

Chile's partial success

Legal system: Civil law, adversarial system *Judges per 100,000 people:* 5¹
Judge's salary at start of career: US \$52,260² *Supreme Court judge's salary:* US \$98,616³
GNI per capita: US \$5,870⁴ *Annual budget of judiciary:* US \$240.5 million⁵
Total annual budget: US \$24.8 billion⁶ *Percentage of annual budget:* 1.0
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges:* No

1 Justice Studies Center of the Americas (2004–05) 2 Dirección de Presupuestos (www.dipres.cl) 3 Ibid.
 4 World Bank Development Indicators (2005) 5 Dirección de Presupuestos (www.dipres.cl) 6 Ibid.

Chile is often cited as a success story of partial judicial reform. It is true that instances of the worst excesses of corruption, for example high court or trial court judges 'selling' sentences, have not been uncovered in the past few years. It is less clear, however, whether levels of administrative corruption have actually fallen. In the criminal justice system, at least, the replacement of closed judicial proceedings with transparent, oral proceedings has closed off some avenues of corruption.

Public perception does not reflect such improvements. A 2005 poll by the research centre Instituto Libertad y Desarrollo placed the judiciary in first place among public institutions most riddled with corruption, while a Mori poll conducted the same year by TI's national chapter found that the judiciary was second only to political parties in the list of corrupt institutions. Polls by the think tank Centro de Estudios de la Realidad Contemporánea show that trust in the justice system actually declined since 1990, when reform of the justice sector began.

Added to this apparent contradiction is the perception that the judiciary has not kept up with

other institutions in terms of adopting a democratic and modern outlook. It is seen as aloof and resistant to change. To explain this it is necessary to trace the reform process to its origins in the restoration of democracy in 1990. The driving motivation for the initial reform was to weaken a Supreme Court that had served the interests of the Pinochet dictatorship. The Court resisted these initial reforms in collaboration with the conservative opposition. It appealed to the principle of independence in a bid to exclude itself from the drive to increase the transparency and accountability of Chile's institutions.

Successive waves of reform have sought to modernise the Supreme Court, and though they did not target judicial corruption specifically, they reduced the opportunities for patronage, particularly in the hiring and training of judges. The Judicial Academy was created in a first package of reforms in the early 1990s, partly to control the recruitment and career path of judges. A subsequent wave began in 1995 and involved deep reform of the criminal justice system. As well as moving to an accusatorial system with transparent oral procedures, it improved the public defence service, restricted the use of pre-trial

detention, introduced three-judge panels for major criminal cases and modernised administrative procedures. New court houses were built and considerable efforts went into training judges and court staff.

But problems remain. The criminal justice sector has a hierarchical structure of evaluation and control mechanisms that shape the careers of judges. Unfortunately, this structure has not improved accountability; rather, it has given way to a system that induces fear in lower court judges and causes appellate court judges to prefer to remain close to the executive branch of government, which exerts a significant influence in the appointments process.¹ Other elements contributing to mistrust are delays and the lack of transparency surrounding many judicial processes, in particular in the civil justice system where reforms have not been successfully implemented.

Bribery has diminished, but reforms have not been fully implemented

To analyse judicial corruption it is necessary to disaggregate the court systems. The criminal system has undergone drastic reforms, which were introduced piecemeal over five years. In some regions modern court systems have been in place for years, while in others they have only operated since June 2005. This may account for differences in real or perceived judicial corruption.

Reforms have yet to be extended to the civil justice system. Partial attempts were made on labour and family matters, but lack of coordination and investment hindered success. The civil justice system is scandalously slow in Chile and the government has not displayed the will needed to change this. A civil case that does not benefit from special treatment can take six to eight years before a judicial decision is reached. Certain practices

are indefensible. The appointment of auxiliary personnel, including experts, is not transparent and guidelines on conflicts of interest are not followed.

At the level of superior courts, there have been cases where secondary court officials have taken bribes to ensure a particular case finds its way into a court listing, or that a file disappears; however, these situations generally pre-date the reform. It has been alleged that certain lawyers peddle influence over certain Supreme Court or appellate court judges. However, there has been no recent evidence of bribes to alter a judicial ruling.

In the criminal justice sector, the most serious pre-reform corruption cases involved court clerks, auxiliaries and expert witnesses, rather than judges. A prime example of court corruption is the extortion of bribes from the family of people in pre-trial detention in exchange for expediting a case. Two factors facilitated this process: ignorance of due process rights by defendants and their families; and excessive delegation of judicial functions by judges to court officials and administrators.

Since the reforms were implemented, the situation in the criminal justice sector looks quite different. Few corruption-related problems have been detected in the new system which, in contrast to the old, distinguishes clearly between the investigatory and accusatory roles (the responsibility of the public prosecutor's office, an autonomous body within the judiciary) and of the adjudicating function (responsibility for the oral criminal courts is also part of the judiciary). The new institutional design facilitates transparency and has eliminated certain functions that had served as conduits – or instigators – of judicial corruption. Under the old system there were only 79 criminal judges in the whole country, with

¹ The Supreme Court draws up shortlists for Supreme Court and appeals court judges, and the appeals court of the relevant jurisdiction draws up the shortlist for trial court judges. The president appoints judges from these lists.

responsibility for investigating, accusing and judging. To deal with their heavy caseloads, criminal judges often delegated the investigatory and accusatory tasks to 'actuaries', court officials who were not necessarily qualified in law. The role of the actuary was abolished by the reforms and the importance of private lawyers was reduced by the creation of the office of public criminal defender.

Costs of corruption

Lack of equal access to justice is a major problem in Chile. Those who are prepared to pay for the best lawyers or for studies by experts can certainly improve their chances in court. It is the responsibility of judges and court staff to minimise differentials in access by consideration of the facts before the court and by refusing to be swayed by external inducements. Another potential cost of corruption is the trampling of the human rights of individuals involved in criminal cases, for example by extorting bribes in exchange for releasing suspects held in preventive detention; certainly it was human rights concerns that motivated the reforms in the first place. Nowadays, there is no evidence that corruption is undermining human rights or blocking general access to justice in Chile.

What's to be done?

The reform of the criminal justice system brought considerable progress in transparency as judicial proceedings became open and oral. But the same cannot be said of other areas of law. Attempts to reform Chile's family courts have failed mainly because they lacked careful planning based on consultation and consensus, and did not receive sufficient political support or funding. As a result, the reforms to juvenile and labour courts have generated frustration and those to civil courts have been paralysed.

Efforts to increase collegiality among lawyers would help to reduce corruption in courts. Chile is one of few countries in the Americas where membership of the bar association is voluntary.² Non-associated lawyers are not required to adhere to the code of ethics of the bar association. A bill to regulate ethical conduct of the entire legal profession was debated in 2003, but was not approved. A sense of professional unity might increase accountability for corrupt acts, especially if unethical acts were widely publicised.

With regard to employees of the public prosecutor's office, the prosecution of illegal acts committed while discharging their duties should rest in the hands of an internal comptroller's office (rather than the regional prosecutor's offices) in order to ensure continuous and impartial oversight. Regulations should be designed to enable more expeditious and more public investigations.

The following recommendations would enhance transparency and prevent corruption in the Chilean judicial system in general:

- Incorporate training in public service and ethics into training programmes for judges and lawyers
- Ensure that judicial decisions and sentences are not merely published, but are also made understandable
- Change appointment, promotion and evaluation systems for lower court judges in order to guarantee that they are merit-based and not dependent on the patronage of superior court judges or executive branch officers
- Implement fiscal control and supervision systems
- Enhance, improve and increase transparency.

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² Professional bar associations were dissolved in 1981 and replaced by private associations.