

CRIMINAL JUSTICE REFORM IN CHILE:
GOOD NEWS FOR THE PROTECTION OF HUMAN RIGHTS?

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1.- INTRODUCTION: A NEW STAGE IN THE PROTECTION OF HUMAN RIGHTS IN CHILE

Unfortunately, the relationship between Latin America and Human Rights in recent decades has been associated with "gross and systematic violations" of basic rights². For many years, different kinds of dictatorships and authoritarian governments governed the destiny of the people of the continent without respecting the most fundamental human rights recognized by the international community.

Since the mid eighties the political landscape has changed and almost all countries in Latin America now have democratically elected governments. However, the heritage of past human rights violations has been a heavy burden for new democratic governments as they transition into democracy. Many strategies have been designed and implemented for newly elected governments to deal with the problems generated by the prior non-democratic regimes³.

Chile, opted against the prosecution of those responsible for gross and systematic violations of human rights. Instead, Chile created the Commission of Truth and Reconciliation, to investigate human rights violations under the former regime, report on what had occurred, and compensate the victims⁴.

Is not my objective to make an accurate evaluation of the success of this strategy. However, in my opinion, it is possible to say that it represented a substantial improvement for the human rights situation in Chile, while it fell short of solving numerous problems in the transition to democracy. These include tension generated by the impunity, the reasonable expectations of truth and justice of both victims and important sectors of Chilean society, as well as and the compliance with Chile's international obligations⁵.

The recent arrest of the former dictator Augusto Pinochet in England, and the reactions of the public authorities and people in Chile demonstrate the accuracy of this diagnosis. A crucial challenge for the young Chilean democracy will be to deal with this problem and found new and better ways to achieve the international standards on human rights and to satisfy the people's expectations of justice⁶.

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²For an explanation of the term "gross and systematic violations" and an extensive analysis of the situation under the Inter-American System, see CECILIA MEDINA, *THE BATTLE OF HUMAN RIGHTS. GROSS SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM*, (1988).

³For a brief overview of strategies adopted in the region see HENRY STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, 1084-1109 (1996).

⁴For more information about the Chilean Strategy, see Jorge Correa, *Dealing with the Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 *Notre Dame L. Rev.* 1455 and Edward C. Snyder, *The Dirty Legal War: Human Rights and The Rule of Law in Chile 1973-1995*, 2 *Tulsa J. Comp. & Int'l L.* 253.

⁵In recent years Chile has been declared in several times non compliance with the American Convention on Human Rights by the Inter-American Commission on Human Rights, based on the application of the amnesty law of 1978 that does not allow the courts to investigate human rights violations during the firsts years of Pinochet regime. See CASES N° 10.843, 11.228, 11.229, 11.231, 11.982, INTER-AM. C.H.R 1996.

⁶The arrest of Pinochet has created a forum for the discussion of proposals to make new advances in the

The problems of human rights in Chile are unfortunately not only linked with the past gross and systematic violations. Democracy is not a *panacea* that will automatically resolve all kinds of problems and overcome a previous and deeply-rooted pattern of human rights violations. There are still several areas of the Chilean legal system that require need to be adapted to the international standards contained in treaties ratified by the country⁷. There are also several practices in different governmental institutions that do not comply with these standards. Good examples include legal and practical constraints on freedom of speech and discrimination against minorities⁸.

The aim of this article is to analyze criminal procedure, an area of the Chilean legal system that constitutes one of the primary sources of human rights violations during the democratic period. The article will also describe current efforts to transform criminal procedure into a model that would satisfy the basic standards of due process recognized by the international community.

To achieve these goals, this article is divided into five chapters. In the second chapter, I will explain how the current criminal justice system in Chile is a source of human rights violations, incorporating into the analysis a brief overview of the current system and its structure, and presenting some data that corroborates this negative diagnosis.

Chapter three discusses the proposal for criminal justice reform from the point of view of its ability to improve the protection of human rights in Chile. In this analysis, I will select specific topics in which the proposed legal design can represent the most important improvements in the protection of human rights.

Chapter four is an attempt to identify and discuss the main challenges of this reform from the point of view of the effective protection of the human rights in Chilean criminal procedure.

Chapter five is to present final remarks and conclusions.

Because of the nature of this article, it is not feasible to analyze all the human rights violations that are possible to identify in current Chilean criminal procedure and all the areas in which reform proposals will introduce improvements from the point of view of human rights. For that reason I will focus my analysis specifically on areas

establishment of the truth of some violations of the human rights in Chile. See "Acuerdo Para Alternativa en DD.HH" (agreement for an alternative to human rights). EL MERCURIO (December 3, 1998) A1.

⁷See CECILIA MEDINA & JORGE MERA (EDITORS), SISTEMA JURIDICO Y DERECHOS HUMANOS, (1996). (This collective volume contains an extensive revision of the most important areas of the Chilean legal system and their accordance with international human rights law. The conclusions support the idea that huge transformations in these different areas are necessary).

⁸ There are several pending cases before the Inter-American Commission on Human Rights about freedom of speech violations in Chile during the democratic period. See cases 11.571 ("Palamara") and 11.714 ("Cuadra"). There is also a case in which the Inter-American Commission on Human Rights concluded that Chile was not in compliance with article 13 of the American Convention on Human Rights, see CASE N° 11.230, INTER-AM. C.H.R. 1996 ("Martorell" case). See also the *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, INTER-AM. C.H.R. 1996, 197 in which the Inter-American Commission declared the incompatibility of the Chilean Desacato Laws with the article 13 of the American Convention on Human Rights. A brief analysis of some paradigmatic cases ruled by the Chilean Supreme Court in these matters, see Mauricio Duce, *Censura y Poder Judicial (Censorship and the Judiciary)*, Apuntes de Derecho N° 1, 6 (1997).

About discrimination of minorities there is an important case pending before the Human Rights Committee of the International Covenant on Civil and Political Rights about the penalization of sodomy (consensual sexual relations between male adults) in Chile. An analysis of the article 365 of the Chilean Criminal Code from the point of view of international human rights, See Nicolas Espejo, *Privacidad Sexo y Estado*, Apuntes de Derecho N°3, 20 (1998).

that are especially sensitive from the perspective of the most basic standards of due process in criminal matters.

Finally, the analysis of this paper is specifically oriented to the criminal justice system in Chile. Despite this fact, it is possible to say that many aspects of the Chilean experience can easily be recognized in several countries in the region. The Chilean experience may thus be understood as a specific example of a general trend in the region.

2.- THE CRIMINAL JUSTICE SYSTEM AS A SOURCE OF HUMAN RIGHTS VIOLATIONS IN CHILE

A common problem of the criminal justice throughout the world is its permanent conflict with human rights⁹. This can be explained by the dynamic and continuous tension between the goals of efficiency in the application of criminal law and the protection of elementary rights of the defendant that are present in the structure of criminal procedure¹⁰.

For that reason it is not surprising to hear that Chilean criminal procedure, like almost all criminal procedures in the world, is a source of human rights violations in its practical operation.

The aim of this chapter is to go beyond this initial claim and analyze to what extent the daily operation of the current criminal procedure is not only a source of such violations, but also one of the main causes of human rights violations in Chile. For that purpose, it is necessary to give a brief overview of the historical configuration and the main normative features of the system, and then analyze the principal factors that contribute to these violations.

As we will see in the following pages, my thesis is that the system's inability to respect the most basic standards of due process is due not only to the system's defective implementation, but also to a legal design and a legal culture inspired by a conception of criminal procedure that is incompatible with respect for basic standards of due process.

2.1.- Brief Overview of Chilean Criminal Procedure

Like almost all Latin American countries, Chile's criminal procedure is part of the colonial Spanish heritage. The starting point of historical studies of criminal procedure in Latin America is the system that was imposed for Spain in the colonies¹¹.

In Latin American colonies, Spain imposed an inquisitive model of criminal procedure, based on a medieval body of rules known as *Las Siete Partidas* (1263-1265)¹². This model of criminal procedure was organized under the same principles and ideas that inspired the canonic inquisitorial system in the thirteenth century. The most striking features of this model were the followings: (1) the concentration of the power in a single judge that performed the jurisdictional as well the prosecutorial functions; (2) the written character of the procedure; (3) the secrecy of the investigatory phase even for the defendant and his lawyer; (4) the limited rights of the defense counsel; (5) the nonexistence of an "oral trial"; (6) the compulsory character of the criminal prosecution (the legality principle); (7) the use of torture as a way to investigate the offenses¹³; (8) and the control the higher courts' ability to control the decisions of lower courts.

⁹ A French scholar referring to the jurisprudence of the European Convention on Human Rights said: "In reality, the great lesson of this European jurisprudence is to show -or prove through application- that no model of criminal procedure -accusatory, inquisitory or mixed- escapes censure by the Strasbourg tribunals". See MIRELLE DELMAS-MARTY, TOWARD A EUROPEAN MODEL OF THE CRIMINAL TRIAL, IN THE CRIMINAL PROCESS AND HUMAN RIGHTS, 196 (1995).

¹⁰ An explanation of this tension, see ALBERTO BINDER, INTRODUCCION AL DERECHO PROCESAL PENAL, 49-59 (1993) and Miguel Soto, *Ministerio Publico y Politica Criminal*, in EL MINISTERIO PUBLICO PARA UNA NUEVA JUSTICIA PENAL, 140-142 (1994).

¹¹ See JULIO MAIER, DERECHO PROCESAL PENAL, 328 (1996).

¹² See, ALEJANDRO CARRIO, CRIMINAL JUSTICE IN ARGENTINA, 11 (1989).

¹³ An explanation of the law of torture and the evidence rules of the inquisitorial system, see JOHN LANGBEIN, TORTURE AND LAW OF PROOF, (1974).

After winning independence in 1810, Chile kept the Spanish laws for several decades. Chile finally enacted its Code of Criminal Proceedings in 1906 after several years of discussion in the parliament which began with the presentation of the project of new criminal procedure in 1894¹⁴, this code regulated an inquisitorial procedure based mainly on *Las Siete Partidas* and local laws enacted in the second half of the nineteenth century, which incorporated certain new individual rights. Since then the main structure of the procedure has been the same. The most important reform of Chilean criminal procedure reinforced the inquisitorial components of the system with the elimination of the public prosecutors in 1927 and the subsequent concentration of prosecutorial and jurisdictional power in a single judge¹⁵.

As a consequence of this evolution, some Chilean scholars have characterized the system as a "reinforced inquisitorial system" instead of a "reformed inquisitorial system" stressing the involution experienced in the country, in contrast to the evolution of the criminal procedure in Europe since the nineteenth century.

The criminal procedure in Chile is divided in two phases: the investigatory phase, called *Sumario*, and the trial phase, called the *Plenario*.

One of the most distinctive features of the Chilean criminal procedure is the role played by the judges in both phases of the procedure. Chile is probably the most radical expression of the absolute concentration of power in hands of a single judge. In Chile, the same judge is in charge of the investigatory phase of the case (acts as the investigative magistrate), and is also responsible for the formulation of charges against the defendant (acts as the prosecutor). That judge is also in charge of issuing the final decision (acts as the jury or a professional panel).

A second distinctive feature of both stages of the procedure is its written character. This means that all aspects of the criminal process must have a written correlative. This written material constitutes a file or dossier of the case, the so-called *expediente*. All the legal proceedings and resolutions of the case must appear in written form, even the witnesses' oral statements are transcribed and then incorporated in the *expediente*. In this way, the *expediente* contains all the relevant elements of the process, in a chronological order.

The *expediente* is a mirror that reflects the reality of the procedure. This means that only the facts that are in the *expediente* should be considered for the judges at the moment they take their decisions. Therefore, a main objective of the criminal process in Chile is the construction of the *expediente*. The backbone of the criminal procedure is the inquire directed for the judges to the construction of the *expediente*.

The main objective of the *Sumario* is to collect evidence to prove that a crime was committed and could be attributed to a specific person or group of people. In other words, during the *Sumario*, judges accumulate the evidence that will support the accusation against the defendant during the *Plenario*. All the activities of the *Sumario* are, as a general rule, conducted in secrecy. The secret character of the *Sumario* not only affects the third parties (press and society) but also the defendant and his or her lawyer. They can not access to the evidence accumulated in the *expediente* during this stage of the procedure.

The *Sumario* could be initiated *ex-officio* by the judges or by a complaint presented on behalf of the victims in the criminal courts or the police precincts. In an average case, the state agency that has the first knowledge of the commission of a crime is the police. The police have the legal duty to communicate this information to the appropriate judge within a short period of time. Once the judge has received the *notitia criminis* (has acquired knowledge that a crime has been committed), the formal judicial investigation starts. In Chile, the responsibility of the criminal investigation, as I mentioned above, is in hands of the judges. Therefore, during this stage of the procedure the judges not only have the legal duty to decide about the rights of the defendant and the other parties, but also the responsibility to conduct the investigation, collect the evidence, and control the legality of these activities.

¹⁴The codification of the criminal procedure was a late process in Chile in comparison with the codification of the civil law (code of civil law is from 1855) and the substantive criminal law (code of criminal law is from 1874).

¹⁵See Mauricio Duce & Cristian Riego, *La Reforma Procesal Penal en Chile*, in SISTEMA ACUSATORIO PROCESO PENAL JUICIO ORAL, (1995) 151.

Despite this formal responsibility, the investigation is normally delegated to the police. The police conduct the main part of the investigation, first when they received the complaint and then when the judges gave them orders to make some investigations in the respective cases. After the police finish with the specific proceedings, they communicate the results of their investigation through written reports that are later incorporated in the *expediente*. If the police arrest a suspect during their investigation, they have 24 or 48 hours (in some situations, five to ten days)¹⁶ to put the suspect at the disposition of courts.

One of the most important judicial decisions during the *Sumario* is a sort of preliminary charge or indictment called *Auto de Procesamiento* by virtue of which judges declare the existence of important presumptions of guilt against a specific person whose since this moment will be formally subjected to the process. The main effects of this declaration are the pre-trial detention of the defendant and the restriction of other rights. After this resolution, and during all this phase of the procedure, the defendant and his lawyer have their rights mainly subordinated to the interests of the investigation. This declaration "...is commonly seen for the public as the most important effect of the procedure because the delay of the final decision transforms the effects of it, especially the pre trial imprisonment, in the real punishment"¹⁷.

As a consequence of the dynamic created by the judicial character of the investigation, the delegation of functions, and its written character, the *sumario* has become a very bureaucratic and formalistic phase of the procedure. The *sumario* is a ritualistic accumulation of evidence and shaping of the *expediente*, it is not a dynamic stage in which there are permanent interaction among the participants in the process.

When the investigation ends (the so-called closed *sumario*), the judge has to decide if he will close the case (*sobreseimiento*) or formulate charges against the defendant (*acusacion* or accusation in english).

If the judge file charges against the defendant, the second phase of the procedure, the *Plenario*, is initiated. The *Plenario* is the adversarial phase of the procedure in which the defendant has access to the evidence collected during the *Sumario* (basically the right to read the *expediente*) and then has the possibility to present his evidence and arguments to the court.

In Chile, this stage of the procedure is entirely written. This means that the arguments are presented in written motions and the court must resolve the case after reading the *expediente*, without a hearing. Parties can present evidence during the so-called *periodo de prueba* (proof period). If parties want to present witnesses, the court will schedule a hearing to take their statements in the presence of the defense counsel, but without direct or cross-examination. These hearings are usually conducted by low employees of the court called *actuarios* and then transcribed in the *expediente*, that later will be study by judges to for the elaboration of the sentence¹⁸.

The *Plenario* ends with the elaboration of the sentence, which is delivered to the parties in written form after several days, weeks, or even months of the deadline by which the defendant's written conclusions were presented to the court.

Once the sentence is delivered, the parties have very broad possibility to seek a revision by the Court of

¹⁶Article 19 No. 7 c) of the Chilean Constitution. For a detailed explanation of the constitutional and legal regulation of the detention and its comparison with international standards of human rights, see Cristian Riego, *El Sistema Procesal Penal Chileno frente a las Normas Internacionales de Derechos Humanos*, in SISTEMA JURIDICO Y DERECHOS HUMANOS, 241-342 (1996).

¹⁷See Cristian Riego, *The Chilean Criminal Procedure Reform*, (Thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws, University of Wisconsin Law School) (1997) 8.

¹⁸Empirical studies show that at least in 70% of cases judges recognized that they do not participate in these hearings. See MARIA ANGELICA JIMENEZ, *EL PROCESO PENAL CHILENO Y LOS DERECHOS HUMANOS: VOLUMEN II ESTUDIOS EMPIRICOS*, 190-191 (1994).

Appeals through several remedies contemplated by Chilean legislation. The Court of Appeals even can see the case without any request through an automatic revision called *consulta*. The *consulta* allows Courts of Appeals to revise resolutions of the lower courts that the legislation considers relevant (for instance all cases with a punishment superior to one year of imprisonment)¹⁹.

To get an idea of the dimension and impact of criminal justice in Chile, it would be interesting to show some basic statistics on the operation of the system. Official statistics show that the police arrested more than 800,000 people a year and almost every detention is justified in the context of a criminal justice intervention²⁰. The system also opens a criminal investigation in more than 600,000 cases a year²¹.

The statistics also show that the profile of the people who constitute the main subjects of the system (arrested and condemned people) are young males that belong to lower classes and that have little educational background²².

These statistics show that the scope of action of the criminal justice system in Chile is very important. The number of detainees and the number of criminal investigations represents a high ratio in comparison with Chile's total population²³. This situation is more extreme if we analyze who are the people most affected by the intervention of the system. The intervention of the system is focused in on a particular segment of the Chilean society, basically poor people²⁴, to whom different kinds of contacts with the system constitute part of their daily life²⁵.

The potential of the system to violate the most basic rights of a vast segment of the population of the country transforms the criminal procedure in Chile into an institutional structure that requires priority attention from the perspective of an effective policy to protect human rights.

2.2.- The Inquisitorial Criminal Procedure as a Structural Problem in the Protection of Human Rights

¹⁹In 1995, 48% of the total work of the Court of Appeals of Santiago, that has jurisdiction not only in the criminal matters but also in all other civil questions, was constituted by *consultas*. See Mauricio Duce and Cristian Riego, *supra* note 15, 158.

²⁰In 1992, the total number of arrests people by the police in Chile was 815,331. See Felipe Gonzalez and Cristian Riego, *Las Garantias de la Detencion en Chile*, in PROCESO PENAL Y DERECHOS FUNDAMENTALES, 229 (1994).

²¹In 1994, 558,211 criminal cases were initiated and in 1995 the number was 576,377. See Instituto Nacional de Estadísticas, *Anuario de Estadísticas Judiciales 1994-1995*. According to this number it is possible to project that for 1998 the total number of cases will be by large superior to 600,000.

²²According to official information in 1994, 54% of the detainees had occupation in a low position and 12% did not have one. With regard to the educational background, 65% of the detainees had only completed primary school and 3% were illiterate. See Maria Angelica Jimenez, *Antecedentes Empiricos del Proceso Penal*, in PROCESO PENAL Y DERECHOS FUNDAMENTALES, 270 (1994).

²³According to United Nations World Population statistics for 1996, Chile had 14,421,000 inhabitants. Information available at <http://www.undp.org/popin/wdtrends/pop/bpopplac.htm>.

²⁴See Cristian Riego, *Los Sectores Populares Frente al Sistema Penal*, in JUSTICIA Y MARGINALIDAD PERCEPCION DE LOS POBRES, 252-257 (1993).

²⁵The most important survey conducted in Chile on perception of the judicial system of the poorest segments of the population shows that 24.3 % of those interviewed declared that they has been arrested by the police at least once in the past. Among the males, the percentage was 43.9%. Of the total number of detainees just 8% (13.8% in the case of males) were place under criminal proceedings. See JORGE CORREA & LUIS BARROS (EDITORS), JUSTICIA Y MARGINALIDAD PERCEPCION DE LOS POBRES, 92-93 (1993).

The preceding description of the Chilean criminal procedure allows us to identify the direct links between the historical inquisitive system adopted by Spain in the Middle Ages and the current system in Chile. The links are found not only in the use of common historical legislative sources, but also in the final configuration and structure of the procedure established in the Code of Criminal Proceedings in Chile.

The design of the inquisitive model of criminal procedure historically and ideologically corresponded to a very different form of State and conception of human rights. The sources of the inquisitive system are its regulation of the Catholic Church in the early thirteenth century, and its later adoption by most European Nation-States in the fifteenth and sixteenth century²⁶.

The growth of the inquisitive criminal procedure coincides with the rise of the Nation-States in Europe and its efforts to concentrate its power. The criminal procedure was one of the tools used in this process of concentration of power in a central authority (the Pope in the religious system and the King in the secular one)²⁷. Hence, the political and ideological environment in which the inquisitive system was adopted in Europe was an authoritarian conception of the state in which the interests and rights of the citizens were subordinated to the State interest. Historically, the development of the inquisitive system is also prior to the invention of the theory of individual rights. Consequently, the recognition of these rights as a relevant element in the configuration of the system was not part of the ideology at that time.

In fact, one of the most important transformations of the inquisitive system was made in Europe during the nineteenth century as a consequence of the liberal ideas developed in the French Revolution²⁸. An essential part of these ideas is the protection of the individual rights.

For various historical reasons, Chile did not follow the developments of criminal procedure in Europe and kept the basic features of the inquisitive system before its reform. During the twentieth century, and particularly in the past ten years, some laws that made minor reforms to the Code of Criminal proceedings have been enacted. Their aim is to improve the protection of individual rights, but they have not represented a transformation of the structure of the system. Thus, their impact has been marginal²⁹.

According to these facts, the failure of the Chilean criminal procedure in the protection of human rights is its ideological design, that makes the most basic structures of the system incompatible with the standards contained in international treaties. In addition, this design is accompanied by the development of a special kind of legal culture³⁰, the so-called inquisitive culture³¹, that has shaped the behavior of the different actors in the system (police, lawyers, judges, etc.) in accordance with this authoritarian way of understanding the procedure.

These circumstances make the current system in Chile a structural obstacle for a better protection of human

²⁶For a general explanation of the develop and evolution of the inquisitive system in Europe, see JULIO MAIER, supra note 11, 288-360. A detailed explanation of the adoption of the inquisitive system in France and in Germany, see JOHN LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE, (1977).

²⁷See JULIO MAIER, supra note 11, 288-289. See Also FRANCISCO TOMAS Y VALIENTE, EL DERECHO PENAL DE LA MONARQUIA ABSOLUTA (SIGLOS XVI, XVII Y XVIII), (1992).

²⁸See, JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION, 128-129 (1986).

²⁹See Cristian Riego, *El Proceso Penal Chileno Frente a la Constitucion Politica del Estado y la Convencion Americana de Derechos Humanos*, in PROCESO PENAL Y DERECHOS FUNDAMENTALES, 327 (1994).

³⁰I understand legal culture to be "the ideas, values, attitudes, and opinions people in society hold, with regard to law and the legal system". See Lawrence Friedman, *Is There a Modern Legal Culture?*, 7 Ratio Juris, 118 (1994).

³¹See ALBERTO BINDER, LA REFORMA PROCESAL EN AMERICA LATINA, IN JUSTICIA PENAL Y ESTADO DE DERECHO, 204 (1993).

rights within the context of the criminal justice system. This dimension of the problem is important because once its identified allow a design of a public policy oriented to introduce changes in the core of the problem.

In contrast to this explanation, the traditional view of the failure of the criminal procedure in Chile to protect human rights has been the lack of economic and human resources in the implementation of the system³². Reforms made according to this theory have included the investment of more money in the system and some partial legal changes. However, the critical situation of the system demonstrates that this strategy is not enough to produce deep changes in the area. Moreover, the absence of a trial, the role of judge, the limited intervention of the defense and other features of the system that I will analyze in the next section show us that the magnitude of the problem exceeds simplistic solutions such as the investment of more money.

2.3.- Analysis of Some Specific Human Rights Violations in the Chilean Criminal Procedure

In this section I will analyze several selected features of the Chilean criminal procedure in light of the standards developed by international human rights law. I will assess whether the selected features are capable of complying with international obligations and to what extent they are doing so at the present time.

The main standards to compare are the international agreements of which Chile is part. Chile is part of two treaties relevant for my analysis. They are the American Convention on Human Rights (hereinafter "American Convention") and the International Covenant on Civil and Political Rights (hereinafter ICCPR)³³. Both international instruments have very similar provisions related to due process guarantees in criminal procedure, articles 8 and 14 respectively³⁴.

While Chile is not part of the European system of protection of human rights, I will also include in this analysis some standards developed for the jurisprudence of the article 6³⁵ of the European Convention on Human Rights (hereinafter "European Convention"), which is the equivalent of articles 8 and 14 of the American Convention and the ICCPR, respectively. The European system of protection of human rights is the most developed regional system³⁶ and its decisions in these matters have had a decisive impact in the reconfiguration of the criminal justice

³²Paradigmatic in this point are the opinions of the former Supreme Court Justice German Valenzuela Erazo. See "German Valenzuela Erazo: Gobierno see Apodero del Poder Judicial" LA TERCERA, January 8 1998, available at <http://www.tercera.cl/diario/1998/01/08/33.html>.

³³Chile ratified the American Convention on August 21, 1990, promulgated it by Decree 873 on August 23, 1990 and published it on January 5, 1991. Chile granted jurisdiction to the Inter-American Court on Human Rights just to investigate human rights violations after March 11 of 1990.

Chile ratified the ICCPR on February 2, 1972, promulgated it by Decree 778 in November of 1976, and published it in April 29, 1989. Chile granted jurisdiction to the Committee on Human Rights just to investigate cases of human rights violations produced after March 11 of 1990.

³⁴See supra appendix.

There are also some relevant norms of both treaties related to the right of personal freedom and its limitation in the criminal procedure such as the article 7 of the American Convention and 9 of the ICCPR. The main focus of this paper will be in the guarantees regulated in articles 8 and 14.

³⁵See infra appendix.

³⁶Steiner and Alston said about the European Convention System:

It is of particular importance within the context of international human rights for several reasons: it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most developed of the three regional systems; and its generated a more

system in Europe the last twenty years³⁷. In fact

Article 6 of the European Convention on Human Rights is the article most invoked before the European Commission and the European Court of Human Rights. It is also the article which in the proceedings both before the European Commission and before the European Court of Human Rights was found most frequently violated³⁸

Subsequently it seems impossible to make a comparative analysis of the Chilean system and international human rights law without including the most important developments of the latter.

In the following pages, my analysis will focus on four basic areas of the criminal procedure related to the protection of basic rights of the defendant: the right to a fair and public hearing; the impartiality of judges; presumption of innocence; finally, I will discuss the use of the torture in the Chilean criminal procedure.

2.3.1.- Justice Without Trial:

The first aspect of the international norms related to the basic guarantees of due process in criminal matters is the idea of a "fair and public hearing"³⁹. This concept is expressly mentioned in article 8.1 of the American Convention, 14.1 of the ICCPR and 6.1 of the European Convention. According to Stavros:

The overriding purpose of art. 6 of the European Convention and of the equivalent clauses in the other instruments under examination, when applied in criminal proceedings, is to ensure a fair trial for the defendant. The right to a "fair hearing", which is entrenched in art. 6(1), should be seen therefore as the generic notion for the more specific guarantees of the provision, especially those of Art. 6 (2) and (3)⁴⁰.

The core idea behind the guarantee of a fair and public hearing is the notion that every accused is entitled to a trial. The trial, according case law of the European Court of Human Rights and the Human Rights Committee, is a public and oral hearing of an adversarial nature, in which both parties have the possibility to present their evidence, contradict the evidence presented by their counterparts, and present their arguments to the court⁴¹.

As I already mentioned above, one striking feature of the criminal procedure in Chile is the lack of a trial in the sense that is specified by international law. The Chilean criminal procedure does not contemplate a hearing with the characteristics required by articles 8.1 and 14.1 of the American Convention and the ICCPR. The written

extensive jurisprudence than any other part of the international system

See HENRY STEINER & PHILIP ALSTON, *supra* note 3, 571.

³⁷Information about the influence of the European Convention and the decisions of its organs in Europe and with special focus in Germany, Austria, Great Britain and Spain, see Maria Ines Horvitz, *Influencia de la Convencion Europea de Derechos Humanos y la Jurisprudencia de sus Organos en el Proceso Penal Europeo*, in PROCESO PENAL Y DERECHOS FUNDAMENTALES, 373 (1994).

³⁸See Henry G. Schermers in preface of STEPHANOS STAVROS, THE GUARANTEES FOR ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, (1993).

³⁹See, Cristian Riego, *supra* note 16, 248.

⁴⁰STEPHANOS STAVROS, THE GUARANTEES FOR ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 42 (1993).

⁴¹Id. at 186-194 and DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 416-419 (1991).

character of the procedure, the lack of personal contact (immediacy principle) between parties and judges, the limited opportunity to present evidence and contradict the evidence collected in the *sumario* and especially, to cross-examine the witnesses, comprise an institutionalized violation of human rights.

This normative situation is aggravated by the way in which the system functions in practice. A very old claim of legal scholars in Chile has been that the real judgment of the accused happened in the *sumario* stage without access to the evidence that has been accumulated in the *expediente* and without the opportunity to present arguments to the judge⁴². Empirical studies show that these claims are accurate⁴³.

To conclude this brief analysis, from the point of view of this first basic component of the guarantees of criminal procedure contemplated in international human rights law, it is possible to say that the design of the Chilean criminal procedure appears as highly problematic. Therefore, other guarantees that are closely linked to the idea of a "fair and public hearing" are also jeopardized in the design of the Chilean criminal procedure.

2.3.2.- Impartiality⁴⁴.

Another basic element that forms the backbone of criminal procedure according to international human rights law is the concept of impartiality of the tribunal. The accused person is not only entitled to a trial in court, but also to a trial by an impartial tribunal (articles 8.1 of the American Convention and 14.1 of the ICCPR).

Impartiality is defined as "the absence of prejudice in favor or against persons or the matter about which judges have to decide,"⁴⁵ or simply the "...absence of prejudice or bias..."⁴⁶.

According to the case law of the European Court of Human Rights, the guarantee of impartiality has two dimensions that must be distinguished: a subjective and an objective. The subjective approach is "...endeavouring to ascertain the personal conviction of a given judge in a given case..." and the objective approach "...is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect."⁴⁷

From the point of view of the objective approach, the maxim "justice must be seen to be done" has been used in the European system as a standard to analyze the lack of impartiality of the court⁴⁸. A general criterion used by the European Court of Human Rights is that the prior involvement of judges or some of the judges of the trial court in a case before its trial is inconsistent with the guarantee of impartiality from the objective point of view.

In more specific terms, the Court has developed some standards according to which this intervention

⁴²See, Mauricio Duce & Cristian Riego, *supra* note 15, 158.

⁴³For example, an empirical study conducted by the Diego Portales Law School analyzed *expedientes* in cases in which the accused was found guilty. The study revealed that evidence was presented by the defense during the *plenario* stage in merely 17% of the cases. As the *plenario* is supposed to be the equivalent of adversarial trial in the criminal procedure the logical conclusion is that the *plenario* is almost irrelevant in the majority of cases. See MARIA ANGELICA JIMENEZ, *supra* note 18, 163-164.

⁴⁴An excellent explanation of the development of the jurisprudence of the European Court of Human Rights in this matter see, STEPHANOS STAVROS, *supra* note 40, 144-161.

⁴⁵See JULIO MAIER, *supra* note 11, 739-740 (translation by the author).

⁴⁶PIERSACK V. BELGIUM 53 Eur. Ct. H.R. (serie A) pa. 30.

⁴⁷*Id.*

⁴⁸See, STEPHANOS STAVROS, *supra* note 40, 144.

produces a violation of the tribunal's impartiality. In *PIERSACK v. BELGIUM*⁴⁹, the Court held that the previous exercise of prosecutorial functions of the president of the trial court (who was the senior deputy prosecutor of the office that prosecuted the case during the pre-trial stage) constituted a violation of article 6.1. of the European Convention. In *DE CUBBER v. BELGIUM*⁵⁰, the Court held that the functions of investigative magistrate and judge of the trial is incompatible with the impartiality of the latter. In *BEN YAACOUB v. BELGIUM* and *HAUSHILD v. DENMARK*, the court held that even the exercise of some judicial functions of one or more judges of the trial court in the pre-trial stage can constitute a violation of impartiality from the objective point of view⁵¹.

A superficial examination of the structure of the criminal procedure in Chile shows that the role played by judges in the different stages is absolutely incompatible with the standards of impartiality developed by international human rights law. In Chile, the same judge is in charge of the prosecution and judicial functions in the pre-trial stage, and then plays the role of judge in the *plenario* stage. This means that in the Chilean criminal procedure the judge is also the prosecutor in the same case.

This situation represents an institutional violation of human rights. Every accused person in Chile is sentenced by a court that lacks even the minimum elements of impartiality from the objective point of view. This problem is not due to the system's lack of resources or poor implementation, but rather its design and historical configuration.

2.3.3.- Presumption of Innocence:

The American Convention and the ICCPR contain a series of specific rights for the defendant in article 8 and 14, which are not possible to analyze in detail in this article. However, I would like to address one particular right that seems to be a very sensitive element of the physiognomy of the criminal procedure and that is especially problematic in the design and practical functioning of the system in Chile.

This right is the presumption of innocence contemplated in article 8.2 of the American Convention and 14.2 of the ICCPR. The Human Rights Committee in its General Comment number 13 characterized the presumption of innocence saying that:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle⁵².

I will focus my analysis on the last aspect explained by the Committee, the right to be treated as innocent during the development of the procedure. This means that an accused person, in principle, can not be subjected to any limitation of his or her rights derivated of the procedure, because he or she is considered by international human rights law an innocent person and must be treated according to that status.

However, this aspect of the presumption of innocence does not preclude the possibility of the states to adopt different preventive measures against the defendant, but requires that such measures only be taken in limited and exceptional circumstances in which there are clear grounds that justify these restrictions. Also, the guarantees require that these measures should be proportional to the aim sought to be protected⁵³.

⁴⁹Supra note 45.

⁵⁰*DE CUBBER v. BELGIUM* 86 Eur. Ct. H.R. (ser. A).

⁵¹See *STEPHANOS STAVROS*, supra note 40, 150-154.

⁵²General Comment 13: Article 14 (Twenty-first session, 1984) par. 7.

⁵³See *STEPHANOS STAVROS*, supra note 40, 50-51.

As I mentioned, one of the most important judicial decisions during *sumario* is the so-called *Auto de Procesamiento* (a sort of preliminary indictment). Through the *Auto de Procesamiento*, judges declare the existence of important presumptions of guilt against a specific person. From that moment the person will be formally subjected to the criminal process acquiring the category of *Procesado*. The automatic effect of the *Auto de Procesamiento* is the limitation of several rights of the *Procesado*. These include pre-trial detention, the suspension of political rights, and the right to be elected to labor unions posts, the inability to travel abroad, and the annotation of the character of *Procesado* in a public register that is used for several purposes (e.g. in job's applications is usually a requirement).

The status of *procesado* finally means severe limits on rights, without any consideration of the proportionality of such measures. *Procesados* are legally second-class citizens in the Chilean legal system. The magnitude of these limitations demonstrate the incompatibility of the regulation of the criminal procedure in Chile with the right to the presumption of innocence, and particularly to the right to be treated as an innocent during the process because according to their status as innocent people these restrictions should be only exceptions and not the general rule for everyone⁵⁴.

Without a doubt, the most important effect of the *Auto de Procesamiento*, and probably the most contradictory with the presumption of innocence, is the automatic pre-trial detention of the *procesado*. With regard to this matter, the Inter-American Commission on Human Rights held that:

The purpose of preventive detention is to ensure that the accused will not abscond or otherwise interfere with the judicial investigation. The Commission stresses that the preventive detention is an exceptional measure and only applies in cases where there exists a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence. Such measure is necessarily exceptional because of the preeminent right to personal liberty and the risk that the pre-trial incarceration poses the right to presumption of innocence and due process guarantees, including the right to defense⁵⁵.

The normative regulation and practical applications of these rules related constitute a clear violation of the standards developed by the Inter-American Commission. First, as we have seen before, the sentence to pre-trial detention is an automatic derivation of the *Auto de Procesamiento* and requires no further evaluation. Second, the grounds that allow the pre-trial imprisonment are far beyond the scope of the American Convention because the Chilean constitution allows it not only to ensure procedural goals (presence of the defendant), but also in case of danger for the society, for the victim or necessity of the investigation. The interpretation of these open clauses has also been very broad and has gone beyond the scope of the international human rights law⁵⁶.

As a result, those in pre-trial detention represent the highest percentage of the total number of inmates in Chilean prisons⁵⁷. Other evidence shows that the real function of pre-trial detention has been as an informal means of punishment⁵⁸.

2.3.4.- Confession and Torture:

⁵⁴See CRISTIAN RIEGO, LA SITUACION DE LOS IMPUTADOS, IN EL PROCESO PENAL CHILENO Y LOS DERECHOS HUMANOS, 88-89 (1994).

⁵⁵See Case No. 11.245, Inter-Am. C.H.R. parr. 84.

⁵⁶An extensive explanation about the incompatibility between the Chilean legal system and the international norms in these matters, see Cristian Riego, *supra* note 16.

⁵⁷Between 1980 and 1992, 60% of the inmate population has been in pre-trial detention. See Maria Angelica Jimenez, *supra* note 22, 262.

⁵⁸See CRISTIAN RIEGO, LA PRISION PREVENTIVA EN CHILE, (1990).

One of the most traditional problems in Latin American criminal procedure's compliance with the standards of International Human Rights has been abuses committed during the police interrogation in the pre-trial stage⁵⁹. A widespread practice throughout the continent has been the use of duress and torture to get self-inculpatory confessions from the defendant which then are used by courts to convict them.

Chile is not an exception with regard to this situation. In fact, several sources show that the use of torture in the context of criminal investigations is a common practice of the police in Chile. In 1996, the Special Rapporteur on Torture of the United Nations, Mr. Nigel Rodley, declared in his report to the Human Rights Commission that the number of cases of torture reported in his visit to Chile in August of 1995 was high enough to recommend that the Chilean authorities take care of the problem and adopt specific measures to eliminate the use of torture by the police⁶⁰.

Several empirical studies show that torture is a regular methodology used by police forces in criminal investigations and that judges make few efforts to control it⁶¹.

This situation represents a clear violation of some provisions of the American Convention and the ICCPR related to due process, such as the right not to be compelled to testify against himself or to plead guilty (articles 8.2(g) and 14.3(g) respectively) and the rule against admitting coerced confessions (article 8.3).

The complex and multiple factors that contribute to this situation are beyond the limited scope of the criminal justice system. There are several cultural and anthropological factors that could help to understand the use of the torture⁶².

For the purpose of this analysis, I would like to stress several factors linked to the design of the Chilean criminal procedure that explain in part the extended use of the torture. The concentration of prosecutorial powers in judges and the prevalent role of confession as the most important evidence create incentives for at least influence the use of torture as a methodology to investigate. Both features are deeply rooted components of the design and ideology of the criminal justice system in Chile and require more than a partial change to improve the situation of the human rights of the defendants.

⁵⁹See, John Maull, *The Exclusion of Coerced Confessions and the Regulation of Custodial Interrogation Under the American Convention on Human Rights*, 32 Am. Crim. L. Rev. 91-92.

⁶⁰See, Report of the Special Rapporteur on Torture according to resolution 1995/37, inform E/CN.4/1996/35/Add.2. See also Jose Zalaquett, "*Tortura en Democracia*" (torture in democracy). LA TERCERA (January 20 1998) available at <http://www.tercera.cl/diario/1998/01/20/13.html>.

⁶¹A survey conducted in Santiago showed that 71% of the inmates declared that they were subjected to important physical mistreatment during their period of detention in police quarters. In the same study, 60% of the criminal judges of Santiago declared that they did not control the police behavior during these stages of the procedure. See MARIA ANGELICA JIMENEZ, *supra* note 18, 196 and 212. A more recent study of criminals files in Santiago show that in 25,8% of the cases there was an accusation presented by the defendant against the police for physical mistreatment during the period of detention and only in a small part of the cases judges initiated an investigations of these complaints. See Felipe Gonzalez et. al, *La Policia y el Proceso Penal: Antecedentes Empiricos*, in LA REFORMA DE LA JUSTICIA PENAL, 294-296 (1998).

⁶²For an anthropological explanation of the use of physical punishment by the police in Latin America, see Teresa Pires do Rio Caldeira, *Violence, The Unbounded Body, and the Disregard for Rights: Limits of Democratization in Brazilian Society*, (manuscript on file with the author).

3.- REFORM AND HUMAN RIGHTS

Since the second half of the '80s, Latin American countries have engaged in an extended effort to reform their criminal justice systems and construct new ones based on the principles of the accusatorial model of criminal procedure and standards of human rights⁶³.

Chile, like other countries in the region, has followed this reform movement and since 1995 the parliament has discussed the enactment of a new Code of Criminal proceedings and some complementary legislation to implement it⁶⁴. This reform has been characterized as "the reform of the century" for public authorities stressing the dimensions and relevance of the change for the Chilean legal system⁶⁵.

The construction of new democracies in the continent after a long non-democratic period defines the political and social environment in which this process has developed. Hence, the protection of human rights has been one of the elements that has played an important role in the design and justification of these reforms.

The aim of this chapter is to analyze the Chilean reform from the point of view of its capability to advance human rights in the criminal justice system. For that purpose I will briefly discuss the role played by human rights in the debate about the reform, then I will describe the main structure of the new system proposed. Finally I will analyze some selected aspects of the new procedure that should represent an improvement for human rights in comparison with the current system.

Before I begin, it is necessary to give a brief overview of the current state of affairs regarding the reform proposals. The legislative discussion of reform started in June of 1995 with the presentation of the new Code of Criminal Proceedings to the Deputies Chamber. After a couple of year of discussion, the code was approved in January of 1998 by the Deputies Chamber, and the discussion in the Senate began in March of 1998. The government expects that during 1999 this project will be approved by the Senate and finally published. At the same time, in September 16 of 1997 was enacted the constitutional reform that introduced the Public Prosecutor Office (Ministerio Publico) in the Chilean Constitution.

The discussion of the project that regulates in detail the structure of the Ministerio Publico started in March of 1998 and it is expected that it will finished during the first half of 1999. The other projects are in the initial steps of the legislative process and should be enacted no later than the first months of the year 2000.

Originally, the reforms were expected to be implemented in March of the year 2000, but some delays in the legislative process will probable change that initial date.

3.1.-The Role of Human Rights in the Reform of Criminal Justice in Chile

One striking characteristic of the process of reform in Chile has been the high level of political and social

⁶³Reforms have been made or are in the process of being implemented in Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Panama, Paraguay, Peru, Republica Dominicana, Uruguay, and Venezuela.

⁶⁴In addition to revising the Code of Criminal Proceedings, the Chilean reforms also include a constitutional reform that configures, at the constitutional level, the basic duties and structure of the new Public Prosecutors Office; a project for a statute that regulates in detail the structure of the Public Prosecutor's Office; a project that reforms the Code of Organization of the Judiciary according to the requirements of the new criminal procedure; a legislative proposal for the creation of a new public defense system; and a project oriented to make some minor adaptations of the terminology in other areas of the Chilean legal system.

⁶⁵See Maria Soledad Alvear (Chilean Ministry of Justice) "Trascendencia de una Reforma" (transcendence of a reform) in LA EPOCA, 8, April 7, 1998. See also "La Reforma Judicial: El Gran Cambio del Siglo XX" (judicial reform: the big change of the twentieth century), LA HORA (especial), 1-8, January 23, 1998.

consensus toward the reform⁶⁶.

The reform process in Chile is a confluence of several goals and discourses that justify the necessity of the change from different perspectives in which human rights have been an important but not unique element. These aspects include the process of democratization in Chile; the modernization of the state; the increasing incorporation of Chile into the international economy; the new development model followed by the country that emphasizes the strength of institutions; negative public opinion about the judicial system; the increasing perception in the public about the failure of the inquisitive system to deal with the most important crimes; a tendency in the region toward uniform judicial systems; etc.

The reform must be understood as a result of the interaction of these different, sometimes contradictory lines of justifications and social expectations. Riego said "The Chilean reform is the product of a very diverse and even contradictory confluence of interests"⁶⁷.

All these elements have been present in the different stages of the reform and it is hard to designate one as the most important or decisive. The message that Chilean President Eduardo Frei sent to the parliament along with the new Code of Criminal Proceedings constitutes a very good example of this complex mixture of ideologies and discourses⁶⁸. According to this document the reform is not only justified because of the necessity to adapt the Chilean criminal procedure to the standards of international human rights, but is also an indispensable step in the development process, economic growth, and the modernization of the state. In addition, the reform is seen as an indispensable improvement of the public safety through increased efficiency of criminal prosecution.

Within this context, the human rights issue has been supported by liberal groups and especially by academic groups that participated in the elaboration of the project. The concern for the public safety aspect of the reform has been stressed by more conservative groups. The economic interests have been supported by groups of entrepreneurs and by public authorities linked with the management of the economy, and so on. The government expressed its commitment for to these goals⁶⁹.

Despite diverse emphases in the discourse of different groups the discussion of the reform has created a basic agreement in human right matters that did not exist before.

The conservative sector has developed a clear support for the improvements in human rights guarantees. Before the articulation of the general principles of the reform, some conservative people started to speak and influence public opinion with an extremely authoritarian orientation...The more articulate proposition of the reform has deterred any support for this kind of discourse.⁷⁰

Several factors have been important to reach this basic agreement about human rights. First, after a period of massive human rights violations there was a special sensitivity toward their protection in diverse social and political groups in Chile. Also, there was a reaction of the people and public authorities against the incapacity of the

⁶⁶For a description of this consensus and the way in which was reached see Juan Enrique Vargas, *La Reforma a la Justicia Criminal en Chile: El Cambio del Rol Estatal*, in LA REFORMA DE LA JUSTICIA PENAL, 55 (1998). See also Mauricio Duce & Cristian Riego, supra note 15, 162-166.

⁶⁷Cristian Riego, supra note 17, 25.

⁶⁸See MENSAJE N° 110-331 DE S.E. EL PRESIDENTE DE LA REPUBLICA CON EL QUE INICIA UN NUEVO PROYECTO DE LEY QUE ESTABLECE UN NUEVO CODIGO DE PROCEDIMIENTO PENAL, Santiago, June 9, 1995. (This is a document intended to justify and explain the reform to the legislative branch prior its discussion).

⁶⁹See Cristian Riego, supra note 17, 26-27.

⁷⁰Id. at 28.

judiciary to deal with the most important violations of human rights during the Pinochet regime and wide-spread perception about the necessity of take measures to avoid a similar situation in the future⁷¹.

In addition, during the first years of democracy, Chile finished incorporating some international treaties into internal legislation, such as the American Convention and the ICCPR. These agreements imposed specific human rights obligations and generated a movement for the improvement of the Chilean legal system toward those standards. The process of integration in the international community after several years of isolation also contributes to this phenomenon. The influence of and the example set by some countries of the region have been also decisive.

As we can see, concern about human rights played an important role in the discussion, design, and goals of the reform, but is far from being the single factor or impulse driving it. Future evaluations of the reform should analyze the results of this change from diverse perspectives. In this work I will explore some ideas only from the point of view of human rights guarantees.

3.2.- Brief Overview of The New Proposed Criminal Procedure

The Chilean proposal attempts to replace the current inquisitorial procedure with a new system structured according to the principles of an accusatorial model of criminal justice⁷².

The model of criminal procedure proposed in Chile, as in other countries in the region, is mainly based on the Model Code of Criminal Procedure for Iberoamerica (which is based on the current German legislation) and also includes among its main sources legislation of some European countries (e.g. Italy and Spain), various projects enacted in Latin American counterparts (e.g Guatemala and Argentina) and some features of the Anglo-American adversarial system.

The proposed model is not an attempt to adopt an American-style criminal procedure. Rather, the idea of the reformers is to follow the development of continental criminal procedure in countries such as Germany and Italy and recent reforms made by other Latin American countries⁷³.

The main innovations of this model of criminal procedure are: the establishment of oral, public, and adversary trials as a central step of the procedure; the separation of functions and differentiation of roles between judges and prosecutors; and the recognition of a set of basic rights of the defendant. In the following pages I will analyze with more details these and other elements of the new procedure.

3.2.1.- New Actors:

One striking characteristic of the current criminal procedure is the absolute concentration of power in the hands of a single judge who performs almost all the possible roles. The new system will radically change this situation through the division of the current functions of the criminal judge among three principal actors.

First, prosecutors will be responsible for criminal investigation, coordinating with the police the practical

⁷¹See Mauricio Duce & Cristian Riego, *supra* note 15, 146-147.

⁷²"Accusatorial procedure" is the phrase used in the European Continental tradition to refer to the "adversary system". The contours of an adversary system are not clear and my intention is not to enter this debate. In this paper I will assume the language used by the reformers in Chile. They contrast the current system (with clear roots in inquisitorial procedure) with the new system (identified in the public discourse as an accusatorial model of criminal procedure). For an explanation of the meaning of "adversary system" see, Mirjan Damaska, *Adversary System*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* (VOL. 1), 24 (1983).

⁷³A description of the main differences between the Italian accusatorial system and the American criminal procedure, see Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 *Temp. L. Rev.* 1211.

proceedings of the particular investigation. The new system also gives to prosecutors power to decide when to prosecute defendants and when to file charges against them. Finally, during the trial, prosecutors will have the responsibility of representing society before the courts.

At the level of judicial responsibilities the new system will divide the functions between judges in charge of the trial phase and judges in charge of the pre-trial phase. In charge of the trial phase will be a trial court composed of a panel of three professional judges, one of whom will play the role of the presiding judge. None of these judges will have prior involvement in the case presented before them as a way to ensure lack of prejudice.

During the pre-trial stage, a single professional judge, the so-called *Juez de Control de la Instruccion* (judge in charge of control the investigation) or *Juez de Garantias* (judge of guarantees) will be in charge of the supervision of the investigation and the adoption of judicial decisions that are required in this stage of the procedure (e.g. the decision about pre-trial detention or the authorization for a search warrant). The difference between this judges and the current investigating magistrate is that these judges will not have power to investigate, except under exceptional circumstances. The idea behind the reform is to put judges in an impartial position that will allow them to supervise the prosecution.

In addition, the reform contemplates the replacement of the current public defender system with a new one to ensure that all defendants have a professional defense during the procedure, if needed. This new design of public defense is based on a mixed system that divides the responsibilities of defense between civil servants who provide free legal representation to poor people and private lawyers who also receive some public funds to give free assistance to the poor.

The new distribution of roles among different actors will allow the construction of a process based on the activity of the parties instead the activity of judges. This is traditionally a feature associated with an accusatorial procedure⁷⁴.

3.2.2.- Procedural Structure:

The new system divides the procedure into three stages. The pre-trial or investigative stage, called *Instruccion*, a preliminary stage, called *Preparacion del Juicio Oral*, and the trial stage, called *Juicio Oral*.

The investigative stage represents a complete change with regard to the *Sumario*. As I mentioned above, in the new system there is an absolute change in the role played by judges. In addition there appears a new actor, the prosecutor, and the defense has the right to participate in almost all the proceedings of this procedural stage.

The most distinctive characteristics of this new stage are that the evidence collected for the prosecution is not kept secret from the defendant and his lawyer (with some specific exceptions) and most judicial decisions are made after hearings that require the presence of both parties instead of a written procedure. In addition, the evidence collected by the prosecutor does not constitute evidence and does not have any value until it is not presented on trial. In other words, evidence only has value when is presented at trial.

The way in which the new procedure can be initiated is similar to the current procedure. The main difference is that information in the case is put at the disposition of the prosecutor instead of judges to decide its destiny. Prosecutors have power to dismiss cases in a very preliminary stage of the investigation or to use limited discretion to decide not to prosecute (opportunity principle). However the general rule in the new system is still compulsory prosecution (legality principle)⁷⁵.

Once the investigation is initiated, the prosecutor, with help of the police, is responsible for collecting all the evidence that could support charges against the defendant. Any activity of the prosecutor that could potentially affect

⁷⁴See Mirjan Damaska, *supra* note 72, 25.

⁷⁵For an explanation of the discretionary powers of the prosecutors in this stage of the procedure in the Chilean reform see Maria Ines Horvitz, *Ministerio Publico y Selectividad*, in Pena y Estado N° 2, 111 (1997).

the constitutional rights of the people (especially the defendant) requires previous authorization by a judge (e.g. authorization for search and seizure in a private home). Hence, the autonomy of the prosecution is limited by judicial control concerning the legality of some proceedings of the investigation.

The new procedure regulates a sort of preliminary charge or indictment, called *Formalización de la Instrucción* made by the prosecutor in a judicial hearing. The purpose of the *Formalización de la Instrucción* is to inform the defendant that he or she is the object of a criminal investigation and of the nature and cause that justifies the investigation. This indictment has some procedural effects but never implies a pre-judicial decision about the substance of the case or an automatic limitation of the rights of the defendant as the *Auto de Procesamiento* did. If the prosecutor wants pre-trial detention of the defendant or another restrictive measure, he or she must present a motion and justify the necessity and proportionality of such measures before the judge in a hearing.

During this phase of the procedure, and after a defendant becomes the object of a *Formalización de la Instrucción*, it is possible for the defendant, prosecutor, and victim to come to an agreement about some limited pre-trial alternatives to suspend or to end the procedure at this stage⁷⁶.

Once the investigation ends, the prosecutor has to decide if he will file charges against the defendant or ask for his release. If he decides to proceed with the prosecution, the second phase of the procedure begins.

The objective of the preliminary phase is to prepare cases to go to trial. The main activity of this stage is a hearing conducted in the presence of both parties by a single judge. In this hearing the parties have to present their arguments and determine what evidence they will present at trial. The judge has very limited power to deny the charges presented by the prosecutor. His main role is to determine the facts that will be discussed by the parties in the trial and the evidence that they will present and discuss at that opportunity.

The trial is the central part of the new procedure, even though it is expected that only a few of the total number of cases will arrive at this stage. The basic structure of the trial is adversarial. This means that the parties are in charge of producing the evidence, and that each has the opportunity to contradict the evidence presented by his other counterpart. Also the parties have the right to present opening and closing arguments to the court. However, judges keep some power to interrogate witnesses after the direct and cross-examination by the parties, and in some exceptional circumstances they even have the power to order the presentation of new evidence before the trial is closed.

Once the debate is closed, the court must deliberate in private. After the court reaches its decision, in the same hearing, it has to announce its opinion acquitting or condemning the accused. The court has a deadline of thirty days after the trial hearing ends to write up a sentence in which it presents a more detailed justification of its decision.

3.3.- How Might the Reform Improve the Situation of Human Rights in the Criminal Justice System?

After this brief analysis of the main features of the proposed new criminal procedure, the question that I will try to answer is how this reform might improve the situation of human rights. In other words, I will explore some areas in which the reform could produce improvement over current criminal procedure with regard to its capability to protect human rights.

The answer is not simple and requires a comparative analysis between the current system and the proposed one. From the point of view of the formal rules, it is difficult not to recognize that the reform will mean a significant improvement in all possible areas of criminal procedure because it introduces into Chilean criminal procedure the basic guarantees of due process contemplated by the American Convention and the ICCPR.

However, the problem is that making a comparison based only in legal rules is superficial and misleading⁷⁷.

⁷⁶An extensive analysis of the most important alternatives see, Mauricio Duce, *Las Salidas Alternativas y la Reforma procesal Penal Chilena*, in REFORMA DE LA JUSTICIA PENAL, 171 (1998).

⁷⁷See John Henry Merryman, *On The Convergence (and Divergence) of the Civil Law and the Common Law*, 17

A more accurate comparison should include additional elements such as legal extension, legal penetration, legal culture, legal structures, legal actors, and legal processes.⁷⁸ It should also analyze the way in which the law works in the concrete operation of both systems (law in action).

As a consequence, one important problem for my comparative analysis is that the Chilean reform has not been implemented nor even enacted. Therefore, I can only contrast the current system with formal rules proposed for the new one, rules that could change before their final enactment. Future research should consider all dimensions of the legal system to make a complete comparison between both systems.

Despite this important limitation, in my opinion the situation of the current system in Chile with regard to its capability to protect the most basic standards of human rights is so precarious, even at the level of formal rules, that this limited comparison is useful to understand the possibilities of reform. From the perspective of the formal rules, the current system lacks the most basic standards for adequate protection of human rights. For that reason, changes at the level of rules will open the possibility of substantive improvements.

In the following pages I will briefly analyze some areas of the procedure in which the reform could make the most important contributions from the point of view of human rights.

3.3.1. Elimination of the Inquisitorial System:

One of my theses about the situation of human rights in the current criminal procedure is that the massive violations produced in it are not caused by the system's lack of resources or its poor implementation. Rather, my explanation has been that its structure and its ideological design are in evident contradiction with the ideology of human rights. Consequently, the first contribution of the reform to human rights in the criminal justice system in Chile will be the elimination of this very authoritarian form of criminal procedure and the construction of a new system based in principles that are compatible with human rights standards.

One goal of the reform is to transform the current practices of the different actors and introduce more rationality into the restriction of rights imposed on the people who are the object of criminal procedure.

The elimination of the inquisitorial system is only possible through a radical transformation of the rules that organize its structure and proceedings. Partial changes present the risk of being cosmetic reforms that could legitimate a system, keeping the main structures and ideas behind the new rules, but not improving the protection of human rights.

However, the change in the rules is only one aspect of this process of transformation. The elimination of the inquisitorial system is not only a legal change, but also a cultural transformation that requires time and must be accompanied by several changes in areas outside the traditional legal field. These areas should include training of the actors, reform of the organizational components of the system, etc.⁷⁹

Reforming the legal rules constitutes the first (but by no means the last) step in the transformation of the inquisitorial system. Without legal reform it is difficult to imagine that a transformation of the magnitude required by the current system would be possible to achieve.

The capacity of the reform to eliminate the inquisitorial system is the first contribution of the reform. Only after this basic contribution it is possible, in my opinion, to analyze improvements in more specific institutions of the procedure.

STAN. J. INT'L L. 379 (1981).

⁷⁸Id. at 380.

⁷⁹Some of these challenges will be analyzed in infra 4.

3.3.2.- The Trial as a Central Part of the Procedure:

In my opinion the core idea of human rights and due process in criminal procedural matters is constituted by the notion of trial. The trial is considered by international human rights standards to be the basic institution that provides the framework for all guarantees of the procedure. Without trial it is difficult to conceive of a criminal procedure capable of respecting human rights⁸⁰. For instance, a system can be very protective of the rights of the defendant during the pre-trial stage of the procedure, but if this defendant does not have the possibility of discussing his arguments, presenting his evidence, and contradicting the evidence of the prosecutor at the trial, all the safeguards of the prior stages of the procedure lack of meaning.

The notion of trial, according to international human rights law, is not vague. On the contrary, it requires some indispensable and specific elements such as publicity, orality, and adversary structure⁸¹. However, international human rights law gives to each state the possibility of shaping the structure of the trial with a different emphasis. Inasmuch as the structure of the trial complies with the basic requirements of international law, each state is free to regulate particularities of its own trials.

In current Chilean criminal procedure none of these characteristics are present in the phase of the process that is supposedly the equivalent to the trial. The *plenario* is more similar to an administrative procedure than a trial in light of international human rights law. In consequence, not only the right to a trial is violated in the design of Chilean criminal procedure, but also several rights linked with the idea of trial as the right to a public hearing (8.1 and 14.1), the right to be tried in one's presence (14.3 (b))⁸², and the right to examine the witnesses presented in the court (8.2 (f) and 14.3 (e)).

From this point of view, the reform is introducing in the Chilean legal system a key institution for the formation of a criminal procedure that could ensure reasonable protection of human rights.

The possible effects of the trial in the protection of human rights are not limited to the improvement of the situation of the particular rights mentioned above. The trial is a procedural institution that can project to the other phases of the procedure the basic requirements of human rights. Hence, the higher level of public exposure that trials generate of the work of police and prosecution can constitute an incentive to avoid, or at least limit, some practices of these actors that are important sources of human rights violations (e.g torture). In addition, the trial can constitute an institutional tool for the education of the actors and society in the values, concepts, and practices of criminal procedure based on respect for due process. The trial constitutes a potential educational tool that could be a very important factor in the creation of a new culture oriented toward the protection of human rights in the criminal justice system.

After recovering the trial as a central part of the procedure, is it possible to imagine of a new system in Chile capable of complying with human right standards. However, the construction of a trial is a task more complex than just the change of formal legal rules. It will require intense work in several areas, including training, development of organizational support and infrastructure, etc.

The consolidation of a culture and practices compatible with the trial probably will be achieved in a long run, but it seems that the change of legal rules is an indispensable step in this process of cultural transformation. This is, in my opinion, an important contribution of the reform.

3.3.3.-Impartiality:

⁸⁰See supra 2.3.1.

⁸¹See supra 2.3.1.

⁸²Regarding the incompatibility of current criminal procedure in Chile with the right of the accused to be tried in his presence, see CRISTIAN RIEGO, supra note 54, 58-60.

Another problem of the current system in relation to its capability to comply with international standards of human rights is an evident contradiction between the roles played by judges and the guarantees of impartiality from the point of view of the objective approach⁸³.

The impartiality of the judges is so important in the design of a procedure that many scholars describe the concept of judge or even the concept of court with the idea of impartiality⁸⁴. Thus, impartiality is not only important as an individual right of an accused person, but also as a crucial element of legitimacy of the judicial system. People are willing to go to the courts to resolve their problems because a third and impartial party will decide. Therefore, the consequence of the lack of impartiality affects a concrete person in a concrete case, but also the legitimacy of the judicial system. This situation is particularly important when this violation is generated by the institutional design of the system, as it is in Chilean criminal procedure.

As I mentioned, impartiality, from the perspective of the objective approach, is basically a problem of institutional design of the system because it is related to the way judicial functions are structured in a particular system.

In this regard, the reform includes a separation of functions between judges of the trial court and judges of the pre-trial stage and also includes the creation of a new office (Ministerio Público) in charge of prosecution. The new distribution of power among various actors constitutes a change that by itself will represent a major improvement in the protection of human rights under the new criminal procedure because it will ensure that, from the objective point of view, judges will be in an institutional position that allows them to play a role of impartial judges.

An important difference with regard to other aspects of the reform is that the new design will represent a significant improvement of the impartiality of judges as a direct consequence of the normative change and its subsequent implementation. I mentioned above that the elimination of the inquisitorial system and the creation of a trial requires more than a change of rules, but only with a change of rules will the improvement of the standards of impartiality be an immediate consequence of the reform.

3.3.4.- Rights of the Defendant:

The reform introduces several normative improvements with regard to the situation of the defendant in the current criminal procedure that are not possible to analyze in detail in this paper.

As a general statement, it is plausible to argue that the new criminal procedure contains a recognition of rights that is very close to the rights regulated in international treaties on human rights, such as articles 7 and 8 of the American Convention and 9 and 14 of the ICCPR. For example, the reform strengthens the normative regulation of the defendant's right to be presumed innocent (8.2 and 14.2); to be informed promptly and in detail about the nature of the charges against him (8.2 (b) and 14.3 (a)); to have adequate time and means for the preparation of his defense (8.2 (c) and 14.3 (b)); to communicate with his lawyer (8.2 (d) and 14.3 (b)); and not to be compelled to be witness against himself (8.2 (g) and 14.3 (g) among other relevant rights.

The major advance in this area is the new ideology behind the procedure that considers the defendant as a person entitled to non-derogable rights and not just as an object of prosecution. For instance, the logic of the new procedure imposes higher standards on the work of the prosecution as a direct consequence of the fact that prosecutorial and judicial functions are separated roles that are in the hands of diverse agencies. Hence, possible limitations on the rights of defendants are protected by several safeguards, the principal one being the existence of judges not committed to the prosecution that are empowered to decide on any restriction.

Another example in which the logic of the new system will represent a significant improvement is in the

⁸³See supra 2.3.2.

⁸⁴See JULIO MAIER, supra note 11, 739.

right of presumption of innocence. Both systems contemplate rules that officially recognize such right, but as we have already seen in the current one, the concrete operation of the system transforms the presumption of innocence into a sort of presumption of guilt. The pre-trial detention as a general rule and several other limitations that are automatic effects of the *auto de procesamiento* place defendants in a position incompatible with their status as people presumed innocent.

The new procedure not only contemplates rules that establish the general principle of protection of the presumption of innocence, but also regulate that no restriction of rights of the defendant can be an automatic consequence of the criminal investigation. Any restriction must be discussed before a judge and the prosecution must always justify its necessity, proportionality, and legality for this particular situation. The idea is that the prosecution cannot adopt any measure that restrict these individual rights of the defendant without prior authorization of a court that must consider the contradictory interests in the case. One additional advantage or safeguard in this new procedural scheme is the fact that this court is not committed to the interests of the prosecution, and in consequence can reject measures that are not in compliance with the standards required by law.

In conclusion, from the perspective of the rights of the defendant, the reform could mean a significant improvement over the current situation because it better recognizes these rights and because the general logic in which these rights will work in the new system is more favorable to their protection.

4.- CHALLENGES OF THE REFORM FROM THE POINT OF VIEW OF HUMAN RIGHTS

The reform represents an historic opportunity to significantly improve the situation of human rights in the criminal justice system in Chile. However, this process is not exempt from difficulties and dangers.

The history of legal reforms in Latin America is full of examples of the best intentions but the worst results. If I add that one common critique of the current reform process in Latin America is that has not always been based on a systematic evaluation of the problems and that implementation is usually very poor⁸⁵, there are not many reasons to be very optimistic about the real results that these changes will produce.

To actualize in tangible results the potential capacity of the proposals to improve the protection of human rights, it is necessary to initiate a new stage in the work of the reform. In my opinion, the work in this new stage should replace the traditional focus on advocacy at a discursive level with work oriented in more pragmatic aspects of the reform such as more systematic identification of the problems, the design of more specific programs to implement the reform, and the elaboration of more sophisticated tools to deal with the possible problems that the system will confront from the perspective of human rights.

The main supporters of the reform from the perspective of its necessity to improve the protection of human rights in criminal justice have been a group of liberal scholars, as I mentioned before. The work of this group has been decisive in creating technical and social consensus toward the main goals of the reform. This group performed a solid theoretical analysis about the current criminal procedure and a solid technical discourse that advocated for the reform.

In its current stage of development, this approach should be complemented with field work, an activity traditionally considered something irrelevant to human rights in the tradition of Chilean legal scholarship. On the other hand, supporters of human rights in other areas usually link the work on human rights with a level of ideological commitment that traditionally has excluded work oriented toward more pragmatic aspects of the institutional system or in areas that are seen as contrary to this ideology. Hence, the debate about human rights in Chile in the area of criminal justice is in some sense highly theoretical and ideological.

A solid theoretical discourse is indispensable to future because the theory will guide the development of reform according to some basic principles. However, without a work focused to deal with the practical problems that the system will confront, the capacity of the reform to produce real changes in the protection of human rights will be severely affected.

My point is that the work for human rights in the next stages of the reform should deal with some problems that traditionally are not part of the concern of the human rights discourse, but with a more creative and less ideological approach can produce significant improvements in the system.

The aim of this chapter is to identify and discuss some of the most important obstacles that the reform will confront in the near future from the perspective of its capacity to improve the protection of human rights and to suggest some lines of action that show how this new proposed approach can constitute an effective strategy to achieve that goal.

4.1.- Cultural Obstacles: The Assumption of a New Role by the Judiciary.

I have pointed out that the reform is much more than a simple change of legal rules, it is also a tremendous cultural change in the society as a whole and particularly for the different actors in the criminal justice system because most of them will have to perform substantially different roles.

From the point of view of the effectiveness of human rights in the new system, one of the most sensitive

⁸⁵See JUAN ENRIQUE VARGAS, LESSONS LEARNED: INTRODUCTION OF ORAL PROCESS IN LATIN AMERICA, 12 (1996) and Cristian Riego, supra note 17, 2.

areas in this cultural transformation is the capacity of judges to assume their new role. The reformers expect that the gap between the recognition of rights in the formal rules and their realization in the functioning of the system will be less important if judges assume their new role as a guarantors of the rights of citizens instead of as prosecutors.

One of the problems of the current system is that judges are not only responsible for judicial functions, but also for prosecution. The role of prosecutors affects the capacity of judges to exercise a more strict control in the legality of the procedure and to restrict the limitations on defendant's rights. The community also perceives that judges are responsible for prosecution and consequently attribute to them the responsibility for the protection of public safety. One important objective of the reform is to change this situation through the division of functions between judges and prosecutors. Judges should assume that their main role is not prosecution of the defendant, but the protection of the individual rights of the people.

Unfortunately, this change of mentality requires very intensive work in areas that exceed the legal framework. It is naive to think that judges who studied and worked for several years in a completely different environment will radically change their behavior in a short period of time merely because of a change of the legal rules. This does not mean change is impossible, but it does imply the need to assume its complexity and the importance of working on various influential factors that are outside procedural rules or ideology.

A powerful and coherent discourse about the need to protect human rights, standing alone, will not produce this change. Instead, work is required in several areas. One evident area that requires more attention is training. Here is essential to work on the design of more specific programs to strengthen the new role of judges and prosecutors. New training programs must include the construction of new roles as a central educational goal. Programs for prosecutors should also stress that the prosecutorial role belongs to them exclusively, because otherwise judges will tend to assume that role.

From the point of view of organizational changes, it is also indispensable to stress the necessity of cultural change in judges. The new organization of courts must be geared to create a modern organization, but also an organization capable of creating incentives to judges to assume their new functions. For instance, a new organization of the distribution of work can create obstacles for judges in charge of the pre-trial stage to block their involvement in every stage of the investigation phase of the procedure, avoiding the reproduction in the new system of the old investigating magistrates.

On the other hand, it is also essential that public authorities and experts send clear signals to society and media with regard to the new roles of judges and prosecutors. If the media and society wrongly attribute the political responsibility of the criminal prosecution to judges in the new system, judges will feel pressure to assume that role. On the other hand, if it is clear that this responsibility belongs to prosecutors it will be more difficult for judges to assume that role. Again, this requires an effort to design specific campaigns to influence public opinion, the use of more sophisticated communicational tools, and so on.

There are several other areas in which it is possible to influence the behavior of judges in a way that allows them to assume their new roles and consequently to improve the institutional conditions for the protection of human rights. In general, however, my point is that work in these areas requires a change in the traditional approach to human rights discourse to produce effective changes.

4.2.- Protection of Human Rights in a Context of Public Safety Demands?

The issue here is how to protect human rights in a social context in which it seems that the most relevant social demand is more security and when that security is associated with a repressive policy with regard to the rights of defendants⁸⁶. The tension between the protection of human rights and the need to improve public safety is another problematic area that requires more specific work to produce real betterment in the situation of human rights.

⁸⁶A good description of the political and social environment in which the policies in this matter are discussed see "Se Disparo la Alarma" LA TERCERA (REPORTAJES), April 26 1998 and "Seguridad Ciudadana: ¿Quien da Mas?, LA TERCERA (REPORTAJES), August 23 1998.

Unfortunately, on many occasions both aspects are seen as part of a *summa zero* conflict. The traditional ideology of human rights has been reluctant to involve itself in the design of public policies linked with public safety because in some way that means to sleep with the enemy.

More productive work in this area should depart from this traditional approach and understand that a successful human rights discourse has to be prepared to give coherent answers to legitimate popular demands in the areas of security, fear of crime, and public safety. Failing to consider these demands could be worse in the long run for the protection of human rights because when there are no satisfactory answers that also achieve the protection of human rights, public authorities are usually prone to adopt very authoritarian solutions, such as eliminating basic guarantees or increasing penalties for crimes⁸⁷.

The best way to confront these demands is to offer new and more sophisticated alternatives to deal with crime, but alternatives that not jeopardize the effectiveness of a policy of compliance with human rights norms. Here it is necessary to work in the construction of a new discourse and explore areas in which both objectives are feasible. Riego⁸⁸ explores two ways in which reform could improve public safety and reduce the fear of crime while protecting human rights. One is to improve the assistance of victims and the other is to involve the new public prosecutor's office in preventing crime at the local level.

The nature of this article does not allow me to explain in detail these and other possible strategies, but they illustrate my point that substantial improvement in the protection of human rights can be achieved by working in areas that are not traditionally part of the human rights discourse.

4.3.- An Efficient Public Defense System

One key aspect of effective protection of the rights of the defendant is to have an efficient system of public defense. The right of defense has an instrumental character in criminal procedure because is a right that generates the conditions for the fulfillment of other rights⁸⁹. It is difficult to imagine preserving many of the rights of the defendant without a defense counsel able to advocate for them. This reflects the importance of a well organized system of public defense.

One common problem in Latin America is that many of the rights that are regulated in constitutions and codes are not possible to exercise because of the lack of professional services of defense. The public defense system in the region present several deficiencies⁹⁰ and requires important changes to assume a relevant role in the new system.

In the Chilean case, the reform proposals include a project that designs a new system of public defense that should produce a qualitative and quantitative improvement in the area (and also an increase in the public funds traditionally invested in it). The construction of this new system is one of the most important aspects of improving the protection of human rights in criminal procedure in Chile. This new system will not only provide free assistance to poor people, but also to any person that need technical assistance. The system also contemplates funds to help the defense make its own investigations and hire expert witnesses.

Unfortunately, the construction of this new system has not been a priority of the reform in contrast with

⁸⁷This is what happened in some countries with regard to their policies against drugs and terrorism.

⁸⁸See Cristian Riego, *supra* note 17, 42-61.

⁸⁹See ALBERTO BINDER, *supra* note 10, 151.

⁹⁰See ANA ISABEL GARITA VILCHES, *LA DEFENSA PUBLICA EN AMERICA LATINA DESDE LA PERSPECTIVA DEL DERECHO PROCESAL PENAL MODERNO. BOLIVIA, COLOMBIA, COSTA RICA, ECUADOR, GUATEMALA, PANAMA*, (1991).

other components, such as the prosecution.

One of the reasons that could explain the low visibility of this matter in the debate is that criminal defense traditionally has not been considered an issue "easy to sell" to the public by the authorities. Usually, the investment of public funds in the area is labelled by conservative sectors as an investment in "criminals". For that reason there are few incentives for public authorities to give this issue a central part in the discussion.

This is an area that requires a new focus to work from human rights perspective because it will not be resolved at the level of confrontation of ideas about the importance of a defense system to protect human rights. The creation of this new public defense system will have a lot of positive externalities that should be part of the discourse in the area.

For instance, from the point of view of the legal profession, the new system will open a nonexistent market for lawyers because it will increase the investment of public funds. Hence, it is possible to think that with an adequate work by lawyers and their professional associations, they can become important supporters of the creation and implementation of this new system. Lawyers can not only help with their technical knowledge, but also with political support and lobby.

This is an example of the impact that a new discourse or focus could have on the protection of human rights even though it is not a discourse that explicitly mention that issue. A policy that tend to produce better protection of human rights should be measured by its final results and not for the ideological commitment of its discourse. This more pragmatic point of view urges us to develop more efficient strategies to deal with problems like the establishment of a new public defense service.

4.4.- Aspects not Covered by the Reform: The Police

The reform does not include the transformation of all the components of the criminal justice system. For instance, there is no reform of the substantive criminal law, nor of the penitentiary system.

Within the aspects not covered by the reform, the most significant in relation to the protection of human rights is the organization of the police.

The reform proposals contain many procedural limitations to the actions of the police in criminal investigations and also open an institutional space for their control through the creation of the public prosecutors office. These elements will probably constitute an improvement with regard to the current situation, but none of these changes represent a deep intervention in the organization of the police. It seems that the magnitude of human rights violations caused by the police in criminal procedure requires more than just procedural changes, but an internal reconfiguration of that institution.

One element of the Chilean transition to democracy is the existence of several authoritarian enclaves which have been almost impossible to reform. One of these enclaves is the organization of biggest police corp (Carabineros de Chile). This constitutes an important limitation to the introduction of more changes that could result in better protection of human rights in criminal procedure. However, in recent months it is possible to see an incipient movement at the level of local authorities that is asking for more police accountability⁹¹. This movement is creating a new possibility of designing a strategy oriented at producing changes at the level of police organization that could impact in the protection of human rights in criminal procedure.

However, one additional obstacle to introducing changes in the police is that there is very little known about them, so that even when there is some institutional space to make changes there are no evaluations or proposals that can be implemented from the perspective of human rights. As a consequence of this situation, studies of the police must constitute an indispensable component of any strategy that intends to deal successfully with human rights in

⁹¹See "Piden Evaluar Rendimiento de Carabineros e Investigaciones" LA TERCERA, August 23 1998 and "Alcades Piden Indicadores Policiales", LA TERCERA, September 21 1998.

Chilean criminal procedure. These kinds of studies require involvement with the police. Again, this represents a new focus in the work for human rights, because the traditional ideology in the area has been reluctant to work with one of the "enemies".

5.- CONCLUSIONS

The situation of human rights in current criminal procedure in Chile is incompatible with international standards of human rights and also represents a violation of international obligations assumed by Chile with the ratification of treaties like the American Convention and the ICCPR. Current criminal procedure also contradicts the most basic values of a democratic state. Therefore, reform of the criminal justice system is an excellent opportunity to deal with some of the most important violations of human rights in a democracy and to realize some basic values imposed by the form of political organization of the country.

From the point of view of the formal rules, the reform proposals represent a significant improvement of the current situation. Hence, the reform contemplates the protection of basic rights of the defendant in terms similar to international human rights law. However, the real transformation of the system is much more than a simple change of rules. For that reason, the challenge from the perspective of human rights in the near future is to elaborate a new strategy capable of producing concrete results in the operation of the system.

A strategy oriented toward producing a real improvement in the situation of the basic rights of the defendant should exchange the traditional focus on the discursive aspects of rights for identification of the concrete problems that the system will confront with regard to the protection of those rights. This transformation also requires more accurate evaluation of the magnitude of problems, determination of more specific and realistic objectives, and finally the use of more creative and sophisticated instruments.

Reform of criminal procedure in Chile offers a unique opportunity to produce a substantive improvement in the protection of human rights that can not be wasted. However, this possibility is not exempt from obstacles and difficulties. The work in the next years will be hard, but with creativity and patience things can change.

APPENDIX

TEXT OF PROVISIONS

I.- American Convention on Human Rights:

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or speak the language of the tribunal or court;
 - (b) prior notification in detail to the accused of the charges against him;
 - (c) adequate time and means for the preparation of his defence;
 - (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the period established by law;
 - (f) the rights of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - (g) the right not to be compelled to be a witness against himself or to plead guilty; and
 - (h) the right to appeal the judgment to a higher court.
3. A confession of guilt by accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgement shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interest of justice.

II.- International Covenant on Civil and Political Rights:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty

according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands, of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have a legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in the court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or a newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such a conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

III.- European Convention on Human Rights:

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require, or to extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have free assistance of an interpreter if he cannot understand or speak the language used in court.