THE REFORM TO THE CRIMINAL JUSTICE IN CHILE:

EVALUATION AND CHALLENGES

Rafael Blanco [1]
Richard Hutt [2]
Hugo Rojas [3]

I. INTRODUCTION

On December 31, 1894, President Jorge Montt (1891-1896) sent a bill to the Chilean National Congress proposing a new Code of Criminal Procedure. At that time he apologized for the content of the bill. He openly admitted that it was a bad bill, but he urged its passage despite its shortcomings. The Criminal Procedure Code ("Código de Procedimiento Penal") was finally approved in 1906, maintaining alive the old inquisitive system.

In this article we do not pretend to explain what happened between 1906 and 2000 (when the criminal reform started as a pilot program in two of the thirteen regions that form Chile). To get a good perception of the frustrations that the Chilean society had with the judiciary, the lack of court's independence, the obstacles to the due process of law in all levels –Supreme Court, Court of Appeals, and local courts-, the corruption in the judicial system, and other symptoms of

[1] Research Dean and Professor of Law, Universidad Alberto Hurtado (Chile). I am grateful with Elizabeth Lira, Brian Loveman, Héctor Hernández, Pedro Irureta, Berta E. Hernández-Truyol, and the students at the University of Florida College of Law that participated in the course *Foreign Enrichment: Latin American Legal Theory* (Sept. 2004). I also would like to thank Universidad Alberto Hurtado School of Law and The William and Flora Hewlett Foundation.

[2] Assistant Public Defender, Cook County, Illinois, Adjunct Professor of Law, Loyola University School of Law (Chicago). I wish to express appreciation to Edwin A. Burnette, and James P. Carey, and dedicate my minor contribution to Ignacio Alarcón, Pablo Contreras, Cecilia Kline, Aníbal Robles, and Sebastián Salazar. I also would like to acknowledge the faculty and students at *Diplomado Reforma Procesal Penal* (Universidad Alberto Hurtado, Santiago, 2004).

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the crisis, it is enough with *El Libro Negro de la Justicia en Chile* (1999), a book prepared by journalist Alejandra Matus (and prohibited for some time).[4]

In the 90s, during the period called Transition to Democracy ("Transición a la Democracia"), a movement of intellectuals and professors re-started the debate which had been interrupted by the dictatorship between 1973 and 1990. This debate found common ground in the insistence that the judiciary had to be reformed, especially in the area of criminal justice. There was widespread dissatisfaction with the passivity of the judiciary during the dictatorship when there was absolutely no protection for the most basic human rights.[5]

In this article we will explore the process of legal reform which has begun to transform the administration of justice in Chile. Responding to a long-standing urge to reform, and after several years of negotiations, the reformation of the code of criminal justice began in earnest on December 16, 2000, in the form of pilot programs in several regions throughout the country. These pilot programs provide a unique opportunity to test the new process. In June of 2005, this period of reformation will culminate in its application in Chile's largest city, Santiago.[6] How well this reformation works in Santiago will have profound implications on its continuing application throughout Chile. This transformation is a complete paradigm shift and can be understood as almost revolutionary. It will produce significant change both institutionally and

[4] It took six years to journalist Alejandra Matus to recollect the information associated with the crisis of the judiciary and presented in EL LIBRO NEGRO DE LA JUSTICIA EN CHILE (1999). On the same day that the book was placed in bookstores (April 14, 1999), former President of the Supreme Court, Judge Servando Jordan, filed a suit against Matus before the Santiago Appeals Court, invoking Article 6(b) of the State Security Law (Ley de Seguridad Interior del Estado) which makes insulting high authorities a crime. Appeals Court Judge, Rafael Huerta also initiated a prosecution against Matus, and ordered the seizure of the entire press run of the book. The editor and the manager of Editorial Planeta, publisher of her book, were detained and all copies of the book were confiscated and banned. Matus received political asylum in the United States in February of 2000. After a period of time as a reporter for the "Nuevo Herald" (Miami, Florida), she received a grant from the Ford Foundation to write EL LIBRO BLANCO DE LA JUSTICIA (2002). She currently works as editor-in-chief of "Plan B" in Santiago. For further information, *see* Alejandra Matus, Symposium on the role of a free press and freedom of expression in the development and consolidation of democracy in Latin America: The Black Book of Chilean Justice, in 56 U. MIAMI L. REV. 329 (2002).

[5] *See generally* INFORME DE LA COMISIÓN NACIONAL SOBRE VERDAD, JUSTICIA Y RECONCILIACIÓN (2001), INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA (2004). For a political explanation of the different Latin American phenomenon that concerned the political actors in the 90s, *see* Tom Farer, Consolidating Democracy in Latin America: Law, Legal Institutions and Constitucional Structure, 10 Am. U.J. Int'l L. & Pol'y 1295 (1995).

[6] According to the 2002 Census, Santiago has a population of 5,875,013 out of a total national population of 15,116,435. For more information, www.censo2002.cl.

culturally. It will be observed closely throughout Latin American and may well provide a useful model and guide for judicial reform in other countries of the region.[7]

II. CHARACTERISTICS OF THE PROCESS OF CRIMINAL PROCEDURE REFORM IN CHILE

The old Chilean system was inherited from Spain during the initial colonization. It was inquisitorial in form, by which the functions of investigation, prosecution, and judgment were all carried out by one institution: the judiciary. This was true throughout all of Latin America, but Chile presented the most inquisitive model of all.

A hallmark of the inquisitive system was the fact that it was, for the most part, a written system. Investigation was assigned to low level functionaries, many of whom had absolutely no training in the law. There was little or no contact between the parties and between the parties and the judge. Cases could and did drag on for years. Because of these factors, most cases were appealed, making final decisions even more distant.

The ability to present clear and objective policy to law enforcement agencies resulted in a lack of professionalism among the police which in turn contributed to a culture of corruption and abuse.

By the end of the last century, most Latin American countries had moved into some form of mixed inquisitional and adversarial system. But in Chile, this transition was quite abrupt, becoming a purely adversarial system in 2000.

In this section we will explore the main characteristics of the new system of criminal procedure: (a) radical separation between the investigatory and decision making functions, (b) oral system, (c) prosecutorial discretion, (d) the incorporation of alternative forms of dispute resolution within the criminal system, (e) the creation of the guarantee judge and the three oral judge panels.[8]

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[7] In case of special interest in the challenges for Latin America in the administration of justice, *see* Juan Enrique Vargas, The vision for reform and its potential for success, 16 Fla. J. Int'l L. 239 (2004).

[8] In this document we do not pretend to offer a general description of the new system. In general *see* Carlos Rodrigo de la Barra Cousiño, Chile: Adversarial vs, Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile, 5 Sw. J.L. & Trade Am. 323 (1998).

a) A radical separation between the investigatory and decision making functions

The new system totally separates the prosecutorial from the decision making process. The Public Ministry was created, with constitutional autonomy, to take on prosecutorial duties.[9] This agency was created to resolve issues of impartiality and objectivity within the area of criminal investigation. It has also tended to reduce bureaucracy and professionalize police activity.

The "Poder Judicial", literally, Judicial Power, was reformed to do what the judiciary should do, namely to judge, unencumbered with the requirements of investigation and prosecution.

The judicial reform establishes two new types of judges.[10] The first are called Guaranteed Judges ("Jueces de Garantía") referring to their role in guaranteeing due process. The guarantee judge reviews the evidence throughout the course of the prosecution. They can take guilty pleas and judge trials. The second types of judges are the judges who hear oral arguments ("Tribunal Oral en lo Penal"). Oral arguments are trials just as the trials before the guarantee judges. The difference here is that there is a panel of three judges who hear the case. Their decision does not have to be unanimous. The decision as to whether to have a trial before a guarantee judge or an oral argument lies in the hands of the accused.

A system of public defenders was also created.[11] The public defender, established on a national level with regional offices, is charged with the legal defense of the poor. Beyond this, of course, is its role as one of the foundations of the adversarial system. The public defenders are augmented by a public system of contract attorneys ("licitaciones públicas"). A public announcement is made, by newspaper, solicitating proposals for private attorneys to accept a set of eventual criminal cases. Responses are evaluated by the public defender. Criteria used for these selections include, the number of attorneys in the particular office, their experience and qualifications, previous cases, administrative support within their office, and generally, their level of professionalism. The assignments are subject to regular review and oversight and

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9 *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA (1980), Chapter VI-A The Public Ministry (1997). Also *see* LAW 19.640, LEY ORGÁNICA CONSTITUCIONAL DEL MINISTERIO PÚBLICO (1999). For further information, www.minpublico.cl.

10 *See generally* CÓDIGO PROCESAL PENAL (2000). For further information, visit www.poderjudicial.cl.

11 *See* LAW 19.718 (2001). For further information, www.defensoriapenal.cl.

effectiveness is evaluated by observation at trial and inspection of files. An attorney can be precluded from accepting further solicitations due to failure to meet these standards.

b) The oral system as a replacement for the written

The system in which litigation is reduced to written complaints and answers has deep roots within Latin American legal systems. All of the legal systems have attempted some form of modification, the written system seems to find was to revive itself. Sometimes it finds expression in the oral presentation of written material. But the commitment to a system of oral argument is essential for the success of judicial reform and especially the reformation of criminal justice. The requirements for written material slows the process, it places barriers between the parties and the judges, it ritualizes the proceedings. Oral argument, on the other hand, infuses the hearing with a sense of dynamism. It permits free and open debate and allows the judge or judges to require clear and logical presentations on both sides. This, in turn, allows the judges to make decisions based on cogent facts which promotes respect not only for the final decision, but for the judicial system as a whole.

All of this presupposes a well-structured trial with careful and thorough preparation, clear presentation, fair decision making throughout the trial, and a fair resolution of the conflict. This complex dynamic can be undermined at any point without proper formation and continuing education. Educational modalities including role-playing, trial simulation, and advocacy training must be provided for judges, prosecutors, and defense attorneys as they practice in this new system.

c) Creating a system for prosecutorial discretion

A further modification is the area of prosecutorial discretion. It can be assumed that no criminal investigation is 100% accurate or that there might be other reasons for prosecutors to decide not to prosecute a particular case. Some criteria have been set up to guide prosecutors as they determine how to proceed on a case. Over time, it is hoped that these criteria will evolve out of an open and public debate of this issue.

Chilean prosecutors can elect not to proceed on a case based on the following:

1. Either no crime was committed or the statute of limitations has expired. In a case such as this, the victim can ask a superior in the office of the Public Ministry ("Fiscal Regional" or "Fiscal Nacional") to review the prosecutor's decision, and ultimately a guarantee judge can make the final decision.

2. When there is not sufficient evidence to continue the investigation. In this case the investigative material is placed in an archive which can be re-opened in light of new evidence. As in the first case, this decision can be reviewed by a higher level prosecutor, and ultimately can be heard by a guarantee judge.

3. When it is not in the public interest to prosecute, in other words, there is what is termed "relevant evidence" of a crime, but the prosecutor chooses not to proceed. This decision is limited to minor crimes, carrying sentences of less than 18 months imprisonment, and is not available in the prosecution of public officials accused of official wrongdoing.

These forms of prosecutorial discretion are important in the new system because the allocation of resources is always a consideration. But is evident that there are definite controls over this type of selectivity, and standards are always subject to review and revision.

d) Incorporating alternative forms of dispute resolution within the criminal system

Another aspect of the new system which is distinctive to the Chilean process is the institution of alternative forms of dispute resolution. These suspend the proceedings while some sort of economic resolution between the parties can be reached or an agreement between the defendant and the prosecutor can be reached. In effect, the Chilean judicial reform amplified on the term "criminal justice" by recognizing the state's power to prosecute and at the same time contemplating ways of reducing re-offending and re-victimization. This is termed Conditional Suspension of Proceedings ("condición suspensional del procedimiento") in which the prosecutor and the accused reach an agreement to end the prosecution. This is available for letter crimes,

carrying sentences of less than three years and requires that the defendant has no previous criminal history. Some of the conditions which can be part of this agreement could include:

1. That the defendant resides in a specific location.

2. That the defendant avoids certain specific persons or locations.

3. That the defendant submits to psychological or medical treatment.

4. That the defendant has either a job or enrolls in some type of educational program.

5. That the defendant pays restitution to the victim.

6. That the defendant report to the Ministry of Justice periodically.

7. That the defendant has a fixed residence and informs the Ministry of Justice when he moves.

These conditions, which are agreed to by the defendant and the prosecutor are then presented to a guarantee judge for ratification and to be formally entered as an order of the court.

Another form of alternate dispute resolution is restitution ("acuerdo reparatorio"), which usually is available for property crimes and less serious offenses. These types of negotiations can be done between the offender and the victim, but they must be ratified by a guarantee judge, and the prosecutor can oppose such agreements as not being in the public interest.

Many of these types of agreements have the characteristics of "Restorative Justice" because they are agreements agreed between the victim and the offender in which both can relate to the other's life experience, while at the same time reducing excuses often made by offenders.[12]

[12] *See* Rafael Blanco, Alejandra Díaz, Joanna Heskia, Hugo Rojas, Justicia Restaurativa: marco teórico, experiencias comparadas y propuestas de política pública, in COLECCIÓN DE INVESTIGACIONES JURÍDICAS UNIVERSIDAD ALBERTO HURTADO (2004) (proposing the use of "suspensiones condicionales del procedimiento" and "acuerdos reparatorios" as practical mechanisms to promote restorative justice in the Chilean legal culture).

Finally, there is a third type of alternative dispute resolution which is somewhat different from the other two. It is the North American system of "plea bargaining" and consists of negotiations between the prosecutor and the defense attorney in which each suggests a possible sentence. These usually involve crimes carrying sentences of less than five years incarceration. All of this assumes a complete disclosure of evidence. The final agreement must be taken to a guarantee judge who has final control over the sentence and who reviews the evidence.

e) Complaint, trial preparation, and trial before the three judge panel

Finally the complaint is brought by the prosecutor to a guarantee judge who will determine the evidence that can be presented in the oral and adversarial trial, in front of the three-judge-panel. It will feature direct examination following the rules of evidence, cross examination, and both sides carefully watching the presentation of evidence. The trial itself is controlled by the presiding judge who follows the rules of procedure, and solves with his peers the objections entered by the parties during the examinations and cross examinations. At the same time there are rules of evidence and rules regarding form of questioning witnesses which must be enforced by the judge.

Crimes of a less serious nature are tried before an impartial judge. To question a sentence, whether it is a misapplication of the law or violates due process, the defendant has recourse to the Court of Appeals and ultimately to the Supreme Court, wither of which could send the case back to a three judge panel, but a different panel from the one which originally heard the case.

III. AT THIS POINT, ON THE ROAD TO REFORMING THE CRIMINAL JUSTICE SYSTEM

In this section we will share where we are on the road to a new system of criminal justice, and what we have experienced, in order to show evidence of achievements and successes in this reformation. The distinct elements on the scene at the moment can be summarized as follows:

a) The application of the reform as a system of pilot programs and gradual application

The reform process in Chile differed from similar processes in other Latin American countries in that it was not applied simultaneously throughout the entire country. On the contrary, it was decided to begin the program in two regions, one in the north (Second Region of Antofagasta) and the other in the south (Ninth region of La Araucanía). The idea was to place the process in an environment which could be controlled and monitored, identifying problems as they arose. This would allow the time and flexibility to adjust problems before beginning the process in other areas. Given that these changes had an impact on the normal routines and practices, the creation of the Public Ministry, for example, it was imperative to study the effect on the various agencies in the system. The strength of the plan was the ability of prosecutors, defense attorneys, and judges to work on an inter-agency level doing simulations to see how the trials would be conducted in the new system.

The regions selected for the first stage were chosen based on the following criteria:

1. Regions in which the legal community clearly expressed a desire to assume this responsibility.

2. The existence of active law schools in the regions.

3. A homogeneous level of criminal activity, that is, that the distribution of crime followed general categories without too wide a variance that could distort the sample.[13]

4. Urban areas with concentrated population centers (Antofagasta and Calama in the north, Temuco and Villarrica in the south).

5. Regions which had a level of technological development and information services sufficient to test the new technologies which would be associated with reform.

[13] In the case of the Ninth Region, indegenous law experts criticized the selection of La Araucanía as pilot program because of the so called "mapuche conflict" related with land ownership and cultural recognition of the indigenous communities and peoples. *See* Universidad de la Frontera, Informe sobre la Situación de los Derechos del Pueblo Mapuche, 35-41 (2002), in internet: http://www.iipmmpri.org/biblioteca/docs/informe%20final%20pdi%20mapuche.pdf; and compare the information with Danko Jaccard, Conflicto mapuche y reforma procesal penal: una mirada crítica, in internet: www.derechosindigenas.cl.

The idea initially was to have a high level of control over problems which would rise during the span of a process such as envisioned here. It was also necessary to recognize new practices which would naturally develop and which would prove to be central to the new system. It was also important to give the participants in the process a sense of responsibility and ownership as well as control over the inevitable tension that develops in periods of voluntary change.

Almost all of the other Latin American countries have chosen to impose judicial reform throughout the country at one time, or have considered it prudent to follow a more gradual development. Such is the case in Venezuela and Paraguay which chose to apply the new code gradually, either developing new rules of investigation and prosecution and then going on to changing the role of the judiciary or opting first to change the role of the judge, and then modifying the Code of Procedure.

b) Beginning the reform without transferring old cases to the new system

Another aspect to consider in the Chilean experience is the fact that the process began to work without taking on cases which had already been filed in the old system. It was easier for the prosecutors, defense attorneys, and judges to proceed without the baggage of the older system, which, for example, had a method of case distribution which slowed the process. Also, the old system did not permit the prosecutorial discretion that the new system allows. It was important for the players to assume their own method of administration during this "gestation period".

Another tool which was very helpful was a computer program which was able to analyze statistical data about cases in the region allowing the agencies to anticipate workload, length of time for specific trials, and the length of time for investigation. The data allowed the agencies to determine just how many prosecutors, defense attorneys, and judges would be needed to complete cases within a reasonable amount of time, as well as to calculate the possible number of cases which could be completed within the year that the system would be working.[14]

[14] Several studies were conducted by the Ministry of Justice, CEJA, Pontificia Universidad Católica de Valparaíso, Universidad Diego Portales, Universidad de Chile, and Universidad Alberto Hurtado, between 1998 and 2002.

c) The design and redesign of critical processes

Another factor which assisted the smooth application for the new system related to studies which focused on designing administrative practices providing the best way to reach strategic goals. Economic studies as well as sociological studies provided a framework not only for later evaluation of the process but also for anticipating what the agencies might expect in the face of the goals and expectations of the new system.[15]

d) Successful training and legal research

A critical element in this process was preparing and applying training modalities. Initially there was not a lot of confidence within the agencies that they would be able to create the new processes on their own, and there was also the low expectation that the legal system itself could change in any significant manner. So it became necessary to design training which focused on the inherent strengths in the system, the oral presentation, the openness, the relative speed of resolution as examples.[16]

The actual training consisted of trial simulations in which the prosecutors, defense attorneys, and judges were able to experience the interactions that arose with each type of case. This process was at the same time monitored by the academic world. It was important to be able to clarify and develop the type of information and skills to confront each step of the new process.

In addition, it is impressive the number of monographs written by the legal actors that are participating in the judicial reform, which shows the magnitude of interest and commitment with the success of the reform.

e) Generating a higher level of consensus among different political views

[15] For a better appreciation of the relation between goals, resources and the criminal reform in Chile, *see generally* Alejandro Vera, Transparencia y Reforma Procesal en Chile (2004), in internet: www.dplf.org/SociedadCivil/Vera_Chile.pdf.

[16] The most recognized programs are offered by Academia Judicial, Universidad de Chile, Universidad Diego Portales School of Law and Universidad Alberto Hurtado School of Law. Professors Mauricio Duce, Cristián Riego, Andrés Baytelman, Héctor Hernández, Rafael Blanco, Mauricio Decap, Ángel Valencia, María Inés Horvitz, Cristián Bofill, Raúl Tavolari, Leonardo Moreno, Antonio Ulloa, Mirtha Ulloa, among others, deserve much credit for the quality of the training processes.

The final, and perhaps most important factor is a sustained political commitment to the reform movement. It is necessary to collectively develop the resources for information gathering, training, monitoring, evaluating, and modifying the process. Reform of this magnitude requires leadership but beyond this it requires a high level of political support and consensus as problems arise and adjustments are required.[17]

IV. EVALUATION OF THE REFORM PROCESS

The process of criminal justice reform, as in the case of all political processes, requires periods of evaluation which permit modifications and changes in both strategic planning and day-to-day systemic operation. The idea is to identify advances and successes as well as challenges as the process moves onward. Indeed all such political processes must pass the test of public scrutiny as well as being tested by political scientists and economists. During this period, the administration of President Eduardo Frei and the current administration of President Ricardo Lagos have closely followed the reformation of the Code of Criminal Justice. At the same time there have been ongoing studies by universities and private organizations which have contributed immensely to both a financial and political understanding of the entire process. These studies have identifies significant successes in this process in the following areas: (a) transparency, (b) speed, (c) contact, (d) orality, (e) due process, (f) impartiality, (h) protection, and (i) professionalism.

a) A greater transparency in the criminal justice system

The reform process has permitted the elimination of the well known process of not divulging the findings of criminal courts, which impeded access to information. The availability of information often depended on buying information or press leaks. In the new system, everything is publicized and can be read. Victims, people filing law suits, prosecutors, and

[17] The leadership of the former Minister of Justice, Soledad Alvear, the former President of the Supreme Court, Mario Garrido, and strong institutions such as Corporación de Promoción Universitaria, Fundación Paz Ciudadana, Deutsche Gesellschaft fuer Technische Zusammenarbeit (GTZ), Fundación Konrad Adenauer, the

defense attorneys all have access to the files. All phases of trials are open to the public. The judges are known and the doors of the courtroom are always open. People are free to enter and leave without difficulty. It is not possible to find this level of publicity in any other country of the region according to comparative studies provided by the Justice Studies Center of the Americas (CEJA).[18] These studies show that in other countries the public is not able to enter courtrooms while court is in session, without specific permission. It is even difficult to find out who is in charge or who is working so hard to guard all of this information. The level of public access of the new system is such that the press has access to these proceedings which will eliminate the practice of buying and selling information and relying of press leaks.

b) A higher level of speed in the process

One of the aspects of the reform which really must be developed and protected is the relative speed of decision making and closing cases. Studies provided by Universidad Diego Portales show that the average duration of a robbery prosecution in Regions IV (Coquimbo) and IX (La Araucanía) was 3.3 months and 1.3 months in Regions II (Antofagasta), III (Atacama), and VII (Maule). A prosecution for theft cases took 2.5 months in Regions IV (Coquimbo) and IX (La Araucanía), and 1.1 months in Regions II (Antofagasta), III (Atacama), and VII (Maule). In homicide cases, the figures showed that the duration was generally 3.3 months in Regions IV (Coquimbo) and IX (La Araucanía, and 3.7 months in Regions II (Antofagasta), III (Atacama), and VII (Maule). These figures included cases under investigation and cases included under the system of prosecutorial discretion. If cases of prosecutorial discretion are deducted, the times increase, however, it is still valuable to have such cases for the sake of openness and the allocation of resources. These figures show that in robbery cases the duration of the case averages 7.7 months if Regions IV (Coquimbo) and IX (Temuco), and 3.2 months in Regions II (Antofagasta), III (Atacama), and VII (Maule). Theft cases average 5.2 months in Regions IV (Coquimbo) and IX (La Araucanía) and 2.3 months in Regions II (Antofagasta), III (Atacama),

Embassy of the United States of America, CEJA, El Mercurio, among others, supported the previous stages of the reform, allowing policy makers to spread the discourse of the need of a total change inside the judiciary.

[18] *See* REVISTA SISTEMAS JUDICIALES; and studies such as Jurisprudencia de juicios orales en materia de delitos sexuales; Construcción de Herramientas de un sistema de información de Estadísticas Judiciales: Aspectos Generales: Para responder a los por qué y para qué de las estadísticas judiciales; etc.; all in www.cejamericas.org.

and VII (Maule). Trying a homicide case took, on the average, 10.4 months in Regions IV (Coquimbo) and IX (La Araucanía), and 4.0 months in Regions II (Antofagasta), III (Atacama), and VII (Maule). These figures contrast markedly with the inquisitional system which in general averaged 3.5 years for a criminal case.[19]

c) Direct contact with the judge

Something which stood out as a positive result of the reform was the disappearance of intermediaries who were the general rule under the old system. The *actuario* was a figure no longer on the scene, being replaced by direct contact between the judge and the victim, the accused and the respective attorneys. This type of contact allows that judge(s) will hear the case from its beginning until the case is resolved. This completely eliminates the problems that were prevalent in the old system of *actuarios* and bailiffs who were used to obtain favors, because with the Reform all decisions are made by judges right in front of the parties.[20]

d) The replacement of the written system with an oral system

Another aspect which merits discussion is the effective replacement of a system relying on written pleadings to one in which oral argument is the method of advocacy. The new trials are entirely oral and the decision is made on the basis of evaluating the evidence presented orally. Even the system of recording the proceedings avoids the production of paper by recording the entire trial onto a CD available to all attorneys.

e) An impartial judge

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[19] This information has been shared by professors of Universidad Diego Portales at the Comité de Expertos del Ministerio de Justicia de la Reforma Procesal Penal, and Comité de Expertos del Ministerio del Interior sobre Seguridad Ciudadana. For statistical information and results, *see generally* Andrés Baytelman, Mauricio Duce, Evaluación de la Reforma Procesal Penal. Estado de una reforma en marcha (2003).

[20] *See* Luz Estella Nagle, Latin America in the Twenty-First Century: The Cinderella of Government: Judicial Reform in Latin America, 30 Cal. W. Int'l L.J. 345 (2000) (commenting the opportunities of judicial corruption in Latin America, including Chile).

One of the major successes of Reform is the replacement of a system in which the judge investigates, prosecutes and decides the case with one in which the prosecutorial function is placed in the hands of an administrative agency not a judicial one. The judge has the function of guaranteeing the protection of due process and thus can decide the case objectively rather than subjectively.

f) Increasing the guarantees of due process for all parties in the proceedings

By providing impartiality to the judiciary, oral trials, immediate access to the judge, and speed to the proceedings, the Reform increases the rights of all parties involved in the criminal process, especially those accused by the state. These rights include, the presumption of innocence, the right to a speedy trial, the right to a quality defense for those without means to hire an attorney, the right to confront witnesses and evidence, and the right to a honest judge.

g) Improvement of programs to protect victims and witnesses

Yet another aspect which merits discussion is the treatment which the new system affords victims and witnesses, namely the protection and attention offered to them during and after the trial. The inquisitional system traditionally lacked any type of assistance for victims of crimes or witnesses which gave little incentive for them to testify. In the new system there are organizations besides the Public Ministry to accompany victims and witnesses to court and to provide psychological support as well. Other methods of protection are also available such as "panic buttons", cell phones, police protection for the home, and even witness re-location.

h) The professionalism of the Police[21]

The final aspect to be mentioned in the process of Reform is the higher level of professionalism among the police. This is intimately linked with the formation of the Public Ministry, which is devoted to criminal investigation. This agency articulates various interests of law enforcement and promotes standards within the bounds of the criminal justice system.

[21] By police we include Policía de Investigaciones and Carabineros de Chile.

Because of this, the police along with their counterparts in the fields of forensic sciences will be solely dedicated to the investigation and solving of crime. The results will aid the prosecutors to make decisions to prosecute, suggest sentences, or to dismiss the case.

In this new scenario, in which defense counsel can vigorously question the evidence provided by the police, there will be a heightened dedication on the part of law enforcement to investigate carefully, which will lead to less mishandling or manipulating evidence throughout the course of an investigation.

V. CHALLENGES TO THE REFORM PROCESS

The following paragraphs present the need to identify some problems in the Reform process which act as important challenges for a successful application in the Metropolitan Region (Santiago).

a) A greater investment in sensitizing and educating the citizenry

All public policy ought to be applied taking into account the connection between the rights and obligations of the citizens. If the people are not permitted an active role in the design, evaluation, and application of a particular policy it will undermine its level of legitimacy and acceptance. The Reform process was marked, from the beginning, with a highly inclusive and participatory process which gave an ample base for approval both politically and technically of the process we have been called Criminal Justice Reform.

Actually, the origin of this project went back to the work carried out by the civic society. The Corporation for the University Promotion ("Corporación de Promoción Universitaria"), a study center linked to the politics parties that compose the coalition "Concertación de Partidos por la Democracia" (ruling in the government since 1990). Under this umbrella of ideas the matrix of the reform was created by a group of intellectuals from different universities, which became the draft of the new Code of Criminal Procedure. Subsequently, the Foundation for Citizenry Peace ("Fundación Paz Ciudadana"), representing a link to the political right ("Renovación Nacional" and "Unión de Demócratas Indepentientes"), and more importantly, a

link to El Mercurio, the most influential written news outlet in the country, joined in the task.[22] This fortunate "joint venture" by both sides was augmented in the public sector by the Ministry of Justice which gave its approval from the onset.

This strategic alliance made the government of Eduardo Frei confident enough to send the project to Parliament. However, Parliament decided to create some space for debate, and created "Foro de la Reforma Procesal Penal" (Forum for the Reform of Criminal Procedure), headed by the Minister of Justice and integrated by private attorneys, professors from several universities, representatives from the political sector and other public and private institutions. This forum debated the project on a more technical level where the project was critically examined and modified until finally given life in the text form which was sent to the commissions of the National Congress. During the legislative process, that took more than four years of negotiations, many academic institutions, public organizations, judges, and prosecutors from other countries were heard.

The hearings generated a high amount of publicity and debate, however it was recognized that the project was begun in a closed setting without public participation which would become significantly important when the Reform was to be applied and evaluated.

As has been suggested previously, a large part of the legitimacy of the entire justice system, and therefore the reform process, will be supported by the good judgment of the citizens as their institutions are formed and to which they are asked to give their support. In part this is simply a requirement of democracy but is even more imperative when this type of paradigm change is contemplated in which the entire system is being reformed, not simply new rules, but new practices, new skill requirements, new relations between citizens and the personnel of the new system; in fact a new cultural vision of the criminal justice system.

Finally, information is required for citizens to utilize the new services of the justice system. To choose from the options provided by an open system, to legitimately demand to exercise their rights and to submit to the obligations inherent in a criminal justice system, all require information from the beginning and throughout the process.

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[22] With the sponsorship of the most prominent and wealthiest entrepreneurs of Chile, Fundación Paz Ciudadana was created in 1992 (after the negotiation of the liberalization of Cristián Edwards, son of Agustín Edwards, by the revolutionary movement Frente Patriótico Manuel Rodrìguez). For more information related with Fundación Paz Ciudadana's efforts to prevent and repress delinquency in Chile, visit www.pazciudadana.cl.

b) Overcoming the false dilemma between efficiency and due process as irreconcilable in the new criminal process.

The Reform has created an special agency for prosecution, known as the Public Ministry, which has as its function the organization and direction of criminal investigation, the creation of law enforcement policies, the protection of victims and witnesses and the representation of the public in the criminal system. This agency has developed specialized units for different types of crimes such as money laundering, narcotic trafficking, corruption as well as units devoted to solving sexual crimes and property crimes. This is the first time in Chilean history that such an agency exists for this purpose. Upon this foundation sophisticated strategies for dealing with crime can be developed with improved resources. The police can form strategic alliances within the community. All of this can be accomplished without the slightest abrogation of the rights of due process.[23] In fact, because of the Public Ministry which provides an objective context and sets limits there will be more control over police work in general.

c) Tension between judicial dispatch and financial pressures

Another problem which confronts the process of reform is the manner of administrative organization for the flow of cases into courtrooms. It is important that the Reform includes a reorganization of the judicial branch which presupposes the professionalization of court administration. There is envisioned a court administrator charged with such jobs as scheduling cases and receiving witnesses and experts. This type of administrator can function efficiently enabling the courts to function efficiently.

The one person courtroom is designed to be an economic approach for the use of human and financial resources. The traditional system had many local rules and regulations which impeded the setting of an schedule which would permit the best use of judges for hearings. It must not be forgotten that the central idea in the new system of criminal justice is precisely that the work of the judges is to conduct trials in which the complaints and needs of the litigants are recognized and where decisions are made in their presence.

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[23] *See* Mauricio Duce, La reforma procesal penal en Chile, ¿buenas noticias para los derechos de imputado? (1998), in internet: http://www.dplf.org/Conference98/Duce.pdf.

This level of transparency, immediate contact between the judge and the parties, will depend, in part, on the administrative capacity to develop procedures which highlight the courtroom as the seat of decision making. One of the jobs of the court administrators will be to reform the old court regulations which varied from courthouse to courthouse, having been promulgated by individual judges. In the new courthouses, administrative functions will be modified sensibly in order to free judges from purely administrative duties so that they can focus their time and energy on matters genuinely judicial.

Given the intense work in these courthouses, it is necessary that the prosecutors' office develop efficient procedures, especially case distribution among prosecutors. The idea of a case associated with one prosecutor should be abandoned. Instead, the prosecutors should have attorneys dedicated to the selection and screening of cases, others who do courtroom litigation. This model is in operation in some prosecutors' offices and should be extended throughout the country.

d) Control over the risk of the return of the inquisitorial system

Another challenge for the new system will be the permanent necessity to develp a monitoring system for the Reform, a way of setting up an early warning system for possible problems, bad practices or interpretation and application of norms contrary to the objectives of the new system of justice.

Some of the problematic practices which have been occasionally detected were in relation to the presentation of the papers which come into oral trials, and which were recopies of the investigation. Slowly, the practice evolved so that it was possible to conduct an oral trial with what were termed "relevant papers", destroying the idea of an oral trial. The whole concept of oral trial replaces paper with live witnesses and presents experts who can be deposed. None of this can be sustained with a written system. In order to avoid the proliferation of paper, the Code should be revised to capitalize on the capability of the oral system to present evidence, present witnesses and to do so entirely without written declaration.

e) The elaboration of a doctrine which successfully protects rights and guarantees, with a minimum of bureaucracy

In effect, the new Code has a system of norms which provide adequate time and space for legal activity, judicial determination, and court administration. All parties are able to develop reasonable standards to measure policy regarding the rights and guarantees of the defendants, standards of proof, standards related with the verdicts in oral trials, among other aspects. Then, the legal actors must develop a balance between the work that will be required by the state agents and the demands of legal efficiency.

VI. CONCLUSIONS

The preceding evaluation can be seen as providing a possible vision of measuring the level of success seen in the new model of justice in Chile, as well as challenges without ignoring the need to be aware of reverting to older inquisitorial practices.

Researching comparative judicial reform processes allows us to see that such changes always confront serious obstacles on the road to completion, and in several occasions the processes have chances of failure. In this document we presented what we think are the key elements that permit to judge the Chilean cultural transition from an inquisitive to an adversarial system as an example of re-foundational success in the design of a new administration of justice a developing country.

Of course the transformation required highly prepared experts in policy making, but also politicians from all sectors, legal actors well trained and a civil society willing to take the challenges of improving the judiciary, in order to promote democracy and human rights in a country tired with the abuses committed in the past.

There are several challenges to attend in the future. The consolidation of democracy and the judicial reform in Chile require permanent monitoring, strong leadership and institutional coordination, but also and more important, the cooperation and comprehension of the civil society through the different socio-legal processes that are going on in the thirteen regions of the country (analyzed in the previous sections).