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### Title

Committing to Justice: An Analysis of Criminal Law Reforms in Chile

### Permalink

<https://escholarship.org/uc/item/6ph2s3cj>

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### Publication Date

2004-07-21

## **INTRODUCTION**

From 1997 to 2001, the Chilean government, with some outside assistance, enacted laws to transform its criminal justice system in hopes of making it more transparent and broadening the rights of defendants and victims involved in the criminal justice process. Despite these significant reforms affecting lower-level criminal courts and regional prosecutors and public defenders, reforms directly affecting society's perception of justice lagged noticeably behind. For example, through 2001 the Chilean government was lackluster in prosecuting high-level officials for human rights violations perpetrated by the regime of Augusto Pinochet. Furthermore, until 2001 the government also significantly restrained individuals who criticized the judiciary itself. After lower-level criminal reforms had been in place for several years, the government then significantly changed its policies regarding the prosecution of high-level Pinochet-era officials and of citizens critical of judicial institutions. As a result, it is fair to ask whether the switch in policy is related to lower-level criminal reforms.

The timing of the criminal law reforms and subsequent policy changes on larger issues of justice suggests a link between lower-level improvements in the justice system and the government's political commitment to the creation of a more open legal system. This relation

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© Lydia Brashear Tiede 2004. This essay is derived from an M.A. thesis in Latin American Studies from the University of California, San Diego. I would like to thank my committee members—Matthew Shugart, Carlos Waisman, and Michael Monteón—for their assistance with the thesis. I also am appreciative of financial assistance received from the Tinker Foundation, the Center for Iberian and Latin American Studies at UCSD, the United States Department of Education (for a Title VI Summer Intensive Language Fellowship), and the Friends of the International Center at the University of California, San Diego, which made possible the thesis research in Chile in the fall of 2001. Finally, I would like to thank William E. Davis and Charles Briggs for their valuable comments on this working paper.

suggests that certain reforms may create the impetus for further reforms, resulting in an even more open system based on the rule of law, in which predictable laws and processes apply equally to all individuals regardless of their political status. Thus it may be that a commitment to justice is self-reinforcing and that once governments show they are serious about reforms, citizens who had previously been cynical or disillusioned regain confidence in the institutions. Once citizens believe that the legal system has fixed and reliable procedures, such as those embodied in the new criminal law reforms, they may have a greater stake in upholding the law and demanding more from both their justice institutions and their political institutions. While conventional wisdom presumes that reforms of judicial institutions would “trickle down” and have an impact on the day-to-day administration of justice, some commentators suggest that empowering civil society to demand access to the legal process may also “trickle up,” improving high-level institutions from the bottom up.<sup>1</sup> I contribute to these discussions by showing that reforms to lower-level institutions may significantly affect the manner in which higher-level institutions operate.

My research is based on interviews with Chilean attorneys, judges, and government officials in Santiago and Temuco, Chile, conducted from August 6 to September 25, 2001. This research is based as well on observations of hearings and an oral trial employing the new criminal procedures implemented in Temuco in 2001. My research also included attendance at a training course for legal practitioners in Santiago and an extensive review of Chile’s criminal procedures and related laws, along with commentary on the reform process.

To examine the connection between lower-level reforms and the improvement of judicial institutions, this essay is divided into five parts. The first provides a review of the literature dealing with legal reforms. In order to understand the accomplishments of lower-level reforms, the second section discusses the administration of criminal justice in Chile prior to the reforms.

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<sup>1</sup> Thomas Carothers (1999) reveals that the United States Agency for International Development’s (USAID) judicial reform efforts tend to apply a “top-down” approach which focuses on reforms to higher-level rather than lower-level courts. In response, Carothers offers a “bottom up” solution which focuses on empowering civil society to influence judicial reform.

The third part describes the lower-level reforms implemented by the Chilean government to transform the criminal justice system from a highly restrictive one to a more open system providing significant rights and privileges to citizens. The fourth section describes how certain Chilean policies contradicted the government's commitment to legal reform and individual rights. Specifically, it analyzes the existence of restrictions on the prosecution of human rights violators during the Pinochet era and restrictions on citizens criticizing the judiciary at the very time when the Chilean government was enhancing individual rights in lower criminal courts. This section also explores recent changes in the Chilean government's stance on human rights prosecution and freedom of expression. The essay concludes by suggesting relationships between criminal law reform and the improvement of a country's overall justice system.

### **INGREDIENTS OF EFFECTIVE JUDICIAL AND LEGAL INSTITUTIONS**

There is much discussion among academics and international development experts regarding the need for legal reform. Well-functioning legal institutions not only provide safeguards for citizens' individual rights, but they also ensure the enforcement of contracts and the equal treatment of parties (domestic or foreign), which bears directly on foreign investment and thus economic well-being. Legal institutions based on the rule of law are associated with democracy, and most commentaries on these institutions focus specifically on how well courts function by emphasizing the need for independent judiciaries, equal and easy access to courts, efficiency, and transparency of the legal process. *Independent judiciaries* are those that operate free of outside influence from government or other intervention, such that judges within these judiciaries can render impartial decisions. *Equal and easy access to courts* refers to whether all individuals have the same rights and treatment in the eyes of the legal system and also to how easy it is for the common citizen to use the legal system to settle disputes. *Transparency* refers to whether procedures are open and easily observable, such that corruption and other improprieties are exposed.

While the above attributes are largely accepted as vital to an effective legal process, there is little rigorous and detailed examination of institutions to determine whether these desirable attributes are actually present and, if not, whether legal reforms can create better-functioning institutions. Furthermore, little scholarly attention is directed at how such reforms to lower-level courts and processes may affect the larger political culture of a society.

Literature on judicial reform comes from two main sources: international development organizations and political scientists. International development agencies tend to focus on how reform efforts can improve the legal system in order to provide enforceable contracts and the protection of property rights.<sup>2</sup> The failure of courts in Latin America has far-reaching consequences to economic development, primarily because foreign investors look to the courts to enforce their contracts.<sup>3</sup> The development literature includes only a few case studies regarding justice reform in Latin America.<sup>4</sup> These studies deal with reforms to criminal procedures and justice-related institutions. Political scientists have analyzed legal reform under the rubric of “new institutionalism,” which asserts that the configuration of institutions does indeed affect the behavior of individuals within these institutions as well as society as a whole.<sup>5</sup> Political scientists tend to focus on how legal institutions are organized, how they derive power, and whether there is a clear separation of power between the judiciary and the other two main branches of government. The institutional literature provides useful insights into the requirements for effective legal institutions. However, it seems to focus predominantly on a country’s highest level of courts, with little attention given to lower-level courts and processes.<sup>6</sup>

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<sup>2</sup> Jarquín and Carrillo 1998: ix. “Judicial reform” refers not only to reforms to the courts but also to other related institutions as well as revisions of laws and codes.

<sup>3</sup> Ibid.

<sup>4</sup> Popkin 2000; Hammergren 1998; Prillaman 2000.

<sup>5</sup> An institutionalist approach as used here refers to rational choice institutionalism. An institutional approach is concerned with “institutions as causal variables” that provide “political actors” with incentives to “maximize their payoffs given the existing institutional constraints” (Crisp 2000).

<sup>6</sup> After a careful review of the political science literature produced in the United States dealing with judicial and legal reforms in Latin America, I only have found articles on reform to Supreme Courts

With few exceptions, most judicial reform experts see an “independent judiciary” as the “cornerstone of successful reform.”<sup>7</sup> Therefore, most judicial reform efforts focus on making judiciaries independent. Independent judiciaries are seen as vital to a country’s democratic process because they help to ensure that judges are not influenced by outside forces, which would result in judges treating individual litigants differently.

Besides an independent judiciary, properly functioning legal institutions also have additional requirements. Healthy legal institutions are efficient administratively.<sup>8</sup> This means that there are processes and procedures in place to handle the proper administration of case files, evidence, and requests by attorneys and litigants. Efficiency has been associated with how quickly cases are adjudicated. Decision-making that is too speedy may deprive individuals of fundamental rights. Access to courts is another significant aspect of effective legal institutions,<sup>9</sup> and many reform efforts are directed at providing funding to ensure that individuals are apprised of the procedures for using the legal system most effectively. Other ingredients for reforming judicial institutions include the existence and protection of certain fundamental individual rights before the law, transparent processes, and the inclusion of civil society efforts in legal reform. Another important aspect of judicial reforms is support of efforts to change the citizenry’s perception of justice,<sup>10</sup> given that trust in the legal system reinforces reform efforts.

A final important aspect of judicial reform is the existence and proper functioning of frontline legal institutions, such as lower-level courts, prosecutors, public defenders, police forces, and bar associations, among others. Such institutions provide crucial functions in the legal process and serve to check the power of other institutions and legal actors. A debate currently exists as to whether these other types of legal institutions help make government more

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in Latin America. These works, which have examined judicial reforms in Argentina, Mexico, and Peru, include: Magaloni 2003; Finkel 2003, 2004, n.d.1, n.d. 2; Domingo 2000.

<sup>7</sup> Jarquín and Carrillo 1998: vii. For more on judicial independence as a reform goal, see Becker 1999.

<sup>8</sup> Prillaman 2000: 22.

<sup>9</sup> *Ibid.*: 29.

<sup>10</sup> Martínez 1998.

accountable.<sup>11</sup> Some legal institutions are seen to reinforce the accountability of other institutional actors because they have the power to sanction legal transgressions by other institutions. In presidential systems, “superintendence agencies,” such as courts, prosecuting agencies, and public defenders, often provide a mechanism to oversee the work of the executive and legislature.<sup>12</sup> However, just creating such superintendence agencies may not be a sufficient safeguard against other malfunctioning institutions if these superintendence agencies themselves do not have sanctioning powers and are not truly independent, but are simply extensions of an executive and legislature that have failed in their public duties.<sup>13</sup>

While the literature is instructive, there has been little written on the connection between legal reforms and a society’s overall commitment to the rule of law and justice. One commentator suggests that the United States’ foreign development efforts “reflected U.S. policy makers’ hope that they could improve the human rights situation by helping Latin American security forces and judicial institutions operate in accordance with legal norms.”<sup>14</sup> This essay will evaluate this “hope” by specifically analyzing lower-level criminal reforms in Chile. Unlike other work, this essay will tie the lower-level criminal law reforms to Chile’s confrontation with its previous judicial institution failures—precisely its failure to prosecute human rights abuses and its failure to allow common citizens to criticize the judiciary.

## **CRIMINAL LAW REFORMS IN CHILE**

Since the 1990s, many Latin American governments have adopted new criminal procedure codes, converting their criminal justice systems from an inquisitorial model to an accusatorial

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<sup>11</sup> Mainwaring 2003. This is not to imply this is the only debate regarding accountability. As noted here, several debates are ongoing regarding the definition and scope of the term “accountability.”

<sup>12</sup> Moreno, Crisp, and Shugart 2003: 81.

<sup>13</sup> *Ibid.*: 99.

<sup>14</sup> Carothers 1999.

model.<sup>15</sup> These new codes resulted, *inter alia*, from an intraregional dissatisfaction with the inquisitorial system and recognition that the criminal justice system was unworkable.<sup>16</sup> The similarity in such reforms across Latin America is also due to the region's movement toward democracy and the necessity of aligning national practices with international law.<sup>17</sup> Criminal code reform in Latin America was also furthered by several international agencies, such as the World Bank, and governmental actors such as the United States Agency for International Development (USAID), as well as regional organizations working on criminal law reform throughout Latin America.

Chile's criminal law reform was marked by the involvement and cooperation of many diverse political actors. Legal development expert William E. Davis indicates that one prominent

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<sup>15</sup> Inquisitorial models are those in which the judge oversees the investigation, trial, and sentencing phases of the criminal justice process. This process is conducted almost entirely through the submission of written documents and is shrouded in secrecy. Adversarial models are those in which the public prosecutor oversees investigations and trials, and the procedures are public, transparent, and oral. The pre-reform criminal law system in Chile is actually classified as a "mixed" inquisitorial system as it theoretically uses procedures from both the true inquisitorial and the true adversarial models. Generally, mixed systems are divided into two parts: *sumario* and *plenario*. In the *sumario* the judge oversees the entire investigation, which is done in secret. During the *sumario*, the judge keeps the defendant ignorant of the charges being investigated, and the judge has the power to detain the defendant for an indeterminate period. In the second phase, *plenario*, attorneys representing the government and legal representatives of the defendant are involved in the process of submitting written evidence and arguments on behalf of their clients.

<sup>16</sup> Maier, Ambos, and Woischnik 2000: 28, citing a code publication by the Instituto Iberoamericano de Derecho Procesal (Buenos Aires: Hamurabi, 1989) and Consiglio Nazionale delle Ricerche Materiali V/1, Roma, 1990; Riego 1992: 16, citing Julio Maier, *Derecho procesal penal argentino* (Buenos Aires: Hamurabi, 1989).

<sup>17</sup> Many Latin American countries have revised their criminal justice systems and enacted new criminal procedure codes. Argentina adopted a federal criminal procedure code promoting the accusatorial system in 1989. Individual Argentine provinces soon followed by adopting similar codes; the province of Córdoba, whose code has been much studied, was the first to do so in 1991. Colombia adopted a new code in 1991, although it included some variations specific to addressing narco-trafficking. Voters in Peru approved a new code in 1991, but it had not yet been implemented at the time of this writing. Guatemala adopted its new code in 1992; El Salvador's and Venezuela's were introduced in 1998. Chile's reform process spanned from 1997 to 2000, and Costa Rica's from 1996 to 1998. Other new codes were adopted in 1999 by Bolivia and Paraguay and in 2000 by Ecuador.



Chilean family, which had been affected by the kidnapping of a family member and was associated with Chile's political right, pushed for criminal law reforms and provided funding along with USAID.<sup>18</sup> Davis further indicates that criminal law reform also was greatly assisted by legislators, nongovernmental organizations, academics, and others, who worked cooperatively to generate proposals for criminal reform legislation.<sup>19</sup>

Generally, these new criminal procedures limit the courts to judging the facts and deciding issues of law, and they leave investigation of the case under the control of a public prosecutor, and the administration of the court under the control of professional court personnel. One of the most dramatic changes brought by these new codes is the introduction of court trials, which require the employment of oral advocacy skills by both the prosecution and defense attorneys. These codes bolster the rights of defendants by creating or fortifying public defender offices and increasing the defendants' participation in the process. The codes also introduce the use of some types of alternative or abbreviated dispute resolution short of a full trial. Generally, it may be said that the codes improve the rights of the victims.

### **The Pre-Reform Criminal Law System in Chile**

Criminal law reforms enacted in Chile between 1997 and 2001 followed the general trend of such reforms in Latin America and converted Chile's criminal justice system from one following an inquisitorial model to one implementing an adversarial model. These reforms affected not only the processing of criminal law cases but also court infrastructure and administration.

In order to fully understand the breadth of the new reforms, an understanding of the prior system is useful. In 1906 Chile adopted its Código de Procedimiento Penal (CPP-1906). This Code maintained many of the basic structures of the inquisitorial system established by Spain

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<sup>18</sup> William E. Davis, e-mail messages, January and June 17, 2004.

<sup>19</sup> Ibid.

during the colonial period.<sup>20</sup> The pre-reform criminal law system is used to describe the state of the law under the CPP-1906, prior to criminal law reforms promulgated in Chile from 1997 to 2001. As discussed later, the gradual implementation of the reforms across Chile led to the continued use of the pre-reform law in several regions of Chile into 2004.

The 1980 changes to the Chilean Constitution did not specifically affect the CPP-1906, but in theory they increased the rights of defendants by incorporating rights espoused by international treaties into national law. Yet despite this incorporation, these rights were seldom recognized. For example, Law No. 18.857, promulgated by the military government in 1989, attempted to reduce the time period for completion of criminal proceedings. In practice, however, the 1980 and 1989 changes did not substantially change the criminal process.<sup>21</sup>

In 1988 Pinochet unexpectedly failed to win the plebiscite and consequently handed over power to Patricio Aylwin, who faced significant challenges from the military legacy.<sup>22</sup> Beginning in 1991 Aylwin proposed substantive changes to the legal system. Although not all of his proposals were adopted, those of Aylwin's proposals that were accepted began a trend in criminal law reform. The 1991 enactment of the *Leyes Cumplidos*<sup>23</sup> created a legal framework for the rights of criminals. Under these laws, detained criminals could not be held incommunicado for indefinite periods, could not be tortured, had the right to see their attorneys regularly, and had the right to appear before a judge within forty-eight hours of arrest.<sup>24</sup>

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<sup>20</sup> Carocca et al. 2000: 7.

<sup>21</sup> *Ibid.*: 12.

<sup>22</sup> Chile had an extremely independent judiciary during the military regime. The military dictatorship did not interfere in the judiciary, except regarding the application of amnesty laws. Pinochet neither packed nor purged the courts. As a result, some legal commentators, such as Jorge Correa Sutil, classified Chile's judiciary at that time as "independent." This "independent judiciary," however, failed to act to prevent serious human rights abuses by the military government, thereby giving tacit approval to government abuses. Thus the independence of the judiciary may be explained by the fact that the judiciary never took any action that the Pinochet government found threatening or provocative. See Correa Sutil 1993.

<sup>23</sup> Ley No. 19.047, published in *Diario Oficial*, No. 33.894 (1991).

<sup>24</sup> Brown 1998. The *Leyes Cumplidos* allowed a maximum of five days of custody prior to arraignment, prison visits with close relatives, and regular access to an attorney.

Despite Aylwin's reforms, authorities still failed to notify detainees promptly of the charges brought against them, defendants were routinely deprived of timely hearings, and legal counsel was available only for those who could afford to pay for private attorneys. Defendants without financial means were often represented by law students rather than government-appointed lawyers.

The lower criminal courts in pre-reform Chile, *juzgados del crimen*, used only one judge, who investigated criminal cases, accused individuals, decided their culpability, and sentenced them. These pre-reform judges also made decisions regarding defendants' fundamental rights, including the duration and conditions for pretrial release from detention. These lower criminal law judges also had administrative and budgetary responsibilities over their individual courts, and they made decisions regarding personnel, office supplies, and budgets. The wide range of their duties prevented lower court judges from acting quickly on cases, resulting in delays and bottlenecks in the process.<sup>25</sup>

Under the pre-reform inquisitorial system, lower criminal courts reviewed cases in a two-step process. The first stage, or *sumario*, was an investigative phase in which the judge carried out the entire investigation, with the assistance of the police. The *sumario* often took place in secret, and defendants were unaware of the accusations against them despite an ongoing investigation. During the *sumario*, the judge could hold a defendant for an indefinite period, and defendants were sometimes held for years before being formally accused. This provided an almost Kafkaesque scenario, in which individual defendants were not informed about the charges against them and/or their detention status. If the judge decided there was enough evidence tying the defendant to a specific crime, he moved the case from the investigative phase to a *plenario* phase, an action that had the appearance of a tacit presumption of guilt. The *plenario* phase involved new actors, including representatives for the defendants and the government, respectively, and also attorneys for the victims. These parties interacted with the judge by

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<sup>25</sup> Author interview with a Chilean attorney, August 9, 2001, Santiago. The interviewee indicated that judges had too much power under the former process.

presenting evidence in written form. After the *plenario* was completed, the same judge who conducted the investigation and made the evidentiary decisions during the *sumario* and *plenario* stages would then decide the guilt of the defendant and determine the sentence.

The most startling aspect of Chile's pre-reform criminal law system was the general lack of defendants' rights. Not only were there few actual rights on paper, but the rights that did exist were frequently curtailed in practice, sometimes due to a lack of resources. For example, Article 19(3) of the Constitution states that everyone has the right to an attorney. However, the quality of a defendant's legal defense was based largely on his financial situation. Often, law students with no practical experience represented indigent defendants in criminal proceedings, including murder trials.<sup>26</sup> The result was that poor defendants were given inadequate representation, and there was a wide disparity in treatment between rich and poor defendants.

In pre-reform Chile, there existed no true right to a presumption of innocence. Individual rights were further curtailed because a judge could not escape the prejudices that inevitably attach when investigating a case prior to its submission to criminal process. The judge was thus given the contradictory tasks of first investigating whether a crime took place and, once deciding that it had, weighing the evidence to resolve the question of guilt—a question the judge had apparently already determined during investigation.

## **Reforms in Chile**

### **REFORM IMPLEMENTATION TIMEFRAME**

Although all of Chile's criminal law reforms were approved by 2001,<sup>27</sup> the laws themselves provide for gradual implementation. The new Código de Procedimiento Penal, although effective

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<sup>26</sup> U.S. Department of State 2001.

<sup>27</sup> Ley No. 19.665, Ley No. 19.708, Ley No. 19.519, Ley No. 19.640, Ley No. 19.718, Ley No. 19.696. For full citations of these laws, with their promulgation dates, see the bibliography at the end of this essay.

as of October 2000, allowed for the new process to be instituted in stages.<sup>28</sup> The reform was to have been implemented in all regions by 2004.<sup>29</sup> In August 2001, the legislature revised the schedule of implementation, making the Santiago metropolitan area the last region for implementation.<sup>30</sup> The reforms promulgated between 1997 and 2001 drastically affected institutional accountability.

Under the reforms, when a crime comes to the attention of the police or a judge, a prosecutor with the Office of the Public Prosecutor (Ministerio Público) is immediately notified of the case, and the investigation begins with this assigned prosecutor in charge. If a defendant is detained by the police, the police must notify a judge within twenty-four hours. The *juez de garantía* (“judge of guarantee”) informs the defendant of the charges against him and makes decisions regarding the defendant’s detention. From the moment the defendant is arrested, he has the right to an attorney.

#### THE JUZGADO DE GARANTÍA

A criminal defendant’s journey begins in a Juzgado de Garantía, or court of guarantee. One “judge of guarantee” oversees the first phase of every criminal case. These judges primarily

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<sup>28</sup> In other countries, such as Venezuela and Costa Rica, criminal procedure reform was implemented across the nation at one time.

<sup>29</sup> The schedule for implementation of the reforms in Chile was as follows: 2000, regions IV and IX; 2001, regions II, III, and VII; 2002, regions I, XI, and XII; 2003, regions V, VI, VIII, and X; and 2004, the metropolitan region (Santiago).

<sup>30</sup> Critics have questioned the legality of this gradual implementation. They argue that the reform is unconstitutional because, during the four-year implementation period, it applies different standards to similarly situated defendants based on the location of their crimes. Author interview, September 2001, Temuco. Counter-arguments appeal to the pragmatic. Because the criminal law reform involved such drastic changes in infrastructure and personnel, gradual implementation ensures the success of the new system. Furthermore, the capital expenditures for the project are so great that only gradual implementation may be possible (author interviews, August 21 and 27, and September 20, 21, and 24, 2001, Santiago and Temuco). See also Pfeffer Urquiaga 2001; *El Mercurio* 2001a, 2001b.

ensure the rights of the defendant and other interveners, such as victims, in the preliminary phase of the investigation.<sup>31</sup> Besides guaranteeing individual rights, *jueces de garantía* also are involved in making legal decisions about preliminary matters. Although not in control of the prosecutors' investigation, the post-reform judges can affect the investigation by either granting or denying prosecutors' requests concerning the defendant's detention and authorization of evidentiary procedures (such as body exams, exhumations, and so on). One *juez de garantía* who had worked under both the pre-reform and post-reform systems stressed that, under the new procedures, judges actually look directly into the defendants' faces, and this has a "tremendous" effect on the judges' decisions.<sup>32</sup> Further, *jueces de garantía* have some influence over prosecutorial discretion by requesting that prosecutors not pursue certain cases.<sup>33</sup> Finally, the *juez de garantía* at this level prepares the case for oral trial by holding hearings, correcting mistakes in legal papers, and excluding or admitting evidence.<sup>34</sup> At the conclusion of this phase, the judge will dictate *el auto de apertura de juicio oral* (order to open the oral trial), which formally moves the case from the preliminary stage to an oral trial.

#### TRIBUNAL DE JUICIO ORAL EN LO PENAL

The Tribunal de Juicio Oral en lo Penal<sup>35</sup> is a separate court tasked with hearing oral criminal trials. Each case is heard by a three-judge panel.<sup>36</sup> The three judges do not include the *juez de*

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<sup>31</sup> Guaranteeing rights means that the judge must ensure that the defendants understand their legal rights and how the process operates. In this way, the judge makes decisions directly concerning defendants' rights, such as designating a public defender and making decisions on detention and conditions of release. CPP, Arts. 102, 127, 154, 132.2, 131, 132, 136, 140, 154, 144, 152, 153, 150.3, 4, 151, 155, 157. The judges in the Juzgado de Garantía also guarantee defendants' rights by overseeing the public prosecutor's investigation on issues relating to evidence and the rights of defendants, victims, and witnesses. Ley No. 19665, Art. 11; Ley No. 19708, Art. 1.

<sup>32</sup> Author interview with the *juez de garantía*, September 21, 2001.

<sup>33</sup> CPP, Art. 168. This is a power that the judge does not have in the United States' common law system. In fact, the decision to initiate or not initiate criminal proceedings is generally an accepted aspect of prosecutorial discretion.

<sup>34</sup> CPP, Arts. 266, 270, 276.

<sup>35</sup> Ley No. 19665, Art. 11; Ley No. 19708.

*garantía* and are unfamiliar with the case until they receive the file from the prior court. The use of three judges in deciding a defendant's guilt lessens the bias that any one judge may have. Thus the collegial structure of the court is intended to provide impartiality. The proceedings are entirely public and similar to Western-style bench (without jury) trials.<sup>37</sup>

As mentioned above, a functioning judiciary requires independence, efficiency, and access.<sup>38</sup> Although the reform in Chile left intact for the most part the prior procedures for nominating and disciplining lower court judges, the preexisting procedures did help to ensure the independence of the lower courts in Chile. The independence of courts is fortified if the nomination process involves two or more elected branches (the executive and legislative),<sup>39</sup> as it does in Chile. While Supreme Court nominations in Chile involve all three branches, lower court nominations only involve two branches. Although lower court nominations do not directly involve the legislative branch, the legislature is tangentially involved since it approves Supreme Court judges, who in turn nominate Appellate Court judges, who in turn assist in the lower court

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<sup>36</sup> During oral arguments, the judge serving as president of the court ensures that defendants understand their rights and the process. At this stage of the trial, the prosecutor or defense attorney presents an opening statement, introduces and questions witnesses (direct and cross-examination), offers other evidence, and makes a closing argument. The judges may ask the witnesses direct questions after they have been questioned by the prosecutor and defense attorney.

<sup>37</sup> The above description is based on my observation of the first murder trial conducted in Temuco, Chile, under the new procedure, on September 24, 2001. During this trial, the courtroom was filled with observers and the media. The judges treated the defendant with respect and at every stage made sure that he understood the proceedings. The prosecutor presented nine witnesses and substantial direct evidence (bloody towels and clothes, photographs of the victim, and so on). The entire trial took only about three hours. Although the presentation of evidence was very professional and the defendant's rights were respected, this murder trial was completed in an extremely short period of time by U.S. standards. The quickness of the trial was primarily due to the limited number of questions asked by the public prosecutor and defense attorney, as well as the Court's allowing the witnesses to speak without interruption. The quickness, however, may also have been due to the newness of the oral trial procedures and the case facts (a brother killing another brother and family witnesses). See *El Mercurio* 2001c.

<sup>38</sup> Prillaman 2000: 15.

<sup>39</sup> Moreno, Crisp, and Shugart (2003: 102) suggest that the independence of courts is even stronger if the appointment process involves elected and nonelected actors.

nominations. From the above analysis, Chile's nomination procedure at the higher and lower levels involves more branches and therefore should make the judiciary more independent than judiciaries that rely on only one branch for nomination.

The reform also has affected the efficiency of the courts. Lower courts now have their own professional administrative staffs, which allow the judges to focus on their primary function: adjudication. The reform in this area was dramatic because it provided new resources and staff to professionally administer the courts, which in turn increases the speed with which cases are adjudicated. Within the first year of the reform, the two regions that had implemented the reform reported an increase in the number of cases resolved over the pre-reform period.<sup>40</sup>

Finally, the reform has dramatically affected access to the courts. The reform has made the criminal process more transparent by opening it to the public. Furthermore, the reform has allowed defendants to meaningfully contest their cases with their own attorneys from the moment of arrest. According to government officials and the attorneys I interviewed in Chile, the reform has also improved access to justice by giving victims a significant voice in their proceedings.<sup>41</sup>

#### **THE OFFICE OF THE PUBLIC PROSECUTOR**

The new CPP, along with amendments to the Constitution, created a new role for the public prosecutor.<sup>42</sup> Under the reform, the Office of the Public Prosecutor is no longer part of the judicial branch. Unlike most countries in Latin America that reformed their systems, in Chile the

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<sup>40</sup> Baytelman 2007: 50. Despite these noteworthy results, the statistics fail to note that the majority of cases that were adjudicated did not terminate in oral trial. In other words, most were either not prosecuted or were resolved through alternative means. Although at first glance this may appear positive, it should be noted that some of the abbreviated processes seriously curtail the rights of the defendants. Further research should address the issue of whether quicker justice in Chile also means quality justice.

<sup>41</sup> Author interviews, August and September 2001, Santiago and Temuco.

<sup>42</sup> Ley No. 19.519 changed the Chilean Constitution by adding a new chapter VI-a, which contains new articles 80A, 80B, 80C, 80D, 80E, 80F, 80G, 80H, and 80I.



legislature provided the Office of the Public Prosecutor with the status of a separate and independent governmental organ, apart from the judicial branch.<sup>43</sup>

The Office of the Public Prosecutor is charged with investigating crimes, including supervision of police and bringing charges against defendants in a court of law, thereby eliminating judges from the investigation of cases before them. After investigation, the prosecutors decide whether to formally charge defendants. Prosecutors also have discretion to enter into agreements with the defense to apply alternative or abbreviated criminal procedures for resolving a criminal case. Under the new reform, the prosecutors also represent the victims' interests in criminal cases.

One of the most significant aspects of Chile's reform is the creation of the Office of the Public Prosecutor. Prosecutors, who now control criminal investigations in almost all parts of the country and bring charges, have taken power away from judges, who held all power in the pre-reform system. By giving the prosecutors important new duties, the reform has allowed judges to be insulated from the prejudices that may have attached when they conducted the criminal investigations themselves. Furthermore, this new use of prosecutors has made the criminal justice system more efficient due to the specialization of tasks.

To determine whether the Office of the Public Prosecutor is an effective superintendence agency, one must look at whether it acts independently or is merely an extension of the executive and legislative branches. In Chile, the Office of the Public Prosecutor is a separate and independent agency; it is not part of the judicial branch. However, the national prosecutor is nominated under procedures identical to those followed for Supreme Court judges, and potential removal by the Supreme Court (if requested by the executive or legislature) makes the national prosecutor beholden to both the executive and the Supreme Court. As a result, the national prosecutor may set policy for adjudicating individual cases pursuant to the wishes of the

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<sup>43</sup> Piedrabuena 2000: 87, 97. This issue was debated by the Supreme Court and legislature. During the discussion of the legislation, the Supreme Court was concerned about the separation of the Office of the Public Prosecutor from the judicial branch (traditionally the Office of the Public Prosecutor was part of the judicial branch).

executive and the Supreme Court, a trend that may be exacerbated in Chile because of the strength of the office of president. The fact that the national prosecutor's decision-making abilities may not be truly independent calls into question how aggressively high-ranking officials in government would be criminally prosecuted, if they were prosecuted at all.

#### **THE OFFICE OF THE PUBLIC DEFENDER**

The reform created a completely new institution, the Office of the Public Defender (*Defensoría Penal Pública*),<sup>44</sup> whose function is to provide a criminal defense for individuals charged with crimes or appearing before lower criminal courts and who need an attorney.<sup>45</sup> In conjunction with the defendants' newly established right to have an attorney at every stage of the proceedings, defendants without financial means are now appointed a public defender as a matter of right. Public defenders actively represent their clients, presenting evidence, examining witnesses, and arguing orally.

In Chile, the president selects and removes the national defender; thus the national defender may make policies and defend cases consistent with the policies of the president. It might be argued that the national defender could create national policy for the entire nation that is based more on the prerogatives of the executive than on sound policy. Although this may be the case in theory, it should be noted that the first appointed national defender, Alex Carroca, was highly critical of the national prosecutor on a number of issues, including the policy of the Office of the Public Prosecutor to ask for up to two years to investigate all crimes, thus slowing down the process.<sup>46</sup>

Despite these nomination and disciplinary procedures, the Office of the Public Defender operates independently due to several internal monitoring procedures. Regional and local public

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<sup>44</sup> Ley No. 19.718.

<sup>45</sup> Ley No. 19.718, Art. 2.

<sup>46</sup> Author interviews, August 21 and 27, and September 20, 21, and 24, 2001, Santiago and Temuco.

defenders must pass a civil service examination to ensure that they meet minimum skill requirements, and the office has internal disciplinary measures.

#### INDIVIDUAL RIGHTS

The reform substantially improves the situation of criminal defendants by providing them with new substantive and procedural rights. The most important new right is the presumption of innocence.<sup>47</sup> The reform also provides the accused the right to a defense attorney from the moment the criminal process begins.<sup>48</sup> Defendants also have rights to a *defensor de confianza*,<sup>49</sup> a public defender who holds the title of attorney.<sup>50</sup> A *defensor de confianza* who is provided free to defendants who cannot afford to pay.

Defendants also have a plethora of other rights, including a right to oral public trial,<sup>51</sup> the right to intervene throughout the process,<sup>52</sup> and the right to immediately know the specific charges against them.<sup>53</sup> Once defendants are aware of the charges against them, they have several rights regarding presenting a defense, including the right to contradict allegations in an accusation and to review the prosecutor's investigation file from the outset.<sup>54</sup> Defendants also have the right to independent and impartial judges.<sup>55</sup>

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<sup>47</sup> CPP, Art. 4.

<sup>48</sup> Constitution of Chile, Art. 8, inc. 1; CPP, Arts. 93, inc. 2b; 104, 132, 261, 286, 291(2).

<sup>49</sup> CPP, Arts. 102, 286.

<sup>50</sup> Ibid.

<sup>51</sup> Constitution of Chile, Art. 1(1).

<sup>52</sup> Constitution of Chile, Art. 8, inc. 2.

<sup>53</sup> CPP, Arts. 93(a), 182, 229.

<sup>54</sup> CPP, Arts. 8, 98, 194, 296, 326.

<sup>55</sup> CPP, Art. 1. Not only is this explicitly set forth in the criminal code, but the actual structure and procedure of the lower courts encourage this impartiality. As discussed above, the first preliminary steps are overseen by one judge who ensures that the defendant's rights are protected. Once the case is moved to oral trial, that judge is replaced by three separate judges who hear all testimony and review all evidence. The three-judge panel lends itself to impartiality as the three must come together to reach a decision regarding the defendant's culpability, and the prejudices of a single judge are hopefully mitigated.

The other main improvement in defendants' rights concerns pretrial custody. Prior to the reform, defendants could be held for long periods while the judge investigated the case. That is, they could be held in prison without knowledge of the case against them or the status of the investigation. Under the new reform, the judge must speak to a defendant within twenty-four hours of his detention, versus the former rule of five days, and a defendant has the right to be informed of the charges and to have an attorney. Decisions regarding pretrial detention of defendants must be made in an adversarial manner, with both the defense and the prosecutor presenting evidence. The judge is limited as to when he can impose pretrial detention by the code requirements themselves. To impose *prisión preventiva*, or preventive detention, the prosecutor must show that a crime has been committed, that the defendant was somehow linked to the crime, and that detention will aid in the success of the investigation. The reform also increases the availability of alternative types of detention, such as house arrest. Besides enhancing the rights of defendants, the criminal reform also has provided additional rights to victims of crimes. Under the reform, victims have a more active role in the criminal process and may even provide input in some cases.

### **HESITANCY TO RESPECT CERTAIN INDIVIDUAL RIGHTS**

Despite the bold efforts to reform Chile's restrictive criminal justice system, other government policies enforced at the same time as the enactment of the legal reforms (1997–2001) seemed to stymie Chile's momentum to create a more modern and open society concerned with citizens' individual rights. In both the criminal prosecution of human rights violators and freedom of expression, the Chilean government seemed resistant to change, suggesting that Chile was not as committed to democracy and the rule of law as the new criminal legislation seemed to indicate.

### **Prosecution of Pinochet and Other Human Rights Violators**

During Chile's transition to and consolidation of democracy, as well as its aftermath, the government was hesitant to confront its past and prosecute high-ranking officials involved with human rights violations during the Pinochet regime. Although amnesty laws enacted in 1978 precluded prosecution for "disappearances" occurring between 1973 and 1978, judges hesitated to pursue other related human rights investigations. As a result, the Chilean courts applied the amnesty laws selectively and inconsistently. The courts did proceed with investigating and prosecuting some cases, but many more were closed or left open indefinitely. In 1999, Human Rights Watch reported that the courts had closed seventy-seven cases involving 261 victims, and hundreds of cases remained open.<sup>56</sup> The issue of impunity remained highly politicized, pitting legislators who supported the amnesty laws against those who supported victims and their families. As a result, the government's commitment to democracy seemed incomplete due to its failure to confront Chile's violent past while at the same time implementing new criminal law reforms.

The Pinochet case provides an example of how the hesitancy in prosecuting human rights abuses overshadowed the quality of Chile's democracy. Chile's legacy of human rights abuses came to the forefront when Pinochet was arrested in the United Kingdom in October 1998 pursuant to an extradition request by Spain, which had a complaint against Pinochet for the disappearance of Spanish citizens. On March 4, 1999, the British Law Lords upheld the legality of Pinochet's arrest, citing Great Britain's international obligations under the United Nations Convention against Torture. In their decision, the Law Lords held that Pinochet was not immune to extradition on torture charges committed after 1988, when the United Kingdom ratified the United Nations Convention.<sup>57</sup> In April 1998, the British home secretary upheld the extradition to Spain in the event that Chile did not have a competing claim. Lawyers representing Chile

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<sup>56</sup> Human Rights Watch 1999a.

<sup>57</sup> Human Rights Watch 1999b.

successfully argued that Chile could hear the case and had a right superior to that of Spain. In March 2000, Pinochet returned to Chile.

At the time, many observers thought that Pinochet's return would result in the dismissal of his case. Surprisingly, in 1999 the courts made some attempts to keep the Pinochet case alive by first holding that the "disappearances" were ongoing crimes, not subject to the amnesty laws. Later, in August 2000, the Chilean Supreme Court confirmed that Pinochet could be stripped of his parliamentary immunity. In the most well-known case against Pinochet—the Caravan of Death—Judge Juan Guzmán indicted Pinochet of fifty-seven counts of homicide and eighteen counts of kidnapping. The Caravan of Death case involved the murder or disappearance of fifty-eight individuals immediately after the 1973 military coup, as well as a Pinochet-ordered helicopter commando raid that removed sixty-eight prisoners from jail and summarily executed them. The Court reindicted Pinochet in 2001 for the lesser charge of covering up a crime. In July 2001, the criminal chamber of the Supreme Court ruled that Pinochet was not competent to stand trial in the Caravan of Death case due to health concerns.<sup>58</sup> The case was not appealed.

One of the outcomes of the Pinochet case was the Supreme Court's opinion stating that amnesty laws and the applicable statutes of limitation could only be applied after the guilty party and criminal circumstances have been established through an investigation.<sup>59</sup> Although such an opinion should have opened the door to more human rights prosecutions against other high-level officials or Pinochet triggermen, it did not do so immediately. Subsequent to the decision in the Pinochet case, some Supreme Court judges indicated that such decisions were within the purview of individual judges.<sup>60</sup>

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<sup>58</sup> The victims are now appealing the case on the grounds that the Court applied the new criminal procedure code to Pinochet's prosecution although this code was not yet effective in Santiago. The ultimate ruling could affect the approximately three hundred other cases against Pinochet for human rights abuses (U.S. Department of State 2001).

<sup>59</sup> U.S. Department of State 2003.

<sup>60</sup> The U.S. Department of State (2002) indicates "[t]hat throughout the year [2001] several judges (particularly in courts martial) continued to close cases under the Amnesty Law without completing an investigation into the circumstances of the crime."

The Pinochet prosecution collided with the criminal law reform in an unexpected and ironic way. Pinochet's own lawyers filed briefs stating that gradual implementation of the reform was unconstitutional and that the reform should apply to the Pinochet case despite the case's current location in Santiago. In one of history's ironies, the lawyers wanted the reform to apply to Pinochet because it provides defendants with greater rights. More cynical observers suggested that legislators delayed the implementation of the new code in Santiago from 2001 to 2004 in order to provide Pinochet with the security of the older, more established criminal law system.<sup>61</sup>

### **Freedom of Expression**

Also troubling was the lack of transparency and openness in the Chilean justice system as reflected in laws restricting freedom of expression. The government continued to uphold antiquated restrictions on free expression at the same time that it was showcasing its new program of individual rights under the criminal law reform. For example, article 6(b) of the Chilean Security Law allowed for the criminal prosecution of individuals who criticized the government, including criticism of judges. Under article 16 of this same law, the courts had the power to physically collect written materials and tape recordings that contained evidence of such criticism.

Between 1990 and 2001, the government prosecuted about thirty individuals (including journalists) under these laws. Most troubling was the government's censorship of Alejandra Matus's *The Black Book of Chilean Justice*, which describes corruption by judges on the Supreme Court and the judges' failure to investigate human rights violations under the Pinochet military government.<sup>62</sup> In April 1999, the Santiago Court of Appeals ordered the police to immediately remove the book from circulation. In that same year, one of the judges Matus had criticized brought defamation charges against her and her publisher. Ms. Matus then fled Chile

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<sup>61</sup> Author interviews, September 20, 2001, Temuco.

<sup>62</sup> Matus 1999. See also *El Mercurio* 2001d.

and was granted political asylum in the United States. The banning of this book was the only case in which Chile's censorship law was applied to a book since the return to democracy. In response, a special rapporteur for the Organization of American States declared that the ban violated Chile's commitments under the Inter-American Convention on Human Rights. Ironically, the increased enforcement of Chile's Security Law took place precisely at the time when the country was implementing criminal law reforms, which purportedly made one aspect of Chilean society more open and transparent.<sup>63</sup>

### **QUALITY REFORMS ON ISSUES INVOLVING INDIVIDUAL RIGHTS**

As seen in the above examples, the Chilean government's policies toward the criminal prosecution of human rights abusers and critics of the judiciary seemed at odds with the great strides made in enhancing individual rights in the lower criminal courts. This discordant situation, however, began to change in 2002, just five years after the implementation of the first criminal law reforms. By 2002 the government began to drastically change its policies in the controversial areas of prosecution of human rights abusers and freedom of expression.

In its 2002 Country Report on Human Rights Practices, the U.S. Department of State reported that "[t]he government, primarily the judiciary, took significant steps to allow for the investigation of human rights abuses committed during the former military regime and to bring those accountable in certain cases to justice."<sup>64</sup> Religious and human rights groups as well as the

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<sup>63</sup> Besides restricting freedom of speech in the area of criticism of government officials, Chile was the only democratic country in the Western Hemisphere to have a law upholding censorship of films. Chile's board of film censors has the power to censor all films that enter the country, and it often invokes this power. One notable example of the board's sweeping powers was its censorship of Martin Scorsese's *The Last Temptation of Christ*. This culture of censorship was embraced by the Supreme Court when it ruled in 1997 that the *Last Temptation* could not be transmitted on television despite the censorship board's order to rescind the ban. In 2001, the Inter-American Court of Human Rights ordered the government to explain what steps it was taking to release the film and to end censorship.

<sup>64</sup> U.S. Department of State 2003: 1–2.



armed services provided information regarding two hundred victims in custody under Pinochet, but the armed forces did not provide a full accounting of many of the three thousand unsolved cases. By 2002 the courts had made great strides in prosecuting cases of human rights. In 2002, after a Defense Ministry roundtable, President Ricardo Lagos publicly acknowledged human rights crimes during the Pinochet regime and expressed concern over six hundred missing person cases on which the military had provided no information. As a result, the Ministry of Justice authorized twenty judges to work exclusively on cases of disappearances and fifty-one judges to give preference to investigating such cases.<sup>65</sup> The work by these judges led to the indictments of retired members of the armed forces and some civilians in about forty cases.<sup>66</sup> These judges have opened cases against three hundred military officers and have ignored the amnesty laws by consistently holding that the laws do not apply to unsolved cases, which are designated as “continuing crimes.”<sup>67</sup>

In September 2003, the Lagos government introduced a new human rights plan. Although not yet approved by Congress, the plan calls for more judges to investigate human rights abuses and provide immunity to low-ranking military or civilian officers who come forward with information to help build cases against high-ranking officers involved in disappearances or torture during the military regime.

Progress in the area of freedom of expression also began in 2001 with the enactment of a new press law that had been stagnating in the legislature since the late 1990s. The new press law eliminated article 6(b) of the Security Law, which made it a crime to “besmirch” the honor of certain government branches or symbols. As a result, Alejandra Matus, exiled for her *Black Book of Chilean Justice*, was allowed to return from the United States. Once in Chile, she appealed the

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<sup>65</sup> Ibid.: 4.

<sup>66</sup> U.S. Department of State 2004: 2.

<sup>67</sup> In December 2003, Chilean judge Jorge Zepeda Arancibia ordered the arrest of retired military intelligence agent Rafael González Verdugo for the death of Charles Horman, an American filmmaker (Rohter 2004). Another interesting development is that Chile’s defense minister, Michelle Bachelet, was a torture victim from the Pinochet regime (Rosenberg 2004).

ban on her book due to the rescission of certain articles of the Security Law. Although the Supreme Court first upheld the ban in August 2001, by the next month the Supreme Court had lifted the ban on Matus's book.<sup>68</sup>

## CONCLUSIONS AND RECOMMENDATIONS

The foregoing discussion has focused on two issues that at first glance appear unrelated. First, a discussion of Chile's criminal law reforms indicated the government's overall commitment to improving the criminal justice system. Second, reforms occurred at a time when Chileans were still grappling with larger cultural and political issues of justice that shielded high-level officials who had committed human rights abuses and laws that punished individuals who criticized the judiciary. By juxtaposing these two issues, this analysis finds a connection between lower-level criminal law reforms and the conception of justice in Chilean society as a whole. An argument may be made that opening the criminal justice system at the lower level provided impetus for more openness at the highest level of government.<sup>69</sup>

The above examples indicate that the political climate and attitude of policymakers underwent significant transformation during the period when sweeping reforms were being

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<sup>68</sup> In a similar reform, in July 2002, Congress changed the Constitution to eliminate the censorship of films and establish a more Western-style classification system. Prior to this change, proposals abolishing film censorship had likewise languished in Congress for years. Although the new laws allowed for significant reforms in the area of freedom of expression, the enforcement of the laws remains a challenge. By the end of 2002, *The Last Temptation* had not been released, and a Santiago Court ordered the seizure of a second book (U.S. Department of State 2003: 8).

<sup>69</sup> Individuals I interviewed indicated that, prior to the reform, citizens did not have confidence in the criminal justice system and believed that judges had too much power. One objective of the reform was to instill citizen confidence in the legal process (author interview with a Chilean attorney, August 9, 2001, Santiago).

In a study of criminal law reforms in El Salvador, American attorney Margaret Popkin analyzed the effect of the peace process on judicial reforms in El Salvador. Popkin emphasizes the importance of placing judicial and criminal law reforms on the national agenda. She states, however, that "changing entrenched attitudes and practices is far more difficult than outside actors tend to appreciate" (Popkin 2000: 251). Changing entrenched attitudes about justice in Chile may likewise prove difficult. It may be too soon to determine the exact effects of the lower-level reforms on these attitudes. Further research regarding public opinion and the opinions of key political actors needs to be undertaken in this regard.

implemented in the lower criminal courts. Confronting issues of past abuse by high-level officials and of restrictive policies prohibiting criticism of high-level officials is no easy task for any government. However, the failure to deal with such issues may marginalize other advances that a state has made to improve its justice system. Chile instituted significant changes in its criminal procedures at the lower level. As discussed, these criminal law reforms ushered in a new era of respect for individual rights and curtailment of the sweeping powers of judges. The main objective of these criminal reforms was to make the process more “just” and more transparent, such that citizens became respected individuals in the criminal process. These changes also made more glaring the incongruity of government policies affecting high-level officials. First, the failure to prosecute Pinochet encouraged the continuation of public mistrust in the legal system and affected the future success of the reforms. Second, the government’s failure to prosecute Pinochet and other powerful human rights abusers revealed that its commitment to a more just and transparent legal system was hypocritical and insincere. Third, by failing to prosecute Pinochet, the government sent a message that common citizens are treated differently than high-level officials.

The government’s protection of high-level officials by grants of immunity and punishment of those criticizing the judiciary were at odds with its new posture offering rights and respects to citizens. The government accordingly changed its policies regarding highly controversial issues in order to bring them in line with its more liberal efforts embracing citizens’ rights.

The connection between lower-level criminal reforms and the confrontation of prior institutional failings regarding the prosecution of higher-level Chilean officials and the ability of citizens to criticize judicial institutions shows that grassroots reforms may “trickle up” to significantly improve the operation of higher institutions. The criminal law reforms provide for better day-to-day justice for citizens. This, in turn, raises citizens’ expectations about justice and the operation of legal institutions. Citizen expectations provide lawmakers with the impetus to reform higher institutions to reflect the new emphasis on transparency and greater openness of the legal process.



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