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# TO CHARGE OR NOT TO CHARGE, THAT IS DISCRETION: THE PROBLEM OF PROSECUTORIAL DISCRETION IN CHILE, AND JAPAN'S SOLUTION

Kirtland C. Marsh<sup>†</sup>

*Abstract:* Chile's recent criminal procedure reform is an ambitious program to bring greater transparency, fairness, and effectiveness to the country's legal system. However, the success of the reform is not assured. To a great extent, the reform's success will depend on the new national Office of the Public Prosecutor's ability to enforce laws and direct law enforcement within the confines of the new system. Prosecutors must balance the interests of the Chilean public's demands for order and convictions with the reform's underlying principles of impartiality and enhanced rights for defendants. If prosecutors resort to the excesses used by investigating judges under the old system, the reform's goal of enhanced defendant rights will be thwarted. On the other hand, if prosecutors are unable to secure convictions and adequately direct law enforcement, Chileans will lose faith in the viability of the new system. Chile's criminal procedure reform can succeed, but it will depend a great deal upon skillful use of prosecutorial discretion in charging cases. In crafting a viable solution to the challenge of managing prosecutorial discretion, Chile should look to the model of Japan's prosecution review commissions.

## I. INTRODUCTION

On June 16, 2005, the final phase of Chile's criminal procedure reform went into effect, culminating a revolution in the country's criminal justice system and marking a significant milestone in Chile's transition to modern democracy.<sup>1</sup> During the past twenty years, Chile has undergone a dramatic transformation admired throughout the region and the world. As an extension of that transformation, Chile's movement to reform its Code of Criminal Procedure was driven by its desire to be "on the same standing as other nations of the world, whose justice systems have efficient ways of protecting [individual] rights and liberties."<sup>2</sup>

Firmly established as an important trading partner with countries in Asia and North America, Chile has emerged as one of the most dynamic

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<sup>1</sup> Ronald Abramson, *After the Revolution, It's Time to Arm the Lawyers*, 9 PIERCE L. MAG. 2 (2005), <http://www.resources.piercelaw.edu/pubs/PLwin05vol9no1/2-5.pdf>.

<sup>2</sup> Claudio Pavlic, *Legal Reform: The Role of Public Institutions and Legal Culture*, 35 CAL. W. INT'L L.J. 237, 256 (2005) (a supervising public defender under a new system in Chile, speaking at a symposium at California Western School of Law); see also CÓDIGO PROCESAL PENAL [Code of Criminal Procedure], available at <http://www.defensoriapenal.cl/archivos/1132775062.pdf>.

countries in the Pacific Rim.<sup>3</sup> According to a recent United Nations study, the rapid rise in Chileans' standard of living in the past decade is nearly without comparison worldwide.<sup>4</sup> Chile has been described as "the Asian economy in the heart of Latin America."<sup>5</sup> Much of Chile's success can be traced to its successful engagement with its trading partners in the Pacific Rim.<sup>6</sup>

Developing countries throughout Latin America and the Pacific region look to Chile as a successful model of government reform.<sup>7</sup> While many other Latin American countries struggle to achieve full democracy and sustained economic growth, the "Chilean model" is praised throughout the region as a successful example of development.<sup>8</sup> With a robust economy that grew at seven percent in the 1990s and five percent in 2005,<sup>9</sup> Chile has become the most prosperous country in South America.<sup>10</sup> In many respects, Chile has successfully transformed itself into the "crown jewel of Latin America."<sup>11</sup> The World Economic Forum, in a report released in September of 2005 ranked Chile twenty-third internationally in terms of economic

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<sup>3</sup> See MARY LOU LATHROP, U.S. DEP'T OF COMMERCE, THE PORTS INDUSTRY SECTOR: CHILE (Sept. 7, 2002), <http://strategis.ic.gc.ca/epic/internet/inimr-ri.nsf/en/gr111423e.html>. Chile's growth is firmly rooted in its burgeoning trade with other Pacific nations. With a Pacific coastline of nearly 4000 miles strategically located on the southwest coast of South America, Chile is considered the continent's door to the South Pacific and Asia. Chile represents the ideal point of transfer for trade between South America and trading partners in Australia, New Zealand, the Far East, North America and Central America. See also CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK, FIELD LISTING – EXPORTS - PARTNERS (Jan. 10, 2006), <http://www.cia.gov/cia/publications/factbook/fields/2050.html> (noting that Chile's top four export partners in 2004 were all Pacific Rim countries: the United States (14%), Japan (11.4%), China (9.9%), South Korea (5.5%)).

<sup>4</sup> Rob Foulkes, *Chile Jumps Six Places in United Nations Development Report*, THE SANTIAGO TIMES, Sept. 8, 2005 (quoting Chilean Sociologist, Aldo Mascareño: "Chile is one of the countries that has registered the greatest improvement in terms of human development. In this sense, it is comparable only to Hong Kong, which is 22nd in the U.N. report").

<sup>5</sup> Rafael X. Zahralddin-Aravena, *Chile and Singapore: The Individual and the Collective, A Comparison*, 12 EMORY INT'L L. REV. 739, 791 (1998) (quoting David Pilling, *Keeping an Eye on the Old Tiger – The Emerging Investor*, FIN. TIMES, Nov. 29, 1993, at 24).

<sup>6</sup> Chile's expanding Pacific trade led to its invitation to become one of the first Latin American countries to enter the Asia-Pacific Economic Cooperation trade group ("APEC"), a multilateral trade forum. See Zahralddin-Aravena, *supra* note 5, at 791. With 21 member economies around the Pacific Rim, APEC's members account for more than 2.5 billion people, a combined gross domestic product of U.S. \$19 trillion and 47% of world trade. See APEC, ABOUT APEC, [http://www.apec.org/apec/about\\_apec.html](http://www.apec.org/apec/about_apec.html) (last visited Sept. 25, 2005) (inclusion in the group and hosting the annual APEC Forum in 2004 are expected by the Chilean government to have a major impact on Chile's future development).

<sup>7</sup> Zahralddin-Aravena, *supra* note 5, at 846-47.

<sup>8</sup> *Writing the Next Chapter in a Latin American Success Story*, THE ECONOMIST, Mar. 31, 2005, at 48.

<sup>9</sup> *Id.*

<sup>10</sup> See Zahralddin-Aravena, *supra* note 5, at 790; see also *Writing the Next Chapter in a Latin American Success Story*, *supra* note 8 (commenting that if Chile continues the rate of growth it has enjoyed during the past decade for another ten years, it will reach the same level of income per person as European Union countries like Greece and Portugal).

<sup>11</sup> Abramson, *supra* note 1, at 2.

competitiveness, far ahead of the next-ranked Latin American country, Uruguay, at fifty-fourth.<sup>12</sup>

Sometimes regarded internationally as a “good house in a bad neighbourhood,”<sup>13</sup> Chile is carefully studied by its neighbors. Other Latin American countries have attempted judicial reform in response to dissatisfied electorates but have had mixed success.<sup>14</sup> If Chile can successfully implement its criminal procedure reform, the effects could reverberate throughout South American legal systems.

Chile has implemented numerous reforms to strengthen its democracy. Among these reforms are its Commission on Truth and Reconciliation, which was founded to address the brutal crimes of the Pinochet regime.<sup>15</sup> In September 2005, Chile drafted a new constitution,<sup>16</sup> which promises to further strengthen the country’s democratic institutions and reduce the armed forces’ power over the government, a vestige of the Pinochet era.<sup>17</sup> As pivotal as these reforms have been to Chilean society, the wholesale reform of Chile’s Code of Criminal Procedure may have the furthest reaching and most sustained effects on the country.

The reform is ambitious in scope, and applying the provisions of Chile’s new Code of Criminal Procedure is fraught with difficulty. In crafting workable procedures for operating the new system effectively, Chilean legal scholars have consulted international approaches to criminal procedure.<sup>18</sup> In so doing, Chile should look to Japan. Another Pacific Rim nation that has been propelled by rapid economic expansion, Japan also shifted from an inquisitorial criminal process to an adversarial system.<sup>19</sup> Furthermore, Japan’s criminal procedure has grappled with regulating the

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<sup>12</sup> See WORLD ECONOMIC FORUM, GLOBAL COMPETITIVENESS REPORT 2005 – 2006, GROWTH COMPETITIVENESS INDEX RANKINGS AND 2004 COMPARISONS, [http://www.weforum.org/pdf/Global\\_Competitiveness\\_Reports/Reports/GCR\\_05\\_06/GCI\\_Rankings\\_pdf](http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/GCR_05_06/GCI_Rankings_pdf) (last visited Jan. 8, 2006).

<sup>13</sup> *Going It Alone*, THE ECONOMIST, Jan. 2, 2003 at 41.

<sup>14</sup> Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT’L L.J. 345, 379 (2000).

<sup>15</sup> David Bosco, *Santiago’s Aftershocks*, LEGAL AFF. 67 (July/Aug. 2002); see also PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* (1991) (detailing repressive tactics used by the fascist government of General Augusto Pinochet, who ruled Chile from 1973 to 1990).

<sup>16</sup> Constitución Política de la República de Chile (Constitution of the Republic of Chile), <https://www.presidencia.cl/view/pop-up-nueva-constitucion-texto.asp>.

<sup>17</sup> *Democratic at Last*, THE ECONOMIST, Sept. 15, 2005, at 60.

<sup>18</sup> See generally ANTONIO MARANGUNIC, MINISTERIO PÚBLICO OF CHILE, & TODD FOGLESONG, VERA INSTITUTE OF JUSTICE, *CHARTING JUSTICE REFORM IN CHILE: A COMPARISON OF THE OLD AND NEW SYSTEMS OF CRIMINAL PROCEDURE* (2004) [hereinafter MARANGUNIC & FOGLESONG], [http://www.vera.org/publication\\_pdf/254\\_498.pdf](http://www.vera.org/publication_pdf/254_498.pdf) (analyzing conviction rates and procedural efficiency).

<sup>19</sup> Mark D. West, Note, *Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 687 (1992).

conduct of powerful public prosecutors.<sup>20</sup> To ensure the success of Chile's criminal procedure reform, Chilean legal officials must confront the issue of regulating prosecutorial discretion in charging cases.<sup>21</sup> Japan's unique solution to the problem—prosecution review commissions composed of laypersons<sup>22</sup>—should be studied by Chile's legal reformers as an effective mechanism for regulating the exercise of prosecutorial discretion.

Part II of this comment examines Chile's criminal procedure reform by tracing the roots of the reform and explaining the mechanics and the implications of the newly created system. Part III analyzes the role of the national Office of the Public Prosecutor within the new system. Part IV describes the recent experience of prosecutors under the criminal procedure reform and assesses the Office of the Public Prosecutor's success in discharging its duties. Part V examines Japan's approach to prosecutorial discretion and its applicability to Chile's justice system. Part VI anticipates future challenges to Chile's criminal procedure reform and proposes an approach for effectively managing prosecutorial discretion.

## II. CHILE'S CRIMINAL PROCEDURE REFORM CREATES A JUSTICE SYSTEM MORE COMPATIBLE WITH DEMOCRACY

The movement to reform Chile's criminal justice system was rooted in popular perception that the colonial-style inquisitorial system, which had been in place throughout the twentieth century, was not compatible with the democratic society Chile hoped to achieve.<sup>23</sup> Widespread reaction amongst the Chilean public to the human rights abuses of the Pinochet dictatorship also influenced the desire for a reformed criminal procedure, as did the inability of the Chilean state to safeguard essential individual rights.<sup>24</sup> In addition to better protection for defendants, Chileans also were widely concerned about improving public safety and the efficiency of the criminal justice system.<sup>25</sup> The reform of Chile's Code of Criminal Procedure represents a massive effort by the national government, and with a total cost

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<sup>20</sup> A. Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38 (1997).

<sup>21</sup> Carlos Rodrigo de la Barra Cousiño, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J. L. & TRADE AM. 323, 338-39 (1998).

<sup>22</sup> West, *supra* note 19, at 694.

<sup>23</sup> Abramson, *supra* note 1, at 2.

<sup>24</sup> de la Barra, *supra* note 21, at 324.

<sup>25</sup> *Id.* at 326.

estimated at U.S. \$550,000,000,<sup>26</sup> the reform is thought to be the single most expensive governmental endeavor in Chile's history.<sup>27</sup>

A. *The Criminal Procedure Reform Is Dedicated to Reconciling State Power with Individual Rights*

Chile's Ministry of Justice maintains that the stated goal of the new system is to resolve social conflicts in a way that is timely, transparent, impartial, accessible, and respectful of people's fundamental rights.<sup>28</sup> Put more simply, the reform is designed to create a modern justice system that is capable of efficiently reconciling the punitive power of the state with robust safeguards of individual rights.<sup>29</sup> The new system aims to redress the deficiencies of the old Code of Criminal Procedure and conduct criminal trials openly.<sup>30</sup> Trials under the new criminal procedure should be speedy (i.e., not subject to protracted delays).<sup>31</sup> The new criminal procedure also emphasizes alternatives to imprisonment and has a greater focus on preserving defendants' rights.<sup>32</sup>

The new framework stands in marked contrast to the former criminal procedure system. Under the old system, a prosecutor took a police report regarding an offense and would conduct a sealed investigation.<sup>33</sup> Then, sometimes years later, the prosecutor would make a decision as to whether enough information had been gathered to charge the defendant.<sup>34</sup> The same prosecutor who had charged the defendant then became the judge in the case.<sup>35</sup> Criminal defense practice consisted of technical motions without court appearances or a chance to confront witnesses.<sup>36</sup> Almost invariably,

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<sup>26</sup> MINISTRY OF JUSTICE, GOVERNMENT OF CHILE, CRIMINAL PROCEDURE REFORM 23 (2005) <http://www.chileangovernment.cl/pdf/CriminalProcedureReform.pdf> (explaining the procedural reform in English) [hereinafter CRIMINAL PROCEDURE REFORM].

<sup>27</sup> Abramson, *supra* note 1, at 3.

<sup>28</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see also MARANGUNIC & FOGLESONG, *supra* note 18, at 6 (criminal prosecutions examined in this research study indicated that ninety-six percent of cases involving an arrest were resolved within a fifteen-month period under the new system, as opposed to an eighty-seven percent resolution rate for the same time period under the old system).

<sup>32</sup> See CRIMINAL PROCEDURE REFORM, *supra* note 26, at 5.

<sup>33</sup> Abramson, *supra* note 1, at 3.

<sup>34</sup> *Id.*; see also James L. Bischoff, Note, *Reforming the Criminal Procedure System in Latin America*, 9 TEX. HISP. J.L. & POL'Y 27, 40 (2003) ("An incredible seventy percent of Latin American prison inmates are there awaiting trial. Indeed, the length of pretrial incarceration often exceeds the maximum sentence the accused could receive if actually convicted of the crime for which he has not yet been indicted").

<sup>35</sup> Abramson, *supra* note 1, at 3.

<sup>36</sup> *Id.*

defendants were found guilty, but sentencing decisions could be indefinitely withheld, often resulting in long-term detentions without formal determinations of guilt.<sup>37</sup> The secretive nature of the process invited corruption, abuse of power, and nepotism.<sup>38</sup> In design, the new system offers a vast improvement over the old criminal procedure.<sup>39</sup> With its greater emphasis on due process and division of power between actors, the reform promises better protection of individual rights.

*B. Chile's Criminal Procedure Reform Is the Product of an Extensive Legislative Process*

Propelled by the public's demands during the 1990s for better protections for defendants and more efficient administration of justice, the Chilean Congress enacted legislation to reform the Code of Criminal Procedure.<sup>40</sup> Beginning with Law 19.519,<sup>41</sup> which established the Office of the Public Prosecutor in September 1997, and concluding with Law 19.696,<sup>42</sup> which established the National Public Defender in March 2001, Congress passed legislation over the course of five years implementing the new Code of Criminal Procedure.<sup>43</sup>

The process of installing the new criminal system has relied on central coordination and gradual implementation.<sup>44</sup> The Commission on the Coordination of the Criminal Procedure Reform, comprised of the Minister of Justice who presides over the Commission, the Supreme Court Chief Justice, the National Prosecutor, and the National Public Defender, along with several other officials, coordinated the reform.<sup>45</sup> Under the direction of the Commission, the reform was gradually implemented throughout Chile.<sup>46</sup> The reform's implementation began in the most sparsely populated regions in December 2000 and culminated with its introduction in metropolitan

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<sup>37</sup> *Id.*

<sup>38</sup> Alejandra Matus, *The Black Book of Chilean Justice*, 56 U. MIAMI L. REV. 329, 331 (2002).

<sup>39</sup> MARANGUNIC & FOGLESONG, *supra* note 18, at executive summary.

<sup>40</sup> See Abramson, *supra* note 1, at 2.

<sup>41</sup> Lydia Tiede, *Commitment to Justice: An Analysis of Criminal Law Reforms in Chile* 15 (U.C. San Diego, Ctr. for Iberian and Latin Am. Stud., Working Paper No. 22, 2004), <http://repositories.cdlib.org/cilas/papers/22>.

<sup>42</sup> *Id.*

<sup>43</sup> See Tiede, *supra* note 41, at 11 n.27 (listing the six relevant statutes from Chile's *Diario Oficial*: Ley No. 19.665, Mar. 9, 2000; Ley No. 19.708 and Ley No. 19.665, January 5, 2001; Ley No. 19.519, Oct. 15, 1999; Ley No. 19.640, Oct. 15, 1999; Ley No. 19.718, Mar. 10, 2001; and Ley No. 19.696, Oct. 12, 2000).

<sup>44</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 9.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Santiago in June 2005.<sup>47</sup> The reform has been implemented in five regional stages with an initial caseload of zero, meaning the new criminal procedure is not applied retroactively.<sup>48</sup> Courts using the old system will continue to handle all crimes committed before that date.<sup>49</sup> This approach was designed to avoid any overload or congestion left by the old system.<sup>50</sup>

C. *Separate and Distinct Judicial System Personnel Roles Will Drive the New System*

A variety of new mechanisms are designed to achieve the goals of the reform. Foremost among these is the clear and strict division of authority among three separate entities: judges, defense attorneys, and prosecutors.<sup>51</sup> These three actors, tasked with new responsibilities, will in large part determine the reform's effectiveness.

The role of judges under the new system is a dramatic departure from the earlier model. Under the old Code of Criminal Procedure, there were seventy-nine judges throughout Chile who were responsible for investigating crimes, filing charges, and sentencing defendants in all of the criminal cases that passed through the nation's judicial system.<sup>52</sup> Under the new system, despite their objections, the responsibilities of judges have been radically curtailed.<sup>53</sup> Further, judges themselves are now divided into two categories: supervisory judges (*jueces de garantías*) and oral criminal trial court judges (*tribunales del juicio oral en lo penal*).<sup>54</sup> Under the new system, there are 420 of the former and 396 of the latter.<sup>55</sup> With more than 800 judges total, the new system represents a tenfold increase in judges to oversee Chile's criminal trials.<sup>56</sup> This massive increase in judicial resources is certain to impact the speed and efficiency of Chile's trials, which early reports indicate are much improved.<sup>57</sup>

Supervisory judges, who are similar to magistrates in the U.S. system, are responsible for granting pretrial authorizations requested by the Public Prosecutor's Office relating to actions that might impact a defendant's

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.* at 13.

<sup>53</sup> de la Barra, *supra* note 21, at 329.

<sup>54</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 13.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 13, 15.

<sup>57</sup> MARANGUNIC & FOGLESONG, *supra* note 18, at 13.

constitutional rights.<sup>58</sup> Supervisory judges direct hearings during investigation and pretrial phases<sup>59</sup> and are responsible for the controversial process of determining whether to release defendants prior to trial or to remand them to pretrial custody.<sup>60</sup>

The role of criminal trial court judges under the new system represents a departure from the earlier Code of Criminal Procedure. Under the new system, trial court judges sit on three-member panels that hear oral arguments and are responsible for both the judgment and sentencing of defendants, as there are no juries under the Chilean system.<sup>61</sup>

Defense attorneys under the new system have a greatly enhanced role compared to their status under the old model.<sup>62</sup> Created by Law 19.718,<sup>63</sup> passed in March 2001, the Criminal Public Defender's Office (*Defensoría Penal Pública*) is composed of a National Defender and regional and local defenders spread throughout the country.<sup>64</sup> As opposed to the previous system, where poorly trained law students could be assigned as counsel, public defenders under the new system are attorneys with a certified level of competence.<sup>65</sup> Of the public defenders, 145 are government employees, and an additional 270 defense attorney positions are awarded by contract to private attorneys in a public bidding system.<sup>66</sup>

Finally, the responsibility for overseeing investigation of crimes, pressing charges, and prosecuting cases falls on the Office of the Public Prosecutor (*Ministerio Público*).<sup>67</sup> Because the role of the prosecutor under the reform is so new to Chile, and prosecutors must now shoulder the burden of directing law enforcement and protecting public safety,<sup>68</sup> the Prosecutor's Office is under great scrutiny. In order to achieve an effective criminal justice system, judges and defense attorneys must learn new skills and attain

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<sup>58</sup> Abramson, *supra* note 1, at 4; *see also* CRIMINAL PROCEDURE REFORM, *supra* note 26, at 9.

<sup>59</sup> Tiede, *supra* note 41, at 12-13.

<sup>60</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 13.

<sup>61</sup> Abramson, *supra* note 1, at 3.

<sup>62</sup> de la Barra, *supra* note 21, at 348-49; *see also* Abramson, *supra* note 1, at 3 ("under the old system, criminal defense practice consisted of filing highly technical motions, with no court appearances, chance for confronting witnesses or other opportunities for zealous, or any, advocacy").

<sup>63</sup> Tiede, *supra* note 41, at 17 n.44.

<sup>64</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 17.

<sup>65</sup> Tiede, *supra* note 41, at 17-18; *see also* Sofia Libedinsky, *The Reform of the Criminal Justice System in Chile: From an Inquisitorial to an Adversarial System*, Feb. 2005, at 3, [http://www.justiceinitiative.org/db/resource2?res\\_id=102833](http://www.justiceinitiative.org/db/resource2?res_id=102833) (explaining that although a legal aid service had already existed, defense was provided by law students in the last year of their studies, cases were transferred frequently because students only worked for a six month period, and the quality of representation was low).

<sup>66</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 17.

<sup>67</sup> de la Barra, *supra* note 21, at 332.

<sup>68</sup> de la Barra, *supra* note 21, at 332-35.

competence in their roles under the new system. One of the greatest challenges of the reform will be changing the legal culture in Chile with the same actors playing new roles.<sup>69</sup> However, public prosecutors, new figures in the Chilean criminal system,<sup>70</sup> may have the greatest challenge as they adapt to a role that has never before existed in Chile.<sup>71</sup>

### III. THE OFFICE OF THE PUBLIC PROSECUTOR MUST BE EFFECTIVE FOR THE REFORM TO SUCCEED

The Office of the Public Prosecutor has assumed some of the most fundamental powers of inquisitorial judges under the old system, as it is responsible for overseeing law enforcement and charging cases.<sup>72</sup> Those responsibilities were formerly vested in a relatively small number of experienced judges with heavy caseloads, who were also responsible for reaching a verdict.<sup>73</sup> In contrast, the new system consists of a relatively large number of inexperienced lawyers who manage law enforcement and seek convictions.<sup>74</sup> It is difficult to determine how well they will respond to the challenge of meeting their new responsibilities.<sup>75</sup>

#### A. *The Office of the Public Prosecutor Is Novel to Chile's Justice System*

The Office of the Public Prosecutor was created through constitutional reform by Law 19.519 in September 1997.<sup>76</sup> In 1999, the Chilean Congress passed Law 19.640, which set forth the responsibilities, operational guidelines, and limitations of the prosecutor's office.<sup>77</sup> The National Prosecutor (*Fiscal Nacional del Ministerio Público*), Guillermo

<sup>69</sup> de la Barra, *supra* note 21, at 333.

<sup>70</sup> *Id.* at 332.

<sup>71</sup> Mauricio J. Duce, *The Role of the Public Prosecutor's Office in Latin America's Criminal Procedure Reform: An Overview* 7, <http://www.cejamerica.org/doc/documentos/reforma-mp2-ing.pdf> (last visited Jan. 13, 2006).

<sup>72</sup> Tiede, *supra* note 41, at 16.

<sup>73</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 13.

<sup>74</sup> *Id.* at 15.

<sup>75</sup> See Bosco, *supra* note 15, at 69 (commenting that some Chileans "fear that ill-prepared prosecutors, in particular, will cause a breakdown in the system . . . it will be painful for judges to watch prosecutors stumble, particularly because public ire at resulting acquittals will likely singe the judiciary. 'Santiago will be a trial by fire,' says Paulina Sanchez, a young magistrate at the capital").

<sup>76</sup> MINISTERIO PÚBLICO, QUIENES SOMOS, QUE ES EL MINISTERIO PÚBLICO (2004), <http://www.ministeriopublico.cl/default.asp?cuerpo=31> (English translation of Public Prosecutor's Office resources and functions available on Public Ministry's website).

<sup>77</sup> See Law 19.640, <http://www.ministeriopublico.cl/default.asp?cuerpo=31> (last visited Oct. 10, 2005).

Piedrabuena Richard, directs the Office of the Public Prosecutor.<sup>78</sup> The office has 642 prosecutors, along with approximately 3000 staff members, who are distributed over sixteen regional prosecutors' offices.<sup>79</sup> The Public Prosecutor's Office was appropriated the equivalent of U.S. \$218,000,000, making it the recipient of nearly forty percent of the resources allocated by Congress to the reform.<sup>80</sup>

The most crucial element of Chile's criminal procedure reform is the separation of duties between judges and prosecutors.<sup>81</sup> Chile's government emphasizes that the mission of prosecutors under the reform is to investigate criminal acts, determine punishable participation, prosecute criminal action, and adopt measures for protecting victims and witnesses.<sup>82</sup> However, the government makes clear that "under no circumstances does the [Office of the Public Prosecutor] hear or adjudicate cases."<sup>83</sup> Prosecutorial duties have been completely separated from the judicial branch.<sup>84</sup> The Office of the Public Prosecutor is entrusted with impartially discharging its new responsibilities, including deciding which cases to charge and which cases to dismiss.<sup>85</sup> This power to select which cases to charge is commonly referred to as prosecutorial discretion.<sup>86</sup>

#### B. *Prosecutors Are Entrusted with an Expansive Power of Discretion*

Prosecutorial discretion, pursuant to Law 19.640, Title I, Section III,<sup>87</sup> and Article 248 of the Chilean Code of Criminal Procedure,<sup>88</sup> vests prosecutors with the power to either charge or dismiss a case. Termed "the discretion problem"<sup>89</sup> by some commentators, there is concern surrounding the prosecutors' newly acquired power.<sup>90</sup> Under the old system, charging

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<sup>78</sup> MINISTERIO PUBLICO, profile of National Prosecutor Guillermo Piedrabuena Richard, <http://www.ministeriopublico.cl/index.asp> (follow "fiscalia nacional" hyperlink, then follow "quien es Guillermo Piedrabuena Richard" hyperlink) (last visited Jan. 12, 2006).

<sup>79</sup> CRIMINAL PROCEDURE REFORM, *supra* note 26, at 15.

<sup>80</sup> *Id.* at 27.

<sup>81</sup> Abramson, *supra* note 1, at 3.

<sup>82</sup> MINISTERIO PUBLICO, OPP FACT SHEET (2004), <http://www.ministeriopublico.cl/index.asp> (follow "English Version" hyperlink; then follow "OPP Fact Sheet").

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; *see generally* de la Barra, *supra* note 21.

<sup>85</sup> Tiede, *supra* note 41, at 16.

<sup>86</sup> de la Barra, *supra* note 21, at 338-340; *see also* West, *supra* note 19, at 684-86 (analyzing origins and international variations of prosecutorial discretion).

<sup>87</sup> Law 19.640, *supra* note 77.

<sup>88</sup> CÓDIGO PROCESAL PENAL, art. 248.

<sup>89</sup> de la Barra, *supra* note 21, at 338.

<sup>90</sup> *Id.*; *see also* e-mail from Felipe Marín, Professor of Law, Diego Portales University in Santiago, Chile, to author (Oct. 17, 2005, 09:20:00 PST) [hereinafter Marín] (on file with the author) (commenting

discretion only occurred in the sealed investigative phase, and the only people with influence over the decision to charge were judges, police, and lawyers with personal connections to judges or the police department.<sup>91</sup> The potential for corruption was considerable, as there was little independent oversight into which cases were charged and which cases were dismissed.<sup>92</sup> Subsequent to the reform, charging discretion is vested in prosecutors, though with some judicial oversight.<sup>93</sup> Prosecutors, however, may still dismiss charges administratively (referred to as *archivo provisional* or *principio de oportunidad*) and do not require judicial authorization to do so.<sup>94</sup> The new system relies on an evolving relationship between prosecutors and supervisory judges in filing criminal cases.<sup>95</sup>

Ideally, the discretion now granted to prosecutors will produce more efficient case selection, reduce the overall caseload, and consequently aid judges in setting appropriate sentences.<sup>96</sup> However, some judges have resisted having their authority curtailed and have asserted their influence in the sentencing process.<sup>97</sup> This is expressly prohibited by the reform, as Article 80 of Law 19.640 explicitly gives prosecutors autonomy in directing criminal investigations.<sup>98</sup> Determining which cases to prosecute remains one of the central responsibilities of prosecutors in an adversarial system.<sup>99</sup> Therein is the most dangerous power of prosecutors, according to former U.S. Attorney General Robert Jackson—charging individuals that they think they should punish rather than picking cases that need to be prosecuted.<sup>100</sup>

If Chile's criminal procedure reform is to succeed, public prosecutors must competently and professionally discharge their duties. Prosecutors will need to employ skillful advocacy and careful use of charging discretion to

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that during the Chilean presidential race of 2005, there was a great deal of controversy surrounding prosecutorial conduct under the new system).

<sup>91</sup> See Matus, *supra* note 38, at 331-33.

<sup>92</sup> See Bosco, *supra* note 15, at 68.

<sup>93</sup> de la Barra, *supra* note 21, at 341.

<sup>94</sup> MARANGUNIC & FOGLESONG, *supra* note 18, at 8 n.9 (“*Archivo Provisional* or *principio de oportunidad* are forms of disposition that are roughly equivalent to dismissals without prejudice in the United States. A prosecutor does not require a judge's consent to dispose of a case in this way”).

<sup>95</sup> de la Barra, *supra* note 21, at 345 (“In building the adversarial procedure, one of the main challenges will be to limit the judge to a point of “relative passivity”).

<sup>96</sup> *Id.* at 347.

<sup>97</sup> Oficio FN. N°127, April 2004 (memo from Chile's Attorney General Ricardo Piedrabuena to regional prosecutors), <http://www.ministeriopublico.cl/index.asp> (follow “oficios” hyperlink under “oficios e instrucciones,” then follow “conflictos de atribuciones” hyperlink under “materias procesales penales”) (last visited Jan. 12, 2006).

<sup>98</sup> Law 19.640, art. 80, *supra* note 77.

<sup>99</sup> Duce, *supra* note 71, at 13.

<sup>100</sup> Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 20 (1940), available at <http://www.roberthjackson.org/Man/theman2-7-6-1/>.

meet their responsibilities under the reform. Their success or failure will be apparent in the coming years.

#### IV. PROSECUTORS WORKING IN THE NEW SYSTEM HAVE MADE ENCOURAGING PROGRESS BUT MUST CONTINUE TO IMPROVE

Since the reform's inception, prosecutors have struggled to fulfill their duties.<sup>101</sup> Conflicts have arisen between prosecutors and supervisory judges concerning the proper balance of authority for directing investigations.<sup>102</sup> Public perception of the reform in Chile has reflected a concern that order will be difficult to maintain under the new system.<sup>103</sup> Throughout the reform's implementation, there has been popular and political pressure for prosecutors to deliver convictions.<sup>104</sup> However, early results from the system's implementation in Santiago are encouraging and demonstrate that the new justice system is more likely to resolve cases quickly and efficiently, producing convictions within a reasonable amount of time.<sup>105</sup>

##### A. *The Reform's Early Results Have Been Encouraging*

The first month of the new system's implementation appeared to be successful. Since the first arrests were made shortly after 12:00 a.m. on June 17, 2005—the first morning of the reform in Santiago—the capital city has enjoyed relatively smooth enactment of the reform's provisions.<sup>106</sup> During just the first month of the reform in metropolitan Santiago, more than 21,000 cases were processed, nearly 5000 cases were quickly resolved, and over 2000 public trials were conducted.<sup>107</sup> President Ricardo Lagos commented that the early results were promising and reinforced the government's optimism about the change in the judicial system.<sup>108</sup> Contemporaneous government statistics also indicated a substantial drop in crime.<sup>109</sup> Despite

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<sup>101</sup> Bosco, *supra* note 15, at 69.

<sup>102</sup> Marín, *supra* note 90 (noting that prosecutors' argumentative abilities are unsophisticated, leaving judges without enough arguments to apply pretrial imprisonment. Instead of having clever prosecutors that argue within procedural confines, prosecutors are struggling and judges are trying to correct the problem themselves).

<sup>103</sup> Bosco, *supra* note 15, at 69.

<sup>104</sup> Wanda Praamsma, *Chile Debates Young Offender's Law*, SANTIAGO TIMES, Oct. 14, 2005; *see also* Wanda Praamsma, *In Chile: Lavin Attacks Bachelet as Soft on Crime*, SANTIAGO TIMES, Sept. 29, 2005.

<sup>105</sup> MARANGUNIC & FOGLESONG, *supra* note 18, at 13.

<sup>106</sup> Negar Kordestani, *First Arrests Made after Santiago's Penal Reform*, SANTIAGO TIMES, June 17, 2005.

<sup>107</sup> *In Brief: Justice System*, SANTIAGO TIMES, July 20, 2005.

<sup>108</sup> *Id.*

<sup>109</sup> Natalia Hernandez, *Crime Falls to Lowest Rate in Eight Years*, SANTIAGO TIMES, Aug. 1, 2005.

these early positive indicators, public concerns remain regarding the perceived lenience of prosecutors, particularly with respect to reduced pretrial detention and juvenile crime.<sup>110</sup>

*B. New Procedures for Pretrial Detention Have Met with Public Resistance*

Chile's new system of pretrial detention is controversial. In the pre-reform era, defendants were often held for years before being tried, resulting in backlogged court calendars.<sup>111</sup> Chile's system mirrored those in the rest of Latin America, where excessive pretrial detention is an enduring human rights problem.<sup>112</sup> In response to this problem, the reform empowered supervisory judges to decide whether a detainee, once arrested, should go free or remain in protective custody.<sup>113</sup> This particular feature of the reform has been met with criticism. Chile's President publicly attacked the policy of granting provisional liberty as being too lenient.<sup>114</sup> Supreme Court Justice Marcos Libedinsky, however, defended the new authority of judges to grant provisional liberty and its foundation in the presumption of innocence, which is an important feature of the new reform.<sup>115</sup>

Presuming defendants to be innocent remains an alien concept in much of Chile, and the criticism of pretrial release reflects the deeply held public suspicion about some aspects of the reform.<sup>116</sup> In response to criticism of the pretrial release policy, Chile's government announced plans in September 2005 to amend the Code of Criminal Procedure and eliminate provisional liberty for criminal offenders.<sup>117</sup> While much of the criticism was fueled by political considerations during an ongoing presidential race,<sup>118</sup> the willingness of the government to consider abandoning pretrial release of defendants less than six months after the reform's enactment indicates the uncertainty surrounding the reform itself.

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<sup>110</sup> Praamsma, *In Chile: Lavin Attacks Bachelet as Soft on Crime*, *supra* note 104.

<sup>111</sup> Tiede, *supra* note 41, at 10.

<sup>112</sup> Jonathan Hafetz, *Pretrial Detention, Human Rights, and Judicial Reform in Latin America*, 26 *FORDHAM INT'L L.J.* 1754 (2003).

<sup>113</sup> Katherine Schmidt, *Chile's Lagos Condemns 'Revolving Door' for Criminals*, *SANTIAGO TIMES*, Sept. 7, 2005.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Bosco, *supra* note 15, at 69 (referring to an October 2002 case in the provincial town of La Serena in which an appellate court quickly revoked the provisional liberty of a defendant in the face of popular protest, leading Chilean Judge Tomas Grey to remark, "It is a cultural problem. . . . Historically an accused person here was always guilty").

<sup>117</sup> Praamsma, *In Chile: Lavin Attacks Bachelet as Soft on Crime*, *supra* note 104.

<sup>118</sup> *Id.*

C. *Responding Effectively to Juvenile Crime Is One of the Justice System's Most Difficult Challenges*

Juvenile crime is a pressing social problem in Chile. Statistical and anecdotal evidence underlies the perception among the Chilean public that juvenile crime is one of the most widespread and destructive sources of crime in Chile.<sup>119</sup> According to a recent study, between 1986 and 2002, arrests of juvenile offenders in Chile rose by nearly 400 percent.<sup>120</sup> High-profile violent home invasions by groups of teenagers in affluent coastal communities during the summer of 2005 reinforced the public's perception that juvenile crime has become a severe problem.<sup>121</sup> Under the old criminal system, minors were usually given lenient punishment by the courts.<sup>122</sup> Under a law passed by Congress in October 2005, minors between the ages of fourteen and sixteen can face five-year prison sentences for serious crimes, and minors between sixteen and eighteen years of age can receive a maximum ten-year sentence.<sup>123</sup> While the maximum sentences are harsh, the legislation's main goal is to improve rehabilitation programs for minors,<sup>124</sup> and Chile's government has constructed new "closed" and "semi-closed" detention centers where juvenile inmates can receive counseling and treatment.<sup>125</sup> However, questions about implementation of the new law remain, particularly regarding how prosecutors might use their charging discretion in cases involving juveniles.<sup>126</sup>

D. *Public Trials and Powerful Defendants: The Senator Lavendero Case Is an Early Indicator of the Strengths and Weaknesses of the New System*

In June 2005, Senator Jorge Lavendero of Chile's Christian Democrat Party pled guilty to child molestation in open court.<sup>127</sup> A powerful senator

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<sup>119</sup> See Praamsma, *Chile Debates Young Offender's Law*, *supra* note 104 (citing FUNDACION PAZ CIUDADANA, BALANCE 2004: DELINCUENCIA CHILE: AVANCES Y DESAFIOS (Apr. 2005), [http://www.pazciudadana.cl/pdf/balance\\_delincuencia\\_en\\_Chile\\_2004.pdf](http://www.pazciudadana.cl/pdf/balance_delincuencia_en_Chile_2004.pdf)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Wanda Praamsma, *Congress Approves New Young Offenders Law*, SANTIAGO TIMES, Oct. 14, 2005.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* ("What will be the protocol for the district attorneys, courts and judges involved [in the cases]?" asked Mauricio Duce, a lawyer and coordinator at the Center for Justice in the Americas.")

<sup>127</sup> Emily Byrne, *Chile's DC Expels Senator after Paedophilia Confession*, SANTIAGO TIMES, June 17, 2005.

from Region IX in Chile's south, Lavendero was highly regarded for his longtime opposition to the Pinochet dictatorship.<sup>128</sup> The senator's trial took place in Temuco, a region of Chile where the criminal procedure reform went into effect in December 2000.<sup>129</sup> Lavendero's confession has been hailed as the reform's first high-profile success.<sup>130</sup>

Many believe that Lavendero entered a guilty plea as a direct result of Chile's newly reformed Code of Criminal Procedure.<sup>131</sup> Under the old system, the trial would have been conducted in secret, consisting of written motions and arguments made to one judge with complete discretion to decide Lavendero's fate.<sup>132</sup> For decades, equality before the law was more slogan than reality, and influential Chileans were able to leverage their positions for favorable treatment by the court.<sup>133</sup> Under the new system, Senator Lavendero was faced with the prospect of a damning public oral trial. The charges were not secret, and an autonomous prosecutor was responsible for pressing charges.<sup>134</sup> Despite his political power, Lavendero was forced to answer to criminal charges.<sup>135</sup>

Lavendero's admission of guilt, however, was marred by a Supreme Court verdict ordering the dismissal of Region IX's Public Prosecutor Esmirna Vidal for negligence in her investigations of Lavendero.<sup>136</sup> Vidal was dismissed by Chile's Attorney General following charges that she failed to properly investigate the case and provided inadequate protection to witnesses.<sup>137</sup> Vidal's dismissal underscores the reform's early challenges and demonstrates that many lawyers still find the new trial format a difficult adjustment.<sup>138</sup> Despite the difficulty lawyers have in adapting to the current system, the new Code of Criminal Procedure helps to ensure that powerful public figures are not above the law and represents an important step in strengthening Chilean democracy.

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<sup>128</sup> Catherine Housholder, *Lavendero Admits to Sex Abuse*, SANTIAGO TIMES, June 21, 2005.

<sup>129</sup> *Id.*

<sup>130</sup> Byrne, *supra* note 127.

<sup>131</sup> Housholder, *supra* note 128.

<sup>132</sup> Byrne, *supra* note 127.

<sup>133</sup> Steve Anderson, *Lavendero in Prison*, SANTIAGO TIMES, September 21, 2005.

<sup>134</sup> Byrne, *supra* note 127.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

E. *Chile's Prosecutors Would Benefit from an External Review of Their Discretion*

The initial difficulties that have beset prosecutors in the early stages of the reform's implementation demonstrate the complexity of prosecutors' role under the new system. In light of this complexity, Chile's legal reformers would be well-advised to institute an external mechanism to oversee prosecutorial decision-making. In creating such a mechanism, Chile should look to the example set by another Pacific nation that rapidly shifted from authoritarianism to democracy and modified an inquisitorial criminal procedure code into an adversarial system. Chile should examine the solution adopted by Japan in constructing a system to manage the problem of prosecutorial discretion.

V. JAPAN'S PROSECUTION REVIEW COMMISSIONS ARE A USEFUL MODEL FOR CHILEAN REFORM

The Japanese approach to regulating prosecutorial discretion is an instructive example for legal reformers in Chile grappling with the issue of properly administering prosecution. In Japan, if a prosecutor decides not to indict a suspect in a case, the victim of the crime may request a hearing regarding the prosecutor's decision.<sup>139</sup> Hearings are conducted by prosecution review commissions (*kensatsu shinsakai*), sometimes referred to as committees for the inquest of prosecution.<sup>140</sup> Even if there is no request by victims to review decisions to suspend prosecution, review commissions may investigate prosecutors' decisions of their own volition.<sup>141</sup> Despite the differences in Japan's society and system of justice from those of Chile, Japan's prosecution review commissions represent an innovative approach to a common problem—balancing the discretionary powers of prosecutors with public oversight.

A. *Prosecution Review Commissions Are the Product of Japan's Unique Legal History*

During the Meiji reforms of the late nineteenth century, Japan instituted a legal system based primarily on German and French models.<sup>142</sup>

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<sup>139</sup> West, *supra* note 19, at 685.

<sup>140</sup> Setsuo Kamiya, *Inquest Service Fuels Ardor For 'Democracy,'* JAPAN TIMES, Feb. 27, 2005, <http://search.japantimes.co.jp/print/features/life2005/fl20050227x3.htm>.

<sup>141</sup> West, *supra* note 19, at 697.

<sup>142</sup> Castberg, *supra* note 20, at 38.

Within the inquisitorial system, judges and prosecutors were given equal status in the Japanese Ministry of Justice.<sup>143</sup> The power of prosecutors crested in the 1930s, a period marked by repression and nearly unchecked police power.<sup>144</sup> After Japan's defeat in World War II, the country's legal system changed dramatically, with the judiciary made independent from the Ministry of Justice and prosecutors granted nearly complete independence.<sup>145</sup> A new constitution and Code of Criminal Procedure were written,<sup>146</sup> and the modern era of Japanese criminal law began.

Under the modern system, Japanese prosecutors are highly independent, free to indict highly placed politicians and empowered to suspend prosecution of those who have committed serious crimes.<sup>147</sup> Article 248 of the Japanese Code of Criminal Procedure states that if "after considering the character, age and situation of the offender, the gravity of the offense, the circumstances under which the offense was committed, and conditions subsequent to the commission of the offense, prosecution is deemed unnecessary, public action may be dispensed with."<sup>148</sup> This somewhat vague statutory language offers Japanese prosecutors a great deal of discretion in deciding which cases to prosecute.<sup>149</sup> The Japanese justice system has several procedures to guard against abuses of prosecutorial discretion. Two of these procedures are administered by the government—internal review of discretion by superiors within prosecutors' offices and judicial review of prosecutors' decisions.<sup>150</sup>

Internal review of charging decisions by individual prosecutors is common, as superiors must usually approve the prosecutors' decisions.<sup>151</sup> Judicial review of prosecutorial decisions is much rarer. Judicial review (*saibanjo no junkiso tetsuzuki*) is provided for in Article 262 of the Code of Criminal Procedure,<sup>152</sup> and allows those who object to non-prosecution in cases of abuse of authority or violence by a public officer to request that a District Court institute criminal proceedings against the accused.<sup>153</sup> The procedure for complaints is complex, time consuming, and does little to

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> West, *supra* note 19, at 686.

<sup>147</sup> *Id.* at 713.

<sup>148</sup> KEISOHŌ [Code of Criminal Procedure], art. 248.

<sup>149</sup> Castberg, *supra* note 20, at 56.

<sup>150</sup> West, *supra* note 19, at 692.

<sup>151</sup> *Id.* ("Prosecutors' offices are pyramidal in structure and decisions by individual prosecutors must be approved by superiors.")

<sup>152</sup> KEISOHŌ, art. 262.

<sup>153</sup> Castberg, *supra* note 20, at 62.

assure success for applicants.<sup>154</sup> As a result, judicial review of prosecutorial discretion is infrequently used; from 1987 to 1990, 979 requests for review were received and only two resulted in prosecution.<sup>155</sup> To supplement these two government-administered procedures, along with indirect legislative controls of prosecutors and the court appointment of special prosecutors, Japan utilizes prosecution review commissions.<sup>156</sup>

Each prosecution review commission consists of eleven members, selected by lot from the voter rolls in the local jurisdiction, and each member serves a six-month term.<sup>157</sup> Commissions review decisions not to prosecute and may begin the investigation process in one of two ways. The commission may receive requests from victims of crime, or it may initiate action on its own by a majority vote of its members.<sup>158</sup> Each commission is empowered to summon and interrogate witnesses.<sup>159</sup> After investigating, commissions determine whether indictment is proper or improper.<sup>160</sup> A majority vote is necessary to determine whether nonindictment was proper, but a supermajority of eight of the eleven members is necessary to determine that the prosecutor should indict the suspect whose prosecution has been suspended.<sup>161</sup> Currently, decisions of the commissions are advisory only. Article 41 of the Prosecution Review Commission statute states that the Chief Prosecutor shall “take proceedings for indictment, if he deems, after consideration of the decision, a public action should be instituted.”<sup>162</sup> Reforms proposed by Japan’s Judicial Reform Council, however, will make the decision of the commissions binding on prosecutors beginning in 2009.<sup>163</sup>

After World War II, one of the Allies’ goals was the democratization of Japan, and the Japanese government was urged to pass the Prosecution Commission Law of 1948.<sup>164</sup> Prosecution review commissions were expected to promote the goal of democratization in postwar Japan. The statute creating the review commissions declares its purpose as guaranteeing “proper and fair execution of the right of public action by reflecting the

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> West, *supra* note 19, at 693-94.

<sup>157</sup> Castberg, *supra* note 20, at 61.

<sup>158</sup> West, *supra* note 19, at 697.

<sup>159</sup> Castberg, *supra* note 20, at 61.

<sup>160</sup> West, *supra* note 19, at 698.

<sup>161</sup> *Id.*

<sup>162</sup> Castberg, *supra* note 20, at 61.

<sup>163</sup> Kamiya, *supra* note 140.

<sup>164</sup> West, *supra* note 19, at 694-95, (citing Kensatsu Shinsakai Hō [Prosecution Review Commission Law], Law No. 147 of 1948).

popular will.”<sup>165</sup> Reportedly, General MacArthur saw the system as one element of a comprehensive plan to give the Japanese “safeguards to sanctity of individual liberty.”<sup>166</sup>

*B. Japan’s Model Promotes Accountability and Accessibility*

Three benefits of prosecution review panels are readily discernible: (1) the system is a watchdog over prosecutors; (2) the availability of registering complaints helps protect victims’ rights; and (3) the system encourages participation in the democratic process.<sup>167</sup> When commissions review decisions made by prosecutors not to indict, the commissions act as an external social check on prosecutors’ discretion.<sup>168</sup> This check helps ensure that prosecutors are diligent in fulfilling their duties, and that the decision not to indict is not a result of improper influence on the prosecutor. Even though decisions by the review commissions are not binding, the commissions create the possibility of negative publicity, and no prosecutor wants the torrent of media criticism that would result from ignoring a commission’s recommendation to prosecute.<sup>169</sup> In this respect, prosecution review commissions help ensure that prosecutors are aware of the possible public backlash from abuse of prosecutorial discretion.<sup>170</sup>

Furthermore, prosecution review commissions help victims to have a greater voice within the justice system. Although the recognition of victims’ rights remains inconsistent in Japan,<sup>171</sup> victims’ ability to register complaints about prosecutors who refuse to indict allows them an avenue to contest improper use of prosecutorial discretion.<sup>172</sup>

Prosecution review commissions also encourage active civic participation in the legal process. In Japan’s justice system, the 201 prosecution review commissions around the country are the only opportunity for the public to directly participate in the criminal justice system.<sup>173</sup> The commissions allow the Japanese public to play a direct role in the administration of justice, which is normally the exclusive realm of legal professionals.<sup>174</sup> With the commissions, ordinary Japanese citizens are able

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<sup>165</sup> West, *supra* note 19, at 695.

<sup>166</sup> *Id.* at 696.

<sup>167</sup> *Id.* at 714.

<sup>168</sup> *Id.* at 703.

<sup>169</sup> *Id.* at 703.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 713.

<sup>172</sup> *See id.* at 685 (describing how victims may initiate review processes).

<sup>173</sup> Kamiya, *supra* note 140.

<sup>174</sup> *Id.*

to exert direct influence on the legal system. The introduction of the modified jury system in 2009 is evidence of the growing trend in Japan of expanded civic participation in the legal process.<sup>175</sup>

### C. *Japan's Prosecution Review Commissions Have Limitations*

For all of its advantages, Japan's system has some shortcomings. The principal limitations to Japanese commissions are their underutilization due to their public obscurity and a lack of enforcement power that impedes their effectiveness.<sup>176</sup>

Prosecution review commissions have not been well publicized, and many Japanese citizens are unaware that they exist.<sup>177</sup> Infrequent use of the commissions can be attributed to the system's obscurity, as it is difficult to assert rights if those rights and a method to exert them are not well known.<sup>178</sup> Furthermore, actors within the justice system do not have an incentive to better inform the public about the review commissions. Prosecutors have little motivation to inform citizens of a process that calls into question their own judgment.<sup>179</sup> A review commission's objection to a decision not to indict is a criticism of the prosecutor's discretion, and consequently prosecutors themselves are not likely to promote the commissions.<sup>180</sup> Private attorneys have no procedural role in review commissions, and Japan's Ministry of Justice is too closely linked to the functions of the Prosecutor's Office to promote a legal mechanism that acts as a check on prosecutorial power.<sup>181</sup> As a result, the commissions are little known by the public and are not used often enough.

Furthermore, when prosecution review commissions are used, they are often not influential in modifying a prosecutor's decision not to charge.<sup>182</sup> In the majority of cases, commissions have approved the suspension of

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<sup>175</sup> Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban'in Seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 943, 992 (2004) (the new jury system will be confined to criminal cases and will be composed of six lay members and three judges in contested cases, and four lay members and one judge in cases where the defendant does not dispute the charges).

<sup>176</sup> West, *supra* note 19, at 701-2.

<sup>177</sup> Kamiya, *supra* note 140; *see also* West, *supra* note 19, at 699 (noting that in a poll conducted in 1990 by the Prime Minister's Office, almost seventy percent of respondents admitted knowing nothing about the system).

<sup>178</sup> West, *supra* note 19, at 713.

<sup>179</sup> *Id.* at 705.

<sup>180</sup> *Id.* at 706.

<sup>181</sup> *Id.* at 705.

<sup>182</sup> Castberg, *supra* note 20, at 61.

prosecution.<sup>183</sup> According to a 1994 study, commissions dealt with 1691 cases: 1583 cases initiated by victims or proxies; and 108 cases initiated by the commissions themselves.<sup>184</sup> Of those cases, commissions made recommendations in 1288 of the cases, agreeing with the decision to suspend prosecution in 878 cases (68%), recommending the cases be prosecuted in 209 cases (16%), and dealing with the remainder of cases in other ways.<sup>185</sup> The study indicated that prosecutors initiated prosecution 28% of the time when recommended by the commission.<sup>186</sup> These figures demonstrate that commissions regularly agree with a prosecutor's decision not to prosecute. Further, the study shows that even when commissions object to decisions not to prosecute, Japanese prosecutors have been reluctant to reopen cases. The Justice System Reform Council's proposal to make commission decisions binding<sup>187</sup> will counteract that reluctance and give commissions more authority.

*D. Japan's System Offers a Practical Solution to the Problem of Regulating Prosecutorial Discretion*

Prosecution review commissions have been a useful mechanism in postwar Japan's justice system for ensuring that prosecutors do not abuse their expansive powers of discretion. Though the system has suffered from obscurity and under-use, prosecution review commissions have played an important role in regulating the conduct of Japanese prosecutors and promoting consistency in charging decisions.<sup>188</sup> The commissions were particularly useful to Japan as it transitioned from its prewar inquisitorial system to its postwar adversarial system, which resulted in the complex modification of prosecutors' role.<sup>189</sup> In a society accustomed to inquisitorial procedure and unified authority, newly adversarial Japanese prosecutors remained vested with substantial power and discretion.<sup>190</sup> To provide a counterbalance to that power, prosecution review commissions have

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 61-62.

<sup>187</sup> JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY Ch. II (2)(3) (June 12, 2001), [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html) ("A system should be introduced that grants legally binding effect to certain resolutions of the Inquests of Prosecution"); see also Kamiya, *supra* note 140 (explaining that the recommendations will become legally binding on prosecutors beginning in 2009).

<sup>188</sup> West, *supra* note 19, at 694.

<sup>189</sup> Castberg, *supra* note 20, at 39.

<sup>190</sup> West, *supra* note 19, at 691.

provided an avenue for ordinary citizens to challenge decisions made by public prosecutors. With the advent of binding commission decisions in 2009, the influence of the commissions will expand.<sup>191</sup>

Like Japan in the twentieth century, Chile in the twenty-first century has transitioned from an inquisitorial system to an adversarial system and has consequently reformed the powers of its public prosecutors. Those prosecutors must balance the goal of successfully prosecuting cases and demonstrating effectiveness to the public while abstaining from heavy-handed indictments or suspensions of prosecutions resulting from improper influence. Japan confronted these same challenges, and its principal response was the institution of prosecution review commissions. It is a solution that merits the attention of Chile's legal reformers.

#### VI. THE FUTURE OF PROSECUTORIAL DISCRETION IN CHILE REQUIRES MORE PUBLIC INFLUENCE ON THE PUBLIC PROSECUTORS

Chile's Office of the Public Prosecutor wields a great deal of power under Chile's new criminal procedure framework. Chile has instituted mechanisms aimed at regulating prosecutorial conduct and enhancing victims' rights, such as supervisory judges dedicated to ensuring due process.<sup>192</sup> Criminal justice in Chile, however, is still controlled exclusively by legal professionals and does not provide for public participation in, for example, juries.<sup>193</sup> Chile would be wise to adopt a version of Japan's system of prosecution review commissions. A Chilean system of prosecution review commissions would aid prosecutors in balancing order with restraint and would help the justice system combat official corruption and repressive law enforcement. Furthermore, public prosecution review commissions would help democratize Chile's legal system and make prosecutors more consistent and accountable in their decisions to indict and prosecute.

Tasked with pressing criminal charges, prosecutors shoulder a heavy burden under current reforms. The Chilean public expects a high conviction rate, and prosecutors are faced with the dual priorities of delivering measurable results while adhering to the due process standards imposed by the reform. Under the new system, prosecutors are more likely to produce convictions within a reasonable amount of time than in the old system.<sup>194</sup> Nevertheless, the opportunity remains for prosecutors to overzealously

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<sup>191</sup> JUSTICE SYSTEM REFORM COUNCIL, *supra* note 187, at Ch. II (2)(3); Kamiya, *supra* note 140.

<sup>192</sup> Abramson, *supra* note 1, at 4.

<sup>193</sup> *Id.* at 3.

<sup>194</sup> MARANGUNIC & FOGLESONG, *supra* note 18, at 13.

charge cases. Chile amending the Code of Criminal Procedure and providing for panels of laypeople to oversee prosecutorial charging decisions might have the effect of ensuring that prosecutors file charges properly and more effectively manage their duties to win convictions.

Prosecution review commissions would also serve the important goal of combating official corruption and police misconduct. One of the most damaging facets of Chile's old system of criminal procedure was the ability of influential defendants to negotiate their way out of criminal charges.<sup>195</sup> With public, oral trials and an independent judiciary, the new system has made this possibility much more remote, as the Senator Lavendero trial demonstrated.<sup>196</sup> However, prosecutors still may be reluctant to prosecute highly placed officials, particularly if those officials have committed less serious crimes than the juvenile sexual abuse for which Senator Lavendero plead guilty. Additionally, the Office of the Public Prosecutor is still under the direction of the executive branch, which may reduce the office's independence and impede the aggressive prosecution of high-ranking officials charged with misconduct.<sup>197</sup>

To ensure that all Chileans, including public officials, are subject to the rule of law, Japanese-style prosecution review commissions could challenge decisions by prosecutors to suspend prosecution where strong evidence of criminal conduct exists.<sup>198</sup> Even if the commissions' decisions were not binding, as Japan's are not, the prospect of a media barrage of negative publicity would encourage public prosecutors to consider the consequences of dropping charges against highly placed officials.<sup>199</sup> Further, prosecution review commissions would help combat police misconduct by exposing cases where suspects were arrested, but the evidence gathered by police was insufficient to support criminal charges. Prosecutors would be reluctant to publicize repressive law enforcement, but public panels of laypersons reviewing prosecutors' decisions not to charge might be better sources of oversight in ensuring that police are not subjecting Chileans to arbitrary arrests.

Prosecution review commissions also have the substantial advantage of democratizing the legal system. Chile's legal reformers elected not to

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<sup>195</sup> Matus, *supra* note 38, at 333.

<sup>196</sup> See *supra* Part IV.D.

<sup>197</sup> Tiede, *supra* note 41, at 16-17.

<sup>198</sup> See generally Castberg, *supra* note 20 at 52-65 (discussing the criteria used by Japanese prosecutors when making charging and indictment decisions).

<sup>199</sup> See Castberg, *supra* note 20, at 79-80 (discussing the 1993 Sagawa Kyubin scandal in Japan, in which a prosecution review commission provoked public outcry over a decision not to prosecute high-ranking officials, who were ultimately indicted and prosecuted).

adopt lay juries in criminal trials but rather have given the task of determining guilt to panels of three judges.<sup>200</sup> While the relative advantages and disadvantages of the jury system are beyond the scope of this comment, juries do have the effect of democratizing the legal process by involving ordinary citizens in the most crucial functions of trial courts.<sup>201</sup> In the absence of juries, Chile would benefit from prosecution review commissions composed of laypersons and an infusion of popular participation into the justice system. Providing an opportunity for civic participation would give the Chilean public a greater sense of empowerment and would help keep the reformed Code of Criminal Procedure responsive to the population it serves.

Finally, prosecution review commissions should be adopted to make public prosecutors more consistent and accountable. Currently, individual prosecutors may subject their charging decisions to the scrutiny of superiors within their offices or to supervisory judges, but as explained above, prosecutors may administratively suspend prosecution of cases with no oversight at all.<sup>202</sup> Additionally, to preserve high conviction rates,<sup>203</sup> prosecutors may decline to press charges in a case where the evidence indicates less than a sure victory. Prosecution review commissions would be a useful mechanism for ensuring accountability and consistency in charging decisions.

## VII. CONCLUSION

Chile's criminal procedure reform is an admirable initiative with the potential to have a positive and persistent impact on the vitality of Chile's emerging democracy. Despite its early successes, the reform may be crippled without consistent and impartial prosecution of crimes. In order to ensure the reform's success, Chile should implement a version of Japan's prosecution review commissions.

Japan, like Chile, adopted an adversarial legal system after abandoning its inquisitorial system.<sup>204</sup> Japanese lawmakers introduced prosecution review commissions as a mechanism to balance the interest of powerful public prosecutors in applying their discretion against the interest of Japanese society in ensuring that prosecutors' discretion is fairly and consistently applied.<sup>205</sup> Chilean legal scholars have consulted international

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<sup>200</sup> Abramson, *supra* note 1, at 3.

<sup>201</sup> See generally Anderson & Nolan, *supra* note 175 (analyzing Japan's introduction of juries).

<sup>202</sup> MARANGUNIC & FOGLESONG, *supra* note 18, at 8 n.9.

<sup>203</sup> Anderson & Nolan, *supra* note 175, at 8.

<sup>204</sup> West, *supra* note 19, at 686.

<sup>205</sup> *Id.* at 694-96.

approaches to criminal procedure in order to enhance the effectiveness of Chile's reform.<sup>206</sup> Japan's model of prosecution review commissions presents a compelling international solution for Chile, a country seeking to regulate its powerful new prosecutors while democratizing its legal system,<sup>207</sup> just as reformers in Japan sought to do sixty years ago.<sup>208</sup>

Prosecution review commissions offer Chile an opportunity to increase the stake of citizens in their new justice system. Beyond being the recipients of better justice, Chileans would be able to take an active part in making sure justice was done. "A civilized system of law," wrote U.S. Supreme Court Justice William Douglas, "is as much concerned with the *means* employed to bring people to justice as it is with the *ends* themselves."<sup>209</sup> Prosecution review commissions offer Chile's justice system better means and better ends. Chilean legal authorities would be wise to adopt them.

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<sup>206</sup> See MARANGUNIC & FOGLESONG, *supra* note 18, at 8 n.11, 11.

<sup>207</sup> See *supra* Part II.A.

<sup>208</sup> West, *supra* note 19, at 694-96.

<sup>209</sup> WILLIAM O. DOUGLAS, WE THE JUDGES 354 (1956).