

ATTACKS ON JUSTICE - CHILE

Highlights

The gradual loss of influence by the military has helped in ensuring the introduction of constitutional and legal reforms that continue to consolidate the democratization process within the country. Nevertheless, the failure to bring many prosecutions in connection with the gross violations of human rights committed under the former military government is a pending issue that must be addressed by the authorities, the judiciary and civil society. The final implementation of reform of the Code of Criminal Procedure, which started in 2000 and culminated in June 2005 with its entry into force in the capital, Santiago, and the enactment of 58 amendments to the 1980 Constitution are significant steps in the modernization of the justice system and political institutions. The recent discovery of secret bank accounts belonging to General Pinochet and his family has led to pressure for investigations to be carried out into not only possible human rights violations but also corrupt practices in which he may have been involved.

BACKGROUND

Ricardo Lagos was elected President in January 2000 as representative of the *Concertación para la Democracia*, a centre-left coalition that includes his own Socialist Party as well as other political organizations. He was the third candidate to be elected President from this coalition since the return to democracy. His term of office ends in 2006 and general elections are scheduled for December 2005. His government has had strong and consistent public support¹, despite the lack of a working majority in Congress that has prevented his administration from carrying through the reforms initially proposed and the fact that public safety and unemployment are of great concern to the population. In addition, the current electoral system and the high quorum established by the Constitution for the adoption of certain measures (amendments to the Constitution and the introduction of codes and organic laws) has given the centre-right coalition (*Alianza por Chile*) broad room for manoeuvre in negotiations.

Nonetheless, of the countries of Latin America, Chile has the lowest corruption rate and its citizens have a high level of trust in public institutions. Between 2000 and 2004, the Chilean economy grew over 50 per cent more than the economies of developed countries and almost twice as much as those of other countries of Latin America. This is best demonstrated in the way that Chile has funded its own judicial reform process instead of depending on financial aid from international organizations and aid agencies, as has been the case in the rest of the region.

The *Chilean Constitution* adopted in 1980 by the military government of General Pinochet contained a series of measures to ensure that the military would maintain a

¹http://www.cooperativa.cl/p4_noticias/antialone.html?page=http://www.cooperativa.cl/p4_noticias/site/artic/20050111/pags/20050111144033.html

strong influence on the government, with no clear separation of powers. It also contained restrictive measures with regard to the protection and recognition of human rights. One of the constant recommendations made by human rights groups and international organizations was the need to adopt a more plural and inclusive Constitution so that the transition towards democracy in Chile could be consolidated. In this sense, the adoption of *Law 20,050*² on 26 August 2005 was a major step in the right direction. As a result of this legislation, 58 constitutional amendments were approved.

They included cutting the presidential term from six to four years and making it impossible for him or her to stand for immediate re-election as well as abolishing the position of non-elected senator, namely, senators previously appointed to that position and former Presidents who were made senators-for-life. As of March 2006, there will be only 38 senators, all of whom will have been elected by direct vote of the people.

As far as the judiciary is concerned, the Supreme Court has been granted directorial, disciplinary and economic oversight of military tribunals in time of war. In addition, the period of tenure of the National Prosecutor has been cut from ten to eight years and he or she must retire from office on reaching 75 years of age.

The role of the military has also been subject to review. In this sense, the duty to preserve the country's institutions no longer lies with the military but with every public body. One major change is that the Commanders of the Armed Forces and the Director General of the uniformed police (*carabineros*) can now be removed by the President of the Republic after notifying Congress only. Authorization is not required from the State Defence Council (*Consejo de Defensa del Estado*). Substantial changes have also been made to the powers of the Constitutional Court (see Judiciary below). Finally, there is a more flexible system in place for reorganizing the political division of the country enabling the government, by means of an organic constitutional law, to set and increase or reduce the number of regions, provinces and municipalities (*comunas*). In the past, it was only able to do so in the case of provinces and municipalities.

Impunity

Several civil society organizations say that impunity is still a major problem in Chile, claiming that the government does not have sufficient will to support investigations into past human rights violations. The exception to this, given their close scrutiny by the media and pressure from public opinion, are the prosecutions that have been brought against General Pinochet and leading officials from the DINA, the former secret police. However, there is a lack of official policy and political determination to investigate other cases of alleged violations perpetrated while the military were in power, especially ones that have a lower profile but which should not for that reason be considered any less important.

A major setback in delivering justice in respect of these cases resulted from a January 2005 decision by the Supreme Court which sought to impose a strict time limit on judicial investigations into enforced disappearances and other crimes against

² http://sdi.bcn.cl/bcn/boletin/publicadores/normas_publicadas/archivos/LEY20050_18.pdf

humanity. In this connection, a deadline of 25 July 2005 was set for concluding all such investigations³. However, as a result of opposition from local and international organizations, enforcement of the decision was temporarily suspended but not overturned.

In this context, it is worth mentioning that the disciplining by the Supreme Court of six judges from the National Judges' Association (*Asociación Nacional de Magistrados*) for criticizing the above decision constitutes a serious breach of judicial independence. Furthermore, another decision by the Supreme Court to censure supervisory judge (*juez de garantía*) Daniel Urrutia Laubreau from Coquimbo for issuing an academic report suggesting that the judiciary needed to say *mea culpa* for its failings and lack of independence during the military government is also questionable⁴.

This situation worsened when the government introduced a policy of granting pardons to members of the military and, in August 2005, went on to reinstate Supreme Court justices who had publicly defended impunity by justifying application of the *Amnesty Law* as well as the position adopted by the State Defence Council (*Consejo de Defensa del Estado*) defending application of the same law to perpetrators of crimes against humanity.

After a year of work, in November 2004, the National Commission on Political Detentions and Torture (*Comisión Nacional sobre la Detención Política y la Tortura*), known as the Valech Commission after its President, Monsignor Sergio Valech, presented its final report which gathered together some 35,000 testimonies describing torture methods and the structure established within the State that allowed them to be carried out. The report, which followed a similar structure to the "1991 Rettig Report", described the political and historical context of the country after the military coup and went on to focus on the methods and practices employed in relation to political detention and torture.

Unlike its predecessor, the Valech Commission report did not name the victims or alleged perpetrators but put forward a series of proposals and recommendations calling on Chile to comply with its international obligations, especially with regard to investigating allegations of torture, and to abolish the *Amnesty Law*, which is a hindrance to democracy as well as effective respect for human rights in the country⁵.

An important step towards reconciliation took place when the Commander of the Armed Forces, General Juan Emilio Cheyre, issued a public document that took a critical stance with regard to the role of the military during the dictatorship. This occurred a few days before publication of the Valech Commission report and, while not assuming any institutional responsibility on the part of the Armed Forces for the abuses that took place, it sought to put the actions of the military into historical context and admitted that human rights violations had taken place in Chile.

³ <http://www.rebellion.org/noticia.php?id=18879>

⁴ This case generated statements from a number of different organizations including the *Red Iberoamericana de Jueces*, *Comisión Andina de Juristas* (www.cajpe.org.pe/Nuevoddhh/Urrutia.pdf), *Asociación de Jueces para la Justicia y Democracia* and *Consortio Justicia Viva*.

⁵ <http://www.derechos.org/nizkor/chile/doc/expp.html>

Despite these initiatives, it is troubling that the government decided to classify the 35,000 testimonies as ‘secret’ for a period of fifty years (*Law 19,992*), thus preventing this information from being used in investigations and prosecutions.

Ratification of the *Rome Statute of the International Criminal Court* by Chile is still pending. Despite the fact that the executive has committed itself to ratifying it, the lack of a clear majority in Congress has made it impossible for the government coalition to obtain the necessary number of votes. Nonetheless, one final attempt is expected to be made before President Lagos’s term of office comes to an end.

The case of General Augusto Pinochet

In August 2004, the Supreme Court lifted immunity from the former military ruler, General Augusto Pinochet, in the case of alleged human rights violations committed in the context of Operation Condor (*Operación Cóndor*), a plan developed during the 1970s and 1980s by the military governments of Chile, Argentina, Paraguay, Uruguay and Bolivia to rid themselves of political opponents. Following the launch of investigations and the collection of testimonies, it ordered General Pinochet to be held under house arrest on nine charges of kidnapping and one of murder. The decision to press charges was appealed by the defendant by means of a *recurso de amparo* (constitutional remedy used in the event of a breach of constitutional rights) and the order authorizing house arrest was revoked but in a final decision, dated January 2005, the Supreme Court determined that the order was valid. A few days later, he was released on bail of \$3,570 dollars by the Santiago Appeals Court.

Between January and March 2005, several irregular bank accounts belonging to General Pinochet and showing unjustified amounts ranging from 17 to 35 million dollars were discovered, in particular in the Riggs Bank. According to press reports, he, his family and closest advisors had at least 128 secret bank accounts overseas, including accounts using 11 false identities⁶. Given the circumstances, in June 2005 the Santiago Appeal Court lifted General Pinochet’s immunity so that he could be prosecuted on charges of tax fraud, corrupt practices and the falsification of passports. In August 2005, investigations were opened against his wife, Lucía Hiriart, and his younger son, Marco Antonio Pinochet Hiriart, as accomplices in the commission of tax fraud.

In September 2005, the Supreme Court once again lifted the immunity of General Pinochet to allow the courts to investigate his involvement in Operation Colombo (*Operación Colombo*), a case involving the alleged cover-up of the murder of 119 people by claiming that they were killed in confrontations between members of leftwing groups and other radical organizations.

However, as in the cases concerning Operation Condor and the “Caravan of Death”, it is unlikely that General Pinochet will be prosecuted by the Supreme Court given that, in those cases, investigations were brought to a close on the grounds that General Pinochet was not fit to fully understand the charges against him or adequately instruct his attorneys, due to his alleged dementia and other health problems.

⁶ <http://www.elmundo.es/elmundo/2005/08/10/internacional/1123686747.html>

It is worth mentioning that Judge Juan Guzmán, who was in charge of many investigations into alleged human rights violations perpetrated by General Pinochet, retired in May 2005. These cases have been referred to Judge Víctor Montiglio, who has been criticized by the Association of Relatives of Disappeared Detainees (*Asociación de Familiares de Detenidos Desaparecidos*, AFDD) for his support of the Amnesty Law.

Anti-terrorist legislation

Over the past few years, members of the Mapuche indigenous group have been prosecuted and convicted on charges of terrorism. The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, made two visits to Chile in 2003 and 2005⁷ to look into this situation. On both occasions, he expressed his concerns to the Chilean Government with regard to the ongoing cases against Pascual Pichún and Aniceto Catrimán, as well as other Mapuche leaders against whom terrorism charges had been brought. In his view, these prosecutions could violate the right to due process which, if it were the case, would indicate use of the judicial system as an instrument of repression under cover of anti-terrorist legislation.

According to the Chilean Constitution, judges have the power to monitor whether laws may be considered unconstitutional in certain situations. However, this power has not been used in these cases.

THE JUDICIARY

The Constitution provides for an independent judiciary and the introduction of an amended *Code of Criminal Procedure* has been a major step in ensuring that this is the case. The proportion of the budget devoted to the judiciary has risen from 0.9 per cent in 1999 to over 2 per cent.

Structure

The judiciary is made up of an ordinary court system and a specialist court system. Within the ordinary system, the highest court is the 21-seat Supreme Court. There are also 17 appeal courts with jurisdiction over the regions, as well as courts of first instance (*juzgados de letras*) that have jurisdiction over a specific district within a region under the principal jurisdiction of an appeal court. The Supreme Court is responsible for general oversight of the court system, including the enforcement of discipline and management of resources, and also plays a key role in appointments.

The President of the Supreme Court, when delivering the annual report on the work of the courts, has repeatedly expressed dismay at the interference and unjustified criticism to which the judiciary has been subjected in respect of a number of its decisions. However, he has rejected criticisms that political pressures may have influenced judicial decisions. One of the main concerns is the lack of will to thoroughly investigate past violations of human rights other than high-profile cases.

⁷ <http://www.derechos.org/nizkor/chile/doc/oral2.html>

In January 2004, the Santiago Appeal Court handed down its first conviction in connection with a case of enforced disappearance. It confirmed the sentences imposed on General Manuel Contreras, the former chief of the military secret police known as the DINA, and four other people involved in the disappearance of Miguel Angel Sandoval Rodríguez, who had been missing since 1975. In November of the same year, the Supreme Court⁸ ruled on the matter, determining that the Amnesty Law was not applicable and sentencing General Contreras to 12 years' imprisonment and his accomplices to five and ten years respectively.

According to the Supreme Court, the crime of enforced disappearance did not constitute homicide and therefore the *Amnesty Law* did not apply in these cases. A lawyer from the State Defence Council (*Consejo de Defensa del Estado*) argued that all enforced disappearances committed under the military government should be considered as murder and not as an ongoing offence. If this argument had been accepted, then such acts might have been covered by the *Amnesty Law*.

Nevertheless, according to the Supreme Court, it is necessary to ascertain whether a person is in fact dead and, if so, to establish the time of death. If it were discovered that the person was still alive at the time of the 1978 Amnesty law but was killed, or the body was found, at a later date, the perpetrators could not be amnestied. Such cases would then remain open until the legal truth about the fate of those concerned was established. The argument made by the State Defence Council was therefore rejected by both human right organizations and the Supreme Court on the grounds that the Amnesty Law was inapplicable to cases concerning crimes against humanity and therefore statutory limitations did not apply⁹.

The Constitutional Court (*Tribunal Constitucional*) is authorized to exercise control over organic laws as well as any laws that interpret the provisions of the Chilean Constitution. Given its limited powers, it has a low profile in Chile. However, with the new constitutional amendments recently approved, it is expected to play a more prominent role, similar to that played by other such courts in the region. Its composition has been increased from seven to ten members (in order to reduce the influence of the justices appointed by the military) and the Armed Forces will no longer be able to nominate candidates, with this function being left exclusively to the Supreme Court. The powers of the Constitutional Court are also likely to be further extended to allow it to revise legal provisions that might affect civil liberties.

Appointment and security of tenure

According to the Constitution, Supreme Court justices are appointed by the President from a list of five candidates submitted by the Supreme Court and have to be ratified by at least two thirds of the Senate (Article 75). Appeal court judges are appointed by the President from a list of three candidates submitted by the Supreme Court. First instance judges are also appointed by the President from a list submitted by the appeal court for the corresponding jurisdiction. The legislation regulating the Public

⁸ http://news.bbc.co.uk/1/hi/spanish/latin_america/newsid_4021000/4021207.stm

⁹ Interview with Judge Juan Guzmán, <http://www.rebellion.org/noticia.php?id=11373>

Prosecutor's Office stipulates that the appointment of prosecutors should follow the same procedure.

Article 77 of the Constitution guarantees tenure to judges as long they exhibit "good behaviour" but stipulates that judges from the lower courts should discharge their functions for the period established by the law. The Supreme Court may remove judges on grounds of "bad behaviour" at the request of the President of Republic or an interested party, or on its own initiative. By a majority vote of its members, the Supreme Court may also transfer a judge to a different position. Furthermore, judges and magistrates are subject to periodic evaluation by the court immediately above the one in which they sit (see, *Courts Code - Código Orgánico de Tribunales* -, Articles 273, 275 and 277).

In 2003, the Supreme Court imposed 201 disciplinary measures, the highest annual figure so far: 53 more than in 2002 and 72 more than in 2004. Sanctions imposed on judges by the Supreme Court for exercising freedom of expression were criticized by human rights organizations. Despite the substantial changes that have been made to the Chilean criminal justice system, the powers of the Supreme Court in this area have not been substantially changed, thereby undermining judicial independence.

Implementation of the reform of the justice system in Chile, which began in the early 1990's, reached completion with the entry into force of the Code of Criminal Procedure in the Metropolitan Region of Santiago on 16 June 2005. The capital accounts for 40 per cent of the population and it was the last stage of a five-stage process carried out across the whole country. Although it was expected to come into effect in Santiago in 2003, this was postponed in order to correct some flaws and shortcomings that had been detected while it was being tested in other regions.

Nonetheless, as of June 2005, the new accusatory and adversarial system is applied in every Chilean court. The main instruments of these reforms are the *Law on the Public Prosecutor's Office (Law 19,640, Ley Orgánica Constitucional del Ministerio Público - LOCMP)*), the new *Courts Code (Law 19,665, Código Orgánico de Tribunales)*, the new *Code of Criminal Procedure (Law 19,696, Código Procesal Penal)* and the *Public Criminal Defence Law (Law 19,718, Ley Orgánica de la Defensoría Penal Pública)*.

This new system is based on an adversarial model that separates the duties of investigation, prosecution and judgment by allocating these tasks to different bodies in order to ensure due process and respect for the right of defence as well as to prevent any overlap in their duties. Under the old system, judges were responsible for all three areas. The three new bodies are the Public Prosecutor's Office (*Ministerio Público*), responsible for investigation and prosecution, the "supervisory courts" (*tribunales de garantías*), which are responsible for ensuring adherence to due process during the investigation stage, and the "oral hearing courts" (*tribunales orales*), which pass judgment. Another major change is that, under this system, the prosecutors exercise control over the police during the investigation stage whereas in the past the police were free to act on their own initiative.

Implementation of these reforms meant investing over 550 million dollars and restructuring the entire justice system. The funding was allocated as follows: 300

million dollars to the judiciary, 218 million dollars to the Public Prosecutor's Office and 50 million dollars to the Public Defender's Office. According to official data¹⁰, the existing 79 criminal court judges were replaced by 420 supervisory judges (*jueces de garantía*) and 396 oral hearing judges (*jueces de tribunal de juicio oral*). The Public Prosecutor's Office has 642 prosecutors distributed across the country while the Public Defender's offices are staffed by 145 public defenders.

The judicial reform process has received widespread support from the Chilean population and has helped to significantly reduce the length of time a criminal case can take. It has also involved the construction of over 300 new buildings which have significantly improved the infrastructure of the judiciary as well as access to justice in Chile.

MILITARY JUSTICE

One of the issues that have been under discussion along with the new *Code of Criminal Procedure* is the need to reform the military justice system. The current system gives military courts broad jurisdiction over all matters involving military personnel and, in the case of some criminal offences, they are competent to try civilians. In principle, their decisions are subject to review by the Supreme Court but this does not ensure respect for fair trial standards.

At the moment Chilean military courts are continuing to try civilians despite recommendations by international bodies such as the Committee against Torture and the Human Rights Committee, as well as judgments by the Inter-American Court of Human Rights. In 2004, fifteen military prosecutors were investigating cases that had been brought against indigenous people (*Mapuches*) for alleged attacks on the uniformed police (*carabineros*) as well as acts of violence committed by *carabineros* against *Mapuches*.

Military justice in Chile does not guarantee the independence of judges and, owing to the excessively ritualistic and bureaucratic procedures they use, military courts are inefficient. Furthermore, the overly-broad concept of what constitutes a military matter allows them to assume jurisdiction over matters that go beyond the normal military remit.

CASES BEFORE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

Between 2002 and 2005, the Inter-American Commission on Human Rights admitted 14 cases against Chile in relation to alleged rights violations concerning judicial guarantees and the judicial protection enshrined in the *American Convention on Human Rights*. In 2002 and 2003, Chile signed friendly settlements with regard to two other similar cases. In 2003, it also signed an agreement committing it to complying with the recommendations made by the Inter-American Commission with regard to the failure to adequately investigate a murder case, including violation of the right of access to justice.

¹⁰ See: www.chileangovernment.cl

RECENT LEGAL REFORMS RELATING TO THE JUSTICE SYSTEM

- 6 February 2002:** *S.D.* [Supreme Decree, *Decreto Supremo – D.S.*] *Nº 519*: Approving the International Convention for the Suppression of Terrorist Bombings, adopted by the United Nations General Assembly in New York on 15 December 1997.
- 22 May 2002:** *Law Nº 19,805*: Setting up new divisions in the appeal courts in Santiago, San Miguel, Valparaíso and Concepción.
- 30 August 2004:** *Law Nº 19,968*: Setting up Family Courts (*Tribunales de Familia*).
- 10 February 2005:** *S.D. Nº 263*: Approving the Inter-American Convention against Terrorism.
- 16 February 2005:** *S.D. Nº 342*: Approving the United Nations Convention against Transnational Organized Crime.
- 16 February 2005:** *S.D. Nº 342*: Approving the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.
- 31 August 2005:** *Law Nº 20,048*: Amending the Penal Code and the Military Justice Code with regard to the issue of contempt.