

ANNUAL LECTURE
JUDGES, CITIZENS, AND A DEMOCRATIC RULE OF
LAW:
BUILDING INSTITUTIONAL TRUSTWORTHINESS TO
RECOVER PUBLIC TRUST*

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Abstract

This article argues that even though in Chile several successful reforms have been made, such as the Criminal Procedure reform, the Labor Procedure reform and the Family courts reform, public confidence in the justice system is still very low. It is argued that this gap should serve as an alert to legal professionals and policymakers in Chile that it is time to rethink and adjust the reform agenda. The article claims that the Chilean justice system must attend to its trustworthiness, which requires that it better incorporate and serve the fundamental principles of democracy, under Lincoln's famous conception of a democratic government as one that is "of, by, and for the people". To accomplish this task, a new set of reforms is suggested aimed at making the justice system more democratically trustworthy and, therefore, capable of recovering citizens' trust.

Key words: *judges, public confidence, democratic rule of law, judicial reforms.*

I. INTRODUCTION

During the transition to democracy, justice reform was high on the political agenda in Chile and in all of Latin America. Judiciaries emerged from the authoritarian era, at best, weak and ineffective, and, at worst, complicit in repression. Since then, much has been done around the region to make the judiciary more procedurally correct, professional, and efficient.¹ In some countries, and especially in Chile, these

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1 DOMINGO & SIEDER (2001); HAMMERGREN (2007).

reforms have brought notable improvements. In Chile, judicial independence scores and other indicators of legal system functioning are now among the highest in Latin America.² In the World Justice Project rankings for the last five years, Uruguay, Costa Rica and Chile have occupied the top three places, respectively, in the Latin American and Caribbean region.³ To be sure, regional analysts generally group Chile with Uruguay and Costa Rica as the countries in the region possessing high levels of rule of law, and characterize Chile as a country with a “culture of legal compliance”.

Yet, since the 1990s, public confidence in the justice system in Chile has plummeted and stagnated at very low levels.⁴ This is evident in both national and cross-national surveys. In a public opinion study conducted by the UNDP in 2016, for example, only 8% of respondents agreed that “In Chile, the judicial system functions well”.⁵ In another study led by the Center for Surveys and Longitudinal Studies of Chile’s Catholic University in 2015, 59% of those surveyed indicated that “the current state of the judicial system in Chile is worse than it was ten years ago”, 30% mentioned that “it’s the same as it was ten years ago”, and only 11% responded that “it is better than it was ten years ago”.⁶ In surveys in Latin America, meanwhile, Chile falls consistently below the regional average of confidence in the justice system (which is not very high), and repeatedly ranks among the countries with the lowest levels of such confidence, together with Honduras and Paraguay—countries whose levels of institutional capacity and stability are much lower than those of Chile.⁷ Finally, in the world polls conducted by the Gallup organization and reported in 2007 and 2014, Chile had the lowest judicial confidence scores of the 34 OECD countries.⁸

In this article, I argue that this gap—between indicators of institutional quality and public perceptions of the justice system—should serve as an alert to legal professionals and policymakers in Chile that it is time to rethink and adjust the reform agenda. Over the past several decades, juridical reforms have been highly technical in nature, aimed at updating procedural codes, modernizing existing structures, and improving efficiency, with the primary goal of attracting investment and attending to

2 See LINZER & STATON (2015), p. 237.

3 See <http://data.worldjusticeproject.org/#/groups/CHL>.

4 Throughout this article, I use the English terms “confidence” and “trust” interchangeably. This follows VAN DER MEER (2017), p. 4, who states, “While we may distinguish conceptually between trust and confidence, empirically the two are hardly separable.” Moreover, in Spanish, there is only one word for both terms: *confianza*.

5 UNDP (2016).

6 See <http://www.encuestas.uc.cl/Documentos/Publicos/Archivos/Presentaci%C3%B3nDPP.pdf>

7 See <http://www.cl.undp.org/content/chile/es/home/presscenter/pressreleases/2016/09/09/pnud-presenta-iv-encuesta-auditor-a-a-la-democracia.html> y <http://www.latinobarometro.org/latOnline.jsp>

8 See http://www.keepeek.com/Digital-Asset-Management/oecd/governance/government-at-a-glance-2015/citizen-satisfaction-with-public-services_gov_glance-2015-56-en#page2.

the concerns of powerful economic sectors.⁹ They have been conceived and designed from the top-down, and have focused on what goes on in or around the courtroom between the various operators of the system¹⁰. Although by several measures, these reforms have been quite successful in Chile¹¹, and, to borrow a metaphor from Jorge Correa, the judiciary, as the “Cinderella” of the Chilean political system, has been able to rise from her poor and subordinate condition to stay and dance at the ball,¹² the low confidence that the Chilean public has in its justice system indicates that a new set of reforms is needed.

Specifically, what I argue in these pages is that in order to recover (or perhaps to construct) public trust, the Chilean justice system must attend to its trustworthiness, which requires that it better incorporate and serve the fundamental principles of democracy, and of a democratic rule of law. Building on Abraham Lincoln’s famous tripartite conception of a democratic government as one that is “of, by, and for the people”,¹³ but adapting it somewhat,

I contend that there are three principal matters that public policymakers must address:

- First, they should ensure that professional training and incentive structures in the justice system enable its operators to practice and communicate a commitment to the equal protection of fundamental rights and to a fair and dignified treatment of all citizens—that is, **that the system of justice is for the citizenry.**

- Second, they should strive to recruit and appoint judges with diverse characteristics and experiences, such that all citizens might see themselves reflected and feel included in the judiciary—that is, **that the system of justice is of the citizenry.**

- Third, they should construct mechanisms of legal empowerment that enable all citizens to identify, claim, and enforce their rights—that is, **that the system of justice is by the citizenry.**

Each of these issues could be the subject of its own article, but I combine them here to emphasize the need for a paradigm shift—from a technocratic and top-down approach to one based in the recognition that, in a democracy, citizens, in addition to being rights-bearers, are “the source and the justification of the very claim to rule upon which a democratic polity relies.”¹⁴ Therefore, it is incumbent upon those who

9 BRINKS (2009); GHAI & COTTRELL (2010); O’DONNELL (2004).

10 GOLUB (2011); HADFIELD & WEINGAST (2014); TASK FORCE ON JUSTICE (2019).

11 BLANCO, HUTT, & ROJAS (2004); BHANSALI & BIEBESHEIMER (2006).

12 CORREA SUTIL (1999).

13 Abraham Lincoln, *Gettysburg Address*, 19 November, 1863. The full sentence reads: “It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that *government of the people, by the people, for the people*, shall not perish from the earth.”

14 O’DONNELL (2004), p. 38.

administer the law to orient themselves toward and strive to serve all citizens on an equal basis. When they do so, social science research suggests, people's perceptions and assessment of the justice system will improve.¹⁵

In the pages that follow, I will explain, first, why the gap between institutional quality and public trust in Chile should concern us. Next, I will present the theoretical foundations of my analysis, highlighting the agreement between normative and sociological theories, respectively, on democratic legitimacy and justice institutions.¹⁶ With that established, I will construct my argument for a new set of reforms aimed at making the justice system more democratically trustworthy and, therefore, capable of recovering citizens' trust. I will organize the argument around Lincoln's tripartite conception (noted above), elaborating, each in turn, why and how to reform the justice system to be for, of, and by the citizenry. In each section, I will offer examples from various sources and from various countries, examples which are intended to be suggestive but by no means exhaustive. In addition, throughout the article, I will make reference to examples from my latest collaborative research project, in which we carried out focus groups with Chilean citizens, organized by socio-economic segment, sex, and age, exploring their perceptions of the justice system, the origins of these, and the relationships between their perceptions and use, actual or hypothetical, of the justice system in conflicts with private and public actors.¹⁷

II. A CONFOUNDING AND WORRISOME GAP

As described above, there is a notable gap in Chile between the performance or the quality of the judiciary, on the one hand, and public confidence in the justice system, on the other. The following graphics illustrate this gap using data on judicial independence and confidence in the judicial system. The upper line in Figure 1 (below) shows the improvement in the institutional quality of the judiciary in Chile between 1995 and 2014, captured by Linzer and Staton's judicial independence measure. The bottom line shows confidence in the justice system as measured by Latinobarómetro. What should be noted in this figure is that the two lines do not move together, as theory predicts (see p. X below), but rather they move in opposite directions.

15 See pp. XXX-XXX below.

16 This article takes as its premise that public confidence in the judiciary serves as a proxy for the "legitimacy" of the judicial system. As NEWTON (2007, p. 3) argues, "Institutional confidence comes close to the concept of legitimation, which has a more profound importance for the system of government than trust in particular political leaders or the government of the day.... In [David] Easton's terms, institutional confidence is a measure of support for the political regime that is more important for our understanding of political stability than more volatile measures of support for [specific] authorities."

17 This project was funded by the Human Rights Initiative of the University of Minnesota and carried out in collaboration with Dr. Janice Gallagher of Rutgers University-Newark, with the assistance of Valentina Salas Ramos and Juliana Restrepo-Sanín. The focus groups were convened and moderated (by us) with professional support from Cadem, S.A. in August 2017. Select findings are available in HILBINK *et al.* (2019), while others are presented in articles currently under review.

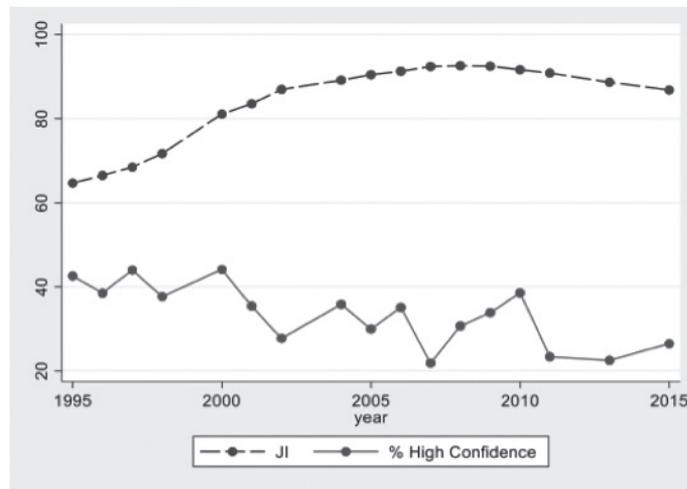


Figure 1: Judicial Independence and confidence in the justice system in Chile, 1995-2015

Using the same data sources, Figure 2 (below) traces the relationship between judicial independence (horizontal axis) and trust in the justice system (vertical axis) in Latin America for the years 2014 and 2015, respectively. What stands out here is that, although Chile has the highest judicial independence score in the region, the level of trust in the justice system is on a par with that of Venezuela, which has the region’s worst level of judicial independence.

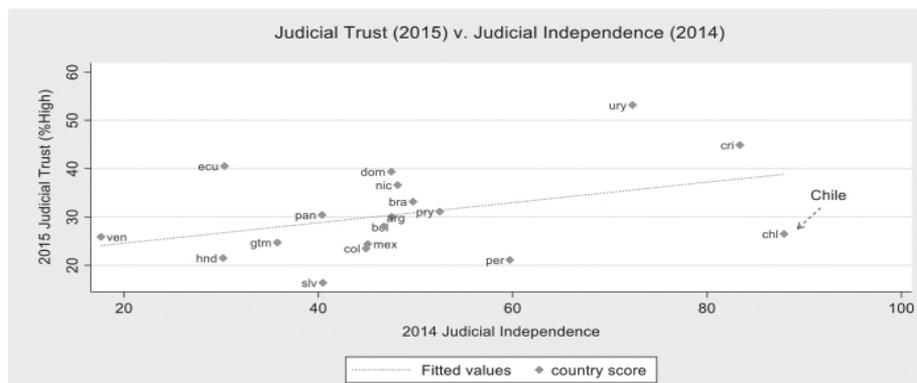


Figure 2: Judicial Independence (Linzer and Staton data from 2014) and trust in the justice system (Latinobarómetro 2015) in Latin America.

The gap illustrated in these figures is confounding, because conventional wisdom holds that what citizens seek from the judiciary is impartiality and fair treatment,¹⁸

18 ROTHSTEIN & STOLLE (2008), pp. 445-7; USLANER (2011), p. 144.

and, given that judicial independence is key for guaranteeing judicial impartiality,¹⁹ public trust in the judiciary should rise as judicial independence improves. Specifically, courts that function independently from the control of powerful actors are able to adjudicate cases *sine spe ac metu*—without the fear of punishment or the hope of reward—and, thus, can offer impartial and fair treatment to the parties in cases before them, regardless of who they are.²⁰ Independent courts should thus provide,²¹ or at least project, the fairness and impartiality that build individual confidence in the judiciary.²² As Julio Ríos-Figueroa puts it, “‘independence’ is the bedrock for judges’ legitimacy before the parties in the dispute, the political actors, and the public at large.”²³ However, in Chile, there is an inverse relationship between judicial independence and public trust in the judiciary.

Moreover, this gap is worrisome for three reasons—one moral and two prudential. First, it signals that the good institutional performance that experts are observing at the macro level, and that is picked up in international indicators, is not translating into lived experiences of fairness and impartiality at the micro level. In other words, institutional improvements are not “trickl[ing] down to the lives of individuals”.²⁴ From a purely normative perspective, then, this gap should concern us.

Second, institutional trust is theorized to be of fundamental importance for the effectiveness of the judicial system and the integrity of the rule of law.²⁵ Much literature holds that when citizens perceive that judicial institutions function rightly and properly, they will have a sense of duty to comply with the law, even when particular decisions go against their interests.²⁶ Moreover, empirical studies indicate that citizens who have confidence in the judicial system will be more likely to cooperate with or turn to legal authorities to resolve disputes, to respond to victimization, and to seek remedies if and when their rights are violated²⁷, while those with low levels of institutional trust are more likely to express greater acceptance of or engagement in illegal behavior, including lethal vigilantism.²⁸ Low public confidence in the justice system may thus portend risks to the rule of law.

Third, and relatedly, because courts are key institutions in maintaining horizontal accountability,²⁹ and because “attitudes about the justice system...color

19 SHARPE (2018), p. 250.

20 BÜHLMANN & KUNZ (2011), p. 322.

21 PEFFLEY & ROHRSCHEIDER (2014), p. 190.

22 BÜHLMANN & KUNZ (2011), p. 334.

23 RÍOS-FIGUEROA (2016), p. 24.

24 AYDIN ÇAKIR & SEKERCIOGLU (2016), p. 645.

25 CANN & YATES (2016), p. 7; CARLIN, LOVE, & SINGER (2016), p. 208.

26 GIBSON (1989); HOUGH, JACKSON & BRADFORD (2013); TYLER (2006).

27 ROBERTS & STALANS 1997; TYLER (2006); HERNÁNDEZ 2010; TYLER & JACKSON 2014.

28 MARIEN & HOOGHE (2011); NIVETTE (2016); TANKEBE (2009); TYLER (2006).

29 O'DONNELL (1999).

citizens' view of much of the rest of the political system",³⁰ "not only the strength of the judiciary but also the stability of a democracy itself depends on the individuals' confidence in the judicial system".³¹ As political scientists Ryan Salzman and Adam Ramsey put it, "When judiciaries do enjoy public support, they build reservoirs of legitimacy and allow for the consolidation of the rule of law...When [they] do not enjoy such support, they can contribute to [regime] instability".³²

For all of these reasons, the argument that I advance in this article is that in Chile, as in many other democratic countries, new reforms to the justice system, aimed at strengthening the "democratic" aspect of the democratic rule of law, are *urgent*.³³ As has been observed in recent years, liberal democracy is "in existential danger" around the world³⁴ and various analysts attribute this situation to its tendency to offer, in the words of Yascha Mounk, too much liberalism and too little democracy, or an "antidemocratic liberalism",³⁵ in which a "technocratic mode of governance" insulates decision making from popular participation and input. Average people thus "don't recognize themselves" in the people that govern them, "and when they look at the decisions taken by them, they don't see their preferences reflected in them".³⁶ This has opened the door to populist movements and parties in numerous countries, including the U.S., putting at risk democracy itself. As examples like Hungary or Venezuela attest, populist leaders, whether on the Right or the Left, often move, in the name of "the people," to rewrite the rules of the game in order to undermine political competition and perpetuate themselves in power.³⁷ With this in mind, I join Mounk in emphasizing the urgency of rethinking and reforming political systems from the perspective of the citizenry. With him, I insist that this does not mean doing away with liberal ideals and institutions (such as the rule of law and independent courts), but rather reforming and reorienting them around democratic principles. As Mounk notes, the challenge is "to find ways of reforming these institutions to strike a better balance" between the technical and professional performance of liberal institutions and their capacity to respond to the citizenry.³⁸ To achieve this, we must think of responsiveness not in terms of democratic accountability of judges, but rather in their democratic trustworthiness.³⁹

30 PEFFLEY & HURWITZ (2010), p. 12.

31 BÜHLMANN & KUNZ (2011), p. 318.

32 SALZMAN & RAMSEY (2013), p. 74.

33 For a discussion of this term, see p. XXX below.

34 MOUNK (2018), p. 18.

35 MOUNK (2018), ch. 2.

36 MOUNK (2018), p. 60.

37 LEVITSKY & ZIBLATT (2018).

38 MOUNK (2018), p. 97.

39 In an article on the role of the judiciary in transitions to democracy, GARZÓN VALDÉS makes this distinction (in Spanish, between "*responsabilidad democrática*" and "*confiabilidad democrática*" in reference to high courts, whose trustworthiness (*confiabilidad*) is "severely affected by two factors: the selection

III. THEORETICAL FOUNDATIONS

An anchoring concept of this article is the democratic rule of law, as articulated, among others, by Argentine political scientist, Guillermo O'Donnell (who, sadly, passed away a few years ago). O'Donnell argued that one can speak of a democratic rule of law when the legal system satisfies three criteria: "1) It upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts".⁴⁰ O'Donnell emphasizes that the democratic rule of law, like democracy itself, is based in "a universal premise of equality",⁴¹ that is, in the fundamental idea that all human beings are, and deserve to be treated as, moral and political equals.⁴² As O'Donnell puts it, under a democratic rule of law, "everyone, including those who are not political citizens (nonadults and foreigners), is construed as an agent...[as] a carrier of a bundle of civil and eventually also social rights...[and] has a legally grounded claim to be treated with full consideration and respect, on an equal basis with everyone else."⁴³

From this perspective, I make the argument that justice reforms must be guided by the idea of a system "of, by, and for the citizenry." This argument is not based in a populist or majoritarian understanding of democracy, which postulates the existence of a general will of a unified (and homogeneous) people that can (and must) be reflected and implemented directly by elected representatives. Thus, it in no way implies that judges should be directly elected or that they should have their finger in the wind, deciding cases based on local or national public opinion.⁴⁴ Rather, my argument is based in the idea that the normative legitimacy of judicial institutions in a democracy depends on the effective recognition of all citizens as legal agents, equal in rights and dignity.⁴⁵ Many times, particularly in contexts of high social inequality, state authorities "tend to forget that their right to exercise authority derives from those 'below', who are carriers of rights and should be treated with full consideration and respect".⁴⁶ When this happens, the state authorities lose their democratic legitimacy.

procedure of the judges and/or a repeated or permanent divergence between their judgments ... and the *communis opinio*" (2003, p. 31). Obviously, here, addressing the issue of confidence in judges, courts, or the judiciary in general, I depart from his focus on high courts and judicial review, but I nonetheless find his distinction relevant and useful.

40 O'DONNELL (2004), p. 36.

41 O'DONNELL (2004), p. 39.

42 RAWLS (1971); DWORKIN (1997).

43 O'DONNELL (2004), p. 38.

44 CORREA SUTIL (1990). For a recent analysis of the benefits and risks of judicial elections in the United States, see GEYH (2019).

45 O'DONNELL (2004). This argument echoes ideas on democratic legitimacy found in DWORKIN (1997), HABERMAS (1996), and DÍAZ (1966).

46 O'DONNELL (2004), p. 39.

This normative perspective on the legitimacy of judicial institutions in democracy intersects with the empirical literature on the sociological legitimacy thereof. As the U.S. political scientist Tom Tyler and his collaborators have argued with regard to the United States and Western Europe, policymakers often assume that increased effectiveness in the justice system will produce increased public support. However, time and again, their research has found that people's evaluations of justice system institutions are based more on normative than on instrumental performance-based judgments. In their book, *Trust in the Law*, Tyler and Huo find that "people base their judgments on how well [they perceive that] the police and courts treat the public" and "not...primarily on either the impact of such institutions on the rate of crime or other instrumental issues such as delay or cost".⁴⁷ In addition to perceptions of a fair and impartial process in which the parties feel heard, researchers have also found that relational factors are fundamental for the perception of fair treatment. That is, people evaluate the degree to which judicial authorities recognize and include citizens among those who have status before the courts. As Tyler and Sevier conclude in a study conducted in California: "In particular, people are concerned about whether they are treated with dignity, courtesy and respect when dealing with legal authorities," and if the treatment they receive reflects "respect for their rights as a citizen". In addition, they note, people focus on whether the authorities "tak[e] the concerns of the people involved seriously, and try[] to find solutions that address those concerns and recogniz[e] their needs in the situation."⁴⁸ If the authorities communicate respect and consideration for citizens, they communicate trustworthiness and create trust.⁴⁹

In what follows, I thus present three areas of reform that aim to improve the democratic quality of the rule of law and (thereby) improve the democratic trustworthiness of the justice system in Chile. The social science literature on institutional trust emphasizes that public trust responds to the perceived trustworthiness of institutions.⁵⁰ And while it is true, as noted above, that citizens have expectations of impartiality and fair treatment from the justice system,⁵¹ it is not enough for judges to meet technical professional standards, of procedural correctness and independence, or that they process cases rapidly and efficiently.⁵² Rather, in order for judicial institutions to win public trust, citizens must perceive and experience the judicial system as a whole, and the courts and judges of which it is composed, as trustworthy in a democratic sense, that is, as actors and entities that treat and serve all people as moral and political equals.

47 TYLER & HUO (2002), p. 196.

48 TYLER & SEVIER (2013), pp. 1129-1130.

49 TYLER & SEVIER (2013), p. 1116.

50 LEVI & STOKER (2000); VAN DER MEER (2017).

51 ROTHSTEIN & STOLLE (2008), pp. 445-7

52 USLANER (2008), pp. 41-42.

IV. JUDGES AND JUSTICE *FOR* THE CITIZENRY

4.1. Judges and Justice *for* the Citizenry: Why?

The famous conception of democratic government that Lincoln articulated in the Gettysburg Address ends with “for the people,” but I begin here with that part of the formulation because the arguments regarding the need for judges *for* the citizenry have been around a long time, animating reform debates in Chile and other (re-)democratizing countries, and are thus likely to sound more familiar than others I will present. Indeed, already in 1990, in an article entitled, “Training Judges for Democracy” Jorge Correa Sutil affirmed the importance of building “a democratic legal and judicial culture permeated by the principle that judges owe their power and authority to a popular delegation of power, *that it is in the name and for the benefit of that people* that they are granted the jurisdictional function”.⁵³

The authoritarian era made clear, in Chile and other places, that formal judicial independence, while important, in no way guarantees the behavioral independence of judges.⁵⁴

Judicial appointment, procedures and decisions, compensation, promotion and discipline can all be free of control and manipulation by political actors, but judges may still remain passive in the face of rights violations and abuses of power. Judges must not only be free of impediments to rule against powerful actors to defend rights and legal and constitutional principles, but rather they must also be willing to do so, to see it as their professional role,—their professional *duty*.⁵⁵ Therefore, even as the judiciary must be organized around the regulative ideal of judges as “neutral thirds”⁵⁶ that administer justice in a fair and impartial manner, the identity and purpose of the judiciary and its operators cannot be value neutral. As Linn Hammergren argues, an “independent judiciary will inevitably promote some set of values, both in its traditional functions and in its interactions with the rest of the government.”⁵⁷ A democratic rule of law requires that this set of values include the equal protection of fundamental rights, the legal accountability of rulers, and a commitment to “affirm the political equality of all citizens”.⁵⁸ If the judicial system does not incorporate, practice, and effectively communicate these values, it might operate in a technically fair and impartial way, but it will not be perceived by citizens as doing so.⁵⁹

53 CORREA SUTIL (1990), p. 294, my emphasis.

54 HILBINK (2007).

55 HILBINK (2012).

56 SHAPIRO (1981).

57 HAMMERGREN (1998), p. 28.

58 O'DONNELL (2004), p. 32.

59 DE SOUSA SANTOS (2015).

4.2. Judges/Justice for the Citizenry: How?

Reforms aimed at promoting a justice system *for* the citizenry must, therefore, include mechanisms to transmit and nurture democratic values and practices among judges at all levels, as well as among all operators of the system. This begins with legal and judicial training anchored in constitutional and democratic rule of law principles. As Javier Couso and I argued in a chapter that we co-authored several years ago, there has been an important change in legal training in Chile since the 1990s, from a “nineteenth-century” legal formalism, as Correa Sutil describes it,⁶⁰ toward “new constitutionalism,” with important effects on judicial behavior.⁶¹ A commitment to constitutional guarantees notably informed the training of the operators of the new criminal procedure, as well as of those in the labor and family courts,⁶² and it is important to nurture and maintain this commitment in all jurisdictions, including the civil courts, where reform is pending.⁶³

It bears mentioning that in the study that we conducted with focus groups in Santiago in August of 2017,⁶⁴ the rights commitment of the criminal procedure system was something that participants recognized. In all the groups, independent of class, sex, and age, there was a basic knowledge of the new criminal procedure, and participants expressed confidence that, if someone were falsely accused, when they were brought for arraignment, the judge would order them released from detention. That is, the participants recognized that judges (those charged with pre-trial functions) protect criminal due process.

Nonetheless, the general opinions of the justice system that focus group participants offered were extremely negative, though not surprising, given the survey data I cited above (see p. XXX). We found that these negative evaluations were related to other perceptions, and sometimes experiences, of discrimination and injustice. Across socioeconomic level, sex, and age, participants shared a vision of the justice system that works differently for people with prestigious family names, money, contacts, and/or power, compared with the way it functions for everyone else: “It’s that justice is not the same for everybody,” affirmed an upper-middle class young woman. “Social status influences greatly what happens to you,” said an older, lower-middle class man. “We all see what happens when an executive is taken prisoner... We all know he is going to get out, get it?” declared a young upper-middle class man, but “if you are poor, yer’ toast,” observed an older, upper-middle class man. The justice system “only protects some people,” commented an older, lower-middle class woman; “Whereas if you live in a poorer place, they aren’t going to concern

60 CORREA SUTIL (1990), p. 307.

61 COUSO & HILBINK (2011).

62 For the commitment with constitutional warranties in the new criminal law procedure, see HORVITZ LENNON & LÓPEZ MASLE (2004). The same tendency can be found in the new labor law procedure for the protection of fundamental rights [*“tutela laboral de derechos fundamentales”*]. UGARTE CATALDO (2009).

63 SABA (2017).

64 See p. XXX and note XX above.

themselves with helping you, or they'll be less concerned," added another member of her group.⁶⁵ In addition, among the low-income participants, quite a few expressed that the justice system doesn't take into consideration either the social contexts in which they live, nor their needs and concerns. For example, a young lower/middle class woman criticized the fact that the system punishes someone who sells pirated CDs at the market to earn a living the same way as it does someone who kills or sells drugs: "it's not the same...[but] they have them all alike [there]." Another woman from the same group commented that when she filed charges against her ex-partner for psychological abuse, "none of [the options that they offer you] are useful when you have other needs;" for example "if he is in prison during the day, it won't help you to get the income you need for your children, when what you need is for him to work or that he gets some kind of psychological treatment."

These findings indicate the importance of thinking about the judicial function in democracy not only in terms of formal due process, but also in terms of equal treatment and effective protection for all. Although judges will always be limited by what the law requires and allow (something recognized by our focus group participants), training and professional development of judges, and of other justice system operators, based more strongly in knowledge of and sensitivity to the social reality of those who come before the courts could help to reorient judicial culture and performance toward the perspectives and needs of the most vulnerable citizens.⁶⁶

There are different mechanisms for achieving this. One, which has already been developed in Chile and should be maintained and expanded, is legal aid clinics that bring aspiring lawyers and judges in direct contact with members of communities to which they might not belong.⁶⁷ This experience can help to render these legal professionals more familiar with and more sensitive to the needs and perspectives from below, as well as to give them the opportunity to develop "soft" skills, which are so important to the perception of fair treatment.⁶⁸ Another mechanism, introduced by the Canadian Judicial Council as part of judicial training in that country, is a "social context awareness program" that includes sessions on poverty, literacy, aboriginal issues, disability, and domestic violence, among others. The goal is to ensure that judges are "aware of diverse social views and invited to be receptive to arguments from different sections of the society." The idea is that, with such awareness and receptivity, judges "may be trusted to reach a decision acceptable to the community, or, at least, to express reasons with appropriate sensitivity".⁶⁹

65 Such opinions were evident in the survey conducted by the the Center for Surveys and Longitudinal Studies of the Catholic University in 2015, in which 95% of respondents indicated they "agreed" or "agreed strongly" that in Chile "there are privileged groups, who receive judicial benefits either because of their family name or their social status", and only 13% "agreed" or "agreed strongly" that in Chile "justice is equal for everyone."

66 DE SOUSA SANTOS (2015), cap. 4.

67 CARRILLO & ESPEJO YAKSIC (2013).

68 CHARN (2003); TYLER & SEVIER (2013).

69 TURENNE (2015), p. 13. There is a need for empirical studies on the effects of such programs on

In addition to suitable training, it is also important that the incentive structure of the institution rewards, and certainly does not punish, judges and other officials that show a commitment to and excel in the provision of justice *for* the citizenry. As has been observed for many years now, the institutional structure of the Chilean judiciary nurtures a corporative and closed mentality, in which judges are oriented principally to their hierarchical superiors, who supervise and evaluate their performance and maintain control over their promotion.⁷⁰ Responding to this problem, the National Association of Magistrates of Chile has repeatedly proposed a series of reforms to make the standards and procedures for judicial appointment, oversight, and promotion more transparent, consistent, and fair; advocating for the creation of a new administrative organ, separate and independent from the Supreme Court, to manage the institution, and even for doing away with the judicial career.⁷¹ These proposals, aimed at strengthening the internal independence of judges, should be considered together with other mechanisms that invite public participation,--not necessarily in the review of individual judges, but rather in global evaluations of institutional performance on specific criteria.⁷² As Rottman and Tyler argue, judicial performance “might be rated highly by legal professionals but at the same time be poorly rated by the public”. In particular, the public puts more emphasis than do legal professionals on procedural justice, especially on the quality of treatment (if judges listen attentively to all parties, if they treat all parties with dignity and respect, if they are in touch with the community). Thus, judicial performance evaluation programs that encompass public input can and should include mechanisms for evaluating how judges treat the people that come before them.⁷³ This would permit the establishment of improvement goals that are in line with public expectations, and might create a dialog between the judiciary and those it is meant to serve.

V. JUDGES/JUSTICE *OF* THE CITIZENRY

5.1 Judges/Justice of the Citizenry: Why?

But even if judicial training were optimized and institutional incentives were better aligned with public expectations, it is still possible that citizens would not see themselves represented or reflected in the judiciary. Thus, reforms that seek to achieve a justice system that is also *of* the citizenry are needed. It is commonly understood

judicial behavior as well as on the perception of citizens affected by them, directly or indirectly, in Chile and in general.

70 ATRIA (2005, 2007); FLORES MONARDES (2006); HILBINK (2007, 2014); VARGAS (2007); ZAPATA (2008, 2009).

71 See, for example, ASOCIACIÓN NACIONAL DE MAGISTRADOS (2016).

72 For U.S. examples, see PODKOPACZ 2005 and the 2016 publication of the Insitute for the Advancement of the American Legal System, *Transparent Courthouse Revisited: An Updated Blueprint for Judicial Performance Evaluation*, at: https://iaals.du.edu/sites/default/files/documents/publications/transparent_courthouse_revisited.pdf

73 ROTTMAN & TYLER 2014, p. 1050.

that when Lincoln spoke of government “*of* the people,” he meant a government originating from or composed of representative members of society as a whole. In regards to the legislature, this idea is well established; John Adams, for example, argued that a republican legislature “should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them.”⁷⁴ Although it is not possible to transfer this ideal directly to the judiciary, whose members do not represent citizens in the same sense,⁷⁵ it seems reasonable to claim that those who make up the judicial ranks should not come from only one sector of society.⁷⁶ On the contrary, the diversity of citizens, full and equal in political status and rights, should be present and represented in all the institutions of the state,⁷⁷ not to give voice to “fixed and specific interests or identities,” but rather to include different perspectives in “a dynamic process” of deliberation and decision making.⁷⁸ As two British analysts put it, “a judiciary that is comprised almost exclusively of members of a small class – White, male, heterosexual and with a socially and economically advantaged background – cannot command the broad community respect which acceptance of its decisions demands. As equality is increasingly recognized as a fundamental component of a well-functioning and modern, liberal democracy, a wholly unrepresentative judiciary is no longer acceptable.”⁷⁹

However, as Roberto Gargarella argues, in Latin America as in the United States, the judiciary was constructed not as an institution *of* the people, but rather as one removed from the people.⁸⁰ The traditional understanding of impartiality, explains Gargarella, required that judges be socially distanced from the persons whose cases they might adjudicate,⁸¹ and especially distanced from those who might have “irrational” demands and expectations (e.g., poor people, women, people of color). The way in which this “distance” was achieved was not only via the institutional insulation of the judiciary, but also, argues Gargarella, via judicial selection rules that ensured that judicial posts were occupied by people socially separate from the common people (and from their irrational tendencies). In historical practice, this meant that only White, wealthy, and educated men could reach the judiciary.⁸² And an absence of social pluralism continues to characterize the judiciary in many

74 Cited by GOODIN (2008), p. 233.

75 KENNEY (2012), p. 130, who states, “Judges are not agents and voters their principals.”

76 CORREA SUTIL (1990), p. 311 notes that, to be democratic, a judiciary must include and reflect the pluralism of the society (specifically mentioning ethnic, political, economic, sex and age variety).

77 PHILIPPS (1995). This is the principal argument behind the movement for gender parity in public institutions around the globe, including the Association of Women Magistrates of Chile—MA_CHI. See <http://www.magistradaschilenas.cl/wp-content/uploads/2018/05/BOLETIN-CONFERENCIA-JUDICIAL-PARIDAD.pdf>

78 DAHLERUP (2014), p. 67; IFILL (2000).

79 BINDMAN & MONAGHAN (2014), p. 7.

80 “Too far removed from the people,” citing James Madison, in Federalist 49 (GARGARELLA (2002)).

81 See CORREA SUTIL (1990), p. 306.

82 GARGARELLA (2002), p. 8.

countries, including Chile, particularly in the higher courts.⁸³ This lack of social diversity in the judicial system is problematic in terms of how the system works and how it is perceived to work.

First, a justice system lacking in social diversity excludes the possibility that a wide range of experiences and points of view are applied in the administration of justice, and without this range, it is less likely that the courts will be sensitive and receptive to the needs and concerns of different citizens.⁸⁴ This does not mean, for example, that only women (or members of other historically disfavored social groups) can understand the perspectives of women (or of these other groups), or (continuing with the example of gender) that female judges decide in a manner distinct from their male counterparts (that they speak, in Carol Gilligan's famous phrase, "in a different voice"⁸⁵). There is no solid empirical evidence to support such claims, at least not as a general matter.⁸⁶ But there *is* evidence, for example, that the presence of one (or more) women on a collegial court influences decisions on sex discrimination ("panel effects").⁸⁷ Also, a recent study on state appellate courts in the United States found that the presence of a critical mass of women in the state judiciary (25% or more in all judicial posts) is correlated with a reduction in the use of arguments that minimize the culpability of the aggressor in rape cases ("*rape myths*"), indicating that the incorporation of more women in the justice system can influence the way in which all of its members frame and discuss gender issues.⁸⁸ In sum, greater diversity in the judicial system serves to broaden the perspectives and "check the partiality" of those in the historically dominant community, thereby improving the democratic quality of justice.⁸⁹

Second, if citizens of diverse origins and backgrounds turn to the courts and see few judges that share their demographic profile (in terms of gender, class, race, ethnicity, sexual orientation, disability, etc.), they may suspect, correctly or not, that

83 For data on the gender composition of the Chilean judiciary, see <http://secretariadegenero.pjud.cl/index.php/mujeres-y-hombres-en-numeros-en-el-poder-judicial>, and on the Chilean public prosecutorial organ: <https://www.emol.com/noticias/Nacional/2018/07/20/914019/Disparidad-de-genero-entre-persecutores-Solo-un-tercio-de-los-fiscales-son-mujeres.html>. On the United States, see GEORGE & YOON (2016).

84 MANSBRIDGE 1999; GOODIN (2008).

85 GILLIGAN (1982).

86 Some studies have found statistically significant differences in the way that individual male and female judges rule in sexual discrimination cases (SONGER, *et al.* (1994); BOYD, *et al.* (2010); HAIRE & MOYER (2015)), but most studies find limited to no evidence of such a difference in other kinds of cases. The lack of difference is often attributed to the constraints that law itself places on all judges (limiting their interpretive discretion) as well as on social pressure for women to conform to established norms in a male-dominated institutional context (see HUNTER (2015)). Others find that political or party ideology, which cuts across gender, is a stronger predictor of interpretive tendencies, reminding us that view on gender roles do not map neatly onto sex: men can be feminists and women can approve of patriarchal norms. For an excellent treatment of these debates see KENNEY (2012).

87 FARHANG and WAWRO (2004); PERESIE (2005).

88 BOUX (2016).

89 GOODIN (2008), p. 249, citing RAWLS (1971), pp. 358-9.

the judges don't know, don't understand, or don't consider their perspectives at the moment of interpreting and administering the law. Even more serious, if the judiciary projects an image of unequal composition, this could easily be interpreted by the citizenry as institutionalized inequality, putting at risk the trust and support of the public. As Lady Justice Hale contends:

In a democracy governed by the people..., the judiciary should reflect the whole community, not just a small section of it. The public should be able to feel that the courts are their courts; that their cases are being decided and the law is being made by people like them, and not by some alien beings from another planet. In the modern world, where social deference has largely disappeared, this should enhance rather than undermine the public's confidence in the law and the legal system.⁹⁰

In short, judicial diversity, like independence, is necessary to judicial legitimacy.

To be sure, in our focus groups, participants from low income sectors and other marginalized groups described the judiciary as socially apart and aloof from people like themselves, if not directly biased against them. For example, participants from lower-middle class sectors stated that those who work in the judiciary “lack humanity” or that they are “removed from reality,” and, as illustrated above, that they don't understand, serve, or fairly treat people like them. These perceptions held by socially excluded people are very similar to those found by Peffley and Hurwitz among African-Americans in the United States, who lack faith in the system of justice, both procedurally and substantively, while Whites have much more trust therein.⁹¹ Part of the problem in the United States derives from the general absence of Blacks in justice institutions, among others,⁹² and a couple of recent studies suggest that descriptive representation in the (federal) courts in the United States improves the perception of and increased the support for these courts on the part of Blacks.⁹³ In addition, an experimental study published this year (2019) in one of the best political science journals in the United States showed that when people are presented with public policy decisions made by committees that are homogeneous in their gender composition, the legitimacy that they attribute to the decision making process is negatively affected, even when the decisions are unrelated to gender. The authors conclude: “our findings provide the first causal evidence connecting men's overrepresentation to diminished perceptions of democratic legitimacy,” which, in combination with research on the link between legitimacy and institutional effectiveness, suggests that “homogenous institutions make effective governance more difficult”.⁹⁴

90 HALE (2014)

91 PEFFLEY & HURWITZ (2010). See https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/?noredirect=on&utm_term=.6e2b09a14d2a. Earlier data is cited in LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (2005), pp. 6-7.

92 GEORGE & YOON (2016). See also: https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report_31319.pdf

93 SCHERER & CURRY (2010); BADAS & STAUFFER (2018).

94 CLAYTON, O'BRIEN, & PISCOPO (2019), p. 127.

5.2 Judges/Justice of the Citizenry: How?

What can be done, then, to promote diversity in the judicial system and, with it, strengthen its legitimacy? As Kate Malleson explains, in countries like Great Britain, the lack of judicial diversity has not resolved itself naturally with the elimination of social and legal barriers to the participation of women and minorities. Thus, positive action is needed.⁹⁵ This does not necessarily imply quotas. Although (gender) quotas in the legislature have been successful in many countries of the world, in the judiciary, where the merit principle governs selection and appointees have guarantees of secure (and generally lengthy) tenure, it would be more complicated to apply them. Nonetheless, there are various alternative methods to ensure that diverse candidates can compete for and attain not only entry-level positions in the judicial hierarchy but also positions in the higher courts.⁹⁶

First, diversity targets can be established at the stage in which vacancies are announced, signaling that diversification is an institutional priority. Second, women and members of other under-represented groups can be proactively recruited, helping to address the problem that such candidates, although they are well qualified, often times think that they don't have a chance of being selected and thus don't apply for higher positions. Traditional candidates tend to have networks that offer them informal access to the workings of the system and to information regarding how to best present themselves. In addition, in many countries, there is a system (informal, of course) of the 'tap on the shoulder' of a prospective candidate, which functions within established social networks. In order to even the playing field, then, what has been proposed, for example in Great Britain, is using that system to "tap on the shoulder of under-represented candidates". The idea is to reorient the established practice of "identify[ing], counsel[ing], encourage[ing], and persuad[ing]" highly-qualified individuals so that it benefits new types of candidates.⁹⁷ What must be avoided, in any case, are methods of informal and secret recruitment among those who are already members of the metaphorical club.⁹⁸

These sorts of initiatives do not imply abandoning the concept of merit in judicial selection. To be sure, for permanent posts, it is extremely important to name people who are highly qualified. But it must be recognized that there is not a neutral way of defining merit; its definition and interpretation will always involve value and status hierarchies.⁹⁹ The criteria will always be based on the skills and qualities of the group of potential candidates, as well as on the particular activities and experiences that such candidates can demonstrate in a *curriculum vitae*.¹⁰⁰ And those who lead the selection tend to define criteria on the basis of qualities and experiences that are

95 MALLESON (2009).

96 For a variety examples from around the world, see IDLO (2018).

97 MALLESON (2009), pp. 387-389.

98 KENNEY (2012), p. 27.

99 MALLESON (2009), pp. 391-393; THORNTON (2007).

100 MALLESON (2006), p. 136.

familiar to them and similar to their own.¹⁰¹ This tendency is amplified in spaces where the selectors have a lot of discretion. Thus, in order to counteract self-replication and promote diversification in the judiciary, it is necessary to rethink merit criteria in accordance with the experiences, skills, and characteristics that diverse candidates might have, and to assure that there is a transparent selection process, in which the criteria and rules are clearly and publicly articulated in advance.

At the same time, it is important to consider not only how judges are appointed, but in who does the appointing.¹⁰² The judicial appointment system in Chile, which concentrates power in the hands of the high courts and doesn't allow the participation or input of representatives from civil society, not even the National Association of Magistrates or the Bar Association, and which continues to be very opaque for the public, reinforces the idea that judges are and must be "removed from the people."¹⁰³ As Bobek notes in reference to the Czech case, public dissatisfaction with the judiciary is driven by the perception that "judicial office ... is something granted and controlled by a narrow clique of judicial officials."¹⁰⁴ In order to make the judiciary more "of the citizenry," then, a reform to the system of judicial appointment that would include the participation of civil society representatives would be in order. A possible model comes from the Netherlands, which has a National Committee for the Selection of Judges, composed of "members of the judiciary and various other sectors, such as public administration, business, education and science, lawyers and the public prosecution service." The members of this Committee serve for three year terms. They review applications and carry out interviews with candidates at different stages of the process, thus playing an important role in the selection of judges.¹⁰⁵

VI. JUDGES/JUSTICE *BY* THE CITIZENRY

6.1 Judges/Justice *by* the Citizenry: Why?

Reforms to promote greater diversity and (thereby) greater social representation in the judiciary may help citizens feel less distant and less alienated from the justice system. However, this does not address the problem at the heart of the democratic rule of law: legal agency. Under a democratic rule of law, all citizens should be able "to make effective and proactive use of law when and as needed in the pursuit of all legitimate life objectives".¹⁰⁶ This connects to the final prong of Lincoln's tripartite conception: government *by* the people. Government by the people implies participation of citizens in the creation and implementation of the law, but this participation need

101 This logic is well explained in ZAPATA 2013.

102 I thank an anonymous reviewer from this journal for suggesting this formulation.

103 GARGARELLA (2002).

104 BOBEK (2014), p. 15

105 STAWA, VAN BENTHEM, y MOLIENE (2018), pp. 47-48.

106 BRINKS (2009), p. 22.

not be direct.¹⁰⁷ In a modern representative democracy, direct participation of citizens in governance is infrequent, but possibilities to activate and influence government processes are multiple and indispensable (such as the vote, petition, demonstrations, etc.) With respect to the judiciary, the corresponding form of participation and activation is the legal claim. As Frances Zemans reminds us, implementation of the law relies on action by citizens to put it in motion, or on what she calls “legal mobilization.” It is individual claims that “determine the benefits that citizens actually receive from their government”.¹⁰⁸ Thus, how many and which rights people enjoy “are contingent upon the factors that promote or inhibit [citizens’] decisions to mobilize the law.”¹⁰⁹ If citizens don’t possess the capacities to participate on an equal basis in the justice system, that is, to claim rights and/or seek judicial resolution of disputes when necessary, then, they won’t have reason to believe in the justice system.

In the focus groups that we conducted (see p. XXX and note XX above), we found that Chileans, especially those from lower socio-economic sectors, many times lack such capacities. They lack a sense of efficacy, both internal and external, with respect to the justice system. That is, they do not know how to make the system work (internal efficacy), nor do they believe that the system works for them (external efficacy). In terms of internal efficacy, we noted among participants in lower-middle class segments a generalized lack of rights consciousness, a lack of knowledge about what to do in case of rights violations, and a lack of accessibility of lawyers.¹¹⁰ As for external efficacy, participants in lower-income sectors declared that the justice system only works when one has power or money to make it work. This was evident in comments such as: “Justice is not for everyone”, “It only works for he who has power”, “The law is made for the rich,” and “If you are poor, better hope nothing happens to you, because you are sunk!” As was noted above, upper-middle class participants recognized the same inequity, but they shared experiences in which the system *had* worked for them. In contrast, the lower-middle class participants had very little confidence—sometimes due to their own experience—in the possibility of obtaining a favorable response or result from judicial institutions. For this reason, the lower income participants tended to say that, faced with a serious conflict or a rights violation, someone like them should resign and do nothing.

These data indicate that the current judicial system in Chile fails to allow many citizens to exercise their legal agency fully and effectively. Thus, a focus of any justice reform in Chile must be access to justice, giving to the citizenry “the ability to approach and influence the decisions of those organs that exercise state authority ... to adjudicate rights and obligations”.¹¹¹

107 I do not address here issues of lay participation in the judicial process (such as the jury or mixed lay and professional institutions), which would be direct forms of administration of justice by citizens. Although there are good arguments, from a democratic theory perspective, to increase lay participation in the judicial process, it is not clear that such a major change serves to improve public confidence in the judicial system. On this subject, see MACHURA (2011).

108 ZEMANS (1983), p. 693.

109 ZEMANS (1983), p. 695.

110 HILBINK *et al.* (2019).

111 GHAI & COTTRELL (2010), p. 3.

6.2 Judges/Justice by the Citizenry: How?

In the past, access to justice has been conceived principally in material or physical terms. The focus was the geographic expansion of institutional infrastructure and the reduction of costs for low income people, or what might be called a focus on the supply side.¹¹² Although “supply” elements continue to be important, today, at the international level, emphasis is put on the demand side, in the “facilitation of the use of the courts ... and of other mechanisms of claims making by the people”.¹¹³ As Daniel Brinks contends:

Any institutional development must be designed with an eye to supplying the resources these legal subjects lack in their interactions with the law and the legal system. The traditional reactive approach – interpreters for indigenous defendants, free lawyers for indigent defendants – is inadequate to the task. *The point is to enhance citizens’ capacity to experience and assert the full range of their legal endowment in their everyday lives.*¹¹⁴

To promote access to justice, then, “legal empowerment” is key.

Empowerment means giving people “opportunities that [they] can use to make effective choices and take action”.¹¹⁵ An empowered actor “is able to envisage options and make a choice” within a given opportunity structure.¹¹⁶ Legal empowerment is thus defined as “a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors”.¹¹⁷ It involves training people to be able 1) to identify legal rights, 2) to identify legal problems, 3) to identify how to claim legal rights, and 4) to identify how to enforce rights.¹¹⁸ The objective can be summarized in the concept of “legal competence,” understood in the following terms:

The competent subject will be aware of the relation between the realization of [their] interests and the machinery of law making and administration. [They] will know how to use this machinery and when to use it. Moreover, [they] will see assertion of [their] interests through legal channels as desirable and appropriate. The legally competent person has a sense of [themselves] as a possessor of rights and [they] see the legal system as a resource for validation of those rights. [They] know when and how to seek validation.¹¹⁹

112 GHAI & COTTRELL (2010), p. 5.

113 GHAI & COTTRELL (2010), p. 5.

114 BRINKS (2009), p. 22, emphasis in the original.

115 MARANLOU (2015), p 142.

116 ALSOP *et al.* (2006), p. 6.

117 COMMISSION ON LEGAL EMPOWERMENT OF THE POOR (2008).

118 MARANLOU (2015), p. 149, referencing ANDERSON (2003).

119 CARLIN, HOWARD & MESSINGER (1967), pp. 62-63, cited in SARAT (1977), p. 449.

Public policies to advance access to justice, and with it, the ability of all citizens to participate in the justice system, must thus include programs of “[citizen] education in routes of access to the administration of justice ... making it possible for those who have experienced violations and ask for the restoration of their rights to know where to turn and how to go about activating the judicial apparatus”.¹²⁰

Of what might public policies for legal empowerment and access to justice consist, specifically? Reformers need not look very far to find a great quantity of examples that are being carried out today in developed and developing countries alike. Programs to enhance people’s legal knowledge and skills have been created at the municipal, state, and/or national level in many countries, building both people’s rights consciousness and their understanding of when, where and how to seek legal remedies and solutions and/or to navigate judicial processes. These can be administered by justice institutions or led by NGOs, and in many places they involve the training of and subsequent outreach by community paralegals. Examples include the Popular Legal Promoters program in Brazil,¹²¹ Welfare Rights Advisors in the United Kingdom,¹²² Housing Court Navigators in New York City,¹²³ and the Women’s Justice Initiative in Guatemala.¹²⁴

A key feature of access to justice programs built around legal empowerment is their proactivity in public outreach, that is, active practices in the community, so as to bring the justice system to the citizenry, rather than the citizenry to the justice system.¹²⁵ Daniel Brinks notes the successful example of “the Balcão de Direitos initiative, which sends teams of lawyers, public prosecutors, social workers and other advocates into various favelas in Brazil.” He underscores that the value of this initiative is that it “bring[s] the legal system to the affected community, rather than simply opening the doors a little wider and waiting for the community to come to the courts”.¹²⁶ In a recent book, Vivek Maru and Varun Gauri provide a first-of-its-kind comparative analysis of community paralegals in six developing countries: Indonesia, Kenya, Liberia, Philippines, Sierra Leone, and South Africa. They offer quantitative and qualitative evidence to show that community paralegal services “increased people’s understanding of law and government, increased their confidence to take action, and allowed them to achieve at least a partial solution to an injustice they would have otherwise had to bear”.¹²⁷

120 RAMOS (2015).

121 See <http://promotoraslegaispopulares.org.br/metodologia/>, addressed briefly in DE SOUSA SANTOS (2015), pp. 62-65.

122 WIGGAN & TALBOT (2006).

123 SANDEFUR & CLARKE (2016). See also https://www.nycourts.gov/courts/nyc/housing/rap_participating.shtml

124 See <http://womens-justice.org/es/our-work/our-programs/>

125 BRINKS (2009), p. 22.

126 BRINKS (2009), p. 31. See also <http://www2.defensoria.pa.def.br/portal/balcao/index.html>

127 MARU & GAURI (2018), p. 14.

A related proposal, but one involving more comprehensive and long-term investment on the part of the state, are what are alternatively labeled “Justice Houses,” “Access to Justice Centers,” or “Citizen Justice Centers.” Justice Houses were developed in Colombia in the late 1990s and now number over 100 across the country. They were designed to “remove barriers that restricted access to justice (grouping several institutions in a single building, placing justice houses in vulnerable areas)” and “decentralize the supply of justice starting with the use of alternative methods of conflict resolution” in order to boost self-management of conflicts by citizens.¹²⁸ The first Access to Justice Center in Argentina was established by the Ministry of Justice and Human Rights in the city of Buenos Aires in 2008 with the twin goals of “bringing justice services closer to the people who need them” and offering “a holistic response to justice-related problems by providing other services that people experiencing justice problems might need under the same roof.” Today, ninety such centers are functioning around the country.¹²⁹ Such multiple-entry models were included in the study conducted by the Research Department of the Supreme Court of Chile, during the Presidency of the Hon. Minister Sergio Muñoz, in 2015. In collaboration with “social, academic, public and private actors,” they conducted an exploratory, national and comparative study, the result of which was the proposal to create Citizen Justice Centers in Chile.¹³⁰ As in the Colombian and Argentine examples, the idea of such Centros would be to provide to the citizenry, especially those in the most vulnerable sectors, integrated services to prevent the escalation of conflicts in the community, as well as to transform the administration of justice into one anchored in dignity, equality, respect, including a more horizontal approach to communication and interaction with citizens. As of this writing, the government of Chile has not taken up the proposal, but the groundwork has been laid should it decide to do so.¹³¹

Another related reform could be the expansion and systematization of mediation programs “in the spaces where people live and where they are genuinely close enough for people to go to the system”.¹³² Chile already has experience with the integration of mediation into family courts,¹³³ and labor courts, as well as various programs operated by the Judicial Assistance Corporations and other state agencies and services.¹³⁴ In addition to its potential to decongest the courts, “the practice of mediation in society tends to strengthen democratic culture and dialogue between equals” while “promoting the strengthening of [people’s] abilities to resolve conflicts and/or differences between citizens”.¹³⁵

128 PODER JUDICIAL, REPÚBLICA DE CHILE (2015), p. 62.

129 See <https://medium.com/sdg16plus/the-argentinians-who-bring-justice-to-the-people-who-need-it-most-efce671c0043>

130 PODER JUDICIAL, REPÚBLICA DE CHILE (2015), p. 62.

131 In addition, they can draw on the experience of the Pilot Program of Neighborhood Justice Units, launched by the Ministry of Justice in 2011-12, analyzed in RIEGO y LILLO (2014).

132 ALFARO, *et al.* (2012), p. 28.

133 VARGAS PAVEZ, CASAS BECERRA & AZÓCAR BENAVENTE (2008)

134 ALFARO, *et al.* (2012); GUERRA, *et al.* (2018).

135 ALFARO, *et al.* (2012), p. 27. In the same vein, see GUERRA, *ET AL.* (2018).

What all such programs have in common is the premise that citizens are not “victims requiring a technical service” but are rather (potential) legal agents who can and should be empowered “to understand and use the law themselves.”¹³⁶ Moreover, they recognize that what people often seek are practical solutions and remedies that may not require a full-blown judicial intervention. These programs aim to “support alternative pathways to justice” and to “tailor services to justice needs.”¹³⁷ In so doing, they invite and permit individuals to participate in the system as equal rights bearers.

VII. FINAL REFLECTIONS

Chile is not the only country in Latin America or in the world that is confronting low levels of trust in its judicial system. However, it is surprising and confounding that trust has deteriorated and persisted at such low levels, despite the significant and sustained improvement in the institutional quality of the judiciary. Although it may be tempting to dismiss this lack of trust, blaming it on public ignorance of the judicial process, frustration on the part of those who lose their cases, and/or on excessively negative media coverage, in this article I have argued that, for moral and prudential reasons, the low public confidence in the judicial system must be taken seriously. In a world where democracy is under threat and authoritarian populism is on the march, we cannot allow ourselves to minimize popular discontent with institutions, but rather must try to understand it better and respond appropriately.

In the previous pages, I have contended that, to recover public trust, judges—and all the operators of the judicial system—must attend to their trustworthiness, and in order to increase their trustworthiness, they must strive to meet the requirements and expectations of a democratic citizenry. As our focus groups revealed, Chileans do not see democratic principles reflected in the functioning of the justice system. As one participant (a young upper-middle class woman) declared, “Democracy is the wrong word, because [there is] democracy for some but not for others... We are not [living] in a democracy, because the people don’t have justice, they [in the justice system] pass by, pass over our rights...” In order to address the low trust in the justice system, then, public policy makers must design and implement reforms that incorporate and promote the equal rights and dignity of all, or, as I have framed it, a justice system of, by, and for the citizenry.

I present this argument at a moment in which international organizations, concerned with equitable and sustainable development around the world, are advocating for a “people-centered approach to justice”. Among the actions the U.N.-backed Task Force on Justice has recently recommended are:

- “Adopting new training methods” that emphasize not just legal knowledge but also “problem solving” through “active listening, conflict management, and negotiation, as well as customer care and data gathering;”

136 MARU & GAURI (2018), pp. 5 and 3.

137 TASK FORCE ON JUSTICE (2019), p. 63.

- “Increasing diversity” such that justice systems “look like’ the communities they serve,” through measure that “increase transparency of recruitment and promotion, target marginalized groups, and provide mentoring and training for people who have historically been excluded from working in the justice system.”

- “Building relationships with people and communities,” which may require “a new culture of collaboration, of openness, and or responsiveness to people and their needs.”¹³⁸

These coincide, I submit, with the Lincolnian framework I have offered here, and indicate that the time is ripe to pursue this new reform agenda in the justice sector.¹³⁹

Before closing, two caveats are in order. First, it must be recognized that reforms focused only on the courts will not alone increase public confidence in the justice system. There is a complex interconnection between different institutions of the justice system, and if there is not cooperation between them, it is likely that the failures in one will have spillover effects in the others.¹⁴⁰ In addition, citizens do not distinguish much between the different institutions of the judicial system. In our focus groups, participants talked a lot about “the system” and often said that “the whole system is bad”. Sometimes they recognized that judges are not at fault if the law itself is flawed, because they are obligated to apply the existing law. But when it comes time to evaluate the justice system, they don’t separate the legislative from the judicial branch. If they perceive that the system produces injustice (which in many cases they state), they blame all the institutions in the system. Thus, I contend that the recovery of public trust will require coordination of the reforms, beyond the judiciary. Second, in the context of notable inequality that exists in Chile, institutional reforms should not be designed and implemented in isolation from social policy. As several recent studies have shown, in countries where the public perceives high levels of inequality, people have less trust in government institutions.¹⁴¹ With respect to the courts, in particular, as social inequality increases, people become “more skeptical of the fairness of the legal system”. Certainly, “inequality leads people to believe that leaders listen far more to the rich than to others in society”.¹⁴² It would thus be naïve to suggest that public trust in the justice system could be made robust without addressing the problems of structural inequality and social exclusion. Yet at the same time, it would be irresponsible to conclude that solutions to the current problems are entirely extra-institutional, that is, that those who design and operate the judicial system can’t do anything about them. Even while fiscal and social policies should aim to reduce inequalities (through investments in health, education, housing, employment, etc.), in order to mitigate the enormous *de facto* differences in power between formally equal citizens, justice sector reforms can and must be designed to help the system function in a more just and democratic manner. *Public trust in the justice system depends on the construction of democratic trustworthiness.*

138 TASK FORCE ON JUSTICE (2019), p. 107.

139 Véase también OECD AND OPEN SOCIETY FOUNDATIONS (2016).

140 BRINKS (2009), p. 43.

141 ZMERLI & CASTILLO (2015), p. 182; see also CHI & KWON (2016); CASAS-ZAMORA & CARTER (2017).

142 USLANER (2017), p. 302.

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