The expansion of plea bargaining in Chile

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Abstract 1

This essay examines the increasing use of plea bargaining in the Chilean criminal process. Although there is a global trend towards the use of plea bargaining, the specific mechanisms used in Chile are explained largely by way of reference to the US criminal justice system, being the jurisdiction that has led the general trend toward the use of negotiated settlement as a replacement for more extensive court proceedings. This essay also provides an overview of the situation in other Latin American jurisdictions, including the degree to which negotiation mechanisms have replaced full trials as a result of the reforms that have been introduced in the last three decades.

I. Introduction

In 2000, the National Congress of Chile approved a comprehensive and far-reaching criminal justice reform. The passing of a group of new laws created an entirely new prosecutorial agency, a new public defenders' office and a new Criminal Procedure Code that markedly changed judicial procedure in Chile by establishing basic due process provisions and introducing oral hearings in all the stages of the criminal justice process. 2

One of the key changes introduced by the reform was the use of public oral trials, proceedings conducted before a panel of three judges to deal with all serious offences.[1] At the same time, the new Criminal Procedure Code established a limited possibility to replace these trials with a plea-bargaining procedure in which a prosecutor could reach an agreement with a defendant whereby the latter forfeits his or her right to a trial in exchange for a more lenient sentence. 3

1 Only those offences with a maximum prison time of up to 541 days are decided by a single judge.

4 In the years following the reform, the new criminal process was widely criticised for being too lenient with defendants, especially when dealing with property-related crimes such as theft and burglary. These types of crimes were of particular concern as they are considered to be the main criminal threat to the public and are usually perpetrated by people with existing criminal records.

5 In 2016, law N° 20.931 was approved by Congress to improve the performance of the criminal justice system when dealing with property-related crimes, including a set of rules designed to promote the use of plea bargaining in such cases. This was accomplished via a complex group of mechanisms that established higher punishments for these offences and provided a significant reduction in the sentences of defendants that accepted a deal forfeiting their right to a trial.

6 This essay will explain how this reform was implemented and will then compare the evolution of plea bargaining in Chile with the corresponding experiences in some other countries.

7 The experience in Chile follows the global trend of increasingly using negotiation mechanisms to deal with the large number of offences that would otherwise overburden the resources of the police, prosecutors and court system by requiring expensive and, at times, lengthy trials. The increasingly expansive use of plea bargaining is currently one of the most important issues in criminal justice because of its potential to undermine efforts to promote due process, particularly the right to a fair public trial. Such trials allow accused persons to exercise their right to defend themselves and have all the facts of their case heard, however, the promotion of plea bargaining, a mechanism designed to incentivise the forfeiture of that right, means arrangements can be made regarding criminal activity without appropriate judicial control being exercised over the process.

8 Thaman describes the trend as follows: 'The irony of this development (towards oral and public trials), is that, with the greater ability of the defence to achieve an acquittal, or make the criminal procedure lengthier and more cumbersome, the more the system turns, informally or formally, to trial-shortening guilty pleas, confession bargaining or other consensual

procedural modes'[2] A similar observation was made by Langer who called 'plea bargaining the trojan horse of the adversarial system'[3]

The case of Chile was selected because its legal system has a good reputation in Latin America as a system that has been successful in implementing an important criminal justice reform. Different aspects of the Chilean experience have been followed by other countries in the region that see the Chilean (reformed) criminal justice system as an important source of information about its functionality. 9

Reference will also be made to the USA here because that is the country that has led the way in expanding the use of plea bargaining. The US legal system is also very influential in Latin America and is a source of abundant information and studies related to the problems associated with using negotiation as a replacement for a trial. 10

II. The context of the Chilean reform

As previously noted, the new Chilean Criminal Procedure Code was introduced in the year 2000 as a part of the political transition to democracy that started in 1988. Because of this political context, the Code was an expression of a very liberal perspective on criminal procedure and the new regulations were oriented toward the recognition of due process guarantees. The centrepiece of the Code was the oral trial before a panel of three judges in which a defendant could challenge the evidence presented by the prosecution with a lawyer provided by the State if the defendant could not afford one. The length of pretrial imprisonment was restricted and a special judge was appointed to protect the rights of defendants in this period. This was completely new for Chile as the previous system used a single judge who decided about pretrial imprisonment, composed a written report based on unilaterally collected and assessed evidence and who then 11

2 Thaman, Stephen: A Typology of Consensual Criminal Procedure, an Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial'; Stephen Thaman (ed), 'World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial' (Carolina Academic Press 2010) 392

3 Langer, Maximo: 'From Legal Transplants to Legal Translations: The globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure Trial'; Stephen Thaman (ed), 'World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial' (Carolina Academic Press 2010) 460; Máximo Langer, 'Plea bargaining, trial-avoiding conviction mechanisms, and the global administration of criminal convictions' (Annu. Rev. Criminol. 2019)

passed judgement on the case, all of which happened with very limited opportunity for the defendant to challenge the charges or evidence.

12 After 2000, different forms of alternative procedures were introduced to allow the parties to settle the case in the pretrial stage, however, most of these alternatives involved agreements that did not lead to significant punishment. In what were considered less serious cases, a token material or symbolic reparation could be made to the victim to end the prosecution. For minor offences,[4] namely those carrying a maximum prison sentence of under 341 days, where the defendant has no criminal record, the prosecutor could reach an agreement to suspend the prosecution for a period. During this period, the defendant was required to meet certain conditions and not commit another offence and, if he or she complied, the prosecution ended.

13 The alternative procedure from this period which is the most similar to plea bargaining as practiced in the USA is the *procedimiento abreviado.* It requires an agreement between the prosecutor and the defendant in which the former proposes a maximum punishment and the defendant forfeits his or her right to a trial. In this procedure, the prosecutor reduces the discretion of the judge to decide the length of the imprisonment, which normally under Chilean criminal law can vary greatly. For example, a typical scenario in a *procedimiento abreviado* is that a prosecutor will ask for four years of imprisonment, which then becomes the maximum sentence a judge can pass, for an offence that the law prescribes a period of imprisonment ranging from three to ten years. The judge can reject the procedure if the defendant's agreement was not obtained voluntarily but can reduce the punishment proposed by the prosecutor or even acquit the defendant if the evidence is insufficient for conviction.

14 After the introduction of this reform, there was a general perception of the system being inadequate to deal with the issue of property-related crimes such as theft and burglary. These offences are the most common in the country and account for approximately half of the cases handled by the criminal justice system.[5] This perception was mainly related to the fact that, according to the new Criminal Procedure Code, most cases involving property-related crimes do not allow pretrial imprisonment because the law prescribes only short prison sentences for such offences. In Chile, only

4 In Chile, offences which carry a maximum 5 years sentence are considered '*simples delitos*' (misdemeanours), offences carrying longer sentences are considered "crímenes" (felonies)

5 Riego, Cristián *El procedimiento abreviado en la ley 20.931*. Polít. crim. bol. 12, Nº 24 (diciembre 2017), Art. 12. P. 1095

property-related offences that involved violence are punishable with long sentences and in a large proportion of such cases, especially those in which the defendant has no prior criminal record, the law allows the replacement of imprisonment with probation.

15 In the system that existed before the reforms, pretrial detention was much easier to decide on because the inquisitorial judge that decided upon it was also the prosecutor of the case. Because of the new limitations on pretrial detention, there was a widespread perception among the public that the system was overly lenient, a situation that put pressure on the government and on Congress to make the criminal process harsher on crime in general.

16 During the first years of the new system, there were several attempts to change the rules of pretrial imprisonment that ended in a reform that made it almost mandatory for a judge to put a defendant in prison while awaiting trial if he or she had a criminal record or if the indicted offence was a felony.

17 However, the changes regarding pretrial detention did not suffice to stop criticism given that the number of trials each year and, as a result, the delay for a defendant to get to trial were both rapidly increasing. This concern was compounded by the fact that the rate of acquittals was simultaneously increasing.[6] The perception was not that the increased acquittal rate was due to weak cases and insufficient evidence being presented but solid cases in which administrative and logistical problems affected the ability of the prosecution to obtain a conviction. For example, police officers and witnesses failing to appear before a court was commonplace in proceedings involving property-related crimes as these gathered little public attention.

18 Public prosecutors managed to convince Congress that the central issue regarding the growing number of expensive and long trials weighing on the system could be traced to property-related crimes where the evidence is so strong that a defendant's only chance for acquittal lies in a failure in the judicial process.

19 The legal community that promoted and supported the reforms in the beginning lost its influence in Congress. It was unable to impede different counter reforms promoted in areas such as pretrial detention and police

6 For example, in 2007 there were a total of 6,086 trials, 89 % of which ended in conviction, the total number of trials in 2015 was 11,076 where 77.58 % ended in conviction. Boletines estadísticos anuales del Ministerio Público de Chile 2007 and 2015.

powers, all of them oriented to respond to the pressure from the public and the media related with the increasing fear of crime.

20 Due to the public concern about crime, a category of those offences that affect public safety was created, namely '*delitos de mayor connotación social*' (major social impact offences).[7] This category of crimes included a selection of the offences that were, on one hand, relevant in terms of frequency and, on the other hand, perceived by the general population as a menace to public safety. The exact boundaries of this category are not completely consistent in all the relevant documents nor in victimisation surveys conducted by the government, however, most of the offences that fall into this category in each of these sources are property-related crimes such as theft and burglary.

III. The reform and its impact

21 The new Criminal Procedure Code introduced in 2000 was very cautious in its regulation of plea bargaining. At the time of its approval, there was consensus among the reformers that plea bargaining was often criticised in the USA because of its rapid expansion and the danger of establishing a system in which the prosecutor has sufficient leverage to impose deals on a defendant that is unsure of being able to prove his or her innocence and sees a trial as a risky alternative that may lead to a long prison sentence. These concerns led to the Code stipulating that plea bargains can only be made in cases involving crimes where the maximum prison sentence was five years and the agreement did not establish special incentives for a guilty plea. Under the Code, the only gain for the defendant foregoing his or her right to a trial is that the prosecutor could ask for the minimum level of punishment established in the law for the offence, i.e., the defendant only avoids the risk of being sentenced to the maximum punishment established in the law. Furthermore, the new law also established that entering a guilty plea is by itself not proof of guilt and that the judge must write a decision analysing the evidence gathered by the prosecutor. If the analysis shows that the evidence is insufficient to secure a conviction, the judge can acquit a defendant despite the guilty plea.

22 In reality, the negotiation process under the original reform package passed in 2000 resulted in some cases disregarding the limits set and, in most

7 Diagnóstico de la Seguridad Ciudadana en Chile, Ministerio del Interior, mayo de 2004, p. 19.

cases where a plea bargain deal was reached, judges did a limited analysis of the evidence. Nevertheless, because the negotiating mechanism could only be entered into for crimes carrying a maximum five-year sentence, the final result was that the negotiated sentences, with a few exceptions, imposed punishments that were replaced by the above-mentioned alternative measures (eg probation) that kept defendants out of prison.

In the year 2016, the National Congress of Chile passed law N° 20931 that 23
established a set of new rules designed to strengthen the effectiveness of the criminal justice system in dealing with various crimes, especially those designated as '*delitos de mayor connotación social*'. One of the main changes to the Code was a set of rules that changed the regular method used when determining the length of imprisonment imposed as punishment for property-related offences. Those rules did not change the punishments formally, however, in practice the result of its application was an increase in the average length of sentences handed down and excluded the use of probation or other alternative measures to avoid imprisonment. At the same time, the new law allowed the use of plea bargaining when the prosecutor recommends sentences up to ten years of imprisonment for property-related offences. Finally, the 2016 reform established a new rule according to which there must be a significant reduction from the maximum prison time permitted under law for any defendant that enters a guilty plea and, what is probably the main incentive for defendants to do so, the alternatives measures could be imposed to eliminate the need for imprisonment.

The advent of these new rules in practice created a new norm that 24
established huge incentives to enter into plea bargaining arrangements in cases involving property-related crimes. In such cases, if a defendant had no prior criminal record, the guilty plea could replace five years in prison with a period of probation while defendants with a criminal record would still see their sentences reduced by several years.

The impact of these reforms in the daily practice of the Chilean justice 25
system is difficult to quantify precisely. The number of people incarcerated has not increased since the new law was established, however, the number of cases going to trial has begun to trend downward in recent years, going from 11,046 in 2015 to 9,661 in 2019.[8]However, what is unclear is whether those trials have been replaced by plea bargaining arrangements because

8 In 2020, the number of trials dropped dramatically, however, this was probably due the quarantine restrictions imposed for COVID-19.

the total number of convictions has also decreased in the same period from 125,003 in 2015 to 100,686 in 2019.[9]

26 There is no data available to know if the number of guilty pleas has increased in cases involving the offences covered by the reform. The impact of the reforms will probably appear clearer later when the prosecutors realise the power that they have to negotiate after the imposition of an important number of harsher punishments in theft and burglary trials. It will take some time for the prosecutors and defence lawyers to learn if the trials in cases in which an offer is rejected will lead to sentences as high as the ones provided in the law Nr. 20931 because it is possible that some judges consider them disproportionate.

IV. Other developments in Latin America

27 In all Spanish speaking countries in Latin America, wide-ranging criminal justice reforms have been adopted in the last three decades. In all of them, the reformed criminal procedure codes of the various States have introduced or promoted oral and public trials. At the same time, all these laws allow the possibility to employ a negotiation mechanism that allows defendants to forfeit their right to a public trial with an uncertain outcome and replace it with an agreed-upon settlement. This is the case of the reforms in Ecuador, Bolivia, Paraguay, several provinces in Argentina, Mexico, Panama, Honduras, Guatemala, El Salvador, Peru, Venezuela, Colombia and, most recently in 2017, Uruguay.[10]

28 As a case study, the Chilean experience is somewhat different to other Latin American countries where it has been more difficult to establish oral trials as the regular forum when deciding on criminal cases. The annual number of trials in other Latin American countries is not as high as it is in Chile and, because of that, their legal systems and legislatures are not under the pressure that was felt in Chile that led to the Chilean reforms that began in 2000.

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9 Boletines estadísticos anuales del Ministerio Público de Chile 2015, 2016, 2018 and 2019.

10 See for an earlier comparative study Julio Maier, Kai Ambos, and Jan Woischnik, eds., Las Reformas Procesales Penales en América Latina', Buenos Aires 2000, 446 Pages, available at https://www.department-ambos.uni-goettingen.de/data/documents/Forschung/Projekte/Reformas%20Procesales%20Penales/ReformasPPAL.pdf.

In fact, in most Latin American countries the the practical use of mecha- 29
nisms similar to plea bargaining has been limited, at least when employed as a method to obtain more convictions more expediently and inexpensively. Seemingly, the existent legal cultures in most Latin American countries' criminal justice systems do not put pressure on the actors involved to bring, process and adjudicate on large numbers of cases in a limited amount of time while using as few resources as possible.

In Argentina for example, there is strong criticism of the use of plea 30
bargaining as a result of concerns for a problem that became apparent in Chile before the 2016 reforms. The essence of the problem in Argentina is that the trial process is so long that defendants are regularly interested in negotiating a guilty plea, not to obtain a reduced sentence, but to obtain any sentence as this will normally be finished within the term of pretrial imprisonment.

Argentina has implemented some programmes designed to facilitate the 31
rapid adjudication of cases in preliminary oral hearings. In these programmes, the use of negotiations has been encouraged, not instead of but together with, quickly convening trial proceedings to reduce the delay in getting the case to court.[11]

These kinds of programmes have been implemented in other Latin 32
American countries but have had limited effects in their respective legal systems.[12] There are some jurisdictions in which it is possible to see a trend toward the use of different forms of alternative procedures; however, these cannot be described as plea bargaining and, thus, a consideration of them is beyond the scope of this paper. The mechanisms that have been extensively used in some places are related to quickly resolving cases or are oriented towards imposing very lenient, or even just symbolic, penalties without any real negotiation process taking place between the parties.[13]

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11 Hazan, Luciano and Riego, Cristian *La oralidad en las etapas previas al juicio: La experiencia de Mar del Plata in Reformas Procesales Penales en America Latina, resultados del proyecto de seguimiento IV etapa*, Ceja, Santiago 2007. Pp 257–294

12 For example: Duce, Mauricio: *La oralidad en las etapas previas al juicio: La experiencia en la ciudad de Cuenca en Ecuador in Reformas Procesales Penales en America Latina, resultados del proyecto de seguimiento IV etapa*, Ceja, Santiago 2007, pp. 315–432.

13 For example: Hartmann, Mildred and Riego, Cristian: *La Reforma Procesal en Colombia in Reformas Procesales Penales en América Latina, resultados del proyecto de seguimiento IV etapa*, Ceja, Santiago 2007. P 126. Also Fuchs; Marie -Cristine Fandiño, Marcos and Gonzalez Leonel (directores) La Justicia Penal Adeversarial en

V. The influence of the USA

33 The new Latin American criminal justice systems created in the transition to democracies after the cold war were not designed to reflect the US system. Indeed, the most influential model at the beginning of the reforms was the German legal system.[14] Furthermore, the jurists that promoted the reforms in each country shared ideas that were critical about the excessive use of plea bargaining in the USA. Those ideas came from European and American legal literature and the new Latin American legal codes were formed by the idea that, although recognising the possibility to forfeit the right to a trial was a natural consequence of the autonomy of the accused person, it was necessary to avoid an over-extensive use of negotiation mechanisms. The perception was that if a prosecutor can ask in a trial for a sentence which is much higher than the one offered in a deal, there is a risk that the differences in what punishment was offered in negotiation and what could be could be imposed by a judge would result in excessive pressure to plead guilty, an outcome that would undermine due legal process.[15]

34 In the case of Chile, the influence of the US' approach is apparent in a couple of areas. One is that the Code included some elements of the adversarial model so prevalent in US proceedings, especially in the regulation of judicial hearings. The new law established some features of pretrial hearings and of trials that enhance the opportunities for the defendant to more effectively challenge the prosecution. For example, in pretrial hearings a defendant could, under certain circumstances, ask for the exclusion of prosecution evidence and, during the trial, the law established a system of cross-examination that provides the defendant with the opportunity to challenge the prosecution's witnesses and experts.

America Latina, Hacia la Gestión del Conflicto y la Fortaleza de la Ley, Ceja, Santiago 2018. P 593.

14 For a comparison between German law and some South American reforms see Kai Ambos, Procedimiento abreviado en el proceso Penal aleman y en los proyectos de reforma sudamericanos, Revista de Derecho Procesal 3/1997, p. 545–597, available at https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/K_Ambos_proced__abreviados_Rev_Derecho_Procesal_1997_3_545-597_new.pdf

15 For example, at the time of the first reforms, the criticism from John Langbein about plea bargaining was well known among the reformers. The paper on torture and plea bargaining was translated and published: John Langbein, Tortura y Plea Bargaining, in El procedimiento abreviado, Maier, Julio y Bovino, Alberto, eds., (Buenos Aires: Editorial del Puerto, 2001), pp 3–30.

Those elements of the adversarial model and the public pressure to adopt a harsher approach to prosecution created in Chilean prosecutors a sense of having to fight an uphill battle involving their responsibility to obtain convictions in procedures where the other actors are always placing obstacles in their path. 35

The second area where the US legal system can be seen to exert influence is in the organisation of the new Chilean institutions that were established by the reforms. These institutions were all imbued with a strong sense of management, which is arguably most obvious in the prosecutorial agency, as strong administrative structures were put in place with the specific purpose of facilitating the management of the criminal justice system in a way that did not exist before the year 2000. 36

As a result of the above, the Chilean approach to prosecution can be considered more adversarial in its internal culture than elsewhere in Latin America and, at the same time, quite conscious of statistics and oriented towards results. The combination of the two above-cited areas where US influence can be seen could explain the political involvement of Chilean prosecutors eager to obtain more leeway to negotiate with defendants and obtain expedient convictions without being constantly confronted by the increased workload and risks of long and expensive trials. 37

In Latin American countries that have undertaken important reforms later than the Chilean one of 2000, the influence of the US legal system has been greater than in countries that first engaged in the process. Especially in Colombia and Mexico, the support of the US govement in the reform process is evident as US officials are permanently present in the criminal justice systems of those two countries because of the issue of organised crime. Both the early and later reforms across Latin America hav been influenced by US legal culture, especially as regard the role and functions of prosecutors.[16] 38

16 In Mexico the program of USAID called PROJUSTICIA has assisted the implementation of the criminal justice reform with a large Budget, according to its reports one specific goal has been the increasing use of agreements to dispose of cases, cf. https://www.usaid.gov/sites/default/files/documents/1862/DO2FactSheet_April2018_SP.pdf In Colombia USAID created the *Programa para el Fortalecimiento y Modernización de la Justicia,* one of its main purposes was the training of Colombian prosecutors, cf. https://pdf.usaid.gov/pdf_docs/pdacx092.pdf

VI. Conclusions

39 The influence of the US legal system's approach to plea bargaining was resisted during for two decades (1990–2010) in which most Spanish speaking Latin American countries undertook extensive reforms of their criminal procedure systems. The consensus among Latin American judges, academics and lawyers used to be that plea bargaining was a dangerous mechanism that could reduce the effectiveness, or even undermine, the main goal of the legal reforms, namely to guarantee due process and the use of oral public trials.

40 With the passage of time, public opinion has become increasingly critical of the new systems, be it in Chile and in other Latin American countries. The politicians became the main players in determining criminal-process rules and the legal community has lost power and credibility by failing to resist the changes undermining due process.

41 In Chile, one of the strategies to make the judicial system harsher on crime has been the establishment of important incentives to increase plea bargaining options, particularly for property-related crimes, a development that has created a division in Chilean criminal procedure. In most cases that pass through the judicial system, plea bargaining plays a limited role because there are no major incentives to enter a guilty plea. However, in cases involving property-related crimes committed by repeat offenders, the law has offered important incentives for defendants to forfeit their right to a trial.

42 The full impact of this change has not yet been reflected in statistics that allow it to be quantified, however, it is a step towards a major change in Chilean criminal procedure. Furthermore, movement in this direction suggests that the key actors involved with the Chilean legal system are abandoning their original scepticism about plea bargaining as they begin to perceive it as the most important tool that is readily available to accomplish efficiency in producing convictions and, at the same time, avoid long and expensive trials.

Further Reading

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