivery and compulsory training.

These legislative changes happened three months after the Decree-Statute 3,621 of 1981 came into force, with the enactment of Act 17,995 of 1981 creating the Metropolitana LAC. Subsequent statutes created two new LACs, the Decree with Force of Law 944 (Valparaiso) and the Decree with Force of Law 994 (Biobio) of the same year.

LACs have two main statutory mandates: a 'social goal', consisting of rendering legal aid to low-income people, and a 'didactic goal', which consists of providing law school graduates with a mandatory apprenticeship period (article 2, Act 17,995 of 1981; article 1, Decree 265 of 1985).

With respect to their legal status, the design of LACs presents a hybrid nature, as explained in the introduction to this chapter, akin to quasi-autonomous non-governmental organisations ('quangos'). Instead of a centralised public agency staffed with civil servants and governed by public law, each Corporation is autonomous from each other, and their staff are considered workers governed by the Code of Employment - a similar set-up to that of the CBA scheme. Although the MoJ oversees

their performance, these institutions are not organised as a public service belonging to the state.

A relevant consequence of not having the legal status of public services relates to LACs funding, as the state was not obliged to allocate public moneys to cover all their expenses. Besides an annual budget allocation coming from the government, the second source of funding were agreements with municipalities, which are autonomous from the executive branch. Among municipalities' statutory tasks is the provision of legal and social aid, directly or through agreements with other civil services (article 4 c) Municipalities Act). According to research participants, geographical coverage was increased through partnerships with the local councils, because there was not enough money for municipalities to deliver legal services themselves (Interviews 3 and 18). Coverage was improved by locating LAC lawyers and law graduates on municipal premises.

Headed by a general director, who must be a lawyer appointed by an honorary board of six members, the boards of the original three Corporations statutorily instituted in 1981 combined representation of professional (two lawyers on behalf of private practitioners), educational (two law deans coming from the existing law schools before 1981) and governmental (the MoJ's Regional Secretaries and the head of the State Defence Council) interests.

The transient nature of Legal Assistance Corporations

The statutes governing LACs announced a prospective Legal Aid System, where the Corporations would become authorised providers (article 13-j Act 17,995, Decrees with Statutory Force 944 and 995 of 1981). It was common to hear research participants mentioning those provisions to illustrate that, from their inception, prospective reform to LACs has been part of these institutions' life cycle.

This legislative decision resembled what happened in the case of professional ethics because the *Decreto Ley 3,621* (Transitory article 2) also announced the enactment of new ethical codes directly from the President for every profession. The dissimilarities, on the other hand, were procedural as well as of substance. On the procedural side, the announcement of a Legal Aid System had no timescale. Regarding professional ethics, there was a statutory deadline of six months for enacting new codes. A more substantial difference related to the underlying state–professions relationship. The *Decreto Ley 3,621* substituted professional self-regulation with state interventionism, as the sole authority for issuing rules was the executive branch and no consideration was given to a role for professional associations.

With respect to legal aid, on the other hand, although there is no record available about its intent, the most probable line of reform would have been towards a market-oriented system – similar to a franchised system of providers competing with LACs for legal aid clients where the state acted as a facilitator of opportunities ('steering, not rowing', as explained in Chapter 1). With the caveat that a comprehensive reform did not exist at the time, a key policymaker at the time asserted that legal change would have been,

> a mechanism in charge of funding, regulating and overseeing legal aid providers, but excluding direct provision from the state; a state mechanism fulfilling those three functions to stabilise that [private provision] (Interview 25).

This conclusion can be supported by the previous analysis of the data on what transpired between the CBA and the government regarding reform plans to legal aid during the second half of the 1970s. In a nutshell, those projects turned the CBA into another supplier of legal services rather than as the sole state-sanctioned and funded

provider. Indeed, this appears to have been a plausible model as it resembled contemporaneous reforms undertaken in other sectors such as health, where patients became entitled to choose between private or public provision through mandatory insurance (Aedo 2001). Moreover, legal aid reform in the line of tendering and competition between LAC provision and private professionals, were popular models in other jurisdictions sharing similar free market principles (i.e. Conservative governments in the UK in 1980s, Regan 1999:188).

The CBA's quietism regarding legal aid reform

In sharp contrast to what had happened with reform to professional ethics' jurisdiction and to its previous history (1964-1980) of zealously struggling against government intervention with respect to *SAJ* (Juridical Assistance Service), the CBA did not try to recover control over the legal aid scheme.

While there was intensive press coverage of the different positions regarding professional associations, news-reporting limited itself to reproducing the statutory language of Act 17,995, without acknowledging the existence of any criticism referring to the creation of the LACs (*El Mercurio* 1981c). For their initial implementation LACs used the CBA's premises and its workforce; and, sometimes, LACs appointed as general directors those lawyers who were working as heads of each CBA centre. The CBA's regulations and practices for training law graduates were followed until the enactment of new regulations in 1985 (Interviews 3, 6, 11 and 15).

The CBA's silent attitude is rather unexpected considering the common opinion among several research participants on the reasons which motivated this reform. Accordingly, the creation of LACs was not a well-thought-thorough policy on

legal aid, but rather the necessary consequence of the new constitutional regime forbidding compulsory membership to practise (Interviews 1, 2, 3 and 17).

Corroborating participants' view, the legislative history of Act 17,995, which created the first Corporation, evidenced the government's fluctuating intentions for establishing these institutions. Originally, this reform sought to fulfil the right to 'effective legal assistance' to which every low-income person was entitled (*Junta de Gobierno. Secretaria de legislación* 1981:293). Nonetheless, during its legislative work the government introduced two new objectives, more closely aligned to reducing the CBA's power: first, to separate the *Servicio de Asistencia Judicial* (Legal Assistance Service) from the CBA's legal personality; and second, to stop the CBA from setting up new legal aid centres (*Idem*:327).

It is possible to signal additional proof of the haste to separate legal aid provision from the CBA's remit. Legal aid provision was not deemed within the critical areas to reform in the justice sector, which referred to certain peripheral services – Child Services, Forensic Medical Examiner, Gendarmerie. When the government announced reform to professional associations, referring to the CBA's Juridical Assistance Service (*SAJ*), the Minister of Employment stated: 'Nothing impedes that this service [SAJ] continues to be carried on by trade associations' (*El Mercurio* 1981:A14). Nonetheless, the enactment of Act 17,995 occurred three months after the enactment of the *Decreto Ley* 3,621, precisely the same time limit that this last statute stipulated for professional associations to continue as trade associations or to legally disappear (Transitory Article 1 Decree-Statute 3,621). If the CBA chose this second option, the dictatorship would have faced a delicate scenario, as this second alternative would have put an end to legal aid provision as well. Thus, the separation of legal aid centres from the CBA's legal personhood, and the

subsequent legal transformation of those centres by adopting the formula of LACs provided a swift solution.

The legal adaptation to the Constitution of 1980 and the changes it triggered regarding the legal profession, and particularly the CBA, permit understanding why legal aid through legal training was stripped from professional control with the creation of LACs. The rush for terminating with all legal prerogatives and public responsibilities of the CBA, rather than the enhancement of effective legal assistance, resulted in the continuity of the legal aid through legal training scheme, now under the management of LACs. Nonetheless, this reform to legal aid's governance, as apparent in the LACs legislation, was conceived as a transient stage before the creation of a Legal Aid System in the foreseeable future.

Still, the question on why the dictatorship kept the legal aid through legal training scheme, rather than pursuing its reform as statutorily proclaimed, remains unanswered.

Why did the dictatorship keep legal aid through legal training after 1981?

The previous section focused on the legal changes to the legal profession and legal aid delivery undertaken after the 1980 Constitution took effect. With respect to the opening question of this chapter, the previous section answered why the dictatorship kept legal aid through legal training, yet modified its provider. The creation of LACs were part of a sum of changes aimed at reducing the legal profession's power, entrusted to the CBA. Notwithstanding, LACs were conceived as transitory institutions, until the creation of a new Legal Aid System, fulfilling the right to legal representation in the meantime.

This final section focuses on the same question, on why the dictatorship kept this scheme after 1981. Despite these eager signs favouring change, reform to legal aid did not take place as implied in the law, as economic and political factors truncated reform efforts. An economic crisis during the first half of the 1980s became a hindrance to governmental policies in general, including those on legal aid. As a consequence of fiscal curbs LACs became an attractive alternative, because a relevant portion of their workforce - law graduates - had to work unpaid, gradually multiplying each year with the increasing enrolment of law students.

Additionally, keeping this scheme achieved two different political objectives. First, the design and implementation of LACs provided a third-way solution to the ideological disputes between corporatism and neoliberalism around legal aid provision. Second, it eased the strained relationship with the legal profession, helping to manage professional associations' outbursts against the deprivation of compulsory membership and disciplinary jurisdiction, as a traditional feature of what it meant to become a lawyer – providing legal aid for free to become admitted to practise - was left unaltered. Nonetheless, as the setting where the legal aid through legal training scheme was implemented changed, questioning over the role of law graduates arose, which would reverberate from 1990s onward (see Chapters 5 and 6).

Economic shortcomings (1982-1983)

Dubbed as the Latin American 'debt crisis', the economic crisis which characterised the first half of the 1980s brought major changes to the government agenda. The background of the crisis can be traced to precedent state-led aggressive industrialisation policies which generated an enormous public debt. The policy of fixing the exchange rate of Chilean pesos to US dollars was instituted in 1979 'partly to neutralise "imported" inflation' (Collier and Sater 2004:366). The steep rise in the

price of oil in 1979 reduced the demand for Chilean exports, which in 1982 were less competitive because of the fixed exchange rate that had overvalued the Chilean peso. The government had to devalue the peso and take control of banks and the financial sector, as well as taking protectionist measures in favour of agriculture (*Idem*:370–1). When the crisis hit the region in 1982, public debt appeared to be beyond control, bringing economic growth to a standstill and increasing impoverishment in urban areas; in Latin America 'economists and international agencies spoke of the "lost decade".' (Pérez-Perdomo 2006:101)

According to Harvey (2005:74), '[i]t all went sour with the Latin American debt crisis of 1982. The result was a much more pragmatic and less ideologically driven application of neoliberal policies in the years that followed.' Demonstrations against the regime began to appear in the streets because of the economic crisis (*The Times* 1985). Thus, it opened a myriad of compromises, some of which contradicted neoliberal theory, such as state intervention seeking to bail out financial institutions (Harvey 2005:74).

This crisis brought a halt to several policies, including those developed by the MoJ, whether by postponing or dismissing them. Private–public partnerships – one possible design choice for replacing the LAC model – were not fully implemented because of the lack of available funding. Interview data has identified the 1982–1983 economic crisis as a possible cause for the lack of progress in legal aid reform. Besides postponing new policies in the justice sector, the crisis shifted the agenda towards more pressing issues than legal aid provision:

> The economic crisis hit us hard, so legal assistance – which as far as I remember was never a major issue – was never put in the first line of the problems that had to be addressed at that time. There were infinitely more serious things, like prison problems, where there had been a significant riot at the beginning of the decade (Interview 25).

Drawbacks for LACs were encountered too. As the crisis limited spending from the government and local councils on legal aid, LACs' did not have money for hiring lawyers as needed. The other source for increasing LACs' workforce, graduates supplied by law schools, did not amount to the quantity expected as a consequence of the limitations over financial arrangements to encourage demand for higher education. According to a law dean, the marketisation of higher education originally considered the expansion of state funding to the new universities opened after 1981, but this could not be implemented because of the economic crisis:

> When the crisis of 81–82 happened, tax revenues were reduced and there was a need for austerity imposed by the Treasury. 'What do we do?' Let's give money to the traditional universities [those founded before 1981]. This meant that several prospects of new private universities did not see the light until many years later (Interview 15).

This shortage in law graduates was a constant issue raised by different general directors:

> The lack of enough students [...] caused that [legal aid] delivery has been less comprehensive than expected by claimants, as in several occasions it has not been possible to assist all the people who have come to the Corporation. [...] To provide adequate legal assistance, only in the Metropolitan region 312 applicants [law graduates in training] per year would be needed. (Intervention of general director Sergio Correa, *CAJ Metropolitana*, 15.4.1982, pp.9-10)
>
> In cities as important as Antofagasta and Coquimbo [N.B. both are regional capitals], their legal offices only had one applicant in training during 1985. Others [...] only had two [... or] no-one. (*CAJVAL* 1985:36)

The LACs transitioning stage began to reach a legislative conclusion with the enactment of a regulation on the apprenticeship stage in 1985 (*Reglamento de práctica profesional de postulantes al título de abogado*). This administrative rule regulated in detail the different obligations graduates had to observe to complete their training successfully.

The consolidation of Legal Assistance Corporations as permanent institutions

If there were doubts about the permanent nature of LACs, they were resolved when the government opted to create a new Corporation in 1987, the Tarapacá and Antofagasta's LAC (Act 18,632 of 1987). According to a former general director, the creation of a new LAC in 1987 addressed the issue of finding 'an equilibrium between creating thirteen bureaucracies' – one corporation per region – and the attempt by the dictatorship of 'having a clear presence in some strategic areas of the country from a geopolitical point of view' (Interview 6).

The official reason – found in its legislative history (*Junta de Gobierno. Secretaria de legislacion* 1987:112–4) – for dividing one LAC into two different Corporations was managerial. The jurisdiction of Valparaiso's Corporation originally covered five northern regions, with large inhabited areas and connectivity problems between locations because of the Atacama Desert. According to its general director (*CAJVAL* 1985:36 and 1986:45), several issues prevented the creation of legal aid offices in the northerner regions of the country: budget cuts from the government, lack of resources from municipalities, low wages for attracting lawyers, and law graduates' disinterestedness in fulfilling their mandatory training in faraway locations:

> The General Directorship has powers to decide the legal office where law graduates must fulfil their professional training. However, when it comes to places distant from the applicant's residence, these attributions become theoretical, due to the impossibility of making the applicant bear the costs of relocation and residence (*CAJVAL* 1987:54).

Valparaiso's LAC was split in two, with the new LAC taking charge of the two northern regions of Tarapacá and Antofagasta, whereas Valparaiso's LAC continued providing legal services in the remaining three regions. The only difference between this LAC and the original three Corporations refers to the composition of its board.

The inexistence of law schools before 1981 within the geographical jurisdiction of this new Corporation made impossible to consider deans of law schools as board members. Thus, its board include the participation of two local council representatives.

Still, the urban/rural divide persisted with the concentration of law graduates in large urban areas, a concern usually emerging with the massive growth in the number of lawyers (Abel 1989:286-289; other related concerns are overcrowding and gender gaps). Anticipating an issue that would become a cause for mobilisation by law graduates in recent times, a general director made the case for requesting money for travel expenses of law graduates to distant locations, although without success (*CAJVAL* 1988:41 and 1989:68).

The Legal Assistance Corporations as a third way

It is possible that by introducing managerial and organisational innovations and keeping some features from the CBA's scheme the dictatorship tried to strike a balance between corporatism and neoliberalism, as mentioned at the outset of this chapter.

A board member at the time explained how they did not consider it a major change to what existed before with the CBA:

> It was a continuity with what existed before: we graduated from law school, and we had our bachelor's degree; we had to do this apprenticeship at the Bar Associations. And that was immediately transferred to the Corporations. *It was a continuity in the system.* Nothing else. Our duty was to structure it, with some features that, for us, being used to what had always existed, were a novelty at the time such as appointing a manager [...] *the logic was to continue with what existed and ideally improving it a little* (Interview 3, emphasis added).

From their onset in 1981, LAC's top positions – general directors and board members – were dominated by lawyers, similar to the to the role played by the CBA's general council. When the Corporations were introduced, their boards did not follow the observed tendency in other countries to include representatives of legal aid 'clients', giving voice to consumers of legal services (Abel 1985:523). Instead, they gave voice to the legal profession and to the legal academy, while increasing monitoring of the government over the scheme's management through the MoJ's representatives. The inclusion of those interest groups as part of the composition of the Corporations' boards could be read as a concession to satisfy corporatist advocates.

Regarding these corporatist remnants, Wiarda (2009:103) argued that, while corporatism was formally abolished by the law in Latin America, 'little follow-up enabling legislation was ever passed, with the result that older laws of corporatism often continue to operate'. As with many other countries in the region, Chile kept the old corporatist rubrics for organised bodies such as *gremios* (guilds), *corporaciones* (interest groups) and *asociaciones gremiales* (trade associations), as was precisely the case for professional associations' regulation after 1981.

On the topic of management, there was a trend at the time in favour of eliminating corporatist practices, abandoning services managed by 'well-known professionals in their respective areas but with no idea of technical management', for more technocratic approaches 'in the hands of experts on management' (Interview 25). According to former board members, LACs left behind a professional logic grounded on charitable or volunteer work supervised by committed and experienced lawyers seeking to contribute to society ('apostles' according to participant 6). Thus, LACs' boards appointed as managers professionals with engineering or management backgrounds, and not lawyers as occurred with *SAJ*. This new form of corporate

governance for legal aid provision, differentiating supervision from management roles, was innovative at the time. As explained by a former board member:

> We made the manager's life very difficult because, as he was innovating so much, we were all a little bit nervous. I remember that we demanded a lot of detail in the meetings with the manager - a manager that, by the way, was quite overwhelming, because as a civil engineer he came to change everything with another mentality to these old crocks, to rock us. So, the relationship with the manager was not an easy one. (Interview 3)

Lawyers involved in this process of implementing LAC were uneasy about these changes. Here, the old managerial practices of lawyers limited their professional jurisdiction before other forms of expertise.

The Corporations' design is characterised by relative atomisation and autonomy from the government. The policy decision of separating the CBA's legal aid centres into three (and, after 1987, four) independent Corporations avoided a centralised legal aid policy. The literature on the transition from a corporatist to neoliberal state has contended that decentralisation processes weaken central government, which is precisely the locus where corporatist bargains with the state are struck (Streeck and Schmitter 1991:147). This relates to what Collier and Sater (2004:374), when writing about the history of Chile, identified as one of neoliberalism's tenets: the restructuring of the state through the decentralisation of social services to the municipalities. This decentralisation allowed the government to cut out bureaucracy at the cost of producing unequal results as poorer municipalities could not shoulder this new burden.

In sum, LACs represented a new form of trade-off over legal aid's structure, aimed at reducing professional power with a design combining professional–corporatist representation and neoliberal decentralised management.

The legal aid through legal training scheme's contested continuity

The previous institutional changes did not encompass the scheme's particularity of providing legal aid through unpaid students in training. It seems that this feature had become an unquestioned part of lawyers' professional identity. Research participants mentioned that before 1981 mandatory training was a way of giving back to society in exchange for tuition-free higher education and the conferment of a university degree. A former dean from a regional law school agreed about this taken-for-granted element of legal professionalism:

> Nobody questioned it. It was assumed as something natural and it was considered an initiation to the secrets of professional practice. (Interview 10)

During the first years of LACs' implementation, the combination of social and pedagogical goals embedded in legal aid through legal training opened the question on whether to prioritise one goal over the other. For instance, the representative of the University of Chile's law dean, a well-known procedural law professor, in the first board's meeting, stated the following:

> The Corporation should have an eminently assistance role and not a teaching one, as currently universities have legal clinics, so everything related to teaching must be their responsibility. (Intervention Mario Mosquera, *CAJ Metropolitana,* 22.10.1981, p.3)

He would reiterate his position before the board:

> According to the current organisation of the Corporations, where emphasis has been placed on service delivery, lawyers should not be lecturers (Intervention Mario Mosquera, *CAJ Metropolitana,* 29.3.1983, p.3)

This dialectic over the purpose of mandatory training would persist in the future, doubting of its previous taken-for-granted moral justification after the introduction of tuition fees.

> Given the duality that emerges from the existing legal regulations there is a need to define the work carried out by applicants at the Corporation: a)

> Training has an educational or teaching nature, or b) Its objective is that applicants give back to society, in return for the professional degree that society will confer them. (Intervention general director Enrique Tornero, *CAJ Metropolitana,* 15.4.1982, p.15)

> Some university courses [...] charge lower tuition fees than their effective return value; therefore, as their internships are undertaken at private establishments and usually paid, it is strange that these professionals do not have to give back to society after finishing their studies [...]. Law is completely different [...] its high tuition fees respond to cross-subsidisation for more expensive courses [...] people with limited resources, in debt for completing their legal studies, are forced to realise an unpaid internship, not justified as it did in previous epochs and which causes a serious detriment (Intervention general director Enrique Tornero, *CAJ Metropolitana,* 14.10.1986, pp.95-96)

These questionings would play a relevant part in the further attempts to reform legal aid through legal training during the democratic era (1990 onwards) as analysed in the next chapters.

Conclusion

The dictatorship's decision to reform legal aid appears to be motivated by its different ideological struggles between corporatist (furthering continuity) and neoliberal (furthering change) ideologies. The previous ideological possibilities were a permanent feature in the constitutional and legal debate that would eventually lead to the reform of legal aid and professional associations in 1981.

Market-oriented policies triumphed over those aimed at safeguarding a public role for professional associations. Though the new constitution enshrined the right to legal representation to those who cannot afford it, the dictatorship focused its law-making efforts on reducing lawyers' power, legislating on the constitutional ban on compulsory membership as a practice requirement. The result was a weakened CBA, deprived of its previous prerogatives to bargain with the dictatorship.

Reform to legal aid was announced by LAC's statutes, evidencing their transient nature between the old CBA scheme and a prospective Legal Aid System.

Nonetheless, the possibility of legal aid reform came to an end with the economic crisis of 1982–1983 which interrupted several governmental policies in the justice sector, including provision of legal services for vulnerable people. LACs' transitory character shifted to a more established one in 1985 with new regulation of law graduates' training stage, which finally settled with the creation of a fourth Corporation in 1987.

LACs represent a compromise position between legal change regarding the confinement of legal profession´s participation in the scheme and continuity over its precedent meaning for lawyers as a valued learning stage. This bargain between change and continuity satisfied the ideological debate within the dictatorship's policymakers, as their organisation kept corporatist representation of societal interests while at the same time keeping compulsory training for future lawyers. On the side of reform, it also created institutions decentralised from central government with a strong element of local autonomy. By keeping legal aid through legal training, LACs are something of a middle ground, providing a diplomatic solution to the internal ideological clashes within the regime and avoiding the complete dismemberment of the legal profession's history.

Even so, this 'under new management' reform would open new flanks to criticise legal aid through legal training (i.e. Why should LACs, rather than law schools, train law graduates? What justifies forcing students to work for free after the introduction of tuition fees?). These questionings would turn into subsequent demands for legal change during the democratic era. The following chapters analyse these failed and successful reform efforts to legal aid through legal training.

Chapter 5: Legal aid reform between tradition and innovation (1990–2001)

The previous chapter explained why the dictatorship created the Legal Assistance Corporations (LACs) – to reduce the legal profession's power over the legal services market; – and why these new institutions kept legal aid through legal training – a combination of factors between LAC's transitory nature until a new legal system would be introduced, economic crisis, ideological struggles within the regime, and the recognition of current conceptions of legal professionalism.

Chapter 5 addresses what the hiving off of professional and specialised legal aid from legal training might tell us about the latter form of legal services delivery. This chapter analyses the different reform attempts regarding public-funded legal services between 1990 – the beginning of a democratic era – until 2001 – with the enactment of the legislation that introduced the Criminal Public Defender service. During this period several reform efforts were undertaken on state-funded legal services, but only one effective statutory change was made: the creation of a specialised, professional criminal legal aid scheme. The failed legislative reform attempts sought to innovate on the side of access to justice by increasing the coverage and nature of services delivered, yet continuing with mandatory training as a statutory goal. The creation of a new institution known as the Criminal Public Defender service was the first successful statutory reform to the LACs model, in accordance to a mixed model of legal aid delivery combining publicly salaried and privately franchised defenders, brought about by the enactment of the criminal procedure reform during the second half of the decade. From then on criminal legal aid provision before the new reformed courts has excluded students in the representation of criminal defendants.

The three reform efforts shared a similar critical diagnosis of LACs and were resisted using professionalism discourses underscoring the particularities of expert service delivery – independence from governmental intervention as a necessary condition for exercising professional discretion and judgement (Freidson 2001:111,122–3) –; and development of a common professional ethos – compulsory training as a manifestation of a calling or vocation to serve and give back to society (Guinier 2000).

The argument in this chapter is that, even though legal aid became a political issue, it was traded-off against legal training; and that trade-off became a barrier to legal change. Only when training prospective lawyers became antithetical to systemic procedure reform – shifting from an inquisitorial to an adversarial criminal system - was it jettisoned. The first statement connects with the earliest legislative debates on legal aid, the potential creation of a National Juridical Service and, subsequently, the Regional Juridical Assistance Corporations. The second statement corresponds to the enactment of the Criminal Public Defender Act in 2001. Consequently, the legal aid through legal training scheme shifted from being justified as an element of professional identity - but which hampered legal transformations – towards being openly criticised as a deficient form of legal services delivery.

The chapter is structured according to the chronological order of the different attempts to change the provision of legal aid. The first section contextualises the main legal and political issues of the first decade of democratic government since the end of the military dictatorship. Characteristically of this period was the existence of an ambitious judicial reform agenda and the strained relationship between the judiciary (i.e. questioned for its past behaviour during the dictatorship) and the other state branches pursuing these changes. The second section analyses the first mooted

reforms the creation of a National Juridical Service. The government opted for overhaul reform to the existing LAC model but retaining core scheme: legal aid through legal training. Criticisms of the introduction of this new service put an end to the project for altering several professional features. The third section focuses on the subsequent replacement of the previous bill by the government, which opted for continuity with the LAC model through the regionalisation of the Corporations. Whereas Congress substantially acquiesced to this alternative of creating Regional Juridical Assistance Corporations, the government's simultaneous concern with criminal justice reform shifted the Ministry of Justice's (MoJ), postponing this reform. In the meantime, LACs expanded their legal services provision autonomously with the creation of mediation centres, and became a platform for the MoJ to put forward policies aimed at anticipating the implementation of prospective legal change.

The first hiving off of legal aid through legal training towards professionalised and specialised criminal legal aid, with introduction of the Criminal Public Defender service, is the subject of the fourth section. A fundamental part of the criminal justice reform, the Criminal Public Defender service can still voluntarily train law graduates but they may not represent criminal defendants. By excluding graduates from legal representation and altering the mandatory character of training towards a discretionary feature of the new institution, for the first time since its inception in the late 1920s and early 1930s, a 'renegotiation of legal professionalism' (Paterson 1996 and 2012) occurred: legal aid through legal training was traded-off to enhance the right to legal defence of the public against professional interests. The concluding section discusses the role that this renewed relation between tradition and innovation meant for the state of legal aid provision and its subsequent legal change efforts.

The return to democratic rule

With the return to democratic rule in 1990, high expectations for introducing changes to the dictatorship's institutions existed – including those related to access to justice. Nonetheless, strong incentives existed for putting continuity before change, which conformed to the particularities of the transition process to democracy.

The Constitution of 1980 was substantively modified in 1989. These amendments were approved through a referendum. The reformed Constitution epitomised a transition agreement in which, in exchange for the reforms promoted by democratic forces, provisions that made up the institutional participation of the armed forces in the process of political decisions and assured Augusto Pinochet a continued political prerogative for the rest of his life, were retained (Godoy 1999:103–4). General Pinochet, who remained the head of the armed forces, was 'a jealous defender of his legacy', and had 'bequeathed a Congress with a built-in majority for the Right designed to block radical reform' (Green 1994:14).

Besides these authoritarian enclaves, the dynamic of power politics at the time offered a coalition government of centre-left parties, the *Concertacion de Partidos por la Democracia* (*Concertación*). As happened in Latin American countries at the time, after the collapse of 'real socialism', the left embraced democracy and market reform, a move supported internationally which narrowed the ideological spectrum inside each country (Mainwaring and Hagopian 2005:4, Weyland 2005: 92). The *Concertación*'s most representative party from the left, the Socialist party, was led by the so-called renovated socialists, for whom democracy and markets were not to be supressed but corrected. As one former minister recalled, the economic policies after

the return to democratic rule of the first government's campaign manifesto were aimed:

> at reducing the fear and distrust of the business world and middle classes, a necessary condition to be able to support, in democracy, the sustained growth of the economy achieved from 1985. Indirectly, the military government's hindmost economic success had significantly influenced the proposals of the Concertación (Boeninger 1997:368–9).

It has been argued that a new stage of neoliberalisation, known as *roll-out* neoliberalism (Peck and Tickell 2002:388) or 'neoliberalism with a human face' began (Green 1994, Collier and Sater 2002). This stage was characterised by a pattern of active state building and regulatory reform, which led to responses for social interventionism and ameliorative forms against social exclusion or dispossession (Levitas 1996, 2005). Politicians from the left sought to correct these neoliberal maladies by deliberately stretching the 'neoliberal policy repertoire' and embracing a range of extra-market forms of governance and regulation such as the incorporation of partnership-based modes of delivery in areas like social welfare (Peck and Tickell 2002:390).

Criticism and reform of the judicial branch

Judicial reform became a salient political issue across the ideological spectrum. The judiciary was now blamed for its lenient attitude towards human rights violations committed by intelligence agents during the dictatorship (Comisión Nacional de Verdad y Reconciliación 1991). The supporters of the authoritarian regime, now members of the opposition, also questioned the lack of modernisation of the judiciary (see Vargas et al 2001:15). Some research participants agreed that the negative opinion towards the judicial branch, grounded in its misdeeds regarding human rights violations and inefficacy, gave rise to an ambitious reform agenda. As interview 18 said:

> The main theme was reforming courts, the judicial system. This was a consequence of the problems that affected the judiciary during the military period throughout which the judiciary did not act adequately, except for extraordinary people. Additionally, there was the perception of a very slow judiciary.

The Constitution of 1980 institutionalised judicially enforceable rights through a special injunction, the *recurso de protección.* This effected a major visibility of human rights practice, compared to what occurred with the Constitution of 1925, which provided limited scope for judicial enforcement of constitutional rights. The judicialisation of traditional political issues brought new grounds for reforming the judicial branch – a phenomenon which was common in Latin America (Couso et al. 2010).

The first democratic government, led by President Aylwin (1990–1994), had a very ambitious judicial reform policy programme (Peña 1993). It introduced new legislation aimed at taming the autarchic and bureaucratic organisation of the judiciary (see Hilbink 2007, Sugarman 2009). Another concern was improving the recruitment and quality of judges, through the creation of a judicial academy (Correa 1989). This thrust for reform was supported by several academics, think-tanks and even a few members of the judiciary (Hermosilla 1990 and 1991, Harasic 1991, Lavados and Vargas 1993, LyD 1991, Peña 1992a and 1992b, Ramírez 1992, Valenzuela 1991a, Vargas and Correa 1995, and Verdugo 1992).

While the first democratic government had a rather ambitious agenda for the justice sector, the second administration, led by President Eduardo Frei (1994–2000), offered continuity, trying to complete some of his predecessor's reforms, such as the creation of the Judicial Academy in 1994 (Act 19,346). A relevant exception to this, discussed below, was the criminal justice reform.

The Supreme Court, as the head of the judicial branch, resisted most reforms and experienced several rifts with other stakeholders and members of the political and professional establishment. This strained relationship began with the National Truth and Reconciliation Commission report blaming the judiciary for its responsibility for the dictatorships' human rights abuses, to which the Supreme Court responded with outrage (*Corte Suprema* 1991). These tensions were exacerbated by two subsequent constitutional impeachments of Supreme Court Justices, one sponsored by government parties in 1993 and the second one by the opposition in 1997 (Fiss 1993, Ruiz-Tagle 2000). While the Supreme Court was weakened, the government took the opportunity to lay down its criminal procedure reform (see below). The Supreme Court's attitude towards the government authorities swayed from antagonistic to cooperation, actively participating in judicial reforms (Correa 1999).

Discontent with legal aid provision

Within this context of upheaval regarding the third branch of government, its past behaviour, institutional status quo and potential for change, legal aid reform was part of this political momentum too. Legislative reform of legal aid was an issue already considered by the *Concertación*'s manifesto for its first government: 'Develop a legal assistance system that permits access to courts to every person, in particular that of low-income people' (*Programa básico de gobierno* [1989] 2002:180).

Legal academics – some of whom later became advisors or policymakers for the *Concertación* governments – had anticipated that the law needed to tackle poverty and facilitate the exercise of the rights of the economically vulnerable (Galecio 1988; Guzman 1987; Harasic 1988). With respect to LACs and the legal aid through legal training scheme, the literature of the period (Bates 1992 and 1992a; Correa 1996; Valenzuela 1991; Vargas 1996 and 1997; Vargas and Correa 1995; Ulloa and Vargas

1995 and 1998) highlighted budget reductions, management problems, limited coverage and lack of professionalisation as common issues retreating legal aid for vulnerable people.

Balmaceda (2000:725-726) provides a detailed overview of the problems which affected the LAC model: high turnover of lawyers, caused by low wages, economic rewards from private practice and work overload; high turnover of law graduates; excessive delegation of responsibilities on law graduates (i.e. they undertake an average of 120 cases) without adequate training and supervision; lack of incentives for law graduates (training's passing rate is considerably high despite of outstanding, expected or deficient performance) and lawyers; sluggishness in case management; poor working conditions; legal prohibitions for representing other parties involved in the same matter; nonexistence of control and overseeing mechanisms over provided services; bureaucratic and centralist design (i.e. legal aid offices located in extreme zones separated by 2,000 km from their headquarters); covered legal services are restricted to litigation.

In 1992, a survey was undertaken to identify the legal needs of the poorest in the country (Correa and Barros 1993). Results were rather grim. 82.8% had a negative perception regarding the justice sector, compared to a meagre positive perception 6.8% (*Idem*:29). A majority of those surveyed had a highly critical view of lawyers, labelling them as 'bloodsuckers'; 'They only care about money.' (*Idem*:65). However, the two main aspirations of the surveyed population for satisfying their legal needs were accessing information about people's rights (58%) and more gratuitous lawyers (37%) (*Idem*:30).

The government used the previous findings and the assistance of one of the authors of this survey, Jorge Correa, to draft a Bill introducing a National Juridical Service to replace the Corporations.

The National Juridical Service (1992–1994)

The Government's Bill

The main purpose of this Bill was to create a more centralised organisation overseeing national policies on legal aid (S., 10th, Leg. 325, 12.11.1992:1053–66). This new public service was expected to decide, coordinate, and execute uniform and general policies on legal aid. Because the reform was organised as a public service, the Bill would introduce a structure of hierarchical bureaucracy for the new organisation, getting rid of any corporatist representation of interests.

Innovations on access to justice consisted of diversifying the supply of legal services and increasing coverage beyond low-income claimants. With respect to new legal services, this Bill considered introducing what the literature denominates as forms of preventive law: targeted towards minimising clients' costs of litigation and enhancing their legal opportunities (Stolle et al. 1997:16). The new Bill introduced alternative dispute resolution (ADR) mechanisms with strong emphasis on the provision of legal information, education, promotion and advice to the population 'with the aim of preventing conflicts or solving those already existing ones' (article 2). This new legal services delivery system began to be implemented by the MoJ through a pilot programme aimed at anticipating the implementation of the prospective statute governing this service (see below).

On the subject of coverage, the Bill considered benefiting not just low-income people but non-profit legal persons too (article 2). These innovations were reflected through the terminology: rather than '*Asistencia Judicial*' – traditionally understood

as legal representation before courts – it used '*Asistencia Jurídica*', which literally translates to 'juridical assistance', where 'juridical' encompasses a broad understanding of legal services as well as of legal aid users.

Legal aid through legal training was not only kept unmodified but had a constraining effect regarding the policy alternatives considered by the government to reform legal aid. Before submitting the Bill to Congress, the government had evaluated schemes that: established a competitive public fund for hiring private practitioners; introduced mandatory legal insurance; created a voucher system; or managed a roster of lawyers whose fees would be paid by the Treasury. Nonetheless, the government dismissed these alternatives in part because they did not consider the future training of lawyers:

> *the current system not only provides legal assistance, but also training for future lawyers*, and these other modalities do not allow structuring a public policy on legal defence or adequate control over the quality standard of the services being delivered (Intervention of Jorge Correa, consultant to the MoJ; S., 1st Constitutional, 861–07:8, emphasis added).

For the government, the unquestioned character of mandatory training may have become a trade-off to create a public service to substitute LACs, where the compromise consisted of preserving the shared ethos imbuing the pathway to become a lawyer.

The Congressional debate

The different positions encountered in the debate before Congress showed a crossbench consensus on the issues affecting LACs but disagreement on the solution of creating a national public service. Congress invited several stakeholders to provide their input on this Bill, including the chairman of the CBA and representatives of the

four LACs – each general director joined by the respective chair of the board, who were the MoJ Regional Secretaries.

LAC representatives presented a spontaneous consensus with respect to the problems affecting the scheme, although they differed on the degree of the transformation pursued by the Bill. Reform to LACs was considered a solution to the absence of a coordinated national policy on legal aid, and to the lack of economic and human resources (interventions of the general directors Gustavo González and Dora Silva, and of the chair of the boards, Mariano Fernández, Humberto Otárola and Arturo Zegarra; *Idem*:14–8). In traditional socio-legal language, the chair of Valparaiso's LAC argued that the official statistics were mismatched with reality, as those figures reflected a functioning Corporation whereas in practice it delivered an insufficient service as a consequence of the lack of resources and uncooperativeness of the judiciary's civil servants (intervention Luis Bork, *Idem*:16–7). The general director from the same Corporation addressed the 'unequal contribution to funding' to LACs made by municipalities:

> There seems to be a form of subsidy from poorer communes to those that have more resources, as mostly the former enter into agreements with the Corporation, whereas the latter do it less often […] nevertheless the Corporation serves every person that requests its services, without discriminating according to the commune where they live […] all municipalities should equitably finance the legal assistance service[.] (Intervention Jorge Abbott, *Idem*:18)

While agreeing on the common operational and economic problems, disagreement existed on the scope of the transformations pursued by the government. This same general director advocated strengthening the Corporations, not replacing them, considering their actual practice: 'With just US$200,000 every year three complete regions are supplied with legal services, which demonstrates a high profitability from the management of the Corporation he leads.' (*Idem*:17) However, if Congress

decided to replace LACs with this national service, he requested that this new public body had complete autonomy from the executive branch because increasingly the administration had become the other party against claimants represented by LAC. Similarly, one interviewee recalled that, without openly stating their position, becoming a national public service disrupted most Corporations' internal organisation regarding human resources: 'The Corporations, many of them, did not want integration in one service simply because of corporate interests. Fundamentally, this meant to disarm internal bureaucracies to create one big bureaucracy. Probably, this [change] affected their internal stabilities.' (Interview 6)

The most definitive attack on creating a public service to replace LACs came from three senators (interventions of senators Sergio Diez, Sergio Fernández and Carlos Letelier; S., 1st Constitutional, 861–07:19). Two of them were practising lawyers, had held governmental posts during the dictatorship and were affiliated to right-wing parties. They were joined by a recently retired Supreme Court Justice, appointed as a senator by the same court. These senators opposed the introduction of a national public service on the basis that experience with similar public bodies had led to their aggrandisement, altering the distribution of public resources. Instead, they suggested that it would be better to create more corporations, autonomous from the government and closer to the local needs of the regions. As explained below, the position of these senators played a relevant role in maintaining the status quo.

Legal aid through legal training: criticism without reform

The debate reflected different problems that relying on graduates brought to the scheme. The issue of the recruitment of graduates, which depended on the educational offer of law degrees rather than on the Corporations' need for practitioners, was denounced by the general director of the Tarapacá and Antofagasta LAC – the

smallest Corporation of the existing four. The shortage of law graduates in training (an issue which had been raised during the 1980s, see Chapter 4) made the delivery of legal services inefficient, to the extent that in 1992 there were only five of them. Nonetheless, they were hopeful that this situation would improve as new law schools had opened in the region (Intervention of Carlos Vila, S., 1st Constitutional, 861–07:15).

Some stakeholders voiced a common scepticism against reliance on unqualified students as providers of legal services. The general director of the Metropolitana's Corporation, Dora Silva, affirmed that, without questioning the 'unblemished vocation for service' of lawyers and graduates, it was not possible to 'duly guarantee a constitutional right based only on vocation' (Intervention of Dora Silva, *Idem*:16; see also intervention of Sergio Urrejola, chair of the CBA, *Idem*:14).

She would become appointed chair of the board of this same Corporation afterwards. In that opportunity she requested her fellow board members to adopt a position on the matter of LAC's institutional mission. Law school dean Mario Mosquera (University of Chile) pointed out that '[t]his assistance and educational duality prevents systematisation needed for bettering service delivery, and if this is maintained, the work of the Corporation's lawyers becomes diverted' (*CAJMetropolitana* 27.5.1994:1-2). His colleague Jaime del Valle, the Catholic University of Chile's law school dean, added that 'the Corporation does not have the capacity to teach and graduates are called to render a service comparable to a legal duty' (*Idem*:2). The board agreed to define LAC's mission as follows: 'Provide free legal guidance, and free legal and judicial assistance, to individuals or legal entities of limited means' (*Idem*:3, originally written using upper case letters), with minor reference to providing facilities for law graduates training.

Nonetheless, in that period there was no attempt to get rid of compulsory training. Interview 18 explained this lack of change during the legislative procedures:

> there was no serious proposal to take them out. That discussion occurred later; that we are not fulfilling [...] international mandates by giving cases to students in practice [...] The idea was to keep the student body because it was considered a great place for them to conclude their education and then to come to the market with a clear idea of what [it] meant to practise.

This finding is less obvious than it seems because, even though the acculturation of legislators with a law background during their training led them to advocate the retention of the scheme, dissatisfaction regarding working conditions, particularly the disparity of supervision, was commonly mentioned by research participants who had done their training with the CBA. Still, as the major dispute concerned the creation of a national service, legal training issues remained secondary without altering the outcome of this Bill.

Regional legal assistance corporations (1995–2002)

The government opted for not continuing with the creation of a National Juridical Service considering the negative responses analysed above. Nonetheless, rather than ending the legislative cycle, the government agreed with the suggestions coming from Senators Diez, Fernández and Letelier and put forward several modifications to the Bill, to the extent that in reality it submitted a new one.

Echoing the criticisms of the Bill creating a National Juridical Service, the government's new legislative proposal altered the vision of national delivery of legal services towards one closer to local needs. This substitution Bill resembled the existing status quo on legal aid as it created Regional Juridical Assistance Corporations (*Corporaciones Regionales de Asistencia Jurídica*; S., 1st Constitutional, 861–07:22–59).

The new Bill proposed a decentralised design where each Corporation was autonomous from the others and had a similar design to the LACs. In accordance with the geographic distribution of the country, the Bill introduced thirteen Regional Juridical Assistance Corporations. As happened with LACs, each corporation was managed by a general director, but now this decision was not exclusive of each board. The President would choose a name from a shortlist of three candidates created by the respective board.

Corporatism was retrieved regarding boards' composition, which followed that of LACs, giving voice to academic, judicial and professional interests – plus a strong element of localism. The MoJ's Regional Secretaries would continue acting as chairs of the boards. Governmental interests were also considered through the appointment of two lawyers with at least five years' working experience. The interests of legal education providers were represented by a lawyer with relevant work experience appointed by the deans of the regional law schools. The Bill designated the chairs or another representative of each regional bar association as members of the board. Similarly, its design also included the chair or a representative of each regional social workers' association. The judiciary was represented as each Court of Appeals had to appoint a board member. Finally, the general director also participated as a member of the board.

This Bill did not alter what was already in place regarding mandatory apprenticeship for future lawyers – as also occurred with the National Juridical Service Bill – but it did expect to increase the number of staff lawyers. In the balance between providing legal services and training future lawyers, the Bill followed the suggestion of three senators, all of them trained lawyers, representatives of the left (Anselmo Sule, Radical) centre-left (Andres Zaldívar, Christian Democrat) and right

(Sergio Fernández, *Unión Demócrata Independiente*), to provide legal aid through at least one lawyer per province – referring to the geographical units that compose a region (*Idem*:24).

The Congressional debate

The analysis of the discussion held before Congress reflects a contention made at the outset on the existence of struggles over the treatment of the problem rather than the diagnosis. Alternatives dismissed regarding legal aid provision illustrate the other contention made in this chapter, that the trade-off for passing these reforms for enhancing access to justice was keeping the legal aid through legal training scheme.

After briefly discussing alternate proposals furthering market-led or state-led mechanisms, the Senate unanimously approved the intention to legislate on this Bill. One senator from the centre-right party *Renovación Nacional* wondered about fulfilling the constitutional mandate of providing legal services to the poor through a legal aid subsidy 'similar to what exists in the housing and health sectors' (Intervention senator Sebastian Pinera; S., 1sr Treasury, 53rd, Leg. 330:6032). Against this modality for legal services provision, a member of the governing centre-left party *Democracia Cristiana* argued that it should be a state duty, delivered through a centralised or decentralised public system (Intervention senator Andres Zaldívar, S., 1st Treasury, 53rd, Leg. 330:6033). Another senator conceived that mandatory training was a hindrance to the introduction of subsidies for hiring legal services because such a system 'does not belong to our culture' (Intervention Hernán Larraín, S., 56th, Leg. 330, 2.5.1995:6361). As will be explained further in this chapter, these previously dismissed alternatives anticipated what happened with criminal legal aid reform.

The new Bill as expression of professional ethos

The regionalisation of the Corporations' design was welcomed by Congress representatives with law degrees because it reflected continuity within change, specially of legal training. Several senators highlighted the continuity between the old CBA scheme and the creation of regional corporations, with special reference to their own experiences as law graduates:

> [W]e have always considered *a great honour that*, as an entry requirement to the professional degree, *we rendered legal advice for six months*[.] (Intervention Andres Zaldívar, Christian Democracy, *Idem*:6352–3, emphasis added)
>
> [I]t is fair to remember that, *as legal studies at the law school were practically free*, he [Arturo Alessandri Rodriguez, the main promoter of the CBA's legal aid provision] considered that *graduates should give back to society* what the latter had granted them, setting up this apprenticeship in the offices of the Chilean Bar Association, *which all those present who are lawyers had to serve*, defending for six months low income people. (Intervention Arturo Alessandri Bessa, National Renovation, *Idem*:6364, emphasis added)
>
> [I] will vote favourably [on] this initiative because it considers the experience of the institutions that preceded it in such *a noble task*; *preserves a decent place for professional novitiate*; [and] fulfils specific constitutional precepts. (Intervention Anselmo Sule, Radical Party, *Idem*:6358, emphasis added)

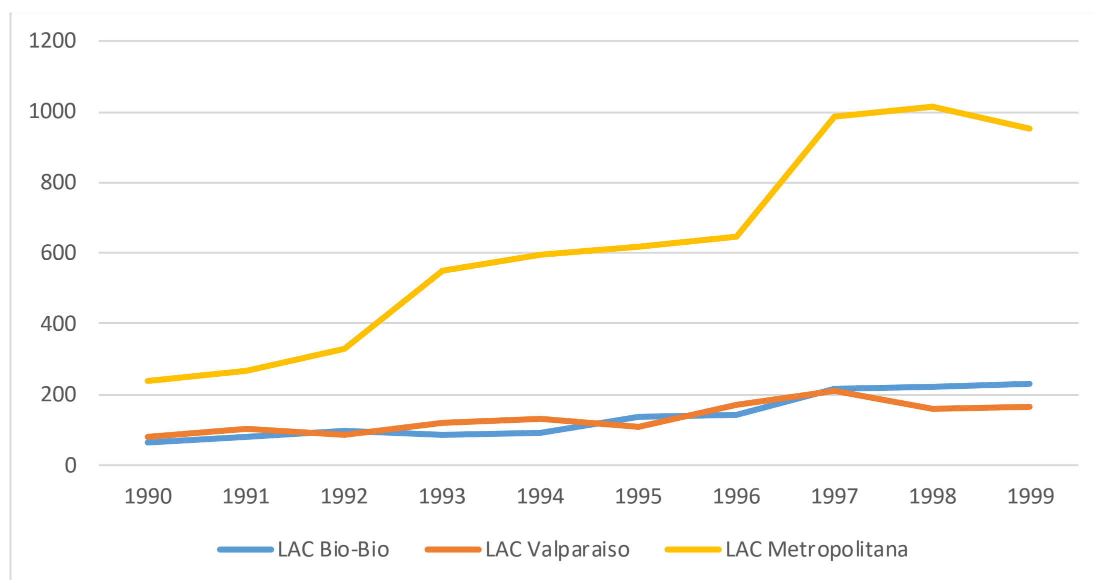
These enthusiastic appraisals from Congress representatives for this trade-off between changing legal aid without altering mandatory training were not imitated by the incumbent Corporations. Scepticism existed regarding the chosen design for the governing institutions and for relying on law graduates to provide legal aid.

The multiplication of LACs from four to thirteen (one per region) was perceived as an attempt to increase government intervention over legal aid provision:

> The atomisation of the Corporations […] will make them more dependent on the central government with all the costs that this entails. Experience [...] has indicated us that a more autonomous management allows us to achieve better standards of efficiency [...] regional management needs support in planning, evaluation, project formulation, etc., which are ineffective to carry out exclusively at the regional level since they involve having technical equipment whose costs exceed local possibilities and, on the other hand, is justified at supra-regional levels (*CAJVAL* 1995:4-5).

On the issue of basing legal provision on law graduates in training to permit new entrants to the profession to appreciate ideals of professionalism, Congress representatives did not take into account existing recruitment issues encountered by LACs, of overcrowding and understaffing (Figure 3).

FIGURE 3 LAW GRADUATES IN MANDATORY TRAINING (1990-1999)



Source: own elaboration using data obtained from each LAC through freedom of information requests

Overpopulation of law graduates was experienced in legal aid offices within large urban areas, where legal education supply concentrated, as the case of Metropolitana's LAC illustrates:

> When the State created the Legal Assistance Corporations in 1981, it thought that the legal aid problem was solved. However, once the law was enacted, it avoided assuming a consistent and coherent financial commitment over time. (...) Likewise, the law did not consider that the Corporations will divert part of the resources destined to serve users to the supervision and guidance of law graduates who undertake their professional training. Situation that has increased due to the creation of new Law Schools belonging to private universities (*CAJ Metropolitana* 1995:7-81).

Insufficient personnel, on the contrary, has been common in remotest parts of the country. This issue was raised during the legislative proceedings, reminding the

constant recruitment problem affecting northern regions where law schools have been scarce:

> [I] represent a region where two of the four provinces almost do not have lawyers providing legal aid to the people. [...] it is not the same to provide legal aid in regions where there are law schools, than doing so in those without them. Because of the latter more consideration and attention will need to be paid to the possibility of providing the Legal Assistance Corporations with staff and equipment with the object of becoming suitable for fulfilling the duty that we are commanding them by law. (Intervention Adolfo Zaldívar, *Idem*:6360)

The overcrowding and understaffing of law graduates limiting LAC's legal aid provision was not sufficient to question the legislative intention of keeping the legal aid through legal training scheme. Nonetheless, both government and some LACs began to implement novel policies on legal aid to anticipate this reform, which are analysed in the next section.

Anticipating legal reform: the Programa de Asistencia Jurídica

The thrust for legislating on legal aid progressed alongside forms of preventive law developed autonomously by some Corporations or with intervention from the MoJ.

With respect to autonomous policies, after some LACs' general directors had visited the United States to examine different experiences of ADR, they created mediation centres. A research participant who worked on developing one of these centres reflected on their roles throughout time:

> [Mediation centres] originated by considering the experience of social workers, who did loads of alternative dispute resolution. These mediation centres had different stages, first, they were oriented towards small claims on different matters and afterwards, they began to work more with family issues. (Interviews 14)

Though the experience of social workers was acknowledged, it was criticised for its amateurism and lack of professionalisation of ADR. A research participant involved

in this process differentiated the previous mediation practice by social workers from these new ADR centres:

> [Personnel were] trained on the use of mediation in a more technical [form], not like that negotiated mechanism used by social workers, which consisted of calling [the parties] and saying 'OK, let's reach an agreement' [...] From a theoretical view, the Corporation did not mediate. It engaged in a strongly intervened and directed bargain or compromise [...] Instead, these new centres worked with a more technical intervention, where mediation played a role closer to [a] Harvardian [mediation method]. (Interview 18)

These Corporations, with the help of the think-tank *Corporación de Promoción Universitaria*, closer to the governing Christian Democracy party, trained lawyers and social workers. The centres provided legal information and advice, including psychosocial assistance. The participation of graduates was limited to drafting compromise settlements or helping to enforce them.

A major innovation consisted of the *Programa de Asistencia Juridica* (Juridical Assistance Programme), locally known as *PAJ*, which was the main top-down access to justice policy developed by the MoJ. Basically, it was a programme conducted by the MoJ through LACs with the purpose of reaching out to those people who were not able to access LAC offices, providing them with legal information and advice, as well as trying to solve conflicts through mediation.

It is possible to identify different stages regarding *PAJ*: preparatory for the new laws that were expected to replace LACs and, subsequently, as a substitute for legal reform by becoming one of LACs' regular tasks.

With international cooperation and funding from the European Union (EU), this pilot programme was created in 1993 (Intervention senator Sergio Diez; S., 21st, Leg. 33, 1.8.1995: 2528). Some research participants stated that the EU expected an innovative policy rather than maintaining the status quo, albeit better funded.

One of *PAJ*'s differentiating features was that it constituted the first case of professional legal aid provision designed with an exclusive focus on access to justice. As a legal aid lawyer put it, '*PAJ* represented a paradigm shift from the legal aid/training scheme' (Interview 8). The main notion furthered by *PAJ*, according to Interview 14, was that of '*mobile justice*': bringing legal information and orientation to people who could not physically access LACs, and solving conflicts through mediation and negotiation. At the outset, full-time professionals carried out these tasks.

PAJ had a double dependency on both the MoJ and LACs, which explains both its success and its problems. The programme operated *as if* it depended directly on the MoJ. The conditional is used here because this state department is not allowed to carry out any provision of services (Article 2 letter n, Decree with Force of Law N° 3 of 2016). Therefore, the MoJ used the Corporations' structure as a platform to implement this programme (Interview 18).

Tensions mounted between *PAJ* and the LACs regarding the social recognition, availability of resources and recruitment of law graduates. As one research participant summarised it, the LACs and *PAJ* were like 'two brothers, one poor and one rich':

> *PAJ* offered a refreshing view on legal aid with a strong emphasis on ADR, getting the spotlight, resources, and more attractive and unique cases than the more routine work done by LAC. (Interview 9)

For LAC staff, their peers implementing *PAJ* were perceived as 'those people who work less and earn more money' (Interview 24). These groups of workers complained about the implicit lack of recognition of what they also considered was ADR provision as carried out by social workers. *PAJ* began recruiting law graduates too, as

students perceived it as a more attractive alternative than traditional legal work done by LACs (Interviews 14–18).

The role of *PAJ* as anticipation of legal change shifted towards that of a replacement or substitute for statutory change as it continued after 1998, when the Regional Legal Assistance Corporations Bill stopped being discussed before Congress.

The termination of this programme came through LAC workers' mobilisation, seeking to improve their own working conditions so they were equivalent to those enjoyed by *PAJ* workers, and with the recommendation by Ministry of Finance to assimilate the programme's tasks with one of the LACs' own (Dirección de Presupuestos 2003:10). According to the Ministry of Finance, the introduction of *PAJ* was a relevant rupturing factor of the existing system of legal aid delivery:

> The multiple, not uniform or integrated, System for Gratuitous Legal Aid is made up of parallel structures of 4 autonomous LAC and a governmental PAJ. This generates problems for coordinating and establishing uniform criteria in the development of similar tasks (*Idem*:9)

The implementation of this recommendation by the MoJ led to the assimilation of *PAJ* into the Corporations' structure, marking its end in 2003.

The relevance of *PAJ* for this research is three-fold. It reflects a first attempt at professionalisation and specialisation of legal aid services delivery, originally excluding graduates and later incorporating them in a limited role without passing new legislation. A form of gradual change occurred, which was triggered by endogenous factors related to giving primacy to access to justice over training of prospective lawyers. Its failure as an independent programme is also relevant because, as happened with other reforms to professional and specialised legal aid discussed later, these efforts began by avoiding the Corporations but, in the end, they had to be

hived as part of the LACs' functions, reflecting a struggle between autonomy and interventionism between the Corporations and the government. Finally, it is also an example of a reform effort by and of itself rather than as an auxiliary or consequential response to a major systemic reform to courts and procedures, which has been the case for the successful reforms to legal aid through legal training that are discussed in the next section and chapter.

Diversion to criminal legal aid

After these early legislative stages, the Bill's passage stopped in 1998 when the Chamber of Deputies required the Senate to take it out of circulation from legislative work. This officially occurred in 2002, probably as a gesture to an electoral promise of continuing with the regionalisation of LACs from the manifesto for the third *Concertación* government (Ricardo Lagos 2000–2006):

> Reinforce those policies intended to achieve a more accessible justice for all. [...] we commit to invest more in legal aid and to modernise its management, and to strengthen and decentralise the Legal Assistance Corporations. These new investments will be allocated to reinforce plans and activities on legal prevention, advice and orientation, as well as ADR. (*Programa de gobierno Ricardo Lagos Escobar* 1999: section 10)

A further explanation for this abrupt end relates to the fact that, simultaneously with the work on this Bill, Congress and the government began discussing criminal procedure reform. The Bill to implement a new Criminal Procedure Code began its legislative journey before the Chamber of Deputies on 9 June 1995 (BCN 2000). The intention was that, as part of the reform to the criminal procedure, a new Bill would be submitted reforming criminal legal aid 'with the aim of materialising the principle of equality under the law' (*Idem*). Several research subjects acknowledged that the two most pressing reforms on the justice sector were reforming criminal justice and

family law, including substantial (i.e. divorce and parentage laws) and procedural changes. Nonetheless, as Interview 24 recalled, in 1997 it was decided to give pre-eminence to criminal procedure, postponing family law reform for later governments:

> [Reform to family law] legislatively speaking, ended 'sleeping the sleep of the righteous', [...] what originally was a major reform proposal on family law became particularised proposals that were enacted across time, once most of the criminal procedure reform was implemented.

This exclusive focus on criminal justice had consequences for the discussion on legal aid reform too, interrupting and replacing the legislative agenda. As chapter 6 explains, procedurals changes to family law courts also brought consequences for legal aid.

The Bill creating the Regional Juridical Assistance Corporations sought to increase access to legal aid, with a design which basically maintained the status quo through better allocation of resources. This was similar to what the MoJ was doing at the time with *PAJ*, as explained before. A decision was needed on whether to continue with the legislative debate on this Bill or focus on the creation of a specialised criminal legal provider. This second alternative appeared more attractive to the Ministry of Finance. This was highlighted by an MoJ policymaker:

> A different concept, technology or state of the art emerged that said 'look, let's abandon what we have been conceptualising as legal representation [...]. First, let's professionalise. Second, let's privatise' – which was a very contested concept and until present it continues to be questioned by small circles in relation to the differences between public and private lawyers [...] The attractiveness of creating a model like this, which is not a public system but a mixed system of defence delivery, led the Budget Division of the Ministry of Finance to do this [interviewee mimed closing a book] 'let's freeze the Bill and see how this [reform to criminal legal aid] goes'. [...] It is not strange that [the Regional Corporations Bill] stopped in 2002 because the advent of the Criminal Public Defender was precisely in 2001. (Interview 24)

As the Budget Division weighed in favouring the proposal for a modern criminal legal aid provider, reform to legal aid with the creation of Regional Legal Assistance Corporations came to an end.

Criminal legal aid (1999–2001)

The previous policy proposals did not result in actual change because, first, they fruitlessly tried to depart from a logic of autonomous providers for a national public service and, second, they competed with other pressing systemic reforms such as criminal justice. Third time was however lucky for legal aid reform as judicial reform led to actual change to legal aid, in the form of specialist reform.

This section explains how the first hiving off of legal aid through legal training occurred, with the creation of a new institution in charge of providing legal representation to criminal defendants. The only successful legislative change to the scheme was part of a thorough, systemic reform of criminal justice, to which representing criminal defendants through apprentices was antithetical. The turn against keeping with tradition regarding legal aid occurred in the context of the criminal justice reform and its creative thrust to introduce new institutions detached from the then incumbent ones. Although the professional ethos supporting mandatory training duties played a role as a trade-off, it became enfeebled because of this reform, setting a model for the coming years.

The political events preceding reform of criminal procedure reflected that the country had begun coming to terms with its dictatorial past. Timing was relevant for explaining the success of the criminal justice reform. The legislative work surrounding this reform occurred when General Pinochet's power began to wane. He retired as Chief Commander of the Armed Forces to assume a role as an unelected

senator. As such, he was constitutionally impeached although most of the senators voted against the impeachment (Loveman and Lira 2000). In 1998 he faced legal proceedings in the United Kingdom to decide his possible extradition to Spain, where a judicial investigation concluded that Pinochet should be indicted for alleged crimes committed by intelligence agents against Spanish nationals. Other heads of the dictatorship's intelligence units faced prosecution, and some were convicted. An outcome of this process could be seen in the 1999 presidential campaign, where candidates from both the left and right began 'to put the ghosts of Allende and Pinochet to rest' (Fontaine 2000:77). Presidential elections after 1990 became dominated by what was called 'the logic of centripetal forces', a drive to win votes from the moderate centre. This logic made parties adopt pragmatic messages and conciliatory tones, which led to a close win by the second democratically elected socialist president in the country, Ricardo Lagos (*Idem*).

In sum, at the time criminal justice reform became a salient political issue, the country had begun to leave behind its turbulent past. The previous change of political circumstances in conjunction with the framing of criminal justice reform in a technical, legalistic and apolitical language did work as an advantage for this reform's positive outcome.

Criminal procedure reform

The wave of judicial reforms from the second half of the decade turned towards procedural changes, beginning with criminal justice. Accordingly, the enactment of a new Criminal Procedure Code Act was preceded by extensive work supported by think-tanks, NGOs, the media, and a group of legal academics with foreign or multidisciplinary training in charge of its drafting (Palacios 2011). Widespread

consensus in favour of this reform existed to the extent that detractors were narrowed down to old-fashioned practitioners:

> There was widespread political will as both left and right supported it, as well as all the media [...] Resistance came from some members of the lawyers' guild, who did not believe in or want [it] because, to some extent, it was a loss of work capital, they would have to learn a radically different system. There were many expectations too, maybe beyond what seemed reasonable, but also loads of enthusiasm, which explains why expectations did not extinguish [...] this was something that had to be done even in a country with zero crime incidence. (Interview 25)

This enthusiasm can be explained considering the degree of changes being sought. Reform to criminal justice represented a systemic change with respect to the judicial branch, transitioning from an inquisitorial, secret and written procedure, to an adversarial, public and oral process. It established a prosecutorial office constitutionally autonomous from the executive and the judiciary, known as *Ministerio Público* (Public Ministry). Because its name is confusing both in English and Spanish – every ministry is a state department and, consequently, a public ministry – from now on I will refer to it as the Prosecutorial Service. The implementation of the new criminal justice was incremental. It followed a regional schedule per year, beginning in December 2000 with smaller regions and finishing in 2005 with the largest region, the *Region Metropolitana* (Hersant 2017).

The Minister of Justice, Soledad Alvear, made the installation of a new adversarial system of criminal justice a challenging issue for legal education (Alvear 1999). She exhorted law schools to redesign their curricula and teaching to meet the increasing role specialisation in criminal cases: prosecutors, specialised judges and defenders. The Minister foresaw that this specialisation would require differentiation between litigators in civil and criminal justice, where the latter group required new skills not necessarily taught by universities (*Idem*).

The drive for procedural reform continued after the new Criminal Procedural Code came into force in 2000, with new family and employment courts (Chapter 6). It would probably come to an end with the reform to civil procedure which, although discussion began in 2005, the legislative debate is currently suspended in Congress.

The introduction of this procedural reform effected a shift in the visibility of access to justice. Since then, all criminal defendants have had the right to legal representation by lawyers (Articles 8 and 93-b, Code of Criminal Procedure). A former LAC board member at the time remembered how the reform problematised the existing institutions implementing the right to legal defence vis-à-vis the novel prosecutorial ones:

> When the procedural reform was introduced, and the Prosecutorial Service was created, the problem of the Corporation's role began to emerge precisely in relation with the Prosecutorial Service. The Prosecutorial Service does not act according to the economic resources of the victim, whereas the Corporation only acts assisting low-income people. (Interview 1).

With the introduction of the right to technical defence before the new criminal courts, the Corporations' scheme and their core element of legal aid through legal training became contested as adequate countermeasures to the powerful Prosecutorial Service.

Pre-legislative definitions: the Legal Assistance Corporations' role in the new criminal justice

Given that the new Criminal Procedure Code excluded law graduates from legal representation, the first issue the government had to face related to the LACs' role. For participants working at the MoJ at the time, it was clear that LACs would not participate as public defenders before the new courts, which was resisted by the Corporations:

> It was sought to professionalise criminal public defence and to raise service standards. Therefore, you needed to generate an institution that could compete with the Prosecutorial Service and not something that was the leftover of the latter; that whatever did not become part of the Prosecutorial

> Service would be left for defence. [...Because] what is at risk is a person's freedom; if you want to proceed with this [reform], then let's do it seriously: create a highly professionalised institution that fosters competition, that appeals to professionals who desire to be here. This effected a clash with the Corporation because they felt they were capable [of providing criminal defence...] if you allocate these funds for criminal legal defence to the Corporation, the Corporation will not destine those resources solely to criminal legal defence, but it would use them for its various necessities and that would lower the [service] standards. (Interview 18)

It is interesting to note that the risk posed by LACs regarding the potential misuse of funds allocated for the sole purpose of providing criminal defence for tackling other pressing needs was previously diagnosed regarding the CBA's scheme (Chapter 4), though here it was something to be avoided. What seems to have been a novel argument for dismissing LACs' intervention was the need for balancing prosecution and defending institutions to guarantee a fair trial according to the adversarial logic of the new criminal justice.

The government considered the lessons arising from comparative experiences, the need to attract seasoned lawyers and to improve financial management as justifications for excluding LACs from criminal legal aid provision under the new procedure. The comparative experiences on criminal legal aid considered by the government (Camhi et al 1997) showed a balanced model: a powerful prosecutor vis-à-vis a specialised public defender. With the creation of a new criminal defender service there was an expectation of attracting better professionals through competitive salaries to work as public defenders (Collins 2015:3).

However, different LAC representatives interviewed for this dissertation said that the Corporations resisted this decision because they wanted to take part in the reforms to criminal justice, especially after their intervention during the initial stages of implementation of the new criminal courts providing legal defence. The enactment of the statute creating the Criminal Public Defender occurred in 2001, after the

criminal procedure reform came into force in 2000. To fulfil the statutory right to legal representation, the MoJ opted to use Valparaiso's LAC to hire and train the first public defenders with the cooperation of law schools from the United States. The implementation of criminal legal aid through one of the LACs faced some difficulties similar to those which had befallen the *PAJ*. The MoJ expected a hands-off approach from this Corporation regarding these *ad hoc* public defenders, whereas the latter LAC expected to treat them the same as its other employees, especially as the Corporations were evaluating whether to participate in the public bids to become licensed providers of criminal legal aid.

One research participant foresaw an economic opportunity for LACs to become franchised providers:

> [T]he idea was that we could appropriate this notion within the Corporation with the purpose of improving working conditions and to give the possibility of a better professional development to our lawyers. (Interview 6)

Valparaiso's LAC decided to actively participate in the bidding process for public funds for criminal defence in two regions (*CAJVAL* 2002:38). In 2004 it was awarded with funds for legal defence in six cities (*CAJVAL* 2005:28). Yet, the intervention of Valparaiso's LAC in the provision of legal assistance for criminal defendants lasted only during the early implementation of the criminal procedure reform. Moreover, it was limited to those geographical areas unattractive to private practitioners, putting an end to the prospect of becoming licensed providers. An interviewee who participated in the public bid explained how the Corporations' potential to become criminal defenders was limited by a subsidiarity logic underlying the new criminal legal aid scheme:

> Fundamentally, when the private sector does not participate, the state must fulfil that role. Yes, it [LAC's participation] persisted for a while but in areas where there were no private practitioners, where supply of private lawyers was very scarce (Interview 12)

This quote from the data shows a common understanding at the time of the constitutional regulation on state entrepreneurialism. It was interpreted that the state was subject to a prohibition to engage in economic activities as an entrepreneur (see Aldunate 2001; Ruiz-Tagle 2000a; Vallejo and Pardow 2008, criticising this understanding for confusing a supermajority requirement to create state enterprises with a constitutional prohibition). Nonetheless, as explained below, the MoJ's decision to implement criminal legal aid using the Corporations, instead of postponing the criminal justice reform until the creation of the new institution, was questioned during the legislative debate in connection with the jettisoning of legal training.

The Criminal Public Defender Service Bill

The government's Bill initiating the legislative work on criminal legal aid justified its reform by criticising the provision of legal services for relying on unqualified law students and *ad hoc* appointed uncompensated lawyers (the *abogado de turno* charitable model). Both schemes were inadequate for 'minimally satisfying this right [to legal defence in a criminal trial]' (BCN 2001:6). The government criticised the *ad hoc* judicial designation of uncompensated counsel for being 'based on the charity of professionals' (*Idem*:6–7) and for discriminating against lawyers in relation to other liberal professions not bound by similar obligations, highlighting that in Europe this system began to disappear on grounds of unconstitutionality. For instance, Cappelletti et al (1976:683) exemplified how the 'contradiction between the theoretical ideal of effective access and the totally inadequate legal aid systems' became intolerable by referring to the ruling of the Constitutional Court of Austria during the early 1970s,

declaring invalid the country's legal aid scheme for not providing adequate compensation to lawyers acting for indigents.

Besides these constitutionally grounded arguments, the Bill offered a critical diagnosis of LACs' practices, similar to that of the literature (see above). Issues related to eligibility criteria; the categories of services covered; incompatible representations; staff turnover; and moral hazards related to the separation between funding and service providers.

With respect to eligibility, the Bill mentioned that there was a gap in the definition of 'legal aid beneficiaries, as the law only referred to 'those who cannot afford a lawyer' (*Idem*:61–2). On the issue of legal services covered, each LAC had differently exercised its discretion to exclude or include different legal matters as part of their services such as debt collection, drug trafficking, inheritance, marriage annulments, less serious offences, crimes privately enforced such as libel and defamation, as well as litigating before municipal courts or public bodies (*Idem*). When a LAC represented one party in a case, it was ruled out from representing other involved parties to avoid committing a criminal offence of incompatible legal defences (Article 232 Criminal Code), thus, depriving claimants from legal aid. The high turnover of law graduates, who work for a fixed training period, and lawyers, because of the low wages they received, affected the guarantee of continuity regarding legal representation. Finally, the absence of a bond between provider (LACs) and investors (municipalities) diminished the allocation of funds because municipalities became unaware of how funds were used and what results were achieved by each providing LAC.

A final prospective issue referred to the implementation of the criminal procedure reform. Without modifying criminal legal aid, it was argued, an inequality

of arms between accusers and defenders would exist (BCN 2001:7). Whereas the prosecution of crimes would become the remit of a constitutionally autonomous, state-funded, professionalised and specialised public service, according to the existent system of legal aid, defence against such prosecution depended on unpaid law graduates in training or judicially appointed lawyers. The conflicted relationship between LACs and municipalities had the potential of exacerbating this problem because 'when municipalities enter agreements with Legal Assistance Corporations, the latter tend to serve or to prefer assisting the victims of crime or their families, rather than the defendants. In practice, of all the matters they deal with, 25% correspond to criminal cases.' (*Idem*:63)

The Bill's explanation of intention concluded that there 'does not exist a satisfying system of criminal public defence in the country', and there was 'no other alternative than to put forward the creation of a new body, well organised and sufficiently funded to assume a task of this magnitude' (*Idem*:7).

The debate in Congress

While by and large Congress backed the government's resolve in favour of professional and specialised criminal legal aid, the actual model put forward by the government did not receive the same level of welcoming consensus. Discourses on legal professionalism played a role in resisting some of the changes to the delivery of legal services too.

Legal aid provision: judicare, public salaried or mixed?

The MoJ required a think-tank close to the political opposition, *Libertad y Desarrollo* (LyD), to prepare a proposal of an agency responsible for criminal legal aid. After reviewing different legal aid systems, the report advocated a hands-off model

regarding state intervention, where the government managed a fund open to public bids, without any public salaried provision of legal services (Camhi et al 1997, BCN 2001:81). Initially, the government agreed with this proposal, but faced strong opposition coming from representatives of the Social Democrat, Radical and Socialist political parties, which favoured a public salaried model and rejected the possibility of including the private sector as purveyors of legal services (Interview 24).

Resistance against the original proposal came from the Corporations as well, reiterating a previous heard argument on balancing the adversarial institutions responsible for prosecuting and defending individuals:

> The Prosecutorial Service will be represented by a centralised organ, with significant resources and with great political and social influence. However, the Criminal Defence office would be left to the best or worst allocation that the authority makes of competitive funds and to the best or worst service that the bidders provide to the defendants; a service that will be provided on the basis of the utility that it can bring to the provider (*CAJVAL* 1996:6)

In between these two alternatives – private provision through franchised lawyers or state provision through public servants – a third-way option emerged: mixed provision combining franchised private defenders competing for funds and public defenders, working as civil servants of a new public service. This mixed model was proposed by the centre-left *Democracia Cristiana*, the political party to which the President and the Minister of Justice (also of the general directors of Metropolitana's Corporation during the first democratic era) were affiliated.

Lawyers' criticism and corporatist answers

Criticism of the government's model also came from the different Bar associations, denouncing its interventionist nature over core professionalism ideals such as independence and autonomy. Led by the CBA, the Bar associations published a joint opinion expressing their worries concerning this new legal aid service (*Colegio de*

Abogados 2000). These reservations were reiterated by the CBA's acting chair before Congress (BCN 2001:263–6).

Their main concern was that criminal defence lawyers would practice a form of 'patrolled advocacy' because lawyers would be hierarchically controlled. They also criticised the possibility that this new service could charge fees to better-off defendants. These lawyers' associations raised concerns about the depersonalisation of the client-lawyer relationship, and the undermining of professional dignity and threats to legal professional secrecy coming from external audits (*Idem*:265).

Some of these criticisms were echoed by representatives of the government and Congress (see interventions of MoJ representative Mirtha Ulloa; *Idem*:262; senator Hernán Larraín, member of the right-wing party *Unión Demócrata Independiente*; *Idem*:301; and senator Marcos Aburto, appointed by the Supreme Court; *Idem*:623), which led to introducing modifications to safeguard confidentiality and narrow the object of the external audits.

During the legislative debate, the return of corporatist elements regarding the design of this new institution arose, not dissimilar to those considered for the dismissed Regional Juridical Assistance Corporations Bill. The original Criminal Public Defender Bill created a National Council on Criminal Defence in charge, among other tasks, of setting the terms for public biddings on criminal defence. This council consisted of representatives of different ministries and the judiciary. The Supreme Court declined the participation of the judicial branch, which led to its replacement with representatives coming from the CBA and the legal academy (intervention deputy Pía Guzmán; *Idem*:181). This was supported by lawyer-parliamentarians, such as Christian Democrat deputy Sergio Elgueta, former chair of

one of the largest regional lawyers' associations, Concepcion's Bar Association (*Id*:200), and right-wing senators Andrés Chadwick and Hernán Larraín (*Idem*:405).

The government agreed to incorporate representatives of the legal profession to the renamed Criminal Defence Council on Public Biddings, without undermining the government majority within the council – represented by the MoJ, the Treasury and the Ministry of Planning and Cooperation. Thus, the largest Bar association in the country and the Council of University Chancellors – the body reuniting the universities created before 1981 – had to appoint a criminal law or criminal procedure law academic, respectively (*Idem*:406).

Reform to mandatory apprenticeship

The provision of legal training was also a controversial issue during the passage of the Bill, discussing whether training in criminal law practice should be kept or eliminated from the new service's tasks. Congress originally considered diversifying apprenticeships to include legal services other than legal representation before courts. Nonetheless, it dismissed this possibility because, in addition to the difficulties of controlling interns and potentially creating a scenario of privileged institutions and graduates, 'it would imply subtracting them [law graduates] from the Legal Assistance Corporations, a human resource that is scarce for the latter' (BCN 2001:94). This fear persisted after the enactment of the Criminal Public Defender Act, as explained by Interview 6:

> I remember having opposed this, arguing that the Corporations needed students. If we offered them to do their apprenticeship at the Prosecutorial Service, many of them would prefer going to the Prosecutorial Service, which had much better working conditions, more resources, better facilities, and they would not go to the Corporations to serve poor people. They would subsidise the work of a well-funded institution.

The discussion got messier as senators began to question why the Corporations were excluded from acting as public defenders but, at the same time, the MoJ had designed a transitional programme to provide criminal legal aid by hiring and training lawyers through LACs. This solution was criticised because it allowed the government to 'interfere in the organisation and appointment of defenders, because if the defenders are bad, the blame will be on the Ministry. He would have preferred postponing the implementation of the reform until there existed a proper [Criminal] Defender service[.]' (intervention Socialist senator José Viera-Gallo, *Idem*:375). Similarly, senator Chadwick stated that it was not 'good for the prestige of the system, […] for equality under the law […] that the system gets implemented with every bit of the prosecutorial side legalised, institutionalised, formalised; and with a provisional, transitory, emergency, defending side' (*Idem*:376).

In connection with this debate also arose the role of professional ethos in attempting to constrain change. Both supporters and detractors of a mandatory training scheme were trained lawyers, but it is possible to distinguish positions between those who were trained before and after 1981. With respect to those trained before 1981, those senators who were members of the Radical Social Democrat party – historically advocates of a public salaried model as explained in Chapter 3 – complained about the absence of students in criminal law practice (*Idem*:371). Once again, Senator Silva appealed to tradition under the expectation that the Corporations' role would be reconsidered:

> There are times when the principles from the past provide arguments that permit a more definite vital conception. Mr Arturo Alessandri created the system of the Judicial Assistance Services belonging to the Bar Associations, with two very specific aims: first, to deliver services to the poorest, neediest people […] and second, training future lawyers after the conferment of their degrees, and which is not understandable how it will be replaced. […] Such a wise mission cannot be consigned to the past. I do not understand why tradition is looked down on (*Idem*:376)

Defending the contrary position of restricting students' intervention was the future head of the Criminal Public Defender service, Alex Carocca, who graduated from law school after 1981 and had studied abroad too. He added that:

> the legal aid system relies on law graduates, rather than for educational objectives, for the purpose of delivering a service and giving back to society. [...] Students' participation in the new criminal procedure is restricted to those proceedings for preparing for a trial and they will intervene in these proceedings, as well as with LAC by assisting victims (*Idem*:372).

A former MoJ policymaker recalled having made a similar position during the legislative debate of this Bill:

> I said, 'excuse me, but it does not seem so clear to me that there is an obligation of the state to provide a place for vocational training in criminal matters. Forensic training should be [a duty of] the universities, of law schools.' If the law schools, their legal clinics, want to establish an agreement with the Criminal Public Defender or the Prosecutorial Service, no problem, but, otherwise, I do not know why they should train students. [...] I believe that it confuses their role. If it is useful to have applicants for the Criminal Public Defender service? I think it is good if it takes advantage of this possibility. [...] But not that it becomes a responsibility of the State of Chile to train lawyers in forensic practice. (Interview 9)

After these exchanges, a trade-off was reached consisting of authorising voluntary training duties without disrupting the right to legal representation by a trained lawyer. Radical Social Democrat senator Augusto Parra drafted an amendment to allow students to do their apprenticeship as assistants of criminal defenders or at those franchised law firms participating in criminal defence. Thus, according to Senator Parra, by allowing graduates to do their training in these institutions they 'will share the responsibility for criminal accusation or defence and, by doing so, they will not only *return to society the good they have received*, but also complete their education properly' (*Idem*:628, emphasis added).

Nonetheless, Senator Parra seemed conscious that with this amendment the ethos underlying mandatory training began to erode and legal aid through legal training might be replaced in the future: 'He estimated [it to be] indispensable to

make these necessary adaptations so in the future it will be possible to continue doing mandatory apprenticeships in criminal law, without innovating, *at least for the moment*, on the general scheme provided by [the law].' (*Idem*:482–3, emphasis added)

The government agreed with this proposal and consequently incorporated an amendment denoting those ideas, approved unanimously by Congress.

The enactment of the Criminal Public Defender service Act and its aftermath

The statute governing the Criminal Public Defender service, the *Ley 19,718*, came into force in 2001, becoming the first significant reform to legal aid being hived off from legal aid through legal training. The delivery of criminal legal services expanded coverage as it was not mediated by the defendant's economic resources – not limited to poor defendants as with LAC – allowing the service to charge a fixed fee regarding better-off defendants.

This new service follows a mixed model of legal aid provision, with a fixed number of public salaried lawyers, representative of 30% of the supply, and private lawyers previously licensed by the same office, representative of the remaining 70%. The initial target furthered by this model was to have a public defender in the first hearing before a criminal court and, for the remaining stages of the trial, a franchised private lawyer would continue representing the defendant. However, in the end, private criminal defenders were authorised to intervene at the first hearing too (Interview 18).

There was a timing issue too, as the Criminal Public Defender was created after the reform to criminal justice began its implementation in 2000, putting additional pressure on legislators. Research participants involved in the elaboration of this policy considered that the Criminal Public Defender had not been subjected to the

same level of thorough deliberation as the other institutions involved in the criminal procedure reform. There was a strong possibility of losing political momentum by continuing with a more time-consuming evaluation of alternatives for criminal legal aid before choosing the final model.

> Political and legislative attention centred in the whole set of remaining reforms, beginning from the top with the constitutional amendments towards those down below. And the Criminal Public Defender service had much lesser attention and it was not unanimously [agreed on]. It was urgent to implement the Criminal Public Defender, because, if not, the reform would not work out. I was left with the feeling that it was a bit fast how it was enacted. A bit of a 'January legislation', the one that becomes passed rapidly before the [legislative] recess of February [...] Political attention faced the risk of dispersing or running out of steam and the implementation of the main thing could not be postponed for something that appeared comparatively minor and that could have admitted further reforms. (Interview 25)

An example of this haste regarding its legislative design, can be found in the split between 30% of public defenders and 70% of private-franchised defenders. This division was not adopted through technical assessments, but rather it was a political decision to arrive at some form of agreement between members of Congress, as a third way solution between right (privatisation) and left (public-salaried) antagonist positions:

> It was resolved through an equation without any technical foundation. How many defenders did we have? Simulation model, territorialisation model, total number by location, let's say, 278. How many of those private/public? 70/30. Why 70/30 and not 65/35? 70/30 just because. That was the agreement and that is why today 70% is private and 30% is public. [...] a political resolution rather than a technical one. The technical support was that both sums equalled the total number of defenders that were required. (Interview 24)

Considering the previous compromise, the solution to mandatory training can be understood as another compromise. Instead of eliminating graduates or legislating on the content of their training, the *Ley 19,718* (article 75) gave ground regarding its imperative nature by authorising the Criminal Public Defender – and the Prosecutorial

Service as well – to enter into agreements with LACs to permit graduates to do their training in those institutions.

Long term outcomes

It is possible to identify several repercussions brought about by the hiving off of criminal legal aid from legal aid through legal training in relation to a changing professional ethos and subsequent policies on legal aid.

Beginning with professional ethos, it is possible to argue that the disputes previously mentioned expanded different views on professionalism that weakened its previous shared meaning. Before the Criminal Public Defender service, the legal profession, whether organised under the CBA or uncoordinated through legally trained members of Congress, successfully resisted changes undermining traditional ideas of professionalism. For instance, the shift from a national public service towards the creation of regional corporations stopped a transformation furthering hierarchal controls and bureaucratic expertise, instead favouring collegial forms of governance with their related logics of social trusteeship that assume community principles, such as preserving values of autonomy and independence (Freidson 2001:12; Evetts 2006:528, Gorman and Sandefur 2011:284, Muzio and Kirkpatrick 2011:393–4).

The legislative process on criminal legal aid, on the other hand, was evenly permeated by rival discourses on access to justice and professionalism. The critical public statements made by the CBA (*Colegio de Abogados* 2000, partially reiterated in 2008) about franchised provision of legal services illustrated how this reform contested the common understanding by the elite of the profession about what constitutes accepted legal practice. These interventions described those providers in terms similar to what recent literature identifies as the *sausage factory* firms discourse: profit-centred firms providing passive defence for their clients mainly

through plea-bargaining with their accusers rather than the self-image of client-centred firms as champions of defendants' rights (Newman 2013:30–2). Besides this underlying caricature, the CBA's position exemplifies a common reasoning over professional employment in large, bureaucratic and commercially orientated workplaces, which arguably exposes practitioners to external sources of power and managerial authority, and subordinates professionalism to the commands and goals of their employer (Muzio and Kirkpatrick 2011:394).

In connection with the differing views of legal professionalism, this was the first statute that introduced a lexical ordering (Rawls 2009:37–8) between providing access to legal representation and training future lawyers, in the sense that one goal must be fully satisfied before moving on to satisfy professional values of a different type (Wendel 2013:359). Considering its voluntary character, legal training became a secondary or even a non-existent goal. Both the Criminal Public Defender and the Prosecutorial Service may devote their efforts to training law graduates, but only if they comply with their core duties of prosecuting and defending criminal defendants, respectively. By introducing this lexical order, the meaning ascribed to legal aid through legal training became legally undermined.

Finally, the introduction of the Criminal Public Defender service had policy consequences too. As explained in detail in the next chapter, the model adopted on criminal justice reform set a path regarding changes to both procedural and legal aid provision on employment and family law. Criminal justice reform became a reform model for policymakers in the sense that subsequent moves available became a fraction of previously taken ones, enabling or preventing further developments (Goodin, Rein and Moran 2006:21). This new wave of reforms enabled changes at the macro-level – represented by reforms to procedural areas of the law – moving towards

micro-level decisions where each decision-making stage has been constrained by the previous choice, as happened with legal service delivery excluding or limiting law graduates' role.

The overall costs of the criminal justice reforms constrained further transformations to the judicial sector. The costs of the new criminal justice were prohibitively high, which caused further reforms to the justice sector to encounter budgetary limitations when trying to replicate what had transpired with criminal procedure, including legal aid. Even so, these judicial reforms again forced the question about who should represent claimants and defendants before the newly created specialist courts.

A good example of this questioning was the constitutional amendment incorporating the right to legal representation for crime victims. The increasing levels of victimisation within the population led to cross-bench support for this amendment (BCN 2011:5). The amendment, which became law in 2011, extended legal representation to victims of crime and made state provision of lawyers for criminal defendants a non-waivable right (*Ley 20,516*). It was also an innovation to the policy repertoire. Benefiting victims from a legal right to be represented at the trial as a party is commonly a feature of inquisitorial systems, not of the adversarial model, where the most controversial participation of victims is limited to the right to provide input into sentencing decisions (Roberts 2015:108–1). This 'inconsistent and incoherent element' to the adversarial logic was dismissed during the legislative proceedings (BCN 2011:20).

No statute creating a new agency to implement this amendment was subsequently enacted. The Minister of Justice explained that, while waiting for a new

national juridical service to replace LACs, this constitutional amendment was going to be implemented through the Corporations:

> He explained that the formula that attracted the most support was to operate through the Legal Assistance Corporations. He stated that there are currently, within these Corporations, twenty-four centres for the attention of victims of violent crimes, eighteen common centres, five units and a centre specialising in the protection of the rights of the child. He indicated that these centres provide care through qualified lawyers and not law school graduates and have achieved very good results. (Intervention Minister Bulnes, *Idem*:107)

There are two points to be made on this constitutional amendment indicative of the shift on legal aid provision that occurred after the hiving off of criminal legal. First, specialised provision has been equalised to allow no intervention by graduates. There was no single argument in favour of introducing graduates as providers of assistance to victims of crime. Second, in contrast to what happened with *PAJ* (and also with family mediation, Chapter 6), there was no bypassing of LACs' experience regarding victims of crime, although by using LACs to implement this new provision, the government signalled an interventionist approach over the Corporations.

In connection with this point, criminal legal aid reform as a game changer on state-funded delivery of legal aid (including the diminished role that corporatist representation of interest groups received) also constituted a watershed event in the relationship between the MoJ and legal aid providers, shifting towards a more interventionist relationship. The Criminal Public Defender service is a ministerial department of the MoJ, in the same way as other public bodies – i.e. Child Care Services or the body in charge of prisons, the Gendarmerie. Moreover, a key pending matter involves the Criminal Public Defender's autonomy from the government, where there have been proposals for constitutionalising its autonomy similarly to the Prosecutorial Service (*Moción parlamentaria* 2006). With respect to LACs, before this reform, the Corporations used to act with utmost autonomy, usually leading their

own modernisation, whereas the MoJ opted out of developing legal aid through external pilot programmes such as *PAJ*. After the separation of criminal legal aid in 2001, the government began intervening more in LACs to exclude, limit or rationalise the intervention of law graduates, as explained in the next chapter.

Conclusion

During the first decade of democratic government, an intensive legislative agenda was centred on reforming the judiciary. Relevant developments for this renewed thrust for legal change regarded the social consequences of the neoliberal policies inherited from the dictatorship, as well as the past behaviour and absence of institutional change of the judiciary during the authoritarian period. Support for change came from different stakeholders voiced by way of critical evaluations. Along the lines of this agenda, improving access to justice for the poor instilled governmental endeavours to reform legal aid which, with the sole exception of criminal legal aid, failed.

Legal aid through legal training, although questioned, was kept unaltered by those legislative initiatives. The personal trajectories of lawyers who had been institutionalised through mandatory training when the CBA ran the scheme shaped their worldview on the issue, which helped to perpetuate the scheme under the guise of being expressive of a common ethos. Alternatively, the MoJ implemented a pilot programme in preparation for future legislative reform, which rather than interrogating their participation continued with legal aid through legal training in a more coordinated and systematised form, with students acting as assistants in preventive legal services such as legal information and advice, and mediation.

While improving legal aid delivery triggered most legal change efforts, legislative transformation of legal aid through legal training only became possible

when access to justice became a prominent issue following systemic reform of the judiciary regarding criminal justice. There is a noteworthy difference between those failed attempts to legislate during the first half of the decade and the first hiving off of criminal legal aid. The first episodes of legal change occurred when the relationship with the judiciary was a strained one and compromises were made, reducing some radical changes to the judicial branch – i.e. a national magistrates council to appoint judges became substituted by the participation of the Senate in the appointment process of Supreme Court Justices. During this last episode, which led to the creation of the Criminal Public Defender service, the judiciary collaborated with criminal justice reform and the debate became more legalistic and technical, including legal aid reform fulfilling the right to equality under the law between prosecutors and defendants.

With the systemic reform to criminal justice, legal aid became a separate theme from legal training. Although during the legislative deliberation on the Criminal Public Defender service training was debated, it was symbolically reintroduced as a voluntary faculty.

As judicial reforms to specialised areas of the law would continue during the next decade, new tensions would emerge because of historical reforms to employment and family legal aid, which will be discussed in the next chapter.

Chapter 6: Legal aid reform flanked by generalist and specialist schemes (2001-2017)

Following the creation of the Criminal Public Defender service, the first successful legislative effort to reform the legal aid through legal training scheme, this chapter addresses a tension which has become apparent. The state has committed to legal aid through legal training (as discussed in previous chapters) but now it has to provide for specialist legal services in certain areas of law, where law students became excluded providers. In other words, after the original legal aid through legal training scheme underwent its first major legal reform with criminal legal aid, this permitted the differentiation between access to justice and legal training in policy debates. Thus, this chapter inquiries on what tensions have risen as a result of historical changes, and changing specialisation, in certain areas of legal aid.

After 2001, policy proposals on legal aid schemes fluctuated between generalist and specialist reforms. Generalist schemes were all aimed at replacing the Legal Assistance Corporations (LACs) with the creation of a new public service following a mixed model for legal aid provision. Corporatist composition of directive bodies of these prospective services, such as national councils or boards, disappeared or was considerably reduced. Schemes diverged from each other on how they tipped the balance in favour of private or public providers. Regarding the future of legal aid through legal training, schemes oscillated between modifying law graduates' role or eliminating their participation in legal aid delivery. These proposals were reactions to different instances of discontent from LAC staff and students regarding working conditions (2001-2006); from lawyers under the burden of representing parties for free before family courts (2008-2013); and ideological disputes against what was perceived as legal aid privatisation (2014-2015). These reform attempts to legal aid

did not prosper. Beyond their legislative failure, these generalist proposals reveal that keeping the legal aid through legal training scheme untouched, as a valued stage for embracing professional values and learning the secrets of legal practice, had lost its grip on limiting potential reforms to legal aid delivery.

Specialist schemes were the result of procedural reforms to labour and family courts. These changes raised the question about who represents parties before these new courts, as happened before with criminal justice reform. Instead of replacing the LACs model with another institution similar to the Criminal Public Defender service, new alternatives were explored. Regarding family courts, widening litigation in person; with respect to labour courts, specialised and professional legal aid by public salaried lawyers within LACs' organisation. Because reform to family justice went hand in hand with the introduction of divorce, courts collapsed and further legislation was needed to increase access to legal representation. LACs increased their staff of family lawyers, and law graduates were allocated limited and supervised responsibilities. Learning from the previous mistakes in family courts, and to counterweight power relations in court between employers and employees, the reform to labour law courts restricted legal representation to admitted lawyers. To fulfil workers' right to legal representation, the Workers' Defence Office (WDO) was introduced as a specialist unit within LACs' organisation. Thus, gradual improvement or substitution of the legal aid through legal training with professional and specialist providers became possible in the context of major changes to the justice sector in relation to modernising courts and judicial proceedings.

The previous developments express the different tensions around legal aid policy debates in more recent times: general or specific schemes, main or ancillary proposals, or more broadly, access to the law or control over the production of

lawyers. Regarding the main research question of this dissertation, which asks why the legal aid through legal training scheme has stood the test of time, for the period covered by this chapter it is possible to anticipate that financial, judicial and educational structures have obstructed comprehensive reform of this scheme. Thus, the legal aid through legal training scheme has become the default generalist model of publicly funded legal services provision for those who cannot afford them.

The chapter is structured according to the chronological order of the different failed and successful attempts to change the provision of legal aid through legal training. The first section focuses on the government's proposal to create an Access to Justice National Service. This draft Bill followed a maximalist logic, trying to reunite every model of legal aid delivery at the time, including modifications to compulsory training. The second section concentrates on specialist reforms to legal aid regarding family and labour law. The third section discusses the first generalist attempts to eliminate legal aid through legal training. These draft Bills contemplated a mixed model of provision, with public salaried lawyers and a voucher system for claimants to choose from a pool of private practitioners. The fourth section analyses the announcement to create a new national legal service, generating the expectation of a prospective public salaried model, though leaving undecided the issue of law graduates training. The last section answers the opening question on what tensions have risen in certain areas of legal aid, and how these tensions may contribute to explain why legal aid through legal training has stood the test of time – this thesis's main research question.

The Access to Justice National Service draft Bill (2001–2006)

The third *Concertación* government was led by Ricardo Lagos (2000–2006), the second democratically elected president who belonged to the Socialist party. He was part of what was known as 'renovated socialists', ideologically close to British Prime Minister Tony Blair and his Third Way politics (Giddens 1998 and 2000). His administration tried to come to terms with some delicate issues which had characterised the first decade of post-transition rule, humans rights violations and constitutional restrains imposed by the dictatorship. Thus, the government created a National Commission on Political Prison and Torture (*Comisión Nacional sobre la Prisión Política y Tortura* 2004) to document and compensate victims of human rights violations.

The 1980 Constitution was profoundly amended in 2005 (*Ley 20,050*) eliminating the tutelage role reserved to the armed forces and other authoritarian enclaves over democratic rule. Constitutional rights, such as the right to legal representation, were rather untouched by this constitutional amendment. An interesting exception to the latter concerned professional associations such as the Chilean Bar Association (CBA). Though it was not comparable to mandatory affiliation as a practice requirement, the introduction of a new section to freedom to work restored professional associations' jurisdiction to adjudicate claims regarding the ethical misconduct of their respective members. Ethical misconducts of non-affiliated professionals would be adjudicated by special courts to be created by law (Article 19 Num. 16 section 4).

Regarding legal aid, Lagos's presidential manifesto limited itself to announce more funding for LACs and to continue with the Regional Juridical Associations Corporations' Bill (as explained in Chapter 5). Nonetheless, this government faced challenges coming from LAC unions, which shifted the agenda on legal aid.

Discontent from legal aid lawyers

It has been argued that lawyers employed by the government have different interests, working conditions, incomes and status compared to private practitioners; thus, the impoverishment of the public sector might displace professionalism for syndicalism (Abel 1989:316). The hiving off of criminal legal aid from the Corporations created an environment of uneasiness for LACs' lawyers, which led to political and work-related discontent.

As mentioned in the previous chapter, there had been an expectation from legal aid lawyers about increasing funding through public bids for becoming franchised criminal defenders, which stemmed from the fact that during the first stages of the criminal justice reform Valparaiso's LAC provided representation to defendants until the Criminal Public Defender service came into force in 2001. Because the government's preferred policy option for improving legal aid involved creating a new and separate institution regarding criminal legal aid rather than improving the existing ones, LAC staff started feeling left out of the reform process. For example:

> [LAC lawyers] witnessed how the implementation of the criminal procedure reform passed a little bit on the side and they said, what do we get from this? They felt that the Corporations were stripped of an important area which many of them liked to practise because they had worked for their lifetime as criminal defenders. (Interview 9)

As LAC lawyers were impatient about waiting for change and participating in the policy discussions, the taken-for-granted nature of the scheme became questioned too. This was illustrated by the following interview:

> You have lived waiting for the authorities to give access to justice the importance that it deserves. […] Fortunately, they stopped conceiving it as the place where applicants [to become admitted as lawyers] will have a folder [with case files…] That [the authorities] stop perceiving it as the poor relation of justice: because it serves poor people it must be poor too. On the contrary,

> that they perceive it as an institution which satisfies a key public need which demands for [...] long-run commitment. (Interview 8)

This uneasiness with the existence of the Criminal Public Defender service, where public defenders are governed as civil servants, heralded a different form of disquiet regarding LAC workers' legal status. Interviewees pointed out the legal complexities governing their status, swaying between being civil servants governed by public law and private workers regulated by labour law. For instance, the Labour Inspectorate, a government agency overseeing rights of workers at their workplace, ruled out having powers to intervene in labour disputes because the Comptroller General had ruled before that LACs were governed as a public service (*Direccion del Trabajo* 2004). The consequences of this legal status were explained by a board member:

> The Corporations are a strange thing: they are not a national service, yet their unions operate at the national level, and in the middle ground locates the Ministry of Justice which, as it does not want to get into a muddle, compromises with the workers and then hands the bill to the Corporations. (Interview 11)

This merging of different governing laws had consequences from the point of view of workers' rights, such as the possibility of undertaking industrial action, as well as other collective rights. The Constitution bans public servants from taking strike action (Article 19 Number 16 Constitution), but, as LAC staff are governed by the Labour Code Act, they are not limited by this prohibition. By applying both governing regimes, LAC workers unionised at the national level, which defied the Corporations' decentralised and autonomous design. The unionisation of LAC workers led to a national federation, which in more recent times has sought to bargain directly with the MoJ instead of negotiating with the workers' different employers (the four separate Corporations).

As previously explained in chapters 4 and 5, participation of law graduates stressed the Corporations' normal functioning, by overcrowding or understaffing legal aid offices:

> There are locations where, basically, the applicant is almost a gift because no-one is interested or because there is only one law school in the region. (Interview 12)
>
> Corporations began to collapse because they did not have the capacity to receive so many graduates, deferring placements for six or eight months [...] In the 1990s applicants were scarce resources. I think that this explosion on the demand for training began in 2005. (Interview 6)

Unions mobilised for better working conditions akin to civil servants working as public defenders. Therefore, they demanded the elimination of legal training to force governments to invest in legal aid provision without law graduates' subsidisation for the scheme.

In 2000, the union of the Metropolitana's LAC mobilised against the alleged misuse of that Corporation to pay political favours by hiring lawyers closer to the governing coalition. It also complained about its board, labelling it a 'decorative' body as most of its members delegate their duties to the general director (*El Mercurio* 2001). The union requested the board to remove this LAC's general director (*El Mercurio* 2001a). Although the board of the Metropolitana's LAC did not remove its general director (*Idem*), the government announced a major reform to legal aid, including the elimination of LACs. Accordingly, the MoJ began drafting a new Bill creating an Access to Justice National Service.

Specific provisions of the draft Bill

This draft Bill (*Mensaje* 2006) considered uniting all the different legal-service providers in one institution, mainly the old LAC and the modern Criminal Public

Defender service. It intended to improve lawyers' working conditions, and mandatory training for law graduates was kept with some modifications.

This proposal sought to create a permanent supply of legal services creating a National Network for Access to Justice, through specialised delivery of legal services. The government's proposal was permeated by a maximalist logic, as Interview 18 explained:

> The intention was to centralise [...] everything related to access to justice which was floating around in different places. […] a diagnosis was elaborated on the whereabouts of these services, about what [they delivered] and how to bring them altogether under this national service. Although the idea of the union was that everything should become part of the state […] in the end [the costs] did not add up. Then, it [legal aid provision] must consider the participation of private actors. And regarding students, it was discussed not to end with their participation but rather to review their role.

This maximalist logic can be found in provisions dealing with lawyers' salaries, the amalgam of to-be-provided legal services and the new regulation of mandatory training. This draft Bill detailed the number of civil servants, including lawyers and their wages, which reflected a desire to compete with the legal market (*Mensaje* 2006: articles 44 and 45). The pre-legislative draft considered a network of providers (*Idem:* articles 33, 34 and 35), including specialist centres for promoting access to justice; for victims of crime and mediation on criminal matters; and coordination centres to facilitate the relationship between this service and the judicial branch. It also considered public–private partnerships, through a public tendered fund for which the service would assume the role of coordinator of a national network of access to justice, overseeing the implementation of policies and technical guidelines on the different forms of delivery by private agents (*Idem:* article 3 g). The Criminal Public Defender would become another unit of this service.

This new national service was to create a national technical council, a consultative body, which was expected to assist its head, the national director.

Representatives of the different units were to be internal to the service, without any nod to the representation of educational, judicial, municipal or professional interests (*Idem:* articles 19 and 20). This new design departed from the corporatist pattern found LACs' boards, which was replicated in the Regional Juridical Assistance Corporations Bill (discussed in Chapter 5).

Legal aid was defined in broad terms to include any intervention by a lawyer on behalf of a party before a court, the state administration and any other public or private body (*Idem:* article 2). Coverage was expanded with respect to both claimants as well as the nature of the legal services to be delivered. Claimants included low-income people and also individuals coming from the 'impoverished middle class' against whom the service was entitled to charge a contribution or small fee. Supply was extended to cover the legal needs of impoverished legal entities such as small and medium sizes businesses (*Idem:* article 49).

This draft Bill reflected the tension outlined in the previous chapter, as there was a critique of the dependence of legal aid on the work of law graduates; yet, the Bill retained mandatory apprenticeship, with some modifications directed at improving claimants' access to legal advice. A policymaker explained how different conceptions of legal aid through legal training at the time came to be rivals:

> The debate about law graduates' participation has always showed two contradicting ideological positions, coming from people who 'tapped their feet over the same floor tile' [NB: worked at the same place]. On one hand, people concerned with the poor, women, the working class, domestic violence, alimonies and similar issues […] [a common rant would begin with a] 'stop wanking about this'. The truth is that the kids do a shitty job, and they graduated, to be honest, from shittier universities. And they force me to educate and to produce people to train them when, if the truth be known, is responsibility of universities. […] On the other hand, a position from the 'old' Chile, […] the model of solidarity, social conscience […] social responsibility […] You want your degree? Well, then go for a ride where potatoes hot up. The goal is not educative; it is to get [students] in touch with poverty. (Interview 24)

These two positions for and against training, between professional calling versus eliminating poor service provision, can be found in the compromise adopted in this draft Bill. This proposal entitled legal aid claimants to the right to *professional immediacy* (Article 38). This right guaranteed that a qualified lawyer would control each claimant's case by limiting the participation of law graduates to a maximum of two students per case. This right of claimants forbade graduates to intervene in oral hearings and to file by themselves any written submission before Courts of Appeals. Law graduates would become authorised to participate in hearings before first instance tribunals – that is, courts where proceedings are written, hearings are officiated by officers of the court or clerks (not by judges), and examination of parties are read from a previously submitted closed-envelope questionnaire.

The government expected to submit this Bill to Congress in 2003, but LACs lawyers would mobilise against this possibility, as they were not involved during the pre-legislative working stage.

Reception of this reform proposal

This draft Bill was the subject of criticism coming from LACs lawyers, who complained because they had not been consulted. In 2003, they decided to strike to reclaim the right to be invited to participate in this process, which coincided with a cabinet reshuffle including the appointment of a new Minister of Justice. The government involved LAC workers in the pre-legislative stages, although it did not necessary deal with their demands in the most diplomatic form. A representative of one of the unions explained their incorporation and subsequent withdrawal from this effort:

> After having agreed on a tailored Bill [...] there was this one last thing that we were polishing up until the representative of [the Ministry of] Justice made a snarky remark [he said] 'the truth is that it does not matter because

> the Minister will not consider it'. We told him to go and fly a kite as we realised we had been wasting our time for about six months. (Interview 8)

LAC workers withdrew their support as they felt the MoJ had adopted a dismissive attitude towards them before and during the preparation of the Bill. A different objection to this proposal focused on the nature of the transformations sought for replacing the Corporations with a national service. This objection was exposed by some LACs' boards:

> The reaction was of perplexity, disorientation, because one could not understand very well the reason for creating a national service when what should have been done was to create more Corporations [...the current Corporations] had very large districts and this clearly obstructed their work. Eventually, this [reform] was going to bureaucratise, politicise everything (Interview 1)

Those interviewed expressed scepticism towards a centralist design as the most adequate replacement for LACs, a criticism heard before against Allende's reform proposal to the CBA's legal aid scheme (see Chapter 4).

In any event, this draft Bill was never submitted to Congress as the attention of the MoJ was diverted towards sectorial reforms on family and labour courts.

Family and labour legal aid

So far, we have seen proposed changes that had not become actual law. Changes to labour and family courts raised the question about who represents parties before these new courts, as happened before with criminal justice reform.

The new labour and family law procedures shared with the criminal procedure reform the features of immediacy, orality and concentration. The centrality of oral hearings and the limitation of written procedures do not need explanation. Immediacy, on the other hand, consists of the custom by which evidence is heard and seen directly and immediately by the judge who is to decide the case, without the mediation of

clerks and summary records, which is usual in civil law proceedings (Merryman and Pérez-Perdomo 2007:114–15). Where they departed from the criminal justice reform was in the lack of new legislation creating professional and specialised legal aid schemes. One reason for that absence was a lack of money in the justice sector following the criminal justice reforms. A policymaker involved in these reforms compared their budget allocations:

> For the criminal procedure reform, money was allocated for building vast piles of infrastructure [whereas] regarding family courts it was just enough for moderate lettings of buildings. (Interview 24)

Despite economic shortages, these procedural reforms still brought incidental changes to legal aid, increasing the differentiation of standards in legal services delivery.

Family justice reform

As mentioned in Chapter 1, the introduction of divorce has been a stimulator of changes in access to justice in other jurisdictions. For instance, in the UK during the early years of the twentieth century marital breakdown was an expensive and complex issue with unequal consequences for the poor who, lacking resources for affording divorce proceedings, were led to adultery, bastardly and bigamy (Goriely 1996:217-218). This problem exacerbated post World War II when massive marital breakdowns happened increasing demand for divorce, for which the development of legal aid was part of the solution (Goriely 1994). A similar driver played divorce reform in Chile, although changes to legal aid were rather accidental as the policy focus was on the creation of family courts. Family justice reform was the most challenging procedural reform for LAC work. It was, according to a former general director, 'the guinea pig of reforms concerning massive attention to legal aid customers' (Interview 16). This participant estimated that the number of legal aid claimants before the reform was

approximately 10,000 and after its implementation it grew to 44,000, of which 33,000 were family claimants or defendants.

The explanation for this upsurge in family law cases related to the connections between three factors: the introduction of divorce, the hasty implementation of family courts and the possibility of litigating in person.

The main substantial change to family law was the introduction of divorce with the enactment of the *Ley 19,947* of 2004. From 1923 until 2004 there was a sort of quasi-divorce regularity (Cox 2011:98–9). With the active participation of lawyers and the acquiescence of courts, witnesses lied with respect to a formality: the actual address of the spouses at the moment of marrying. On the sole basis of this perjured statement, courts annulled the marriage on the ground of the lack of jurisdiction of the local register officer where the marriage agreement was held and registered. This became a routinised practice, accepted by both laypeople and juridical agents committing acts of instrumental law-breaking for subverting marriage regulation (Fritsvold 2009:806–7). This quasi-divorce regularity was criticised for hiding 'a separation without regulation', which just required money and friends who were ready to lie; its costs were borne by the helpless spouse, eventually their offspring and society (Tapia 2002:224).

Access to this form of marriage annulment was highly unequal (Cox 2011:99). People from wealthier neighbourhoods sued in this way eight times more than those at lower socioeconomic levels. LACs would not undertake the representation of low-income people because, as a public service, they refused to commit a fraud (*Idem*). With the introduction of divorce, Corporations could serve vulnerable people to pursue the termination of their marriages.

And then the 'debacle' of implementation – as labelled by an MoJ policymaker – occurred because, to appease socially conservative parliamentarians who were against the introduction of divorce, the government struck a deal to implement the new courts at once across the whole territory, rather than gradual implementation as undertaken with the criminal procedure reform (BCN 2004:936,945 and 954):

> The decision to implement it at once […] had a single name and a single surname: absolute divorce [...]. [President] Lagos wanted at all costs that [the] Civil Marriage [Act] was passed during his government and the last trench in which parliamentarians who were against divorce took root was [...] given the importance of the family bond, family courts should be implemented immediately [...] [The original Bill] had considered gradual implementation […] it was a political responsibility shared by all those of us who were sat at the table and when asked if we could do it [...] we said yes, we can. It was similar to the *Transantiago*. (Interview 24)

The interviewee compared the implementation of family courts with that of the public transport system in the capital: wholesale reform which reorganised from scratch the bus services for a population of approximately six million inhabitants from one day to another (*Economist* 2007). It caused enormous problems to its users, to the extent that President Bachelet – whose approval rating fell from 50% to 39% (*Economist* 2008) – stated that *Transantiago* was 'a bad word' (*El Mercurio* 2007). The situation was similar with family courts' implementation: 'We were informed on Friday that the courts would open on Monday' (Interview 20), stated a former general director.

Finally, with the introduction of divorce, vulnerable people became entitled to litigate in person, a factor explained in the next section.

Family law justice without lawyers

This reform reflected a situation of attrition towards the profession, first, by rejecting lawyers' intervention by expanding self-representation and, second, after the latter failed, by requiring compulsory performance through judicial appointment of lawyers.

Reform to family courts contained two main innovations from an access to justice perspective: the expansion of the right to litigate every family matter in person; and the introduction of voluntary mediation. The legislation creating family courts allowed parties to intervene *in person,* but judges had the power to appoint a lawyer if they considered that due process would not be properly guaranteed without legal representation (article 18 Act 19,968 of 2004).

According to some research participants, the rationale for the decision to expand litigation in person in every family legal issue was unrelated to the LACs' capacity to supply legal services to an increasing demand. Rather, it was used as a means to guarantee direct contact between judges and parties, as lawyers acted more in their own self-interest:

> It was a rule naively conceived to allegedly bring more immediacy. The argument for not reinforcing the Corporations was that people will be able to go by themselves. (Interview 14)

This urge for 'lawyer-free litigation' (Abel 1989:303) policies in times of constraints on fiscal expenditure was welcomed because it saved the national budget considerable resources on legal services:

> It was the perfect tool that the Treasury ended up 'imposing', because it was also endorsed by all this access to justice ideology on self-representation, of people having direct contact with the judge. [...] The exacerbation of the concept of access to justice ended up demonising the lawyer: lawyers limit access, they lie to the client. (Interview 24)

The use of 'adversarial mythologies' (Hunter 2003) aimed at demonising family lawyers has been a common strategy for promoting alternative dispute resolution (ADR) in family law. In Chile, this move furthering self-representation went in hand with the introduction of voluntary and mandatory mediation for several matters, including alimony and divorce. A register of authorised private mediators was

created. In the previous chapter it was explained that from the mid-nineties LACs had extensive experience on ADR. Nonetheless, to avoid competing with the private market of licensed mediators, the government instructed LACs to stop intervening in family mediation (Interviews 16 and 18). This instruction was resented as a new case of bypassing the Corporations in favour of privatisation:

> the best mediators [...] were in the Corporations' centres. [...] It was very inexplicable that, once again, a reform circumvented them. A whole system of licensed mediators was created [...] which, at the end of the day, has been very questioned and no advantage has been taken of what already existed in the Corporations. (Interview 14)

The reduction in the role of legal services provision by the Corporations may also reflect the lower value assigned to family law as a less sophisticated area of the law. This worldview on family law was acknowledged with disappointment by research participants. A former general director stated the following:

> it was disgraceful that, associated with the representation of people of limited resources, the area of family law was necessarily perceived as something minimised, not so difficult. Once again, family is postponed with minor signs in favour of labour, criminal [legal aid], where resources are injected and training [NB: continuing legal education] encouraged. (Interview 16)

Recent empirical research on the reform of the family courts in Chile has confirmed this perception of family law being in a lower position in comparison to other branches of law. Key players participating in family courts' design and implementation submitted that family law 'is not law at all' (Azócar 2015:24), as this branch of the law is loaded with emotions and, thus, nonjuridical (Azócar 2018:24).

The need for legal professionals

The courts collapsed, resulting in a resort, first, to the Corporations and, subsequently, to the old charitable model of *ad hoc* judicial appointment of uncompensated lawyers. The collapse described hampered the work of LACs too.

The literature on litigants in person has stressed their disruptive character for the courts, as they represent the 'classic outsiders' of the legal system: '[l]egally uninformed, sometimes emotional and "difficult"', forcing judges 'from the relative safety of passivity towards a degree of intervention that seeks to reconcile two competing demands: the needs of the unrepresented litigant for help and the needs of all parties for a system that is perceived as even-handed' (Moorhead 2007:406). Research in Chile on family court judges dealing with litigants in person confirm these disruptive effects (Fuentes 2015:948). Family court judges engage in two tasks, filtering (discriminating what is legally relevant from all the information received from each litigant in person) and communicating (trying to explain them what information is relevant and what is not). In practice, these judges must listen to stories that are difficult to follow, many of which they have admitted not understanding, and spend considerable time talking to litigants whom, beyond judges' efforts to be clear, do not understand them as well (*Idem*).

Because of the importance of orality, the promise of a concentrated, speedy trial became impossible to fulfil with such a high level of demand, postponing hearings for months, even in matters such as uncontested divorce (*Idem:*941). A detailed illustration was given by the following interviewee:

> If a preliminary hearing was held today, the trial hearing was set for twelve or fourteen months later. [...] it was horrible because even negotiating settlements in the preparatory hearing was not permitted, including uncontested divorces. No, everything had to be decided in the final hearing. [...] if we stopped attending hearings, courts' own management goals would have failed [… because] between 70% and 80% of their caseload [was ours]. (Interview 20)

LACs had to work hand in hand with the judiciary – led by the Supreme Court – to satisfy the massive rise in demand for legal services before family courts. The main

policy was setting up ‘LAC courtrooms’, intended to serve LAC ‘clients’ exclusively (Interviews 12, 13, 14 and 20).

The appointment of LACs to represent litigants in person caused new problems to equality of arms because the Corporations could only represent one party, which was usually the claimant:

> What had to happen indeed happened [...] between two low income opposing parties who could access legal aid, the first to come was first served so that the other could no longer be represented by the Corporation. (Interview 14)

To avoid accusations of conflict of interests, LACs did not undertake the other party’s representation, leaving the latter defenceless (Interviews 12 and 16). Consequently, family courts resorted to the old institution of the *abogado de turno* to even up the situations for the unrepresented party. This developed into a dispute between the CBA and the Supreme Court regarding the unpaid nature of this duty, which will be analysed later in this chapter because of its consequences for legal aid through legal training. In light of these issues, the executive and legislative branches worked on legislation to make amendments.

Reform to family courts

In 2006, Congress began the legislative process on a Bill submitted by the government that was targeted at ameliorating several of the problems caused by representation in person and the ineffectiveness of mediation (BCN 2008). Congress reversed the situation, reinstating compulsory legal representation, and mediation also became mandatory as a pretrial stage in several matters. The Corporations were strengthened too, increasing their budget for hiring more lawyers.

The Minister of Justice, after acknowledging the miscalculation made by the government in the number of new lawsuits – 182,000 in theory, 420,000 in practice –,

stated that this new reform to the family courts would 'practically reengineer [LACs]. Officially speaking, currently the Legal Assistance Corporations have a staff of 126 lawyers. With this new Bill, they would be able to destine 164 new lawyers to represent people in family cases.' (BCN 2008:188)

Congress inverted representation rules: parties must be represented by lawyers or by LACs, unless a judge authorises otherwise (article 18 modified by Act 20,286 of 2008). Additionally, this statutory reform to family courts authorised LACs to represent both claimants and defendants. The LACs' budget was enhanced too, allowing for extending working hours, hiring more lawyers and creating specialised units. This was necessary to give lawyers, not graduates, presence before courts in oral hearings.

Labour justice reform

The labour procedure reform was enacted in 2006 but came into force in 2008. Congress postponed its implementation on several occasions, and it also considered a gradualist implementation schedule, avoiding further judicial turmoil.

With respect to access to justice, the immediacy ideal of enabling workers to interact directly with the judge was used to justify the introduction of oral stages (BCN 2005:6). Nonetheless, apparently learning from its previous experience with family courts, this reform did not introduce litigation in person. Dismissing self-representation, the first Bill was limited to guaranteeing representation by lawyers but without innovating with new institutions (BCN 2005a:8). This led to debate on other possibilities: specialising the Corporations (BCN 2005:108–16); creating a labour defender service (BCN 2008a:114); private provision through public tenders; and preserving legal aid through legal training and the *abogado de turno* schemes (BCN 2005:246).

The reason behind legal aid becoming an undecided issue during the legislative proceedings of the labour procedural reform was the struggle between the Treasury, against increasing public expenditure, and the Ministry of Labour and Social Security, furthering the improvement of workers' rights. A research participant, closely engaged with the process, summarised their positions:

> [The Minister of Labour] wanted at all costs professional representation […] for workers, as an obvious way to level the field […] The proposal of the National Budget department [belonging to the Exchequer…] was simply to keep the existing model [...] What a major slap in the face [to workers' rights] to be represented by students in practice versus renowned lawyers [for the employers...]. (Interview 24)

The clashes at the macro-level between the Ministry of Labour – advocating change on legal aid provision – and the Treasury – backing the existing LAC model -, respectively, led the government to announce a reform similar to criminal legal aid.

Resistance came from LAC workers against the bypassing of their institution, as this had happened with *PAJ*, criminal legal aid and family mediation. Specifically, they were against what they perceived as the privatisation of legal services initiated with the Criminal Public Defender service. As one legal aid lawyer stated, the government's proposal was 'at least self-contradictory. We proclaimed that we were the only public institution allowed to defend private interests before courts.' (Interview 8)

Eventually, the government withdrew from the idea of submitting a Bill creating a new public service reminiscent of criminal legal aid reform. However, there was disillusionment from members of Congress for not creating a workers' defender service. Christian Democrat deputy, Jorge Burgos, was the most vocal against this decision:

> I would like to communicate some bad news […] the Executive decided not to submit for legislative proceedings the Bill creating a labour defender – whose logic would be equivalent to that of the Criminal Public Defender

> service – but rather to increment the budget of the Ministry of Justice, for having more programmes and lawyers in the Corporations. In my opinion, this decision constitutes a serious mistake. (BCN 2008a:146)

Without creating a new service, the Bill introducing legal representation in oral hearings before labour courts as a reserved activity for lawyers was passed by Congress (article 431 Labour Code). Students were excluded from oral stages and hearings, only being allowed to intervene in the written stages of trials (BCN 2008a:229).

As a trade-off to overcome the previous disagreements regarding legal aid provision, the MoJ arranged an internal division of labour within the Corporations, separating the representation of plaintiffs in labour cases from legal aid through legal training in a new unit locally known as *Oficina de Defensa Laboral* (Workers Defence Office (WDO)). According to Interview 24, pressures at the highest level were exerted for there to be a specialist defender unit, for which 'the Ministry of Labour forcibly piled the respective budget on the Ministry of Treasury'. Although from a technical point of view WDO mainly represent claimants rather than defendants against former or current employers, the reference to 'defence' was a rhetorical device to present this new institution to workers as being as close as possible to the Criminal Public Defender service.

The Workers Defence Office

The WDO implementation was considered 'neater' than family reform by several participants, to use a former general director's expression (Interview 16). A general director highlighted the gamut of techniques used for its implementation:

> public competition for lawyers, examinations, technical reports, psychological evaluations, interviews, and, subsequently, the selection, training and appointment of Workers Defence Office staff. And it began with vast resources too – wages were increased by up to 50%. (Interview 20)

Nonetheless, the WDO still came across difficulties. One group of issues related to its legality, whereas a second group centred on the relationship between the MoJ and the LACs.

The WDO had to shake off several objections to its legal status coming from the CBA. While the CBA repeated some of its previous complaints about hierarchical controls and depersonalisation of the client-lawyer relationship (the 'sausage factory' criticism, Chapter 5), its main critique towards the WDO related to the lack of legislation ordering the provision of specialised legal aid (*Colegio de Abogados* 2008).

The CBA requested an audit from the Comptroller General reviewing the legality of this policy, as for the CBA it was basically a public service created by decree rather than by statute as constitutionally mandated. The Comptroller General dismissed the complaint, upholding the MoJ's policy to create the WDO and arguing that it was not unlawful. The WDO was 'a programme integrated by lawyers working at [LAC], whose functions are providing specialised legal advice and representation in labour law, without constituting a public service or a different legal entity from the entities carrying it out' (*Contraloría General de la República* 2010).

For several participants, these complaints were considered corporate defences from incumbents against new entrants to the legal services market for labour legal aid:

> a corporate defence of a market niche: a relevant number of labour lawyers use *pactums de quota litis* [where] they get paid with a very significant portion of their clients' compensations [...] the Workers Defence Office acts as a regulator for that matter. (Interview 6)

Though the 'regulator' label for the WDO seems inaccurate to describe its role – in the legal fees example, the WDO acts more as an equaliser mechanism – the main

purpose for setting this unit was reducing procedural imbalances and pursuing substantive fairness before labour courts. Nonetheless, besides scepticism towards the CBA – a common attitude perceived in several participants – the 'regulator' label may have arisen from the fact that mandatory affiliation to the CBA became voluntary from 1981 (see Chapter 4). Consequently, it stood in the way of disciplinary control over ethical misdeeds regarding this form of fee arrangements (article 36 Code of Professional Ethics 2011). With the WDO, the market has a new competitor for low-income clients to which it needs to adapt.

Issues regarding the relationship between the MoJ and LACs stemmed from the former state department's policies implementing this new unit within the Corporations. The first issue related to the MoJ's interventionist role towards the Corporations, which was a resisted measure:

> It was suggested to us that, administratively speaking, the workers defender system was going to be a section of the Corporations, but technically it would directly depend [on] the Ministry [...] that seemed unacceptable to me. It could not be possible that we were the ones hiring, dealing with the personnel, but we were excluded from having a say on technical issues. (Interview 14)

This double monitoring issue evidenced in these views is comparable to those experienced previously by the LACs, with the execution of other programmes by the MoJ through them, such as *PAJ* or the initial stages of criminal legal aid. Nonetheless, the reception by LAC lawyers of the WDO was rather positive as this elevation of service standards and working conditions opened a window for pressuring for change on unreformed areas:

> The staff understood that this was a process [...] of gradual change and as we were progressing in the improvement of the different units, it was necessarily a challenge for what could come next. (Interview 13)

> [The WDO] essentially represents the ideal of what, in theory, should be a national service or how a decentralised service should be equipped. (Interview 12)

LAC lawyers welcomed the WDO as an improvement, although it was resented that this enhancement was limited only to some of their peers:

> [WDO] came with individually assigned resources [...] an issue that at the same time generated an internal difficulty within the Corporation because a labour defender could easily earn twice as much as a family lawyer [...] even if, technically speaking, [...] their skills are the same: litigation, substantive and adjective legal knowledge. (Interview 16)

> There is a criticism to the creation of specialised offices with higher standards than the rest [...] of elite groups with more resources [...] it happened before with the Legal Assistance Program [*PAJ*]. (Interview 9)

As occurred with previous MoJ programmes, the WDO shared a similar fate: it began being provided through the Corporations until it became impossible for the MoJ to continue monitoring its implementation directly. Subsequently, it became a separate unit within each LAC. Thus, the WDO became an established institution.

The specific reforms in family and labour legal aid show in the Chilean context that advances in legal aid occur when they are focused in specific areas. In the case of family legal aid, policies experimented with lawyer-free self-representation which, after failure, made the need for proper legal representation a more pernicious one. As regards labour legal aid, it began as a rhetorical device of a new service which in practice became a fully organised specialist unit within LACs. In both family and labour legal aid trade-offs between the old legal aid through legal training scheme and new legal services delivery were absent. This consistency on the same theme can be explained because specialist changes to legal aid were embedded in systemic reforms to the judiciary where the legal aid through legal training scheme became antithetical. There is actual change in specialist areas which occurs when other motivations underlie a systemic procedural reform to some branches of the law.

The introduction of vouchers with the National Juridical Assistance Service Draft Bills (2008–2013)

As explained before, the reform to family and labour courts went alongside the creation of a specialist and professional legal aid service without passing a law creating new public services. These were new units within LACs. Unsurprisingly then, the fourth *Concertación* government (Michelle Bachelet 2006–2010) had not made any electoral promises regarding legal aid (*Programa de gobierno de Michelle Bachelet* 2005). Her presidential manifesto was limited to an obscure statement of the coalition's pride in the several procedural reforms undertaken during the previous sixteen years, veering instead towards policy announcements on substantive areas of the law (i.e. a new Criminal Code).

A turning point occurred when a similar unpaid legal aid scheme to that of the Corporations, the charitable *ad hoc* judicial appointment of unpaid lawyers known as *abogado de turno*, was challenged by the CBA before the Constitutional Court (*Tribunal Constitucional* 2008) and the International Labour Organization (ILO 2008).

The Chilean Bar Association's litigation against free legal representation

Reform to family courts in 2005 authorised parties to litigate in person, as discussed above. This created several problems for courts, which led them to appoint lawyers from the Corporations. Nonetheless, because of conflict-of-interest rules, LACs could only represent one party. Therefore, judges began appointing lawyers using the old *ad hoc* system of the *abogado de turno* to guarantee legal representation to both parties.

These judicial appointments prompted a rift between the CBA and the judiciary. The CBA complained to the Supreme Court about the judicial appointment

of lawyers to assist unrepresented parties before family courts. For the CBA, the increasing use of this charitable scheme hindered lawyers' practice in small urban and rural areas (*Colegio de Abogados* 2006 and 2006a). After the Supreme Court rejected these complaints, the CBA challenged this legal aid scheme before national courts and international organisations.

The CBA challenged the constitutionality of the scheme on grounds of economic rights such as freedom to work and to be an entrepreneur before the Constitutional Court. For the CBA, the scheme was discriminatory against lawyers because no other profession had a similar duty (*Tribunal Constitucional* 2008).

Before the International Labour Organization (ILO), the CBA followed a similar strategy by underscoring the anachronistic justifications for the existence of this duty which, it argued, amounted to forced labour (ILO 2008). The CBA claimed that the reasons justifying this duty were not currently satisfied. Tuition fees had been introduced in 1981, making moribund the moral argument of free representation as lawyers' repayment to society for receiving free higher education. Further, the country's economy during the past 25 years had been healthy enough to improve access to justice, and the expansion of the legal profession had made lawyers more affordable. Finally, the power to appoint lawyers in family courts was not means test restricted to parties who could not afford legal representation. Thus, for the CBA, this legislation had led to an incomprehensible and highly abusive situation, where lawyers may have been working for free when representing better-off parties.

Both challenges were partially successful in the sense that, while these rulings did not strike down the duty to represent low-income people for free, other features were abolished. The Constitutional Court subsequently ruled that the uncompensated character of the legal services was unconstitutional, but not the power to appoint

lawyers in the first place (*Tribunal Constitucional* 2009). The ILO considered that the system's application was characterised by its undefined length and unpredictability, non-differentiation between better-off and vulnerable claimants, imposition of financial losses exclusively on lawyers, and disproportionate sanctions of suspension from exercising the profession for six months. As it lacked reasonable limits in terms of proportionality, it constituted forced labour (ILO 2008:36–8).

The CBA's actions could be read as disowning its own past, as before 1981 it was the CBA who controlled lawyers designated to fulfil this duty. A more pessimistic reflection was offered by a participant who had been involved with legal aid delivery for most of his career:

> That experience [the *abogado de turno*] has been weakened, which is so unprecedented in Latin America, where as a complement to mandatory training we had to undertake cases [...] for free [...] it disappeared thanks to the market economy, though lawyers' culture contributed too. The Chilean Bar Association officially wiped it away. Nowadays the young chaps reject this idea [...] why this six-months apprenticeship should remain in force [...]. This is pitiful because these were two institutions that gave Chile a certain prestige [...] which really helped people – the rest is just a bunch of literature. (Interview 5)

The government foresaw the possibility of novel challenges to legal aid through legal training on similar grounds – violation of the constitutional rights to entrepreneurial activities and work, and of international conventions against forced labour. A general director acknowledged the aversion of students to working for free:

> the different student unions [...] questioned it because it is free, something that for us, in the 1980s, for my father in the decade of the 1950s, it went unquestioned. [...] more serious [... was] the certainty that the system would blow up without the students in practice. (Interview 13)

Besides this scepticism coming from law students, the previous quote reveals economic reasons for keeping mandatory participation of law graduates in legal aid provision, an issue that will be discussed later in this chapter. The possibility of legal

challenges to legal aid through legal training was also incited by LAC lawyers. For example, Interview 8 said how, as a LAC lawyer,

> I always urged students to mobilise. I told them that in my opinion this apprenticeship was unconstitutional because it differentiates between professions.

The combination of student's questioning legal aid through legal training and the preceding judicial rulings put the government on the ropes, triggering responses to prevent judicial challenges by law graduates.

In 2008, the MoJ announced a new Bill which would limit the role of graduates to that of aides to lawyers. The Corporations would be substituted with a new public service. Legal aid would be provided through professional and specialised assistance to victims of violent crimes and consumer protection, as well as continuing with family and labour legal aid (*El Mercurio* 2009). The MoJ unsuccessfully approached the CBA's board to create a task force to work on this reform (*ACGCA* 16.6.2008). The board was particularly against the minor role of graduates in this prospective public service, which included the possibility of eliminating their mandatory training.

The outgoing government of President Bachelet produced a Bill during its final months in office (*La Nacion* 2010, *La Tercera* 2010). The Bill was submitted to Congress on 10 March 2010, the same day President Piñera was sworn into office (*Mensaje* 2010). Its submission before the end of the Bachelet's term was symbolic. As one LAC lawyer informed me, 'to show us that they had drafted it and kept their promise to submit it' (Interview 8).

Reform to legal aid was a salient issue during the presidential campaign for the 2009 election, where every candidate agreed on the necessity of putting an end to LACs and legal services provision through law graduates in training (*Colegio de*

Abogados 2009). The election was won by Sebastián Pinera, who belonged to the centre-right-wing coalition *Alianza por Chile*. The presidential manifesto for the first centre-right government democratically elected since 1958 adopted as its main policy the introduction of a voucher system, where eligible applicants for legal aid are supplied with a voucher which they may cash in with either salaried or private practitioners (Paterson 1996:249). The manifesto explained this system as follows:

> Voucher for Legal Aid for low-income people to hire legal services freely or paying a small contribution. This policy would allow professionalising and improving the quality of legal defence as lawyers, rather than recently graduated students, would deliver legal services to those who cannot afford them. (*Programa de gobierno de Sebastian Pinera* 2009:113)

The manifesto followed a policy proposal from researchers of a think tank close to Pinera's coalition, *Libertad y Desarrollo* (LyD) – they had experience as authors of the first policy proposal for criminal legal defence (see Chapter 5). Their diagnosis was that legal aid through legal training lacked accountability over the performance of practitioners, which usually affected legal aid beneficiaries by providing them a sluggish service, unequal access to pieces of evidence and problems to enforce favourable rulings (Delaveau 2009; Delaveau and Baeza 2011). These authors proposed merging the Criminal Public Defender and the LACs into a Public Defender service. Whereas criminal legal aid would be served through the existing mixed model, the other components (labour, family, civil) would be provided by public-private partnerships, where the new service would coordinate demand (beneficiaries) with supply (lawyers) through vouchers (*Idem*). Nonetheless, the role conceived for public salaried provision in this proposal was limited only to emergencies or on a subsidiary basis in locations with lack of private supply, to avoid creating a full-scale public service (Delaveau 2009:463).

Both outgoing and incoming governments drafted Bills for a National Juridical Assistance Service, with an organisation similar to the Criminal Public Defender service: professional and specialised provision of legal services, private–public partnerships on legal services provision through franchised lawyers and quality standards on legal services delivery. Because they share several key features, they will be discussed together in the following section.

Specific provision of the draft Bills

Alongside adopting a voucher system, similar organisational designs can be found in both the outgoing and incoming governments' proposals regarding the composition of the directive bodies. Corporatist representation of the judiciary, the CBA and universities reappeared, though counterbalanced by a majoritarian representation of the government.

The directive body in Bachelet's proposal was composed of seven members: three representatives of the Ministries of Justice, Social Development and Finance, respectively; one representative of the judicial branch; a representative of the largest Bar association in the country; and two academics (a legal scholar and an economist) selected by the Council of Universities' Chancellors – a body composed of those universities founded before 1981 and of autonomous universities which originally were the regional branches of the first group of universities (*Mensaje* 2010: article 12). Piñera's National Council was composed of five members, excluding representation of the judiciary, and reducing the representation of the Council of Universities' Chancellors to only one - a legal academic specialised in private or labour law to represent (*Mensaje* 2012: article 12).

The key highlight of this new service was that, for the first time since the introduction of legal aid in 1929, governments from rival political ideologies shared

the same resolve to eliminate the training dimension from legal aid provision. Whereas Bachelet's Bill did not state a reason for this change – it euphemistically said that the rules governing admission to practice needed to be adjusted to the new system – Piñera's draft Bill cited the Constitutional Court rulings of 2008 and 2009 as a 'change of circumstances' that made it 'untenable' to continue with the legal aid through legal training scheme. In explaining the intents for this second draft Bill, it was asserted that 'the education of law undergraduates is a responsibility of universities and that legal aid beneficiaries should be assisted by professionals with consolidated experience' (*Mensaje* 2012:8). Piñera's draft Bill also derogated the *abogado de turno* charitable scheme (*Idem*:9).

Neither of these proposals considered the alternative of having law graduates as lawyers' assistants or to train law graduates voluntarily, as happened with the Criminal Public Defender service and the Prosecutorial Service (see Chapter 5). This difference reveals that the legal aid through legal training scheme had become discredited as a policy alternative.

Reception of this reform proposal

Pinera's government was optimistic that its proposal would receive broad support, though internal and external criticism as well as political developments in the Justice sector would put an end to this proposal.

The government's optimism, according to a research participant, was uphold on the positive economic assessments of this policy proposal:

> In 2010, a new draft Bill was presented again, which gained momentum because this time it came with a financial report which had not existed before. (Interview 20)

The reference to the financial report highlights the feasibility of this reform as every presidential motion to Congress submitting a Bill must have a financial report from the Ministry of Finance. Of all the generalist policies discussed in this chapter, this was the only one which boasted the said report. The country's major broadsheet newspaper, *El Mercurio* (2011a, 2011b) supported the elimination of mandatory training, welcoming the idea of a portable subsidy or voucher for claimants as a scheme which might increase transparency, choice and access to better lawyers by the poorest.

External critiques focused on the elimination of training. The chair of the CBA, who was also close to the government, and the deans of two law schools founded before 1981 supported the reform's aim to improve access to justice, but questioned the elimination of training (*El Mercurio* 2011). Law students supported this Bill, although criticised the argument that if mandatory training was eliminated the 'call for service' of future lawyers would disappear (*Idem*).

Opposition to market-driven legal aid schemes such as vouchers usually originates from the public salaried sector, on accountability grounds regarding legal aid providers and concerns over quality in legal services provided *en masse* (Paterson 1996:249). Coincidentally, internal criticism came from the Corporations. As reasons for rejecting this draft Bill some participants mentioned the vulnerable condition of, and long-term relationship with, LACs' users vis-à-vis those served through franchised providers:

> Private law affairs go beyond a mere formal defence in specific procedural stages [...] the Corporation's users [...] are served in [more than] one area and [...] not for a limited time, as may happen in a criminal case, [...but] throughout their lives. (Interview 12)

> We serve vulnerable people and for them empathy is very important. It is not enough to win. (Interview 20)

In addition to this ideal of a personalised client–lawyer relationship that allegedly exists in LAC provision, other criticisms referred to the economic side of public–private partnerships, where the incentives would lead to serving large numbers of clients quickly, with low commitment to their clients' rights:

> To make it efficient you need to be awarded with a portfolio of clients and, to be profitable, the time that you allocate to serving clients must be quite limited […] with just three cases, it does not work for you; you need […] a thousand cases. But to manage a thousand cases so you can become awarded with another thousand you have to get out of this system fast. […] The [criminal] public defender is well evaluated; the licensed private defender is not. (Interview 13)

> one cannot establish economic biases with respect to legal services because some people, although they may earn higher incomes than the poorest quintile, genuinely cannot afford a lawyer, and this happens because they live under considerable indebtedness [...] this human right cannot be limited by an income issue […] it would be an assault on universal legal access. (Interview 16)

For these critics, the voucher system not only would lead to an uncompromised, formal defence, but in the end the social costs would be internalised by legal aid claimants where the cost for paying for a voucher may end up being higher than the benefit from legal representation. The issues pointed out by these participants can be explained as scenarios propitious for principal-agent problems, where funding is provided by a third party – the proposed public service – acting as a principal of an agent whom the principal does not supervise – private legal aid lawyers (Bevan 1996:101-103). Beneficiaries of legal aid vouchers seem to be in better position to supervise lawyers, but they lack the necessary knowledge to make lawyers accountable. Therefore, private legal aid lawyers have strong incentives to engage in supply-induced demand for services which their clients cannot evaluate but the principal will continue paying for (Bevan 1996:100).

These objections, particularly the parallel with the Criminal Public Defender service, were contested as an inaccurate comparison because the operation of criminal

defence is narrower than legal aid regarding potential lawsuits from claimants in other areas of the law, where alternative dispute resolution schemes may put an end to conflict. A participant who worked on this proposal made this point, objecting the previous criticism as grounded on 'ideological biases', advocating a more nuanced analysis that distinguished pre-trial legal services from litigation and their dissimilar provision mechanisms:

> criminal defendants have been admitted to and previously registered in the system and therefore you only have demand [for legal aid] from absolutely identified people. This differs in the model of operation of the Corporation because it has a very, very important percentage of consultation, orientation and education. […] You cannot outsource legal orientation and information because you are giving the person who is going to provide the final service the incentive to litigate everything. […] You must serve them through a public, institutional system. Regarding [litigation], it established a mixed, private and public, scheme. (Interview 19).

This draft Bill combined vouchers for hiring franchised private practitioners, contracting out only legal representation, but keeping information and advice as a remit of the new service's public salaried lawyers - a combination aimed at reducing supply-induced demand (Wall 1996:555; for the debate on supply-induced demand, see Chapter 1).

A different type of criticism, which concerned the elimination of mandatory training, was formulated by the Supreme Court. The highest court in the country warned the MoJ that this draft Bill was altering a core requirement to become admitted to practice, as it was within the Court's remit to have the final say regarding the conferment of the lawyer degree. The Court's position was summarised as follows:

> The Supreme Court is part of the state, and in that sense the degree is awarded by the state. […] If the state confers the degree, it must ensure that applicants comply with minimum standards. If it [mandatory training] was eliminated, and the state stopped participating in this qualification stage, then the admission to practise system was also reviewable [...] The Supreme Court has been, especially in recent times, fairly exhaustive when reviewing the applicants' background, not only regarding their training stage. (Interview 19)

The Supreme Court's role as a mechanism for securing trust in lawyers from laypeople, through the verification of graduates' compliance with admission requirements, would be considerably limited with the elimination of legal training. If this draft Bill became law, the only common training stage for futures lawyers providing verifiable credentials of a modicum of legal practice experience to laypeople would come to an end. This prospective reform would force the Supreme Court to confer the lawyer degree to graduates without the possibility of corroborating if they have developed practical skills before becoming admitted to practise (Dingwall and Fenn 1987; Webb and Nicolson 1999; for this discussion on mechanisms for securing confidence on expert service, see Chapter 1).

Some context is needed to understand the Supreme Court's stance on compulsory training. In 2008, the Supreme Court discovered that some law graduates were transferring to less demanding law schools after repeatedly failing their final exams (*Ciper* 2008). In response, the Court introduced new regulations limiting students' transfers and requiring law schools to produce bylaws governing compliance with those rules (*Auto Acordado sobre la titulación de abogados* of 2008 and *Instrucciones para la tramitación del expediente sobre juramento* of the same year, amended in 2015). In the same vein, the Supreme Court addressed the possibility of creating a national examination, similar to Bar examinations in other countries (*La Semana Jurídica* 2010). These decisions received support from some Bar associations and law schools, but also attracted hostility from others (Cumplido 2008; *El Mercurio* 2008; Guerrero 2008 and 2011; Hernández 2008; *Qué Pasa* 2010; Rodríguez 2008 and 2011; Schweitzer 2008 and 2011; *The Clinic* 2011; Vargas 2008, 2009 and 2011; Yrarrázaval and Nahum 2008). The debate caught the

ear of the government, which assembled a task force to study and consider policies for the certification and qualification mechanisms to practise law, including assessing and eventually reforming compulsory training at LACs (Comité de Certificación y Habilitación para la Profesión de Abogado 2010). However, it was short-lived, being suspended by the incoming government (Coloma and Agüero 2012).

With this stance, the Supreme Court, as the third branch of the state, joined the chorus of criticism which demanded an answer from the government to the future absence of a mandatory training stage.

In the end, legal training became an undefined issue, one of the reasons that impeded the submission of the Bill to Congress. The reform lost its political priority, a factor directly linked to the rotation of Ministers of Justice during Piñera's government (three in official capacity, plus one interim).

The announcement of a National Juridical Assistance Service (2014–2015)

We have already discussed two generalist reform attempts with different characteristics: one maximalist proposal (2001-2006), bringing together every policy alternative at the time; and a second proposition based on market-driven mechanisms. This third example, which is considerably less detailed than the previous ones, was imbued with a stronger state-driven rhetoric.

According to Roberts (2016) the three dimensions which had characterised Chilean democracy - stable forms of party-based political representation, relatively low levels of social mobilisation, and a technocratic consensus around neoliberal policies – were challenged from 2011 with en masse popular protests sparked by educational inequalities, and claims around labour, environmental and indigenous rights. This wave of social protests 'outflanked Chile's party system to the left and

punctured the aura of inevitability and consensus that surrounded the highly touted economic model', dawning a political new era 'defined by the repoliticization of social and economic inequalitites (*Idem*:127). The intellectual work of different Chilean scholars and former civil servants built a narrative critical towards what used to be called 'the Chilean model' (Jacksic and Drake 1999) of free market and social inclusion policies which characterised the first two decades of democratic government after the end of the dictatorship.

These ideologues advocated a new model, 'the regime of the public' where private providers of social services would be placed in the same position before citizens as public services are (Atria et al. 2013:192). This new ideological model stressed that social rights were a subversion of the bourgeois and liberal idea of self-interest which inspired individual rights. Instead, social rights should revolve 'around the socialist notion of reciprocal duty' (Atria 2015:606). Inverting the slogan used by neoliberals during the 1980s – 'private solutions to public problems' – a socialist government should differentiate between private goods whose distribution is left to the market and social rights provided through welfare programmes (Atria 2015a:633).

In 2014, former president Michelle Bachelet, won the presidency for a second time. She was supported by a coalition in which the old centre-left *Concertacion* was joined by leftist parties such as the Communist party. This coalition was denominated *Nueva Mayoría* (New Majority). Bachelet's campaign manifesto announced major legal changes to what were perceived as the core neoliberal institutions inherited from Pinochet's dictatorship: constitutional, educational and tax reforms.

In contrast, it also considered reforming legal aid, but in a rather moderate, undetailed form, nonreflective of this new social right's thrust. The campaign manifesto announced reform to legal aid as follows:

> [W]e will promote a New System of Juridical Assistance for Chile. The target of this new legal aid system must be to secure preventative legal services, advice on legal matters and legal representation for people who cannot totally or partially afford those services in a similar form to those who can assume legal services expenses. (*Programa de gobierno de Michelle Bachelet* 2013:108)

As happened with previous reform announcements, government reaction – rather than proactive action – led to actual policy proposals. In November 2014, as part of an agreement to end a national strike by LAC lawyers and workers, the government announced it would begin working on a new Bill to be submitted to Congress in September 2015 (*El Mercurio Legal* 2015).

The government announcement to reform LACs considered expanding coverage and services, but without defining a provision model (judicare, salaried or mixed) or the future of legal training. The original announcement did not include eliminating mandatory training, but proposed relocating students as legal assistants or paralegals, rather than as proto-lawyers (*El Mercurio Legal* 2015a). A subsequent announcement stated that it would evaluate extending coverage to consumer and environmental matters, and to the middle classes for a low fee (*Idem*). The debate centred on the character of this apprenticeship and the content of training, namely, whether apprenticeships should be compulsory for every law graduate or just for those who want to practise as litigants.

Reception of this announcement

This announcement occurred when students had begun to mobilise their grievances on the scheme. Law graduates in training receive a *sui generis* legal status. While undergraduate degrees' internships are governed by the Labour Code Act, which requires employers to provide collation and transport for interns, in the case of law students their training is treated as a legal duty, without compensating either of those

costs. In other words, two identical situations are governed differently (an issue which was anticipated by the first general director of Metropolitana's LAC during the 1980s; Chapter 4). The consequences of this divergent treatment has been echoed in the exploitative working conditions they encounter.

In this context, criticisms of compulsory training became commonplace. The following is a good summary about the 'enslaving' working conditions faced by law graduates according to a board member representative of a law school:

> You get for free a compulsory workforce. It's the closest thing to slavery: [...] unremunerated, obligatory, uninsured, in some places they must bring their own paper [to print briefs...] neither collation [...] little support […] it must be the only profession in our country that demands all of this to obtain the degree. (Interview 23)

This is a fine example of the change of setting for legal aid through legal training since 1981. Economic burdens such as unpaid work, non-refundable expenses and the lack of insurance against accidents at work were common features of the old CBA scheme and the past decades with LACs. The difference is that students began to take action to modify the scheme. Several participants attributed this change in attitude to the introduction of student fees in 1981. Since then, law students have had the burden of fees and student loans, rather than in previous times when they studied law for free (Interviews 2, 6 and 7).

Individual complainants seeking to modify the scheme failed. There was a folk wisdom among participants about the case of a student who complained before the Comptroller General for bearing all the financial costs her training entailed. She argued that this situation should be treated as other tertiary education degrees' internships, which must be remunerated according to the Labour Code Act (article 8). The Comptroller General dismissed the claim by stating that this was not an internship based on a contractual agreement, but a legal duty governed by specific

laws prescribing its *gratis* nature (*Contraloría General de la República* 2014; 2019 confirming the previous ruling).

In 2014, students decided to group under a collective organisation named *Cordinadora de postulantes* (Coordination for Applicants). Their aim was to lobby the executive and legislative authorities about the problems they had identified through student surveys. The *Coordinadora* intervened before Congress, requesting legislation that would regulate their status, with the expectation of improving their working conditions (Interview 26). They also tried to negotiate with general directors about their situation. Law graduates supported the demands for change of LAC lawyers too. One legal aid lawyer explained this spontaneous alliance:

> Students are very receptive to our causes because they understand the situations we have undergone. Moreover, they have experienced the shortage of supplies, the usual indifference from the authorities regarding our needs. (Interview 8)

Nonetheless, the main positions on this matter – to eliminate students or assimilate them to other internships – were in conflict:

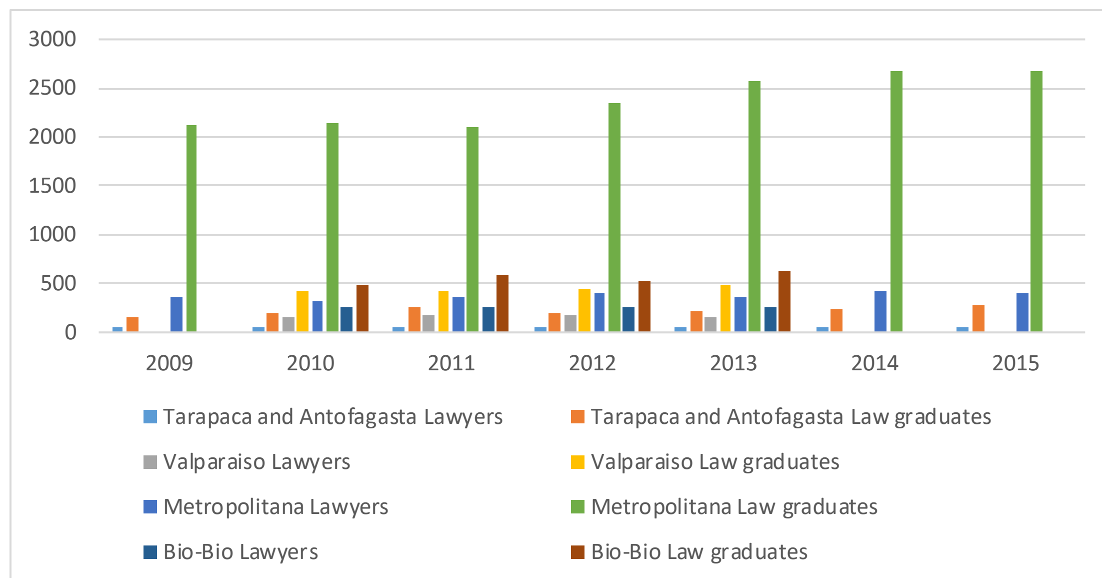
> There is a line of argument that says 'no, the student must be trained by the university and the Corporation has nothing to do about this'. And there are other lines that say, 'let's incorporate the students, who are a capital, regulate their payment as occurs in other professions with students in practice'. (Interview 18)

This interview summarises the two main positions on this debate: that training has nothing to do with legal aid provision or that students may play a role which needs to be properly defined the law. It is worth noting that retaining legal training unmodified was not a possibility, as the position favouring reform, not elimination, of training considered students as an input for the system in need of regulation.

It is possible to associate the first position – eliminating legal aid through legal training – with LAC's facing overcrowding issues, whereas the second position –

upgrading law graduates role – would be representative of those Corporations dealing with understaffing problems (Figure 4).

FIGURE 4 NUMBER OF LAWYERS AND GRADUATES PER LEGAL ASSISTANCE CORPORATIONS (2009-2015)



Source: own elaboration using data from Ministerio de Justicia (2014) and collected through freedom of information requests

The number of law graduates had a systematic increase since 2010, going from 3,240 to 3,893 in 2013; the ratio of graduates per lawyer was approximately of four per lawyer (Ministerio de Justicia 2014:223-224), though this ratio presents different characteristics depending on the particularities of each LAC. Thus, Metropolitana's LAC has the highest ratio (between six and seven graduates per year) whereas Bio-Bio's LAC has the lowest, which is explained by the number of universities that teach law degrees in the territorial jurisdiction of each LAC (*Idem*). In 2015, Tarapacá and Antofagasta's LAC assessed internal and external negative factors restraining the fulfilment of its responsibilities (*CAJTA* 2015). This Corporation identified as internal factors of institutional weaknesses lack of staff, burnout, and budget limitations to hire and train workforce; and regarding external threats it identified competition from other public bodies such as those dedicated to advice victims of crime and legal

clinics from state universities, and the elimination of law graduates in training from the Corporations (*Idem*:34).

A commission of LAC workers and MoJ policymakers began working at the pre-legislative stage on this Bill (Interview 8 & 18). This pre-legislative work did not prosper because of internal elections within LAC's unions to renew their representatives in 2015. Additionally, the government informed the commission that it would not be able to conclude its work before the discussion of the national budget, thus effectively postponing work on this draft Bill (*Idem*).

After suspending work on the preparation of a legislative draft Bill, controversies regarding LACs' general directors took place. In 2016, workers belonging to the Metropolitana's Corporation accused its former general director before the Comptroller General of allegedly committing several irregularities, such as hiring people because of political favours (*Qué Pasa* 2016, *La Tercera* 2018). Similar political scandals occurred in Valparaiso and Biobio's LAC regarding the appointment and removal of general directors (*Diario Constitucional* 2017).

New reform announcements were not considered, creating disillusionment within to LAC lawyers. A former legal aid lawyer acknowledged this:

> The bill modifying the service was like a confidence trick, an urban legend that a new service was being created, announced by each Minister of Justice like this is coming up soon. But the truth is they were just rumours. A concrete proposal of a new service was never brought to fruition to the rank-and-file LAC members. (Interview 16)

A concluding remark from the previous developments is that the need to reform the legal aid through legal training scheme became uncontested, including from a cross-party perspective. LAC legal staff, the CBA and more recently law graduates played an active role. In turn, these protests were met with governmental announcements and policy proposals on generalist reform to legal aid, sometimes balancing innovation

(novel methods of legal services delivery) and tradition (modifying training); or focusing solely on legal representation by eliminating vocational training. These responses to the different grievances were not given legal effect; yet they might have had a soothing effect.

What tensions have risen as a result of historical changes, and changing specialisation, in certain areas of legal aid

The policy changes and failed proposals discussed in this chapter are illustrative of a pattern that began with criminal legal aid. Each generalist proposal was intended to improve access to legal services, not training. Corporatist representation of academic or professional interests either disappeared (2001-2006) or was strongly counterbalanced with public interests through representatives of different ministries (2008-2013). Market-driven reforms contested old ideas of professionalism as did the elite of the legal profession with its actions challenging a similar legal aid scheme. These mooted reforms exemplify the absence of consensus for retaining legal aid through legal training unmodified.

Changes in family and labour legal aid show in the Chilean context that advances in legal aid occur when they are focused in specific areas, as ancillary to systemic reforms to the judiciary where the legal aid through legal training scheme became antithetical. In both cases trade-offs between the legal aid through legal training scheme and new legal services delivery were non-existent. This contrasts with generalist proposals where each one of these failed reforms needed to deliver something in return for eliminating or altering mandatory training. Furthermore, all generalist propositions to legal aid were designed as prime reforms, unrelated to major institutional changes to the judicial and public bodies before which legal aid lawyers and law graduates perform.

The other side of these effective changes to legal aid provision, it is possible to argue, has been the persistence of the legal aid through legal training scheme for economic, educational and judicial factors.

Regarding economic factors the high costs of implementation associated with the criminal justice reforms limited the degree of subsequent judicial transformations. In this sense, legal aid through legal training became an attractive solution to save public funds, as well as ductile enough to host new specialist units:

> I was there when [a high exchequer officer] said 'for Justice there is no single *peso*' [...] and that largely determines the course of reforms such as family, labour, and ends up generating what became the 'LAC alternative' [...] from facing this sort of imminent danger of their obsolescence and closure, [...] to having winds in favour in the sense of their competitiveness in budgetary terms. It is a low-cost model and that has meant, in response to your question, the reason [for] the system's maintenance [...] But the Corporations have problems. No problem: remodel them, because there is no money for new houses. I have an old house that leaks, there is money to fix the roof, primp them a little, tidy up the garden and that's it. (Interview 24)

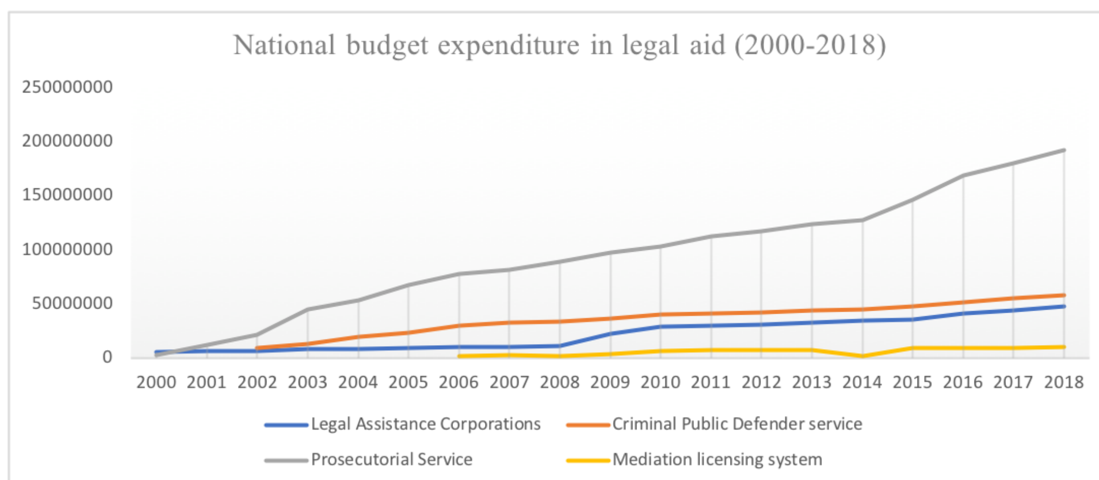
A similar economic limitation confronted the possibility of creating a voucher scheme using public–private partnerships. Research participants acknowledged high financial costs impeded this reform:

> this economic lineament of delivering public services through private companies, either through public-private partnerships, public tenders or vouchers [...] was never settled with the Corporations because in some way or another they are still a service provided by the state, which it delivers by resting on law graduates, who are an inexpensive workforce. It is so expensive trying to [...] professionalise it 100%, that Piñera's government did not submit the Bill. (Interview 18)

The previous quotes illustrate how efficiency pressures over resource allocation have usually entailed a substantial risk for funding or deliver inadequate legal services (Paterson and Sherr 1999:234). As exemplified below (Figure 5), after the increasing costs needed for the implementation of criminal justice reform, this temptation to save resources made the Corporations an attractive option to keep them rather unchanged. With respect to the metaphor used by this participant, in my fieldnotes I noted down

that the WDO premises were located in modern buildings, whereas the Corporations' headquarters were placed inside antiquated and dimly lit constructions.

FIGURE 5 NATIONAL BUDGET EXPENDITURE IN LEGAL AID (2000-2018)



Source: own elaboration using data from annual national budgets available at [*http://www.dipres.gob.cl/598/w3-propertyvalue-15954.html*](http://www.dipres.gob.cl/598/w3-propertyvalue-15954.html) [30.10.2021]

The alternative of getting rid of training also faced constraints from an educational dimension. While recent governments announced that training should be a responsibility of each law school, they did not legislate to order them to modify their curricula accordingly. The underlying reason for not intervening related to universities' autonomy and freedom of education to define their own law curriculum and prospectuses. This issue was explained by the students' representative:

> there is a sort of 'doctrine of silence' [...] we discussed with the former [LAC] general director that universities are not in a position to take charge of legal training [...] At a political level, this will not happen [...] unless the state assumes a steadfast attitude on demanding universities to take over training. (Interview 26)

Systemic change towards oral procedures made antithetical the intervention of graduates as litigants because the existing law curricula did not provide the necessary skills for performing before the new courts:

> family was reformed, labour was going to be reformed, criminal was no longer [part of LAC tasks]. In the end, a large percentage of the Corporations'

> services needed more professionalisation because *you cannot put a student to litigate in oral systems.* (Interview 14, emphasis added)

> All procedures are marching towards an audience-based system. In a few years civil procedure will transit through that same place. *I am against that the student is the main one who attends judicial hearings.* I believe it is great they attend accompanied by a lawyer [...]. But not more than that. (Interview 23, emphasis added)

Regarding the old written procedures still in force (criminal cases governed by the pre-reform inquisitorial proceedings; public and private law disputes before courts governed by the Civil Procedure Code), the educational background of law graduates went unquestioned. Written procedures appear to be one of the last remaining features of a period dominated by the traditional ideal of a liberal profession, precisely when legal aid through legal training was originally introduced (late 1920s and 1930s): at a time of generalist and professionally oriented education, where lawyers worked individually, enjoying considerable independence from their clients, and when the profession held a monopoly over admission to practice and ethical jurisdiction (Pérez-Perdomo 2007).

Specialisation, in this case regarding trial skills, questions the validity of generalist qualifications' claims to justify their professional monopoly (Moorhead 2010:230). The generalist model of legal education and practice underlying the legal aid through legal training model was perceived as antithetical because performing before new courts demanded different skills from lawyers to engage in oral debates and to negotiate. The shift towards adversarial and oral procedures required more involvement from litigators as trial hearings may take several days, compared to written procedures where the same lawyer may submit several briefings on the same day. This prevention had been raised during the early 1990s by the general director of Valparaiso's LAC, encouraging for changes to legal aid provision hand in hand with reform to courts and judicial proceedings:

> The urgent need to closely link any modification to the judicial system with a strengthening of free legal assistance. If this does not occur, any improvement in the administration of justice will be in exclusive benefit of the wealthiest sectors of society and will make the disadvantages affecting the lower-income sectors more apparent. The slowness and inefficiency of judicial proceedings, although it may seem contradictory, favours to some extent free legal assistance since it allows handling a greater number of cases that, if carried on more expeditiously, could not be assumed responsibly (*CAJVAL* 1992:32).

Still, as a relevant consequence of the policies specialising legal aid provision was reducing the role of law graduates in litigation, the legal aid through legal training scheme tried to follow a similar same path. According to a protocol signed by the fourth Corporations with the MoJ, law graduates are permitted to litigate only under certain circumstances: coached interventions on oral stages before family courts, appeal arguments before the Courts of Appeals and predominantly in written procedures (*Ministerio de Justicia* 2012).

Conclusion

The hiving off of legal aid from legal training tells us that the legal aid through legal training scheme has lost its original settled intent. It has stopped being representative of an agreed ethos within the legal profession which supported the delivery of legal services for free as a payback to society. Instead it has been the object of different generalist reform attempts altering or eliminating compulsory training.

Legal aid through legal training has lost acceptance as a model in the context of new procedural reforms, exploring new alternatives such as widening litigation in person or introducing state provision of specialist legal services, instead of replacing the LACs with another institution similar to the Criminal Public Defender service. Hiving off only becomes possible when it has been done in specialist areas in the context of a major change to the justice sector in relation to modern courts. Yet, the

form it has taken has been in the shape of consequential responses, without the passage of legislation creating new institutions delivering legal services.

It is possible to identify a variety of purposes from hiving-off policies: as a fundamental piece of a larger judicial reform (criminal legal aid as part of the shift from an inquisitorial to an adversarial system); as a substitute for legislative reforms (labour legal aid); or as a corrective measure of a statutory flop limiting lawyers' dominance over legal representation (family legal after the fiasco of litigation in person). On the other hand, these policies have increased MoJ intervention, reducing the autonomy of each Corporation.

Complete reform to legal aid through legal training would have included sustained review of financial, educational and procedural features. But its complete reform has not succeeded. Only if legal aid through legal training becomes antithetical to systemic court reform its reform would become possible. Until then, legal aid through legal training will continue as the legal aid scheme 'by default'.

Chapter 7: Conclusion

The following question has been researched in this dissertation: Despite political ruptures and developments in the legal profession, why has the core provision of legal aid in Chile – seeking to fulfil a constitutional right through a compulsory training stage for law graduates – stood the test of time since 1981? Throughout this thesis, the scheme of publicly funded legal services provision for vulnerable people has been called *legal aid through legal training*, because unpaid legal assistance and representation is delivered by law graduates in training as a preadmission requirement to practice.

The research question has three interrelated sub-questions: Why did the military dictatorship choose to keep legal aid through legal training, despite radically reshaping higher education and professional associations? What does the hiving-off of legal aid from legal training in 2001 tell us about legal aid through legal training? What tensions have risen as a result of historical changes, and changing specialisation, in certain areas of legal aid? These questions were answered in chapters 4, 5 and 6, respectively

Historical origins of the legal aid through legal training scheme

To understand the puzzle about why legal services for those who cannot afford them have been delivered through law student training for the period examined, this thesis traced its origins. Chapters 3 and 4 explained the transition of this scheme from being a remit of the legal profession to becoming a state duty in 1981.

Regarding its origins, Chapter 3 argued that the development of the organised legal profession went in hand with the development of legal aid until the second half

of the 1960s. There was a partnership between the state and the legal profession. The authorisation by law of the Chilean Bar Association (CBA) in 1925 exemplified the structural changes happening at the time: changing from a reactive state to an active and interventionist state, which furthered corporatist provision of welfare services through professional associations. The legal aid through legal training scheme played a significant role during the formation of the CBA, strengthening this institution through bargains with the government. A particular factor for explaining legal aid's development refers to legal education, as legal aid through legal training was originally introduced as part of new laws on higher education, with special emphasis on access to the legal profession. These laws created vocational training stages for future lawyers, providing the basis for legal aid trough legal training.

In 1934 Congress enacted the first legislation on the scheme, constituting the CBA as a monopoly provider of legal aid, including the definition of covered legal services and certification of legal aid claimants through means-tested evaluation. This statute also regulated admission requirements to practice law, providing for mandatory legal aid at the CBA's centres without charge in the form of four months (later extended to six months) compulsory training. Thus, the CBA had the final word over the final stage of legal training.

Legislative and administrative regulations, and records from congressional debates and the Chilean Bar Association (CBA) unveiled a combination of factors which supported the governance structures of the scheme: a corporatist ideology furthering interest groups with stakes in the economy by conferring on them policymaking and implementation powers; a professionalisation process by the institutionalisation of an official and national lawyer association; and the shift to an active administrative state to address the demands from lower and middle classes

regarding provision of welfare. This confluence of interests permitted governments to offer a solution to the unmet legal needs of those worse off and the expansion of the CBA's jurisdiction (in Abbott's sense, 1988) in public affairs for almost thirty years.

This legal aid scheme prevailed through troubled times, the 1960s and 1970s, when the CBA's monopoly was challenged by state interventionist ideologies from the left, without success. The 1965 constitutional amendment securing the right to legal representation as a duty of the state, among other proposed changes, was passed only with regards to expropriation of property rights for agrarian uses. The 1972 Bill was aimed at reducing the CBA's role from sole provider of legal aid to board membership in a new social and legal public service. Nonetheless, even this failed reform effort retained the legal aid through legal training scheme unchanged.

Why did the military dictatorship choose to keep legal aid through legal training?

The first research question this thesis has sought to answer referred to the dictatorship's decision in 1981 to preserve legal aid through legal training, in the context of a deep transformation of tertiary education and professional associations. This was examined in Chapter 4.

Before 1981, the ideological shift from corporatism to neoliberalism under the dictatorship meant that change was likely to occur. Early signs of reform in legal aid emerged after the military coup of 1973. The military dictatorship tried out policy proposals (1973–1975, and 1978) aimed at opening a market for legal aid provision, in which the CBA would compete against private providers for public funding. While those failed reforms did not target legal aid through legal training scheme directly, the CBA's monopoly would have been eroded had they been implemented.

After 1981, the restructuring of higher education and professional associations clearly reflected the neoliberal narrative embedded in the new constitutional order of 1980 - that of a state which intervenes in the market only when there is no private initiative on a specific field. Thus, professional associations became voluntary trade associations competing with each other for members, and the foundation of new universities was left to private initiative.

Instead of implementing an in-depth reform improving access to justice, the creation of Legal Assistance Corporations (LACs) was one of the by-products of this reduction of professional power. The dictatorship stripped the CBA of its legal aid provision duties by conferring legal personality on its legal assistance units in the form of three autonomous LACs. The LACs were placed in charge of continuing with the legal aid through legal training scheme.

LACs were designed as a temporary solution, which would be integrated into a prospective Legal Aid System (to be created during the transition years leading to the reinstitution of democratic rule). However, those proposals for legal aid reform came to an end with the economic crisis of 1982–1983. This economic crisis interrupted several governmental policies involving public-private partnerships for delivering public services. Thus, LACs' temporary character shifted to a more established one, first, with the enactment of new regulation of law graduates in 1985 and, secondly, the creation of a fourth Corporation in 1987.

Retaining legal aid through legal training provided a diplomatic solution to avoid the complete dismemberment of the legal profession's historical position. In addition, the Corporations, with their relative atomisation and autonomy from the government, were not a public service run by the government, as feared by the CBA during the 1960s and early 1970s; nor did they represent the dominance of external

forces such as market-consumerism over this occupational group. As regards LACs' governance, their boards include members representing the legal profession's interests as well as of the existing law schools before 1981 – a nod to corporatism – counteracted by governmental intervention in the appointment of four of the six board members. Consequently, the creation of LACs could be read as in keeping with tradition rather than breaking with it.

The innovations in the supply of legal education and professional associations by private actors also impacted on legal aid through legal training. The privatisation of legal education went in hand with the introduction of tuition fees and student loans. Those charging mechanisms challenged the moral arguments used to justify the unpaid nature of legal aid through legal training. In other words, the 'giving back to society' argument for receiving free undergraduate education began to wane. The debilitation of professional authority caused by the end of compulsory membership reduced the influence of the CBA as a mouthpiece for 'all' the legal profession. Both developments would deepen during the democratic era.

In sum, the continuity of the legal aid through legal training scheme can be explained by the processes analysed in Chapter 4: policies aimed at reducing professional power over markets; the effects of an economic crisis over the introduction of major reforms to legal aid; the government need to provide legal services to the poor; and pragmatic compromises to avoid alienating the legal profession represented until then by the CBA.

What does the hiving off of legal aid from legal training tell us about legal aid through legal training?

Chapter 5 undertook the sub-inquiry about the separation between general provision of legal aid through law graduates and specialised legal services delivered exclusively or predominantly by lawyers. After two generalist Bills which attempted to balance tradition and innovation, the creation of the Criminal Public Defender service in 2001 opened a new stage of change.

The generalist Bills did not question the scheme, but rather tried to improve its governance. Simultaneously, the Ministry of Justice (MoJ) developed new forms of legal services provision, in the form of a legal assistance programme (*Programa de Asistencia Judicial; PAJ*) implemented through LACs. This programme was designed to prepare the ground for legislative reform, diversifying the services provided beyond legal aid before courts, to include, for example, legal information and alternative dispute resolution mechanisms (ADR).

However, the professional and specialised Criminal Public Defender service represented a departure from the previous scheme. The hiving off of criminal legal aid from LACs opened the door to contesting the institutionalisation of legal aid through legal training because a new form of access to legal services - not reliant on students - had become possible.

What that hiving off of specialist and professional criminal defence from legal aid through legal training tells us is that the provision of the latter legal aid scheme survived only in the absence of wider structural reform to judicial procedures. In other words, whereas the generalist Bills from the 1990s failed as they focused exclusively on legal aid governance, specialist and professional criminal legal aid was a relevant part of a larger reform to criminal justice.

Regarding compulsory training, whereas the legislative debates of the generalists Bills illustrate a constraining role for the transformations being pursued – i.e. schemes without training responsibilities were discarded; institutional design closer to a professional logic of collegialism – regarding criminal legal aid it was used as a trade-off permitting the new Criminal Public Defender service and the Prosecutorial Service to voluntary train law graduates.

Legal aid through legal training, then, reflects a particular conception of lawyering: namely, one that enables generalist and professionally-oriented legal education, aimed at producing litigators capable of functioning before courts where procedures are written, diluted over time, and mediated by clerks.

What tensions have risen as a result of historical changes, and changing specialisation, in selected areas of legal aid?

Chapter 6 discusses the new setting for the legal aid through legal training scheme and its governing institutions, the LACs, after the hiving off of criminal legal aid from both of them. This chapter answered the sub-inquiry asking what tensions have risen as a result of historical changes and changing specialisation in certain areas of legal aid. The novelty of the subsequent period after 2001 relates to the emergence of access to justice as a distinct right. In other words, legal aid became a separate concern from legal training.

The reform dynamics alternated between similar logics, generalist or specialist. Generalist reform efforts, which did not materialise in actual law, proposed modifying or eliminating training duties in relation to legal services delivery. Tensions coming from the use of the charitable model, where judges appointed lawyers to represent parties for free, before the new family law courts, became a cause for legal mobilisation. The CBA led judicial challenges to this scheme,

succeeding before the Constitutional Court and the International Labour Organization. The unintended consequence of these rulings was the opening of grounds for judicial challenges to legal aid through legal training by law graduates. Against this possibility, two subsequent administrations, from the centre-left and centre-right, promoted the elimination of the legal aid through legal training scheme. These failed generalist reforms attempted to introduce a mixed model of legal aid, where the first line of legal advice would be led by public salaried lawyers, who would later refer claimants to franchised practitioners for legal representation before courts.

Specialist changes were achieved through a successful division of labour within LACs, by professionalising and making specialist employment and (in part) family legal aid provision, in the context of procedural reforms in those branches of the law. These changes led to the limitation or exclusion of graduates from oral hearings, without the creation of new public services separated from LACs.

In sum, after 2001, legal aid through legal training became one amongst a variety of models for legal services delivery for vulnerable people, as a default generalist scheme vis-à-vis criminal, employment and (in part) family legal aid. Training became peripheral in policy debates, though it has not yet been possible to replace law graduates in running LACs.

Why has legal aid through legal training stood the test of time since 1981?

The answer to this research question depends on the function which this legal scheme, conceived as a transitory scheme towards professional legal assistance in 1934 and later in 1981, has performed in different historical periods.

From 1981 until 1990, legal aid through legal training provided a financially viable alternative for the government to satisfy legal needs of low-income people in a period of economic crisis. As supply of legal education began to increase, so did the

growth in the number of law graduates, gradually expanding LACs' legal offices with cadres of prospective lawyers.

During the first decade of democratic rule, reform to legal aid formed part of a rhetoric of overcoming poverty and legal marginalisation during the first half of the decade. The legal aid through legal training scheme acted as a constraint in relation to generalist reforms, as parliamentarians with a legal background appealed to tradition and old professional ideals learned during mandatory training in order to resist major transformations to the scheme and its governing institutions. Thus, the focus of generalist reforms shifted towards reform of governance, not replacement, of the scheme. This reformist approach, instead of foundational or radical change, was common at the time in light of the constitutional constraints imposed by the dictatorship's 1980 Constitution. To by-pass these limitations to reform, the government and LACs developed an alternative agenda to expand access to justice from legal aid, implementing ADR policies and accessing people located in areas with poor access to services.

With the institution of the Criminal Public Defender service, statutory change to legal aid through legal training and its governing institutions became possible. The previous reliance on law students working for free as lawyers for poor claimants began to vanish. Reform occurred in specialist areas where judicial reforms altered the scenarios for legal practice, demanding a major presence and specialisation of practitioners before courts. These hiving off policies encompassed a variety of purposes that could not be fulfilled properly by legal aid through the legal training scheme. In the case of criminal legal aid, this was a fundamental piece of a systemic judicial reform shifting from an inquisitorial to an adversarial system. Regarding employment law legal aid, the creation of the Workers Defence Office (WDO)

internal to LACs was a substitute for legislative reform to create a public defender service. Finally, in the case of family legal aid, limitations over the role of law graduates formed part of the corrective measures to overcome the litigation in person fiasco discussed in more detail in the earlier chapter.

The legal aid through legal training scheme has become the default option for those legal needs not covered by specialist and professional providers. The scheme is appropriate for the previous written judicial procedures, offers an economic means for the state to fulfil the right to legal representation, and a melting-pot training stage for students with diverse legal educational backgrounds.

Further research

This research advances knowledge through a case study in the tradition of previous comparative surveys on access to justice and legal aid (Cappelletti et al 1975; Cappelletti and Garth 1978; Goriely and Paterson 1996; Regan et al 1999; Moorhead and Pleasance 2003a). The history of legal aid though legal training is an uncharted field, particularly after 1981, when the scheme was put under stress by economic, political, judicial and educational developments.

There are some limitations to the research. From a theoretical point of view, socio-legal studies on law and institutions usually follow a three-level analysis: macro-level, meso-level and micro-level (Kagan 2009). At the macro-level the thesis analyses the relationship between legal aid and the political system in consideration of mooted and successful statutory reforms. At the meso-level, it discusses the LACs' role in implementing the law, as well as their interactions with external stakeholders (law schools, the judiciary, bar associations). Lastly, at the micro-level the thesis has individual level data from interviews about participants' life choices. Nonetheless, I

have limited myself to data, broadly speaking, produced by or for elites. This thesis does not consider micro-level participants – legal aid claimants and students – or a group of middle-level participants – social workers as gatekeepers of claimants' access to legal aid.

I chose to focus primarily on a macro-level of analysis for contextual reasons. The civilian lawyer ideal type as an employee close to the state appears to emerge in those countries in which social change is being put into action by the state apparatus (Peña 2002:4). Chilean history provides several examples of these processes. It has been argued that the movement of Independence from the Spanish Empire was the first project of modernisation attempted in Chile by the governing elites of Enlightenment ideals (Jocelyn-Holt 1992). During the last century the state played a central role in Latin America, advancing modernity: it expanded political participation by widening the franchise through universal voting rights; introduced import substitution as a means to industrialisation; fostered entrepreneurial classes and favoured collective over individual autonomy (Larrain 2007:49–50). Thus, it has been argued, '[a]s a consequence of the enormous pull of politics and the state, civil society in Latin America is weak and highly dependent upon state political dictates' (*Idem*:52).

This 'modernisation from above' is a predominant feature of the chosen research setting, where studying top-down legal change processes seemed more appropriate. This explains the methodological exclusions too. The main reason for not considering these potential participants refers to the fact that, in comparison to the research participants, neither users nor students have played a relevant role in setting agendas for change in the history of legal aid delivery. As explained in Chapter 2,

when I found that some law graduates began to organise in 2014 to create a common platform and to push for change to their working conditions, I accessed and interviewed one representative of this collective organisation. Although this research participant provided valuable insight about the origins of their organisation and their reasons for mobilisation, the organisation's existence is very recent, and thus does not contribute to knowledge on events of long duration. Indeed, it may not be representative of what happens in other LACs, or of individual, or less formal efforts coming from other graduates to modify training conditions.

To expand this research, it would be useful to incorporate the voices of bottom-up participants. Claimants may provide the viewpoint from the demand side in economic terms, or of their own legal consciousness, from a socio-legal perspective (Cowan 2004, Hertogh 2004, Silbey 2005). Law graduates may reflect upon their different professional identities, standpoints on what constitutes a lawyer, participation in the provision of legal aid, and, foremost, beliefs about change and potential engagement in mobilisations for this cause. Finally, regarding middle-level stakeholders, further research should include a data sample of social workers. These professionals have more direct contact with the needs of claimants and may have a different consideration about why legal aid through legal training has not been changed, why it should or should not be modified and even the possibility of identifying jurisdictional struggles with lawyers and students in training.

Personal identity and professional identity were unexpected elements which played relevant roles. I did not anticipate that these would matter as my focus was on policy changes and decisions rather than on the actors. To explore in depth how having to work for free affects the everyday lives of lawyers, it could be possible to

expand this project to a cultural history of the legal profession (Pue and Sugarman 2003).

The Criminal Public Defender service, with all its innovations, gives pre-eminence to legal services but does not eliminate the possibility of training law graduates. How the introduction of tendering in legal aid provision in accordance with the tenets of New Public Management has altered the duality between access to justice and legal professionalism is another area for further research (Moorhead 2001; Sommerlad 1999 and 2001; Tata 2007; Welsh 2013 and Welsh 2017). From a legal and institutional change perspective, criminal public defenders, franchised criminal defenders, and the Criminal Public Defender service may all have played a role in setting or altering reform agendas following similar paths to that of legal aid through legal training.

Though this dissertation used insights from previous case studies, comparative approaches could expand this dissertation's audience. For instance, it could be extended to contrasting countries with similar legal and political backgrounds, with intensive reforms to legal aid or complete stasis. A different comparative research could focus on countries that have similar schemes for admission to practise or combine legal aid delivery with legal education for future lawyers, as the recent case of the New York Bar rule on mandatory pro bono referenced in the Introduction of this thesis.

With these lines of further research it would be possible to explore in depth the original contribution this thesis makes to existing literature on cases studies on legal aid development in different countries. This thesis advances knowledge on the existing typologies of legal aid models with what appears to be a novel form of delivery, highly flexible as the historical evidence has illustrate regarding its different

functions. Legal aid through legal training began as the main legal aid scheme available – the other being the *abogado de turno* -, transitioning toward a system of diversified provision of legal services for the poor characterised by the specialisation of areas, leaving legal aid through legal training as the resilient, generalist and default scheme.

Appendix 1: Political and legal timeline of the legal aid through legal training scheme (1925-2018)

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
1924	Military movements interrupted democratic continuity			
1925	1925 Constitution comes into force Reinstitution of democracy	The Chilean Bar Association (CBA) is sanctioned by law (*Decreto-Ley 406*)		
1927	Colonel Ibanez's dictatorship begins			
1928		Membership to the CBA becomes mandatory to practice law.	The new statute governing the CBA (Act 4,409), allows this professional association to open legal aid surgeries for the poor	
1929		Higher education regulation introduces mandatory training for future lawyers		
1931	Ibanez's dictatorship ends			
1932	After brief de facto governments, democratic rule is reinstated with the election of President Arturo Alessandri		The CBA opens its first legal aid surgery	
1934			Enactment of the first statute regulating the	

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
			legal aid through legal training scheme (Act 5,520). The CBA becomes to sole official provider of legal aid and issuer of means test certificates for claimants. Mandatory training encompasses a four months training lapse period of 4 months	
1935		A final exam to be sit before a panel composed of the CBA's chair and the chief justice of Santiago's Court of Appeals and the Supreme Court, originally introduced in 1925, becomes implemented	New funding source for the CBA, by allocating fines for non-deducting child support maintenance from workers' wages	
1939			A fixed amount from the nation's budget must be allocated annually for the CBA's legal aid scheme	
1941			Criminalisation of unauthorised legal practice of law. This statute was partially justified because poor people could access	

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
			legal services through the legal aid through legal training scheme	
1944		Elimination of the preadmission requirement of passing a final national exam	Legislative trade-off between eliminating the national exam in exchange for increasing mandatory training from four to six months.	
1964	The presidency of Christian Democrat Eduardo Frei Montalva begins, under the slogan of Revolution in Liberty		Statutory allocation of funding for buying new premises for legal aid, exempting the CBA from any taxes related to those purchases	
1965				Constitutional amendment bill incorporating a social right to legal representation and assistance
1967				The amendment to the Constitution of 1925 is passed by Congress, but it does not introduce a right to legal representation
1970	The presidency of Socialist Salvador Allende begins, supported by the *Unidad Popular*			

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
	coalition, under the slogan of The Chilean path to socialism			
1972		The CBA participates in a national strike against the government. The Supreme Court rules against the government's request to impose sanctions for the CBA's industrial action		The government submits a legislative bill creating a National Juridical Service to substitute the CBA's from its legal aid responsibilities
1973	Military coup of 11 September initiates military dictatorship led by General Pinochet	The CBA endorses military authorities. Alejandro Silva, chair the CBA's board, participates in the commission responsible for drafting a new constitution		The CBA opposes reform to legal aid proposed by Allende's government After the military coup, the regime creates a task force for reforming legal aid provision
1974	*Declaration of Principles* by the Military Junta	Statutory intervention of professional associations, including the CBA, forbidding internal elections. The government could remove and board members. A majority of the board approved a vote of no confidence putting an end to Alejandro Silva's presidency of the		The CBA opposes the dictatorship's proposal on legal aid creation

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
		CBA		
1975				After a similar rejection from the Supreme Court, the government interrupts legal aid reform
1976	*Acta Constitucional 3* confers the constitutional right to legal representation and permits restricting freedom to work through compulsory affiliation to professional associations as a practice requirement			
1978			Statutory authorisation allowing legal clinics and Women's National Service to undertake their own means test for certifying poor claimants before courts, rather than referring these assessments to the CBA	The government creates a new task force on legal aid reform
1979				General Pinochet delivers his "Seven modernisations" speech, announcing reform to legal

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
				aid. The CBA opposes the government's legal aid proposal
1980	A controverted constitutional referendum to vote for or against the new constitution is held. The alternative favouring the new Constitution of 1980 wins			
1981	The 1980 Constitution comes into force	Statutory reform of professional associations, including the CBA, stripping them from all their legal prerogatives, including compulsory affiliation as a practice requirement and disciplinary jurisdiction. These associations could continue existing as voluntary trade associations. Reform to tertiary education permitting the foundation of private universities	Creation of three Legal Assistance Corporations (LACs), quangos responsible for providing legal aid to the poor and mandatory training to law graduates.	
1982	Economic crisis caused by the fixation of exchange rate			

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
1985			Legal training regulations comes into force	
1987			Statutory creation of a fourth Legal Assistance Corporation	
1988	Plebiscite over the continuity of the regime. The "No" alternative wins			
1989	Plebiscite over reforms to the Constitution and first general election since 1973			
1990	President Aylwin and the *Concertación de partidos por la democracia* (centre-left coalition) undertakes office			
1991	The Report of the Chilean National Commission on Truth and Reconciliation on human rights violations			
1992				The government submits to Congress a Bill creating a National Legal Aid Service
1993			The Ministry of Justice (MoJ) launches the Legal Aid Programme, aimed at providing legal	

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
			information and alternative dispute resolution mechanisms to population with connectivity problems. The programme is executed using LACs organisational structure	
1994	President Eduardo Frei Ruiz-Tagle undertakes office (second *Concertacion* administration)			
1995	Congress begins legislative process on criminal procedure reform			Government substitutes previous bill on legal aid, proposing to create Regional Legal Aid Corporations (RLAC)
1997	Impeachment against the Supreme Court's Chief Justice	The CBA confronts the judiciary on corruption and supports the government's constitutional amendments to judicial appointments and other features	Constitutional amendment to the judiciary's chapter gets passed in Congress. The Prosecutorial Service is regulated as a constitutionally autonomous body from the government, the judiciary and Congress	
1998	Arrest of General Pinochet in London for			

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
	extradition proceedings regarding the investigation of crimes against Spanish nationals occurred during the dictatorship			
2000	President Ricardo Lagos undertakes office (third *Concertacion* government)	The CBA joined by regional bar associations make a public statement criticising the creation of a Criminal Public Defender service	Criminal Procedure Code comes into force, shifting from an inquisitorial to an adversarial system. This reform is gradually implemented	
2001	The union of Metropolitana's Corporation request the removal of its general director to the board		Criminal legal aid before the new criminal justice courts is hived off from LACs with the statutory creation of the Criminal Public Defender office.	Government announces reform to Legal Assistance Corporations
2002				Congress stores away RLAC bill
2003				The MoJ's Legal Aid Programme comes to an end
2004			The new Marriage Act introducing divorce comes into force.	
2005		A major constitutional amendment is passed by Congress. It reinstates disciplinary	Family justice reform is passed by Congress. Litigation in person is robustly encouraged	

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
		control of professional associations over their voluntary members		
2006	President Michelle Bachelet undertakes office (fourth *Concertacion* administration)	CBA complains before the Supreme Court about family judges for excessive appointments of uncompensated lawyers to represent low income parties	Employment procedure reform is passed by Congress, postponing its implementation until 2008	MoJ finishes drafting a legislative bill on an Access to Justice National Service, without submitting I to Congress
2008		The CBA successfully mobilises against judicial appointment of uncompensated lawyers before the Constitutional Court and the International Labour Organisation. The CBA unsuccessfully questions before the Comptroller General the legality of the decision to create public salaried provision of legal services for workers litigating in employment courts	Amendments to limit litigation in person before family courts are passed by Congress To implement the reform to employment justice, a specialised Workers' Defender Office unit is instituted within the Corporations	
2009				The government announces reform to Legal Assistance

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
				Corporations and the elimination of legal aid through legal training
2010	President Sebastian Piñera underakes office, supported by the centre-right *Coalicion por el cambio*	The Comptroller General dismisses CBA's request to oversee the workers' defender unit		During her last day in office President Bachelet submits to Congress a Bill creating a National Legal Aid Service
2011			A constitutional amendment secures the right to legal representation for crime victims	Government announces reform to Legal Assistance Corporations and the elimination of legal aid through legal training
2012				The MoJ finishes the draft bill to create a National Legal Aid Service
2014	President Bachelet undertakes office for a second period, supported by the centre-left coalition *Nueva Mayoria*		National strike of Corporations' workers	The government's manifesto proposes a constitutional process to replace the 1980 Constitution
2015				The government announces reform to Legal Assistance Corporations
2016			Workers belonging to the Metropolitana's Corporation accuse before the Comptroller General the existence of	

Year	Political milestones	Developments regarding the legal profession	Legislative events related to legal aid	Failed interventions on legal aid provision
			several irregularities during the administration of the previous general director	
2018	President Piñera undertakes office for a second period, supported by the centre-right coalition *Chile Vamos*			

Appendix 2: Collected archives

A note on records' citation

Unless stated otherwise in this appendix, citations to archival data in the body of this thesis follows the APA (American Psychological Association) format : author, year of publication and page.

Presidential manifestos

Gobierno de Chile (1974) *Declaración de Principios del Gobierno de Chile,* available at http://www.archivochile.com/Dictadura_militar/doc_jm_gob_pino8/DMdocjm0005.pdf [16.10.2018]

Gobierno de Chile (1979) *Mensaje Presidencial: 11 septiembre 1979-11 septiembre 1980: S.E. el Presidente de la República General de Ejército Augusto Pinochet Ugarte informa al país*. Gobierno de Chile, available at http://www.memoriachilena.gob.cl/602/w3-article-82406.html [18.5.2021]

Programa básico de gobierno [1989] (2002), in C. Moreno and E. Ortega (comp.) *La Concertación desconcertada* (Santiago: LOM ediciones), pp. 171–224

Programa de gobierno Ricardo Lagos Escobar (1999), available at http://pdba.georgetown.edu/Security/citizensecurity/chile/politicas/programalagos.pdf [16.10.2018]

Programa de gobierno Michelle Bachelet (2005), available at https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/13433/1/2005_programa-MB.pdf [31.10.2021]

Programa de gobierno Sebastián Piñera (2009), available at http://200.6.99.248/~bru487cl/files/Programa_de_Gobierno_2010.pdf [31.10.2021]

Programa de gobierno Michelle Bachelet (2013), available at http://www.subdere.gov.cl/sites/default/files/noticias/archivos/programamb_1_0.pdf [31.10.2021]

For the period circa 1964–1973 there are well-established compilations of presidential manifestos (Gonzalez 1988 and Farías 2000). These documents have been cited following APA format (for reference detail on these sources see Bibliography)

Legislative documents

Laws

Laws in Chile, whether constitutional, legislative (statutes, decrees with force of law and decree-statutes) or administrative regulations, are published in the official gazette, the *Diario Oficial.* The established form to reference these legal documents is by mentioning the source of law (*Ley*=statute; *Decreto*=decree; *Reglamento*=administrative by-laws), their number, their full name or the abbreviation of common use (i.e. Transparency Act) indistinctively, and the publishing date. A relevant departure of the previous format refers to constitutions and relevant legislation enacted in the form of codes (i.e. *Código Civil*=Civil Code; *Código de Procedimiento Civil*=Civil Procedure Code), as the Chilean legal system belongs to the European Continental tradition characterised by the codification of laws. Regarding constitutions and codes, the accepted convention to reference them is by identifying the number of the article and the specific code containing that particular provision (for a detailed account of laws cited in this dissertation, see *Table of Laws* above).

Laws are available at the Library of Congress (*Biblioteca Nacional del* Congreso; *BCN*), which has two branches, one in Santiago and the other in Valparaiso. The Library's online catalogue is available at https://www.leychile.cl/Consulta/.

Legislative debates

Regarding the official records of legislative debates, the conventional practice to reference these records is as follows: first, as Congress is bicameral, by identifying the specific house, the *Cámara de Diputados* (Chamber of Deputies, (C.D.) or the *Senado* (Senate; 'S'); then, the session number, specifying if the session corresponded to an ordinary session – a session scheduled during the legislative calendar – or an extraordinary session – a session held on a date not contemplated in the legislative calendar for each year –; and the date of the session: i.e. C.D. 5th, extra., 30.10.1934:254, refers to Chamber of Deputies, 5th extraordinary session, held on that date and published on that page. In more recent years, legislative debates also specify the period of legislative work with a number, for example, Leg. 325. In the case of Bills actually submitted to Congress, their references sometimes include their

register number, named bulletins (*Boletin*): for example, C.D., 30.11.1964:3976, bulletins 10396 and 10396-A.

The Library of Congress (BCN) in recent years has assembled official reports (*Historia de la Ley*) organising the legislative debates of bills passed by Congress. These official reports are available as hardcopies at the same library and online regarding recent statutes or constitutional amendments (https://www.bcn.cl/historiadelaley/).

BCN (2000) Historia de la Ley N° 19.696, available at https://www.leychile.cl/Consulta/portada_hl?tipo_norma=XX1&nro_ley=19696+&anio=2018 [19.11.2018]

BCN (2001) Historia de la Ley Nº 19.718 Crea la Defensoría Penal Pública., available at http://www.bcn.cl/obtienearchivo?id=recursoslegales/10221.3/28034/1/HL19718.pdf

BCN (2004) Historia de la Ley Nº 19.968 Crea los Tribunales de Familia , available at http://www.bcn.cl/obtienearchivo?id=recursoslegales/10221.3/22979/1/HL19968_Art71.pdf [19.11.2018]

BCN (2005) Historia de la Ley N° 20.022, available at http://www.bcn.cl/obtienearchivo?id=recursoslegales/10221.3/3811/1/HL20022.pdf[19.11.2018]

BCN (2005a) Historia de la Ley N° 20.087 Sustituye el Procedimiento Laboral contemplado en el Libro V del Código del Trabajo.https://www.bcn.cl/historiadelaley/fileadmin/file_ley/5683/HLD_5683_37a6259cc0c1dae299a7866489dff0bd.pdf [19.11.2018]

BCN (2008) Historia de la Ley Nº 20.286 Introduce modificaciones orgánicas y procedimentales a la Ley Nº 19.968, que crea los Tribunales de Familia, available at https://www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/546/1/HL20286.pdf [9.11.2018]

BCN (2008a) Historia de la Ley Nº 20.260 Modifica el Libro IV del Código del Trabajo y la Ley Nº 20.087, que establece un Nuevo Procedimiento Laboral, available at https://www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/3926/4/HL19968Art106.pdf[19.11.2018]

BCN (2011) Historia de la Ley Nº 20.516 Reforma constitucional que establece la obligación de otorgar defensa penal y asesoría jurídica a las personas naturales que han sido víctimas de delitos y que no pueden procurárselas por sí mismas available at https://www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/35291/1/HL20516.pdf

Junta de Gobierno. Secretaria de legislación (1981). *Historia de la Ley N. 17.955, publicada en el Diario Oficial de 8–5–81* (Santiago: Biblioteca del Congreso Nacional)

Junta de Gobierno. Secretaria de legislación (1987). *Historia de la Ley N. 18.632, publicada en el Diario Oficial de 24–7–87* (Santiago: Biblioteca del Congreso Nacional)

Moción parlamentaria (2006) *Reforma constitucional que garantiza la independencia y autonomía de la Defensoría Penal pública,* Boletín [Bulletin] 4498-07, parliamentary motion submitted 7 September 2006, available at https://www.camara.cl/pley/pley_detalle.aspx?prmID=4885&prmBoletin=4498-07 [21.11.2018]

The law-making debate on the two generalist Bills attempting to reform legal aid (see Chapter 5) occurred before the Constitution, Legislation, Justice and Regulation Commission of the Senate. Because of accessibility online and length I opted for using this report, denominated *Primer Informe de la Comisión de Constitución, Legislación, Justicia y Reglamento del Senado* (First Report from the Constitution, Legislation, Justice and Regulation of the Senate), Boletín 861-07, 30.11.1994: see http://www.senado.cl/appsenado/index.php?mo=tramitacion&ac=getDocto&iddocto=9249&tipodoc=info last accessed 21 November 2018. This report is cited as follows: S., 1st Constitutional, 861-07:8, refers to the Senate's Commission; the number is for the first report issued by this Commission; 'Constitutional' refers to the Constitution, Legislation, Justice and Regulation Commission in short; 861-07 refers to the bulletin number; and finally 8 is the page.

Records of the constitution-making process of the 1980 Constitution

This dissertation uses the online version of the records for the different constitution-making bodies involved in drafting the Constitution of 1980: the Research Commission for a New Constitution (CENC) and the State Council (CdE). These reports were produced by the Library of Congress (available at https://www.leychile.cl/Consulta/antecedentes_const_1980). Unfortunately, these documents do not include page numbers. Therefore, these sources have been cited as follows: for example, *CENC* 100, 6/1/75 (3) refers to a debate that took place in the commission during session 100, held on 30 December 1974, where (3) refers to the volume compiling the minute for the session. Regarding the State Council (CdE), CdE 62, 9/1/79 refers to session 62, held on 9 January 1979.

Government documents collected through freedom of information requests

Legislative proposals (draft Bills).

Mensaje (2006) *Anteproyecto de ley que crea el Servicio Nacional de Acceso a la Justicia, del Gobierno de Don Ricardo Lagos Escobar*, 2006

Mensaje (2010) *Anteproyecto de ley que crea el Servicio Nacional de Asistencia Jurídica, Gobierno de Dona Michelle Bachelet Jeria*, 2010

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Chilean Bar Association

Board meetings' records

The minutes of the Chilean Bar Association's (CBA) board sessions are known as *Actas del Consejo General del Colegio de Abogados.* These archives are available at the CBA's library in Santiago. These documents will be abbreviated as *ACGCA* and cited by including the date when the session was held, i.e. *ACGCA* 31.2.1932, identifies the session held by its board on 31 February 1932. Between 1980 and 1990 the board changed its name to *Directorio Nacional.* Therefore those records will be cited, for example, *ADNCA* 1.2.1982

Official communications

The CBA's official communications to its regional bar associations and to public authorities are called *Oficios* (official letters) identified by their number, sometimes with a brief reference about the communication and the name of the addressee.

Colegio de Abogados (1965) Oficio 37, 12.2.1965, sent to the President of the Republic.

Colegio de Abogados (1965a) Oficios 78 to 86, 17.5.1965, communications sent to each regional bar association.

Colegio de Abogados (1965b) Oficio 98, 29.3.1965, sobre Servicio de Asistencia Judicial y turno, communication sent to the MoJ and the Supreme Court.

Colegio de Abogados (1965c) Oficio 309, 23.6.1965, sobre avisos relacionados con el Servicio de Asistencia Judicial, communication sent to Magallanes' SAJ.

Colegio de Abogados (1972) Oficios 6 to 16, 12.1.1972, Hace presente dictación de la ley 17.590, communication sent to regional bars.

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Colegio de Abogados (1972d) Oficio 364, 15.9.1972, communication sent to the Supreme Court

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Colegio de Abogados (1974) Oficio 223. 16.8.1974, communication sent to the Commandant of the Armed Forces Sergio Arellano Stark.

Colegio de Abogados (1974a) Oficio 264, 10.9.1974, formula observaciones al Proyecto que crea el Servicio Nacional de Asistencia Juridico Social, communication sent to the Ministero of Justice, appending the draft Bill creating a National Socio-Juridical Assistance Service.

Colegio de Abogados (1979) Oficio 75, 25.5.1981, communication sent to the Minister of Justice

Colegio de Abogados (1979a) Oficio 252, 6.12.1979, communication sent to the chair of the commission drafting a decree-statute creating a National Juridical Assistance Service

Colegio de Abogados (1980) Oficio 183, 8.9.1980, communication sent to the chair of commission studying legal assistance

Colegio de Abogados (1980a) Oficio 241, 1.12.1980, communication sent to the chair of the Courts of Appeals of Santiago

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Colegio de Abogados (2000) *Opinión del Colegio de Abogados de Chile sobre el Proyecto de Defensoría Penal Pública*, June

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Colegio de Abogados (2006a) *Solicita reconsideración de informe de 22 de febrero de 2006, hecho suyo por la Excma. Corte Suprema según acuerdo de 24 de marzo de 2006*, 10 May

Colegio de Abogados (2008) *Opinión del Colegio de Abogados de Chile A.G. en materia de defensoría y asesoría legal a quienes no pueden procurársela por sus propios medios*, June

Colegio de Abogados (2009) *Debate Visiones para la Justicia en Chile*, 30 October

Legal Assistance Corporations documents collected through freedom of information requests

Board meetings' records

The minutes of the Legal Assistance Corporations' (LAC) board sessions are known as *Actas del Consejo Directivo.* These documents are referenced in the body of this dissertation by identifying the specific LAC and cited by including the date when the session was held and page number. For example, *CAJMetropolitana* 15.4.1982:9-10, identifies the respective LAC (Metropolitana) session held by its board on 15 April 1982, recorded in pages 9 and 10.

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CAJVAL (2002) *Memorias 1998-2001*

CAJVAL (2005) *Informe Anual*

CAJTA 2015 *Informe levantamiento de información de Corporación de Asistencia Judicial de las Regiones de Tarapacá y Antofagasta*

Appendix 3 Interview schedule

Introduction

- Can you tell me about your background involvement with legal aid?

Questions on the history of legal aid in Chile

- Do you have any knowledge regarding legal aid provision before 1981, when the Chilean Bar Association (CBA) managed the scheme?
- Did politicians, lawyers or someone else complain about this legal aid scheme?
- Was mandatory training an issue at the time?
- What were the main issues which led the government to strip the CBA of providing legal aid and create the Legal Assistance Corporations (LACs)?

Questions related to participant involvement with policy proposals on legal aid

- What were the main issues regarding legal aid provision being discussed at the time of your involvement (give examples of Bills/policies/announcements at the time)?
- Was mandatory training an issue at the time?
- Did students complain about its unpaid character, working conditions or something else?
- Did the growth in the number of law students per year affect legal aid delivery?
- How would you describe your involvement in those events?
- Who were the interested parties in those issues and what were their positions?

- Did LACs participate in the formulation of policy proposals and legal reforms to legal aid?
- What happened with those proposals?

Questions related to the development of LACs' responsibilities

- What kinds of legal services were provided through LACs?
- Can you explain how LACs tried to fulfil their training responsibilities?
- Can you describe the institutional relationships that existed in relation to legal aid provision by LACs (at local and national levels)?
- What role, if any, did law schools/the CBA/other Corporations/the judiciary have regarding the scheme?
- Were there national policies on legal aid or legal training developed by the MoJ?

Question related to procedural reforms from 1990 onwards

- Did the criminal/employment/family procedure reform affect LACs?
- Who were the interested parties in those reforms?
- What were their attitudes regarding legal aid provision in criminal/employment/family?

Closing questions

- At the time you left, what goals were achieved?
- Do you any have knowledge regarding issues that remain unsolved?

- The government has announced a new Bill with specialised and professionalised areas of legal aid delivery and changes to mandatory training. What is your opinion about this announcement?
- Do you think legal aid through legal training should be changed and how?
- What did legal aid through legal training mean to you?

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