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REFLECTION ON CRIMINAL JUSTICE REFORMS IN CHILE

James P. Carey[†]

I. Introduction

In “Reform to the Criminal Justice System in Chile: Evaluation and Challenges,” Chilean Professors Blanco and Rojas (with the translation help of Loyola University Chicago Adjunct Professor Richard Hutt) describe with admirable clarity and succinctness the dramatic reforms currently under way in the Chilean Criminal Justice system. What they do not—and cannot—communicate in an article, is the great sense of momentous change which one gets from talking with lawyers and law students in Santiago, Chile. My colleague, Bill Elward,^{††} and I experienced this sense of change during our June 2004 visit. We had been invited by Professors Rojas and Blanco to teach trial advocacy skills to law students of Universidad Alberto Hurtado in Santiago and also to practicing lawyers who were pursuing a certificate program there. Alberto Hurtado is leading the way in preparing its students and practicing lawyers to effectuate the reforms.

Having just said that this great excitement and hopefulness cannot be communicated by writing about it—nevertheless, I will try to capture the feeling in this article. I will then comment on some of the reforms described in the article by drawing some comparisons with the American system and the Italian experience in the reform of its criminal code, which began in 1988.

II. The Andes and Father Montes

We landed in Santiago at daybreak, the Andes obscuring the sunrise and looming in the horizon as the plane descended. The city itself seemed tucked into the very base of the mountains, which jut so vertically into the sky they seem to overhang the city. In retrospect, the presence of the mountains serves as an apt metaphor for the relationship between Chile’s hopeful present and its recent past. The repressive Pinochet regime looms over Chile’s reform effort, like the mountains over the city. Pinochet is a physical presence, residing as he does presently in Santiago, awaiting trial on many charges.

Bill Elward and myself were given a tour of Alberto Hurtado in June 2004. On the spur of the moment, we were ushered into the office of the University President, Father Montes, S.J. If the mountains serve as a metaphor for the challenges facing Chileans in their attempt to reform their society, Father Montes exemplified the spirit and courage with which the effort has been undertaken. Although we had intruded on his day unexpectedly, he welcomed us warmly and motioned us to sit around a small table. For the next half hour, Father Montes answered our many questions about Chilean society and about the university. He

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described his own role in creating the university out of what had formerly been a Jesuit Institute, of the university's mission to expand higher education beyond the traditional elite, and of creating the "new man." His dramatic story and lofty ambition were communicated in a soft-spoken, self-effacing manner. Afterwards, when we reflected on just what Father Montes had accomplished, on the very real—even dangerous—obstacles he had overcome, we both felt that we had met a hero. We also both felt that we could justly feel proud to be lawyers because we were reminded by his personal example and by his endeavor that law is a powerful engine for social change.

The sense of dynamism and of peril inherent in the Chilean criminal justice reform was personified in Father Montes.

III. The Chilean Reform Compared to the American System and to the Italian Reforms of 1988

To give the Chilean reforms context, and to suggest what issues may arise in the implementation of the reforms, I will compare the Chilean reforms with Italian reforms in three areas: the oral trial, the prosecutor's role, and the protection of individual rights.

These comparisons are easily drawn thanks to the research of Professor William Pizzi of the University of Colorado Law School and his colleagues. I will draw on two of his articles about the Italian system as a basis for my comparisons.¹

A. The Oral Trial

Professors Blanco and Rojas assert that, following the reforms, Chile now has an oral trial system. Its contours however are unclear. They refer to "oral argument," and that the system "presupposes a well-structured trial."² They describe the role of a newly created three-judge panel where the "presiding judge . . . follows the rules of procedure and solves with his peers the objections entered by the parties during the examinations and cross-examinations."³ This implies a trial very much like an American trial, where counsel controls the presentation of the information through direct and cross examination and judges appear relegated to a passive role.

Indeed, Bill Elward and I spent our time teaching the rudiments of witness examination to the lawyers and students last June, evidencing the Chilean commitment to train lawyers equipped to actively conduct an oral trial.

The Italian reform of 1988 included a similar enhancement in the roles of the advocates. Pizzi and Montagna note however, that in practice there appears to be

¹ William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *YALE J. INT'L L.* 1 (1992); William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 *MICH. J. INT'L L.* 429 (2004).

² Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 *LOY. U. CHI. INT'L L. REV.* 253 (2005) [hereinafter Blanco & Rojas].

³ *Id.* at 259.

grudging acceptance of this change.⁴ For example, Article 507 of the Italian code permits the trial judge to call witnesses himself, rather than relying solely on the litigants.⁵ Further, two appellate court opinions in 1992 and 1993, respectively, emphasized “that while the power of the parties to introduce evidence at trial is important, this power cannot preclude a judge from seeking additional evidence that the judge believes is necessary for a proper decision of the case.”⁶ Pizzi and Montagna see this as an example of the continuing influence of the civil law tradition.⁷ It is likely that Chile will have to work through a similar delineation of its trial procedure against a background of a deeply ingrained civil law tradition.

Blanco and Rojas state that there are “rules of evidence and rules regarding the form of questioning witnesses” that must be enforced by the judge.⁸ Traditionally, civil law systems are not bound by a plethora of evidence rules, instead trusting the trial judge to determine the probative weight of the evidence. Blanco and Rojas appear to be referring to the rule against hearsay in this statement, indicating Chile’s clear move away from the civil law tradition and into an adversarial system.

Pizzi and Montagna cite two recent appellate court decisions which suggest that, although cross-examination has been incorporated into the Italian system in order to provide adversarial testing, it has not been viewed in the same light as it has in the United States.⁹ One case permitted the police to relate in court statements from witnesses—even though the defense could not cross examine the makers of the statements.¹⁰ Another case permitted introduction of an accomplice’s confession against the defendant, despite a clear prohibition of such an admission in Article 513(2) of the Code.¹¹

These evidentiary rulings, which permit hearsay and thereby derogate from the right to cross-examine, suggest the kinds of issues which Chilean judges will be called upon to address.

B. The Prosecutor

a) *Institutional Role*

In the American system, the prosecutor is in the executive branch, and by virtue of the separation of powers doctrine is apart from the judiciary and the legislature. This separation has important consequences for the prosecutor and his exercise of discretion.

⁴ See generally Pizzi & Montagna, *supra* note 1.

⁵ Pizzi & Montagna, *supra* note 1, at 447.

⁶ *Id.*

⁷ *Id.*

⁸ Blanco & Rojas, *supra* note 2, at 259.

⁹ Pizzi & Montagna, *supra* note 1, at 449-55.

¹⁰ *Id.* at 451-52.

¹¹ *Id.* at 452-55.

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In addition, the prosecutor is apart from police agencies. For the most part, prosecutors prosecute and police investigate.¹² Yet, there are ways in which the prosecutor and police are treated as one, namely in the application of exclusionary rules of evidence. If the police violate the constitutional rights of the accused, the prosecutor loses the evidence. Knowledge which the police have is imputed to the prosecution, so that a conviction will be reversed for failure to disclose exculpatory evidence to the accused, whether known or unknown to the prosecutor.

The Italian prosecutor plays quite a different role than the American prosecutor. Following the report of a crime, the Italian public prosecutor controls the investigation, while the judge serves as a check on his power.¹³ Moreover, the judge and the prosecutor are part of the same professional association, “the magistratura.”¹⁴

The Chilean reform “totally separates the prosecutorial from the decision making process.”¹⁵ This separation was accomplished by the creation of the Office of the Public Ministry which is designed solely to prosecute.¹⁶ This system will avoid the entanglement that the Italian prosecutor faces in investigating and prosecuting a crime, while enhancing the prosecutor’s discretionary power.

b) Discretion and Plea Bargaining

American prosecutors on the one hand, have great discretion by virtue of the separation of powers doctrine. Civil law prosecutors on the other hand, are said to be constrained by the doctrine of mandatory prosecution. Mandatory prosecution virtually eliminates plea bargaining.

The Italian reform created opportunities for plea bargaining, but in a narrow, rigid form.¹⁷ Yet, even though bargaining is limited in the kinds of crimes that can be bargained and in the range of available dispositions, one feature of the Italian plea bargaining is more advantageous to the accused than the American system. The Italian judge maintains greater control over the outcome of the case than his American counterpart. In certain circumstances the trial judge may give the defendant the reduced sentence which he sought even though the prosecution has refused to accept the bargain. In Italy, the accused does not enter a plea of guilty,

[i]nstead plea bargaining in Italy is supposed to function not as a request to the judge to “accept” a guilty plea as in the U.S. model, but rather as a

¹² Sometimes prosecutors will conduct investigation using the power of the grand jury. Federal prosecutors play this role more frequently than state prosecutors, ordinarily because the latter prosecute street crime for which investigation is provided by local police.

¹³ Pizzi & Marafiotti, *supra* note 1, at 13.

¹⁴ Pizzi & Montagna, *supra* note 1, at 446.

¹⁵ Blanco & Rojas, *supra* note 2, at 255.

¹⁶ See generally Office of the Public Ministry Web site at <http://www.minpublico.cl> (last visited Sept. 5, 2005).

¹⁷ Pizzi & Marafiotti, *supra* note 1, at 21.

request to evaluate the case from several different angles and determine if the defendant is indeed guilty and if the reduced sentence being sought is an appropriate way to avoid a trial and yet permit an adequate sentence.¹⁸

The Chilean reform explicitly creates limited prosecutorial discretion, and provides for three “alternative forms of dispute resolution” including a kind of plea bargaining.¹⁹ One of these alternatives, “Acuerdo Reparatorio,” available for property crimes and less serious crimes, involves negotiation between offender and victim.²⁰ Any agreement must be ratified by the Guarantee Judge (“*Jueces de Garantía*”).²¹ The active role accorded to the victim in this alternative reflects a traditional characteristic of the civil law. In the civil law tradition, victims are permitted to appear through counsel and to present evidence.²² Victims can also appeal the trial court’s decision. Although victims in the American system have been permitted to play a role in sentencing hearings, they have no advocacy role at trial.²³

As for so-called “plea bargaining,” the Chilean reform permits negotiation between prosecutor and defense counsel for crimes carrying a sentence of less than five years.²⁴ The Guarantee Judge has final control over the sentence.²⁵

The Chilean reform thus echoes the Italian change, by providing for prosecutorial discretion and forms of plea bargaining. Like the Italian changes, these are limited changes designed both for efficiency and transparency. The new practices remain a far cry, however, from those available in the United States—for better or worse.

C. Individual Rights

The exclusionary rule is a salient feature of the American system: Illegally seized evidence—confessions which are improperly obtained, identifications which are the result of unnecessary suggestiveness—are all excluded as evidence from the state’s case-in-chief in order to deter the police from violating the suspect’s rights. Civil law systems, although they uniformly preclude admission of coerced confessions, do not seek to protect individual rights through the exclusion of evidence. Even the English system, precursor to the American system, does not employ a blanket exclusionary rule.

An important aspect of the Chilean reform—not surprising in light of the Pinochet regime—is the creation of a special judicial branch, the Guarantee Judge.²⁶ Blanco and Rojas do not delineate the specific function of these judges,

¹⁸ Pizzi & Montagna, *supra* note 1, at 444.

¹⁹ Blanco & Rojas, *supra* note 2, at 257-58.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Pizzi & Montagna, *supra* note 1, at 433.

²⁴ Blanco & Rojas, *supra* note 2, at 258.

²⁵ *Id.*

²⁶ *Id.* at 256.

but the rationale for their creation is the protection of individual rights.²⁷ Whether these judges can exclude evidence because of illegal searches or improper interrogation is unclear.²⁸ Blanco and Rojas refer to the role of Guarantee Judges in assuring “due process,” which includes the presumption of innocence, the right to a speedy trial, the right to a quality defense for those without means to hire an attorney, the right to confront witnesses and evidence, and the right to an honest judge.²⁹

When Bill Elward and I visited Alberto Hurtado, we were asked to give a public lecture about the exclusionary rule as a means of protecting individual rights. We were introduced as well to Professor Hector Hernandez Basualto of the Alberto Hurtado faculty, who had recently published an article about exclusion of evidence under the new reform.³⁰ Unfortunately for us, the article is in Spanish; but publication of such an article indicates that exclusion is part of the academic discussion surrounding the Chilean reform which will hopefully play some role in the new procedure.

IV. Conclusion

Professors Blanco and Rojas characteristically do not mention their own roles in the Chilean reforms. Professor Blanco played a key role as a lobbyist for reform in the legislature. Professor Rojas and he, together with their colleagues, have made Universidad Alberto Hurtado a center for the training of lawyers and law students in the skills and procedures of the new system.³¹ They, and Father Montes, are inspirations to an American lawyer, who is reminded by their heroic example of the power of the law to effect social change, but also of the precariousness of the rule of law, which relies on men and women of courage to make it real.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 256.

³⁰ Hector Hernandez Basualto, *La Exclusión de la Prueba Ilicita en el Nuevo Proceso Penal Chileno*, 2 *Codección de Investigaciones Jurídicas* 3 (2004).

³¹ *See generally* Universidad Alberto Hurtado Web site, at <http://www.uahurtado.cl/> (last visited Sept. 5, 2005).