

Chile

The year was dominated by the events related to the arrest of General (retd.) Augusto Pinochet in the United Kingdom and the investigations into past human rights violations involving Pinochet and other high-ranking retired military officers. Judges are increasingly more willing to investigate and open trials for past human rights violations. However, the 1978 amnesty law continues to be the major obstacle. The Chilean judiciary is characterised by the predominant position of the Supreme Court and a concentration of different powers within it.

The Chilean Constitution was elaborated during the military dictatorship and was approved by plebiscite in September 1980. It was amended several times, the last amendment being approved in 1997. The Constitution, although guaranteeing the separation of powers and the Rule of Law in the country, assigns an excessive role in the functioning of the democratic institutions to the military. The parliament holds legislative power and works through two chambers (the Chamber of Deputies and the Senate). Only 38 out of 48 senators are directly elected and the rest are designated (four are former chiefs of military branches). In January the Inter-American Commission on Human Rights found that the institution of designated senators - non-elected, but appointed by the military and other corporations - violated human rights by distorting political representation and was, hence, undemocratic.

People went to the polls to elect a new president on 12 December 1999. However, none of the candidates could obtain a majority, and a second round was scheduled for mid-January when Mr. Ricardo Lagos, the candidate of the ruling Coalition for Democracy (Concertación por la Democracia) obtained 51.3 % of all votes, against 48.7% for his opponent, Joaquin Lavín, of the right-wing Alliance for Chile. Mr. Lagos thus became the first socialist President of Chile after the violent overthrow of Mr. Salvador Allende in 1973. He will have to govern with an assembly in which the Senate is still dominated by a conservative majority composed of right-wing parties and non-elected senators who can still block most new legislation and all constitutional reforms.

Human Rights Background

Respect for human rights in Chile has been marked by a remarkable switch in governmental and judicial attitudes towards the investigations into and eventual trials of those responsible for past human rights violations perpetrated during the military dictatorship. One of the major events influencing this development has been the proceedings against Pinochet in foreign countries. However, these developments are also marked by the persistence of large legal and institutional obstacles, namely the amnesty law enacted in 1978, covering crimes committed between 1973 and 1978, and the alleged influence of the military in the appointment of members of key institutions such as the Senate and the Supreme Court.

In March 1999 the UN Human Rights Committee examined Chile's periodical report under the International Covenant of Civil and Political Rights. In its Concluding Observations, the Committee expressed concern, inter alia, about:

- The amnesty law that covers crimes committed between 1973 and 1978 which prevents Chile from ensuring an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterated its

previous view that amnesty laws are generally incompatible with the duty of the state party to investigate human rights violations;

- The enclaves of power retained by members of the former military regime. The Committee also observed that the composition of the Senate impedes legal reforms that would enable Chile to comply more fully with its Covenant obligations;
- "The wide jurisdiction of the military courts to deal with all cases involving prosecution of military personnel and their power to conclude cases that began in the civilian courts contribute to the impunity which such personnel enjoy against punishments for serious human rights violations. Furthermore, the continuing jurisdiction of Chilean military courts to try civilians does not comply with Article 14 of the Covenant. The Committee recommended that the law be amended so as to restrict the jurisdiction of the military courts to the trials only of military personnel charged with offences of an exclusively military nature"
- Persistent complaints of torture and the lack of an independent investigating mechanism for such complaints;
- The reform of the Code of Criminal Procedure, which will strengthen compliance with the fair trial guarantees provided by the Covenant, will not come into force for a long period of time. The Committee recommended that such period be shortened;
- The law and practice of pre-trial detention that allows the holding of people in detention until the completion of the criminal process. The Committee recommended that the law be amended so as to ensure that pre-trial detention is an exception and not the rule.

In June 1999 the OAS Special Rapporteur on Freedom of Expression visited Chile. His visit was advanced some months after a book by the journalist Ms. Alejandra Matus, the *Black book of Chilean Justice*, was banned from circulation by a court order under the state security law provisions on defamation of authorities. The ban was instigated by the Supreme Court justice, Servando Jordán, who was mentioned in the book. The author had to flee to the United States where she was granted political asylum.

The 1978 Amnesty Law and Impunity for Human Rights Violations

Judges are increasingly more willing to investigate and open trials for past human rights violations. However, the 1978 amnesty law continues to be the major obstacle. In the context of increasing willingness on the part of the judiciary to investigate and prosecute crimes committed during the dictatorship, the Minister of Defence organised a series of round table discussions with the participation of representatives of the armed forces, human rights lawyers in their personal capacity, religious leaders and prominent intellectuals. Groups representing the victims of human rights violations refused to participate.

During the year under review the Supreme Court widened its progressive jurisprudence, putting aside the amnesty law and allowing investigations and prosecutions to proceed in some cases involving forced disappearance. On 9 June 1999 Judge Juan Guzman of the Santiago Appeals Court ordered the arrest of five high-ranking military officers who had been involved in a special army unit's operation in 1973 known as "the death caravan", in which dozens of prisoners from different regions were taken from the prisons and executed. The legal ground for the arrest was kidnapping rather than murder, which is covered by the amnesty law. The view taken by Judge Guzman, that a person should be considered as abducted until it is legally proven that he or she was released or killed, was upheld by the Supreme Court in July when it ruled that the amnesty law was inapplicable in the case of the

five officers arrested pursuant to Judge Guzman's order. The core of this doctrine is that the kidnapping and disappearance of people should not necessarily be considered as having resulted in their death. The doctrine of disappearance as a continuing crime, upheld by the Supreme Court, constituted a step forward and added to the already well-settled Supreme Court doctrine that full investigations into a crime that is allegedly covered by the amnesty law, and the identification of the perpetrators of that crime, are necessary before the amnesty law can be applied in their favour.

In July 1999 Judge Carlos Cerda indicted the former head of the air force intelligence, Edgar Ceballos, for the 1974 murder and disappearance of two communist militants. The judge followed the Supreme Court's jurisprudence whereby in order for the amnesty law to be applied, a previous full investigation is required (see Attacks on Justice 1998).

In September 1999 two other senior officers (retired General Humberto Gordon and Roberto Schmied) were arrested and charged with participation in the 1982 abduction of trade union leader Tucapel Jiménez. The Supreme Court ruled again that the amnesty law was not applicable and that the trials could go ahead.

At the end of October Judge Milton Juica issued an arrest warrant against retired generals Hugo Salas and Humberto Leiva, former director and sub-director of the National Intelligence Centre (CNI), under charges of participation in and covering up of the 1987 killing of 12 members of the left-wing Manuel Rodríguez Patriotic Front, in the so-called "Operation Albania". Indictments were also served for six other high-ranking intelligence officers. These events followed the arrest and indictment in 1998 of eight former members of the intelligence service. The lack of progress in the case during 11 years in the military justice system prompted the Supreme Court to appoint a judge from the Santiago Appeals Court to work as investigating judge in the case in early 1998.

A number of cases involving serious offences which were previously closed by military tribunals, or even by the ordinary civilian courts, were reopened by decision of the Supreme Court in application of its new doctrine relating to the amnesty law described above. In all these cases investigations continue or indictments have already been served.

Investigations and prosecutions of human rights violations in Chile also continued in foreign countries. Besides the outstanding case of former ruler General Augusto Pinochet (see below) in October 1999, the President of the Supreme Court allowed extradition proceedings to start against former head of the Chilean secret police, General (ret'd.) Manuel Contreras, requested by Italy, where he had been sentenced in absence for the 1975 attempted murder of a Chilean Christian Democrat politician on Italian territory. Another former Chilean intelligence agent, Mr. Enrique Arancibia, continued his detention in Argentina, charged with the 1974 killing of Mr. Carlos Pratts, a former army chief, in Buenos Aires.

Developments in General Pinochet's Case

In October 1998 General Pinochet was arrested in Great Britain pursuant to an extradition request issued by a Spanish judge on charges of genocide, torture and hostage-taking. As General Pinochet, who is a senator for life in Chile, alleged immunity from prosecution, his case was heard first by a High Court magistrate who granted his habeas corpus petition. Then a Law Lords panel of the House of Lords quashed that decision allowing the extradition to proceed, but in December 1998 the Law Lords reconsidered their previous decision and

annulled it on the grounds that one of the member Lords of the first panel had links that may have involved a potential conflict of interests. The case was re-opened and in April 1999 the second Law Lords panel decided that General Pinochet does not enjoy immunity for certain crimes, namely torture and conspiracy to commit torture, committed between 1978, when the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force in Great Britain and Chile, and 1989 when General Pinochet ceased to be the President of Chile. In the same month the British Home Secretary, Jack Straw, decided to allow the extradition proceedings to start.

Spanish investigating judge, Baltasar Garzon, who issued the international arrest warrant, presented additional information including reports of a number of alleged cases of torture committed after 1988 involving General Pinochet, but Secretary Straw did not take them into account for his decision, although they were annexed to the dossier. Mr. Straw's decision was appealed by General Pinochet's defence.

Talks between the Spanish and Chilean governments were held during the year to submit the case to international arbitration. In October, the Belgian judicial authorities renewed their arrest warrant against Pinochet.

On 8 October 1999 the Bow Street Magistrate's Court ruled that General Pinochet could lawfully be extradited to Spain to face trial on thirty-four charges of torture and one of conspiracy to torture, therefore taking into account the additional evidence presented by Spanish judge Garzon, including the argument that the suffering of the relatives of those disappeared could amount to torture. General Pinochet's defence filed an appeal, but the decision was later confirmed by the High Court. The final decision was then left in the hands of Home Secretary Straw to carry out the extradition but, on the basis of a controversial medical report carried out at his own initiative and not disclosed to the complainants, he declared in January to be "minded" to release General Pinochet for unfitness to stand trial. After a short legal battle to oblige Mr. Straw to disclose the medical report to the complainants, among them Belgium, France, Spain and Switzerland, Mr. Straw implemented his decision. General Pinochet returned to Chile in March 2000.

However, investigations into alleged crimes involving General Pinochet continued in Chile. Judge Juan Guzman conducted investigations into a total of 57 criminal complaints brought against General Pinochet by human rights organisations and victims' relatives. The complaints refer to a probable involvement of General Pinochet in the operations of the "death caravan" (see above) in which at least 72 persons were executed. The bodies of 20 of them were never found and Judge Guzman considered these to be cases of continuing forced disappearance which are, therefore, not covered by the amnesty law (see above). The case is still being handled in the military justice system, but towards the end of the year the Public Defender's Office requested the case be transferred to the ordinary civilian jurisdiction. Meanwhile, the number of criminal complaints filed before Judge Guzman relating to the same case is increasing and may reach 90 by the beginning of the year 2000.

Despite the progress made, the obstacles for the prosecution and trial of General Pinochet in Chile are still formidable. General Pinochet, as a senator, enjoys immunity from prosecution that can be withdrawn only by a decision of the Santiago Appeals Court confirmed by the Supreme Court. Towards the end of the year parliament discussed a proposed bill to grant former heads of state, among them General Pinochet, immunity from prosecution. This would permit General Pinochet to renounce his seat as senator for life without losing his immunity

from prosecution. The bill, which is aimed at reducing the influence of General Pinochet in the Senate, at the same time guarantees him immunity that can only be taken away by a judicial decision. The bill was passed by parliament in January 2000. In March 2000 Judge Guzman requested the Appeals Court to deprive Senator Pinochet of his immunity.

The Judiciary

Structure

The judiciary comprises an ordinary court system and a special courts system. Within the ordinary system the Supreme Court occupies the highest position. There are also 17 Appeal Courts with jurisdiction over the regions, and first-level courts (juzgados de letras), with jurisdiction over a district within a region under the primary jurisdiction of an Appeals Court. The Chilean judiciary is characterised by the predominant position of the Supreme Court and a concentration of different powers within it. The Supreme Court is responsible for general oversight, including discipline and resource management and also plays a central role in the appointment procedure. The influence of supporters of the former military government has diminished, but it is still strong.

Justice Roberto Davila's term as President of the Supreme Court ended on 6 January 2000 after two years in the post. The end of his period, following a decision of the Supreme Court sitting as a plenary assembly, was somewhat controversial as he argued that his term was to be for three years.

Appointment and Security of Tenure

Judges of all levels are appointed by the President of the Republic from a list prepared by the Supreme Court for justices of the Supreme Court itself or judges in the Appeals Courts, or the Appeals Courts for first-level courts. The new law of the Public Prosecutor's office establishes that the appointment of prosecutors will follow the same method of appointment (see below).

Article 77 of the Constitution guarantees security of tenure to judges "during good behaviour". The Supreme Court can remove judges on grounds of "bad behaviour" upon the request of the President of the Republic, an interested party or on its own initiative. By majority vote of its membership the Supreme Court can also transfer a judge to a different post. Furthermore, judges and magistrates are subject to periodic evaluations by the immediate superior court (Code of Tribunals, Articles 273, 275 and 277). During 1999 the Supreme Court removed, transferred or applied other sanctions to a number of judges, which was seen by most observers as generally being consistent with legal provisions and as favourable to a corruption-free judiciary.

The wide scope of the Supreme Court's powers with regard to magistrates and judges renders the latter's independence subject to significant constraint.

Resources

The uncovering of a substantial deficit in the judiciary's annual budget caused serious concern during the year and threatened to paralyse the administration of justice in the country. This prompted accusations of mismanagement and the request for an independent

and public financial auditing of the judiciary. It further obliged the Supreme Court to adopt emergency measures that affected the hiring of a significant number of substitute and temporary judges, and also brought about the request of the director of the administrative body's resignation. The administrative body (Corporación Administrativa del Poder Judicial) is composed of five justices of the Supreme Court but is actually headed by an executive secretary whose resignation was requested. The financial gap in the judiciary's annual budget was said to reach 6 % despite the increase of funds allocated by the central government in the order of 10 %.

The issue contributed to a further public discrediting of the judiciary. In the second part of the year, however, an agreement was reached with the central government whereby the latter agreed to cover the existing gap and to transfer an additional 10 % for the 2000 budget.

Military Justice

Military tribunals continued to enjoy wide jurisdiction over all matters involving military officers, even in civil matters. Additionally, the military tribunals have jurisdiction to try civilians for certain kinds of criminal offences. Decisions in the military court system are subject to review by the Supreme Court, but the Supreme Court has rarely overruled a military court sentence. Furthermore, whenever a conflict of jurisdiction occurs between military tribunals and civilian ones the Supreme Court has tended to grant jurisdiction to the former. This tendency has begun to change in the past two years, however, as the composition of the Supreme Court no longer reflects as strong a military influence.

In January the President of the Republic revealed his plans to introduce for debate in parliament two bills affecting the military justice system. The first one would eliminate the right of the military Auditor-General to sit on the bench of the Supreme Court in all cases involving military officers (see Attacks on Justice 1998), whereas the second one would limit the jurisdiction of military tribunals and establish the primacy of the ordinary civilian courts.

In April the army Auditor-General, General (ret'd.) Fernando Torres, resigned and was replaced by Brigadier Juan Romero after holding office for ten years. The fall of General Torres was followed in August by that of his closest collaborators in the legal service of the military. Seven high-ranking officers were granted an early retirement, ending the Torres' era which had been characterised by unconditional support to General Pinochet and former military junta members.

With regard to the military tribunals' jurisdiction, the Committee against Torture recommended in March 1999 that "the law be amended to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature".

Legal and Judicial Reform

The reform of the judiciary and the legal system continued during the year with tangible results in different areas.

The Law Organising the Public Prosecutor's Office

The main achievement during the year was the enactment in October of a bill regulating the Office of the Public Prosecutor (Law 19.640) and the appointment of the first prosecutor-general the following month. The legal institution of the Public Prosecution was introduced into the Chilean legal order in 1997 through a constitutional amendment that granted it autonomy and independence (see Attacks on Justice 1998).

The new law gives to the Public Prosecutor the powers to investigate and formulate criminal charges. In the past these functions were vested in the criminal judge. The Prosecutor will have direct control over the investigations and the police forces for this purpose. However, orders to deprive individuals of their constitutional rights - such as arrest warrants - will need to be previously approved by a judge (Juez de garantías - Article 4).

The Prosecutor-General, the head of the Public Prosecutor's office, will be appointed by the President of the Republic with the consent of the Senate from a list of five candidates prepared by the Supreme Court, following an open and public contest (Article 15). The Prosecutor-General will serve for a non-renewable term of ten years and will have, among others, the power to appoint regional prosecutors, who will act as heads of the prosecutions services in each of the judicial districts, from a list prepared by the corresponding Appeals Court. The regional prosecutors will also serve a non-renewable term of ten years.

The law establishes the criminal, civil and disciplinary liability of prosecutors for on-duty acts. Disciplinary authority is exercised by the immediate superior in the hierarchical line according to an established procedure that grants the questioned person the right to defence and to file an appeal. Disciplinary sanctions rank from private reprimand to removal from office, according to the gravity of the misconduct. The Prosecutor-General and the regional prosecutors can only be removed by decision of the Supreme Court upon a request by the President of the Republic and the Chamber of Deputies of the national assembly as a whole, or through ten of its members.

It is worth noting that the procedure of appointment and removal for prosecutors resembles that of the ordinary judges within the judiciary, and presents the same inconvenience, namely, the concentration of power in the hierarchical superior of both institutions to appoint, evaluate, investigate and decide on the merits of a complaint that may lead to the removal of the person in question.

In November, the Supreme Court prepared a list of five candidates on the basis of open and public applications and hearings, and the President of the Republic appointed Mr. Guillermo Piedrabuena as the first prosecutor-general of the country.

Discussions of the New Code of Criminal Procedure and the Law on the Public Defender

The bill containing a new Code of Criminal Procedure, which is one of the pillars of the legal reform programme, continued to be discussed in the two chambers of the national assembly until the end of the year. The new code will set out a criminal procedure based on an adversarial model that is due to be implemented during the year 2000, initially in two judicial districts, and gradually extended to the rest of the country until the year 2003 when full implementation should be achieved. The entry into force of the new system envisages an increase in the number of criminal judges from 75 to 782, 404 of whom will be guarantee judges and 378 criminal judges who are to sit on benches of three during predominantly oral hearings.

Among the provisions of the new code, and the one that has provoked the most debate, is one which grants the Prosecutor control over the police during the investigations stage. This has been criticised by the uniformed police as an unjustified limitation on its initiative to investigate and an obstacle to prompt and efficient action against crime. The police currently enjoys free initiative to act.

The law on the Public Defender, another key pillar in an adversarial criminal system, was introduced in parliament for debate in July. The Public Defender's Office will be composed of approximately 417 legal defenders who will provide free legal assistance to those accused who do not have the means to pay their own legal counsel in criminal proceedings.